

where necessary to afford individuals with disabilities and their companions who are individuals with disabilities, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

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

(2) A public entity shall not rely on an individual accompanying an individual with a disability to interpret or facilitate communication, except in an emergency involving a threat to public safety or welfare, or unless the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

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

(1) High quality, clear, real-time, full-motion video and audio over a dedicated high speed Internet connection;

(2) A clear, sufficiently large, and sharply delineated picture of the interpreter's head and the participating individual's head, arms, hands, and fingers, regardless of his body position;

(3) Clear transmission of voices; and

(4) Training to nontechnicians so that they may quickly and efficiently set up and operate the VIS.

(e) *Sports stadiums*. One year after the effective date of this regulation, sports stadiums that have a seating capacity of 25,000 or more shall provide captioning on the scoreboards and video monitors for safety and emergency information.

12. Revise § 35.161 to read as follows:

**§ 35.161 Telecommunications.**

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

(b) When a public entity uses an automated attendant system for receiving and directing incoming telephone calls, that automated attendant system must provide effective communication with individuals using auxiliary aids and services, including TTYs or a telecommunications relay system.

(c) A public entity shall respond to telephone calls from a telecommunications relay service established under title IV of the

Americans with Disabilities Act in the same manner that it responds to other telephone calls.

**Subpart F—Compliance Procedures**

13. Amend § 35.171 by revising paragraph (a)(2) to read as follows:

**§ 35.171 Acceptance of complaints.**

(a) \* \* \*

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

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

\* \* \* \* \*

14. Revise § 35.172 to read as follows:

**§ 35.172 Investigations and compliance reviews.**

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

(b) The designated agency may conduct compliance reviews of public entities based on information indicating a possible failure to comply with the nondiscrimination requirements of this part.

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

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

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

(d) At any time, the complainant may file a private suit pursuant to § 203 of the Act, whether or not the designated agency finds a violation.

**Subpart G—Designated Agencies**

15. Amend § 35.190 by adding paragraph (e) to read as follows:

**§ 35.190 Designated agencies.**

\* \* \* \* \*

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

Dated: May 30, 2008.

**Michael B. Mukasey,**  
*Attorney General.*

[FR Doc. E8–12622 Filed 6–16–08; 8:45 am]

**BILLING CODE 4410–13–P**

**DEPARTMENT OF JUSTICE**

**28 CFR Part 36**

[CRT Docket No. 106; AG Order No. 2968–2008]

RIN 1190–AA44

**Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Justice (Department) is issuing this notice of proposed rulemaking (NPRM) in order to: Adopt enforceable accessibility standards under the Americans with Disabilities Act of 1990 (ADA) that are “consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board” (Access Board); and perform periodic reviews of any rule judged to have a significant economic impact on a substantial number of small entities, and a regulatory assessment of the costs and benefits of any significant regulatory action as required by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

In this NPRM, the Department proposes to adopt Parts I and III of the *Americans With Disabilities Act and Architectural Barriers Act Accessibility Guidelines* (2004 ADAAG), which were published by the Architectural and Transportation Barriers and Compliance Board (Access Board) on July 23, 2004. Prior to its adoption by the Department, the 2004 ADAAG is effective only as guidance to the Department; it has no legal effect on the public until the Department issues a final rule adopting

the revised ADA Standards (proposed standards).

Concurrently with the publication of this NPRM, the Department is publishing an NPRM to amend its title II regulation, which covers state and local government entities, in order to adopt the 2004 ADAAG as its proposed standards for title II entities, to make amendments to the title II regulation for consistency with title III, and to make amendments that reflect the collective experience of 16 years of enforcement of the ADA.

**DATES:** All comments must be received by August 18, 2008.

**ADDRESSES:** Submit electronic comments and other data to <http://www.regulations.gov>. Address written comments concerning this NPRM to: ADA NPRM, P.O. Box 2846, Fairfax, VA 22031-0846. Overnight deliveries should be sent to the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, located at 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005. All comments will be made available for public viewing online at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

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

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

**SUPPLEMENTARY INFORMATION:**

**Electronic Submission and Posting of Public Comments**

You may submit electronic comments to <http://www.regulations.gov>. When submitting comments electronically, you must include CRT Docket No. 106 in the subject box, and you must include your full name and address.

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be

posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "FOR FURTHER INFORMATION CONTACT" paragraph.

**Overview**

Throughout this NPRM, the current, legally enforceable ADA Standards will be referred to as the "1991 Standards," 28 CFR part 36, App. A, 56 FR 35544 (July 26, 1991), modified in part at 59 FR 2674 (Jan. 18, 1994). The Access Board's 2004 revised guidelines will be referred to as the "2004 ADAAG," 69 FR 44084 (July 23, 2004), as amended (editorial changes only) at 70 FR 45283 (Aug. 5, 2005). The revisions now proposed in the NPRM, based on the 2004 ADAAG, are referred to in the preamble as the "proposed standards."

In performing the required, periodic review of its existing regulation, the Department has reviewed the title III regulation section by section, and, as a result, proposes several clarifications and amendments in this NPRM. The Department's initial, formal benefit-cost analysis can be found at Appendix B. See E.O. 12866, 58 FR 51735 (Sept. 30, 1993), amended by E.O. 13258, 67 FR 9385 (Feb. 26, 2002), and E.O. 13422, 72 FR 2703 (Jan. 18, 2007); 5 U.S.C. 601, 603, and 610(a); and OMB Circular A-4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>. The NPRM was submitted to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, for

review and approval prior to publication in the **Federal Register**. It has also been reviewed by the Small Business Administration's Office of Advocacy pursuant to Executive Order 13272, 67 FR 53461 (Aug. 13, 2002).

**Purpose**

On July 26, 1990, President George H.W. Bush signed into law the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.*, a comprehensive civil rights law prohibiting discrimination on the basis of disability. At the beginning of his administration, President George W. Bush underscored the nation's commitment to ensuring the rights of over fifty million individuals with disabilities nationwide by announcing the New Freedom Initiative (available at <http://www.whitehouse.gov/infocus/newfreedom>). The Access Board's publication of the 2004 ADAAG is the culmination of a long-term effort to facilitate ADA compliance and enforcement by eliminating, to the extent possible, inconsistencies among federal accessibility requirements and between federal accessibility requirements and state and local building codes. In support of this effort, the Department is announcing its intention to adopt standards consistent with Parts I and III of the 2004 ADAAG as the ADA Standards for Accessible Design. To facilitate this process, the Department is seeking public comment on the issues discussed in this notice.

**The ADA and Department of Justice Regulations**

The ADA broadly protects the rights of individuals with disabilities in employment, access to state and local government services, places of public accommodation, transportation, and other important areas of American life and, in addition, requires newly designed and constructed or altered state and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Under the ADA, the Department is responsible for issuing regulations to implement title II and title III of the Act, except to the extent that transportation providers subject to title II or title III are regulated by the Department of Transportation. *Id.* at 12134.

The Department also is proposing amendments to its title II regulation, which prohibits discrimination on the basis of disability in state and local government services, concurrently with the publication of this NPRM, in this issue of the **Federal Register**.

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

On July 26, 1991, the Department issued its final rules implementing title II and title III, which are codified at 28 CFR part 35 (title II) and part 36 (title III). Appendix A of the title III regulation, at 28 CFR part 36, contains the 1991 Standards, which were based upon the version of ADAAG published by the Access Board on the same date. Under the Department's regulation implementing title III, places of public accommodation and commercial facilities are currently required to comply with the 1991 Standards with respect to newly constructed or altered facilities.

#### Relationship to Other Laws

The Department of Justice regulation implementing title III, 28 CFR 36.103, provides:

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

(b) Section 504. This part does not affect the obligations of a recipient of federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and regulations issued by federal agencies implementing section 504.

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

Nothing in this proposed rule will alter this relationship. The Department recognizes that public accommodations subject to title III of the ADA may also be subject to title I of the ADA, which prohibits discrimination on the basis of disability in employment; section 504, which prohibits discrimination on the basis of disability in the programs and activities of recipients of federal financial assistance; and other federal statutes such as the Air Carrier Access

Act, 49 U.S.C. 41705, and the Fair Housing Act, 42 U.S.C. 3601 *et seq.* Compliance with the Department's ADA regulations does not necessarily ensure compliance with other federal statutes.

Public accommodations that are subject both to the Department's regulations and to regulations published by other federal agencies must ensure that they comply with the requirements of both regulations. If there is a direct conflict between the regulations, the regulation that provides greater accessibility will prevail. When different statutes apply to entities that routinely interact, each entity must follow the regulation that specifically applies to it. For example, a quick service restaurant in an airport is a public accommodation subject to title III. It regularly serves the passengers of air carriers subject to the Air Carrier Access Act (ACAA). The restaurant is subject to the title III requirements, not to the ACAA requirements. Conversely, the airline is required to comply with the ACAA, not with the ADA.

#### The Roles of the Access Board and the Department of Justice

The Access Board was established by section 502 of the Rehabilitation Act of 1973, 29 U.S.C. 792. The Board consists of thirteen public members appointed by the President, of whom the majority must be individuals with disabilities, and the heads of twelve federal departments and agencies specified by statute, including the heads of the Department of Justice and the Department of Transportation. Originally, the Access Board was established to develop and maintain accessibility guidelines for federally funded facilities under the Architectural Barriers Act of 1968 (ABA), 42 U.S.C. 4151 *et seq.* The passage of the ADA expanded the Access Board's responsibilities. The ADA requires the Access Board to "issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter \* \* \* to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities." 42 U.S.C. 12204. The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the minimum guidelines issued by the Access Board. *Id.* at 12134, 12186.

The Department was extensively involved in the development of the 2004

ADAAG. As a federal member of the Access Board, the Attorney General's representative voted to approve the revised guidelines. Although the enforceable standards issued by the Department under title II and title III must be consistent with the minimum guidelines published by the Access Board, it is the sole responsibility of the Attorney General to promulgate standards and to interpret and enforce those standards.

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

#### The Revised Guidelines (2004 ADAAG)

Part I of the 2004 ADAAG provides scoping requirements for facilities subject to the ADA; scoping is a term used in the 2004 ADAAG to describe requirements (set out in Parts I and II) that prescribe what elements and spaces—and, in some cases, how many—must comply with the technical specifications. Part II provides scoping (which is defined in the preamble of title 2) requirements for facilities subject to the ABA (*i.e.*, facilities designed, built, altered, or leased with federal funds). Part III provides uniform technical specifications for facilities subject to either statute. This revised format is designed to eliminate unintended conflicts between the two federal accessibility standards and to minimize conflicts between the federal regulations and the model codes that form the basis of many state and local building codes.

The 2004 ADAAG is the culmination of a ten-year effort to improve ADA compliance and enforcement. In 1994, the Access Board began the process of updating the original ADAAG by establishing an advisory committee composed of members of the design and construction industry, the building code community, state and local government entities, and people with disabilities. In 1999, based largely on the report and recommendations of the advisory committee,<sup>1</sup> the Access Board issued a proposed rule to update and revise its ADA and ABA Accessibility Guidelines.

<sup>1</sup> After a two-year process of collaboration with the Access Board, the Advisory Committee issued its *Recommendations for a New ADAAG* in September 1996, available at <http://www.access-board.gov/pubs.htm>.

See 64 FR 62248 (Nov. 16, 1999). In response to its proposed rule, the Access Board received more than 2,500 comments from individuals with disabilities, affected industries, state and local governments, and others. The Access Board provided further opportunity for participation by holding public hearings throughout the nation. The Access Board worked vigorously from the beginning to harmonize the ADA and ABA Accessibility Guidelines with industry standards and model codes. The Access Board released an interim draft of its guidelines to the public on April 2, 2002, 67 FR 15509, in order to provide an opportunity for entities with model codes to consider amendments that would promote further harmonization. By the date of its final publication on July 23, 2004, 69 FR 44084, the 2004 ADAAG had been the subject of extraordinary public participation and review.

In addition, the Access Board amended the ADAAG four times since 1998. In 1998, it added specific guidelines on state and local government facilities, 63 FR 2000 (Jan. 13, 1998), and building elements designed for use by children, 63 FR 2060 (Jan. 13, 1998). Subsequently, the Access Board added specific guidelines on play areas, 65 FR 62498 (Oct. 18, 2000), and on recreational facilities 67 FR 56352 (Sept. 3, 2002).

These amendments to the ADAAG have not previously been adopted by the Department as ADA Standards. Through this NPRM, the Department is announcing its intention to publish a proposed rule that will adopt revised ADA Standards consistent with the 2004 ADAAG, including all of the amendments to the ADAAG since 1998.

### The Advance Notice of Proposed Rulemaking

The Department published an advance notice of proposed rulemaking (ANPRM) on September 30, 2004, 69 FR 58768, for two reasons: (1) To begin the process of adopting the Access Board's 2004 ADAAG by soliciting public input on issues relating to the potential application of the Access Board's revisions once the Department adopts them as revised standards; and (2) to request background information that would assist the Department in preparing a regulatory analysis under the guidance provided in OMB Circular A-4, available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>, Sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs). While underscoring that the Department, as a member of the Access Board, had

already reviewed comments provided to the Access Board during its development of the 2004 ADAAG, the Department specifically requested public comment on the potential application of the 2004 ADAAG to existing facilities. The extent to which the 2004 ADAAG is used with respect to the barrier removal requirement applicable to existing facilities under title III (like the program access requirement in title II) is solely within the discretion of the Department. The ANPRM dealt with the Department's responsibilities under both title II and title III.

Public response to the ANPRM was extraordinary. The Department extended the comment deadline by four months at the public's request. 70 FR 2992 (Jan. 19, 2005). By the end of the extended comment period, the Department had received more than 900 comments covering a broad range of issues. Most of the comments responded to questions specifically posed by the Department, including issues involving the application of the 2004 ADAAG once the Department adopts it and cost information to assist the Department in its regulatory assessment. The public provided information on how to assess the cost of elements in small facilities, office buildings, hotels and motels, assembly areas, hospitals and long-term care facilities, residential units, recreational facilities, and play areas. Comments addressed the effective date of the proposed standards, the triggering event by which the effective date is measured in new construction, and variations on a safe harbor that would excuse elements built in compliance with the 1991 Standards from compliance with the proposed standards. Comments responded to questions regarding elements scoped for the "first time" in the 2004 ADAAG, including detention and correctional facilities, recreational facilities, and play areas, as well as proposed additions to the Department's regulation for items such as free-standing equipment. Comments also dealt with specific requirements in the 2004 ADAAG.

Many commenters requested clarification of or changes to the Department's title III regulation. Commenters observed that now, more than seventeen years after enactment of the ADA, as facilities are becoming physically accessible to individuals with disabilities, the Department needs to focus on second generation issues that ensure that individuals with disabilities can actually gain access to and use the accessible elements. So, for example, commenters asked the

Department to focus on such issues as ticketing in assembly areas and reservations for hotel rooms, rental cars, and boat slips. The public asked about captioning and the division of responsibility between the Department and the Access Board for fixed and non-fixed (or free-standing) equipment. Finally, commenters asked for clarification on some issues in the existing regulations, such as title III's requirements regarding service animals.

All of the issues raised in the public comments are addressed, in turn, in this NPRM or in the NPRM for title II. Issues involving title II of the ADA, such as the exhaustion of administrative remedies under the Prison Litigation Reform Act (PLRA), 42 U.S.C. 1997e *et seq.*, are addressed in the Department's NPRM for title II, in this issue of the **Federal Register**, published concurrently with this NPRM.

### Background (SBREFA, Regulatory Flexibility Act, and Executive Order) Reviews

The Department must provide two types of assessments as part of its NPRM: an analysis of the costs and benefits of adopting the 2004 ADAAG as its proposed standards, and a periodic review of its existing regulations to consider their impact on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. E.O. 12866, 58 FR 51735 (Sept. 30, 1993), as amended by E.O. 13258, 67 FR 9385 (Feb. 26, 2002) and E.O. 13422, 72 FR 2763 (Jan. 18, 2007); Regulatory Flexibility Act of 1980, 5 U.S.C. 601, 603, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 610(a); OMB Circular A-4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>; and E.O. 13272, 67 FR 53461 (Aug. 13, 2002).

The Department leaves open the possibility that, as a result of the receipt of comments on an issue raised by the 2004 ADAAG, or if the Department's Regulatory Impact Analysis reveals that the costs of making a particular feature or facility accessible are disproportionate to the benefits to persons with disabilities, the Attorney General, as a member of the Access Board, may return the issue to the Access Board for further consideration of the particular feature or facility. In such a case, the Department would delay adoption of the accessibility requirement for the particular feature or facility in question in its final rule and await Access Board action before moving to consider any final action.

Regulatory Impact Analysis. An initial regulatory impact analysis of the costs and benefits of a proposed rule is required by Executive Order 12866 (as amended by Executive Order 13258 and Executive Order 13422). A full benefit-cost analysis is required of any regulatory action that is deemed to be significant—that is, a regulation that will have an annual effect of \$100 million or more on the economy. See OMB Circular A-4; Regulatory Flexibility Act of 1980, 5 U.S.C. 601, 603, as amended by SBREFA, 5 U.S.C. 610(a).

Early in the rulemaking process, the Department concluded that the economic impact of its adoption of the 2004 ADAAG as proposed standards for title II and title III was likely to exceed the threshold for significant regulatory actions of \$100 million. The Department has completed its initial regulatory impact analysis measuring the incremental benefits and costs of the proposed standards; the initial regulatory impact analysis is addressed at length with responses to public comments from the ANPRM, in Appendix B.

The public may notice differences between the Department's regulatory impact analysis and the Access Board's regulatory assessment of the 2004 ADAAG. The differences in framework and approach result from the differing postures and responsibilities of the Department and the Access Board. First, the breadth of the proposed changes assessed in Appendix A of this NPRM is greater than in the Access Board's assessments related to the 2004 ADAAG. Unlike the Access Board, the Department must examine the effect of the proposed standards not only on newly constructed or altered facilities, but also on existing facilities. Second, whereas the Access Board issued separate rules for many of the differences between the 1991 Standards and the 2004 ADAAG (e.g., play areas and recreational facilities), the Department is proposing to adopt several years of revisions in a single rulemaking.

According to the Department's initial Regulatory Impact Analysis ("RIA"), it is estimated that the incremental cost of the proposed requirements for each of the following eight existing elements will exceed monetized benefits by more than \$100 million when using the 1991 Standards as the comparative baseline: Side reach; water closet clearances in single-user toilet rooms with in-swinging doors; stairs; elevators; location of accessible routes to stages; accessible attorney areas and witness stands; assistive listening systems; and

accessible teeing grounds, putting greens, and weather shelters at golf courses. However, this baseline figure does not take into account the fact that, since 1991, various model codes and consensus standards—such as the model International Building Codes ("IBC") published by the International Codes Council and the consensus accessibility standards developed by the American National Standards Institute ("ANSI")—have been adopted by a majority of states (in whole or in part) and that these codes have provisions mirroring the substance of the Department's proposed regulations. Indeed, such regulatory overlap is intentional since harmonization among federal accessibility standards, state and local building codes, and model codes, is one of the goals of the Department's rulemaking efforts.

Even though the 1991 Standards are an appropriate baseline to compare the new requirements against, since they represent the current set of uniform federal regulations governing accessibility, in practice it is likely that many public and private facilities across the country are already being built or altered in compliance with the Department's proposed standards with respect to these elements. Because the model codes are voluntary, public entities often modify or carve out particular standards when adopting them into their laws, and even when the standards are the same, local officials often interpret them differently. The mere fact that a state or local government has adopted a version of the IBC does not necessarily mean that the facilities within that jurisdiction are legally subject to its accessibility provisions. Because of these complications, and the inherent difficulty of determining which baseline is the most appropriate for each provision, the RIA accompanying this rulemaking compares the costs and benefits of the proposed requirements to several alternative baselines, which reflect various versions of existing building codes. In addition, since the Department is soliciting comment on these eight particular provisions with high net costs, the Department believes it is useful to further discuss the potential impact of alternative baselines on these particular provisions.

For example, the Department's proposed standards for existing stairs and elevators have identical counterparts in one or more IBC versions (2000, 2003, or 2006). Please note, however, that the IBC 2006 version bases a number of its provisions on guidelines in the 2004 ADAAG. These IBC versions, in turn, have been adopted

collectively by forty-six (46) states and the District of Columbia on a statewide basis. In the four (4) remaining states (Colorado, Delaware, Illinois, and Mississippi), while IBC adoption is left to the discretion of local jurisdictions, the vast majority of these local jurisdictions have elected to adopt IBC as their local code. Thus, given that nearly all jurisdictions in the country currently enforce a version of the IBC as their building code, and to the extent that the IBC building codes may be settled in this area and would not be further modified to be consistent if they differ from the final version of these regulations, the incremental costs and benefits attributable to the Department's proposed regulations governing alterations to existing stairs and elevators may be less significant than the RIA suggests over the life of the regulation.

In a similar vein, consideration of an alternate IBC/ANSI baseline would also likely lower the incremental costs and benefits for five other proposed standards (side reach; water closet clearances in single-user toilet rooms with in-swinging doors; location of accessible routes to stages; accessible attorney areas and witness stands; and assistive listening systems), albeit to a lesser extent. Each of these proposed standards has a counterpart in either Chapter 11 of one or more versions of the IBC, ANSI A117.1, or a functionally equivalent state accessibility code. While IBC Chapter 11 and ANSI A117.1 have yet not been as widely adopted as some other IBC chapters, the RIA nonetheless still estimates that between 15% and 35% of facilities nationwide are already covered by IBC/A117.1 provisions that mirror these five proposed standards. It is thus expected that the incremental costs and benefits for these proposed standards may also be lower than the costs and benefits relative to the 1991 Standards baseline.

*Question 1: The Department believes it would be useful to solicit input from the public to inform us on the anticipated costs or benefits for certain requirements. The Department therefore invites comment as to what the actual costs and benefits would be for these eight existing elements, in particular as applied to alterations, in compliance with the proposed regulations (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses), as well as additional practical benefits from these*

requirements, which are often difficult to adequately monetize.

The Department does not have statutory authority to modify the 2004 ADAAG; instead, the ADA requires the Attorney General to issue regulations implementing the ADA that are "consistent with" the ADA Accessibility Guidelines issued by the Access Board. See 42 U.S.C. 12134(c), 12186(c). As noted above in other parts of this preamble, the Department leaves open the possibility of seeking further consideration by the Access Board of particular issues based on disproportionate costs compared to benefits and public comments. The Access Board did not have the benefit of our RIA or public comment on our RIA as it pertains to the 2004 ADAAG.

*Question 2: The Department would welcome comment on whether any of the proposed standards for these eight areas (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses) should be raised with the Access Board for further consideration, in particular as applied to alterations.*

*Stages.* The proposed requirement to provide direct access to stages represents an effort to ensure that individuals with disabilities are able to participate in programs in an integrated setting. Under the current 1991 Standards, a compliant accessible route connecting seating locations to performing areas is permitted to go outside the assembly area and make use of an indirect interior accessible route to access the stage area. As a result, even when other audience members are able to access a stage directly via stairs in order to participate in ceremonies, skits, or other interactive on-stage events, persons with mobility disabilities may be required to use an inconvenient indirect entrance to the stage. As graduates or award recipients, they may be required to part company with their peers, to make their way to the stage alone, and to make a conspicuous entrance. To address this situation, the proposed requirement mandates that, when a direct circulation path (for audience members) connects the seating area to a stage, the accessible route to the stage must also be direct.

