MPO Certification of Paratransit Plan

The (name of Metropolitan Planning Organization) hereby certifies that it has reviewed the ADA paratransit plan prepared by (name of submitting entity (ies)) as required under 49 CFR part 37. 139(h) and finds it to be in conformance with the transportation plan developed under 49 CFR part 613 and 23 CFR part 450 (the FTA/FHWA joint planning regulation). This certification is valid for one year.

signature

name of authorized official

title

date

Existing Paratransit Service Survey

This is to certify that (name of public entity (ies)) has conducted a survey of existing paratransit services as required by 49 CFR 37.137 (a).

signature

name of authorized official

title

date

Included Service Certification

This is to certify that service provided by other entities but included in the ADA paratransit plan submitted by (name of submitting entity (ies)) meets the requirements of 49 CFR part 37, subpart F providing that ADA eligible individuals have access to the service; the service is provided in the manner represented; and, that efforts will be made to coordinate the provision of paratransit service offered by other providers.

signature

name of authorized official

title

date

Joint Plan Certification I

This is to certify that (name of entity covered by joint plan) is committed to providing ADA paratransit service as part of this coordinated plan and in conformance with the requirements of 49 CFR part 37, subpart F.

signature

name of authorized official

title

date

Joint Plan Certification II

This is to certify that (name of entity covered by joint plan) will, in accordance with 49 CFR 37.141, maintain current levels of paratransit service until the coordinated plan goes into effect.

signature

name of authorized official

title

date

State Certification that Plans have been Received

This is to certify that all ADA paratransit plans required under 49 CFR 37.139 have been received by (state DOT)

signature

name of authorized official

title

date

[56 FR 45621, Sept. 6, 1991, as amended at 79 FR 21406, Apr. 16, 2014]

APPENDIX D TO PART 37—CONSTRUCTION AND INTERPRETATION OF PROVISIONS OF 49 CFR PART 37

This appendix explains the Department's construction and interpretation of provisions of 49 CFR part 37. It is intended to be used as definitive guidance concerning the meaning and implementation of these provisions. The appendix is organized on a section-by-section basis. Some sections of the rule are not discussed in the appendix, because they are self-explanatory or we do not currently have interpretive material to provide concerning them.

The Department also provides guidance by other means, such as manuals and letters. The Department intends to update this Appendix periodically to include guidance, provided in response to inquiries about specific situations, that is of general relevance or interest.

AMENDMENTS TO 49 CFR PART 27

Section 27.67(d) has been revised to reference the Access Board facility guidelines (found in appendix A to part 37) as well as the Uniform Federal Accessibility Standard (UFAS). This change was made to ensure consistency between requirements under section 504 and the ADA. Several caveats relating to the application of UFAS (e.g., that spaces not used by the public or likely to result in the employment of individuals with disabilities would not have to meet the standards) have been deleted. It is the Department's understanding that provisions of the Access Board standards and part 37 make them unnecessary.

The Department is aware that there is a transition period between the publication of this rule and the effective date of many of its provisions (e.g., concerning facilities and paratransit services) during which section 504 remains the basic authority for accessibility modifications. In this interval, the Department expects recipients' compliance with section 504 to look forward to compliance with the ADA provisions. That is, if a recipient is making a decision about the shape of its paratransit service between the publication of this rule and January 26, 1992, the decision should be in the direction of service that will help to comply with post-January 1992 requirements. A recipient that severely curtailed its present paratransit service in October, and then asked for a three- or five-year phase-in of service under its paratransit plan, would not be acting consistent with this policy.

Likewise, the Department would view with disfavor any attempt by a recipient to accelerate the beginning of the construction, installation or alteration of a facility to before January 26, 1992, to ''beat the clock'' and avoid the application of this rule's facility standards. The Department would be very reluctant to approve grants, contracts, exemption requests etc., that appear to have this effect. The purpose of the Department's administration of section 504 is to ensure compliance with the national policy stated in the ADA, not to permit avoidance of it.

SUBPART A—GENERAL

Section 37.3 Definitions

The definition of ''commuter authority'' includes a list of commuter rail operators drawn from a statutory reference in the ADA. It should be noted that this list is not exhaustive. Other commuter rail operators (e.g., in Chicago or San Francisco) would also be encompassed by this definition.

The definition of ''commuter bus service'' is important because the ADA does not require complementary paratransit to be provided with respect to commuter bus service operated by public entities. The rationale that may be inferred for the statutory exemption for this kind of service concerns its typical characteristics (e.g., no attempt to comprehensively cover a service area, limited route structure, limited origins and destinations, interface with another mode of transportation, limited purposes of travel). These characteristics can be found in some transportation systems other than bus systems oriented toward work trips. For example, bus service that is used as a dedicated connecter to commuter or intercity rail service, certain airport shuttles, and university bus systems share many or all of these characteristics. As explained further in the discussion of subpart B, the Department has determined that it is appropriate to cover these services with the requirements applicable to commuter bus systems.

The definitions of ''designated public transportation'' and ''specified public transportation'' exclude transportation by aircraft. Persons interested in matters concerning access to air travel for individuals with disabilities should refer to 14 CFR part 382, the Department's regulation implementing the Air Carrier Access Act. Since the facility requirements of this part refer to facilities involved in the provision of designated or specified public transportation, airport facilities are not covered by this part. DOJ makes clear that public and private airport facilities are covered under its title II and title III regulations, respectively.

The examples given in the definition of ''facility'' all relate to ground transportation. We would point out that, since transportation by passenger vessels is covered by this rule and by DOJ rules, such vessel-related facilities as docks, wharfs, vessel terminals, etc. fall under this definition. It is intended that specific requirements for vessels and related facilities will be set forth in future rulemaking.

The definitions of ''fixed route system'' and ''demand responsive system'' derive directly from the ADA's definitions of these terms. Some systems, like a typical city bus system or a dial-a-ride van system, fit clearly into one category or the other. Other systems may not so clearly fall into one of the categories. Nevertheless, because how a system is categorized has consequences for the requirements it must meet, entities must determine, on a case-by-case basis, into which category their systems fall.

In making this determination, one of the key factors to be considered is whether the individual, in order to use the service, must request the service, typically by making a call.

With fixed route service, no action by the individual is needed to initiate public transportation. If an individual is at a bus stop at the time the bus is scheduled to appear, then that individual will be able to access the transportation system. With demand-

reponsive service, an additional step must be taken by the individual before he or she can ride the bus, i.e., the individual must make a telephone call.

(S. Rept. 101–116 at 54).

Other factors, such as the presence or absence of published schedules, or the variation of vehicle intervals in anticipation of differences in usage, are less important in making the distinction between the two types of service. If a service is provided along a given route, and a vehicle will arrive at certain times regardless of whether a passenger actively requests the vehicle, the service in most cases should be regarded as fixed route rather than demand responsive.

At the same time, the fact that there is an interaction between a passenger and transportation service does not necessarily make the service demand responsive. For many types of service (e.g., intercity bus, intercity rail) which are clearly fixed route, a passenger has to interact with an agent to buy a ticket. Some services (e.g., certain commuter bus or commuter rail operations) may use flag stops, in which a vehicle along the route does not stop unless a passenger flags the vehicle down. A traveler staying at a hotel usually makes a room reservation before hopping on the hotel shuttle. This kind of interaction does not make an otherwise fixed route service demand responsive.

On the other hand, we would regard a system that permits user-initiated deviations from routes or schedules as demand-responsive. For example, if a rural public transit system (e.g., a recipient of funds under 49 U.S.C. 5311) has a few fixed routes, the fixed route portion of its system would be subject to the requirements of subpart F for complementary paratransit service. If the entity changed its system so that it operated as a route-deviation system, we would regard it as a demand responsive system. Such a system would not be subject to complementary paratransit requirements.

The definition of ''individual with a disability'' excludes someone who is currently engaging in the illegal use of drugs, when a covered entity is acting on the basis of such use. This concept is more important in employment and public accommodations contexts than it is in transportation, and is discussed at greater length in the DOJ and EEOC rules. Essentially, the definition says that, although drug addiction (*i.e.*, the status or a diagnosis of being a drug abuser) is a disability, no one is regarded as being an individual with a disability on the basis of current illegal drug use.

Moreover, even if an individual has a disability, a covered entity can take action against the individual if that individual is currently engaging in illegal drug use. For example, if a person with a mobility or vision impairment is ADA paratransit eligible, but is caught possessing or using cocaine or marijuana on a paratransit vehicle, the transit provider can deny the individual further eligibility. If the individual has successfully undergone rehabilitation or is no longer using drugs, as explained in the preamble to the DOJ rules, the transit provider could not continue to deny eligibility on the basis that the individual was a former drug user or still was diagnosed as a person with a substance abuse problem.

We defined ''paratransit'' in order to note its specialized usage in the rule. Part 37 uses this term to refer to the complementary paratransit service comparable to public fixed route systems which must be provided. Typically, paratransit is provided in a demand responsive mode. Obviously, the rule refers to a wide variety of demand responsive services that are not ''paratransit,'' in this specialized sense.

The ADA's definition of ''over-the-road bus'' may also be somewhat narrower than the common understanding of the term. The ADA definition focuses on a bus with an elevated passenger deck over a baggage compartment (*i.e.*, a ''Greyhound-type'' bus). Other types of buses commonly referred to as ''over-the-road buses,'' which are sometimes used for commuter bus or other service, do not come within this definition. Only buses that do come within the definition are subject to the over-the-road bus exception to accessibility requirements in Title III of the ADA.

For terminological clarity, we want to point out that two different words are used in ADA regulations to refer to devices on which individuals with hearing impairments communicate over telephone lines. DOJ uses the more traditional term ''telecommunications device for the deaf'' (TDD). The Access Board uses a newer term, ''text telephone.'' The DOT rule uses the terms interchangably.

A ''used vehicle'' means a vehicle which has prior use; prior, that is, to its acquisition by its present owner or lessee. The definition is not relevant to existing vehicles in one's own fleet, which were obtained before the ADA vehicle accessibility requirements took effect.

A ''vanpool'' is a voluntary commuter ridesharing arrangement using a van with a seating capacity of more than seven persons, including the driver. Carpools are not included in the definition. There are some systems using larger vehicles (e.g., buses) that operate, in effect, as vanpools. This definition encompasses such systems. Vanpools are used for daily work trips, between commuters' homes (or collection points near them) and work sites (or drop points near them). Drivers are themselves commuters who are either volunteers who receive no compensation for their efforts or persons

who are reimbursed by other riders for the vehicle, operating, and driving costs.

The definition of ''wheelchair'' includes a wide variety of mobility devices. This inclusiveness is consistent with the legislative history of the ADA (See S. Rept. 101–116 at 48). While some mobility devices may not look like many persons' traditional idea of a wheelchair, three- and more-wheeled devices, of many varied designs, are used by individuals with disabilities and must be transported. ''Wheelchair'' is defined in this rule as a mobility aid belonging to any class of three-or more-wheeled devices, usable indoors, designed or modified for and used by individuals with mobility impairments, whether operated manually or powered. The ''three- or-more-wheeled'' language in the definition is intended to encompass wheelchairs that may have additional wheels (*e.g.*, two extra guide wheels in addition to the more traditional four wheels).

Persons with mobility disabilities may use devices other than wheelchairs to assist with locomotion. Canes, crutches, and walkers, for example, are often used by people whose mobility disabilities do not require use of a wheelchair. These devices must be accommodated on the same basis as wheelchairs. However, the Department does not interpret its rules to require transportation providers to accommodate devices that are not primarily designed or intended to assist persons with mobility disabilities (*e.g.*, skateboards, bicycles, shopping carts), apart from general policies applicable to all passengers who might seek to bring such devices into a vehicle. Similarly, the Department does not interpret its rules to require transportation providers to permit an assistive device to be used in a way that departs from or exceeds the intended purpose of the device (*e.g.*, to use a walker, even one with a seat intended to allow temporary rest intervals, as a wheelchair in which a passenger sits for the duration of a ride on a transit vehicle).

The definition of wheelchair is not intended to include a class of devices known as ''other power-driven mobility devices'' (OPMDs). OPMDs are defined in Department of Justice ADA rules as ''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 carts * * * Segway[s]®, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair * * * .'' DOT is placing guidance on its Web site concerning the use of Segways in transportation vehicles and facilities.

The definition of ''direct threat'' is intended to be interpreted consistently with the parallel definition in Department of Justice regulations. That is, part 37 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. 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.

Section 37.5 Nondiscrimination

This section states the general nondiscrimination obligation for entities providing transportation service. It should be noted that virtually all public and private entities covered by this regulation are also covered by DOJ regulations, which have more detailed statements of general nondiscrimination obligations.

Under the ADA, an entity may not consign an individual with disabilities to a separate, ''segregated,'' service for such persons, if the individual can in fact use the service for the general public. This is true even if the individual takes longer, or has more difficulty, than other persons in using the service for the general public.

One instance in which this principal applies concerns the use of designated priority seats (e.g., the so-called ''elderly and handicapped'' seats near the entrances to buses). A person with a disability (e.g., a visual impairment) may choose to take advantage of this accommodation or not. If not, it is contrary to rule for the entity to insist that the individual must sit in the priority seats.

The prohibition on special charges applies to charges for service to individuals with disabilities that are higher than charges for the same or comparable services to other persons. For example, if a shuttle service charges $20.00 for a ride from a given location to the airport for most people, it could not charge $40.00 because the passenger had a disability or needed to use the shuttle service's lift-equipped van. Higher mileage charges for using an accessible vehicle would likewise be inconsistent with the rule. So would charging extra to carry a service animal accompanying an individual with a disability.

If a taxi company charges $1.00 to stow luggage in the trunk, it cannot charge $2.00 to stow a folding wheelchair there. This provision does not mean, however, that a transportation provider cannot charge nondiscriminatory fees to passengers with disabilities. The taxi company in the above example can charge a passenger $1.00 to stow a

wheelchair in the trunk; it is not required to waive the charge. This section does not prohibit the fares for paratransit service which transit providers are allowed to charge under §37.131(d).

A requirement for an attendant is inconsistent with the general nondiscrimination principle that prohibits policies that unnecessarily impose requirements on individuals with disabilities that are not imposed on others. Consequently, such requirements are prohibited. An entity is not required to provide attendant services (e.g., assistance in toileting, feeding, dressing), etc.

This provision must also be considered in light of the fact that an entity may refuse service to someone who engages in violent, seriously disruptive, or illegal conduct. If an entity may legitimately refuse service to someone, it may condition service to him on actions that would mitigate the problem. The entity could require an attendant as a condition of providing service it otherwise had the right to refuse.

The rule also points out that involuntary conduct related to a disability that may offend or annoy other persons, but which does not pose a direct threat, is not a basis for refusal of transportation. For example, some persons with Tourette's syndrome may make involuntary profane exclamations. These may be very annoying or offensive to others, but would not be a ground for denial of service. Nor would it be consistent with the nondiscrimination requirements of this part to deny service based on fear or misinformation about the disability. For example, a transit provider could not deny service to a person with HIV disease because its personnel or other passengers are afraid of being near people with that condition.

This section also prohibits denials of service or the placing on services of conditions inconsistent with this part on individuals with disabilities because of insurance company policies or requirements. If an insurance company told a transit provider that it would withdraw coverage, or raise rates, unless a transit provider refused to carry persons with disabilities, or unless the provider refused to carry three-wheeled scooters, this would not excuse the provider from providing the service as mandate by this part. This is not a regulatory requirement on insurance companies, but simply says that covered entities must comply with this part, even in the face of difficulties with their insurance companies.

Section 37.7 Standards for Accessible Vehicles

This section makes clear that, in order to meet accessibility requirements of this rule, vehicles must comply with Access Board standards, incorporated in DOT rules as 49 CFR part 38. Paragraph (b) of §37.7 spells out a procedure by which an entity (public or private) can deviate from provisions of part 38 with respect to vehicles. The entity would have to describe how its alternative mode of compliance would meet or exceed the level of access to or usability of the vehicle that compliance with part 38 would otherwise provide.

It should be noted that equivalent facilitation does not provide a means to get a waiver of accessibility requirements. Rather, it is a way in which comparable (not a lesser degree of) accessibility can be provided by other means. The entity must consult with the public through some means of public participation in devising its alternative form of compliance, and the public input must be reflected in the submission to the Administrator (or the Federal Railroad Administrator in appropriate cases, such as a request concerning Amtrak). The Administrator will make a case-by-case decision about whether compliance with part 38 was achievable and, if not, whether the proffered alternative complies with the equivalent facilitation standard. DOT intends to consult with the Access Board in making these determinations.

This equivalent facilitation provision can apply to buses or other motor vehicles as well as to rail cars and vehicles. An example of what could be an equivalent facilitation would concern rail cars which would leave too wide a horizontal gap between the door and the platform. If the operator used a combination of bridgeplates and personnel to bridge the gap, it might be regarded as an equivalent facilitation in appropriate circumstances.

Section 37.7(c) clarifies which specifications must be complied with for over-the-road buses purchased by public entities (under subpart D of part 37) or private entities standing in the shoes of the public entity (as described in §37.23 of part 37). This section is necessary to make clear that over-the-road coaches must be accessible, when they are purchased by or in furtherance of a contract with a public entity. While the October 4, 1990 rule specified that over-the-road coaches must be accessible under these circumstances, we had not previously specified what constitutes accessibility.

Accordingly, this paragraph specifies that an over-the-road bus must have a lift which meets the performance requirements of a regular bus lift (see §38.23) and must meet the interim accessibility features specified for all over-the-road buses in part 3, subpart G.

Section 37.9 Standards for Transportation Facilities

This section makes clear that, in order to meet accessibility requirements of this rule, vehicles must comply with appendix A to part 37, which incorporates the Access Board facility guidelines.

Paragraph (b) of §37.9 provides that, under certain circumstances, existing accessibility modifications to key station facilities do not need to be modified further in order to conform to appendix A. This is true even if the standards under which the facility was modified differ from the Access Board guidelines or provide a lesser standard of accessibility.

To qualify for this ''grandfathering,'' alterations must have been before January 26, 1992. As in other facility sections of the rule, an alteration is deemed to begin with the issuance of a notice to proceed or work order. The existing modifications must conform to ANSI A–117.1, Specifications for Making Buildings and Facilities Accessible to and Usable by the Physically Handicapped 1980, or the Uniform Federal Accessibility Standard. (UFAS).

For example, if an entity used a Federal grant or loan or money to make changes to a building, it would already have had to comply with the Uniform Federal Accessibility Standards. Likewise, if a private entity, acting without any Federal money in the project, may have complied with the ANSI A117.1 standard. So long as the work was done in conformity with the standard that was in effect when the work was done, the alteration will be considered accessible.

However, because one modification was made to a facility under one of these standards, the entity still has a responsibility to make other modifications needed to comply with applicable accessibility requirements. For example, if an entity has made some modifications to a key station according to one of these older standards, but the modifications do not make the key station entirely accessible as this rule requires, then additional modifications would have to be made according to the standards of appendix A. Suppose this entity has put an elevator into the station to make it accessible to individuals who use wheelchairs. If the elevator does not fully meet appendix A standards, but met the applicable ANSI standard when it was installed, it would not need further modifications now. But if it had not already done so, the entity would have to install a tactile strip along the platform edge in order to make the key station fully accessible as provided in this rule. The tactile strip would have to meet appendix A requirements.

The rule specifically provides that ''grandfathering'' applies only to alterations of individual elements and spaces and only to the extent that provisions covering those elements or spaces are found in UFAS or AHSI A117.1. For example, alterations to the telephones in a key station may have been carried out in order to lower them to meet the requirements of UFAS, but telecommunications devices for the deaf (TDDs) were not installed. (Neither UFAS nor the ANSI standard include requirements concerning TDDs). However, because appendix A does contain TDD requirements, the key station must now be altered in accordance with the standards for TDDs. Similarly, earlier alteration of an entire station in accordance with UFAS or the ANSI standard would not relieve an entity from compliance with any applicable provision concerning the gap between the platform between the platform and the vehicle in a key station, because neither of these two standards addresses the interface between vehicle and platform.

One further clarification concerning the implication of this provision deals with a bus loading island at which buses pull up on both sides of the island. It would be possible to read the bus pad specification to require the island to be a minimum of 84 inches wide (two widths of a bus stop pad), so that a lift could be deployed from buses on both sides of the island at the same time. A double-wide bus pad, however, is likely to exceed available space in most instances.

Where there is space, of course, building a double-wide pad is one acceptable option under this rule. However, the combination of a pad of normal width and standard operational practices may also suffice. (Such practices could be offered as an equivalent facilitation.) For example, buses on either side of the island could stop at staggered locations (*i.e.*, the bus on the left side could stop several feet ahead of the bus on the right side), so that even when buses were on both sides of the island at once, their lifts could be deployed without conflict. Where it is possible, building the pad a little longer than normal size could facilitate such an approach. In a situation where staggered stop areas are not feasible, an operational practice of having one bus wait until the other's lift cycle had been completed could do the job. Finally, the specification does not require that a pad be built at all. If there is nothing that can be done to permit lift deployment on both sides of an island, the buses can stop on the street, or some other location, so long as the lift is deployable.

Like §37.7, this section contains a provision allowing an entity to request approval for providing accessibility through an equivalent facilitation.

Section 37.11 Administrative Enforcement

This section spells out administrative means of enforcing the requirements of the ADA. Recipients of Federal financial assistance from DOT (whether public or private entities) are subject to DOT's section 504 enforcement procedures. The existing procedures, including administrative complaints to the DOT Office of Civil Rights, investigation, attempts at conciliation, and final resort to proceedings to cut off funds to a noncomplying recipient, will continue to be used.

In considering enforcement matters, the Department is guided by a policy that emphasizes compliance. The aim of enforcement action, as we see it, is to make sure that entities meet their obligations, not to impose sanctions for their own sake. The Department's enforcement priority is on failures to comply with basic requirements and ''pattern or practice'' kinds of problems, rather than on isolated operational errors.