The Department has generally determined that the overall costs for this requirement are relatively high in the alterations context, due to the expense of having to provide a lift or ramp to access the stage area directly, regardless

of which baseline is used for the analysis. The Department, however, has had difficulty in estimating the real costs of this requirement because of a lack of information about whether colleges, elementary and secondary schools, and entertainment venues now routinely provide such access when they are altering existing auditoriums or how frequently such alterations occur. Also, the Department currently lacks sufficient data or other sources with which to quantify the benefits that accrue to students and other persons with disabilities who, as a result of direct access to stages, would be able to participate fully and equally in graduation exercises and other events.

*Question 3: The Department would welcome information from operators of auditoriums on the likelihood that their auditoriums will be altered in the next fifteen years, and, if so, whether such alterations are likely to include accessible and direct access to stages. In addition, the Department would like specific information on whether, because of local law or policy, auditorium operators are already providing a direct accessible route to their stages. (The Department is also interested in whether having to provide a direct access to the stage would encourage operators of auditoriums to postpone or cancel the alteration of their facilities.) The Department also seeks information on possible means of quantifying the benefits that accrue to persons with disabilities from this proposed requirement or on its importance to them. To the extent that such information cannot be quantified, the Department welcomes examples of personal or anecdotal experience that illustrate the value of this requirement.*

The Department's RIA also estimates significant costs, regardless of the baseline used, for the proposed requirement that court facilities must provide an accessible route to a witness stand or attorney area and clear floor space to accommodate a wheelchair. These costs arise both in the new construction and alteration contexts. If the witness stand is raised, then either a ramp or lift must be provided to ensure access to the witness stand. While the RIA quantifies the benefits for this proposed requirement (as it does for all of the proposed requirements) primarily in terms of time savings, the Department fully appreciates that such a methodology does not capture the intangible benefits that accrue when persons with mobility disabilities are able to participate in the court process as conveniently as any other witness or party. Without access to the witness stand, for example, a wheelchair user, or

a witness who uses other mobility devices such as a walker or crutches, may have to sit at floor level. If the witness with a mobility disability testifies from a floor level position, the witness could be placed at a disadvantage in communicating with the judge and jury who may no longer be able to see the witness as easily, or, potentially at all. This may create a reciprocal difficulty for the judge and jurors who lose the sightline normally provided by the raised witness stand that enables them to see and hear the witness in order to evaluate his or her demeanor and credibility—difficulty that redounds to the detriment of litigants themselves and ultimately our system of justice.

*Question 4: The Department welcomes comment on how to measure or quantify the intangible benefits that would accrue from accessible witness stands. We particularly invite anecdotal accounts of the courtroom experiences of individuals with disabilities who have encountered inaccessible witness stands, as well as the experiences of state and local governments in making witness stands accessible, either in the new construction or alteration context.*

Under the 1991 Standards, Assistive Listening Systems ("ALS") are required in courtrooms and in other settings where audible communication is integral to the use of the space and audio amplification systems are provided for the general audience. However, these Standards do not set forth technical specifications for such systems. Since 1991, advancements in ALS and the advent of digital technologies have made these systems more amenable to uniform technical specifications. In keeping with these technological advancements, the revised requirements create a technical standard that, among other things, ensures that a certain percentage of required ALS have hearing-aid compatible receivers. Requiring hearing-aid compatible ALS enables persons who are hard of hearing to hear a speech, a play, a movie, or to follow the content of a trial. Without an effective ALS, people with hearing loss are effectively excluded from participation because they are unable to hear or understand the audible portion of the presentation.

From an economic perspective, the cost of a single hearing-aid compliant ALS is not high—about \$500 more than a non-compliant system—and compliant equipment is readily available on the retail market. As estimated in the RIA, the high overall costs for the revised technical requirements for ALS are instead driven by the assumption that entities with large assembly areas (such

as universities, stadiums, and auditoriums) will be required to purchase a relatively large number of compliant systems. On the other hand, the overall scoping for ALS has been reduced in the Department's proposed requirement, thus mitigating the cost to covered entities. The proposed revision to the technical requirement merely specifies that (25% or at least 2) of the required ALS receivers must be hearing-aid compatible. The RIA estimates that a significant part of the cost of this requirement will come from the replacement of individual ALS receivers and system maintenance.

*Question 5: The Department seeks information from arena and assembly area administrators on their experiences in managing ALS. In order to evaluate the accuracy of the assumptions in the RIA relating to ALS costs, the Department welcomes particular information on the life expectancy of ALS equipment and the cost of ongoing maintenance.*

The Department's proposed requirements mandate an accessible (pedestrian) route that connects all accessible elements within the boundary of the golf course and facility, including teeing grounds, putting greens, and weather shelters. Requiring access to necessary features of a golf course ensures that persons with mobility disabilities may fully and equally participate in a recreational activity.

From an economic perspective, the Department's RIA assumes that virtually every tee and putting green on an existing course will need to be regraded in order to provide compliant accessible (pedestrian) routes to these features. However, the Department's proposal also excuses compliance with the requirement for an accessible (pedestrian) route so long as a "golf car passage" (*i.e.*, the path typically used by golf cars) is otherwise provided to the teeing ground, putting green, or other accessible element on a course. Because it is likely that most public and private golf courses in the United States already provide golf passages to most or all holes, the actual costs of this requirement for owners and operators of existing golf courses should be reduced with little to no practical loss in accessibility.

*Question 6: The Department seeks information from the owners and operators of golf courses, both public and private, on the extent to which their courses already have golf car passages to teeing grounds, putting greens, and weather shelters, and, if so, whether they intend to avail themselves of the proposed exception.*

Analysis of impact on small entities. The second type of analysis that the Department has undertaken is a review of its existing regulations for title II and title III in order to consider the impact of those regulations on small entities. The review requires agencies to consider five factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. 5 U.S.C. 610(b). Based on these factors, the agency should determine whether to continue the rule without change, or to amend or rescind the rule to minimize any significant economic impact of the rule on a substantial number of small entities. *Id.* at 610(a).

In performing this review, the Department has gone through its regulation section by section, and, as a result, proposes several clarifications and amendments in this NPRM. Amendments to its title II regulation are proposed in the NPRM for title II published concurrently with this rule. The proposals reflect the Department's analysis and review of complaints or comments from the public as well as changes in technology. Many of the proposals aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, a significant goal in the development of the 2004 ADAAG was to eliminate duplication or overlap in federal accessibility guidelines as well as to harmonize the federal guidelines with model codes. The Department has also worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

#### Organization of This NPRM

The subsequent sections of this NPRM deal with the Department's response to comments and its proposals for changes to its current regulation that derive from the required, periodic review that it performed. The proposed standards and the Department's response to comments regarding the 2004 ADAAG are contained in Appendix A to the NPRM. Appendix B to the NPRM contains the

Department's initial, formal benefit-cost analysis.

The section of the NPRM entitled, "General Issues," briefly introduces topics that are noteworthy because they are new to the title III regulation or have been the subject of attention or comment. The topics introduced in the general issues section include: safe harbor and other proposed limitations on barrier removal, service animals, equipment, wheelchairs and other power-driven mobility devices, auxiliary aids and services (including captioning and video interpreting services), and certification of state and local building codes.

Following the "General Issues" section, there is a section entitled, "Section-By-Section Analysis and Response to Comments." This section provides a detailed discussion of the proposed changes to the title III regulation. The section-by-section analysis follows the order of the current regulation, except that regulatory sections that remain unchanged are not indicated. The discussion within each section explains the proposals and the reasoning behind them, as well as the Department's response to related public comments. Subject areas that deal with more than one section of the regulation include references to the related sections, where appropriate.

Both the "General Issues" section and the "Section-By-Section Analysis" include specific questions to which the Department requests public response. These questions are numbered and italicized so that they are easier for readers to locate and reference. The Department emphasizes, however, that the public may comment on any aspect of this NPRM and is not required to respond solely to questions specifically posed by the Department.

The Department's proposed changes to the actual regulatory text of title III, that follow the section-by-section analysis are entitled, "Part 36: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities."

#### General Issues

This section briefly introduces topics that are noteworthy because they are new to the title III regulation or have been the subject of considerable attention or comment. Each topic is discussed subsequently in the section-by-section analysis.

Safe harbor and other proposed limitations on barrier removal. One of the most important issues that the Department must address is the effect that supplemental or changed ADA Standards will have on the continuing

obligation of public accommodations to remove architectural, transportation, and communication barriers in existing facilities to the extent that it is readily achievable to do so. This issue was not addressed in the 2004 ADAAG because it was outside the scope of the Access Board's authority under the ADA. Responsibility for implementing title III's requirement that public accommodations eliminate existing architectural barriers where it is readily achievable to do so rests solely with the Department.

The Department's current regulation implementing title III of the ADA establishes the requirements for barrier removal by public accommodations. 28 CFR 36.304. Under this requirement, the Department uses the 1991 Standards as a guide to identify what constitutes an architectural barrier, as well as the specifications that covered entities must follow in making architectural changes to the extent that it is readily achievable. 28 CFR part 36, App. B. Once adopted, therefore, the 2004 ADAAG will present a new reference point for title III's requirement to remove architectural barriers in existing places of public accommodation. The Department is concerned that the incremental changes in the 2004 ADAAG may place unnecessary cost burdens on businesses that have already removed barriers by complying with the 1991 Standards in their existing facilities.

The Department seeks to strike an appropriate balance between ensuring that people with disabilities are provided access to buildings and facilities and potential financial burdens on existing places of public accommodation under their continuing obligation for barrier removal. Such a balance would not impose unnecessary financial burdens on existing places of public accommodation.

The Department's ANPRM raised several options that might reduce such financial burdens. One approach, described in the ANPRM as Option I, is to establish a safe harbor with regard to elements in existing facilities that comply with the scoping and technical provisions in the 1991 Standards. Specifically, the Department would deem that public accommodations have met their obligation for barrier removal with respect to any element in an existing facility if that element complies with the scoping and technical requirements in the 1991 Standards. Another possible approach—Option II in the ANPRM—is to reduce the scoping requirements for some of the supplemental or changed requirements as they apply to existing facilities (e.g.,

play areas and recreational facilities). Option III in the ANPRM proposed the exemption of certain elements in the proposed standards; under this option, the Department would determine that certain supplemental requirements are inappropriate for barrier removal. After reviewing the public comments on the ANPRM, the Department has decided to propose a combination of Options I and II. The specific proposals are addressed in the discussion of barrier removal in the section-by-section analysis of § 36.304 below.

The Department is not proposing to adopt Option III. Instead, in keeping with its obligations under the SBREFA to consider regulatory alternatives, the Department is seeking public comment on an alternative suggested by advocates for small business. Under this alternative, the Department would revamp its approach to barrier removal that is readily achievable as applied to "qualified small business" entities, which are defined in § 36.104.

Small business advocates argued for clearer guidance on when barrier removal is, and is not, readily achievable. According to the small business advocacy groups, the Department's current approach to readily achievable barrier removal disproportionately affects small businesses for the following reasons: (1) Small businesses are more likely to operate in older buildings and facilities; (2) the 1991 Standards are too numerous and technical for most small business owners to understand and then to square with the ADA requirements with state and local building or accessibility codes; and (3) small businesses are particularly vulnerable to title III litigation and are often compelled to settle because they cannot afford the litigation costs involved in proving whether an action is readily achievable. Advocates for small business endorsed many of the proposals in the ANPRM, such as the safe harbor and reduced scoping for some elements.

The proposed standards will go a long way toward meeting the concern of small businesses with regard to harmonizing federal and state requirements; the Access Board harmonized the 2004 ADAAG with the model codes that form the basis of most state and local accessibility codes. Still, the Department is proposing that a qualified small business is presumed to have done what is readily achievable in a given year if, in the prior tax year, it spent a fixed percentage of its revenues on readily achievable barrier removal. The Department believes that the efficacy of any such proposal will turn on two determinations: (1) The

definition of a qualified small business, and (2) the formula for calculating what percentage of revenues should be sufficient to satisfy the readily achievable presumption. The Department discusses its proposal for safe harbor and reduced scoping requirements in the section-by-section analysis of § 36.304.

The Department invites comment on whether public accommodations that operate existing facilities with play or recreation areas should be exempted from compliance with certain requirements in the 2004 ADAAG. Existing facilities would continue to be subject to accessibility requirements in existing law, but not specifically to the requirements in: (1) The Access Board's supplemental guidelines on play areas, 65 FR 62498 (Oct. 18, 2000); and (2) the Access Board's supplemental guidelines on recreation facilities, 67 FR 56352 (Sept. 3, 2002). Under that scenario, the 2004 ADAAG would apply only to new play areas and recreation facilities, and would not govern the accessibility of existing facilities as legal requirements. Public accommodations that operate existing facilities with play or recreation areas, pursuant to the ADA's requirements to provide equal opportunity for individuals with disabilities, may still have the obligation to provide an accessible route to the playground, some accessible equipment, and an accessible surface for the play area or recreation facility.

*Question 7: Should the Department exempt owners and operators of public accommodations from specific compliance with the supplemental requirements for play areas and recreation facilities, and instead continue to determine accessibility in these facilities on a case-by-case basis under existing law? Please provide information on the effect of such a proposal on people with disabilities and places of public accommodation.*

*Service animals.* The Department wishes to clarify the obligations of public accommodations to accommodate individuals with disabilities who use service animals. The Department continues to receive a large number of complaints from individuals with service animals. It appears that many covered entities are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals. At the same time, some individuals with impairments—who would not be covered as individuals with disabilities—are claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access to hotels,



restaurants, and other places of public accommodation. Another trend is the use of wild, exotic, or unusual species, many of which are untrained, as service animals. The Department is proposing amendments to its regulation on service animals in the hope of mitigating the apparent confusion.

*Minimal protection.* In the Department's *ADA Business Brief on Service Animals*, which was published in 2002, the Department interpreted the minimal protection language within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). Although the Department received comments urging it to eliminate the minimal protection language, the Department continues to believe that it should retain the "providing minimal protection" language and interpret the language to exclude so-called "attack dogs" that pose a direct threat to others.

*Guidance on permissible service animals.* In the original regulation implementing title III, "service animal" was defined as "any guide dog, signal dog, or other animal," and the Department believed, at the time, that leaving the species selection up to the discretion of the person with a disability was the best course of action. Due to the proliferation of animals used by individuals, including wild animals, the Department believes that this area needs some parameters. Therefore, the Department is proposing to eliminate certain species from coverage even if the other elements of the definition are satisfied.

*Comfort animals vs. psychiatric service animals.* Under the Department's present regulatory language, some individuals and entities have assumed that the requirement that service animals must be individually trained to do work or perform tasks excluded all individuals with mental disabilities from having service animals. Others have assumed that any person with a psychiatric condition whose pet provided comfort to them was covered by the ADA. The Department believes that psychiatric service animals that are trained to do work or perform a task (*e.g.*, reminding its owner to take medicine) for individuals whose disability is covered by the ADA are protected by the Department's present regulatory approach.

Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine; providing

safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.

The Department is proposing new regulatory text in § 36.104 to formalize its position on emotional support/comfort animals, which is that "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals." The Department wishes to state, however, that the exclusion of emotional support animals from ADA coverage does not mean that individuals with psychiatric, cognitive, or mental disabilities cannot use service animals. The Department proposes specific regulatory text in § 36.104 to make this clear: "The term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities." This language simply clarifies the Department's longstanding position and is not a new position.

The Department's rule is based on the assumption that the title II and title III regulations govern a wider range of public settings than the settings that allow for emotional support animals. The Department recognizes, however, that there are situations not governed exclusively by the title II and title III regulations, particularly in the context of residential settings and employment, where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.

*Modification in policies, practices, or procedures.* The preamble to § 36.302 of the current title III regulation states that the regulatory language was intended to provide the "broadest feasible access" to individuals with service animals while acknowledging that, in rare circumstances, accommodating service animals may not be required if it would result in a fundamental alteration of the nature of the goods or services the public accommodation provides or the safe operation of the public accommodation. 56 FR 35544, 35565 (July 26, 1991). In order to clarify this provision, the Department is incorporating into the proposed

regulation guidance that it has provided previously through technical assistance.

*Proposed training standards.* The Department has always required that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability, but has never imposed any type of formal training requirements or certification process. While some groups have urged the Department to modify this position, the Department does not believe such a modification would serve the array of individuals with disabilities who use service animals.

Detailed regulatory text changes and the Department's response to public comments on these issues and others are discussed below in the definition section, § 36.104, and the section on modifications in policies, practices, and procedures, § 36.302(c).

*Equipment and furniture.* In question seven of the ANPRM, the Department asked for comment on whether regulatory guidance is needed with respect to the acquisition and use of free-standing equipment or furnishings used by covered entities to provide services, and asked for specific examples of the circumstances in which such equipment should be addressed. The ANPRM explained that free-standing equipment was already addressed in the regulation in several different contexts, but because covered entities continue to raise questions about their obligations to provide accessible free-standing equipment, the Department was considering adding specific language on equipment. The Department received comments both in favor and against new guidance on accessible equipment and furniture, but has decided not to add any specific regulation governing equipment at this time.

Many businesses were opposed to additional requirements for free-standing equipment, although they favored a move toward clarity and specificity. Some businesses were concerned that they lack control of the design or manufacturing of such equipment.

Most organizations and individuals representing individuals with disabilities were in favor of adding or clarifying requirements for accessible equipment. Disability organizations pointed out that from the user's perspective, it is not relevant whether the equipment (*e.g.*, ATMs, vending machines) is free-standing or fixed, because the equipment must be accessible in order for individuals with disabilities to use it.

A specific point of concern to several commenters was inaccessible aisles

between movable display racks in stores. The Department's current regulation addresses this issue under barrier removal, requiring that stores rearrange display racks when readily achievable but adding the following exception to § 36.304(f): "The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space." If the rearrangement of display racks is not readily achievable, stores still have an obligation to provide alternatives to barrier removal, such as retrieving merchandise from inaccessible shelves or racks. 28 CFR 36.305(b)(2).

When the title III regulation was initially proposed in 1991, it contained a provision concerning accessible equipment, which required that newly purchased furniture or equipment that was made available for use at a place of public accommodation be accessible, unless complying with this requirement would fundamentally alter the goods, services, facilities, privileges, advantages, or accommodations offered, or would not be readily achievable. See 56 FR 7452, 7470-71 (Feb. 22, 1991). In the final title III regulation promulgated in 1991, the Department decided not to include this provision, explaining in the preamble to the regulation that "its requirements are more properly addressed under other sections, and . . . there are currently no appropriate accessibility standards addressing many types of furniture and equipment." 56 FR 35544, 35572 (July 26, 1991).

Equipment has been covered under the Department's ADA regulation, including under the provision requiring modifications in policies, practices, and procedures and the provision requiring barrier removal, even though there is no provision specifically addressing equipment. See 28 CFR 36.302, 36.304. If a person with a disability does not have full and equal access to a covered entity's services because of the lack of accessible equipment, the entity must provide that equipment, unless doing so would be a fundamental alteration or would not be readily achievable.

The Department has decided to continue with this approach, and not to add any specific regulatory guidance addressing equipment at this time. It intends to analyze the economic impact of future regulations governing specific types of free-standing equipment. The 2004 ADAAG includes revised requirements for some types of fixed equipment that are specifically addressed in the 1991 Standards, such as ATMs and vending machines, as well

as detailed requirements for fixed equipment that is not addressed by name in the current Standards, such as depositories, change machines, and fuel dispensers. Because the 2004 ADAAG provides detailed requirements for many types of fixed equipment, covered entities may apply those requirements to analogous free-standing equipment to ensure that they are accessible, and to avoid potential liability for discrimination. The Department also believes that when federal guidance for accessibility exists for equipment required to be accessible to individuals who are blind or have low vision, entities should consult such guidance (e.g., federal standards implementing section 508 of the Rehabilitation Act, 36 CFR part 1194, or the guidelines that specify communication accessibility for ATMs and fare card machines in the 2004 ADAAG, 36 CFR part 1191, App. D). With regard to the specific issue of display racks in stores, the Department does not propose to change the approach in the current regulation. The tension between access for individuals with disabilities and loss of selling space caused by the arrangement of the racks within the store is the same whether the store is newly constructed or an existing facility. The existing approach appropriately balances the needs of businesses and individuals with disabilities.

*Accessible golf cars.* Question six of the ANPRM asked whether golf courses should be required to make at least one, and possibly two, specialized golf cars available for the use of individuals with disabilities with no greater advance notice than that required of other golfers. The ANPRM also asked about the safety of such cars and their potential for damaging golf course greens. Accessible golf cars are designed for use by individuals with mobility disabilities and are operated using hand controls. An individual with a disability can hit a golf ball while remaining in the seat of an accessible golf car. Some accessible golf cars have a swivel, elevated seat that allows the golfer to play from a semi-standing position. Accessible golf cars can be used by individuals without disabilities as well. The Department received many comments on the subject of accessible golf cars (approximately one quarter of all comments received), the majority of which favored a requirement for accessible golf cars. However, the Department has decided not to add a regulation specifically addressing accessible golf cars at this time.

Comments in support of requiring courses to provide accessible golf cars came from individuals both with and

without disabilities. These commenters generally supported having one, two, or multiple cars per course. A number of comments stressed the social aspect of golf, generally, and its specific importance in many business transactions. Most commenters believed that no advance notice should be required to reserve an accessible golf car. Some golf course owners argued that a requirement for advance reservation of an accessible golf car might allow them to develop pooling arrangements with other courses.

In response to the Department's questions regarding the safety of accessible golf cars, most commenters stated that the accessible cars are safe, do not damage the greens, and speed up the pace of play. Some commenters expressed concern about the safety of accessible golf cars, arguing either that the cars should pass the American National Standards Institute (ANSI) standards for traditional golf cars,<sup>2</sup> or that accessible cars should not be required until there are applicable safety standards. Comments from golf courses with experience in providing accessible golf cars were generally positive in terms of the cars' safety and the impact on maintenance of the greens and the course.

As the Department requested, the public also addressed the issue of whether a golf course that does not provide standard golf cars should offer accessible cars. One commenter explained that the courses that do not provide golf cars are often shorter length courses, such as "executive" or nine-hole courses, and that individuals with disabilities who are learning to play golf, or who might not have the stamina to play eighteen holes, would be more likely to use these courses. Thus, accessible golf cars should be available at these courses. This commenter pointed out that one executive course that had no traditional—but two accessible—cars made money on the single-user cars because individuals with and without disabilities wanted to use them.

The Department also received comments opposing a requirement to provide accessible golf cars from some golf course owners, associations, and individuals. Those opposing such a requirement argued that there was little demand for accessible golf cars, or that the problem could be solved by putting "medical flags" on traditional golf cars. Such flags might identify cars that were permitted to have wider use of the course. Other commenters stated that accessible golf cars were too expensive

<sup>2</sup> ANSI Z130.1-1999.

or were specialized equipment that individuals with disabilities should purchase for themselves.

Like some individuals with disabilities, some commenters who opposed a requirement for accessible golf cars also expressed concern about the lack of safety standards. There were also concerns that repair costs for greens or for accessible golf cars would be more significant than with traditional golf cars. One commenter suggested that courses exceeding certain slope and degree standards be exempted from having single-user cars. Others argued that, in practice, the safety issue and the issue of damage to courses are negligible.