Under the DOJ rules implementing title II of the ADA (28 CFR part 35), DOT is a ''designated agency'' for enforcement of complaints relating to transportation programs of public entities, even if they do not receive Federal financial assistance. When it receives such a complaint, the Department will investigate the complaint, attempt conciliation and, if conciliation is not possible, take action under section 504 and/or refer the matter to the DOJ for possible further action.

Title III of the ADA does not give DOT any administrative enforcement authority with respect to private entities whose transportation services are subject to part 37. In its title III rule (28 CFR part 36), DOJ assumes enforcement responsibility for all title III matters. If the Department of Transportation receives complaints of violations of part 37 by private entities, it will refer the matters to the DOJ.

It should be pointed out that the ADA includes other enforcement options. Individuals have a private right of action against entities who violate the ADA and its implementing regulations. The DOJ can take violators to court. These approaches are not mutually exclusive with the administrative enforcement mechanisms described in this section. An aggrieved individual can complain to DOT about an alleged transportation violation and go to court at the same time. Use of administrative enforcement procedures is not, under titles II and III, an administrative remedy that individuals must exhaust before taking legal action.

We also would point out that the ADA does not assert any blanket preemptive authority over state or local nondiscrimination laws and enforcement mechanisms. While requirements of the ADA and this regulation would preempt conflicting state or local provisions (e.g., a building code or zoning ordinance that prevents compliance with appendix A or other facility accessibility requirements, a provision of local law that said bus drivers could not leave their seats to help secure wheelchair users), the ADA and this rule do not prohibit states and localities from legislating in areas relating to disability. For example, if a state law requires a higher degree of service than the ADA, that requirement could still be enforced. Also, states and localities may continue to enforce their own parallel requirements. For example, it would be a violation of this rule for a taxi driver to refuse to pick up a person based on that person's disability. Such a refusal may also be a violation of a county's taxi rules, subjecting the violator to a fine or suspension of operating privileges. Both ADA and local remedies could proceed in such a case.

Labor-management agreements cannot stand in conflict with the requirements of the ADA and this rule. For example, if a labor-management agreement provides that vehicle drivers are not required to provide assistance to persons with disabilities in a situation in which this rule requires such assistance, then the assistance must be provided notwithstanding the agreement. Labor and management do not have the authority to agree to violate requirements of Federal law.

Section 37.13 Effective Date for Certain Vehicle Lift Specifications.

This section contains an explicit statement of the effective date for vehicle lift platform specifications. The Department has decided to apply the new part 38 lift platform specifications to solicitations after January 25, 1992. As in the October 4, 1990, rule implementing the acquisition requirements; the date of a solicitation is deemed to be the closing date for the submission of bids or offers in a procurement.

SUBPART B—APPLICABILITY

Section 37.21 Applicability—General

This section emphasizes the broad applicability of part 37. Unlike section 504, the ADA and its implementing rules apply to entities whether or not they receive Federal financial assistance. They apply to private and public entities alike. For entities which do receive Federal funds, compliance with the ADA and part 37 is a condition of compliance with section 504 and 49 CFR part 27, DOT's section 504 rule.

Virtually all entities covered by this rule also are covered by DOJ rules, either under 28 CFR part 36 as state and local program providers or under 28 CFR part 35 as operators of places of public accommodation. Both sets of rules apply; one does not override the other. The DOT rules apply only to the entity's transportation facilities, vehicles, or services; the DOJ rules may cover the entity's activities more broadly. For example, if a public entity operates a transit system and a zoo, DOT's coverage would stop at the transit system's edge, while DOJ's rule would cover the zoo as well.

DOT and DOJ have coordinated their rules, and the rules have been drafted to be consistent with one another. Should, in the context of some future situation, there be an apparent inconsistency between the two rules, the DOT rule would control within the sphere of transportation services, facilities and vehicles.

Section 37.23 Service Under Contract

This section requires private entities to ''stand in the shoes'' of public entities with whom they contract to provide transportation services. It ensures that, while a public entity may contract out its service, it may not contract away its ADA responsibilities. The requirement applies primarily to vehicle acquisition requirements and to service provision requirements.

If a public entity wishes to acquire vehicles for use on a commuter route, for example, it must acquire accessible vehicles. It may acquire accessible over-the-road buses, it may acquire accessible full-size transit buses, it may acquire accessible smaller buses, or it may acquire accessible vans. It does not matter what kind of vehicles it acquires, so long as they are accessible. On the other hand, if the public entity wants to use inaccessible buses in its existing fleet for the commuter service, it may do so. All replacement vehicles acquired in the future must, of course, be accessible.

Under this provision, a private entity which contracts to provide this commuter service stands in the shoes of the public entity and is subject to precisely the same requirements (it is not required to do more than the public entity). If the private entity acquires vehicles used to provide the service, the vehicles must be accessible. If it cannot, or chooses not to, acquire an accessible vehicle of one type, it can acquire an accessible vehicle of another type. Like the public entity, it can provide the service with inaccessible vehicles in its existing fleet.

The import of the provision is that it requires a private entity contracting to provide transportation service to a public entity to follow the rules applicable to the public entity. For the time being, a private entity operating in its own right can purchase a new over-the-road bus inaccessible to individuals who use wheelchairs. When that private entity operates service under contract to the public entity, however, it is just as obligated as the public entity itself to purchase an accessible bus for use in that service, whether or not it is an over-the-road bus.

The ''stand in the shoes'' requirement applies not only to vehicles acquired by private entities explicitly under terms of an executed contract to provide service to a public entity, but also to vehicles acquired ''in contemplation of use'' for service under such a contract. This language is included to ensure good faith compliance with accessibility requirements for vehicles acquired before the execution of a contract. Whether a particular acquisition is in contemplation of use on a contract will be determined on a case-by-case basis. However, acquiring a vehicle a short time before a contract is executed and then using it for the contracted service is an indication that the vehicle was acquired in contemplation of use on the contract, as is acquiring a vehicle obstensibly for other service provided by the entity and then regularly rotating it into service under the contract.

The ''stand in the shoes'' requirement is applicable only to the vehicles and service (public entity service requirements, like §37.163, apply to a private entity in these situations) provided under contract to a public entity. Public entity requirements clearly do not apply to all phases of a private entity's operations, just because it has a contract with a public entity. For example, a private bus company, if purchasing buses for service under contract to a public entity, must purchase accessible buses. The same company, to the extent permitted by the private entity provisions of this part, may purchase inaccessible vehicles for its tour bus operations.

The Department also notes that the ''stands in the shoes'' requirement may differ depending on the kind of service involved. The public entity's ''shoes'' are shaped differently, for example, depending on whether the public entity is providing fixed route or demand responsive service to the general public. In the case of demand responsive service, a public entity is not required to buy an accessible vehicle if its demand responsive system, when viewed in its entirety, provides service to individuals with disabilities equivalent to its service to other persons. A private contractor providing a portion of this paratransit service would not necessarily have to acquire an accessible vehicle if this equivalency test is being met by the system as a whole. Similarly, a public entity can, after going through a ''good faith efforts'' search, acquire inaccessible buses. A private entity under contract to the public can do the same. ''Stand in the shoes'' may also mean that, under some circumstances, a private contractor need not acquire accessible vehicles. If a private company contracts with a public school district to provide school bus service, it is covered, for that purpose, by the exemption for public school transportation.

In addition, the requirement that a private entity play by the rules applicable to a public entity can apply in situations involving an ''arrangement or other relationship'' with a public entity other than the traditional contract for service. For example, a private utility company that operates what is, in essence, a regular fixed route public transportation system for a city, and which receives funding under 49 U.S.C. 5307 or 49 U.S.C. 5309 via an agreement with a state or local government agency, would fall under the provisions of this section. The provider would have to comply with the vehicle acquisition, paratransit, and service requirements that would apply to the public entity through

which it receives the FTA funds, if that public entity operated the system itself. The Department would not, however, construe this section to apply to situations in which the degree of FTA funding and state and local agency involvement is considerably less, or in which the system of transportation involved is not a *de facto* surrogate for a traditional public entity fixed route transit system serving a city (e.g., a private non-profit social service agency which receives funds under 49 U.S.C. 5310 to purchase a vehicle).

This section also requires that a public entity not diminish the percentage of accessible vehicles in its fleet through contracting. For example, suppose a public entity has 100 buses in its fleet, of which 20 are accessible, meaning that 20 percent of its fleet is accessible. The entity decides to add a fixed route, for which a contractor is engaged. The contractor is supplying ten of its existing inaccessible buses for the fixed route. To maintain the 20 percent accessibility ratio, there would have to be 22 accessible buses out of the 110 buses now in operation in carrying out the public entity's service. The public entity could maintain its 20 percent level of accessibility through any one or more of a number of means, such as having the contractor to provide two accessible buses, retrofitting two if its own existing buses, or accelerating replacement of two of its own inaccessible buses with accessible buses.

This rule applies the ''stand in the shoes'' principle to transactions wholly among private entities as well. For example, suppose a taxi company (a private entity primarily engaged in the business of transporting people) contracts with a hotel to provide airport shuttle van service. With respect to that service, the taxi company would be subject to the requirements for private entities not primarily in the business of transporting people, since it would be ''standing in the shoes'' of the hotel for that purpose.

Section 37.25 University Transportation Systems

Private university-operated transportation systems are subject to the requirements of this rule for private entities not primarily engaged in the business of transporting people. With one important exception, public university-operated transportation systems are subject to the requirements of the rule for public entities. The nature of the systems involved—demand-responsive or fixed route—determines the precise requirements involved.

For public university fixed route systems, public entity requirements apply. In the case of fixed route systems, the requirements for commuter bus service would govern. This has the effect of requiring the acquisition of accessible vehicles and compliance with most other provisions of the rule, but does not require the provision of complementary paratransit or submitting a paratransit plan. As a result, private and public universities will have very similar obligations under the rule.

Section 37.27 Transportation for Elementary and Secondary Education Systems

This section restates the statutory exemption from public entity requirements given to public school transportation. This extension also applies to transportation of preschool children to Head Start or special education programs which receive Federal assistance. It also applies to arrangements permitting pre-school children of school bus drivers to ride a school bus or allowing teenage mothers to be transported to day care facilities at a school or along a school bus route so that their mothers may continue to attend school (See H. Rept. 101–485, pt. 1 at 27). The situation for private schools is more complex. According to the provision, a private elementary or secondary school's transportation system is exempt from coverage under this rule if all three of the following conditions are met: (1) The school receives Federal financial assistance; (2) the school is subject to section 504; and (3) the school's transportation system provides transportation services to individuals with disabilities, including wheelchair users, equivalent to those provided to individuals without disabilities. The test of equivalency is the same as that for other private entities, and is described under §37.105. If the school does not meet all these criteria, then it is subject to the requirements of Part 37 for private entities not primarily engaged in the business of transporting people.

The Department notes that, given the constitutional law on church-state separation, it is likely that church-affiliated private schools do not receive Federal financial assistance. To the extent that these schools' transportation systems are operated by religious entities or entities controlled by religious organizations, they are not subject to the ADA at all, so this section does not apply to them.

Section 37.29 Private Providers of Taxi Service

This section first recites that providers of taxi service are private entities primarily engaged in the business of transporting people which provide demand responsive service. For purposes of this section, other transportation services that involve calling for a car and a driver to take one places (e.g., limousine services, of the kind that provide luxury cars and chauffeurs for senior proms and analogous adult events) are regarded as taxi services.

Under the ADA, no private entity is required to purchase an accessible automobile. If a taxi company purchases a larger vehicle,

like a van, it is subject to the same rules as any other private entity primarily engaged in the business of transporting people which operates a demand responsive service. That is, unless it is already providing equivalent service, any van it acquires must be accessible. Equivalent service is measured according to the criteria of §37.105. Taxi companies are not required to acquire vehicles other than automobiles to add accessible vehicles to their fleets.

Taxi companies are subject to nondiscrimination obligations. These obligations mean, first, that a taxi service may not deny a ride to an individual with a disability who is capable of using the taxi vehicles. It would be discrimination to pass up a passenger because he or she was blind or used a wheelchair, if the wheelchair was one that could be stowed in the cab and the passenger could transfer to a vehicle seat. Nor could a taxi company insist that a wheelchair user wait for a lift-equipped van if the person could use an automobile.

It would be discrimination for a driver to refuse to assist with stowing a wheelchair in the trunk (since taxi drivers routinely assist passengers with stowing luggage). It would be discrimination to charge a higher fee or fare for carrying a person with a disability than for carrying a non-disabled passenger, or a higher fee for stowing a wheelchair than for stowing a suitcase. (Charging the same fee for stowing a wheelchair as for stowing a suitcase would be proper, however.) The fact that it may take somewhat more time and effort to serve a person with a disability than another passenger does not justify discriminatory conduct with respect to passengers with disabilities.

State or local governments may run user-side subsidy arrangements for the general public (e.g., taxi voucher systems for senior citizens or low-income persons). Under the DOJ title II rule, these programs would have to meet ''program accessibility'' requirements, which probably would require that accessible transportation be made available to senior citizens or low-income persons with disabilities. This would not directly require private taxi providers who accept the vouchers to purchase accessible vehicles beyond the requirements of this rule, however.

Section 37.31 Vanpools

This provision applies to public vanpool systems the requirements for public entities operating demand responsive systems for the general public. A public vanpool system is one operated by a public entity, or in which a public entity owns or purchases or leases the vehicles. Lesser degrees of public involvement with an otherwise private ridesharing arrangement (e.g., provision of parking spaces, HOV lanes, coordination or clearinghouse services) do not convert a private into a public system.

The requirement for a public vanpool system is that it purchase or lease an accessible vehicle unless it can demonstrate that it provides equivalent service to individuals with disabilities, including individuals who use wheelchairs, as it provides to individuals without disabilities. For a public vanpool system, the equivalency requirement would be met if an accessible vehicle is made available to and used by a vanpool when an individual with a disability needs such a vehicle to participate. Public vanpool systems may meet this requirement through obtaining a percentage of accessible vehicles that is reasonable in light of demand for them by participants, but this is not required, so long as the entity can respond promptly to requests for participation in a vanpool with the provision of an accessible van when needed.

There is no requirement for private vanpools, defined as a voluntary arrangement in which the driver is compensated only for expenses.

Section 37.33 Airport Transportation Systems

Fixed route transportation systems operated by public airports are regarded by this section as fixed route commuter bus systems. As such, shuttles among terminals and parking lots, connector systems among the airport and a limited number of other local destinations must acquire accessible buses, but are not subject to complementary paratransit requirements. (If a public airport operates a demand responsive system for the general public, it would be subject to the rules for demand responsive systems for the general public.)

It should be noted that this section applies only to transportation services that are operated by public airports themselves (or by private contractors who stand in their shoes). When a regular urban mass transit system serves the airport, the airport is simply one portion of its service area, treated for purposes of this rule like the rest of its service area.

Virtually all airports are served by taxi companies, who are subject to §37.29 at airports as elsewhere. In addition, many airports are served by jitney or shuttle systems. Typically, these systems operate in a route-deviation or similar variable mode in which there are passenger-initiated decisions concerning destinations. We view such systems as demand responsive transportation operated by private entities primarily engaged in the business of transporting people.

Since many of these operators are small businesses, it may be difficult for them to meet equivalency requirements on their own without eventually having all or nearly all accessible vehicles, which could pose economic problems. One suggested solution to this problem is for the operators serving a given airport to form a pool or consortium arrangement, in which a number of shared

accessible vehicles would meet the transportations of individuals with disabilities. As in other forms of transportation, such an arrangement would have to provide service in a nondiscriminatory way (e.g., in an integrated setting, no higher fares for accessible service).

Section 37.35 Supplemental Service for Other Transportation Modes

This section applies to a number of situations in which an operator of another transportation mode uses bus or other service to connect its service with limited other points.

One instance is when an intercity railroad route is set up such that the train stops outside the major urban center which is the actual destination for many passengers. Examples mentioned to us include bus service run by Amtrak from a stop in Columbus, Wisconsin, to downtown Madison, or from San Jose to San Francisco. Such service is fixed route, from the train station to a few points in the metropolitan area, with a schedule keyed to the train schedule. It would be regarded as commuter bus service, meaning that accessible vehicles would have to be acquired but complementary paratransit was not required.

Another instance is one in which a commuter rail operator uses fixed route bus service as a dedicated connection to, or extension of, its rail service. The service may go to park and ride lots or other destinations beyond the vicinity of the rail line. Again, this service shares the characteristics of commuter bus service that might be used even if the rail line were not present, and does not attempt to be a comprehensive mass transit bus service for the area.

Of course, there may be instances in which a rail operator uses demand responsive instead of fixed route service for a purpose of this kind. In that case, the demand responsive system requirements of the rule would apply.

Private entities (i.e., those operating places of public accommodation) may operate similar systems, as when a cruise ship operator provides a shuttle or connector between an airport and the dock. This service is covered by the rules governing private entities not primarily engaged in the business of transporting people. Fixed route or demand responsive rules apply, depending on the characteristics of the system involved.

One situation not explicitly covered in this section concerns *ad hoc* transportation arranged, for instance, by a rail operator when the train does not wind up at its intended destination. For example, an Amtrak train bound for Philadelphia may be halted at Wilmington by a track blockage between the two cities. Usually, the carrier responds by providing bus service to the scheduled destination or to the next point where rail service can resume.

The service that the carrier provides in this situation is essentially a continuation by other means of its primary service. We view the obligation of the rail operator as being to ensure that all passengers, including individuals with disabilities, are provided service to the destination in a nondiscriminatory manner. This includes, for instance, providing service in the most integrated setting appropriate to the needs of the individual and service that gets a passenger with a disability to the destination as soon as other passengers.

Section 37.37 Other Applications

The ADA specifically defines ''public entity.'' Anything else is a ''private entity.'' The statute does not include in this definition a private entity that receives a subsidy or franchise from a state or local government or is regulated by a public entity. Only through the definition of ''operates'' (see discussion of §37.23) do private entities' relationships to public entities subject private entities to the requirements for public entities. Consequently, in deciding which provisions of the rule to apply to an entity in other than situations covered by §37.23, the nature of the entity—public or private—is determinative.

Transportation service provided by public accommodations is viewed as being provided by private entities not primarily engaged in the business of transporting people. Either the provisions of this part applicable to demand responsive or fixed route systems apply, depending on the nature of a specific system at a specific location. The distinction between fixed route and demand responsive systems is discussed in connection with the definitions section above. It is the responsibility of each private entity, in the first instance, to assess the nature of each transportation system on a case-by-case basis and determine the applicable rules.

On the other hand, conveyances used for recreational purposes, such as amusement park rides, ski lifts, or historic rail cars or trolleys operated in museum settings, are not viewed as transportation under this rule at all. Other conveyances may fit into this category as well.

The criterion for determining what requirements apply is whether the conveyances are primarily an aspect of the recreational experience itself or a means of getting from Point A to Point B. At a theme park, for instance, a large roller coaster (though a ''train'' of cars on a track) is a public accommodation not subject to this rule; the tram that transports the paying customers around the park, with a stop at the roller coaster, is a transportation system subject to the ''private, not primarily'' provisions of this part.

Employer-provided transportation for employees is not covered by this part, but by

EEOC rules under title I of the ADA. (Public entities are also subject to DOJ's title II rules with respect to employment.) This exclusion from part 37 applies to transportation services provided by an employer (whether access to motor pool vehicles, parking shuttles, employer-sponsored van pools) that is made available solely to its own employees. If an employer provides service to its own employees and other persons, such as workers of other employers or customers, it would be subject to the requirements of this part from private entities not primarily engaged in the business of transporting people or public entities, as applicable.

The rule looks to the private entity actually providing the transportation service in question in determining whether the ''private, primarily'' or ''private, not primarily'' rules apply. For example, Conglomerate, Inc., owns a variety of agribusiness, petrochemical, weapons system production, and fast food corporations. One of its many subsidiaries, Green Tours, Inc., provides charter bus service for people who want to view national parks, old-growth forests, and other environmentally significant places. It is probably impossible to say in what business Conglomerate, Inc. is primarily engaged, but it clearly is not transporting people. Green Tours, Inc., on the other hand, is clearly primarily engaged in the business of transporting people, and the rule treats it as such.

On the other hand, when operating a transportation service off to the side of to the main business of a public accommodation (e.g., a hotel shuttle), the entity as a whole would be considered. Even if some dedicated employees are used to provide the service, shuttles and other systems provided as a means of getting to, from, or around a public accommodation remain solidly in the ''private, not primarily'' category.

SUBPART C—TRANSPORTATION FACILITIES

Section 37.41 Construction of Transportation Facilities by Public Entities

Section 37.41 contains the general requirement that all new facilities constructed after January 25, 1992, be accessible to and usable by individuals with disabilities. This provision tracks the statute closely, and is analogous to a provision in the DOJ regulations for private entities. Section 226 of the ADA provides little discretion in this requirement.

The requirement is keyed to construction which ''begins'' after January 25, 1992. The regulation defines ''begin'' to mean when a notice to proceed order has been issued. This term has a standard meaning in the construction industry, as an instruction to the contractor to proceed with the work.

Questions have been raised concerning which standards apply before January 26, 1992. There are Federal requirements that apply to all recipients of federal money, depending on the circumstances.

First, if an entity is a Federal recipient and uses Federal dollars to construct the facility, regulations implementing section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), require the recipient to comply with the Uniform Federal Accessibility Standards.

Second, since the Civil Rights Restoration Act of 1987 (Pub. L. 100–259), an operation of a recipient of federal funds would also have to comply with section 504, even though the activity was not paid for with Federal funds. Thus, the Uniform Federal Accessibility Standards would apply to this construction as well.

As mentioned above, the Department intends, in the period before January 26, 1991, to view compliance with section 504 in light of compliance with ADA requirements (this point applies to alterations as well as new construction). Consequently, in reviewing requests for grants, contract approvals, exemptions, etc., (whether with respect to ongoing projects or new, experimental, or one-time efforts), the Department will, as a policy matter, seek to ensure compliance with ADA standards.