The Department has decided not to add a regulation specifically addressing accessible golf cars at this time. As with free-standing equipment, the Department believes that the existing regulation is adequate to address this issue. The Department may gain additional guidance in the future from the experience of the Department of Defense, which is planning to provide two accessible golf cars at each of the 174 golf courses that the Department of Defense operates, except those at which it would be unsafe to operate such golf cars because of the terrain of the course. See U.S. Department of Defense, *Report to Congress: Access of Disabled Persons to Morale, Recreation, and Welfare (MRW) Facilities and Activities* (Sept. 25, 2007).

*Wheelchairs and other power-driven mobility devices.* Since the passage of the ADA, choices of mobility aids available to individuals with disabilities have vastly increased. In addition to devices such as wheelchairs and mobility scooters, individuals with disabilities may use devices that are not designed primarily for use by individuals with disabilities, such as electronic personal assistive mobility devices (EPAMDs). (The only available model known to the Department is the Segway®.) The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices for locomotion in pedestrian areas. These new or adapted mobility aids benefit individuals with disabilities, but also present new challenges for public accommodations and commercial facilities.

EPAMDs illustrate some of the challenges posed by new mobility devices. The basic Segway® model is a two-wheeled, gyroscopically stabilized,

battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. The EPAMD can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of 3 to 4 miles per hour and the approximate maximum speed for power-operated wheelchairs of 6 miles per hour. In a study of trail and other nonmotorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of people using EPAMDs ranged from 68¼ inches to 79½ inches. See Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 2004), available at <http://www.tfhr.gov/safety/pubs/04103>. Thus, EPAMDs can operate at much greater speeds than wheelchairs, and the average user is much taller than most wheelchair users.

EPAMDs have been the subject of debate among users, pedestrians, disability advocates, state and local governments, businesses, and bicyclists. The fact that the device is not designed primarily for use by or marketed primarily to individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of whether individuals with disabilities should be allowed to operate them in areas and facilities where other powered devices are not allowed. Those who question the use of EPAMDs in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users. Although the question of their safety has not been resolved, many states have passed legislation addressing EPAMD operation on sidewalks, bicycle paths, and roads. In addition, some states, such as Iowa and Oregon, have minimum age requirements, or mandatory helmet laws. New Jersey requires helmets for all EPAMD users, while Hawaii and Pennsylvania require helmets for users under a certain age.

While there may be legitimate safety issues for EPAMD users and bystanders, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. For example, individuals with severe respiratory conditions who can walk limited distances and individuals with multiple sclerosis have reported benefitting significantly from EPAMDs. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional

mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. See Rachel Metz, *Disabled Embrace Segway*, New York Times, Oct. 14, 2004.

The Department has received questions and complaints from individuals with disabilities and covered entities about which mobility aids must be accommodated and under what circumstances. While some individuals with disabilities support the use of unique mobility devices, other individuals with disabilities are concerned about their personal safety when others are using such devices. There is also concern about the impact of such mobility devices on facilities, such as the weight of the device on fragile floor surfaces.

The Department intends to address these issues and proposes to adopt a policy that sets the parameters for when these devices must be accommodated. Toward that end, the Department proposes new definitions of the terms “wheelchair”—which includes manually and power-driven wheelchairs and mobility scooters—and “other power-driven mobility device” and accompanying regulatory text. The proposed definitions are discussed in the section-by-section analysis of § 36.104, and the proposed regulatory text is discussed in the section-by-section analysis of § 36.311.

Much of the debate surrounding mobility aids has centered on appropriate definitions for the terms “wheelchair” and “other power-driven mobility devices.” The Department has not defined the term “manually powered mobility aids.” Instead, the proposed rule provides a list including wheelchairs, walkers, crutches, canes, braces, or similar devices. The inclusion of the term “similar devices” indicates that the list is not intended to be exhaustive. The Department would like input as to whether addressing “manually powered mobility aids” in this manner (*i.e.*, via examples of such devices) is appropriate. The Department also would like information as to whether there are any other non-powered or manually powered mobility aids that should be added to the list and an explanation of the reasons they should be included. If an actual definition is preferred, the Department would welcome input with regard to the language that might be used to define “manually powered mobility aids,” and an explanation of the reasons this language would better serve the public.

*Auxiliary aids and services:* captioning and video interpreting services. Section 36.303 of the title III regulation requires a public

accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech, and their companions.

The Department has investigated hundreds of complaints alleging that public accommodations have failed to provide effective communication, many of which have resulted in settlement agreements and consent decrees. During the course of its investigations, the Department has determined that public accommodations sometimes misunderstand the scope of their obligations under the statute and the regulation. Moreover, the number of individuals with hearing loss continues to grow in this country as a large segment of the population ages and as people live longer.

The Department is proposing several changes to § 36.303 to update the regulatory language in response to numerous technological advances and breakthroughs in the area of auxiliary aids and services since the regulation was promulgated sixteen years ago. The most significant changes are in the language regarding video interpreting services and the provision of effective communication for companions. In addition, the Department is discussing in its preamble to § 36.303 options for adding captioning and narrative description that may eventually result in proposed textual changes. The specific amendments are described below in § 36.303 of the section-by-section analysis.

**Certification.** The current title III regulation provides that state or local governments may apply to the Department for certification that state laws or local building codes comply with or exceed the minimum accessibility requirements of the ADA. The current submission requirements and certification process, however, have proved onerous for state and local governments and for the Department. Many have urged the Department to streamline the certification process and

make it less cumbersome for state and local jurisdictions.

In keeping with the Department's efforts to clarify legal obligations under the ADA and harmonize requirements with other federal laws and model codes, the proposed rule includes amendments to subpart F (§§ 36.601–36.608) to streamline the certification process. The proposed changes are intended to provide more flexibility in the certification process and shorten the overall time involved. The Department believes that the adoption of the 2004 ADAAG will help achieve these goals because it has been further harmonized with model codes. The specific changes to subpart F are described below in the section-by-section analysis.

### Section-By-Section Analysis and Response to Comments

This section provides a detailed description of the Department's proposed changes to the title III regulation, the reasoning behind the proposals, and responses to public comments received on the topic. The section-by-section analysis follows the order of the title III regulation itself, except that if the Department is not proposing a change to a regulation section, the unchanged section is not mentioned.

#### Subpart A—General

##### Section 36.104 Definitions

“1991 Standards” and “2004 ADAAG”

The Department is proposing to add to the proposed regulation definitions of both the “1991 Standards” and the “2004 ADAAG.” The term “1991 Standards” refers to the currently enforceable ADA Standards for Accessible Design, codified at 28 CFR part 36, App. A. The term “2004 ADAAG” refers to Parts I and III of the *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines*, which were issued by the Architectural and Transportation Barriers Compliance Board on July 23, 2004, at 69 FR 44084 (to be codified at 36 CFR 1191), and which the Department is proposing to adopt in this NPRM. These terms are included in the definitions section for ease of reference.

“Existing Facility”

Under the ADA, a facility is initially classified as one of three types: (1) An existing facility; (2) an altered facility; or (3) a newly designed and constructed facility. In the current regulation, title III defines new construction at § 36.401(a) and alterations at § 36.402. In contrast, the term “existing facility” is not defined, although it is used in the

statute and the regulations for titles II and III. 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR 35.150.

The Department's enforcement of the ADA is premised on a broad understanding of “existing facility.” The classifications of facilities under the ADA regulation are not static. Rather, a building that was newly designed and constructed at one time—and therefore subject to the accessibility standards in effect at the time—becomes an “existing facility” after it is completed. At some point in its life, it may also be considered “altered” and then again become “existing.”

The added definition of “existing facility” in the proposed regulation clarifies that the term means exactly what it says: A facility in existence on any given date is an existing facility under the ADA. If a facility exists, it is an existing facility whether it was built in 1989, 1999, or 2009.

“Other Power-Driven Mobility Device”

The proposed regulation defines the term “other power-driven mobility device” as “any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf carts, bicycles, electronic personal assistance mobility devices (EPAMDs) (e.g., Segway®), or any mobility aid designed to operate in areas without defined pedestrian routes.” The definition is designed to be broad and inclusive because the Department recognizes the diverse needs and preferences of individuals with disabilities and does not wish to impede individual choice except when necessary. Power-driven mobility devices are included in this category. Mobility aids that are designed for areas or conditions without defined pedestrian areas, such as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians, are also included in this category.

*Question 8: Please comment on the proposed definition of other power-driven mobility devices. Is the definition overly inclusive of power-driven mobility devices that may be used by individuals with disabilities?*

The Department's proposed regulatory text on accommodating wheelchairs and other power-driven mobility devices is discussed below in § 36.311 of the section-by-section analysis.

#### “Place of Lodging”

The Department proposes to add a definition of “place of lodging” that will be used in proposed § 36.406(c) to address the coverage of rental accommodations in time-shares, condominium hotels, and mixed-use and corporate hotels. The proposed definition specifies that a place of lodging is a facility that provides guestrooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less), where the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay, and which operates under conditions and with amenities similar to a hotel, motel, or inn, such as an on-site proprietor and reservations desk. The factors to be followed in determining the conditions and amenities of a hotel include rooms available on a walk-up basis, linen service, and accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit. It is the Department’s intention that facilities that do not meet this definition would not be covered by the proposed § 36.406(c).

#### “Qualified Interpreter”

The Department proposes to add to the definition of qualified interpreter to clarify that the term includes, but is not limited to, sign language interpreters, oral interpreters, and cued speech interpreters.

Not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily qualified to interpret orally. Also, someone with just a rudimentary familiarity with sign language or finger spelling is not a qualified sign language interpreter. Likewise, a qualified sign language interpreter would not include someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

The revised definition includes examples of different types of interpreters. An oral interpreter has special skill and training to mouth a speaker’s words silently for individuals who are deaf or hard of hearing, many of whom were raised orally and taught to read lips or were diagnosed with hearing loss later in life and do not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker’s voice is unclear, there is a quick-paced exchange of communication (e.g., in a meeting), or

when the speaker does not directly face the individual who is deaf or hard of hearing. A cued speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code or cue to represent each speech sound.

#### “Qualified Reader”

The current title III regulation identifies a qualified reader as an auxiliary aid, but it does not define the term. See 28 CFR 36.303(b)(2). Based upon the Department’s investigation of complaints alleging that some entities have provided ineffective readers, the Department proposes to define “qualified reader” similarly to “qualified interpreter” to ensure that entities select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. Failing to provide a qualified reader to a person with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

#### “Qualified Small Business”

A qualified small business is a business entity defined as a small business concern under the regulations promulgated by the Small Business Administration (SBA) pursuant to the Small Business Act. See 15 U.S.C. 632; 13 CFR part 121. Under section 3(a)(2)(C) of the Small Business Act, federal departments and agencies are prohibited from prescribing a size standard for categorizing a business concern as a small business unless they have been specifically authorized to do so or have proposed a size standard in compliance with the criteria set forth in the SBA regulations, have provided an opportunity for public notice and comment on the proposed standard, and have received approval from the Administrator of the SBA to use the standard. See *id.* Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria. If they decide otherwise, they must be prepared to justify how they arrived at a different standard and why the SBA’s regulations do not satisfy the agency’s program requirements. See 13 CFR 121.903.

The ADA does not define “small business” or specifically authorize the Department to prescribe size standards. The Department believes that the size standards SBA has developed are appropriate for determining which businesses subject to the ADA should be subject to the proposed safe harbor provisions. Therefore, the Department proposes to adopt the SBA’s size

standards to define small businesses under the ADA.

The SBA’s small business size standards define the maximum size that a concern, together with all of its affiliates, may be if it is to be eligible for federal small business programs or to be considered a small business for the purpose of other federal agency programs. Concerns primarily engaged in the same kind of economic activity are classified in the same industry regardless of their types of ownership (such as sole proprietorship, partnership or corporation). Approximately 1200 industries are described in detail in the North American Industry Classification System—United States, 2007. For most places of public accommodation, the SBA has established a size standard based on average annual receipts. The majority of places of public accommodation will be classified as small businesses if their average annual receipts are less than \$6.5 million. However, some will qualify with higher annual receipts. The SBA’s small business size standards should be familiar to most small businesses. Current standards, which can only be changed after notice and comment rulemaking, are available at <http://www.census.gov/epcd/naics07/naics07fr3.htm>.

#### “Service Animal”

The Department is proposing to amend the definition of “service animal” in § 36.104 of the current regulation, which is defined as, “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.” Proposed § 36.104 would:

1. Remove “guide” or “signal” as descriptions of types of service dogs and add “other common domestic” animal to the Department’s current definition;
2. Remove “individuals with impaired vision” and replace it with “individuals who are blind or have low vision”;
3. Change “individuals with hearing impairments” to “individuals who are deaf or hard of hearing”;
4. Replace the term “intruders” with the phrase “the presence of people” in the section on alerting individuals who are deaf or hard of hearing;
5. Add the following to the list of work and task examples: Assisting an individual during a seizure, retrieving

medicine or the telephone, providing physical support to assist with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation;

6. Add that “service animal” includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, or mental disabilities;

7. Add that “service animal” does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents; and

8. Add that animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not “service animals.”

The Department is proposing these changes in response to concerns expressed by commenters who responded to the Department’s ANPRM. Issues raised by the commenters include:

“Minimal protection.” There were many comments by service dog users urging the Department to remove from the definition “providing minimal protection.” The commenters set forth the following reasons: (1) The current phrase can be interpreted to allow “protection dogs” that are trained to be aggressive and to provide protection to be covered under the ADA, so long as they are paired with a person with a disability; and (2) since some view the minimal protection language to mean that a dog’s very presence can act as a crime deterrent, the language allows any untrained pet dog to provide this minimal protection by its mere presence. These interpretations were not contemplated by the ADA or the title III regulation.

In the Department’s *ADA Business Brief on Service Animals*, which was published in 2002, the Department interpreted the minimal protection language within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). Despite the Department’s best efforts, the minimal protection language appears to have been misinterpreted. Nonetheless, the Department continues to believe that it should retain the “providing minimal protection” language and interpret the language to exclude so-called “attack dogs” that pose a direct threat to others.

*Question 9: Should the Department clarify the phrase “providing minimal*

*protection” in the definition or remove it?*

“Alerting to intruders.” Some commenters argued that the phrase “alerting to intruders” in the current text has been misinterpreted by some people to apply to a special line of protection dogs that are trained to be aggressive. People have asserted, incorrectly, that use of such animals is protected under the ADA. The Department reiterates that public accommodations are not required to admit any animal that poses a direct threat to the health or safety of others. The Department has proposed removing “intruders” and replacing it with “the presence of people.”

“Task” emphasis. Many commenters followed the lead of an umbrella service dog organization in suggesting that “performing tasks” should form the basis of the service animal definition, that “do work” should be eliminated from the definition, and that “physical” should be added to describe tasks. Tasks by their nature are physical, so the Department does not believe that such a change is warranted. In contrast, the phrase “do work” is slightly broader than “perform tasks,” and adds meaning to the definition. For example, a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place. As one service dog user stated, in some cases “critical forms of assistance can’t be construed as physical tasks,” noting that the manifestations of “brain-based disabilities,” such as psychiatric disorders and autism, are as varied as their physical counterparts. One commenter stated that the current definition works for everyone (*i.e.*, those with physical and mental disabilities) and urged the Department to keep it. The Department has evaluated this issue and believes that the crux of the current definition (individual training to do work or perform tasks) is inclusive of the varied services provided by working animals on behalf of individuals with all types of disabilities and proposes that this portion of the definition remain the same.

Define “task.” One commenter suggested defining the term “task,” presumably so that there would be a better understanding of what type of service performed by an animal would qualify for coverage. The Department feels that the common definition of task is sufficiently clear and that it is not necessary to add to the definitions section. However, the Department has proposed additional examples of work or tasks to help illustrate this requirement in the definition.

Define “animal” or what qualifies certain species as “service animals.” When the regulations were promulgated in the early 1990s, the Department did not define the parameters of acceptable animal species, and few anticipated the variety of animals that would be used in the future, ranging from pigs and miniature horses to snakes and iguanas. One commenter suggested defining “animal” (in the context of service animals) or the parameters of species to reduce the confusion over whether a particular service animal is covered. One service dog organization commented that other species would be acceptable if those animals could meet the behavioral standards of trained service dogs. Other commenters asserted that there are certain animals (*e.g.*, reptiles) that cannot be trained to do work or perform tasks, so these animals would not be covered. The Department has followed closely this particular issue (*i.e.*, how many unusual animals are now claimed as service animals) and believes that this aspect of the regulation needs clarification.

To establish a practical and reasonable species parameter, the Department proposes to narrow the definition of acceptable animal species to “dog or other common domestic animal” by excluding the following animals: Reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, or goats), ferrets, amphibians, and rodents. Many commenters asserted that limiting the number of allowable species would help stop erosion of the public’s trust, which results in reduced access for many individuals with disabilities, despite the fact that they use trained service animals that adhere to high behavioral standards. The Department is compelled to take into account practical considerations of certain animals and contemplate their suitability in a variety of public contexts, such as restaurants, grocery stores, and performing arts venues.

In addition, the Department believes that it is necessary to eliminate from coverage all wild animals, whether born or bred in captivity or the wild. Some animals, such as nonhuman primates, pose a direct threat to safety based on behavior that can be aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement against the use of monkeys as service animals, stating, “[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, the potential for serious injury and zoonotic (animal to human disease transmission)

risks." See AVMA position statement, *Nonhuman Primates as Assistance Animals* (2005), available at [http://www.avma.org/issues/policy/nonhuman\\_primates.asp](http://www.avma.org/issues/policy/nonhuman_primates.asp). The potential for nonhuman primates to transmit dangerous diseases to humans has been documented in scientific journals.

Although unusual species make up a very small percentage of service animals as a collective group, their use has engendered broad public debate and, therefore, the Department seeks comment on this issue.

*Question 10: Should the Department eliminate certain species from the definition of "service animal"? If so, please provide comment on the Department's use of the phrase "common domestic animal" and on its choice of which types of animals to exclude.*

*Question 11: Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the "common domestic animal" prong of the proposed definition?*

*Comfort animals.* It is important to address the concept of comfort animals or emotional support animals, which have become increasingly popular, primarily with individuals with mental or psychiatric impairments, many of which do not rise to the level of disability. Comfort animals are also used by individuals without any type of impairment who claim the need for such animals in order to bring their pets into places of public accommodation.

The difference between an emotional support animal and a legitimate psychiatric service animal is the service that is provided (*i.e.*, the actual work or task performed by the service animal). Another critical factor rests on the severity of the individual's impairment. For example, only individuals with conditions that substantially limit them in a major life activity currently qualify for coverage under the ADA, and only those individuals will qualify to use a service animal. See 42 U.S.C. 12102(2) (defining disability); 28 CFR 36.104 (same). Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Many Americans have some type of physical or mental impairment (*e.g.*, arthritis, anxiety, back pain, imperfect vision, etc.), but establishing a physical or mental disability also requires there to be a substantial limitation of a major life activity. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulations were promulgated,

service animals have been trained to assist individuals with many different types of disabilities. In some cases, individuals with minor impairments who are not individuals with disabilities under the Act have mistakenly concluded that any type of impairment qualified them for the ADA's protection of the right of individuals with disabilities to use service animals.

*Change "service animal" to "assistance animal."* Some commenters asserted that "assistance animal" is a term of art and should replace "service animal." While some agencies, like the Department of Housing and Urban Development (HUD), use the term "assistance animal," that term is used to denote a broader category of animals than is covered by the ADA. The Department believes that changing the term used under the ADA would create confusion, particularly in view of the broader parameters for coverage under the Fair Housing Act (FHA) *cf.*, HUD Handbook No. 4350.3 Rev-1, Chg-2, *Occupancy Requirements of Subsidized Multifamily Housing Programs* (June 2007), available at <http://www.hudclips.org>. Moreover, the Department's proposal to change the definition of "service animal" under the ADA is not intended to affect the rights of people with disabilities who use assistance animals in their homes under the FHA. In addition, the Department wishes to use the term "psychiatric service animal" to describe a service animal that does work or performs a task for the benefit of an individual with a psychiatric disability. This contrasts with "emotional support" animals that are covered under the Air Carrier Access Act, 49 U.S.C. 41705 *et seq.*, and its implementing regulations. 14 CFR 382.7 *et seq.*; see also 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on air transportation), and that qualify as "assistance animals" under the FHA, but do not qualify as "service animals" under the ADA.

#### "Video Interpreting Services" (VIS)

The Department has added a definition of "video interpreting services (VIS)," a technology composed of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera

located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image.

VIS can provide immediate, effective access to interpreting services seven days a week, twenty-four hours a day by allowing people in different locations to engage in live, face-to-face communications. Moreover, VIS is particularly helpful where qualified interpreters are not readily available (*e.g.*, for quick response to emergency hospital visits, in areas with an insufficient number of qualified interpreters to meet demand, and in rural areas where distances and an interpreter's travel time present obstacles).

Along with the addition of the definition of VIS, other amendments to the communications section are discussed below in § 36.303.

#### "Wheelchair"

The Department proposes the following definition of "wheelchair" in § 36.104: "Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven."

The proposed definition of "wheelchair" is informed by several existing definitions of "wheelchair." Section 507 of the ADA defines wheelchair in the context of whether to allow wheelchairs in federal wilderness areas: "the term 'wheelchair' means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area." 42 U.S.C. 12207(c)(2). The Department believes that while this definition is appropriate in the limited context of federal wilderness areas, it is not specific enough to provide clear guidance in the array of settings covered by title III.

The other existing federal definition of wheelchair that the Department reviewed is in the Department of Transportation regulation implementing the transportation provisions under title II and title III of the ADA. The Department of Transportation's definition of wheelchair is "a mobility aid belonging to any class of three- or four-wheeled devices, usable indoors, designed for and used by individuals with mobility disabilities, whether operated manually or powered." 49 CFR 37.3. The Department has adopted much of the language from this definition.

Under the proposed definition, wheelchairs include manually operated and power-driven wheelchairs and mobility scooters. Mobility devices such as golf cars, bicycles, and electronic personal assistance mobility devices (EPAMDs) are inherently excluded from the proposed definition. Typically, the devices covered under the proposed definition are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas. However, it could include a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. "Typical indoor and outdoor pedestrian areas" refer to locations and surfaces used by and intended for pedestrians, including sidewalks, paved paths, floors of buildings, elevators, and other circulation routes, but would not include such areas as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians.

The Department does not propose to define specific dimensions that qualify a device as a wheelchair. The Department of Transportation's definition includes a subpart defining "common wheelchair" to provide guidance for public transit authorities on which devices must be transported. A "common wheelchair" is a wheelchair that "does not exceed 30 inches in width and 48 inches in length measured two inches above the ground, and does not weigh more than 600 pounds when occupied." 49 CFR 37.3. The narrower definition of "common wheelchair" was developed with reference to the requirements for lifts to establish parameters for the size and weight a lift can safely accommodate. See 49 CFR part 37, App. D (2002). The Department does not believe it is necessary to adopt stringent size and weight requirements for wheelchairs.

The Department requests public input on the proposed definition for "wheelchair."

*Question 12: As explained above, the definition of "wheelchair" is intended to be tailored so that it includes many styles of traditional wheeled mobility devices (e.g., wheelchairs and mobility scooters). Does the definition appear to exclude some types of wheelchairs, mobility scooters, or other traditional wheeled mobility devices? Please cite specific examples if possible.*

*Question 13: Should the Department expand its definition of "wheelchair" to include Segways®?*

*Question 14: Are there better ways to define different classes of mobility devices, such as the weight and size of the device that is used by the Department of Transportation in the definition of "common wheelchair"?*

*Question 15: Should the Department maintain the non-exhaustive list of examples as the definitional approach to the term "manually powered mobility aids"? If so, please indicate whether there are any other non-powered or manually powered mobility devices that should be considered for specific inclusion in the definition, a description of those devices, and an explanation of the reasons they should be included.*

*Question 16: Should the Department adopt a definition of the term "manually powered mobility aids"? If so, please provide suggested language and an explanation of the reasons such a definition would better serve the public.*

The proposed regulation regarding mobility devices, including wheelchairs, is discussed below in the section-by-section analysis for § 36.311.

#### **Subpart B—General Requirements**

##### *Section 36.208 Direct Threat*

The proposed regulation moves the definition of direct threat from § 36.208(b) to the definitions section at § 36.104. This is an editorial change. Consequently, § 36.208(c) would become § 36.208(b) in the proposed regulation.

##### *Section 36.211 Maintenance of accessible features*

The general rule regarding the maintenance of accessible features, which provides that a public accommodation must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by qualified individuals with disabilities, is unchanged. However, the Department wishes to clarify its application and proposes one change to the section.

The Department has noticed that some covered entities do not understand what is required by § 36.211, and it would like to take the opportunity presented by this NPRM to clarify. Section 36.211(a) broadly covers *all* features that are required to be accessible under the ADA, from accessible routes and elevators to roll-in showers and signage. It is not sufficient for a building or other feature to be built in compliance with the ADA, only to be blocked or changed later so that it is inaccessible. A common problem observed by the Department is that

covered facilities do not maintain accessible routes. For example, the accessible routes in offices or stores are commonly obstructed by boxes, potted plants, display racks, or other items so that the routes are inaccessible to people who use wheelchairs. Under the ADA, the accessible route must be maintained and, therefore, these items are required to be removed. If the items are placed there temporarily—for example, if an office receives multiple boxes of supplies and is moving them from the hall to the storage room—then § 36.211(b) excuses such "isolated or temporary interruptions." Other common examples of features that must be maintained, and often are not, are platform lifts and elevators. Public accommodations must ensure that these features are operable and, to meet this requirement, regular servicing and making repairs quickly will be necessary.

The Department proposes to amend the rule by adding § 36.211(c) to address the discrete situation in which the scoping requirements provided in the proposed standards may reduce the number of required elements below that are required by the 1991 Standards. In that discrete event, a public accommodation may reduce such accessible features in accordance with the requirements in the proposed standards.

##### *Section 36.302 Modifications in Policies, Practices, or Procedures*

##### *Section 36.302(c) Service Animals*

The Department's regulation now states that "[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability." 28 CFR 36.302(c)(1). In general, the Department is proposing to retain the scope of the current regulation while clarifying its longstanding policies and interpretations.

The Department is proposing to revise § 36.302(c) by adding the following sections as exceptions to the general rule on access. Proposed § 36.302 would:

1. Expressly incorporate the Department's policy interpretations as outlined in published technical assistance *Commonly Asked Questions about Service Animals* (1996) (<http://www.ada.gov/qasrvc.htm>) and *ADA Business Brief: Service Animals* (2002) (<http://www.ada.gov/svcanimb.htm>) and add that a public accommodation may ask an individual with a disability to remove a service animal from the premises if: (1) The animal is out of



control and the animal's owner does not take effective action to control it; (2) the animal is not housebroken or the animal's presence or behavior fundamentally alters the nature of the service the public accommodation provides (e.g., repeated barking during a live performance); or (3) the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications;

2. Add that if a place of public accommodation properly excludes a service animal, the public accommodation must give the individual with a disability the opportunity to obtain goods, services, or accommodations without having the service animal on the premises;

3. Add requirements that the work or tasks performed by a service animal must be directly related to the handler's disability; that a service animal that accompanies an individual with a disability into a place of public accommodation must be individually trained to do work or perform a task, be housebroken, and be under the control of its owner; and that a service animal must have a harness, leash, or other tether;

4. Modify the language in § 36.302(c)(2), which currently states, "[n]othing in this part requires a public accommodation to supervise or care for a service animal," to read, "[a] public accommodation is not responsible for caring for or supervising a service animal," and relocate this provision to proposed § 36.302(c)(5). (This proposed language does not require that the person with a disability care for his or her service animal if care can be provided by a family member, friend, attendant, volunteer, or anyone acting on behalf of the person with a disability.);

5. Expressly incorporate the Department's policy interpretations as outlined in published technical assistance *Commonly Asked Questions about Service Animals* (1996) (<http://www.ada.gov/qasrvc.htm>) and *ADA Business Brief: Service Animals* (2002) (<http://www.ada.gov/svcanimb.htm>) that a public accommodation must not ask about the nature or extent of a person's disability, nor require proof of service animal certification or licensing, but that a public accommodation may ask: (i) If the animal is required because of a disability; and (ii) what work or tasks the animal has been trained to perform;

6. Add that individuals with disabilities who are accompanied by service animals may access all areas of a public accommodation where

members of the public are allowed to go; and

7. Expressly incorporate the Department's policy interpretations as outlined in published technical assistance *Commonly Asked Questions about Service Animals* (1996) (<http://www.ada.gov/qasrvc.htm>) and *ADA Business Brief: Service Animals* (2002) (<http://www.ada.gov/svcanimb.htm>) and add that a public accommodation must not require an individual with a disability to pay a fee or surcharge, post a deposit, or comply with requirements not generally applicable to other patrons as a condition of permitting a service animal to accompany its handler in a place of public accommodation, even if such deposits are required for pets, and that if a public accommodation normally charges its clients or customers for damage that they cause, a customer with a disability may be charged for damage caused by his or her service animal.

These changes will respond to the following concerns raised by individuals and organizations that commented in response to the ANPRM.

*Proposed behavior or training standards.* Some commenters proposed behavior or training standards for the Department to adopt in its revised regulation, not only to remain in keeping with the requirement for individual training, but also on the basis that without training standards the public has no way to differentiate between untrained pets and service animals. Because of the variety of individual training that a service animal can receive—from formal licensing at an academy to individual training on how to respond to the onset of medical conditions, such as seizures—the Department is not inclined to establish a standard that all service animals must meet. While the Department does not plan to change the current policy of no formal training or certification requirements, some of the behavioral standards that it has proposed actually relate to suitability for public access, such as being housebroken and under the control of its handler.

*Hospital and healthcare settings.* Public accommodations, including hospitals, must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. 28 CFR 36.302(c)(1). The exception to this requirement is if making the modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. *Id.* at 36.302(a). The Department generally follows the guidance of the Centers for Disease Control and Prevention (CDC)

on the use of service animals in a hospital setting.

As required by the ADA, a healthcare facility must permit a person with a disability to be accompanied by his or her service animal in all areas of the facility in which that person would otherwise be allowed, with some exceptions. Zoonotic diseases can be transmitted to humans through trauma (bites, scratches, direct contact, arthropod vectors, or aerosols). Although there is no evidence that most service animals pose a significant risk of transmitting infectious agents to humans, animals can serve as a reservoir for a significant number of diseases that could potentially be transmitted to humans in the healthcare setting. A service animal may accompany its owner to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, rest rooms, and all other areas of the facility where visitors are permitted, except those listed below.

Under the ADA, the only circumstances under which a person with a disability may not be entitled to be accompanied by his or her service animal are those rare circumstances in which it has been determined that the animal poses a direct threat to the health or safety of others. A direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated or mitigated by a modification of policies, practices, or procedures. Based on CDC guidance, it is generally appropriate to exclude a service animal from areas that require a protected environment, including operating rooms, holding and recovery areas, labor and delivery suites, newborn intensive care nurseries, and sterile processing departments. See Centers for Disease Control, *Guidelines for Environmental Infection Control in Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee* (June 2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5210a1.htm>.

#### *Section 36.302(e) Hotel Reservations*

Each year, the Department receives many complaints about failed reservations. Most of these complaints involve individuals who have reserved an accessible hotel room only to discover upon arrival that the room they reserved is either not available or not accessible. Although reservations services were not addressed in the ANPRM, commenters noted the ongoing

problem with hotel reservations and urged the Department to provide regulatory guidance on the issue.

The reservations policies, practices, and procedures of public accommodations are subject to title III's general and specific nondiscrimination provisions. See 42 U.S.C. 12182; 28 CFR 36.302. With this NPRM, the Department proposes to address hotel reservations within its regulation on modifications to policies, practices, and procedures. See 28 CFR 36.302.

The proposed rule is based on straightforward nondiscrimination principles: individuals with disabilities should be able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. Currently, this simple premise appears more often to be the exception than the rule.

*General rule on reservations.* The Department's proposed § 36.302(e)(1) states the general rule that a public accommodation that owns, leases (or leases to), or operates a place of lodging shall modify its policies, practices, and procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms in the same way as others (*i.e.*, during the same hours and in the same manner as individuals who do not need accessible rooms).

Reservations can be made in many different ways—in person, on the phone, directly with the hotel, with a parent company, or through a travel agency. The proposed rule is meant to reach any public accommodation that owns, leases (or leases to), or operates a place of lodging, and is not limited to a hotel's operation of its own reservations service. Thus, the rule would apply equally to corporations that own one or more hotel chains and provide a system by which prospective customers can reserve guest rooms, as well as to franchisors that provide reservation services. All covered entities must modify their policies and practices to ensure parity in reservations policies between those who need accessible rooms and those who do not.

*Identification of accessible guest rooms.* Proposed § 36.302(e)(2) states that hotel reservations services must identify and describe the accessible features in the hotels and guest rooms. This requirement is integral to ensuring that individuals with disabilities receive the information they need to benefit from the services offered by the place of lodging. As a practical matter, a public accommodation's designation of a guest room as "accessible" will not necessarily ensure that the room complies with all of the 1991 Standards.

In older facilities subject to barrier removal, strict compliance with the 1991 Standards is not required. Public accommodations must remove barriers to the extent that it is readily achievable to do so. Individuals with disabilities must be able to ascertain which features—in new and existing buildings—are included in the hotel's accessible guest rooms. The presence or absence of particular accessible features may be the difference between a room that is usable by a person with a disability and one that is not. Information about the availability and nature of accessible features will minimize the risk that individuals with disabilities will reserve a room that is not what was expected or needed.

*Guarantees of accessible guest room reservations.* Section 36.302(e)(3) provides that a public accommodation that owns, operates, leases (or leases to) a place of lodging shall guarantee accessible guest rooms that are reserved through a reservations service to the same extent that it guarantees rooms that are not accessible. The Department recognizes that not all reservations are guaranteed and the proposed rule does not impose an affirmative duty to do so. When a public accommodation typically guarantees hotel reservations (absent unforeseen circumstances), it must provide the same guarantee for accessible guest rooms. Because the Department is aware that reservation guarantees take many different forms (*e.g.*, an upgrade within the same hotel or a comparable room in another hotel), the Department seeks comment on the current practices of hotels and third party reservations services with respect to "guaranteed" hotel reservations and the impact of requiring a public accommodation to guarantee accessible rooms to the extent it guarantees other rooms.

*Question 17: What are the current practices of hotels and third party reservations services with respect to "guaranteed" hotel reservations? What are the practical effects of requiring a public accommodation to guarantee accessible guest rooms to the same extent that it guarantees other rooms?*

Finally, although not included in the proposed regulation as currently drafted, the Department is seeking comment on whether additional regulatory guidance is needed on the policies, practices, and procedures by which public accommodations hold and release accessible hotel guest rooms, and whether third party travel agents should be subject to the requirements set out in § 36.302(e)(2) and § 36.302(e)(3).

*Hold and release of accessible guest rooms and third-party reservations.* With respect to the hold and release of accessible guest rooms, the Department has addressed this issue in settlement agreements and recognizes that current practices vary widely. As in the ticketing context, regulating in the area of hotel reservations involves complicated issues, such as guest room dispersion and variable pricing. The Department is concerned about current practices by which accessible guest rooms are released to the general public even though the hotel is not sold out. In such instances, individuals with disabilities may be denied an equal opportunity to benefit from the services offered by the public accommodation, *i.e.*, a hotel guest room.

The Department also recognizes that the proposed rule does not reach all public accommodations that are engaged in the business of providing hotel reservations. As discussed above, the rule reaches public accommodations that own, lease (or lease to), or operate a place of lodging. It does not reach an entity that, for example, owns or operates a travel agency, while the agency or service is independent of any place of lodging. Public accommodations that own, lease (or lease to), or operate places of lodging are required to provide the information prescribed by the proposed rule to third parties like travel agencies, but the third parties are not, independently, liable. At this juncture, the Department seeks comment from individuals, businesses, and advocacy groups as to whether such entities should be required to identify and describe accessible features in hotel rooms available through their services, and whether such entities should be subject to the guarantee obligations set out in proposed § 36.302(e)(2) and § 36.302(e)(3).

*Question 18: What are the current practices of hotels and third-party reservations services with respect to (1) holding accessible rooms for individuals with disabilities and (2) releasing accessible rooms to individuals without disabilities? What factors are considered in making these determinations? Should public accommodations be required to hold one or more accessible rooms until all other rooms are rented, so that the accessible rooms would be the last rooms rented?*

*Question 19: Should a public accommodation that does not itself own, lease (or lease to), or operate a place of lodging but nevertheless provides reservations services, including reservations for places of lodging, be subject to the requirements of proposed § 36.302(e)(2) and (e)(3)?*

### Section 36.302(f) Ticketing

The ticketing policies and practices of public accommodations are subject to title III's general and specific discrimination provisions. See 42 U.S.C. 12182; 28 CFR 36.302. Through the investigation of complaints, its enforcement actions, and public comments related to ticketing, the Department is aware of the need to provide regulatory guidance to entities involved in the sale or distribution of tickets. With this NPRM, the Department proposes to include a section on ticketing within the regulation on modifications to policies, practices, and procedures. See 28 CFR 36.302.

In response to the ANPRM, individuals with disabilities and related advocacy groups commented that the reduced requirements for accessible seating in assembly areas underscored the need for clarification from the Department on ticketing related issues. One disability advocacy group asserted, that in order to guarantee equal access to assembly areas for people with disabilities, it is necessary to provide complementary design standards, sales policies, and operational procedures.

The Department agrees that more explicit regulation is needed to ensure that individuals with disabilities are not improperly denied access to events because of discriminatory procedures for the sale of wheelchair spaces. The Department's enforcement actions have demonstrated that some venue operators, ticket sellers and distributors are not properly implementing title III's nondiscrimination provisions.

The Department has entered into agreements addressing problems with ticketing sales and distribution by requiring specific modifications to ticketing policies. While these negotiated settlement agreements and consent decrees rest on fundamental nondiscrimination principles, they represent solutions tailored to specific facilities. The Department believes that guidance in this area is needed, but also recognizes that ticketing practices and policies vary with venue size and event type, and that a "one-size-fits-all" approach may be unrealistic.

The proposed rule clarifies the application of title III with respect to ticketing issues in certain contexts, and is intended to strike a balance between a covered entity's desire to maximize ticket sales and the rights of individuals with disabilities to attend events in assembly areas in a manner that is equal to that afforded to individuals without disabilities. The proposed rule does not, however, purport to cover or clarify all

aspects or applications of title III to ticketing issues. Moreover, the rule applies only to the sale or distribution of tickets that are sold or distributed on a preassigned basis. Tickets sold for most motion pictures, for example, would not be affected by the proposed rule.

Because this rule addresses ticketing policies and practices for stadiums, arenas, theaters, and other facilities in which entertainment and sporting events are held, its provisions are related to and informed by those in proposed § 36.308 (discussed below in the section-by-section analysis of § 36.308), which covers seating in assembly areas. Section 221 of the proposed standards reduces the scoping requirements for accessible seating in assembly areas. After the proposed standards are finalized, the scoping reduction will apply to all public accommodations. See proposed 28 CFR 36.211(c).

*Ticket distribution methods.* Section 36.302(f)(1) states the general rule that a public accommodation shall modify its policies, practices, and procedures to ensure that individuals with disabilities can purchase single or multi-event tickets for accessible seating in the same way as others, *i.e.*, during the same hours and through the same distribution methods as other seating is sold. Tickets can be purchased in many different ways: in person or on the phone, directly through the venue, or through a third-party company. The proposed rule makes clear that it is meant to reach all public accommodations that provide a service by which individuals can purchase event tickets, and is not limited to a venue's operation of its own ticketing systems.

The Department has received numerous complaints from individuals who were denied the opportunity to acquire tickets for accessible seats through avenues such as ticketing presales, promotions, lotteries, or waitlists. The proposed rule, at § 36.302(f)(2), makes clear that public accommodations must include accessible seating in all stages of the ticketing process, including presales, promotions, lotteries, or waitlists.

*Identification of available accessible seating.* Section 36.302(f)(3) of the proposed rule requires a facility to identify available accessible seating. In the Department's investigations of theaters and stadiums, the Department has discovered that many facilities lack an accurate inventory of the accessible seating in their venues, and that this information gap results in lost opportunities for patrons who need accessible seating. For some public

accommodations, multiple inventories may be required to account for different uses of the facility because the locations of accessible seating may change in an arena depending on whether it is used for a hockey game, a basketball game, or a concert. The proposed rule further requires that the facility identify the accessible seating on publicly available seating charts. This transparency will facilitate the accurate sale of accessible seating.

Proposed § 36.302(f)(4) requires public accommodations to provide individuals with disabilities with accurate information about the location of accessible seating. The proposed rule specifically prohibits the practice of "steering" individuals with disabilities to certain wheelchair spaces so that the facility can maximize potential ticket sales for other unsold wheelchair spaces.

*Season tickets and multiple event sales.* Proposed § 36.302(f)(5) addresses the sale of season tickets and other tickets for multiple events. The proposed rule provides that public accommodations must sell season tickets or tickets for multiple events for accessible seating in the same manner that such tickets are sold to those purchasing general seating. The rule also states that spectators purchasing tickets for accessible seating on a multi-event basis shall be permitted to transfer tickets for single-event use by friends or associates in the same fashion and to the same extent as other spectators holding tickets for the same type of ticketing plan. A facility must provide a portable seat for the transferee to use, if necessary.

*Secondary market ticket sales.* The Department is aware that the proposed rule may represent a significant change in practice for many public accommodations with respect to "secondary market" ticket sales. Because the secondary market is a recognized—and often integral—part of the ticketing distribution system for many venues and activities, individuals with disabilities will be denied an equal opportunity to benefit from the goods offered—attendance at an event—if public accommodations have no obligations with respect to accessible seating bought or sold in this way. In conjunction with the proposed rule, the Department seeks comment about public accommodations' current practices with respect to the secondary market for tickets, and the anticipated impact of the proposed rule on different types of facilities or events.

*Question 20: If an individual resells a ticket for accessible seating to someone who does not need accessible seating,*

should the secondary purchaser be required to move if the space is needed for someone with a disability?

*Question 21: Are there particular concerns about the obligation imposed by the proposed rule, in which a public accommodation must provide accessible seating, including a wheelchair space where needed, to an individual with a disability who purchases an "inaccessible" seat through the secondary market?*

*Release of unsold accessible seats.*

Proposed § 36.302(f)(6) provides regulatory guidance regarding the release of unsold accessible seats. Through its investigations, the Department has become familiar with the problem of designated accessible seating being sold to the general public before people who need accessible seating buy tickets. As a result, individuals who need to use the accessible seating cannot attend the event.

The Department has entered into agreements addressing this problem by requiring specific modifications to ticketing policies. The Department believes that guidance in this area is needed, but also recognizes that ticketing practices and policies vary with venue size and event type, and that a "one-size-fits-all" approach may be unrealistic. These options provide flexibility so that ticketing policies can be adjusted according to the venue size and event type.

*Facility sell-out.* Proposed § 36.302(f)(6)(i) allows for the release of unsold accessible seating once standard seats in the facility have been sold, but luxury boxes, club boxes, or suites are not required to be sold out before the remaining accessible seats are released. To implement this option, the release of unsold accessible seating should be done according to an established, written schedule. Blocks of seats should be released in stages, and should include tickets in a range of price categories and locations that is representative of the range of seating that remains available to other patrons.

*Sell-outs in specific seating areas.* Under the second contingency, proposed § 36.302(f)(6)(ii), a facility could release unsold accessible seating in a specific seating area if all of the standard seats in that location were sold out. For example, if all seats in the orchestra level are sold, the unsold accessible seats in the orchestra level could be released for sale to the general public.

*Sell-outs in specific price ranges.* The third approach described at proposed § 36.302(f)(6)(iii) permits a public accommodation to release unsold

accessible seats in a specific price range if all other seats in that price range were sold out. For example, if all \$50 seats were sold, regardless of their location, the unsold \$50 accessible seats may be released for sale to the general public.

*Question 22: Although not included in the proposed regulation, the Department is soliciting comment on whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches described above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices, and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?*

*Ticket pricing.* Section 36.302(f)(7) of the proposed rule addresses ticket pricing. The proposed rule codifies the Department's longstanding policy that public accommodations cannot impose a surcharge for wheelchair spaces. Accessible seating must be made available at all price levels for an event. If an existing facility has barriers to accessible seating at a particular price level for an event, then a percentage (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) of the number of accessible seats must be provided at that price level in an accessible location. In no case shall the price of any particular accessible seat exceed the price that would ordinarily be charged for an inaccessible seat in that location. For example, many theaters built prior to the passage of the ADA have balconies that are inaccessible to people who use wheelchairs, and the only wheelchair spaces are located in the orchestra level in which tickets are more expensive. If a comparably sized balcony in a theater built under the ADA's new construction standards would have two wheelchair spaces, the existing theater must sell two orchestra wheelchair spaces at the balcony price on a first come, first served basis.

*Fraudulent purchase of designated accessible seating.* The Department has received numerous comments regarding fraudulent attempts to purchase wheelchair spaces for patrons other than those who use wheelchairs. Moreover, the Department recognizes that the implementation of some of its proposals, such as those relating to the public identification of accessible

seating, increase the potential for the fraudulent purchase of accessible seats by those who do not need them. The Department continues to believe that requiring an individual to provide proof that he or she is a person with a disability is an unnecessary and burdensome invasion of privacy and may unfairly deter individuals with disabilities who seek to purchase tickets to an event.

Notwithstanding this position, the proposed rule at § 36.302(f)(8) permits public accommodations to take certain steps to address potential ticket fraud. A covered entity may inquire at the time of the ticket purchase whether the wheelchair space is for someone who uses a wheelchair. For season or subscription tickets, a facility may require the purchaser to attest in writing that the wheelchair space is for someone who uses a wheelchair. However, the proposed rule preserves the right of an individual with a disability to transfer his or her ticket for individual events and clarifies that the intermittent use of the wheelchair space by a person who does not use a wheelchair does not constitute fraud.

*Purchase of multiple tickets.* The Department has received numerous complaints that public accommodations are unfairly restricting the number of tickets that can be purchased by individuals with disabilities. Many public accommodations limit the number of tickets an individual with a disability may purchase, requiring the individual to purchase no more than two tickets (for himself or herself and a companion), while other patrons have significantly higher purchase limits (if any). This is particularly unfair for families, friends, or other groups larger than two that include a person who requires accessible seating. If the ticket number is limited, the result for wheelchair users is that parents and children, friends, classmates, and others are separated. Section 36.302(f)(9) clarifies the application of title III to ameliorate such a situation.