Section 37.42

Service in an integrated setting to passengers at intercity, commuter, and high-speed rail station platforms constructed or altered after February 1, 2012.

Individuals with disabilities, including individuals who use wheelchairs, must have access to all accessible cars in each train using a new or altered station. This performance standard will apply at stations where construction or alteration of platforms begins 135 days or more after the rule is published. The performance standard does not require rail operators to retrofit existing station platforms or cars. The requirement is prospective, and section 37.42 does not require retrofit of existing stations (though compliance with existing disability nondiscrimination requirements not being altered is still required). To meet this performance standard on lines or systems where track passing through stations and adjacent to platforms is shared with existing freight rail operations, passenger railroads that do not choose to provide level-entry boarding may, after obtaining FRA and/or FTA approval, use car-borne lifts, ramps or other devices, mini-high platforms (making multiple stops where necessary to accommodate passengers wishing to use different cars of the train), or movable station-based lifts.

On commuter, intercity, or high-speed rail lines or systems in which track passing through stations and adjacent to platforms is not shared with existing freight rail operations, the performance standard *must* be met by providing level-entry boarding to all

accessible cars in each train that serves new or altered stations on the line or system. For example, if a new commuter or high-speed rail line or system is being built, and the track adjacent to platforms is not shared with freight traffic (*e.g.,* it is a passenger rail-only system, or a passing or gauntlet track exists for freight traffic), then the stations would have to provide level-entry boarding. Other options would not be permitted.

If a platform being constructed or altered is not adjacent to track used for freight, but the track and platform are used by more than one passenger railroad (*e.g.,* Amtrak and a commuter railroad), the possibility of the platform serving cars with different door heights exists. In this situation, the level-entry boarding requirement continues to exist. Generally, the platform should be level with respect to the system that has the lower boarding height. This is because it is not good safety practice to make passengers step down (or be lifted down or use ramps to get down) to board a train. For example, if Amtrak operates through a station with cars that are 15 inches ATR, and a commuter railroad uses the same platform with cars that are 25 inches ATR, the platform would be level with respect to the Amtrak cars. The commuter railroad would have to provide another means of access, such as lifts. In all such cases where mixed rail equipment will be used, the rule requires that both FRA and FTA be consulted by the railroads involved. As in other cases where level-entry boarding is not used, the railroad must obtain FTA and/or FRA approval for the means the railroad wants to use to meet the performance standard.

The details of the ''track passing through stations and adjacent to platforms is shared with existing freight rail operations'' language are important. There may be stations that serve lines that are shared, at some points, by passenger and freight traffic, but where the freight traffic does not go through the particular station (*e.g.,* because freight traffic bypasses the station), level-entry boarding is required. There could also be situations on which multiple tracks pass through a station, and freight traffic uses only a center track, not a track which is adjacent to a platform. In such cases, the new or altered platform would have to provide level-entry boarding. It is important to note that this language refers to ''existing'' freight rail traffic, as opposed to the possibility that freight traffic might use the track in question at some future time. Likewise, if freight trains have not used a track passing through a station in a significant period of time (*e.g.,* the past 10 years), the Department does not view this as constituting ''existing freight rail traffic.''

Passenger rail operators must provide access only to accessible, available cars that people with disabilities are trying to access at a given station. If a train has eight accessible cars, and wheelchair users want to enter only cars 2 and 7 (see discussion below of passenger notification), then railroad personnel need to deploy lifts or bridge plates only at cars 2 and 7, not at the other cars. Similarly, the rule requires operators to provide access only to available cars at a station. If a train has eight accessible cars, but the platform only serves cars 1 through 6, then railroad personnel need to deploy lifts or bridge plates only at cars that people with disabilities are trying to access and that are available to all passengers. We would also point out that wheelchair positions on rail passenger cars are intended to serve wheelchair users, and railroad operators should take steps to ensure that these spaces are available for wheelchair users and not for other uses. For example, it would be contrary to the rule for a wheelchair user to be told that he or she could not use car 7 because the wheelchair spaces were filled with other passengers' luggage from a previous stop.

In order to ensure that access was provided, passengers would have to notify railroad personnel. For example, if a passenger at a station wanted to use a station-based lift to access car 6, the passenger would request the use of car 6 and railroad personnel would deploy the lift at that car. Likewise, at a station using a mini-high platform, a passenger on this platform would inform train personnel that he or she wanted to enter car 5, whereupon the train would pull forward so that car 5 was opposite the mini-high platform. We contemplate that these requests would be made when the train arrives, and railroads could not insist on advance notice (*e.g.,* the railroad could not require a passenger to call a certain time in advance to make a ''reservation'' to use a lift to get on a particular car). As part of its submission to FTA or FRA, the railroad would describe the procedure it would use to receive and fulfill these requests.

Where a railroad operator wishes to provide access to its rail cars through a means other than level-entry boarding, it is essential that it provide an integrated, safe, timely, reliable, and effective means of access for people with disabilities. A railroad is not required to choose what might be regarded as a more desirable or convenient method over a less desirable or convenient method, or to choose a more costly option over a less costly option. What a railroad must do is to ensure that whatever option it chooses works. However, to assist railroads in choosing the most suitable option, the rule requires that a railroad not using level-entry boarding, if it chooses an approach other than the use of car-borne lifts, must perform a comparison of the costs (capital, operating, and life-cycle costs) of car-borne lifts versus the

means preferred by the railroad operator, as well as a comparison of the relative ability of each of the two alternatives (*i.e.,* car-borne lifts and the railroad's preferred approach) to provide service to people with disabilities in an integrated, safe, reliable, and timely manner. The railroad must submit this comparison to FTA and FRA at the same time as it submits its plan to FRA and/or FTA, as described below, although the comparison is not part of the basis on which the agencies would determine whether the plan meets the performance standard. The Department believes that, in creating this plan, railroads should consult with interested individuals and groups and should make the plan readily available to the public, including individuals with disabilities.

To ensure that the railroad's chosen option works, the railroad must provide to FRA or FTA (or both), as applicable, a plan explaining how its preferred method will provide the required integrated, safe, reliable, timely and effective means of access for people with disabilities. The plan would have to explain how boarding equipment (*e.g.,* bridge plates, lifts, ramps, or other appropriate devices) and/or platforms will be deployed, maintained, and operated, as well as how personnel will be trained and deployed to ensure that service to individuals with disabilities was provided in an integrated, safe, timely, effective, and reliable manner.

FTA and/or FRA will evaluate the proposed plan with respect to whether it will achieve the objectives of the performance standard and may approve, disapprove, or modify it. It should be emphasized that the purpose of FTA/FRA review of this plan is to make sure that whatever approach a railroad chooses will in fact work; that is, it will really result in an integrated, safe, reliable, timely and effective means of access for people with disabilities. If a plan, in the view of FRA or FTA, fails to meet this test, then FTA or FRA can reject it or require the railroad to modify it to meet the objectives of this provision.

In considering railroads' plans, the agencies will consider factors including, but not limited to, how the proposal maximizes integration of and accessibility to individuals with disabilities, any obstacles to the use of a method that could provide better service to individuals with disabilities, the safety and reliability of the approach and related technology proposed to be used, the suitability of the means proposed to the station and line and/or system on which it would be used, and the adequacy of equipment and maintenance and staff training and deployment.

For example, some commenters have expressed significant concerns about the use of station-based lifts, noting instances in which such lifts have not been maintained in a safe and reliable working order. A railroad proposing to use station-based lifts would have to describe to FTA or FRA how it would ensure that the lifts remained in safe and reliable operating condition (such as by cycling the lift daily or other regular maintenance) and how it would ensure that personnel to operate the lift were available in a timely manner to assist passengers in boarding a train. This demonstration must clearly state how the railroad expects that their operations will provide safe and dignified service to the users of such lifts.

In existing stations where it is possible to provide access to every car without station or rail car retrofits, rail providers that receive DOT financial assistance should be mindful of the requirement of 49 CFR 27.7(b)(2), which requires that service be provided ''in the most integrated setting that is reasonably achievable.'' For example, if a set of rail cars has car-borne lifts that enable the railroad to comply with section 37.42 at new or altered station platforms, it is likely that deployment of this lift at existing stations will be reasonably achievable. Similarly, it is likely that, in a system using mini-high platforms, making multiple stops at existing stations would be reasonable achievable. The use of a station-based lift at an existing station to serve more than one car of a train may well also be reasonably achievable (*e.g.,* with movement of the lift or multiple stops, as needed). Such actions would serve the objective of providing service in an integrated setting. In addition, in situations where a railroad and the Department have negotiated access to every accessible car in an existing system (*e.g.,* with car-borne lifts and mini-high platforms as a back-up), the Department expects the railroads to continue to provide access to every accessible car for people with disabilities.

Section 37.42(e) provides a safety requirement concerning the setback of structures and obstacles (*e.g.,* mini-high platforms, elevators, escalators, and stairwells) from the platform edge. This provision is based on long-standing FRA recommendations and the expertise of the Department's staff. The Department believes that it is inadvisable, with the exception of boarding and alighting a train, to ever have a wheelchair operate over the two-foot wide tactile strips that are parallel to the edge of the platform. This leaves a four-foot distance for a person in a typical wheelchair to maneuver safely past stair wells, elevator shafts, *etc.* It also is important because a wheelchair user exiting a train at a door where there is not a six-foot clearance would likely have difficulty exiting and making the turn out of the rail car door. The requirement would also avoid channeling pedestrians through a relatively narrow space where, in crowded platform conditions, there would be an increased chance of someone falling off the edge of the platform. Since the rule concerns only new and altered platforms, the Department does

not believe the cost or difficulty of designing the platforms to eliminate this hazard will be significant.

Section 37.42(f) provides the maximum gap allowable for a platform to be considered ''level.'' However, this maximum is not intended to be the norm for new or altered platforms. The Department expects transportation providers to minimize platform gaps to the greatest extent possible by building stations on tangent track and using gap-filling technologies, such as moveable platform edges, threshold plates, platform end boards, and flexible rubber fingers on the ends of platforms. The Department encourages the use of Gap Management Plans and consultation with FRA and/or FTA for guidance on gap safety issues.

Even where level-entry boarding is provided, it is likely that, in many instances, bridge plates would have to be used to enable passengers with disabilities to enter cars, because of the horizontal gaps involved. Section 38.95(c)(5), referred to in the regulatory text, permits various ramp slopes for bridge plates, depending on the vertical gap in given situation. In order to maximize the opportunity of passengers to board independently, the Department urges railroads to use the least steep ramp slope feasible at a given platform.

Section 37.43 Alteration of Transportation Facilities by Public Entities

This section sets out the accessibility requirements that apply when a public entity undertakes an alteration of an existing facility. In general, the section requires that any alteration, to the maximum extent feasible, results in the altered area being accessible to and usable by individuals with disabilities, including persons who use wheelchairs. The provisions follow closely those adopted by the DOJ, in its regulations implementing title III of the ADA.

The section requires specific activities whenever an alteration of an existing facility is undertaken.

First, if the alteration is made to a primary function area, (or access to an area containing a primary function), the entity shall make the alteration in such a way as to ensure that the path of travel to the altered area and the restrooms, telephones and drinking fountains servicing the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

Second, alterations to drinking fountains, telephones, and restrooms do not have to be completed if the cost and scope of making them accessible is disproportionate.

Third, the requirement goes into effect for alterations begun after January 25, 1992.

Fourth, the term ''maximum extent feasible'' means that all changes that are possible must be made. The requirement to make changes to the maximum extent feasible derives from clear legislative history. The Senate Report states—

The phrase ''to the maximum extent feasible'' has been included to allow for the occasional case in which the nature of an existing facility is such as to make it virtually impossible to renovate the building in a manner that results in its being entirely accessible to and usable by individuals with disabilities. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

Thus, for example the term ''to the maximum extent feasible'' should be construed as not requiring entities to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member unless the load-bearing structural member is otherwise being removed or altered as part of the alteration. (S. Rept. 101–116, at 68).

Fifth, primary function means a major activity for which the facility is intended. Primary function areas include waiting areas, ticket purchase and collection areas, train or bus platforms, baggage checking and return areas, and employment areas (with some exceptions stated in the rule, for areas used by service personnel that are very difficult to access).

Sixth, ''path of travel'' means 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 and includes restrooms, telephones, and drinking fountains serving the altered area. If changes to the path of travel are disproportionate, then only those changes which are not disproportionate are to be completed.

Seven, the final rule specifies that costs exceeding 20 percent would be disproportionate. This is consistent with the DOJ. In determining costs, the Department intends costs to be based on changes to the passenger service area that is scheduled for alteration.

Finally, the Department has defined the term ''begin'', in the context of begin an alteration that is subject to the alteration provision to mean when a notice to proceed or work order is issued. Two terms are used (instead of only notice to proceed in the context of new construction) because many alterations may be carried out by the entity itself, in which case the only triggering event would be a work order or similar authorization to begin.

In looking at facility concepts like ''disproportionality'' and ''to the maximum extent feasible,'' the Department will consider any expenses related to accessibility for passengers. It is not relevant to consider non-passenger related improvements (e.g., installing a new track bed) or to permit ''gold-plating'' (attributing to accessibility

costs the expense of non-related improvements, such as charging to accessibility costs the price of a whole new door, when only adding a new handle to the old door was needed for accessibility).

Section 37.47 Key Stations in Light and Rapid Rail Systems

Section 37.49 Designation of Responsible Person(s) for Intercity and Commuter Rail Stations

This section sets forth a mechanism for determining who bears the legal and financial responsibility for accessibility modifications to a commuter and/or intercity rail station. The final provision of the section is the most important. It authorizes all concerned parties to come to their own agreement concerning the allocation of responsibility. Such an agreement can allocate responsibility in any way acceptable to the parties. The Department strongly encourages parties to come to such an agreement.

In the absence of such an agreement, a statutory/regulatory scheme allocates responsibility. In the first, and simplest, situation posed by the statute, a single public entity owns more than 50 percent of the station. In this case, the public entity is the responsible person and nobody else is required to bear any of the responsibility.

In the second situation, a private entity owns more than 50 percent of the station. The private entity need not bear any of the responsibility for making the station accessible. A public entity owner of the station, who does not operate passenger railroad service through the station, is not required to bear any of the responsibility for making the station accessible. The total responsibility is divided between passenger railroads operating service through the station, on the basis of respective passenger boardings. If there is only one railroad operating service through the station, it bears the total responsibility.

The Department believes that reference to passenger boardings is the most equitable way of dividing responsibility among railroads, since the number of people drawn to the station by each is likely to reflect ''cost causation'' quite closely. The Department notes, however, that, as passenger boarding percentages change over time, the portion of responsibility assigned to each party also may change. Station modifications may involve long-term capital investment and planning, while passenger boarding percentages are more volatile. Some railroads may stop serving a station, while others may begin service, during the period of time before modifications to the station are complete. To help accommodate such situations, the rule refers to passenger boardings ''over the entire period during which the station is made accessible.''

This language is intended to emphasize that as circumstances change, the parties involved have the responsibility to adjust their arrangements for cost sharing. For example, suppose Railroad A has 30 percent of the passenger boardings in year 1, but by year 10 has 60 percent of the boardings. It would not be fair for Railroad A to pay only 30 percent of the costs of station modifications occurring in later years. Ultimately, the total cost burden for modifying the station over (for example) 20 years would be allocated on the share of the total number or boardings attributable to each railroad over the whole 20 year period, in order to avoid such unfairness.

The third, and most complicated, situation is one in which no party owns 50 percent of the station. For example, consider the following hypothetical situation:

Party	Ownership percentage	Boardings percentage
Private freight RR	40	0
City	30	0
Amtrak	0	25
Commuter A	30	50
Commuter B	0	25

The private freight railroad drops out of the calculation of who is responsible. All of the responsibility would be allocated among four public entities: the city (a public entity who does not operate railroad service), Amtrak, and the two commuter railroads. Half the responsibility would go to public entity owners of the station (whether or not they are railroads who run passenger service through the station). The other half of the responsibility would go to railroads who run passenger service through the station (whether or not they are station owners).

On the ownership side of the equation, the city and Commuter A each own half of that portion of the station that is not owned by the private freight railroad. Therefore, the two parties divide up the ownership half of the responsibility equally. Based on their ownership interest, each of these two parties bears 25 percent of the responsibility for the entire station. Note that, should ownership percentages or owners change over the period during which the station is to be made accessible, these percentages may change. It is ownership percentage over this entire period that ultimately determines the percentage of responsibility.

On the passenger rail operations side of the equation, 50 percent of passenger boardings are attributable to Commuter A and 25 percent each to Commuter B and Amtrak. Therefore, half of this portion of the responsibility belongs to Commuter A, while a quarter share each goes to the other railroads. This means that, based on passenger boardings, 25 percent of the responsibility

goes to Commuter A, 12.5 percent to Commuter B, and 12.5 percent to Amtrak. Again, it is the proportion of passenger boardings over the entire length of the period during which the station is made accessible that ultimately determines the percentage of responsibility.

In this hypothetical, Commuter A is responsible for a total of 50 percent of the responsibility for the station. Commuter A is responsible for 25 percent of the responsibility because of its role as a station owner and another 25 percent because of its operation of passenger rail service through the station.

The Department recognizes that there will be situations in which application of this scheme will be difficult (e.g., involving problems with multiple owners of a station whose ownership percentages may be difficult to ascertain). The Department again emphasizes that agreement among the parties is the best way of resolving these problems, but we are willing to work with the parties to ensure a solution consistent with this rule.

Section 37.51 Key Stations in Commuter Rail Systems

These sections require that key stations in light, rapid, and commuter rail systems be made accessible as soon as practicable, but no later than July 26, 1993. Being made accessible, for this purpose, means complying with the applicable provisions of appendix A to this part. ''As soon as practicable'' means that, if modification can be made before July 26, 1993, they must be. A rail operator that failed to make a station accessible by July 1993 would be in noncompliance with the ADA and this rule, except in a case where an extension of time had been granted.

What is a key station? A key station is one designated as such by the commuter authority or light/rapid rail operator, through the planning process and public participation process set forth in this section. The five criteria listed in the regulation are intended to guide the selection process but, while the entity must take these criteria into account (and this consideration must be reflected in the planning process and documents), they are not mandatory selection standards. That is, it is not required that every station that meets one of the criteria be designated as a key station. Since the criteria are not mandatory selection standards, the understanding of their terms is also a matter appropriately left to the planning process. A tight, legalistic definition is not necessary in the context of factors intended for consideration. For instance, what constitutes a major activity center or how close a station needs to be to another station to not be designated as key depend largely on local factors that it would not be reasonable to specify in this rule.

Given the wide discretion permitted to rail operators in identifying key stations, there would be no objection to identifying as a key station a new (presumably accessible) station now under construction. Doing so would involve consideration of the key station criteria and would be subject to the planning/public participation process.

If an extension to a rail system (e.g., a commuter system) is made, such that the system comes to include existing inaccessible stations that have not previously been part of the system, the Department construes the ADA to require application of key station accessibility in such a situation. The same would be true for a new start commuter rail system that began operations using existing stations. Key station planning, designation of key stations, and with being consistent with the ADA would be required. The Department would work with the commuter authority involved on a case-by-case basis to determine applicable time limits for accessibility, consistent with the time frames of the ADA.

The entity must develop a compliance plan, subject to the public participation and planning process set forth in paragraph (d) of each of these sections. Note that this plan must be completed by July 26, 1992, not January 26, 1992, as in the case of paratransit plans. The key station plans must be submitted to FTA at that time. (The statute does not require FTA approval of the plans, however.).

A rail operator may request an extension of the July 1993 completion deadline for accessibility modifications to one or more key stations. The extension for light and rapid rail stations can be up to July 2020, though two thirds of the key stations (per the legislative history of the statute, selected in a way to maximize accessibility to the whole system) must be accessible by July 2010.

Commuter rail stations can be extended up to July 2010.

Requests for extension of time must be submitted by July 26, 1992. FTA will review the requests on a station-by-station basis according to the statutory criterion, which is whether making the station accessible requires extraordinarily expensive alterations. An extraordinarily expensive alteration is raising the entire platform, installing an elevator, or making another alteration of similar cost and magnitude. If another means of making a station accessible (e.g., installation of a mini-high platform in a station where it is not necessary to install an elevator or to provide access to the platform for wheelchair users), then an extension can be granted only if the rail operator shows that the cost and magnitude of the alteration is similar to that of an elevator installation or platform raising.

The rule does not include a specific deadline for FTA consideration of an extension

request. However, since we are aware that, in the absence of an extension request, accessibility must be completed by July 1993, we will endeavor to complete review of plans as soon as possible, to give as much lead time as possible to local planning and implementation efforts.

Once an extension is granted, the extension applies to all accessibility modifications in the station. However, the rail operator should not delay non-extraordinarily expensive modifications to the station. The key station plan and any extension request should include a schedule for phasing in non-extraordinarily expensive modifications to the station. For example, even if a key station is not going to be accessible to wheelchair users for 15 years, pending the installation of an elevator, the rail operator can improve its accessibility to persons with visual impairments by installing tactile strips.

An extension cannot be granted except for a particular station which needs an extraordinarily expensive modification. An extension cannot be granted non-extraordinarily expensive changes to Station B because the extraordinarily expensive changes to Station A will absorb many resources. Non-extraordinarily expensive changes, however costly considered collectively for a system, are not, under the statute, grounds for granting an extension to one or more stations or the whole system. Only particular stations where an extraordinarily expensive modification must be made qualify for extensions.

The FTA Administrator can approve, modify, or disapprove any request for an extension. For example, it is not a forgone conclusion that a situation for which an extension is granted will have the maximum possible extension granted. If it appears that the rail operator can make some stations accessible sooner, FTA can grant an extension for a shorter period (e.g., 2005 for a particular station rather than 2010).

Section 37.53 Exception for New York and Philadelphia

Consistent with the legislative history of the ADA, this section formally recognizes the selection of key stations in two identified litigation settlement agreements in New York and Philadelphia as in compliance with the ADA. Consequently, the entities involved can limit their key station planning process to issues concerning the timing of key station accessibility. The section references also §37.9, which provides that key station accessibility alterations which have already been made, or which are begun before January 26, 1992, and which conform to specified prior standards, do not have to be re-modified. On the other hand, alterations begun after January 25, 1992 (including forthcoming key station modifications under the New York and Philadelphia agreements), must meet the requirements of appendix A to this part.

This is an exception only for the two specified agreements. There are no situations in which other cities can take advantage of this provision. Nor are the provisions of the two agreements normative for other cities. Other cities must do their own planning, with involvement from local citizens, and cannot rely on agreements unique to New York and Philadelphia to determine the appropriate number of percentage of key stations or other matters.

Section 37.57 Required Cooperation

This section implements §242(e)(2)(C) of the ADA, which treats as discrimination a failure, by an owner or person in control of an intercity rail station, to provide reasonable cooperation to the responsible persons' efforts to comply with accessibility requirements. For example, the imposition by the owner of an unreasonable insurance bond from the responsible person as a condition of making accessibility modifications would violate this requirement. See H. Rept. 101–485 at 53.

The statute also provides that failure of the owner or person in control to cooperate does not create a defense to a discrimination suit against the responsible person, but the responsible person would have a third party action against the uncooperative owner or person in control. The rule does not restate this portion of the statute in the regulation, since it would be implemented by the courts if such an action is brought. Since cooperation is also a regulatory requirement, however, the Department could entertain a section 504 complaint against a recipient of Federal funds who failed to cooperate.

The House Energy and Commerce Committee provided as an example of an action under this provision a situation in which a failure to cooperate leads to a construction delay, which in turn leads to a lawsuit by an individual with disabilities against the responsible person for missing an accessibility deadline. The responsible person could not use the lack of cooperation as a defense in the lawsuit, but the uncooperative party could be made to indemnify the responsible person for damages awarded the plaintiff. Also, a responsible person could obtain an injunction to force the recalcitrant owner or controller of the station to permit accessibility work to proceed. (*Id.*)

This provision does not appear to be intended to permit a responsible person to seek contribution for a portion of the cost of accessibility work from a party involved with the station whom the statute and §37.49 do not identify as a responsible person. It simply provides a remedy for a situation in which someone impedes the responsible person's efforts to comply with accessibility obligations.

Section 37.59 Differences in Accessibility Completion Date Requirements

Portions of the same station may have different accessibility completion date requirements, both as the result of different statutory time frames for different kinds of stations and individual decisions made on requests for extension. The principle at work in responding to such situations is that if part of a station may be made accessible after another part, the ''late'' part of the work should not get in the way of people's use of modifications resulting from the ''early'' part.

For example, the commuter part of a station may have to be made accessible by July 1993 (e.g., there is no need to install an elevator, and platform accessibility can be achieved by use of a relatively inexpensive mini-high platform). The Amtrak portion of the same station, by statute, is required to be accessible as soon as practicable, but no later than July 2010. If there is a common entrance to the station, that commuter rail passengers and Amtrak passengers both use, or a common ticket counter, it would have to be accessible by July 1993. If there were a waiting room used by Amtrak passengers but not commuter passengers (who typically stand and wait on the platform at this station), it would not have to be accessible by July 1993, but if the path from the common entrance to the commuter platform went through the waiting room, the path would have to be an accessible path by July 1993.

Section 37.61 Public Transportation Programs and Activities in Existing Facilities

This section implements section 228(a) of the ADA and establishes the general requirement for entities to operate their transportation facilities in a manner that, when viewed in its entirety, is accessible to and usable by individuals with disabilities. The section clearly excludes from this requirement access by persons in wheelchairs, unless these changes would be necessitated by the alterations or key station provisions.

This provision is intended to cover activities and programs of an entity that do not rise to the level of alteration. Even if an entity is not making alterations to a facility, it has a responsibility to conduct its program in an accessible manner. Examples of possible activities include user friendly farecards, schedules, of edge detection on rail platforms, adequate lighting, telecommunication display devices (TDDs) or text telephones, and other accommodations for use by persons with speech and hearing impairments, signage for people with visual impairments, continuous pathways for persons with visual and ambulatory impairments, and public address systems and clocks.

The Department did not prescribe one list of things that would be appropriate for all stations. For example, we believe that tactile strips are a valuable addition to platforms which have drop-offs. We also believe that most larger systems, to the extent they publish schedules, should make those schedules readily available in alternative formats. We encourage entities to find this another area which benefits from its commitment to far-reaching public participation efforts.

SUBPART D—ACQUISITION OF ACCESSIBLE VEHICLES BY PUBLIC ENTITIES

Section 37.71 Purchase or Lease of New Non-Rail Vehicles by Public Entities Operating Fixed Route Systems

This section generally sets out the basic acquisition requirements for a public entity purchasing a new vehicle. The section requires any public entity that purchases or leases a new vehicle to acquire an accessible vehicle.

In addition, the waiver request must include copies of advertisements in trade publications and inquiries to trade associations seeking lifts for the buses. The public entity also must include a full justification for the assertion that a delay in the bus procurement sufficient to obtain a lift-equipped bus would significantly impair transportation services in the community. There is no length of time that would be a *per se* delay constituting a ''significant impairment''. It will be more difficult to obtain a waiver if a relatively short rather than relatively lengthy delay is involved. A showing of timetables, absent a showing of significant impairment of actual transit services, would not form a basis for granting a waiver.

Any waiver granted by the Department under this provision will be a conditional waiver. The conditions are intended to ensure that the waiver provision does not create a loophole in the accessible vehicle acquisition requirement that Congress intended to impose. The ADA requires a waiver to be limited in duration and the rule requires a termination date to be included. The date will be established on the basis of the information the Department receives concerning the availability of lifts in the waiver request and elsewhere. In addition, so that a waiver does not become open-ended, it will apply only to a particular procurement. If a transit agency wants a waiver for a subsequent delivery of buses in the procurement, or another procurement entirely, it will have to make a separate waiver request.

For example, if a particular order of buses is delivered over a period of time, each delivery would be the potential subject of a waiver request. First, the entity would request a waiver for the first shipment of buses. If all of the conditions are met, the waiver would be granted, with a date specified to coincide

with the due date of the lifts. When the lifts become available those buses would have to be retrofitted with the lifts. A subsequent delivery of buses—on the same order—would have to receive its own waiver, subject to the same conditions and specifications of the first waiver.

The purpose of the waiver, as the Department construes it, is to address a situation in which (because of a sudden increase in the number of lift-equipped buses requested) lift manufacturers are unable to produce enough lifts to meet the demand in a timely fashion.

Section 37.73 Purchase or Lease of Used Non-Rail Vehicles by Public Entities Operating a Fixed Route System

The basic rule is that an acquisition of a used vehicle would have to be for an accessible vehicle.

There is an exception, however, for situations in which the transit provider makes a good faith effort to obtain accessible used vehicles but does not succeed in finding them. The ADA requires transit agencies to purchase accessible used vehicles, providing a ''demonstrated good faith efforts'' exception to the requirement. The reports of the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor offered the following guidance on what ''good faith efforts'' involve:

The phrase ''demonstrated good faith efforts'' is intended to require a nationwide search and not a search limited to a particular region. For instance, it would not be enough for a transit operator to contact only the manufacturer where the transit authority usually does business to see if there are accessible used buses. It involves the transit authority advertising in a trade magazine, i.e., Passenger Transport, or contacting the transit trade association, American Public Transit Association (APTA), to determine whether accessible used vehicles are available. It is the Committee's expectation that as the number of buses with lifts increases, the burden on the transit authority to demonstrate its inability to purchase accessible vehicles despite good faith efforts will become more and more difficult to satisfy. S. Rept. 101–116 at 49; H. Rept. 101–485 at 90.

Consistent with this guidance, this section requires that good faith efforts include specifying accessible vehicles in bid solicitations. The section also requires that the entity retain for two years documentation of that effort, and that the information be available to FTA and the public.

It does not meet the good faith efforts requirement to purchase inaccessible, rather than accessible, used buses, just because the former are less expensive, particularly if the difference is a difference attributable to the presence of a lift. There may be situations in which good faith efforts involve buying fewer accessible buses in preference to more inaccessible buses.

The public participation requirements involved in the development of the paratransit plans for all fixed route operators requires an ongoing relationship, including extensive outreach, to the community likely to be using its accessible service. We believe that it will be difficult to comply with the public participation requirements and not involve the affected community in the decisions concerning the purchase or lease of used accessible vehicles.

There is an exception to these requirements for donated vehicles. Not all ''zero dollar'' transfers are donations, however. The legislative history to this provision provides insight.

It is not the Committee's intent to make the vehicle accessibility provisions of this title applicable to vehicles donated to a public entity. The Committee understands that it is not usual to donate vehicles to a public entity. However, there could be instances where someone could conceivably donate a bus to a public transit operator in a will. In such a case, the transit operators should not be prevented from accepting a gift.

The Committee does not intend that this limited exemption for donated vehicles be used to circumvent the intent of the ADA. For example, a local transit authority could not arrange to be the recipient of donated inaccessible buses. This would be a violation of the ADA. S. Rpt. 101–116, at 46; H. Rpt. 101–486, at 87.

Entities interested in accepting donated vehicles must submit a request to FTA to verify that the transaction is a donation.

There is one situation, in which a vehicle has prior use is not treated as a used vehicle. If a vehicle has been remanufactured, and it is within the period of the extension of its useful life, it is not viewed as a used vehicle (see H. Rept. 101–485, Pt 1 at 27). During this period, such a vehicle may be acquired by another entity without going through the good faith efforts process. This is because, at the time of its remanufacture, the bus would have been made as accessible if feasible. When the vehicle has completed its extended useful life (e.g., the beginning of year six when its useful life has extended five years), it becomes subject to used bus requirements.

Section 37.75 Remanufacture of Non-Rail Vehicles and Purchase or Lease of Remanufactured Non-rail Vehicles by Public Entities Operating Fixed Route Systems

This section tracks the statute closely, and contains the following provisions. First, it requires any public entity operating a fixed route system to purchase an accessible vehicle if the acquisition occurs after August 25, 1990, if the vehicle is remanufactured after August 25, 1990, or the entity contracts or undertakes the remanufacture of a vehicle

after August 25, 1990. The ADA legislative history makes it clear that remanufacture is to include changes to the structure of the vehicle which extend the useful life of the vehicle for five years. It clearly is not intended to capture things such as engine overhauls and the like.

The term remanufacture, as used in the ADA context, is different from the use of the term in previously issued FTA guidance. The term has a specific meaning under the ADA: there must be structural work done to the vehicle and the work must extend the vehicle's useful life by five years.

The ADA imposes no requirements on what FTA traditionally considers bus rehabilitation. Such work involves rebuilding a bus to original specifications and focuses on mechanical systems and interiors. Often this work includes replacing components. It is less extensive than remanufacture.

The statute, and the rule, includes an exception for the remanufacture of historical vehicles. This exception applies to the remanufacture of or purchase of a remanufactured vehicle that (1) is of historic character; (2) operates solely on a segment of a fixed route system which is on the National Register of Historic Places; and (3) making the vehicle accessible would significantly alter the historic character of the vehicle. The exception only extends to the remanufacture that would alter the historic character of the vehicle. All modifications that can be made without altering the historic character (such as slip resistant flooring) must be done.

Section 37.77 Purchase or Lease of New Non-Rail Vehicles by Public Entities Operating a Demand Responsive System for the General Public

Section 224 of the ADA requires that a public entity operating a demand responsive system purchase or lease accessible new vehicles, for which a solicitation is made after August 25, 1990, unless the system, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities. This section is the same as the October 4, 1990 final rule which promulgated the immediately effective acquisition requirements of the ADA.

The Department has been asked to clarify what ''accessible when viewed in its entirety'' means in the context of a demand responsive system being allowed to purchase an inaccessible vehicle. First, it is important to note that this exception applies only to demand responsive systems (and not fixed route systems). The term ''equivalent service'' was discussed during the passage of the ADA. Material from the legislative history indicates that ''when viewed in its entirety/equivalent service'' means that ''when all aspects of a transportation system are analyzed, equal opportunities for each individual with a disability to use the transportation system must exist. (H. Rept. 101–184, Pt. 2, at 95; S. Rept. 101–116 at 54). For example, both reports said that ''the time delay between a phone call to access the demand responsive system and pick up the individual is not greater because the individual needs a lift or ramp or other accommodation to access the vehicle.'' (*Id.*)

Consistent with this, the Department has specified certain service criteria that are to be used when determining if the service is equivalent. As in previous rulemakings on this provision, the standards (which include service area, response time, fares, hours and days of service, trip purpose restrictions, information and reservations capability, and other capacity constraints) are not absolute standards. They do not say, for example, that a person with a disability must be picked up in a specified number of hours. The requirement is that there must be equivalent service for all passengers, whether or not they have a disability. If the system provides service to persons without disabilities within four hours of a call for service, then passengers with disabilities must be afforded the same service.

The Department has been asked specifically where an entity should send its ''equivalent level of service'' certifications. We provide the following: Equivalent level of service certifications should be submitted to the state program office if you are a public entity receiving FTA funds through the state. All other entities should submit their equivalent level of service certifications to the FTA regional office (listed in appendix B of this part). Certifications must be submitted before the acquisition of the vehicles.

Paragraph (e) of this section authorizes a waiver for the unavailability of lifts. Since demand responsive systems need not purchase accessible vehicles if they can certify equivalent service, the Department has been asked what this provision is doing in this section.

Paragraph (e) applies in the case in which an entity operates a demand responsive system, which is not equivalent, and the entity cannot find accessible vehicles to acquire. In this case, the waiver provisions applicable to a fixed route entity purchasing or leasing inaccessible new vehicles applies to the demand responsive operator as well.

Section 37.79 Purchase or Lease of New Rail Vehicles by Public Entities Operating Rapid or Light Rail Systems

This section echoes the requirement of §37.71—all new rail cars must be accessible.

Section 37.81 Purchase or Lease of Used Rail Vehicles by Public Entities Operating Rapid or Light Rail Systems

This section lays out the requirements for a public entity acquiring a used rail vehicle. The requirements and standards are the same as those specified for non-rail vehicles in §37.73. While we recognize it may create difficulties for entities in some situations, the statute does not include any extension or short-term leases. The Department will consider, in a case-by-case basis, how the good faith efforts requirement would apply in the case of an agreement between rail carriers to permit quick-response, short-term leases of cars over a period of time.

Section 37.83 Remanufacture of Rail Vehicles and Purchase or Lease of Remanufactured Rail Vehicles by Public Entities Operating Rapid or Light Rail System

This section parallels the remanufacturing section for buses, including the exception for historical vehicles. With respect to an entity having a class of historic vehicles that may meet the standards for the historic vehicle exception (e.g., San Francisco cable cars), the Department would not object to a request for application of the exception on a system-wide, as approved to car-by-car, basis.

Section 37.85 Purchase or Lease of New Intercity and Commuter Rail Cars

This section incorporates the statutory requirement that new intercity and commuter rail cars be accessible. The specific accessibility provisions of the statute (for example, there are slightly different requirements for intercity rail cars versus commuter rail cars) are specified in part 38 of this regulation. These standards are adopted from the voluntary guidelines issues by the Access Board. The section basically parallels the acquisition requirements for buses and other vehicles. It should be noted that the definition of commuter rail operator clearly allows for additional operators to qualify as commuter, since the definition describes the functional characteristics of an operator, as well as listing existing commuter rail operators.

We would point out that the ADA applies this requirement to all new vehicles. This includes not only vehicles and systems that currently are being operated in the U.S., but new, experimental, or imported vehicles and systems. The ADA does not stand in the way of new technology, but it does require that new technology, and the benefits it brings, be accessible to all persons, including those with disabilities. This point applies to all vehicle acquisition provisions of this regulation, whether for rail or non-rail, private or public, fixed route or demand responsive vehicles and systems.

Section 37.87 Purchase or Lease of Used Intercity and Commuter Rail Cars

The section also parallels closely the requirements in the ADA for the purchase or lease of accessible used rail vehicles. We acknowledge that, in some situations, the statutory requirement for to make good faith efforts to acquire accessible used vehicles may create difficulties for rail operators attempting to lease rail cars quickly for a short time (e.g., as fill-ins for cars which need repairs). In some cases, it may be possible to mitigate these difficulties through means such as making good faith efforts with respect to an overall agreement between two rail operators to make cars available to one another when needed, rather than each time a car is provided under such an agreement.

Section 37.89 Remanufacture of Intercity and Commuter Rail Cars

This section requires generally that remanufactured cars be made accessible, to the maximum extent feasible. Feasible is defined in paragraph (c) of the section to be ''unless an engineering analysis demonstrates that remanufacturing the car to be accessible would have a significant adverse effect on the structural integrity of the car.'' Increased cost is not a reason for viewing other sections of this subpart concerning remanufactured vehicles.

In addition, this section differs from the counterpart sections for non-rail vehicles and light and rapid rail vehicles in two ways. First, the extension of useful life needed to trigger the section is ten rather than five years. Second, there is no historic vehicle exception. Both of these differences are statutory.

Remanufacture of vehicles implies work that extends their expected useful life of the vehicle. A mid-life overhaul, not extending the total useful life of the vehicle, would not be viewed as a remanufacture of the vehicle.

Section 37.93 One Car Per Train Rule

This section implements the statutory directive that all rail operators (light, rapid, commuter and intercity) have at least one car per train accessible to persons with disabilities, including individuals who use wheelchairs by July 26, 1995. (See ADA sections 242(a)(1), 242(b)(1), 228(b)(1).) Section 37.93 contains this general requirement. In some cases, entities will meet the one-car-per train rule through the purchase of new cars. In this case, since all new rail vehicles have to be accessible, compliance with this provision is straightforward.

However, certain entities may not be purchasing any new vehicles by July 26, 1995, or may not be purchasing enough vehicles to ensure that one car per train is accessible. In these cases, these entities will have to retrofit existing cars to meet this requirement.

What a retrofitted car must look like to meet the requirement has been decided by the Access Board. These standards are contained in part 38 of this rule.

We would point that, consistent with the Access Board standards, a rail system using mini-high platforms or wayside lifts is not required, in most circumstances, to ''double-stop'' in order to give passengers a chance to board the second or subsequent car in a train at the mini-high platform or way-side lift. The only exception to this would be a situation in which all the wheelchair positions spaces in the first car were occupied. In this case, the train would have to double-stop to allow a wheelchair user to board, rather than passing the person by when there was space available in other than the first car, except where doing is necessary to comply with the provisions of section 37.42 of this part.

Section 37.95 Ferries and Other Passenger Vessels

Although at this time there are no specific requirements for vessels, ferries and other passenger vessels operated by public entities are subject to the requirements of §37.5 of this part and applicable requirements of 28 CFR part 35, the DOJ rule under title II of the ADA.

SUBPART E—ACQUISITION OF ACCESSIBLE VEHICLES BY PRIVATE ENTITIES

Section 37.101 Purchase or Lease of Non-Rail Vehicles by Private Entities Not Primarily Engaged in the Business of Transporting People

Section 37.103 Purchase or Lease of New Non-Rail Vehicles by Private Entities Primarily Engaged in the Business of Transporting People

Section 37.105 Equivalent Service Standard

The first two sections spell out the distinctions among the different types of service elaborated in the ADA and requirements that apply to them. For clarity, we provide the following chart.

PRIVATE ENTITIES ''NOT PRIMARILY ENGAGED''

System type	Vehicle capacity	Requirement
Fixed Route	Over 16	Acquire accessible vehicle.
Fixed Route	16 or less	Acquire accessible vehicle, or equivalency.
Demand Responsive.	Over 16	Acquire accessible vehicle, or equivalency.
Demand Responsive.	16 or less	Equivalency—see §37.171.

PRIVATE ENTITIES ''PRIMARILY ENGAGED''

System type	Vehicle type/capacity	Requirement
Fixed route	All new vehicles except auto, van with less than 8 capacity, or over the road bus.	Acquire accessible vehicle.
Demand responsive.	Same as above	Acquire accessible vehicle, or equivalency.
Either fixed route or demand responsive.	New vans with a capacity of less than 8.	Same as above.

Equivalency, for purposes of these requirements, is spelled out in §37.105. It is important to note that some portions of this section (referring to response time, reservations capacity, and restrictions on trip purpose) apply only to demand responsive systems. Another provision (schedules/headways) applies only to fixed route systems. This is because these points of comparison apply only to one or the other type system. The remaining provisions apply to both kinds of systems.

In applying the provisions this section, it is important to note that they are only points of comparison, not substantive criteria. For example, unlike the response time criterion of §37.131, this section does not require that a system provide any particular response time. All it says is that, in order for there to be equivalency, if the demand responsive system gets a van to a non-disabled person in 2 hours, or 8 hours, or a week and a half after a call for service, the system must get an accessible van to a person with a disability in 2 hours, or 8 hours, or a week and a half.

The vehicle acquisition and equivalency provisions work together in the following way. A private entity is about to acquire a vehicle for a transportation service in one of the categories to which equivalency is relevant. The entity looks at its present service (considered without regard to the vehicle it plans to acquire). Does the present service meet the equivalency standard? (In answering this question, the point of reference is the next potential customer who needs an accessible vehicle. The fact that such persons have not called in the past is irrelevant). If not, the entity is required to acquire an accessible vehicle. If so, the entity may acquire an accessible or an inaccessible vehicle. This process must be followed every time the entity purchases or leases a vehicle. Given changes in the mixes of both customers and vehicles, the answer to the question about equivalency will probably not be the same for an entity every time it is asked.