There are various ways that covered entities can accommodate groups that require at least one wheelchair space. The proposed regulation permits up to three companions to sit in a designated wheelchair area, platform, or cross-over aisle that is designated as a wheelchair area, even if the number of companions outnumbers the individuals requiring a wheelchair space. For example, a parent who uses a wheelchair could attend a concert with his or her spouse and their two children who do not use wheelchairs, and all four could sit together in the wheelchair area. The Department recognizes that some

advocates may object to this use of designated wheelchair areas because it will reduce the amount of accessible seating available for those who need it. On balance, however, the Department believes that the opportunity to sit with family and friends, as other patrons do, is an integral element of the experience of attending a ticketed event, and it is an element that is often denied to individuals with disabilities.

By limiting the number of tickets that can be purchased under this provision to four, the Department seeks a balance by which groups and families can be accommodated while still leaving ample space for other individuals who use wheelchairs. The Department seeks comments from individuals, business entities, and advocacy organizations on whether the proposed rule will appropriately effectuate the integration and nondiscrimination principles underlying the rule.

*Question 23: Is the proposed rule regarding the number of tickets that a public accommodation must permit individuals who use wheelchairs to purchase sufficient to effectuate the integration of wheelchair users with others? If not, please provide suggestions for achieving the same result with regard to individual and group ticket sales.*

*Group ticket sales.* Group ticket sales present another area in which the Department believes additional regulatory guidance is appropriate. The purpose of the proposed rule is to prevent the current practice of separating groups in a way that isolates or segregates those in the group who require wheelchair seating. For group sales, if a group includes one or more individuals who use a wheelchair, the proposed rule requires the facility to place that group in a seating area that includes wheelchair spaces so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from the group. In existing facilities that lack accessible seating in certain areas (e.g., a theater with an inaccessible balcony) the proposed regulation requires covered entities to seat at least three companions with the individual using a wheelchair in the accessible seating area of the orchestra.

#### *Section 36.303 Auxiliary Aids and Services*

*Captioning, narrative description, and video interpreting services.* The Department is proposing changes to § 36.303 in order to codify its longstanding policies in this area, and to

propose amendments based on technological advances and breakthroughs in the area of auxiliary aids and services since the original regulation was published more than sixteen years ago. The Department is proposing to add video interpreting services (VIS) to the regulatory text and is discussing in this preamble options for addressing captioning and narrative description.

Several types of auxiliary aids that have become more readily available have been added to § 36.303. The Department has added a new technology in § 36.303(b)(1), video interpreting services (VIS), which consists of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, the interpreter in one image and the individual who is deaf or hard of hearing in the other image. VIS can provide immediate, effective access to interpreting services seven days a week, twenty-four hours a day by allowing people in different locations to engage in live, face-to-face communications. Moreover, VIS is particularly helpful when qualified interpreters are not readily available (*e.g.*, for quick responses to emergency hospital visits, in areas with an insufficient number of qualified interpreters to meet demand, and in rural areas where distances and an interpreter's travel time present obstacles).

For purposes of clarification, the Department proposes to add to § 36.303(b)(1) the exchange of written notes as an example of an auxiliary aid or service. This common-sense example is a codification of the Department's longstanding policy with regard to title III entities, and was included in the preamble to the original regulation. See 56 FR 35544, 35566 (July 26, 1991). This additional example of an appropriate auxiliary aid or service was inserted because many entities do not realize that this easy and efficient means is available to them. While the exchange of written notes is inappropriate for lengthy or complicated communications, it can be appropriate for situations such as routine purchases in a department store or at a sports arena, or as a means of communication

while awaiting the arrival of an interpreter.

In § 36.303(b)(2), the Department proposes to insert additional examples of auxiliary aids and services for individuals who are blind or have low vision. The preamble to the 1991 title III regulation makes clear that the original list was illustrative and that "additional examples such as signage or mapping, audio description services, secondary auditory programs (SAP), telebrailers, and reading machines \* \* \* may be considered appropriate auxiliary aids and services." 56 FR 35544, 35566. Because technological advances in the seventeen years since the ADA was enacted have increased the range of auxiliary aids and services for those who are blind or have low vision, the Department has added additional examples, including brailled displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP), and accessible electronic and information technology.

The Department proposes replacing the term "telecommunications devices for deaf persons (TDD's)" with "text telephones (TTYs)" in § 36.303(b)(1). Although "TDD" is the term used in the ADA, "TTY" has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. Second, the Department has inserted in § 36.303(d)(2) additional types of auxiliary aids and services that can effectively provide telephone communication for individuals who are deaf or hard of hearing. Two of the auxiliary aids now included—public telephones equipped with volume control mechanisms and hearing aid-compatible telephones—are designed for individuals who are hard of hearing. The third added auxiliary aid or service is VIS, which is an alternative designed for individuals who are deaf. A public accommodation need not provide all of these auxiliary aids and services, but should offer those needed to provide effective communication.

*Companions.* The Department's proposed language for § 36.303(c) imposes no new obligations on places of public accommodation. The first sentence of § 36.303(c)(1) adds the phrase "and their companions," so that the sentence now reads: "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities and their companions who are individuals with disabilities." A new § 36.303(c)(1)(i) defines "companion" as "a family member, friend, or associate of a program

participant who, along with the participant, is an appropriate person with whom the public accommodation should communicate.” Section 36.303(c)(1)(ii) advises that public accommodations should be aware that the method of communication used by the individual and the nature, length, and complexity of the communication involved are factors to be considered by the public accommodation in determining what type of auxiliary aid or service is necessary. *See, e.g., Department of Justice, The Americans with Disabilities Act, Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities* (Title III TA Manual), III–4.300, available at <http://www.ada.gov/taman3.html>. For example, an individual with a disability who is deaf or hard of hearing may need a qualified interpreter to discuss with hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (*e.g., dosage, side effects, drug interactions, etc.*). In comparison, an individual who is deaf or hard of hearing who purchases an item in the hospital gift shop may only need an exchange of written notes to achieve effective communication.

The Department is proposing to add companions to the scope of coverage of § 36.303 to emphasize that the ADA applies in some instances in which a public accommodation needs to communicate with a family member, friend, or associate of the program participant in order to provide its services. Examples of such situations include when a school communicates with the parent of a child during a parent-teacher meeting or in a life-threatening situation, when a hospital needs to communicate with an injured person’s companion to obtain necessary information. In such situations, if the companion is deaf or hard of hearing, blind, has low vision, or has a disability that affects his or her speech, it is the public accommodation’s responsibility to provide appropriate auxiliary aid or service to communicate effectively with the companion. Where communication with a companion is necessary to serve the interests of a person who is participating in a public accommodation’s services, programs, or activities, effective communication must be assured.

*Companions in health care settings.* Effective communication is particularly critical in health care settings where misdiagnosis and improper or delayed medical treatment. Under the ADA, hospitals must provide effective means of communication for patients and their

companions with disabilities. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion with a disability is necessary in a variety of circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. In addition, a companion may be the patient’s next of kin or health care surrogate with whom hospital personnel communicate concerning the patient’s medical condition. Moreover, a companion could be designated by the patient to communicate with hospital personnel about the patient’s symptoms, needs, condition, or medical history. It has been the Department’s longstanding position that public accommodations are required to provide effective communication to companions when they accompany patients to medical care providers for treatment.

*Consultation on auxiliary aid or service.* A public accommodation should consult with the individual with a disability, wherever possible, to determine what auxiliary aid or service would provide effective communication. In many cases, more than one auxiliary aid or service will provide effective communication, and the individual with a disability can provide invaluable information as to what auxiliary aids are effective. For example, it could be difficult to provide effective communication using written notes involving someone with a developmental disability or in severe pain, or if a public accommodation were to provide a qualified ASL interpreter, when an individual needs an oral interpreter instead. Both examples illustrate the importance of consulting with the individual with a disability.

Proposed § 36.303(c)(2) states that a public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her. The Department is adding this language to emphasize that when a public accommodation is interacting with a person with a disability, it is the public accommodation’s responsibility to provide an interpreter to ensure that the communication is as effective as its communications with others. It is not appropriate to require the person with a disability to bring another individual to provide such services or, when an accompanying individual is present, to expect that individual to provide such services.

*Limited instances in which an accompanying individual may interpret.* Section 36.303(c)(3) codifies the Department’s policy that there are very limited instances when a public accommodation may rely on an accompanying individual to interpret or facilitate communication: (1) In an emergency involving a threat to public safety or welfare; or (2) if the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances. In such instances, the public accommodation is still required to offer to provide an interpreter free of charge. In no circumstances should a child be used to facilitate communication with a parent about a sensitive matter. The Department has produced a video and several publications that explain this and other ADA obligations in law enforcement settings. They may be viewed at <http://www.ada.gov> or ordered from the ADA Information Line (800–514–0301 (voice) or 800–514–0383 (TTY)).

Public accommodations must be aware that considerations of privacy, confidentiality, emotional involvement, and other factors may adversely affect the ability of family members or friends to facilitate communication. In addition, the Department stresses that privacy and confidentiality must be maintained. We note that covered entities, such as hospitals, that are subject to the Privacy Rules, 45 CFR parts 160, 162, and 164, of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, are permitted to disclose to a patient’s relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. The agreement need not be in writing. Covered entities should consult the HIPAA Privacy Rules regarding other ways disclosures might be able to be made to such persons.

*Telecommunications.* The Department is proposing to reorganize § 36.303(d) and make several substantive changes that reflect changing terminology and technology.

The heading “Telecommunications devices for the deaf (TDDs)” currently at § 36.303(d) is replaced by the broader heading “Telecommunications.” Paragraph (d)(1) is retitled, “Telephones” and altered to address situations in which a public accommodation must provide an effective means to communicate by telephone for individuals with disabilities, including the use of

automated attendant systems, which are electronic, automated systems and that are a common method for answering and directing incoming calls to places of public accommodation. The Department has become aware that individuals with disabilities who use TTYs or telecommunications relay services—primarily those who are deaf or hard of hearing or who have speech-related impairments—have been unable to use automated attendant systems because they are not compatible with TTYs or telecommunications relay services. Automated attendant systems often disconnect before the individual using one of these calling methods can complete the communication. The Department, therefore, proposes a new § 36.303(d)(1)(i) that requires that individuals using telecommunications relay services or TTYs must be able to connect to and use effectively any automated attendant system used by a public accommodation.

The Department declined to address this issue in the 1991 regulations because it believed that it was more appropriate for the Federal Communications Commission (FCC) to address this in its rulemaking under title IV of the ADA. See 56 FR 35544, 35567 (July 26, 1991). Because the FCC has since raised this concern with the Department and requested that the Department address it, it is now appropriate to raise this issue in the title III regulation.

As mentioned above in the discussion of § 36.303(b), the Department is replacing the term “telecommunications devices for the deaf (TDDs)” wherever it occurs throughout the proposed regulation with the term “text telephones (TTYs).” Thus, § 36.303(d)(2) is entitled, “Text telephones (TTY),” and where “TDD” is used in this portion, it is replaced by “TTY.” Aside from these updates to terminology and adjustments to the section numbering, proposed § 36.303(d)(2) is unchanged substantively from current § 36.303(d).

*Video interpreting services.* Section 36.303(f) has been added to establish performance standards for video interpreting services (VIS), a system the Department recognizes as a means to provide qualified interpreters quickly and easily. VIS also has economic advantages, is readily available, and because of advances in video technology, can provide a high quality interpreting experience. Circumventing the difficulty of providing live interpreters quickly, more public accommodations are providing qualified interpreters via VIS.

There are downsides to VIS, such as frozen images on the screen, or when an individual is in a medical care facility and is limited in moving his or her head, hands, or arms. Another downside is that the camera may mistakenly focus on an individual’s head, which makes communication difficult or impossible. In addition, the accompanying audio transmission might be choppy or garbled, making spoken communication unintelligible. Lastly, the Department is aware of complaints that some public accommodations have difficulty setting up and operating VIS, because staff have not been appropriately trained.

To address these potential problems, the Department is proposing the inclusion of four performance standards for VIS to ensure effective communication: (1) High quality, clear, real-time, full-motion video and audio over a dedicated high-speed Internet connection; (2) a clear, sufficiently large, and sharply delineated picture of the participant’s heads, arms, hands, and fingers, regardless of his or her body position; (3) clear transmission of voices; and (4) nontechnicians who are trained to set up and operate VIS quickly.

Finally, the changes enumerated above result in the current § 36.303(f), “Alternatives,” being moved to § 36.303(h).

*Captioning at movie theaters.* The Department is considering options under which it might require that movie theater owners and operators exhibit movies that are captioned for patrons who are deaf or hard of hearing. Both open and closed captioning are examples of auxiliary aids and services under the Department’s regulation. 28 CFR 36.303(b)(1). Open captions are similar to subtitles in that the text is visible to everyone in the theater, while closed captioning displays the written text of the audio only to those individuals who request it. The ADA itself contains no explicit language regarding captioning in movie theaters, but the legislative history of title III states that, “[o]pen-captioning \* \* \* of feature films playing in movie theaters, is not required by this legislation. Film makers, are, however, encouraged to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films.” H.R. Rep. No. 101–485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 389–91; S. Rep. No. 101–116 at 64 (1989). Congress was silent, however, on the question of closed captioning in movie theaters, a technology not yet developed at that time for first run movies, while

acknowledging that closed captions may be an effective auxiliary aid and service for making aurally delivered information available to individuals who are deaf or hard of hearing. See H.R. Rep. No. 101–485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 303, 391. In addition, Congress stated that “technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.” *Id.*

Similarly, in 1991, the Department stated that “[m]ovie theaters are not required \* \* \* to present open-captioned films,” but was silent as to closed captioning. 56 FR 35544, 35567 (July 26, 1991). The Department also noted, however, that “other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required to make such information accessible to persons with hearing impairments. Captioning is one means to make the information accessible to individuals with disabilities.” *Id.* The Department cited in its regulation “open and closed captioning,” as examples of auxiliary aids and services. 28 CFR 36.303(b)(1).

Captioning makes films accessible to individuals whose hearing is too limited to benefit from assistive listening devices. Technological advances since the early 1990s have made open and closed captioning for movies more readily available and effective. Movie theater owners generally do not pay for open movie captions; rather, the cost generally is absorbed by the movie studios. Originally, the captions had to be burned onto select film prints, which would be distributed to theaters around the country. These prints usually were not captioned and distributed at the same time the movie was released to the general public, but only after a film had experienced some commercial success. This technology has evolved, however, and burning captions onto individual film prints is no longer necessary. Due to advances in digital technology, captions can be turned on or off in digital format without having to use a separate film print with the hard captions burned on. As a result, captions can be superimposed onto the film at theaters. In addition, digital projection systems send all captions and audio to the theaters on a hard disk or via satellite, and a digital projector is

used to display the movie. While movie theater owners need to purchase expensive projectors in order to display digital movies, the Department understands that movie theater operators are moving to digital film and are entering into creative agreements to help finance the projectors. Open captioning can now be done before a movie is released to the public.

Closed captioning displays the written text of the audio only to those individuals who request captioning. With some closed captioning systems, the captions are displayed on the back wall of the theater as the movie is shown on the movie screen and reflected onto portable devices at the seats of patrons who are deaf or hard of hearing. Another system involves captioning that the patron receives through electronic devices, such as personal digital assistants (PDAs), using mobile wireless technology. The individual wears a pair of glasses or a head band that plugs into the PDA (*i.e.*, a wireless transmitter sends the captions to each moviegoer using the device), and that produces "floating" captions that appear as if they are several meters in front of the viewer's eyes. Significantly, more than half of the feature films produced by the major movie studios now provide some form of captioning.

While the Department has not required that the movie theater industry caption its presentations, during the mid-1990s, as closed captioning became available, the Department began requiring in certain settlement agreements that presentations be closed captioned. See Agreement Between Walt Disney World Co. and the United States (Jan. 17, 1997), available at <http://www.ada.gov/disagree.htm> (requiring captioning for film, video, and video monitors that are part of an attraction or that provide information).

The Department is aware that the courts have split on the question of whether captioning should be provided at movie theaters. See *Ball v. AMC Entm't*, 246 F. Supp. 2d 17 (D.D.C. 2003) (denying defendant movie operators' motion for summary judgment and noting that a closed captioned system is an auxiliary aid or service that could be required under the ADA); *Cornilles v. Regal Cinema*, No. Civ. 00-173-AS, 2001 WL 34041789 (D. Or. Dec. 11, 2001) (unpub. op.) (rejecting plaintiff's request that all films at a movie theater be captioned, noting that defendants already provide some captioning); *Todd v. American Multi-Cinema, Inc.*, No. Civ. A. H-02-1944, 2004 WL 1764686 (S.D. Tex. Aug. 5, 2004) (unpub. op.) (granting summary judgment for

defendant because of plaintiffs' inability to rebut defendants' claims that providing a specific type of closed captioning constituted an undue burden). The judge in the *Ball* case cited legislative history for the proposition that captioning may be required, noting that technological advances may "require public accommodations to provide auxiliary aids and services in the future which today would not be required" and that the type of accommodation and services provided \* \* \* [under the ADA] should "keep pace with the rapidly changing technology of the times." 246 F. Supp. 2d at 22 (citing H.R. Rep. No. 101-485(II) at 108).

Several state Attorney General Offices around the country have begun negotiating agreements and, in some instances, initiating lawsuits to ensure that movie theater owners and operators provide captioning at certain movie screenings.

Although captioning was not mentioned in the ANPRM, two commenters requested that captioning be provided and a movie theater owner urged the Department not to require movie theaters to provide captioning or narrative description services.

The Department is considering options under which it might require captioning for movies exhibited by public accommodations, while recognizing that the movie industry is in transition as more movies are made in digital format and movie theater owners and operators begin to purchase digital projectors. Movie theater owners and operators with digital projectors have available to them different options for providing captioning than those without digital projectors. The Department is aware of the flux in the technology used to exhibit movies and seeks comments regarding how to require captioning while the film industry transitions to a digital format. Also, the Department is concerned about the potential cost to exhibit captioned movies, although that cost may vary depending upon whether open or closed captioning is used and whether or not digital projectors are used. The Department is cognizant that the cost of captioning must stay within the parameters of the undue burden requirement in 28 CFR 36.303(a).

The Department is considering the possibility of requiring that, after the effective date of the revised regulation, a public accommodation will exhibit all new movies in captioned format at every showing. The Department would not specify which types of captioning to provide, but would instead leave that to the discretion of the movie theater owners and operators.

*Question 24: Should the Department require that, one year after the effective date of this regulation, public accommodations exhibit all new movies in captioned format at every showing? Is it more appropriate to require captioning less frequently? Should the requirement for captioning be tied to the conversion of movies from film to the use of a digital format? Please include specifics regarding how frequently captioning should be provided.*

*Narrative description.* The Department is also considering options under which it might require that movie theater owners and operators exhibit movies with narrative descriptions, which enable individuals who are blind or have low vision to enjoy movies by providing a spoken interpretation of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. The descriptions are narrated and recorded onto an audiotape or disk that can be synchronized with the film as it is projected. For example, a special reader head attached to the film projector can read a timecode track printed on the film, which then sends a signal using an infrared or FM transmitter to the theater where the narration can be heard on headsets equipped with receivers and worn by the movie patron.

As with captioning, the same two issues arise with this technology: the cost and the change to digital movies and projectors. The Department understands that the cost of narrative description equipment is less than that for closed captioning. Generally, movie studios contract with entities to provide the narrative description, and it can be done at the same time captioning is created. The Department understands that when theaters move to digital technology, both the caption data and the narrative descriptions can be embedded into the digital signal that is projected.

*Question 25: Should the Department require that, one year after the effective date of this revised regulation, a public accommodation will exhibit all new movies with narrative description? Would it be more appropriate to require narrative description less frequently? Should the requirement for narrative description of movies be tied to the use of a digital format? If so, why? Please include specifics regarding how frequently narrative description should be provided.*

*Captioning at sporting venues.* The Department is aware that individuals who are deaf or hard of hearing have expressed concerns that they are unaware of information that is provided over the public address systems.



Therefore, in § 36.303(g), the Department is proposing that sports stadiums with a capacity of 25,000 or more provide captioning for patrons who are deaf or hard of hearing for safety and emergency information announcements made over the public address system. There are various options that could be used for providing captioning, such as on a scoreboard, on a line board, on a handheld device, or other methods.

*Question 26: The Department believes that requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 has the potential of creating an undue burden for smaller entities. However, the Department requests public comment about the effect of requiring captioning of emergency announcements in all stadiums, regardless of size. Would such a requirement be feasible for small stadiums?*

*Question 27: The Department is considering requiring captioning of safety and emergency information in sports stadiums with a capacity of 25,000 or more within a year of the effective date of the regulation. Would a larger threshold, such as sports stadiums with a capacity of 50,000 or more, be more appropriate or would a lower threshold, such as stadiums with a capacity of 15,000 or more, be more appropriate?*

*Question 28: If the Department adopted a requirement for captioning at sports stadiums, should there be a specific means required? That is, should it be provided through any effective means (scoreboards, line boards, handheld devices, or other means), or are there problems with some means, such as handheld devices, that should eliminate them as options?*

*Question 29: The Department is aware that several major stadiums that host sporting events, including National Football League football games at Fed Ex Field in Prince Georges County, Maryland, currently provide open captioning of all public address announcements, and do not limit captioning to safety and emergency information. What would be the effect of a requirement to provide captioning for patrons who are deaf or hard of hearing for game-related information (e.g., play-by-play information), safety and emergency information, and any other relevant announcements?*

#### Section 36.304 Removal of Barriers

The Department is offering for public comment several proposed additions to § 36.304, which requires the removal of architectural or communications

barriers that are structural in nature when it is readily achievable to do so. These proposed additions are designed to mitigate financial burdens on covered entities, while at the same time ensuring that individuals with disabilities have access to existing facilities. Discussed below, in turn, is a proposal for a safe harbor provision and a reduced scoping option that would apply to all public accommodations, as well as a proposal for a safe harbor provision and an exemption that would apply only to qualified small businesses as defined in § 36.104.

The proposed additions stem from the Department's proposal to adopt the 2004 ADAAG and from comments the Department received in response to its ANPRM from small business advocates expressing concern with the Department's interpretation of the barrier removal requirement. The reason that the Department's proposal to adopt the 2004 ADAAG is relevant to barrier removal is that the Department approaches barrier removal by reference to the alterations standard. 28 CFR 36.304(d)(1); 56 FR 35544, 35570 (July 26, 1991). To the extent that it is readily achievable to do so, public accommodations must comply with the requirement for alterations by following the accessibility standards in Appendix A of the existing regulation. *Id.* By specifying that covered entities follow the 1991 Standards, the regulation provides clear guidance on both what constitutes a barrier and how to make an existing facility accessible to and usable by individuals with disabilities. *Id.*

Because the Department uses the 1991 Standards as a guide to identify what constitutes a barrier, the proposed standards will provide a new reference point in assessing an entity's obligations for readily achievable barrier removal. As discussed above, the 2004 ADAAG contains several changes from the 1991 Standards. Some of those changes are additions; the 2004 ADAAG introduces requirements for elements in facility types, like recreational facilities and play areas, that are not in the 1991 Standards. In other situations the changes are incremental, and were added either because of additional study by the Access Board or in order to harmonize requirements with the model codes. It is the incremental changes that are relevant to the Department's first proposed addition to § 36.304, the proposal of an element-by-element safe harbor for all public accommodations. The Department has prepared a detailed matrix that identifies both the incremental changes and the new requirements in Appendix 8 of its Regulatory Impact Analysis, which is

available for public review at <http://www.ada.gov>. The elements listed as numbers 1 through 66 on the matrix are incremental changes that the Department deems to be subject to the safe harbor.