One difference between the requirements for ''private, not primarily'' and ''private, primarily'' entities is that the requirements apply to all vehicles purchased or leased for

the former, but only to new vehicles for the latter. This means that entities in the latter category are not required to acquire accessible vehicles when they purchase or lease used vehicles. Another oddity in the statute which entities should note is that the requirement for ''private, primarily'' entities to acquire accessible vans with less than eight passenger capacity (or provide equivalent service) does not become effective until after February 25, 1992 (This also date also applies no private entities ''primarily engaged'' which purchase passenger rail cars). All other vehicle acquisition requirements became effective after August 25, 1990.

The Department views the line between ''private, primarily'' and ''private, not primarily'' entities as being drawn with respect to the bus, van, or other service which the entity is providing. For example, there is an obvious sense in which an airline or car rental company is primarily engaged in the business of transporting people. If the airline or car rental agency runs a shuttle bus from the airport terminal to a downtown location or a rental car lot, however, the Department views that shuttle service as covered by the ''private, not primarily'' requirements of the rule (see discussion of the Applicability sections above). This is because the airline or car rental agency is not primarily engaged in the business of providing transportation by bus or van. The relationship of the bus or van service to an airline's main business is analogous to that of a shuttle to a hotel. For this purpose, it is of only incidental interest that the main business of the airline is flying people around the country instead of putting them up for the night.

Section 37.109 Ferries and Other Passenger Vessels

Although at this time there are no specific requirements for vessels, ferries and other passenger vessels operated by private entities are subject to the requirements of §37.5 of this part and applicable requirements of 28 CFR part 36, the DOJ rule under title III of the ADA.

SUBPART F—PARATRANSIT AS A COMPLEMENT TO FIXED ROUTE SERVICE

Section 37.121 Requirement for Comparable Complementary Paratransit Service

This section sets forth the basic requirement that all public entities who operate a fixed route system have to provide paratransit service that is both comparable and complementary to the fixed route service. By ''complementary,'' we mean service that acts as a ''safety net'' for individuals with disabilities who cannot use the fixed route system. By ''comparable,'' we mean service that meets the service criteria of this subpart.

This requirement applies to light and rapid rail systems as well as to bus systems, even when rail and bus systems share all or part of the same service area. Commuter bus, commuter rail and intercity rail systems do not have to provide paratransit, however. The remaining provisions of subpart F set forth the details of the eligibility requirements for paratransit, the service criteria that paratransit systems must meet, the planning process involved, and the procedures for applying for waivers based on undue financial burden.

Paratransit may be provided by a variety of modes. Publicly operated dial-a-ride vans, service contracted out to a private paratransit provider, user-side subsidy programs, or any combination of these and other approaches is acceptable. Entities who feel it necessary to apply for an undue financial burden waiver should be aware that one of the factors FTA will examine in evaluating waiver requests is efficiencies the provider could realize in its paratransit service. Therefore, it is important for entities in this situation to use the most economical and efficient methods of providing paratransit they can devise.

It is also important for them to establish and consistently implement strong controls against fraud, waste and abuse in the paratransit system. Fraud, waste and abuse can drain significant resources from a system and control of these problems is an important ''efficiency for any paratransit system. It will be difficult for the Department to grant an undue financial burden waiver to entities which do not have a good means of determining if fraud, waste and abuse are problems and adequate methods of combating these problems, where they are found to exist.

Section 37.123 ADA Paratransit Eligibility—Standards

General Provisions

This section sets forth the minimum requirements for eligibility for complementary paratransit service. All fixed route operators providing complementary paratransit must make service available at least to individuals meeting these standards. The ADA does not prohibit providing paratransit service to anyone. Entities may provide service to additional persons as well. Since only service to ADA eligible persons is required by the rule, however, only the costs of this service can be counted in the context of a request for an undue financial burden waiver.

When the rule says that ADA paratransit eligibility shall be strictly limited to persons in the eligible categories, then, it is not saying that entities are in any way precluded from serving other people. It is saying that the persons who must be provided service, and counting the costs of providing them service, in context of an undue burden waiver, are limited to the regulatory categories.

TEMPORARY DISABILITIES

Eligibility may be based on a temporary as well as a permanent disability. The individual must meet one of the three eligibility criteria in any case, but can do so for a limited period of time. For example, if an individual breaks both legs and is in two casts for several weeks, becomes a wheelchair user for the duration, and the bus route that would normally take him to work is not accessible, the individual could be eligible under the second eligibility category. In granting eligibility to such a person, the entity should establish an expiration date for eligibility consistent with the expected end of the period disability.

TRIP-BY-TRIP ELIGIBILITY

A person may be ADA paratransit eligible for some trips but not others. Eligibility does not inhere in the individual or his or her disability, as such, but in meeting the functional criteria of inability to use the fixed route system established by the ADA. This inability is likely to change with differing circumstances.

For example, someone whose impairment-related condition is a severe sensitivity to temperatures below 20 degrees is not prevented from using fixed route transit when the temperature is 75 degrees. Someone whose impairment-related condition is an inability to maneuver a wheelchair through snow is not prevented from using fixed route transit when there is no snow on the ground. Someone with a cognitive disability may have learned to take the same bus route to a supported employment job every day. This individual is able to navigate the system for work purposes and therefore would not be eligible for paratransit for work trips. But the individual may be unable to get to other destinations on the bus system without getting lost, and would be eligible for paratransit for non-work trips. Someone who normally drives his own car to a rail system park and ride lot may have a specific impairment related condition preventing him from getting to the station when his car is in the shop. A person who can use accessible fixed route service can go to one destination on an accessible route; another destination would require the use of an inaccessible route. The individual would be eligible for the latter but not the former.

In many cases, though the person is eligible for some trips but not others, eligibility determinations would not have to be made literally on a trip-by-trip basis. It may often be possible to establish the conditions on eligibility as part of the initial eligibility determination process. Someone with a temperature sensitivity might be granted seasonal eligibility. Somebody who is able to navigate the system for work but not non-work trips could have this fact noted in his or her eligibility documentation. Likewise, someone with a variable condition (e.g., multiple sclerosis, HIV disease, need for kidney dialysis) could have their eligibility based on the underlying condition, with paratransit need for a particular trip dependent on self-assessment or a set of medical standards (e.g., trip within a certain amount of time after a dialysis session). On the other hand, persons in the second eligibility category (people who can use accessible fixed route service where it exists) would be given service on the basis of the particular route they would use for a given trip.

Because entities are not precluded from providing service beyond that required by the rule, an entity that believes it is too difficult to administer a program of trip-by-trip eligibility is not required to do so. Nothing prevents an entity from providing all requested trips to a person whom the ADA requires to receive service for only some trips. In this case, if the entity intends to request an undue financial burden waiver, the entity, as provided in the undue burden provisions of this rule, must estimate, by a statistically valid technique, the percentage of its paratransit trips that are mandated by the ADA. Only that percentage of its total costs will be counted in considering the undue burden waiver request.

CATEGORY 1 ELIGIBILITY

The first eligibility category includes, among others, persons with mental or visual impairments who, as a result, cannot ''navigate the system.'' This eligibility category includes people who cannot board, ride, or disembark from an accessible vehicle ''without the assistance of another individual.'' This means that, if an individual needs an attendant to board, ride, or disembark from an accessible fixed route vehicles (including ''navigating the system''), the individual is eligible for paratransit. One implication of this language is that an individual does not lose paratransit eligibility based on ''inability to navigate the system'' because the individual chooses to travel with a friend on the paratransit system (even if the friend could help the person navigate the fixed route system). Eligibility in this category is based on ability to board, ride, and disembark independently.

Mobility training (e.g., of persons with mental or visual impairments) may help to improve the ability of persons to navigate the system or to get to a bus stop. Someone who is successfully mobility trained to use the fixed route system for all or some trips need not be provided paratransit service for those trips. The Department encourages entities to sponsor such training as a means of assisting individuals to use fixed route rather than paratransit.

CATEGORY 2 ELIGIBILITY

The second eligibility criterion is the broadest, with respect to persons with mobility impairments, but its impact should be reduced over time as transit systems become more accessible. This category applies to persons who could use accessible fixed route transportation, but accessible transportation is not being used at the time, and on the route, the persons would travel. This concept is route based, not system based.

Speaking first of bus systems, if a person is traveling from Point A to Point B on route 1, and route 1 is accessible, the person is not eligible for paratransit for the trip. This is true even though other portions of the system are still inaccessible. If the person is traveling from Point A to Point C on route 2, which is not accessible, the person is eligible for that trip. If the person is traveling from Point A to Point B on accessible route 1, with a transfer at B to go on inaccessible route 3 to Point D, then the person is eligible for the second leg of the trip. (The entity could choose to provide a paratransit trip from A to D or a paratransit or on-call bus trip from B to D.)

For purposes of this standard, we view a route as accessible when all buses scheduled on the route are accessible. Otherwise, it is unlikely that an accessible vehicle could be provided ''within a reasonable period of [a] time'' when the individual wants to travel, as the provision requires. We recognize that some systems' operations may not be organized in a way that permits determining whether a given route is accessible, even though a route-by-route determination appears to be contemplated by the statute. In such cases, it may be that category 2 eligibility would persist until the entire system was eligible.

With respect to a rail system, an individual is eligible under this standard if, on the route or line he or she wants to use, there is not yet one car per train accessible or if key stations are not yet accessible. This eligibility remains even if bus systems covering the area served by the rail system have become 100 percent accessible. This is necessary because people use rail systems for different kinds of trips than bus systems. It would often take much more in the way of time, trouble, and transfers for a person to go on the buses of one or more transit authorities than to have a direct trip provided by the rail operator. Since bus route systems are often designed to feed rail systems rather than duplicate them, it may often be true that ''you can't get there from here'' relying entirely on bus routes or the paratransit service area that parallels them.

If the lift on a vehicle cannot be deployed at a particular stop, an individual is eligible for paratransit under this category with respect to the service to the inaccessible stop. If on otherwise accessible route 1, an individual wants to travel from Point A to Point E, and the lift cannot be deployed at E, the individual is eligible for paratransit for the trip. (On-call bus would not work as a mode of providing this trip, since a bus lift will not deploy at the stop.) This is true even though service from Point A to all other points on the line is fully accessible. In this circumstance, the entity should probably think seriously about working with the local government involved to have the stop moved or made accessible.

When we say that a lift cannot be deployed, we mean literally that the mechanism will not work at the location to permit a wheelchair user or other person with a disability to disembark or that the lift will be damaged if it is used there. It is not consistent with the rule for a transit provider to declare a stop off-limits to someone who uses the lift while allowing other passengers to use the stop. However, if temporary conditions not under the operator's control (e.g., construction, an accident, a landslide) make it so hazardous for anyone to disembark that the stop is temporarily out of service for all passengers may the operator refuse to allow a passenger to disembark using the lift.

CATEGORY 3 ELIGIBILITY

The third eligibility criterion concerns individuals who have a specific impairment-related condition which prevents them from getting to or from a stop or station. As noted in the legislative history of the ADA, this is intended to be a ''very narrow exception'' to the general rule that difficulty in traveling to or from boarding or disembarking locations is not a basis for eligibility.

What is a specific impairment-related condition? The legislative history mentions four examples: Chronic fatigue, blindness, a lack of cognitive ability to remember and follow directions, or a special sensitivity to temperature. Impaired mobility, severe communications disabilities (e.g., a combination of serious vision and hearing impairments), cardiopulmonary conditions, or various other serious health problems may have similar effects. The Department does not believe that it is appropriate, or even possible, to create an exhaustive list.

What the rule uses as an eligibility criterion is not just the existence of a specific impairment-related condition. To be a basis for eligibility, the condition must prevent the individual from traveling to a boarding location or from a disembarking location. The word ''prevent'' is very important. For anyone, going to a bus stop and waiting for a bus is more difficult and less comfortable than waiting for a vehicle at one's home. This is likely to be all the more true for an individual with a disability. But for many persons with disabilities, in many circumstances, getting to a bus stop is possible.

If an impairment related condition only makes the job of accessing transit more difficult than it might otherwise be, but does not prevent the travel, then the person is not eligible.

For example, in many areas, there are not yet curb cuts. A wheelchair user can often get around this problem by taking a less direct route to a destination than an ambulatory person would take. That involves more time, trouble, and effort than for someone without a mobility impairment. But the person can still get to the bus stop. On the basis of these architectural barriers, the person would not be eligible.

Entities are cautioned that, particularly in cases involving lack of curb cuts and other architectural barrier problems, assertions of eligibility should be given tight scrutiny. Only if it is apparent from the facts of a particular case that an individual cannot find a reasonable alternative path to a location should eligibility be granted.

If we add a foot of snow to the scenario, then the same person taking the same route may be unable to get to the bus stop. It is not the snow alone that stops him; it is the interaction of the snow and the fact that the individual has a specific-impairment related condition that requires him to push a wheelchair through the snow that prevents the travel.

Inevitably, some judgment is required to distinguish between situations in which travel is prevented and situations in which it is merely made more difficult. In the Department's view, a case of ''prevented travel'' can be made not only where travel is literally impossible (e.g., someone cannot find the bus stop, someone cannot push a wheelchair through the foot of snow or up a steep hill) but also where the difficulties are so substantial that a reasonable person with the impairment-related condition in question would be deterred from making the trip.

The regulation makes the interaction between an impairment-related condition and the environmental barrier (whether distance, weather, terrain, or architectural barriers) the key to eligibility determinations. This is an individual determination. Depending on the specifics of their impairment-related condition, one individual may be able to get from his home to a bus stop under a given set of conditions, while his next-door neighbor may not.

COMPANIONS

The ADA requires entities to provide paratransit to one person accompanying the eligible individual, with others served on a space-available basis. The one individual who is guaranteed space on the vehicle can be anyone—family member, business associate, friend, date, etc. The provider cannot limit the eligible individual's choice of type of companion. The transit authority may require that the eligible individual reserve a space for the companion when the individual reserves his or her own ride. This one individual rides even if this means that there is less room for other eligible individuals. Additional individuals beyond the first companion are carried only on a space available basis; that is, they do not displace other ADA paratransit eligible individuals.

A personal care attendant (i.e., someone designated or employed specifically to help the eligible individual meet his or her personal needs) always may ride with the eligible individual. If there is a personal care attendant on the trip, the eligible individual may still bring a companion, plus additional companions on a space available basis. The entity may require that, in reserving the trip, the eligible individual reserve the space for the attendant.

To prevent potential abuse of this provision, the rule provides that a companion (e.g., friend or family member) does not count as a personal care attendant unless the eligible individual regularly makes use of a personal care attendant and the companion is actually acting in that capacity. As noted under §37.125, a provider may require that, as part of the initial eligibility certification process, an individual indicate whether he or she travels with a personal care attendant. If someone does not indicate the use of an attendant, then any individual accompanying him or her would be regarded simply as a companion.

To be viewed as ''accompanying'' the eligible individual, a companion must have the same origin and destination points as the eligible individual. In appropriate circumstances, entities may also wish to provide service to a companion who has either an origin or destination, but not both, with the eligible individual (e.g., the individual's date is dropped off at her own residence on the return trip from a concert).

Section 37.125 ADA Paratransit Eligibility—Process

This section requires an eligibilty process to be established by each operator of complementary paratransit. The details of the process are to be devised through the planning and public participation process of this subpart. The process may not impose unreasonable administrative burdens on applicants, and, since it is part of the entity's nondiscrimination obligations, may not involve ''user fees'' or application fees to the applicant.

The process may include functional criteria related to the substantive eligibility criteria of §37.123 and, where appropriate, functional evaluation or testing of applicants. The substantive eligibility process is not aimed at making a medical or diagnostic determination. While evaluation by a physician (or professionals in rehabilitation or

other relevant fields) may be used as part of the process, a diagnosis of a disability is not dispositive. What is needed is a determination of whether, as a practical matter, the individual can use fixed route transit in his or her own circumstances. That is a transportation decision primarily, not a medical decision.

The goal of the process is to ensure that only people who meet the regulatory criteria, strictly applied, are regarded as ADA paratransit eligible. The Department recognizes that transit entities may wish to provide service to other persons, which is not prohibited by this rule. However, the eligibility process should clearly distinguish those persons who are ADA eligible from those who are provided service on other grounds. For example, eligibility documentation must clearly state whether someone is ADA paratransit eligible or eligible on some other basis.

Often, people tend to think of paratransit exclusively in terms of people with mobility impairments. Under the ADA, this is not accurate. Persons with visual impairments may be eligible under either the first or third eligibility categories. To accommodate them, all documents concerning eligibility must be made available in one or more accessible formats, on request. Accessible formats include computer disks, braille documents, audio cassettes, and large print documents. A document does not necessarily need to be made available in the format a requester prefers, but it does have to be made available in a format the person can use. There is no use giving a computer disk to someone who does not have a computer, for instance, or a braille document to a person who does not read braille.

When a person applies for eligibility, the entity will provide all the needed forms and instructions. These forms and instructions may include a declaration of whether the individual travels with a personal care attendant. The entity may make further inquiries concerning such a declaration (e.g., with respect to the individual's actual need for a personal care attendant).

When the application process is complete—all necessary actions by the applicant taken—the entity should process the application in 21 days. If it is unable to do so, it must begin to provide service to the applicant on the 22nd day, as if the application had been granted. Service may be terminated only if and when the entity denies the application. All determinations shall be in writing; in the case of a denial, reasons must be specified. The reasons must specifically relate the evidence in the matter to the eligibility criteria of this rule and of the entity's process. A mere recital that the applicant can use fixed route transit is not sufficient.

For people granted eligibility, the documentation of eligibility shall include at least the following information:

—The individual's name
—The name of the transit provider
—The telephone number of the entity's paratransit coordinator
—An expiration date for eligibility
—Any conditions or limitations on the individual's eligibility, including the use of a personal care attendant.

The last point refers to the situation in which a person is eligible for some trips but not others. Or if the traveler is authorized to have a personal care attendant ride free of charge. For example, the documentation may say that the individual is eligible only when the temperature falls below a certain point, or when the individual is going to a destination not on an accessible bus route, or for non-work trips, etc.

As the mention of an expiration date implies, certification is not forever. The entity may recertify eligibility at reasonable intervals to make sure that changed circumstances have not invalidated or changed the individual's eligibility. In the Department's view, a reasonable interval for recertification is probably between one and three years. Less than one year would probably be too burdensome for consumers; over three years would begin to lose the point of doing recertifications. The recertification interval should be stated in the entity's plan. Of course, a user of the service can apply to modify conditions on his or her eligibility at any time.

The administrative appeal process is intended to give applicants who have been denied eligibility the opportunity to have their cases heard by some official other than the one who turned them down in the first place. In order to have appropriate separation of functions—a key element of administrative due process—not only must the same person not decide the case on appeal, but that person, to the extent practicable, should not have been involved in the first decision (e.g., as a member of the same office, or a supervisor or subordinate of the original decisionmaker). When, as in the case of a small transit operator, this degree of separation is not feasible, the second decisionmaker should at least be ''bubbled'' with respect to the original decision (i.e., not have participated in the original decision or discussed it with the original decisionmaker). In addition, there must be an opportunity to be heard in person as well as the chance to present written evidence and arguments. All appeals decisions must be in writing, stating the reasons for the decision.

To prevent the filing of stale claims, the entity may establish a 60 day ''statute of limitations'' on filing of appeals, the time starting to run on the date the individual is

notified on the negative initial decision. After the appeals process has been completed (i.e., the hearing and/or written submission completed), the entity should make a decision within 30 days. If it does not, the individual must be provided service beginning the 31st day, until and unless an adverse decision is rendered on his or her appeal.

Under the eligibility criteria of the rule, an individual has a right to paratransit if he or she meets the eligibility criteria. As noted in the discussion of the nondiscrimination section, an entity may refuse service to anindividual with a disability who engages in violent, seriously disruptive, or illegal conduct, using the same standards for exclusion that would apply to any other person who acted in such an inappropriate way.

The rule also allows an entity to establish a process to suspend, for a reasonable period of time, the provision of paratransit service to an ADA eligible person who establishes a pattern or practice of missing scheduled trips. The purpose of this process would be to deter or deal with chronic ''no-shows.'' The sanction system—articulated criteria for the imposition of sanctions, length of suspension periods, details of the administrative process, etc.—would be developed through the public planning and participation process for the entity's paratransit plan, and the result reflected in the plan submission to FTA.

It is very important to note that sanctions could be imposed only for a ''pattern or practice'' of missed trips. A pattern or practice involves intentional, repeated or regular actions, not isolated, accidental, or singular incidents. Moreover, only actions within the control of the individual count as part of a pattern or practice. Missed trips due to operator error are not attributable to the individual passenger for this purpose. If the vehicle arrives substantially after the scheduled pickup time, and the passenger has given up on the vehicle and taken a taxi or gone down the street to talk to a neighbor, that is not a missed trip attributable to the passenger. If the vehicle does not arrive at all, or is sent to the wrong address, or to the wrong entrance to a building, that is not a missed trip attributable to the passenger. There may be other circumstances beyond the individual's control (e.g., a sudden turn for the worse in someone with a variable condition, a sudden family emergency) that make it impracticable for the individual to travel at the scheduled time and also for the individual to notify the entity in time to cancel the trip before the vehicle comes. Such circumstances also would not form part of a sanctionable pattern or practice.

Once an entity has certified someone as eligible, the individual's eligibility takes on the coloration of a property right. (This is not merely a theoretical statement. If one depends on transportation one has been found eligible for to get to a job, and the eligibility is removed, one may lose the job. The same can be said for access to medical care or other important services.) Consequently, before eligibility may be removed ''for cause'' under this provision, the entity must provide administrative due process to the individual.

If the entity proposes to impose sanctions on someone, it must first notify the individual in writing (using accessible formats where necessary). The notice must specify the basis of the proposed action (e.g., Mr. Smith scheduled trips for 8 a.m. on May 15, 2 p.m. on June 3, 9 a.m. on June 21, and 9:20 p.m. on July 10, and on each occasion the vehicle appeared at the scheduled time and Mr. Smith was nowhere to be found) and set forth the proposed sanction (e.g., Mr. Smith would not receive service for 15 days).

The entity would provide the individual an opportunity to be heard (i.e., an in-person informal hearing before a decisionmaker) as well as to present written and oral information and arguments. All relevant entity records and personnel would be made available to the individual, and other persons could testify. It is likely that, in many cases, an important factual issue would be whether a missed trip was the responsibility of the provider or the passenger, and the testimony of other persons and the provider's records or personnel are likely to be relevant in deciding this issue. While the hearing is intended to be informal, the individual could bring a representative (e.g., someone from an advocacy organization, an attorney).

The individual may waive the hearing and proceed on the basis of written presentations. If the individual does not respond to the notice within a reasonable time, the entity may make, in effect, a default finding and impose sanctions. If there is a hearing, and the individual needs paratransit service to attend the hearing, the entity must provide it. We would emphasize that, prior to a finding against the individual after this due process procedure, the individual must continue to receive service. The entity cannot suspend service while the matter is pending.

The entity must notify the individual in writing about the decision, the reasons for it, and the sanctions imposed, if any. Again, this information would be made available in accessible formats. In the case of a decision adverse to the individual, the administrative appeals process of this section would apply. The sanction would be stayed pending an appeal.

There are means other than sanctions, however, by which a transit provider can deal with a ''no-show'' problem in its system. Providers who use ''real time scheduling'' report that this technique is very effective in reducing no-shows and cancellations, and increasing the mix of real time scheduling in a system can probably be of benefit in this area. Calling the customer to reconfirm a

reasonable time before pickup can head off some problems, as can educating consumers to call with cancellations ahead of time. Training of dispatch and operator personnel can help to avoid miscommunications that lead to missed trips.

Section 37.127 Complementary Paratransit for Visitors

This section requires each entity having a complementary paratransit system to provide service to visitors from out of town on the same basis as it is provided to local residents. By ''on the same basis,'' we mean under all the same conditions, service criteria, etc., without distinction. For the period of a visit, the visitor is treated exactly like an eligible local user, without any higher priority being given to either.

A visitor is defined as someone who does not reside in the jurisdiction or jurisdictions served by the public entity or other public entities with which it coordinates paratransit service. For example, suppose a five-county metropolitan area provides coordinated paratransit service under a joint plan. A resident of any of the five counties would not be regarded as a visitor in any of them. Note that the rule talks in terms of ''jurisdiction'' rather than ''service area.'' If an individual lives in XYZ County, but outside the fixed route service area of that county's transit provider, the individual is still not a visitor for purposes of paratransit in PQR County, if PQR is one of the counties with which XYZ provides coordinated paratransit service.

A visitor can become eligible in one of two ways. The first is to present documentation from his or her ''home'' jurisdiction's paratransit system. The local provider will give ''full faith and credit'' to the ID card or other documentation from the other entity. If the individual has no such documentation, the local provider may require the provision of proof of visitor status (i.e., proof of residence somewhere else) and, if the individual's disability is not apparent, proof of the disability (e.g., a letter from a doctor or rehabilitation professional). Once this documentation is presented and is satisfactory, the local provider will make service available on the basis of the individual's statement that he or she is unable to use the fixed route transit system.

The local provider need serve someone based on visitor eligibility for no more than 21 days. After that, the individual is treated the same as a local person for eligibility purposes. This is true whether the 21 days are consecutive or parceled out over several shorter visits. The local provider may require the erstwhile visitor to apply for eligibility in the usual local manner. A visitor who expects to be around longer than 21 days should apply for regular eligibility as soon as he arrives. The same approach may be used for a service of requested visits totaling 21 days or more in a relating compact period of time. Preferably, this application process should be arranged before the visitor arrives, by letter, telephone or fax, so that a complete application can be processed expeditiously.

Section 37.129 Types of Service

The basic mode of service for complementary paratransit is demand responsive, origin-to-destination service. This service may be provided for persons in any one of the three eligibility categories, and must always be provided to persons in the first category (e.g., people who cannot navigate the system). The local planning process should decide whether, or in what circumstances, this service is to be provided as door-to-door or curb-to-curb service.

For persons in the second eligibility category (e.g., persons who can use accessible buses, but do not have an accessible bus route available to take them to their destination), origin-to-destination service can be used. Alternatively, the entity can provide either of two other forms of service. One is on-call bus, in which the individual calls the provider and arranges for one or more accessible buses to arrive on the routes he needs to use at the appropriate time. On-call bus service must meet all the service criteria of §37.131, except that on-call buses run only on fixed routes and the fare charged can be only the fixed route fare that anyone pays on the bus (including discounts).

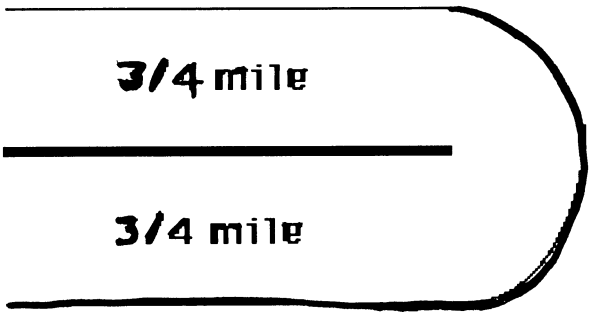
The second option is ''feeder paratransit'' to an accessible fixed route that will take the individual to his or her destination. Feeder paratransit, again, would have to meet all the criteria of §37.131. With respect to fares, the paratransit fare could be charged, but the individual would not be double charged for the trip. That is, having paid the paratransit fare, the transfer to the fixed route would be free.

For persons in the third eligibility category (e.g., persons who can use fixed route transit but who, because of a specific impairment-related condition, cannot get to or from a stop), the ''feeder paratransit'' option, under the conditions outlined above, is available. For some trips, it might be necessary to arrange for feeder service at both ends of the fixed route trip. Given the more complicated logistics of such arrangements, and the potential for a mistake that would seriously inconvenience the passenger, the transit provider should consider carefully whether such a ''double feeder'' system, while permissible, is truly workable in its system (as opposed to a simpler system that used feeder service only at one end of a trip when the bus let the person off at a place from which he or she could independently get to the destination). There may be some

situations in which origin to destination service is easier and less expensive.

Section 37.131 Service Criteria for Complementary Paratransit Service Area

The basic bus system service area is a corridor with a width of ¾ of a mile on each side of each fixed route. At the end of a route, there is a semicircular ''cap'' on the corridor, consisting of a three-quarter mile radius from the end point of the route to the parallel sides of the corridor.



Complementary paratransit must provide service to any origin or destination point within a corridor fitting this description around any route in the bus system. Note that this does not say that an eligible user must live within a corridor in order to be eligible. If an individual lives outside the corridor, and can find a way of getting to a pickup point within the corridor, the service must pick him up there. The same holds true at the destination end of the trip.

Another concept involved in this service criterion is the core service area. Imagine a bus route map of a typical city. Color the bus routes and their corridors blue, against the white outline map. In the densely populated areas of the city, the routes (which, with their corridors attached, cut 1½ mile swaths) merge together into a solid blue mass. There are few, if any, white spots left uncovered, and they are likely to be very small. Paratransit would serve all origins and destinations in the solid blue mass.

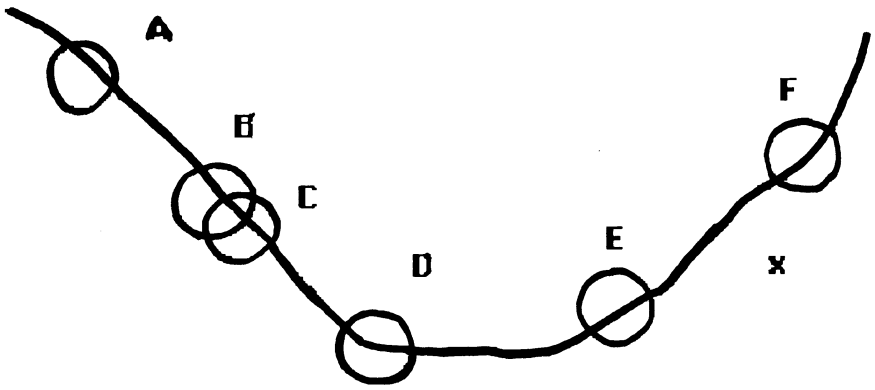
But what of the little white spots surrounded by various bus corridors? Because it would make sense to avoid providing service to such small isolated areas, the rule requires paratransit service there as well. So color them in too.

Outside the core area, though, as bus routes follow radial arteries into the suburbs and exurbs (we know real bus route maps are more complicated than this, but we simplify for purposes of illustration), there are increasingly wide white areas between the blue corridors, which may have corridors on either side of them but are not small areas completely surrounded by corridors. These white spaces are not part of the paratransit service area and the entity does not have to serve origins and destinations there. However, if, through the planning process, the entity wants to enlarge the width of one or more of the blue corridors from the ¾ of a mile width, it can do so, to a maximum of 1½ miles on each side of a route. The cost of service provided within such an expanded corridor can be counted in connection with an undue financial burden waiver request.

There may be a part of the service area where part of one of the corridors overlaps a political boundary, resulting in a requirement to serve origins and destinations in a neighboring jurisdiction which the entity lacks legal authority to service. The entity is not required to serve such origins and destinations, even though the area on the other side of the political boundary is within a corridor. This exception to the service area criterion does not automatically apply whenever there is a political boundary, only when there is a legal bar to the entity providing service on the other side of the boundary.

The rule requires, in this situation, that the entity take all practicable steps to get around the problem so that it can provide service throughout its service area. The entity should work with the state or local governments involved, via coordination plans, reciprocity agreements, memoranda of understanding or other means to prevent political boundaries from becoming barriers to the travel of individuals with disabilities.

The definition of the service area for rail systems is somewhat different, though many of the same concepts apply.



Around each station on the line (whether or not a key station), the entity would draw a circle with a radius of ¾ mile. Some circles may touch or overlap. The series of circles is the rail system's service area. (We recognize that, in systems where stations are close together, this could result in a service area that approached being a corridor like that of a bus line.) The rail system would provide paratransit service from any point in one circle to any point in any other circle. The entity would not have to provide service to two points within the same circle, since a trip between two points in the vicinity of the same station is not a trip that typically would be taken by train. Nor would the entity have to provide service to spaces between the circles. For example, a train trip would not get close to point x; one would have to take a bus or other mode of transportation to get from station E or F to point x. A paratransit system comparable to the rail service area would not be required to take someone there either.

Rail systems typically provide trips that are not made, or cannot be made conveniently, on bus systems. For example, many rail systems cross jurisdictional boundaries that bus systems often do not. One can travel from Station A to a relatively distant Station E on a rail system in a single trip, while a bus trip between the same points, if possible at all, may involve a number of indirect routings and transfers, on two bus systems that may not interface especially well.

Rail operators have an obligation to provide paratransit equivalents of trips between circles to persons who cannot use fixed route rail systems because they cannot navigate the system, because key stations or trains are not yet accessible, or because they cannot access stations from points within the circles because of a specific impairment-related condition. For individuals who are eligible in category 2 because they need an accessible key station to use the system, the paratransit obligation extends only to transportation among ''circles'' centered on designated key stations (since, even when the key station plan is fully implemented, these individuals will be unable to use non-key stations).

It is not sufficient for a rail operator to refer persons with disabilities to an accessible bus system in the area. The obligation to provide paratransit for a rail system is independent of the operations of any bus system serving the same area, whether operated by the same entity that operates the rail system or a different entity. Obviously, it will be advantageous for bus and rail systems to coordinate their paratransit efforts, but a coordinated system would have to ensure coverage of trips comparable to rail trips that could not conveniently be taken on the fixed route bus system.

RESPONSE TIME

Under this provision, an entity must make its reservation service available during the hours its administrative offices are open. If those offices are open 9 to 5, those are the hours during which the reservations service must be open, even if the entity's transit service operated 6 a.m. to midnight. On days prior to a service day on which the administrative offices are not open at all (e.g., a Sunday prior to a Monday service day), the reservation service would also be open 9 to 5. Note that the reservation service on any day

does not have to be provided directly by a ''real person.'' An answering machine or other technology can suffice.

Any caller reaching the reservation service during the 9 to 5 period, in this example, could reserve service for any time during the next 6 a.m. to 12 midnight service day. This is the difference between ''next day scheduling'' and a system involving a 24-hour prior reservation requirement, in which a caller would have to reserve a trip at 7 a.m. today if he or she wanted to travel at 7 a.m. tomorrow. The latter approach is not adequate under this rule.

The entity may use real time scheduling for all or part of its service. Like the Moliere character who spoke prose all his life without knowing it, many entities may already be using some real time scheduling (e.g., for return trips which are scheduled on a when-needed basis, as opposed to in advance). A number of transit providers who have used real time scheduling believe that it is more efficient on a per-trip basis and reduces cancellations and no-shows significantly. We encourage entities to consider this form of service.

Sometimes users want to schedule service well in advance, to be sure of traveling when they want to. The rule tells providers to permit reservations to be made as much as 14 days in advance. In addition, though an entity may negotiate with a user to adjust pick-up and return trip times to make scheduling more efficient, the entity cannot insist on scheduling a trip more than one hour earlier or later than the individual desires to travel. Any greater deviation from desired trip would exceed the bounds of comparability.

FARES

To calculate the proper paratransit fare, the entity would determine the route(s) that an individual would take to get from his or her origin to his or her destination on the fixed route system. At the time of day the person was traveling, what is the fare for that trip on those routes? Applicable charges like transfer fees or premium service charges may be added to the amount, but discounts (e.g., the half-fare discount for off-peak fixed route travel by elderly and handicapped persons) would not be subtracted. The transit provider could charge up to twice the resulting amount for the paratransit trip.

The mode through which paratransit is provided does not change the method of calculation. For example, if paratransit is provided via user side subsidy taxi service rather than publicly operated dial-a-ride van service, the cost to the user could still be only twice the applicable fixed route fare. The system operates the same regardless of whether the paratransit trip is being provided in place of a bus or a rail trip the user cannot make on the fixed route system. Where bus and rail systems are run by the same provider (or where the same bus provider runs parallel local and express buses along the same route), the comparison would be made to the mode on which a typical fixed route user would make the particular trip, based on schedule, length, convenience, avoidance of transfers, etc.

Companions are charged the same fare as the eligible individual they are accompanying. Personal care attendants ride free.

One exception to the fare requirement is made for social service agency (or other organization-sponsored) trips. This exception, which allows the transit provider to negotiate a price with the agency that is more than twice the relevant fixed route fare, applies to ''agency trips,'' by which we mean trips which are guaranteed to the agency for its use. That is, if an agency wants 12 slots for a trip to the mall on Saturday for clients with disabilities, the agency makes the reservation for the trips in its name, the agency will be paying for the transportation, and the trips are reserved to the agency, for whichever 12 people the agency designates, the provider may then negotiate any price it can with the agency for the trips. We distinguish this situation from one in which an agency employee, as a service, calls and makes an individual reservation in the name of a client, where the client will be paying for the transportation.

RESTRICTIONS AND PRIORITIES BASED ON TRIP PURPOSE

This is a simple and straightforward requirement. There can be no restrictions or priorities based on trip purpose in a comparable complementary paratransit system. When a user reserves a trip, the entity will need to know the origin, destination, time of travel, and how many people are traveling. The entity does not need to know why the person is traveling, and should not even ask.

HOURS AND DAYS OF SERVICE

This criterion says simply that if a person can travel to a given destination using a given fixed route at a given time of day, an ADA paratransit eligible person must be able to travel to that same destination on paratransit at that time of day. This criterion recognizes that the shape of the service area can change. Late at night, for example, it is common for certain routes not to be run. Those routes, and their paratransit corridors, do not need to be served with paratransit when the fixed route system is not running on them. One couldn't get to destinations in that corridor by fixed route at those times, so paratransit service is not necessary either.

It should be pointed out that service during low-demand times need not be by the same paratransit mode as during higher usage periods. For example, if a provider

uses its own paratransit vans during high demand periods, it could use a private contractor or user-side subsidy provider during low demand periods. This would presumably be a more efficient way of providing late night service. A call-forwarding device for communication with the auxiliary carrier during these low demand times would be perfectly acceptable, and could reduce administrative costs.

CAPACITY CONSTRAINTS

This provision specifically prohibits two common mechanisms that limit use of a paratransit system so as to constrain demand on its capacity. The first is a waiting list. Tyically, a waiting list involves a determination by a provider that it can provide service only to a given number of eligible persons. Other eligible persons are not able to receive service until one of the people being served moves away or otherwise no longer uses the service. Then the persons on the waiting list can move up. The process is analogous to the wait that persons in some cities have to endure to be able to buy season tickets to a sold-out slate of professional football games.

The second mechanism specifically mentioned is a number limit on the trips a passenger can take in a given period of time. It is a kind of rationing in which, for example, if one has taken his quota of 30 trips this month, he cannot take further trips for the rest of the month.

In addition, this paragraph prohibits any operational pattern or practice that significantly limits the availability of service of ADA paratransit eligible persons. As discussed under §37.125 in the context of missed trips by passengers, a ''pattern or practice'' involves, regular, or repeated actions, not isolated, accidental, or singular incidents. A missed trip, late arrival, or trip denial now and then does not trigger this provision.

Operational problems outside the control of the entity do not count as part of a pattern or practice under this provision. For example, if the vehicle has an accident on the way to pick up a passenger, the late arrival would not count as part of a pattern or practice. If something that could not have been anticipated at the time the trip was scheduled (e.g., a snowstorm, an accident or hazardous materials incident that traps the paratransit vehicle, like all traffic on a certain highway, for hours), the resulting missed trip would not count as part of a pattern or practice. On the other hand, if the entity regularly does not maintain its vehicles well, such that frequent mechanical breakdowns result in missed trips or late arrivals, a pattern or practice may exist. This is also true in a situation in which scheduling practices fail to take into account regularly occurring traffic conditions (e.g., rush hour traffic jams), resulting in frequent late arrivals.

The rule mentions three specific examples of operational patterns or practices that would violate this provision. The first is a pattern or practice of substantial numbers of significantly untimely pickups (either for initial or return trips). To violate this provision, there must be both a substantial number of late arrivals and the late arrivals in question must be significant in length. For example, a DOT Inspector General's (IG) report on one city's paratransit system disclosed that around 30 percent of trips were between one and five hours late. Such a situation would trigger this provision. On the other hand, only a few instances of trips one to five hours late, or many instances of trips a few minutes late, would not trigger this provision.

The second example is substantial numbers of trip denials or missed trips. For example, if on a regular basis the reservation phone lines open at 5 a.m. and callers after 7 a.m. are all told that they cannot travel, or the phone lines shut down after 7 a.m. and a recorded message says to call back the next day, or the phone lines are always so busy that no one can get through, this provision would be triggered. (Practices of this kind would probably violate the response time criterion as well.) Also, if, on a regular basis, the entity misses a substantial number of trips (e.g., a trip is scheduled, the passenger is waiting, but the vehicle never comes, goes to the wrong address, is extremely late, etc.), it would violate this provision.

The third example is substantial numbers of trips with excessive trip lengths. Since paratransit is a shared ride service, paratransit rides between Point A and Point B will usually take longer, and involve more intermediate stops, than a taxi ride between the same two points. However, when the number of intermediate stops and the total trip time for a given passenger grows so large as to make use of the system prohibitively inconvenient, then this provision would be triggered. For example, the IG report referred to above mentioned a situation in which 9 percent of riders had one way trips averaging between two and four hours, with an average of 16 intermediate stops. Such a situation would probably trigger this provision.

Though these three examples probably cover the most frequently cited problems in paratransit operations that directly or indirectly limit the provision of service that is theoretically available to eligible persons, the list is not exhaustive. Other patterns or practices could trigger this provision. For example, the Department has heard about a situation in which an entity's paratransit contractor was paid on a per-trip basis, regardless of the length of the trip. The contractor therefore had an economic incentive

to provide as many trips as possible. As a result, the contractor accepted short trips and routinely denied longer trips. This would be a pattern or practice contrary to this provision (and contrary to the service area provision as well).

ADDITIONAL SERVICE

This provision emphasizes that entities may go beyond the requirements of this section in providing service to ADA paratransit individuals. For example, no one is precluded from offering service in a larger service area, during greater hours than the fixed route system, or without charge. However, costs of such additional service do not count with respect to undue financial burden waiver requests. Where a service criterion itself incorporates a range of actions the entity may take (e.g., providing wide corridors outside the urban core, using real time scheduling), however, costs of providing that optional service may be counted for undue financial burden waiver request purposes.

Section 37.133 Subscription Service

As part of its paratransit service, an entity may include a subscription service component. However, at any given time of day, this component may not absorb more than 50 percent of available capacity on the total system. For example, if, at 8 a.m., the system can provide 400 trips, no more than 200 of these can be subscription trips.

The one exception to this rule would occur in a situation in which there is excess non-subscription capacity available. For example, if over a long enough period of time to establish a pattern, there were only 150 non-subscription trips requested at 8 a.m., the provider could begin to provide 250 subscription trips at that time. Subsequently, if non-subscription demand increased over a period of time, such that the 50 trips were needed to satisfy a regular non-subscription demand at that time, and overall system capacity had not increased, the 50 trips would have to be returned to the non-subscription category. During times of high subscription demand, entities could use the trip time negotiation discretion of §37.131(c)(2) to shift some trips to other times.

Because subscription service is a limited subcomponent of paratransit service, the rule permits restrictions to be imposed on its use that could not be imposed elsewhere. There may be a waiting list for provision of subscription service or the use of other capacity constraints. Also, there may be restrictions or priorities based on trip purpose. For example, subscription service under peak work trip times could be limited to work trips. We emphasize that these limitations apply only to subscription service. It is acceptable for a provider to put a person on a waiting list for access to subscription service at 8 a.m. for work trips; the same person could not be wait-listed for access to paratransit service in general.

Section 37.135 Submission of Paratransit Plans

This section contains the general requirements concerning the submission of paratransit plans. Each public entity operating fixed route service is required to develop and submit a plan for paratransit service. Where you send your plans depends on the type of entity you are. There are two categories of entities which should submit their plans to states—(1) FTA recipients and (2) entities who are administered by the state on behalf of FTA.