The safe harbors discussed in the following paragraphs are available for specific building elements that comply with the 1991 Standards. If a public accommodation identified barriers but did not remove them because it was not readily achievable because of cost considerations, that public accommodation has a continuing obligation to remove those barriers if the economic considerations for the public accommodation change. For example, a business upturn may provide the ability to pay for physical changes to the facility, or technological advances may have reduced the costs of a previously expensive modification. Regardless of the reason that barrier removal has not yet been accomplished, any barrier removal undertaken after the effective date of this rule must comply with the proposed standards to the extent that it is readily achievable to do so.

*Element-by-element safe harbor for public accommodations.* The Department is proposing to amend § 36.304(d) in order to adopt a safe harbor for elements in existing facilities that comply with the 1991 Standards, or option I in the ANPRM. This provision is proposed § 36.304(d)(2). What is currently § 36.304(d)(2) in the regulation would be redesignated as § 36.304(d)(6). Specifically, the new § 36.304(d)(2) codifies a safe harbor for all elements that are in compliance with the specific requirements—both the scoping and technical specifications—of the 1991 Standards. Elements in existing facilities that are not altered after the effective date of this rule, and that comply with the 1991 Standards, are not required to be modified in order to comply with the proposed standards.

This safe harbor provision is not a blanket exemption for facilities. Compliance with the 1991 Standards is determined on an element-by-element basis in each covered facility. As noted, elements that the Access Board addressed for the first time in the supplemental guidelines (e.g., play area requirements introduced in the supplemental guidelines, etc.) would not be subject to the safe harbor. Of course, this safe harbor would have no effect on noncompliant elements. Barrier removal is an ongoing obligation. To the extent that elements in existing facilities that impose barriers are not already in compliance with the 1991 Standards, public accommodations would be required to modify such

elements to comply with the proposed standards.

The proposed safe harbor reflects the Department's determination that it would be an inefficient use of resources to require covered entities that have complied with the 1991 Standards to retrofit elements simply to comply with the proposed standards if the change provides only a minimal improvement in accessibility. To a substantial degree, the barrier has already been removed. In addition, covered entities would have a strong disincentive for voluntary compliance if, every time the applicable standards are revised, covered entities are required once again to modify elements simply to keep pace with new proposals.

The Department recognizes, however, that there are also considerations opposing this approach. While the incremental benefit of the revisions may be minimal with respect to some elements, with respect to others the proposed standards may confer a significant benefit on some individuals with disabilities that would be unavailable—except of course when public accommodations and commercial facilities undergo alterations or new construction—if this option is adopted. Because there are valid arguments on both sides of this issue, the Department sought public comment on this issue in its ANPRM.

*General comments regarding safe harbor.* The Department received numerous comments on this option in the ANPRM. Generally, covered entities favored a safe harbor, while entities representing individuals with disabilities did not. Some disability rights groups, however, favored the safe harbor, arguing that the marginal improvements in accessibility were insufficient to ask entities to retrofit elements that work for most individuals with disabilities. One disability rights group commented that proposing new standards without a safe harbor would penalize compliant businesses, who would have to pay for retrofits twice, and reward scofflaws, who would have avoided the expense of complying with the current law. Some businesses opposed the application of a safe harbor and, instead, encouraged the government to consider other avenues for reducing costs, like providing tax relief for businesses. A tax credit is already available to small businesses (as defined in the tax code), and larger businesses can receive a tax deduction. 26 U.S.C. 44.

Several disability groups and state advocacy centers felt that there was no need for a safe harbor because the statute already controls costs by limiting

required actions to what is "readily achievable." 28 CFR 36.304. The statutory defense maximizes accessibility by requiring case-specific, individualized determinations that excuse strict compliance when it is too difficult or costly. The safe harbor, by contrast, would exempt even some actions that are readily achievable. Similarly, disability rights groups objected to a blanket rule when the facilities at issue vary so greatly, arguing that large companies should be able to do more to provide accessibility than smaller businesses.

A broad cross section of industries and advocates for industry favored the safe harbor approach organizations representing retail establishments, hotels and lodging, and recreational facilities. These entities raised issues related to cost, reliance on federal law, and fair play. Industry advocates were concerned not only with the cost of making the actual changes, but also with the cost of assessing their facilities for compliance with the incremental changes, arguing that the money would be better spent on other, higher priority accessibility measures.

As noted earlier in the general discussion of the safe harbor proposals, some commenters proposed that the Department treat the proposed standards like most building codes when they are updated and apply them prospectively only. Under the International Building Code, for example, an existing structure is generally grandfathered provided that the building meets a minimum level of safety. *See* International Code Council, International Bldg. Code, Commentary, section I.206 (2003); International Existing Bldg. Code, Commentary, section 101.4 (2003).

While the Department agrees generally with the goal of aiming for consistency between the ADA Standards and building codes—indeed, great effort in the development of the 2004 ADAAG was undertaken to create consistency with building codes where possible—there are critical differences between the 2004 ADAAG and building codes. The ADA is a civil rights statute, not a building and safety code. Its primary goal is to ensure access and equality for individuals with disabilities. It is also a relatively new law, and much of the built environment remains inaccessible. Nevertheless, the Department is asking for public input on a more limited version of this approach that would exempt owners and operators of places of public accommodation from compliance with the supplemental requirements for play areas and recreation facilities.

*Specific areas of dispute.* Commenters expressed specific concern with the application of a safe harbor to four discrete areas: reach ranges, ATMs, seating in assembly areas, and access to swimming pools. Part of the reason the Department received so many comments about reach ranges and swimming pools may owe to the fact that the Department used these requirements in its ANPRM in order to illustrate the application of a safe harbor. With the exception of swimming pools, which are discussed below in § 36.304(d)(4)(ii), these concerns are addressed, in turn, in the following paragraphs.

*Maximum side reach ranges.* Reach ranges apply to a variety of building elements, including light switches, key pads, electrical outlets, fire alarm pulls, card readers, thermostats, elevator controls, pay phones, and other elements. The 2004 ADAAG includes a change in the maximum height of a side reach range from 54 inches in the current ADA Standards, to 48 inches in the 2004 ADAAG. The change related to the needs of little people, and, not surprisingly, the most vocal opposition for a safe harbor came from groups representing little people. Commenters argued that the lowered height of operable controls can mean the difference between independence and dependence. One individual argued that little people can become trapped in elevators, posing serious safety risks, when the controls are over 48 inches high. Two groups strongly opposed a safe harbor for side reach ranges, one of which estimated that the revised reach range will provide access to an additional half million individuals with disabilities.

Industry commenters asserted that requiring existing facilities to apply the new requirement would mean, among other things, that entities would be required to lower every light switch in every building to the extent it is readily achievable. One business group noted that thousands of businesses have already internalized the cost of lowering operating controls from 60 inches to 54 inches to comply with the 1991 Standards, and that an additional retrofit would require an additional commitment of funds. A small business association stated that lowering pay phones would be a significant expense to the pay phone industry, which is already incurring losses due to the introduction of cell phones on the market. Other associations expressed concerns about vending machines, most of which now comply with the 54-inch reach range.

Potential solutions that do not require structural modifications were offered by

disability advocacy groups. One national advocacy group stated that public accommodations could provide relatively low-cost solutions to the problem, such as light switch extension handles or other inexpensive alternatives to relocating operating controls. Some commenters noted that, while it is not an ideal solution, individuals of short stature may choose to carry equipment that would enable them to reach controls.

Independence and ready accessibility are significant goals in the ADA. The Department would like to hear further from individuals of short stature whether there are discrete areas—like operating controls in elevators—that are either significant to daily living or pose safety risks that cannot be ameliorated by extension handles or similar, less expensive devices. The 48-inch maximum reach range would apply fully to alterations and new construction. Similarly, elements that do not comply with the existing requirement of a 48-inch reach range would also be required to meet the new 48-inch reach range.

*ATMs.* Several commenters expressed concern about the application of a safe harbor to ATMs. Specifically, “talking ATMs”—or ATMs with speech output that are independently usable by individuals who are blind or have low vision—are an important issue for one advocacy group, as well as for the banking and ATM industries. The 1991 Standards use a performance test, requiring that “[i]nstructions and all information for use shall be made accessible to and independently usable by persons with vision impairments.” 28 CFR part 36, App. A, section 4.34.4. The 2004 ADAAG has a similar requirement that more specifically spells out what is necessary for ATMs to be speech-enabled. Under the 2004 ADAAG, there are specific design requirements for speech output, and speech must be delivered through a mechanism that is readily available to all users. See 2004 ADAAG section 707.5.

Some individuals who are blind or have low vision fear that a safe harbor would derail the efforts they have made to ensure that ATMs have speech output. The banking and ATM industries object to retrofitting all existing ATMs, arguing it requires both hardware and software changes that can be expensive in certain cases. They also argue that retrofitting is inefficient, since most machines, especially those in banks, are replaced every seven to nine years, a relatively short life span compared to other elements in facilities,

and will be updated when they are replaced.

Because new ATMs are generally equipped with speech output, this is a time-limited issue that really affects a discrete group of stand-alone ATMs in rural areas or small retail locations, like gas stations or convenience stores. Industry commenters describe a practice by which used machines in urban areas or larger banks are generally sold to smaller entities or placed in rural areas as new machines are purchased. ATMs vary in their technological sophistication, and it is more expensive to adapt the smaller, stand-alone machines.

Even though the ATM requirement appears in the 1991 Standards, the Department has traditionally treated the speech or communication element as subject to the requirements for auxiliary aids and services in § 36.303. The Department’s preamble to its regulation explained that, “[g]iven that § 36.304’s proper focus is on the removal of physical barriers, the Department believes that the obligation to provide communications equipment and devices \* \* \* is more appropriately determined by the requirements for auxiliary aids and services under § 36.303.” 56 FR 35544, 35568. When the Department later discussed ATMs as they relate to barrier removal in the 1991 regulation, the Department referred only to those aspects of the ATM that make it physically accessible to individuals with mobility disabilities. *Id.*

The safe harbor provision applies only to readily achievable barrier removal; the Department is not planning to apply a safe harbor to the requirement for auxiliary aids and services. ATMs that lack speech output are not eligible for a safe harbor. Although the Department is not applying a safe harbor to the communication-related requirements on ATMs, the Department is proposing a new section dealing with equipment that the Department hopes will resolve some of the concerns raised by both sides. The issue of whether it is permissible for an entity to purchase used ATMs that do not have speech output remains an open question, and the Department is proposing questions designed to elicit more specific feedback from the industry in the section dealing with equipment. The Department offers for comment a narrowly drawn exemption for small, stand-alone ATMs, in which entities would be allowed to purchase used ATMs without speech output in certain circumstances.

*Stadium-style theaters.* Finally, commenters expressed concern regarding the application of a safe harbor to stadium-style theaters. Lines

of sight and dispersal of wheelchair seating in assembly areas, especially in stadium-style theaters, have been the subject of litigation. The 1991 Standards require that wheelchair seating “provide people with physical disabilities a choice of admissions prices and lines of sight comparable to those for members of the general public.” The 2004 ADAAG adopts specific design guidelines for lines of sight and the dispersal of wheelchair seating. *Cf.* 28 CFR part 36, App. A, section 4.33.3; 2004 ADAAG sections 221, 802. As the Department explained in the ANPRM, however, this guideline is merely the codification of longstanding Department policy. Because the requirements in the 2004 ADAAG are not a change from that policy, entities that comply with the Department’s policy will also be in compliance with the relevant provisions in the proposed standards.

*Reduced scoping for public accommodations, small facilities, and qualified small businesses.* As noted above, the Department is still considering the possibility of developing an alternative set of reduced scoping requirements for certain elements that were not subject to specific scoping and technical requirements in the 1991 Standards. Business entities were generally in favor of exemptions and reduced scoping, although most of the comments addressed elements in compliance with technical and scoping requirements in the 1991 Standards (e.g., the maximum side reach range). Disability advocacy groups and individuals strongly objected to exemptions and to significantly reduced scoping, arguing that the 2004 ADAAG represents minimum standards, and that the readily achievable standard already provides enough flexibility to covered entities.

The Department believes that reduced scoping for a select few specifications in the context of barrier removal is a moderate and reasonable response to business entities’ concerns about the potential for increased costs of compliance and litigation risk when the Department adopts the 2004 ADAAG. Reduced scoping reflects the determination that, while some requirements make sense for alterations and new construction, in the barrier removal context they might not because of the expense or nature of the measure required. Given the disparity in size and resources among the entities that fall within the ambit of public accommodations, reduced scoping would be justified only for supplemental elements that are particularly complicated and expensive

to retrofit. Based on comments in the ANPRM and the Department's initial regulatory assessment, the Department has identified ten elements for which the Department believes reduced scoping might be appropriate for barrier removal: play areas, swimming pools, wading pools, saunas and steam rooms, exercise machines, team or player seating areas, areas of sport activity, boating facilities, fishing piers and platforms, and miniature golf courses.

*Play areas.* Sections 206.2.17, 206.7.8, and 240.1 of the 2004 ADAAG provide a detailed set of requirements for newly constructed and altered play areas. At least one ground level play component of each type provided (e.g., for different experiences such as rocking, swinging, climbing, spinning, and sliding) must be accessible and connected to an accessible route. In addition, if elevated play components are provided, entities must make at least fifty percent (50%) of the elevated play components accessible and connect them to an accessible route, and may have to make an additional number of ground level play components (representing different types) accessible as well. There are a number of exceptions to the technical specifications for accessible routes, and there are special rules (incorporated by reference from nationally recognized standards for accessibility and safety in play areas) for accessible ground surfaces. Accessible ground surfaces must be inspected and maintained regularly and frequently to ensure continued compliance.

The Department is concerned about the potential impact of these supplemental requirements on existing play areas that are not otherwise being altered. Consequently, the Department is proposing several specific provisions and posing additional questions in an effort to both mitigate and gather information about the potential burden of the supplemental requirements on existing facilities.

State and local governments may have already adopted accessibility standards or codes similar to the 2004 ADAAG requirements for play and recreation areas, but which might have some differences from the Access Board's guidelines.

*Question 30: The Department would welcome comment on whether there are state and local standards specifically regarding play and recreation area accessibility. To the extent that there are such standards, we would welcome comment on whether facilities currently governed by, and in compliance with, such state and local standards or codes should be subject to a safe harbor from compliance with applicable*

*requirements in the 2004 ADAAG. We would also welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines that would permit such a safe harbor with respect to play and recreation areas undertaking alterations.*

*Question 31: The Department requests public comment with respect to the application of these requirements to existing play areas. What is the "tipping point" at which the costs of compliance with the supplemental requirements for existing play areas would be so burdensome that the entity would simply shut down the playground?*

The Department notes that section 240.1 of the 2004 ADAAG specifies that play areas located in family child care facilities where the proprietor actually resides are exempt from the scoping and technical requirements for play areas. Thus, such family child care facility owners have no obligation to make similar changes for their existing facilities for purposes of barrier removal. According to the Access Board, these family child care facilities are typically located in private homes, serve a relatively small number of children (usually no more than twelve) at any given time, and install simple and inexpensive playground equipment for which accessible products are less likely to be readily available. For such facilities, moreover, the cost of providing an accessible ground surface could far exceed the cost of the equipment itself, increasing the likelihood that the home owner will simply decide not to provide any playground equipment. While this exception may limit the accessibility of play areas in home-based child care facilities, such facilities would remain subject to the ADA's general requirement to ensure that individuals with disabilities have an equal opportunity to enjoy the services of their facilities.

The Department proposes to add § 36.304(d)(4)(i) to provide that, for purposes of the readily achievable barrier removal requirement, existing play areas that are less than 1,000 square feet in size are exempt from the scoping and technical requirements for play areas in the 2004 ADAAG found in section 240 of the proposed standards. The Department selected this size based on the provision in section 1008.2.4.1 of the 2004 ADAAG, Exception 1, permitting play areas less than 1,000 square feet in size to provide accessible routes with a reduced clear width (44 inches instead of 60 inches). In its 2000 regulatory assessment for the play area guidelines, the Access Board assumed

that such "small" play areas represent one hundred percent (100%) of the play areas located in restaurants, the largest proportion (between sixty to eighty percent (60–80%)) of the play areas located in hotels and day care facilities, and about twenty percent (20%) of the play areas located in schools. (The Access Board assumed that play areas in city and state parks are typically larger than 1,000 square feet.) If these assumptions are correct, the proposed exemption would have the greatest impact upon existing play areas located in restaurants, hotels, and day care facilities and would have relatively little impact on existing play areas located in schools or parks.

*Question 32: The Department would like to hear from public accommodations and individuals with disabilities about the potential effect of this approach. Should existing play areas less than 1,000 square feet be exempt from the requirements applicable to play areas?*

The Department also proposes to add § 36.304(d)(3)(i) to provide that, for purposes of the readily achievable barrier removal requirement, existing play areas will be permitted to meet a reduced scoping requirement with respect to their elevated play components. Elevated play components are play components that are approached above or below grade and that are part of a composite play structure consisting of two or more components that are attached or functionally linked to create an integrated unit providing more than one play activity. The proposed standards provide that a play area that includes both ground level and elevated play components must ensure that a specified number of the ground level play components and at least fifty percent (50%) of the elevated play components are accessible.

Many commenters advised the Department that making elevated play components accessible in the barrier removal context would exceed what is readily achievable for most facilities. Given the nature of the element at issue, retrofitting existing elevated play components in play areas to meet the scoping and technical specifications in the alteration standard would be difficult and costly, and in some instances, infeasible. In response to expressed concerns, the Department proposes to reduce the scoping for existing play areas undertaking barrier removal by permitting entities to substitute ground level play components for elevated play components. Entities that provide elevated play components that do not

comply with the 2004 ADAAG section 240.2.2 would be deemed in compliance with their barrier removal obligations as long as the number of accessible ground level play components is equal to the sum of (a) the number of ground level play components required to comply with the 2004 ADAAG section 240.2.1 (as provided by Table 240.2.1.2, but at least one of each type) and (b) the number of elevated play components required to comply with the 2004 ADAAG section 240.2.2 (namely, fifty percent (50%) of all elevated play components). In existing play areas that provide a limited number of ground level play components, qualifying for this exception may require providing additional ground level play components.

While this provision may result in less accessibility than the application of the alteration standard where readily achievable, public accommodations will likely be more willing to voluntarily undertake barrier removal measures in play areas if they anticipate that compliance will be straightforward and readily achievable in most instances. In addition, for existing play areas with limited resources, it will often be more efficient to devote resources to making the ground surface of the play area accessible, which is necessary to provide an accessible route to any play components. Reduced scoping for elevated play components could also minimize the risk that covered entities will delay compliance, remove elevated play components, or simply close the play area. It also provides a bright-line rule for which compliance can be easily evaluated.

*Question 33: The Department would like to hear from public accommodations and individuals with disabilities about the potential effect of this approach. Should existing play areas be permitted to substitute additional ground level play components for the elevated play components it would otherwise have been required to make accessible?*

*Question 34: The Department would welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines for play and recreational facilities undertaking alterations that would permit reduced scoping of requirements or substitution of ground level play components in lieu of elevated play components, as the Department is proposing with respect to barrier removal obligations for certain play or recreational facilities.*

The Department is also considering reducing the scoping for sites with multiple existing play areas designed for

the same age group. Where separate play areas are provided within a single site, even if each play area serves the same age group and provides the same types of play components, the 2004 ADAAG would require each play area to comply. In existing facilities that are not being altered, where multiple play areas designed for a particular age group are provided, the Department is considering requiring only one play area to be made accessible.

*Question 35: Should the Department require only one play area of each type to comply in existing sites with multiple play areas? Are there other select requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping?*

*Swimming pools.* The Department is proposing two specific provisions to minimize the potential impact of the supplemental requirements on existing swimming pools. First, the Department is proposing to add § 36.304(d)(3)(ii) to provide that, for purposes of the readily achievable barrier removal requirement, swimming pools that have at least 300 linear feet of swimming pool wall will be required to provide only one (rather than two) accessible means of entry, which must be a sloped entry or a pool lift. This provision represents a less stringent requirement than section 242.2 of the 2004 ADAAG, which requires such pools, when newly constructed or altered, to provide two accessible means of entry. Under this proposal, for barrier removal purposes, public accommodations would be required to have at least one accessible entry where readily achievable to do so.

Commenters responding to the ANPRM noted that the two-means-of-entry-standard, if applied in the barrier removal context, will disproportionately affect small businesses, both in terms of the cost of implementing the standard and anticipated litigation costs. Larger covered entities benefit from economies of scale, which are not available to small businesses. Although complying with the alteration standard will not be readily achievable for many small businesses (at least not complete compliance), the litigation-related costs of proving that compliance is not readily achievable may be significant. Moreover, these commenters argue, the immediacy of perceived noncompliance with the standard—it will usually be readily apparent whether a public accommodation has the required accessible entry or entries—makes this element particularly vulnerable to serial ADA litigation. The reduced scoping would apply to all existing public accommodations, regardless of size.

The Department recognizes that this approach could reduce the accessibility of larger swimming pools compared to the requirements in the 2004 ADAAG. Individuals with disabilities and advocates were particularly concerned about the accessibility of pools, and noted that for many people with disabilities, swimming is one of the few types of exercise that is generally accessible and, for some people, can be an important part of maintaining health. Other commenters noted that having two accessible means of egress from a pool can be a significant safety feature in the event of an emergency. It may be, however, that as a practical matter the reduction in scoping may not be significant, as the measures required to meet the alteration standards for accessible entries would often not be readily achievable even if considered on a case-by-case basis.

*Question 36: The Department would like to hear from public accommodations and individuals with disabilities about this exemption. Should the Department allow existing public accommodations to provide only one accessible means of access to swimming pools more than 300 linear feet long?*

The Department also proposes to add § 36.304(d)(4)(ii) to provide that, for purposes of the readily achievable barrier removal requirement, existing swimming pools that have less than 300 linear feet of swimming pool wall will be exempt from the provisions of section 242.2 of the 2004 ADAAG. In its 2002 regulatory assessment for the recreation guidelines, the Access Board assumed that pools with less than 300 feet of linear pool wall would represent ninety percent (90%) of the pools in high schools; eighty percent (80%) of the pools in hotels and motels; seventy percent (70%) of the pools in exercise and sports facilities; forty percent (40%) of the pools in public parks and community centers (e.g., YMCAs); and thirty percent (30%) of the pools in colleges and universities.

*Question 37: The Department would like to hear from public accommodations and individuals with disabilities about the potential effect of this approach. Should existing swimming pools with less than 300 linear feet of pool wall be exempt from the requirements applicable to swimming pools?*

Finally, the Department is interested in collecting information regarding the number of existing facilities that provide more than one swimming pool on a site. The Department is considering creating an exception that would permit existing facilities with multiple

swimming pools on a site to make only one of each type of swimming pool accessible.

*Question 38: What types of facilities provide more than one swimming pool on a site? In such facilities, do the pools tend to be identical or do they differ in type (e.g., in size, configuration, function, or use)?*

*Wading pools.* Section 242.3 of the 2004 ADAAG provides that newly constructed or altered wading pools must provide at least one sloped means of entry to the deepest part of the pool. The Department is concerned that installing a sloped entry in existing wading pools may not be feasible for a significant proportion of covered entities and is considering creating an exemption for existing wading pools that are not being altered. The Department is also interested in collecting information regarding the number of existing facilities that provide more than one wading pool on a site. As an alternative to an exemption for all existing wading pools, the Department is considering creating an exception that would permit existing facilities with multiple wading pools on a site to make only one of each type of pool accessible.

*Question 39: What site constraints exist in existing facilities that could make it difficult or infeasible to install a sloped entry in an existing wading pool? Should existing wading pools that are not being altered be exempt from the requirement to provide a sloped entry? What types of facilities provide more than one wading pool on a site? In such facilities, do the pools tend to be identical or do they differ in type (e.g., in size, configuration, function or use)?*

*Saunas and steam rooms.* The Department is proposing one specific provision to minimize the potential impact of the supplemental requirements on existing saunas and steam rooms. Section 241 of the 2004 ADAAG requires newly constructed or altered saunas and steam rooms to meet accessibility requirements, including accessible turning space and an accessible bench. Where saunas or steam rooms are provided in clusters, five percent (5%), but at least one sauna or steam room in each cluster, will have to be accessible. The Department understands that many saunas are manufactured (pre-fabricated) and come in standard sizes (e.g., two-person or four-person), and that the two-person size may not be large enough to meet the turning space requirement. Therefore, the Department proposes in § 36.304(d)(4)(iii) to specify that, for purposes of the readily achievable barrier removal requirement, existing

saunas or steam rooms that have a capacity of only two persons are exempt from the scoping and technical requirements for saunas and steam rooms in section 241 of the 2004 ADAAG. While this exception may limit the accessibility of small existing saunas or steam rooms, such facilities would remain subject to the ADA's general requirement to ensure that individuals with disabilities have an equal opportunity to enjoy the services and amenities of their facilities.

*Exercise machines.* Sections 206.2.13 and 236 of the 2004 ADAAG require one of each type of fixed exercise machine to meet clear floor space specifications and to be on an accessible route. Types of machines are generally defined according to the muscular groups exercised or the kind of cardiovascular exercise provided.

*Question 40: Will existing facilities have to reduce the number of available exercise equipment and machines in order to comply? What types of space limitations would affect compliance?*

*Team or player seating areas.* Section 221.2.1.4 of the 2004 ADAAG requires one or more wheelchair spaces to be provided in each team or player seating area with fixed seats, depending upon the number of seats provided for spectators. For bowling lanes, the requirement would be limited to lanes required to be accessible.

*Question 41: Are team or player seating areas in certain types of existing facilities (e.g., ice hockey rinks) more difficult to make accessible due to existing designs? What types of existing facilities typically have design constraints that would make compliance with this requirement infeasible?*

*Areas of sport activity.* Sections 206.2.2 and 206.2.12 of the 2004 ADAAG require each area of sport activity (e.g., courts and playing fields, whether indoor or outdoor) to be served by an accessible route. In court sports, the accessible route would also have to directly connect both sides of the court. The Department is considering limiting the application of this requirement in existing facilities that have multiple areas of sport activity that serve the same purpose. For example, in existing facilities with multiple soccer fields of a similar size, the Department may interpret the readily achievable barrier removal requirement to require that a reasonable number but at least one soccer field (rather than all of them) be served by an accessible route.

*Question 42: Should the Department interpret the barrier removal requirement to require only a reasonable number but at least one of each type of*

*playing field to be served by an accessible route? Should the Department create an exception to this requirement for existing courts (e.g., tennis courts) that have been constructed back-to-back without any space in between them?*

*Boating facilities.* Sections 206.2.10, 235.2, and 235.3 of the 2004 ADAAG require a specified number of boat slips and boarding piers at boat launch ramps to be accessible and connected to an accessible route. In existing boarding piers, the required clear pier space may be perpendicular to and extend the width of the boat slip if the facility has at least one accessible boat slip, providing that more accessible slips would reduce the total number (or widths) of existing boat slips. Accessible boarding piers at boat launch ramps must comply with the requirements for accessible boat slips for the entire length of the pier. If gangways (only one end of route is attached to land) and floating piers (neither end is attached to land) are involved, a number of exceptions are provided from the general standards for accessible routes in order to take into account the difficulty of meeting accessibility slope requirements due to fluctuations in water level. In existing facilities, moreover, gangways need not be lengthened to meet the requirement (except, in an alteration, as may be required by the path of travel requirement).

*Question 43: The Department is interested in collecting data regarding the impact of these requirements in existing boating facilities. Are there issues (e.g., space limitations) that would make it difficult to provide an accessible route to existing boat slips and boarding piers at boat launch ramps? To what extent do the exceptions for existing facilities (i.e., with respect to boat slips and gangways) mitigate the burden on existing facilities?*

*Fishing piers and platforms.* Sections 206.2.14 and 237 of the 2004 ADAAG require at least twenty-five percent (25%) of railings at fishing piers and platforms to be no higher than 34 inches high, so that a person seated in a wheelchair can fish over the railing, to be dispersed along the pier or platform, and to be on an accessible route. (An exception permits railings to comply instead with the model codes, which permit railings to be 42 inches high.) If gangways (where only one end of route is attached to land) and floating piers (where neither end is attached to land) are involved, a number of exceptions are provided from the general standards for accessible routes in order to take into account the difficulty of meeting

accessibility slope requirements due to fluctuations in water level. In existing facilities, moreover, gangways need not be lengthened to meet the requirement (except, in an alteration, as may be required by the path of travel requirement).

*Question 44: The Department is interested in collecting data regarding the impact of this requirement on existing facilities. Are there issues (e.g., space limitations) that would make it difficult to provide an accessible route to existing fishing piers and platforms?*

*Miniature golf courses.* Sections 206.2.16, 239.2, and 239.3 of the 2004 ADAAG require at least fifty percent (50%) of the holes on miniature golf courses to be accessible and connected to an accessible route (which must connect the last accessible hole directly to the course entrance or exit); generally, the accessible holes would have to be consecutive ones. Specified exceptions apply to accessible routes located on the playing surfaces of holes.

*Question 45: The Department is considering creating an exception for existing miniature golf facilities that are of a limited total square footage, have a limited amount of available space within the course, or were designed with extreme elevation changes. If the Department were to create such an exception, what parameters should the Department use to determine whether a miniature golf course should be exempt?*

*Scope of coverage.* As illustrated by the above discussion, the 2004 ADAAG introduces supplemental scoping and technical requirements for play areas and recreation facilities that apply to elements and spaces—e.g., playgrounds and swimming pools—that are found in a variety of different types of facilities. In light of these supplemental requirements and their potentially wide-ranging application, the Department wishes to emphasize that the types of private entities covered under title III are unchanged by the proposed rule, and to reiterate the criteria that determine whether an entity is exempt from coverage under the ADA. In addition, the Department notes that certain types of facilities, while they may be exempt from the coverage of the ADA, may nonetheless be subject to the accessibility requirements of other federal laws.

Private clubs (e.g., country clubs and civic organizations) are generally exempt from title III. Under the ADA, the definition of a private club is based on title II of the Civil Rights Act of 1964 and related case law. Generally, entities are considered private clubs where members exercise a high degree of control over club operations; the

membership selection is highly selective; substantial membership fees are charged; the entity is operated on a nonprofit basis; and the club was not founded specifically to avoid compliance with federal civil rights laws. For example, a country club may qualify as a private club and have a golf course on its grounds. If the golf course is for the exclusive use of club members and their guests, the golf course is not a public accommodation covered by title III. However, if the country club allows nonmembers to pay a fee to play golf, the golf course is a public accommodation and is subject to title III. The country club's other operations and facilities, however, would remain exempt if they were exclusive to members.

Religious organizations and entities controlled by religious organizations, including places of worship, are also exempt from the coverage of title III. This exemption is intended to have a broad application and covers all of the activities of a religious entity, whether they are religious or secular. For example, a religious organization that operates a child care facility that includes a playground, even if the child care facility is open to nonmembers, is exempt from the requirements of the ADA despite the fact that the facility would otherwise qualify as a public accommodation under title III. However, it should be noted that religious organizations that receive federal financial assistance are not exempt from the responsibility to comply with the requirements of section 504 or any other applicable federal statute that prohibits discrimination on the basis of disability in federally assisted programs.

Finally, facilities governed by homeowners associations or similar organizations may be covered by the Fair Housing Act (FHA) and subject to HUD's jurisdiction, rather than title III of the ADA, or they may be covered by both the FHA and title III. The distinguishing feature is whether use of the facilities in question is limited exclusively to owners, residents, and their guests, or if the facilities are made available to the public. For example, a development governed by a homeowners association that includes a swimming pool may be covered by the FHA only, or both the FHA and the ADA. The residences and other areas provided for the exclusive use of residents and their guests are covered by the FHA. If the swimming pool is available only to residents and their guests, it would be covered by the FHA only. However, if the pool is also available to members of the public who buy pool memberships, the pool would

qualify as a public accommodation and would be subject to the requirements of title III.

*Safe harbor for qualified small businesses regarding what is readily achievable.* The Department is offering for public comment a modification to the barrier removal requirement at § 36.304(d)(5) that provides a safe harbor for qualified small businesses as defined in § 36.104. Pursuant to this safe harbor, a qualified small business would have met its readily achievable barrier removal obligations for a given year if, in the preceding tax year, it spent at least one percent (1%) of its gross revenues on barrier removal. In so doing, the Department wishes to promulgate a rule that will benefit a broad class of small businesses by providing a level of certainty in short-term and long-term planning with respect to barrier removal. An effective rule would also provide some protection, through diminished litigation risks, to small businesses that undertake significant barrier removal projects. The Department received many comments from the small business community urging it to consider changing its approach to barrier removal.

The Department seeks public input on this safe harbor for readily achievable barrier removal, and, specifically, solicits advice on whether one percent (1%) is the appropriate level of expenditure. Another business group, which proposed a similar scheme, suggested that the Department propose that small businesses spend five percent (5%) of their net revenues. The Department believes from its experience in enforcing the ADA that the relevant expenditure should be a percentage of gross, rather than net, revenues in order to avoid the effect of differences in bookkeeping practices and to maximize accessibility consistent with congressional intent. The Department recognizes, however, that entities with similar gross revenues may have very different net revenues, and that this difference may significantly affect what is readily achievable for a particular entity. Such an approach places significant importance on getting the right percentage of revenues that should be considered.

Any formulaic approach, even for a subset of the public accommodations covered by the ADA, is a departure from the Department's current position on barrier removal. During the Department's rulemaking for the regulation published in 1991, the issue of barrier removal received significant attention. Advocacy groups both for individuals with disabilities and private

businesses requested specific guidance on what measures were required for barrier removal. Commenters were concerned that, absent a standard, unsafe or ineffective design practices might be undertaken. The Department's current rule reflects the view of many commenters that requiring public accommodations to comply with the alteration standards, where readily achievable to do so, promotes certainty and good design.

SBREFA requires the Department to consider alternative means of compliance for small businesses. 5 U.S.C. 603(c). To comply with this obligation, the Department is soliciting public comment on the possibility of providing a safe harbor to qualified small businesses that have spent at least one percent (1%) of their gross revenues to remove architectural, communication, or transportation barriers.

*Question 46: Should the Department adopt a presumption whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during the previous tax year, the entity spent at least one percent (1%) of its gross revenues on barrier removal? Why or why not? Is one percent (1%) an appropriate amount? Are gross revenues the appropriate measure? Why or why not?*

#### *Section 36.308 Seating in Assembly Areas*

The Department is proposing to revise this section to be consistent with revisions in the proposed requirements applicable to new construction and alterations. The purpose of the section is unchanged: To establish the barrier removal requirements for assembly areas. Sections 36.308(a)(1) and (b) have been revised to include an express requirement to provide companion seats and designated aisle seats.

Section 36.308(a)(1)(ii)(A) and (B) have been revised to provide that wheelchair and companion seats must be an integral part of the seating area, dispersed to all accessible seating levels, and that the locations must provide viewing angles to the screen, performance area, or other focal point that are equivalent to or better than the average viewing angles provided to all other spectators.

Proposed § 36.308(a)(1)(iii) provides that companion seats may be fixed or movable and that they shall be equivalent in size, quality, comfort, and amenities to the other seats in the assembly area.

A new § 36.308(c)(1) has been added to provide that when an assembly area has designated seating sections that

provide spectators with distinct services or amenities that are not generally available to other spectators, the facility must ensure that wheelchair seating spaces and companion seating are provided in each specialty seating area. The number of wheelchair seating spaces and companion seating provided in specialty seating areas shall be included in, rather than being additive to, wheelchair space requirements set forth in table 221.2.1.1 in the proposed standards.

Proposed § 36.308(c)(2) requires that, to the extent possible, wheelchair users shall be permitted to purchase companion tickets on the same terms that tickets are made available to other members of the public. In assembly areas with seating capacities exceeding 5,000, each of five designated wheelchair spaces shall have at least three companion seats (*i.e.*, five groups of four seats, each group including a wheelchair space) in order to provide more flexible seating arrangements for families and other small groups. The group companion seats required by this section may be located adjacent to either the wheelchair location or other companion seats. The Department is proposing this requirement to address complaints from many wheelchair users that the practice of providing a strict one-to-one relationship between wheelchair locations and companion seating often prevents family members from attending events together.

#### *Section 36.309 Examinations and Courses*

Section 309 of the ADA is intended to fill the gap that is created when licensing, certification, and other testing authorities are not covered by section 504 or title II of the ADA, and to ensure that individuals with disabilities are not excluded from educational, professional, or trade opportunities because examinations or courses are offered in a place or manner that is not accessible. *See* 42 U.S.C. 12189. Through its enforcement efforts, the Department has discovered that the requests made by testing entities for documentation regarding the existence of an individual's disability and her or his need for a modification or an auxiliary aid or service are often inappropriate or burdensome. The proposed rule attempts to address this problem.

Section 36.309(b) as revised states that while it is appropriate for a testing entity to require that an applicant document the existence of a disability in order to establish that he or she is entitled to testing modifications or aids, the request for documentation must be

appropriate and reasonable. Requested documentation should be narrowly tailored so that the testing entity can ascertain the nature of the disability and the individual's need for the requested modification or auxiliary aid. Generally, a testing entity should accept without further inquiry documentation provided by a qualified professional who has made an individualized assessment of the applicant. Appropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, accommodation, or classification, such as eligibility for a special education program. When an applicant's documentation is recent and demonstrates a consistent history of a diagnosis, there is no need for further inquiry into the nature of the disability. A testing entity should consider an applicant's past use of a particular auxiliary aid or service.

Finally, a private entity should respond in a timely manner to requests and should provide applicants with a reasonable opportunity to supplement their requests with additional information, if necessary. Failure by the testing entity to act in a timely manner and making requests of unnecessary magnitude could result in the sort of delay that amounts to a denial of equal opportunity or equal treatment.

#### *Section 36.311 Mobility Devices*

Proposed § 36.311 has been added to provide additional guidance to public accommodations about the circumstances in which power-driven mobility devices must be accommodated.

As discussed earlier in this NPRM, this proposal is in response to growing confusion about what types of mobility devices must be accommodated. The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized for locomotion purposes riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices that are not designed for indoor use or exclusively used by people with disabilities. Indeed, there has been litigation about whether the ADA requires covered entities to allow people with disabilities to use their EPAMDs like users of traditional wheelchairs. Individuals with disabilities have sued several shopping malls in which businesses refused to allow a person with a disability to use an EPAMD. *See, e.g., Sarah Antonacci, White Oaks Faces Lawsuit over Segway, State Journal-Register, Oct. 9, 2007, available at <http://www.sj-r.com/news/>*



*stories/17784.asp*; Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE 6 News, July 26, 2005, available at <http://www.wate.com/Global/story.asp?s=3643674>. The Department believes clarification on what the ADA requires is necessary at this juncture.

Section 36.311(a) reiterates the general rule that public accommodations shall permit individuals using wheelchairs, scooters, and manually powered mobility aids, including walkers, crutches, canes, braces, and similar devices, in any areas open to pedestrians. The regulation underscores this general proposition because the great majority of mobility scooters and wheelchairs must be accommodated under nearly all circumstances in which title III applies.

Section 36.311(b) adopts the general requirement in the ADA that public accommodations must make reasonable modifications to their policies, practices, and procedures when necessary to enable an individual with a disability to use a power-driven mobility device to participate in its services, programs, or activities unless doing so would result in a fundamental alteration of their services, programs, or activities.

If a public accommodation restricts the use of power-driven mobility devices by people without disabilities, then it must develop policies addressing which devices and under what circumstances individuals with disabilities may use power-driven mobility devices for the purpose of mobility. Under the Department's proposed regulation in § 36.311(c), public accommodations must adopt policies and procedures regarding the accommodation of power-driven mobility devices other than wheelchairs and scooters that are designed to assess whether allowing an individual with a disability to use a power-driven mobility device is reasonable and does not result in a fundamental alteration to its programs, services, or activities. Public accommodations may establish policies and procedures that address and distinguish among types of mobility devices.

For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing EPAMDs by members of the general public.

Section 36.311(c) lists permissible factors that a public accommodation may consider in determining whether the use of different types of power-driven mobility devices by individuals with disabilities may be permitted. In developing policies, public accommodations should group power-driven mobility devices by type (e.g., EPAMDs, golf cars, gasoline-powered vehicles, wheelchairs designed for outdoor use, and other devices). A blanket exclusion of all devices that fall under the definition of other power-driven mobility devices in all locations would likely violate the proposed regulation.

The factors listed in § 36.311(c)(1) through (3) may be used in order to develop policies regarding the use of other power-driven mobility devices by people with disabilities. The dimensions, weight, and other characteristics of the mobility device in relation to a wheelchair or scooter, as well as the device's maneuverability and speed, may be considered. Another permissible consideration is the potential risk of harm to others by the operation of other power-driven mobility devices. The use of gasoline-powered golf cars by people with disabilities inside a building may be prohibited, for example, because the exhaust may be harmful to others. A mobility device that is unsafe to others would not be reasonable under the proposed regulation. Additionally, the risk of harm to the environment or natural or cultural resources or conflicts with federal land management laws and regulations are also to be considered. The final consideration is the ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

While a public accommodation may inquire into whether the individual is using the device due to a disability, the entity may not inquire about the nature and extent of the disability, as provided in § 36.311(d).

The Department anticipates that, in many circumstances, allowing the use of unique mobility devices by individuals with disabilities will be reasonable to provide access to a public accommodation's services, programs, and activities, and that in many cases it will not fundamentally alter the public accommodation's operations and services. On the other hand, the use of mobility devices that are unsafe to others, or unusually unwieldy or disruptive, is unlikely to be reasonable and may constitute a fundamental alteration.

Consider the following examples:

*Example 1:* Although people who do not have mobility disabilities are prohibited from operating EPAMDs at a theme park, the public accommodation has developed a policy allowing people with disabilities to use EPAMDs as their mobility device at the theme park. The policy states that EPAMDs are allowed in all areas of the theme park that are open to pedestrians as a reasonable modification to its general policy on EPAMDs. The public accommodation determined that the venue provides adequate space for a larger device such as an EPAMD and that it does not fundamentally alter the nature of the theme park's goods and services. The theme park's policies do, however, require that EPAMDs be operated at a safe speed limit. A theme park employee may inquire at the ticket gate whether the device is needed due to the user's disability and also inform an individual with a disability using an EPAMD that the theme park's policy requires that it be operated at or below the designated speed limit.

*Example 2:* A luxury cruise ship has developed a policy regarding the use of EPAMDs by individuals with disabilities on the ship. In developing the policy, the public accommodation has considered the dimensions of the EPAMD, including its height, in relation to the common areas of the ship and the safety of other passengers. Since the cruise ship in this example is large, there are many areas where a person using an EPAMD can be easily accommodated, including decks and spaces where passengers routinely walk and exercise, under certain weather conditions. However, the dimensions of the ship, as on most such vessels, are more compact than analogous features of facilities on land and may contain thresholds and other features that present obstacles to some EPAMDs. Therefore, with respect to some areas, such as the passageways in cabin areas where the spaces are narrow and ceilings are low, the cruise ship may determine that allowing an individual with a disability to use an EPAMD for mobility would result in a fundamental alteration to some of the cruise ship areas. In these constricted areas, the cruise ship staff may offer a wheelchair or other means of locomotion where the EPAMD would be inappropriate. If the cruise ship in this example is smaller, it may be necessary for the staff to restrict the use of EPAMDs in most or all areas.

The Department is seeking public comment on the proposed definitions and policy concerning wheelchairs and other mobility devices.

*Question 47:* Are there types of personal mobility devices that must be accommodated under nearly all circumstances? Conversely, are there types of mobility devices that almost always will require an assessment to determine whether they should be accommodated? Please provide examples of devices and circumstances in your responses.

*Question 48:* Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain

vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?

*Question 49: Should personal mobility devices used by individuals with disabilities be categorized by intended purpose or function, by indoor or outdoor use, or by some other factor? Why or why not?*

#### **Subpart D—New Construction and Alterations**

Subpart D establishes the title III requirements applicable to new construction and alterations. The Department is proposing to amend this subpart to adopt the proposed standards and to make related changes to give effect to these changes, as described below.

##### *Section 36.403 Alterations and Path of Travel*

The Department is proposing one change to § 36.403 on alterations and path of travel by adding a path of travel safe harbor. Proposed § 36.403(a)(1) states that if a private entity has constructed or altered required elements of a path of travel in accordance with the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the proposed standards solely because of an alteration to a primary function area served by that path of travel. The Department is not proposing any additional changes to §§ 36.402 through 36.405, which establish requirements for alterations. Some commenters suggested that the definition of alteration be modified to provide more guidance on what actions trigger application of the proposed standards generally, and the extent to which an alteration triggers an additional path of travel obligation.

Consequently, the Department is proposing a safe harbor to clarify alteration requirements as they pertain to path of travel. One commenter noted that changing a door lock on a hotel guest room would trigger requirements to make the path of travel accessible. This suggestion is expressly rejected by the language of the existing regulation in § 36.403(c)(2), which makes clear that “alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.” Commenter suggestions that painting and wallpapering be expressly excluded from the definition of alterations are similarly unnecessary as both the 1991

Standards and the proposed standards provide in the definition of “alteration” that “[n]ormal maintenance, reroofing, painting or wallpapering \* \* \* are not alterations unless they affect the usability of the building or facility.”

##### *Section 36.406 Standards for New Construction and Alterations*

##### *Section 36.406(a)(2) Applicable Standards*

Section 306 of the ADA, 42 U.S.C. 12186, directs the Attorney General to issue regulations to implement title III that are consistent with the guidelines published by the Access Board. Commenters suggested that the Department should not adopt the 2004 ADAAG, but should develop an independent regulation. The Department is a statutory member of the Access Board and was actively involved in the development of the 2004 ADAAG. Because of the Department’s long involvement in the process to develop the 2004 ADAAG, the Department does not believe that it is necessary or appropriate to begin that lengthy process anew. Nevertheless, during the process of drafting this NPRM, the Department has reviewed the 2004 ADAAG to determine if additional regulatory provisions are necessary. As a result of this review, the Department has decided to propose new sections, which are contained in §§ 36.406(b)–(g), to clarify how the Department will apply the proposed standards to social service establishments, housing at places of education, assembly areas, and medical care facilities. Each of these provisions is discussed below.