These FTA grantees submit their plans to the states because the agency would like the benefit of the states' expertise before final review. The states' role is as a commenter, not as a reviewer.

This section also specifies annual progress reports concerning the meeting of previously approved milestones, any slippage (with the reasons for it and plans to catch up), and any significant changes in the operator's environment, such as the withdrawal from the marketplace of a private paratransit provider or whose service the entity has relied upon to provide part of its paratransit service.

Paragraph (d) of this section specifies a maximum time period for the phase-in of the implementation of paratransit plans. The Department recognizes that it is not reasonable to expect paratransit systems to spring into existence fully formed, like Athena from the head of Zeus. Under this paragraph, all entities must be in full compliance with all paratransit provisions by January 26, 1997, unless the entity has received a waiver from FTA based on undue financial burden (which applies only to the service criteria of §37.131, not to eligibility requirements or other paratransit provisions).

While the rule assumes that most entities will take a year to fully implement these provisions, longer than a year requires the paratransit plans to submit milestones that are susceptible to objective verification. Not all plans will be approved with a five-year lead-in period. Consistent with the proposed rule, the Department intends to look at each plan individually to see what is required for implementation in each case. DOT may approve only a shorter phase-in period in a given case.

Section 37.137 Paratransit Plan Development

Section 35.137 establishes three principal requirements in the development of paratransit plans.

First is the requirement to survey existing paratransit services within the service area. This is required by section 223(c)(8) of the ADA. While the ADA falls short of explicitly

requiring coordination, clearly this is one of the goals. The purpose of the survey is to determine what is being provided already, so that a transit provider can accurately assess what additional service is needed to meet the service criteria for comparable paratransit service. The plan does not have to discuss private paratransit providers whose services will not be used to help meet paratransit requirements under this rule. However, the public entity will need to know specifically what services are being provided by whom if the entity is to count the transportation toward the overall need.

Since the public entity is required to provide paratransit to all ADA paratransit eligible individuals, there is some concern that currently provided service may be cut back or eliminated. It is possible that this may happen and such action would have a negative effect on transportation provided to persons with disabilities in general. The Department urges each entity required to submit a plan to work with current providers of transportation, not only to determine what transportation services they provide, but also to continue to provide service into the foreseeable future.

Second, §37.137 specifies requirements for public participation. First, the entity must perform outreach, to ensure that a wide range of persons anticipated to use the paratransit service know about and have the opportunity to participate in the development of the plan. Not only must the entity identify who these individuals or groups are, the entity also must contact the people at an early stage in the development process.

The other public participation requirements are straightforward. There must be a public hearing and an opportunity to comment. The hearing must be accessible to those with disabilities, and notice of the hearing must be accessible as well. There is a special efforts test identified in this paragraph for comments concerning a multi-year phase-in of a paratransit plan.

The final general requirement of the section specifies that efforts at public participation must be made permanent through some mechanism that provides for participation in all phases of paratransit plan development and submission. The Department is not requiring that there be an advisory committee established, although this is one method of institutionalizing participation. The Department is not as interested in the specific structure used to ensure public participation as we are interested in the effectiveness of the effort.

The Department believes that public participation is a key element in the effective implementation of the ADA. The ADA is an opportunity to develop programs that will ensure the integration of all persons into not just the transportation system of America, but all of the opportunities transportation makes possible. This opportunity is not without tremendous challenges to the transit providers. It is only through dialogue, over the long term, that usable, possible plans can be developed and implemented.

Section 37.139 Plan Contents

This section contains substantive categories of information to be contained in the paratransit plan: Information on current and changing fixed route service; inventory of existing paratransit service; discussion of the discrepancies between existing paratransit and what is required under this regulation; a discussion of the public participation requirements and how they have been met; the plan for paratransit service; the budget for paratransit services; efforts to coordinate with other transportation providers; a description of the process in place or to be used to register ADA paratransit eligible individuals; a description of the documentation provided to each individual verifying eligibility; and a request for a waiver based on undue financial burden, if applicable. The final rule contains a reorganized and slightly expanded section on plan contents, reflecting requests to be more explicit, rather than less explicit.

The list of required elements is the same for all entities required to submit paratransit plans. There is no document length requirement, however. Each entity (or group plan) is unique and we expect the plans to reflect this. While we would like the plan elements presented in the order listed in this section, the contents most likely will vary greatly, depending on the size, geographic area, budget, complexity of issues, etc. of the particular submitting agency.

This section and §37.139 provide for a maximum phase-in period of five years, with an assumed one-year phase-in for all paratransit programs. (The required budget has been changed to five years as well.) The Department has established a maximum five-year phase-in in the belief that not all systems will require that long, but that some, particularly those which had chosen to meet compliance with section 504 requirements with accessible fixed route service, may indeed need five years.

We are confident that, through the public participation process, entities can develop a realistic plan for full compliance with the ADA. To help ensure this, the paratransit plan contents section now requires that any plan which projects full compliance after January 26, 1993 must include milestones which can be measured and which result in steady progress toward full compliance. For example, it is possible that the first part of year one is used to ensure comprehensive registration of all eligible persons with disabilities, training of transit provider staffs and the development and dissemination of information to users and potential users in

accessible formats and some modest increase in paratransit service is provided. A plan would not be permitted to indicate that no activity was possible in the first year, but proportionately more progress could be planned for later years than for the first year. Implementation must begin in January 1992.

Each plan, including its proposed phase-in period, will be the subject of examination by FTA. Not all providers who request a five-year phase-in will receive approval for a five-year phase-in. The plan must be careful, therefore, to explain what current services are, what the projections are, and what methods are in place to determine and provide accountability for progress toward full compliance.

We have been asked for assistance in assessing what the demand for paratransit service will be. FTA's ADA Paratransit Manual provides detailed assistance in this and many other areas of the plan development process.

The ADA itself contained a figure of 43 million persons with disabilities. It should be pointed out that many of these may not necessarily be eligible for ADA paratransit service. The Department's regulatory impact analysis discussing the probable costs involved in implementing this rule places the possible percentage of population who would be eligible for paratransit service at between 1.4 and 1.9 percent. This figure can vary depending on the type and variety of services you have available, or on such things as climate, proximity to medical care, family, etc. that a person with a disability may need. Clearly estimating demand is one of the most critical elements in the plan, since it will be used to make decisions about all of the various service criteria.

Section 37.139 contains a new paragraph (j), spelling out in more detail requirements related to the annual submission of plans. Since there is now the possibility for five-year phase-ins, the annual plan demonstrates the progress made to date, and explains any delays.

Section 37.141 Requirements If a Joint Plan is Submitted

The Department believes that, particularly in large, multi-provider regions, a coordinated regional paratransit plan and system are extremely important. Such coordination can do much to ensure that the most comprehensive transportation can be provided with the most efficient use of available resources. We recognize that the effort of putting together such a coordinated system can be a lengthy one. This section is intended to facilitate the process of forming such a coordinated system.

If a number of entities wish to submit a joint plan for a coordinated system, they must, like other entities, submit a document by January 26, 1992. At a minimum, this document must include the following:

(1) A general statement that the participating entities intend to file a joint coordinated plan;

(2) A certification from each participating entity that it is committed to providing paratransit as a part of a coordinated plan;

(3) A certification from each participating entity that it will maintain at least current levels of paratransit service until the coordinated paratransit service called for by the joint plan is implemented;

(4) As many elements of the plan as possible.

These provisions ensure that significant planning will precede, and plan implementation will begin by, January 26, 1992, without precluding entities from cooperating because it was not possible to complete coordinating different public entities by that date. The entities involved in a joint plan are required to submit all elements of their plan by July 26, 1992.

The final provision in the section notes that an entity may later join a coordinated plan, even if it has filed its own plan on January 26, 1992. An entity must submit its own plan by January 26, 1992, if it has not provided a certification of participation in a joint plan.). In this case, the entity must provide the assurances and certifications required of all of the other participating entities.

The Department fully expects that many jurisdictions filing joint plans will be able to do so by January 26, 1992. For those who cannot, the regulatory provision ensures that there will be no decrease in paratransit service. Further, since we anticipate coordinated service areas to provide more effective service, complete implementation of a joint plan could be more rapid than if each entity was providing service on its own.

Entities submitting a joint plan do not have any longer than any other entities to fully implement complementary paratransit service. In any case, all plans (joint or single) must be fully implemented by January 26, 1997, absent a waiver for undue financial burden (which would, in the case of a joint plan, be considered on a joint basis).

Section 37.143 Paratransit Plan Implementation

As already discussed under §37.135, the states will receive FTA recipient plans for recipients of funding under 49 U.S.C. 5311 administered by the State or any small urbanized area recipient of funds under 49 U.S.C. 5307 administered by a state. Public entities who do not receive FTA funds will submit their plans directly to the applicable Regional Office (listed in appendix B to the rule).

The role of the state is to accept the plans on behalf of FTA, to ensure that all plans are

submitted to it and forward the plans, with any comments on the plans, to FTA. This comment is very important for FTA to receive, since states administer these programs on behalf of FTA. Each state's specific knowledge of FTA grantees it administers will provide helpful information to FTA in making its decisions.

The rule lists five questions the states must answer when they forward the plans. These questions are gauged to capitalize on the working knowledge the states possess on the grantees. FTA will send a more specific letter of instruction to each state explaining its role.

Section 37.147 FTA Review of Plans

This provision spells out factors FTA will consider in reviewing each plan, including whether the submission is complete, whether the plan complies with the substance of the ADA regulation, whether the entity complied with the public participation requirements in developing the plan, efforts by the entity to coordinate with other entities in a plan submission, and any comments submitted by the states.

These elements are not the only items that will be reviewed by FTA. Every portion of the plan will be reviewed and assessed for compliance with the regulation. This section merely highlights those provisions thought most important by the Department.

Section 37.151 Waiver for Undue Financial Burden

The Department has adopted a five-year phase-in for paratransit service. Under this scheme, each entity required to provide paratransit service will be able to design a phase-in of its service specifically geared to local circumstances. While all jurisdictions will not receive approval for plans with a five year phase-in, each entity will be able to request what it needs based on local circumstances. Generally, the section allows an entity to request a wavier at any time it determines that it will not be able to meet a five-year phase-in or make measured progress toward its full compliance date specified in its original plan.

A waiver for undue financial burden should be requested if one of the following circumstances applies. First, when the entity submits its first plan on January 26, 1992, if the entity knows it will not be able to reach full compliance within five years, or if the entity cannot make measured progress the first year it may submit a waiver request. The entity also should apply for a waiver, if, during plan implementation, there are changed circumstances which make it unlikely that compliance will be possible.

The concept of measured progress should be given its plain meaning. It is not acceptable to submit a plan which shows significant progress in implementing a plan in years four and five, but no progress in years one and two. Similarly, the progress must be susceptible to objective verification. An entity cannot merely ''work toward'' developing a particular aspect of a plan.

The Department intends that undue burden waiver requests will be given close scrutiny, and waiver will not be granted highly. In reviewing requests, however, as the legislative history indicates, FTA will look at the individual financial constraints within which each public entity operates its fixed route system. ''Any determination of undue financial burden cannot have assumed the collection of additional revenues, such as those received through increases in local taxes or legislative appropriations, which would not have otherwise been made available to the fixed route operator.'' (H. Rept. 101–485, Pt. 1, at 31)

Section 37.153 FTA Waiver Determination

If the FTA Administrator grants a waiver for undue financial burden, the waiver will be for a specified period of time and the Administrator will determine what the entity must do to meet its responsibilities under the ADA. Each determination will involve a judgment of what is appropriate on a case-by-case basis. Since each waiver will be granted based on individual circumstances, the Department does not deem it appropriate to specify a generally applicable duration for a waiver.

When a waiver is granted, the rule calls for entities to look first at limiting the number of trips provided to each individual as a means of providing service that does not create an undue burden. This capacity constraint, unlike manipulations of other service criteria, will not result in a degradation of the quality of service. An entity intending to submit an undue burden waiver request should take this approach into account in its planning process.

It should be noted that requiring an entity to provide paratransit service at least during core hours along key routes is one option that the Administrator has available in making a decision about the service to be provided. This requirement stems from the statutory provision that the Administrator can require the entity to provide a minimum level of service, even if to do so would be an undue financial burden. Certainly part of a request for a waiver could be a locally endorsed alternative to this description of basic service. The rule states explicitly the Administrator's discretion to return the application for more information if necessary.

Section 37.155 Factors in Decision To Grant an Undue Financial Burden Waiver

Factors the Administrator will consider in making a decision whether to grant an

undue financial burden waiver request include effects on current fixed route service, reductions in other services, increases in fares, resources available to implement complementary paratransit over the period of the plan, current level of accessible service (fixed route and paratransit), cooperation among transit providers, evidence of increased efficiencies that have been or could be used, any unique circumstances that may affect the entity's ability to provide paratransit service, the level of per capita service being provided, both to the population as a whole and what is being or anticipated to be provided to persons who are eligible and registered to receive ADA paratransit service.

This final element allows some measure of comparability, regardless of the specific service criteria and should assist in a general assessment of level of effort.

It is only the costs associated with providing paratransit service to ADA-paratransit eligible persons that can be counted in assessing whether or not there is an undue financial burden. Two cost factors are included in the considerations which enhance the Administrator's ability to assess real commitment to these paratransit provisions.

First, the Department will allow a statistically valid methodology for estimating number of trips mandated by the ADA. While the regulation calls for a trip-by-trip determination of eligibility, this provision recognizes that this is not possible for some systems, particularly the large systems. Since only those trips provided to a person when he or she is ADA eligible may be counted in determining an undue financial burden, this provision is necessary.

Second, in determining costs to be counted toward providing paratransit service, paragraph (b)(3) allows an entity to include in its paratransit budget dollars to which it is legally entitled, but which, as a matter of state or local funding arrangements, are provided to another entity that is actually providing the paratransit service.

For example, a state government may provide a certain formula allocation of the revenue from a certain tax to each jurisdiction for use in providing transportation service at the local level. The funds, depending on local arrangements, may flow either to a transit authority—a regulated entity under this rule—or to a city or county government. If the funds go to the transit authority, they clearly may be counted in an undue burden calculation. In addition, however, this provision also allows funds that flow through the city or county government to be counted in the undue burden calculation, since they are basically the same funds and should not be treated differently based on the accident of previously-determined local arrangements. On the other hand, this provision does not allow funds of a private non-profit or other organization who uses Department of Health and Human Services grant or private contributions to be counted toward the entity's financial commitment to paratransit.

SUBPART G—PROVISION OF SERVICE

Section 37.161 Maintenance of Accessible Features—General

This section applies to all entities providing transportation services, public and private. It requires those entities to maintain in operative condition those features or facilities and equipment that make facilities and vehicles accessible to and usable by individuals with disabilities.

The ADA requires that, to the maximum extent feasible, facilities be accessible to and usable by individuals with disabilities. This section recognizes that it is not sufficient to provide features such as lift-equipped vehicles, elevators, communications systems to provide information to people with vision or hearing impairments, etc. if these features are not maintained in a manner that enables individuals with disabilities to use them. Inoperative lifts or elevators, locked accessible doors, accessible paths of travel that are blocked by equipment or boxes of materials are not accessible to or usable by individuals with disabilities.

The rule points out that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the ADA or this rule. Repairs must be made ''promptly.'' The rule does not, and probably could not, state a time limit for making particular repairs, given the variety of circumstances involved. However, repairing accessible features must be made a high priority. Allowing obstructions or out of order accessibility equipment to persist beyond a reasonable period of time would violate this Part, as would mechanical failures due to improper or inadequate maintenance. Failure of the entity to ensure that accessible routes are free of obstruction and properly maintained, or failure to arrange prompt repair of inoperative elevators, lifts, or other accessibility-related equipment, would also violate this part.

The rule also requires that accommodations be made to individuals with disabilities who would otherwise use an inoperative accessibility feature. For example, when a rail system discovers that an elevator is out of order, blocking access to one of its stations, it could accommodate users of the station by announcing the problem at other stations to alert passengers and offer accessible shuttle bus service around the temporarily inaccessible station. If a public address system were out of order, the entity could designate personnel to provide information to customers with visual impairments.

Section 37.163 Keeping Vehicle Lifts in Operative Condition—Public Entities

This section applies only to public entities. Of course, like vehicle acquisition requirements and other provisions applying to public entities, these requirements also apply when private entities ''stand in the shoes'' of public entities in contracting situations, as provided in §37.23.

This section's first requirement is that the entity establish a system of regular and frequent maintenance checks of lifts sufficient to determine if they are operative.

Vehicle and equipment maintenance is an important component of successful accessible service. In particular, an aggressive preventive maintenance program for lifts is essential. Lifts remain rather delicate pieces of machinery, with many moving parts, which often must operate in a harsh environment of potholes, dust and gravel, variations in temperature, snow, slush, and deicing compounds. It is not surprising that they sometimes break down.

The point of a preventive maintenance program is to prevent breakdowns, of course. But it is also important to catch broken lifts as soon as possible, so that they can be repaired promptly. Especially in a bus system with relatively low lift usage, it is possible that a vehicle could go for a number of days without carrying a passenger who uses the lift. It is highly undesirable for the next passenger who needs a lift to be the person who discovers that the lift is broken, when a maintenance check by the operator could have discovered the problem days earlier, resulting in its repair.

Therefore, the entity must have a system for regular and frequent checks, sufficient to determine if lifts are actually operative. This is not a requirement for the lift daily. (Indeed, it is not, as such, a requirement for lift cycling at all. If there is another means available of checking the lift, it may be used.) If alternate day checks, for example, are sufficient to determine that lifts are actually working, then they are permitted. If a lift is used in service on a given day, that may be sufficient to determine that the lift is operative with respect to the next day. It would be a violation of this part, however, for the entity to neglect to check lifts regularly and frequently, or to exhibit a pattern of lift breakdowns in service resulting in stranded passengers when the lifts had not been checked before the vehicle failed to provide required accessibility to passengers that day.

When a lift breaks down in service, the driver must let the entity know about the problem by the most immediate means available. If the vehicle is equipped with a radio or telephone, the driver must call in the problem on the spot. If not, then the driver would have to make a phone call at the first opportunity (e.g., from a phone booth during the turnaround time at the end of the run). It is not sufficient to wait until the end of the day and report the problem when the vehicle returns to the barn.

When a lift is discovered to be inoperative, either because of an in-service failure or as the result of a maintenance check, the entity must take the vehicle out of service before the beginning of its next service day (with the exception discussed below) and repair the lift before the vehicle is put back into service. In the case of an in-service failure, this means that the vehicle can continue its runs on that day, but cannot start a new service day before the lift is repaired. If a maintenance check in the evening after completion of a day's run or in the morning before a day's runs discloses the problem, then the bus would not go into service until the repair had taken place.

The Department realizes that, in the years before bus fleets are completely accessible, taking buses with lifts out of service for repairs in this way would probably result in an inaccessible spare bus being used on the route, but at least attention would have to be paid quickly to the lift repair, resulting in a quicker return to service of a working accessible bus.

The rule provides an exception for those situations in which there is no spare vehicle (either accessible or inaccessible) available to take the place of the vehicle with an operative lift, such that putting the latter vehicle into the shop would result in a reduction of service to the public (e.g., a scheduled run on a route could not be made). The Department would emphasize that the exception does not apply when there is any spare vehicle available.

Where the exception does apply, the provider may keep the vehicle with the inoperative lift in service for a maximum of three days (for providers operating in an area of over 50,000 population) or five days (for providers operating in an area of 50,000 population or less). After these times have elapsed, the vehicle must go into the shop, not to return until the lift is repaired. Even during the three- or five-day period, if an accessible spare bus becomes available at any time, it must be used in place of the bus with the inoperative lift or an inaccessible spare that is being used in its place.

In a fixed route system, if a bus is operating without a working lift (either on the day when the lift fails in service or as the result of the exception discussed above) and headways between accessible buses on the route on which the vehicle is operating exceed 30 minutes, the entity must accommodate passengers who would otherwise be inconvenienced by the lack of an accessible bus. This accommodation would be by a paratransit or other special vehicle that would pick up passengers with disabilities

who cannot use the regular bus because its lift is inoperative. Passengers who need lifts in this situation would, in effect, be ADA paratransit eligible under the second eligibility category. However, since they would have no way of knowing that the bus they sought to catch would not be accessible that day, the transit authority must actively provide alternative service to them. This could be done, for example, by having a ''shadow'' accessible service available along the route or having the bus driver call in the minute he saw an accessible passenger he could not pick up (including the original passenger stranded by an in-service lift failure), with a short (i.e., less than 30-minute) response from an accessible vehicle dispatched to pick up the stranded passenger. To minimize problems in providing such service, when a transit authority is using the ''no spare vehicles'' exception, the entity could place the vehicle with the inoperative lift on a route with headways between accessible buses shorter than 30 minutes.

Section 37.165 Lift and Securement Use

This provision applies to both public and private entities.

All people using wheelchairs, as defined in the rule, and other powered mobility devices, under the circumstances provided in the rule, are to be allowed to ride the entity's vehicles.

Entities may require wheelchair users to ride in designated securement locations. That is, the entity is not required to carry wheelchair users whose wheelchairs would have to park in an aisle or other location where they could obstruct other persons' passage or where they could not be secured or restrained. An entity's vehicle is not required to pick up a wheelchair user when the securement locations are full, just as the vehicle may pass by other passengers waiting at the stop if the bus is full.

The entity may require that wheelchair users make use of securement systems for their mobility devices. The entity, in other words, can require wheelchair users to ''buckle up'' their mobility devices. The entity is required, on a vehicle meeting part 38 standards, to use the securement system to secure wheelchairs as provided in that part. On other vehicles (*e.g.*, existing vehicles with securement systems which do not comply with part 38 standards), the entity must provide and use a securement system to ensure that the mobility device remains within the securement area. This latter requirement is a mandate to use best efforts to restrain or confine the wheelchair to the securement area. The entity does the best it can, given its securement technology and the nature of the wheelchair. The Department encourages entities with relatively less adequate securement systems on their vehicles, where feasible, to retrofit the vehicles with better securement systems, that can successfully restrain a wide variety of wheelchairs. It is our understanding that the cost of doing so is not enormous.

An entity may not, in any case, deny transportation to a wheelchair and its user because the wheelchair cannot be secured or restrained by a vehicle's securement system, to the entity's satisfaction. The same point applies to an OPMD and its user, subject to legitimate safety requirements.

Entities have often recommended or required that a wheelchair user transfer out of his or her own device into a vehicle seat. Under this rule, it is no longer permissible to require such a transfer. The entity may provide information on risks and make a recommendation with respect to transfer, but the final decision on whether to transfer is up to the passenger.

The entity's personnel have an obligation to ensure that a passenger with a disability is able to take advantage of the accessibility and safety features on vehicles. Consequently, the driver or other personnel must provide assistance with the use of lifts, ramps, and securement devices. For example, the driver must deploy the lift properly and safely. If the passenger cannot do so independently, the driver must assist the passenger with using the securement device. On a vehicle which uses a ramp for entry, the driver may have to assist in pushing a manual wheelchair up the ramp (particularly where the ramp slope is relatively steep). All these actions may involve a driver leaving his seat. Even in entities whose drivers traditionally do not leave their seats (*e.g.*, because of labor-management agreements or company rules), this assistance must be provided. This rule overrides any requirements to the contrary.

Wheelchair users, especially those using electric wheelchairs, often have a preference for entering a lift platform and vehicle in a particular direction (*e.g.*, backing on or going on frontwards). Except where the only way of successfully maneuvering a device onto a vehicle or into its securement area or an overriding safety concern (*i.e.*, a direct threat) requires one way of doing this or another, the transit provider should respect the passenger's preference. We note that most electric wheelchairs are usually not equipped with rearview mirrors, and that many persons who use them are not able to rotate their heads sufficiently to see behind. People using canes or walkers and other standees with disabilities who do not use wheelchairs but have difficulty using steps (*e.g.*, an elderly person who can walk on a level surface without use of a mobility aid but cannot raise his or her legs sufficiently to climb bus steps) must also be permitted to use the lift, on request.

A lift conforming to Access Board requirements has a platform measuring at least 30″

× 48″, with a design load of at least 600 pounds (*i.e.,* capable of lifting a wheelchair/occupant combination of up to 600 pounds). Working parts upon which the lift depends for support of the load, such as cables, pulleys, and shafts, must have a safety factor of at least six times the design load; nonworking parts such as the platform, frame, and attachment hardware, which would not be expected to wear, must have a safety factor of at least three times the design load.

If a transportation provider has a vehicle and equipment that meets or exceeds standards based on Access Board guidelines, and the vehicle and equipment can in fact safely accommodate a given wheelchair, then it is not appropriate, under disability nondiscrimination law, for the transportation provider to refuse to transport the device and its user. Transportation providers must carry a wheelchair and its user, as long as the lift can accommodate the size and weight of the wheelchair and its user and there is space for the wheelchair on the vehicle. However, if in fact a lift or vehicle is unable to accommodate the wheelchair and its user, the transportation provider is not required to carry it.

For example, suppose that a bus or paratransit vehicle lift will safely accommodate an 800-pound wheelchair/passenger combination, but not a combination exceeding 800 pounds (*i.e.,* a design load of 800 lbs.). The lift is one that exceeds the part 38 design standard, which requires lifts to be able to accommodate a 600-pound wheelchair/passenger combination. The transportation provider could limit use of that lift to a combination of 800 pounds or less. Likewise, if a wheelchair or its attachments extends beyond the 30 × 48 inch footprint found in part 38's design standards but fits onto the lift and into the wheelchair securement area of the vehicle, the transportation provider would have to accommodate the wheelchair. However, if such a wheelchair was of a size that would block an aisle and interfere with the safe evacuation of passengers in an emergency, the operator could deny carriage of that wheelchair based on a legitimate safety requirement.

Section 37.167 Other Service Requirements

The requirements in this section apply to both public and private entities.

On fixed route systems, the entity must announce stops. These stops include transfer points with other fixed routes. This means that any time a vehicle is to stop where a passenger can get off and transfer to another bus or rail line (or to another form of transportation, such as commuter rail or ferry), the stop would be announced. The announcement can be made personally by the vehicle operator or can be made by a recording system. If the vehicle is small enough so that the operator can make himself or herself heard without a P.A. system, it is not necessary to use the system.

Announcements also must be made at major intersections or destination points. The rule does not define what major intersections or destination points are. This is a judgmental matter best left to the local planning process. In addition, the entity must make announcements at sufficient intervals along a route to orient a visually impaired passenger to his or her location. The other required announcements may serve this function in many instances, but if there is a long distance between other announcements, fill-in orientation announcements would be called for. The entity must announce any stop requested by a passenger with a disability, even if it does not meet any of the other criteria for announcement.

When vehicles from more than one route serve a given stop or station, the entity must provide a means to assist an individual with a visual impairment or other disability in determining which is the proper vehicle to enter. Some entities have used external speakers. FTA is undertaking a study to determine what is the best available technology in this area. Some transit properties have used colored mitts, or numbered cards, to allow passengers to inform drivers of what route they wanted to use. The idea is to prevent, at a stop where vehicles from a number of routes arrive, a person with a visual impairment from having to ask every driver whether the bus is the right one. The rule does not prescribe what means is to be used, only that some effective means be provided.

Service animals shall always be permitted to accompany their users in any private or public transportation vehicle or facility. One of the most common misunderstandings about service animals is that they are limited to being guide dogs for persons with visual impairments. Dogs are trained to assist people with a wide variety of disabilities, including individuals with hearing and mobility impairments. Other animals (e.g., monkeys) are sometimes used as service animals as well. In any of these situations, the entity must permit the service animal to accompany its user.

Part 38 requires a variety of accessibility equipment. This section requires that the entity use the equipment it has. For example, it would be contrary to this provision for a transit authority to bolt its bus lifts shut because transit authority had difficulty maintaining the lifts. It does little good to have a public address system on a vehicle if the operator does not use it to make announcements (except, as noted above, in the situation where the driver can make himself or herself heard without recourse to amplification.)

Entities must make communications and information available, using accessible formats and technology (e.g., Braille, large

print, TDDs) to obtain information about transportation services. Someone cannot adequately use the bus system if schedule and route information is not available in a form he or she can use. If there is only one phone line on which ADA paratransit eligible individuals can reserve trips, and the line is chronically busy, individuals cannot schedule service. Such obstacles to the use of transportation service are contrary to this section. (The latter could, in some circumstances, be viewed as a capacity constraint.)

It is inconsistent with this section for a transit provider to refuse to let a passenger use a lift at any designated stop, unless the lift is physically unable to deploy or the lift would be damaged if it did deploy (see discussion under §37.123). In addition, if a temporary situation at the stop (e.g., construction, an accident, a landslide) made the stop unsafe for anyone to use, the provider could decline to operate the lift there (just as it refused to open the door for other passengers at the same point). The provider could not, however, declare a stop ''off limits'' to persons with disabilities that is used for other persons. If the transit authority has concerns about barriers or safety hazards that peculiarly affect individuals with disabilities that would use the stop, it should consider making efforts to move the stop.

Under DOT hazardous materials rules, a passenger may bring a portable medical oxygen supply on board a vehicle. Since the hazardous materials rules permit this, transit providers cannot prohibit it. For further information on hazardous materials rules, as they may affect transportation of assistive devices, entities may contact the Department's Research and Special Programs Administration, Office of Hazardous Materials Transportation (202–366–0656).

One concern that has been expressed is that transportation systems (particularly some rail systems) may make it difficult for persons with disabilities to board or disembark from vehicles by very rapidly closing doors on the vehicles before individuals with disabilities (who may move more slowly through crowds in the vehicle or platform than other persons) have a chance to get on or off the vehicle. Doing so is contrary to the rule; operators must make appropriate provision to give individuals with disabilities adequate time to board or disembark.

Section 37.169 Interim Requirements for Over-the-Road Bus Service Operated by Private Entities

Private over-the-road bus (OTRB) service is, first of all, subject to all the other private entity requirements of the rule. The requirements of this section are in addition to the other applicable provisions.

Boarding assistance is required. The Department cannot require any particular boarding assistance devices at this time. Each operator may decide what mode of boarding assistance is appropriate for its operation. We agree with the discussion in the DOJ Title II rule's preamble that carrying is a disfavored method of providing assistance to an individual with a disability. However, since accessible private OTRBs cannot be required by this rule, there may be times when carrying is the only available means of providing access to an OTRB, if the entity does not exercise its discretion to provide an alternative means. It is required by the rule that any employee who provides boarding assistance—above all, who may carry or otherwise directly physically assist a passenger—must be trained to provide this assistance appropriately and safely.

The baggage priority provision for wheelchairs and other assistive devices involves a similar procedure to that established in the Department's Air Carrier Access Act rule (14 CFR part 382). In brief, it provides that, at any given stop, a person with a wheelchair or other assistive device would have the device loaded before other items at this stop. An individual traveling with a wheelchair is not similarly situated to a person traveling with luggage. For the wheelchair user, the wheelchair is an essential mobility device, without which travel is impossible. The rationale of this provision is that, while no one wants his or her items left behind, carrying the wheelchair is more important to its user than ordinary luggage to a traveler. If it comes to an either/or choice (the wheelchair user's luggage would not have any priority over other luggage, however). There would be no requirement, under this provision, for ''bumping'' baggage already on the bus from previous stops in order to make room for the wheelchair.

The entity could require advance notice from a passenger in only one circumstance. If a passenger needed boarding assistance, the entity could require up to 48 hours' advance notice for the purpose of providing needed assistance. While advance notice requirements are generally undesirable, this appears to be a case in which a needed accommodation may be able to be provided successfully only if the transportation provider knows in advance that some extra staffing is needed to accomplish it. While the primary need for advance notice appears to be in the situation of an unstaffed station, there could be other situations in which advance notice was needed in order to ensure that the accommodation could be made. Entities should not ask for advance notice in all cases, but just in those cases in which it is really needed for this purpose. Even if advance notice is not provided, the entity has the obligation to provide boarding assistance if it can be provided with available staff.

Section 37.171 Equivalency Requirement for Demand Responsive Service Operated by Private Entities Not Primarily in the Business of Transporting People

This provision is a service requirement closely related to the private entity requirements for §§37.101–37.105 of this part. Entities in this category are always required to provide equivalent service, regardless of what they are doing with respect to the acquisition of vehicles. The effect of this provision may be to require some entities to arrange, either through acquiring their own accessible vehicles or coordinating with other providers, to have accessible vehicles available to meet the equivalency standards of §37.105 or otherwise to comply with those standards.

Section 37.173 Training

A well-trained workforce is essential in ensuring that the accessibility-related equipment and accommodations required by the ADA actually result in the delivery of good transportation service to individuals with disabilities. The utility of training was recognized by Congress as well. (*See* S. Rept. 100–116 at 48.) At the same time, we believe that training should be conducted in an efficient and effective manner, with appropriate flexibility allowed to the organizations that must carry it out. Each transportation provider is to design a training program which suits the needs of its particular operation. While we are confident of this approach, we are mindful that the apparent lack of training has been a source of complaint to FTA and transit providers. Good training is difficult and it is essential.

Several points of this section deserve emphasis. First, the requirements for training apply to private as well as to public providers, of demand responsive as well as of fixed route service. Training is just as necessary for the driver of a taxicab, a hotel shuttle, or a tour bus as it is for a driver in an FTA-funded city bus system.

Second, training must be to proficiency. The Department is not requiring a specific course of training or the submission of a training plan for DOT approval. However, every employee of a transportation provider who is involved with service to persons with disabilities must have been trained so that he or she knows what needs to be done to provide the service in the right way. When it comes to providing service to individuals with disabilities, ignorance is no excuse for failure.

While there is no specific requirement for recurrent or refresher training, there is an obligation to ensure that, at any given time, employees are trained to proficiency. An employee who has forgotten what he was told in past training sessions, so that he or she does not know what needs to be done to serve individuals with disabilities, does not meet the standard of being trained to proficiency.

Third, training must be appropriate to the duties of each employee. A paratransit dispatcher probably must know how to use a TDD and enough about various disabilities to know what sort of vehicle to dispatch. A bus driver must know how to operate lifts and securement devices properly. A mechanic who works on lifts must know how to maintain them. Cross-training, while useful in some instances, is not required, so long as each employee is trained to proficiency in what he or she does with respect to service to individuals with disabilities.

Fourth, the training requirement goes both to technical tasks and human relations. Employees obviously need to know how to run equipment the right way. If an employee will be assisting wheelchair users in transferring from a wheelchair to a vehicle seat, the employee needs training in how to do this safely. But every public contact employee also has to understand the necessity of treating individuals with disabilities courteously and respectfully, and the details of what that involves.

One of the best sources of information on how best to train personnel to interact appropriately with individuals with disabilities is the disability community itself. Consequently, the Department urges entities to consult with disability organizations concerning how to train their personnel. Involving these groups in the process of establishing training programs, in addition to providing useful information, should help to establish or improve working relationships among transit providers and disability groups that, necessarily, will be of long duration. We note that several transit providers use persons with disabilities to provide the actual training. Others have reported that role playing is an effective method to instill an appreciation of the particular perspective of one traveling with a disability.

Finally, one of the important points in training concerns differences among individuals with disabilities. All individuals with disabilities, of course, are not alike. The appropriate ways one deals with persons with various kinds of disabilities (e.g., mobility, vision, hearing, or mental impairments) are likely to differ and, while no one expects bus drivers to be trained as disability specialists, recognizing relevant differences and responding to them appropriately is extremely significant. Public entities who contract with private entities to have service provided—above all, complementary paratransit—are responsible for ensuring that contractor personnel receive the appropriate training.

Appendix A to Part 37—Standards for Accessible Transportation Facilities

Sections 504(a) and (b) of the Americans with Disabilities Act (ADA) require the Access Board to adopt accessibility guidelines; sections 204(c) and 306(c) of the ADA require the Department of Transportation to adopt regulatory standards ''consistent with the minimum guidelines and requirements'' issued by the Access Board. In the original 1991 publication of part 37, the Department complied with this requirement by reproducing the Access Board's Americans with Disabilities Act Accessibility Guidelines (ADAAG) in their entirety as Appendix A.

The Access Board revised ADAAG in July 2004. ADAAG, including technical amendments issued in July 2005, is codified in Appendices B and D to 36 CFR part 1191. In order to avoid duplication of material that the Access Board has already included in the CFR, and which is now readily available on the Internet, the Department has adopted ADAAG by cross-reference in part 37, rather than reproducing the lengthy Access Board publication. However, there are certain provisions of ADAAG that the Department is modifying for clarity or to preserve requirements that have been in effect under the existing standards. Under the ADA, the Department, in adopting standards, has the discretion to depart from the language of ADAAG as long as the Department's standards remain consistent with the Access Board's minimum guidelines. In addition, this appendix provides additional guidance concerning some sections of the DOT standards as they apply to transportation facilities.

Section 201.1

The basic scoping requirement requires all areas of newly designed and newly constructed buildings and facilities to be accessible. Former §4.1.1(5) provided a ''structural impracticability'' exception to the requirements for new buildings and facilities. The Access Board deleted this exception to avoid duplication with an existing requirement to the same effect in Department of Justice regulations (see 28 CFR §36.401(c)). For consistency with the approach taken by the Access Board and Department of Justice, and to ensure consistency between facilities subject to Titles II and III of the ADA under part 37, the Department has added the language of the Department of Justice regulation to §37.41 of this part.

Section 206.3

This section concerns the location of accessible paths. The Department is retaining language from former §10.3.1(1), which provides that ''Elements such as ramps, elevators, or other circulation devices, fare vending or other ticketing areas, and fare collection areas shall be placed to minimize the distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to the general public.'' This concept, in our view, is implicit in the language of §206.3. However, we believe it is useful to make explicit the concept that, in transportation facilities such as rail stations, important facility elements are placed so as to minimize the distance persons with disabilities must travel to use them. This requirement is intended to affect decisions about where to locate entrances, boarding locations (e.g., where a mini-high platform is used for boarding), and other key elements of a facility.

Section 406.8

To maintain the *status quo* with respect to detectable warnings in pedestrian facilities, the Department is adding a provision (not found in the current version of the new ADAAG) requiring curb ramps to have detectable warnings.

Section 810.2.2

The Department recognizes that there will be some situations in which the full dimensions of a bus boarding and alighting area complying with the §810.2.2 may not be able to be achieved (e.g., there is less than 96 inches of perpendicular space available from the curb or roadway edge, because of buildings or terrain features). The Department is adding language from former §37.9 (c) of this part, which provides that ''Public entities shall ensure the construction of bus boarding and alighting areas comply with 810.2.2, to the extent the construction specifications are within their control.'' Where it is not feasible to fully comply with §810.2.2, the Department expects compliance to the greatest extent feasible.

We note that there may be some instances in which it will be necessary to make operational adjustments where sufficient clearance is not available to permit the deployment of lifts or ramps on vehicles. For example, a bus driver could position the bus at a nearby point—even if not the precise location of the designated stop—so that a passenger needing a lift or ramp to get on or off the bus can do so. To avoid the need for such operational adjustments, it is important to place bus shelters, signs, etc. so that they do not intrude into the required clearances.

Section 810.5.3

This section concerns coordination between rail platforms and rail vehicles. The Department is adding language from the former §10.3.1 (9) (Exception 2), which provides that ''In light rail, commuter rail, and intercity rail systems where it is not operationally or structurally feasible to meet the horizontal gap or vertical difference requirements, mini-high platforms, car-borne or

platform-mounted lifts, ramps or bridge plates or similarly manually deployed devices, meeting the requirements of 49 CFR Part 38 shall be permitted.''

In September 2005, the Department issued guidance concerning the relationship of its ADA and 504 rules in the context of rail platform accessibility This guidance emphasized that access to all cars of a train is significant because, if passengers with disabilities are unable to enter all cars from the platform, the passengers will have access only to segregated service. This would be inconsistent with the nondiscrimination mandate of the ADA. It would also, in the case of Federal Transit Administration (FTA) and Federal Railroad Administration (FRA)-assisted projects (including Amtrak), be inconsistent with the requirement of the Department's section 504 regulation (49 CFR §27.7), which requires service in the most integrated setting reasonably achievable. This guidance states the Department's views of the meaning of its existing rules, and the Department will continue to use this guidance in applying the provisions of this rule.

The Department notes that a related section of 49 CFR part 38 has been the source of some misunderstanding. Section 38.71(b)(2) provides that ''Vehicles designed for, and operated on, pedestrian malls, city streets, or other areas where level-entry boarding is not practicable shall provide wayside or car-borne lifts, mini-high platforms, or other means of access in compliance with §38.83 (b) or (c) of this part.'' The Department has received some suggestions that this provision should be interpreted to mean that, if there is any portion of a system in which level-entry boarding is not practicable, then the *entire* system can use some method other than level-entry boarding. Such an interpretation is incorrect. The authority to use alternatives to level-entry boarding pertains only to those portions of a system in which rail vehicles are ''operated on'' an area where level-entry boarding is not practicable.

For example, suppose a light rail system's first three stops are on a pedestrian/transit mall where it is infeasible to provide level-entry boarding. The transit system could use car-borne lifts, mini-high platforms, etc. to provide access at those three stops. The system's next ten stops are part of a right-of-way in which level-entry boarding is practicable. In such a case, level-entry boarding would have to be provided at those ten stops. There is nothing inappropriate about the same system having different means of boarding in different locations, in such a case.

We also caution against a potential misunderstanding of the sentence in §810.5.3 that provides that ''Low-level platforms shall be 8 inches minimum (205 mm) above top of rail.'' This does not mean that high-level platforms are prohibited or that low-level platforms are the only design consistent with the rules. It simply means that where low-level platforms are otherwise permitted, such platforms must be at least 8 inches above the top of rail, except where vehicles are boarded from the street or a sidewalk.

[56 FR 45621, Sept. 6, 1991, as amended at 61 FR 25416, May 21, 1996; 71 FR 63266, Oct. 30, 2006; 76 FR 57936, Sept. 19, 2011; 79 FR 21406, Apr. 16, 2014]

APPENDIX E TO PART 37—REASONABLE MODIFICATION REQUESTS

A. This appendix explains the Department's interpretation of §§37.5(i) and 37.169. It is intended to be used as the official position of the Department concerning the meaning and implementation of these provisions. The Department also issues guidance by other means, as provided in §37.15. The Department also may update this appendix periodically, provided in response to inquiries about specific situations that are of general relevance or interest.

B. The Department's ADA regulations contain numerous requirements concerning fixed route, complementary paratransit, and other types of transportation service. Transportation entities necessarily formulate policies and practices to meet these requirements (*e.g.*, providing fixed route bus service that people with disabilities can use to move among stops on the system, providing complementary paratransit service that gets eligible riders from their point of origin to their point of destination). There may be certain situations, however, in which the otherwise reasonable policies and practices of entities do not suffice to achieve the regulation's objectives. Implementing a fixed route bus policy in the normal way may not allow a passenger with a disability to access and use the system at a particular location. Implementing a paratransit policy in the usual way may not allow a rider to get from his or her origin to his or her destination. In these situations, subject to the limitations discussed below, the transportation provider must make reasonable modifications of its service in order to comply with the underlying requirements of the rule. These underlying provisions tell entities the end they must achieve; the reasonable modification provision tells entities how to achieve that end in situations in which normal policies and practices do not succeed in doing so.

C. As noted above, the responsibility of entities to make requested reasonable modifications is not without some limitations. There are four classes of situations in which a request may legitimately be denied. The first is where granting the request would fundamentally alter the entity's services,