The Department is proposing to adopt the proposed standards and to establish the effective date and triggering event for the new coverage. Specifically, the Department is proposing to amend § 36.406(a) by dividing it into two sections. Proposed § 36.406(a)(1) specifies that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences less than six months after the effective date of the proposed rule. Proposed § 36.406(a)(2) specifies that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences six months or more after the effective date. The Department is also proposing to delete the advisory information now published in a table at § 36.406(b).

The ANPRM gave notice that the Department must determine when the proposed standards will apply to newly constructed facilities following the

publication of a final rule by establishing: (1) The effective date after publication of the final rule; and (2) the triggering event for compliance with the proposed standards (*i.e.*, the event or action that compels compliance with the proposed standards).

Attachment A to this proposed rule is an analysis of the major changes in the proposed standards and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. In addition to those comments, the Department also received some comments that raised issues concerning the scope of the coverage of the proposed standards, the Department’s decision to adopt them, and the established methods of interpretation. Comments discussing the costs and benefits of the proposed standards will be addressed in the discussion of the Department’s regulatory impact analysis. Comments on the effect of the proposed standards on existing facilities will be discussed in conjunction with the analysis of § 36.304 of this proposed rule. The remaining comments addressed global issues, such as the Department’s proposal to adopt the 2004 ADAAG as the ADA Standards for Accessible Design without significant changes and the application of the proposed standards to employee areas.

Several commenters, including individual business owners and organizations representing business interests, questioned the application of the proposed standards to employee work areas, maintaining that all employment issues should be subject to title I of the ADA, 42 U.S.C. 12111 *et seq.* These comments indicate a fundamental misunderstanding of the statutory scope of title III coverage and the scope of the 1991 Standards.

The commenters correctly observed that title I prohibits discrimination against individuals with disabilities employed in a business that has fifteen or more employees. Title III has no direct effect on that employer/employee relationship, but does establish requirements for the design, construction, or alteration of both public accommodations and commercial facilities, 42 U.S.C. 12183. As the Department explained in the preamble to its 1991 NPRM to implement title III:

Commercial facilities are those facilities that are intended for nonresidential use by a private entity and whose operations affect commerce. \* \* \* [T]he new construction and alteration requirements of subpart D of the [1991] rule apply to all commercial facilities, whether or not they are places of public accommodation. Those commercial facilities that are not places of public

accommodation are not subject to the requirements of subparts B and C (e.g., those requirements concerning auxiliary aids and general nondiscrimination provisions).

Congress recognized that the employees within commercial facilities would generally be protected under title I (employment) of the Act. However, as the House Committee on Education and Labor pointed out, “[t]o the extent that new facilities are built in a manner that make[s] them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees.” H.R. Rep. No. 101–485, Part 2, at 117 (1990). \* \* \* While employers of fewer than 15 employees are not covered by title I’s employment discrimination provisions, there is no such limitation with respect to new construction covered under title III. Congress chose not to so limit the new construction provisions because of its desire for a uniform requirement of accessibility in new construction, because accessibility can be accomplished easily in the design and construction stage, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is a place of public accommodation is always a possibility.

56 FR 7455 (Feb. 22, 1991). The Department’s proposed rule merely continues this long-standing interpretation of title III’s application to commercial facilities (and employee areas within public accommodations). 56 FR 35544, 35547 (July 26, 1991).

Several commenters suggested that the proposed standards would establish new requirements applicable to employee-only areas, such as restrooms, locker rooms, cafeterias, and break rooms. These comments misunderstand the current law. The 1991 Standards apply to the new construction of, or alteration to, commercial facilities (including employee areas of public accommodations), unless a specific exemption applies. Employee common-use areas, such as those listed above, have been subject to title III and to subpart D of the implementing regulation, including the provisions in the 1991 Standards. This coverage means that unless the area is subject to a specific exemption, it must comply with the Standards and it must be on an accessible route. The proposed standards will not change that coverage.

The major change in the rule is in the treatment of employee work areas. Under the 1991 Standards, section 4.1.1(3), areas used only as work areas are only required to permit a person using a wheelchair to approach, enter, and exit the area. Because of public comment suggesting that owners of commercial facilities were not providing accessible routes within the facility, proposed section 206.2.8 contains a

requirement to provide accessible common use circulation paths, subject to several exceptions. Specific comments received on employee work areas are addressed in Appendix A.

Finally, one commenter suggested that the Department should adopt a system for providing formal interpretations of the ADA Standards for Accessible Design, analogous to the code interpretation systems used by the states and the major model codes. Because the ADA is a civil rights statute—rather than a building code—the statute does not contemplate or authorize a formal code interpretation system. The ADA anticipated that there would be a need for close coordination of the ADA building requirements with the state and local requirements. Therefore, the statute authorized the Attorney General to establish an ADA code certification process, which is addressed in subpart F of this rule.

In addition, the Department operates an extensive technical assistance program. The Department anticipates that once this rule is final, it will revise its existing technical assistance materials to provide guidance about the implementation of this rule.

*Effective date:* Time period. When the ADA was enacted, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Titles II and III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. New construction under title II and alterations under either title II or title III had to comply with the design standards on that date. For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—eighteen months after the 1991 Standards were published by the Department.

The ANPRM presented three options for the effective date time period: Option I, providing that the effective date of the proposed standards would be eighteen months after publication of the final rule; Option II, providing that the effective date of the proposed standards would be six months after publication of the final rule; or Option III, providing that the effective date of the proposed standards would be twelve months after publication of the final rule.

The Department received numerous comments on this issue. The majority of business, trade, and government organizations advocated eighteen months or more from publication of the final rule. In contrast, many disability

advocacy groups and individuals argued that the revised regulation should be effective upon final publication, or very soon thereafter. Many commenters asserted that the importance of providing increased accessibility for people with disabilities necessitates that the proposed standards become effective as soon as possible.

The current situation is substantially different from the conditions that prevailed in 1990 when the ADA was first enacted. Covered entities are no longer dealing with a new statutory obligation. Rather, the Department is dealing with a transition between two similar editions of the title III regulation. Therefore, the Department proposes that covered entities must comply with the proposed standards for construction that begins six months after publication of the final rule as an appropriate balancing of stakeholder concerns.

This approach is consistent with the approach of other federal agencies that are in the process of adopting the 2004 ADAAG: The Department of Transportation (DOT), which is generally responsible for the enforcement of title II of the ADA with respect to public transportation, and the General Services Administration (GSA), which has adopted the Access Board’s Architectural Barriers Act (ABA) guidelines to replace the Uniform Federal Accessibility Standards (UFAS). DOT’s final rule adopting the 2004 ADAAG became effective shortly after publication. See 71 FR 63263 (Oct. 30, 2006) (to be codified at 49 CFR part 37). Likewise, GSA adopted an effective date of six months following publication of the final rule. See 70 FR 67786 (Nov. 8, 2005).

*Effective date:* Triggering event. In the ANPRM, the Department suggested “first use” as an alternative triggering event for facilities that do not require building permits or that do not receive certificates of occupancy. The Department received many comments in response to this suggestion, as well as criticisms of the current triggering event for new construction under title III. Some commenters noted that permitting requirements for construction projects covered by title III vary across both states and localities. For example, some jurisdictions in Iowa do not have building codes applying to title III entities, while Kentucky and Chicago do not require building permits and certificates of occupancy for construction under certain monetary thresholds. Owners and operators of play areas and recreational facilities commented that the permitting process for such projects, when it exists, is

different from those involving typical buildings. Specifically, the current title III triggering events are ill-suited for application to many elements of golf and miniature golf sites, amusement rides and attractions, playgrounds, park facilities without electricity, and similar entities.

The information provided by commenters indicates that the first-use approach would not provide adequate guidance on when the proposed standards would apply to certain facilities and elements. Several commenters suggested the start of construction as the triggering event because it would eliminate confusion over facilities that do not require permitting. Using the start of construction as the triggering event would harmonize title III's requirements for new construction with the requirements for new construction and alterations under title II and alterations under title III. Several commenters on this issue urged the Department to use the same triggering events for title II and title III.

The Department has been persuaded by these comments to propose a triggering event paralleling that for the alterations provisions (*i.e.*, the date on which construction begins). This would apply clearly across all types of covered public accommodations, and the Department plans to clarify what constitutes the start of construction based on responses to this NPRM. This approach poses fewer problems than the first-use approach by measuring only the date on which physical construction commences.

For prefabricated elements such as modular buildings and amusement park rides and attractions, or installed equipment such as ATMs, the Department proposes that the start of construction means the date on which the site preparation begins. Site preparation includes providing an accessible route to the element.

*Question 50: The Department proposes using the start of construction as the triggering event for applying the proposed standards to new construction under title III. The Department asks for public comment on how to define the start of construction and the practicality of applying commencement of construction as a triggering event. Is the proposed definition of the start of construction sufficiently clear and inclusive of different types of facilities? Please be specific about the situations that are not covered in the proposed definitions, and suggest alternatives or additional language. In addition, the Department asks that the public identify facilities subject to title III for which*

*commencement of construction would be ambiguous or problematic.*

#### *Section 36.406(b) Application of Standards to Fixed Elements*

The Department is proposing a new § 36.406(b) that would clarify that the requirements established by this section, including those contained in the proposed standards (and the 2004 ADAAG) prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to people with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established elsewhere in this regulation. Although the Department often chooses to use the requirements of the 1991 Standards as a guide to determining when and how to make equipment and furnishings accessible, those coverage determinations fall within the discretionary authority of the Department; they do not flow automatically from the Standards.

The Department is also clarifying that the advisory notes, appendix notes, and figures that accompany the 1991 Standards do not establish separately enforceable requirements. This clarification has been made to address concerns expressed by commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (*e.g.*, Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosings to make them more visible to people with low vision).

#### *Section 36.406(c) Places of Lodging*

The Department is proposing to add a new § 36.406(c) to clarify the scope of coverage for places of lodging. For many years the Department has received inquiries from members of the public seeking clarification of ADA coverage of rental accommodations in time-shares, condominium hotels, and mixed-use and corporate hotel facilities that operate as places of lodging (as that term is now defined in § 36.104). This section proposes to address the treatment of these hotel-like facilities that have attributes of both residential dwellings and transient lodging facilities. These hybrid facilities have become increasingly popular since the ADA's enactment in 1990 and make up the majority of new hotel construction in some vacation destinations. The hybrid residential and lodging characteristics of

these new types of facilities complicate determinations of ADA coverage, prompting questions from both industry and individuals with disabilities. While the Department has interpreted the ADA to encompass these hotel-like facilities when they are used to provide transient lodging, the regulation has not specifically addressed them. Therefore, the Department is proposing a new § 36.406(c), entitled, "Places of lodging," which clarifies that places of lodging including time-shares, condominium hotels, and mixed-use and corporate hotel facilities shall comply with the provisions of the proposed standards, including but not limited to the requirements for transient lodging in sections 224 and 806 of the 2004 ADAAG.

The proposed rule, in the definitions section, clarifies that a covered "place of lodging" is a facility that provides guest rooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less), to which the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay, and which operates under conditions and with amenities similar to a hotel, motel, or inn, particularly including factors such as: (1) An on-site proprietor and reservations desk; (2) rooms available on a walk-up basis; (3) linen service; and (4) a policy of accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit. Time-shares and condominiums or corporate hotels that do not meet this definition will not be covered by § 36.406(c) of the proposed regulation, but will likely be covered by the requirements of the Fair Housing Act, 42 U.S.C. 3601 *et seq.* The Department is seeking public input on this proposal.

*Question 51: The Department requests comments on determining the appropriate basis for scoping for a time-share or condominium-hotel. Is it the total number of units in the facility, or some smaller number, such as the number of units participating in the rental program, or the number of units expected to be available for rent on an average night the most appropriate measure?*

*Question 52: The Department's proposed definition of "place of lodging" includes facilities that are primarily short-term in nature, i.e., two weeks or less in duration. Is "two weeks or less" the appropriate dividing line between transient and residential use? Is thirty days a more appropriate dividing line?*

*Question 53: The Department believes that the scoping and technical requirements for transient lodging, rather than those for residential dwelling units, should apply to these places of lodging. Is this the most appropriate choice?*

*Question 54: How should the Department's regulation provide for a situation in which a new or converted facility constructs the required number of accessible units, but the owners of those units choose not to participate in the rental program? Does the facility have an obligation to encourage or require owners of accessible units to participate in the rental program? Does the facility developer, the condominium association, or the hotel operator have an obligation to retain ownership or control over a certain number of accessible units to avoid this problem?*

*Question 55: How should the Department's regulation establish the scoping for a time-share or condominium-rental facility that decides, after the sale of units to individual owners, to begin a rental program that qualifies the facility as a place of lodging? How should the condominium association, operator, or developer determine which units to make accessible?*

#### *Section 36.406(d) Social Service Establishments*

The Department is proposing a new § 36.406(d) that provides that group homes, halfway houses, shelters, or similar social service establishments that provide temporary sleeping accommodations or residential dwelling units shall comply with the provisions of the proposed standards applicable to residential facilities, including, but not limited to, the provisions in sections 233 and 809 of the 2004 ADAAG.

The reasons for this proposal are based on two important changes in the 2004 ADAAG. For the first time, residential dwellings are explicitly covered in section 233 of the 2004 ADAAG. Second, the language addressing scoping and technical requirements for homeless shelters, group homes, and similar social service establishments is eliminated. Currently, such establishments are covered in the transient lodging section (section 9.5) of the 1991 Standards. The deletion of section 9.5 creates ambiguity of coverage that must be addressed.

The Department proposed in the ANPRM that the establishments currently covered by section 9.5 be covered as residential dwelling units, which are covered in section 233 of the 2004 ADAAG, rather than as transient lodging guest rooms in section 224 of

the 2004 ADAAG. The Department considers this a prudent action based on its effect on social service providers. Transferring coverage of social service establishments from transient lodging to residential dwellings will alleviate conflicting requirements for social service providers. The Department believes that a substantial percentage of social service providers are recipients of federal financial assistance from HUD. The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, they are covered both by the ADA (including section 9.5 of the 1991 Standards) and section 504. The two design standards for accessibility (*i.e.*, the 1991 Standards and UFAS) have confronted many social service providers with separate, sometimes conflicting requirements for the design and construction of facilities. To resolve the conflicts, the residential dwelling standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the 1991 Standards from the proposed standards presents two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential dwelling section, which harmonizes the regulatory requirements under the ADA and section 504. The Department chose the option that harmonizes the regulatory requirements.

In response to its request for public comments on this issue, the Department received a total of eleven responses from industry and disability rights groups and advocates. Some commenters representing disability rights groups expressed concern that the residential dwelling requirements in the 2004 ADAAG are less stringent than the revised transient lodging requirements and would result in diminished access for people with disabilities.

The commenters are correct that in some circumstances, the residential requirements are less stringent, particularly with respect to accessibility for people with communication-related disabilities. Other differences are that the residential guidelines do not require elevator access to upper floors if the required accessible features can be provided on a single, accessible level, and the residential guidelines do not expressly require roll-in showers. Despite this, the Department still believes that applying the residential

dwelling unit requirements to homeless shelters and similar social service establishments is appropriate to the nature of the services being offered at those facilities, and because it will harmonize the ADA and section 504 requirements applicable to those facilities. In addition, the Department believes that the proposal is consistent with its obligations under the Regulatory Flexibility Act to provide some regulatory relief to small entities that operate on limited budgets.

Nevertheless, the Department is requesting information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service establishments, and from the clients of these facilities who would be affected by this proposed change.

*Question 56: To what extent have conflicts between the ADA and section 504 affected these facilities? What would be the effect of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms?*

Another commenter expressed concern about how the Department would address dormitory-style settings in homeless shelters, transient group homes, halfway houses, and other social service establishments if they are scoped as residential dwelling units. The commenter noted that the transient lodging requirements include a specific provision, § 224.3, that in guest rooms with more than twenty-five beds, at least five percent (5%) of the beds must have parallel clear floor space enabling a person using a wheelchair to access and transfer to the bed. The residential dwelling unit section does not explicitly include a similar provision.

In response to this concern, the Department has added § 36.406(d)(1), which states that in settings in which the sleeping areas include more than twenty-five beds, and in which the residential dwelling unit requirements apply, five percent (5%) of the beds must comply with section 806.2.3 of the 2004 ADAAG (*i.e.*, at least five percent (5%) must have parallel clear floor space on both sides of the bed enabling a person using a wheelchair to access and transfer to the bed).

*Definitions of residential facilities and transient lodging.* The 2004 ADAAG adds a definition of "residential dwelling unit" and modifies the current definition of "transient lodging" in the 1991 Standards. Under section 106.5 of the 2004 ADAAG, a "residential dwelling unit" is defined as "a unit intended to be used as a residence, that is primarily long-term in nature" and does not include transient lodging,

inpatient medical care, licensed long-term care, and detention or correctional facilities. Additionally, section 106.5 of the 2004 ADAAG, changes the definition of “transient lodging” to a building or facility “containing one or more guest room[s] for sleeping that provides accommodations that are primarily short-term in nature” and does not include residential dwelling units intended to be used as a residence. The references to “dwelling units” and “dormitories” in the 1991 Standards definition are omitted in the 2004 ADAAG definition of transient lodging.

The Department said in the ANPRM that by applying the 2004 ADAAG residential facility guidelines to transient group homes, homeless shelters, halfway houses, and other social service establishments, these facilities would be more appropriately classified according to the nature of the services they provide, rather than the duration of those services. Participants in these programs may be housed on either a short-term or long-term basis in such facilities, and variation occurs even within the same programs and same facility. Therefore, duration can be an inconsistent way of classifying facilities.

Several commenters stated that the definitions of residential dwellings and transient lodging are not clear and will confuse social service providers. They noted that including “primarily long-term” and “primarily short-term” in the respective definitions creates confusion when applied to the listed facilities because they serve people for widely varying lengths of time.

The Department is aware of the wide range of services and duration of services provided by social service establishments. Therefore, rather than focus on the length of a person’s stay at a facility, it makes more sense to look at a facility according to the type of services provided. For that reason, rather than saying that social service establishments are residential facilities, the Department has drafted the proposed § 36.406(d) to provide that group homes and other listed facilities shall comply with the provisions in the 2004 ADAAG that would apply to residential facilities.

Finally, the Department received comments from code developers and architects commending the decision to coordinate the 2004 ADAAG with the requirements of section 504, and asking it to coordinate the 2004 ADAAG with the Fair Housing Act’s accessibility requirements. The Department believes that the coordination of the Fair Housing Act with other applicable disability rights statutes is within the

jurisdiction of HUD, which is the agency charged with the responsibility to develop regulations to implement the Fair Housing Act, the Architectural Barriers Act, and the provisions of section 504 applicable to federally funded housing programs.

#### *Section 36.406(e) Housing at a Place of Education*

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in postsecondary educational settings, including architectural features. Housing types in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In addition to the ADA and section 504, other federal laws, including the Fair Housing Act of 1968, may apply. Covered entities subject to the ADA must always be aware of, and comply with, any other federal statutes or regulations that govern the operation of residential properties.

Since the enactment of the ADA, the Department has received many questions about how the ADA applies to educational settings, including school dormitories. Neither the 1991 Standards nor the 2004 ADAAG specifically addresses how it applies to housing in educational settings. Therefore, the Department is proposing a new § 36.406(e) that provides that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG. Housing provided via individual apartments or townhouses will be subject to the requirements for residential dwelling units.

Public and private school dormitories have varied characteristics. Like social service establishments, schools are generally recipients of federal financial assistance and are subject to both the ADA and section 504. College and university dormitories typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they are often used for short-term stays of one to three days, a week, or several months. They also are diverse in their layout. Some have double-occupancy rooms and a toilet and bathing room shared with a hallway of others, while others may have cluster, suite, or group arrangements where several rooms are located inside a secure area with

bathing, kitchen, and similar common facilities.

Private schools are subject to title III and are required to make their programs and activities accessible to individuals with disabilities. Throughout the school year and the summer, school dormitories can become program areas in which small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms—both accessible rooms and standard rooms—in order to socialize, to study, and to use all public and common use areas is an essential part of having access to these educational programs and activities.

Applying the requirements for residential facilities to school dormitories could hinder access to educational programs for students with disabilities. The prior discussion about social service establishments with sleeping accommodations explains that the requirements for dispersing accessible units would not necessarily require an elevator or access to different levels of a facility. Conversely, applying the transient lodging requirements to school dormitories would necessitate greater access throughout the facility for students with disabilities. Therefore, the Department requests public comment on how to scope school dormitories.

*Question 57: Would the residential facility requirements or the transient lodging requirements in the 2004 ADAAG be more appropriate for housing at places of education? How would the different requirements affect the cost when building new dormitories and other student housing?*

#### *Section 36.406(f) Assembly Areas*

The Department is proposing a new § 36.406(f) to supplement the assembly areas requirements in the proposed standards. This provision would impose four additional requirements.

Proposed § 36.406(f)(1) requires wheelchair and companion seating locations to be dispersed so that some seating is available on each level served by an accessible route. This should have the effect of ensuring a choice of ticket prices, services, and amenities offered in the facility. Factors distinguishing specialty seating areas are generally dictated by the type of facility or event, but may include such distinct services and amenities as: Reserved seating (when other seats are sold on a first-come-first-served basis only); reserved seating in sections or rows located in premium locations (e.g., behind home plate or near the home team’s end zone) that are not otherwise available for purchase by other spectators; access to wait staff for in-seat food or beverage

service; availability of catered food or beverages for pre-game, intermission, or post-game meals; restricted access to lounges with special amenities (such as couches or flat-screen televisions); or access to team personnel or facilities for team-sponsored events (e.g., autograph sessions, sideline passes, or facility tours) not otherwise available to other spectators.

Proposed § 36.406(f)(2) reiterates the longstanding requirement that wheelchair and companion seating must be integrated in the seating area, and adds a new prohibition: that the seating may not be placed on temporary platforms or other movable structures. The Department has become aware that a growing trend in the design of large sports facilities is to provide wheelchair seating on removable platforms that seat four or more wheelchair users and their companions. These platforms cover one or more rows of standard seating. The platforms are designed to be removed so that the part of the seating bowl they cover can be used to seat additional ambulatory spectators. The sale of any seats in the covered area requires removal of the platform, thereby eliminating some of the required wheelchair seating locations. In another design that produces a similar result, removable platforms configured to provide multiple, non-wheelchair seats are installed over some or all of the required wheelchair seating locations. In this configuration, selling a ticket for one wheelchair location requires the removal of multiple standard seats.

The Department believes that both of these designs violate both the letter and the intent of this regulation. Both designs have the potential to reduce the number of available wheelchair seating spaces below the level required. Reducing the number of available spaces is likely to result in reducing the opportunity for people who use wheelchairs to have the same choice of ticket prices and access to amenities that are available to other patrons in the facility. In addition, placing wheelchair seating on removable platforms may have a disproportionate effect on the availability of seating for individuals who use wheelchairs and their companions attempting to buy tickets on the day of the event. Use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of wheelchair seating will be lost when a platform is removed. The use of movable seats, on the other hand, could meet such a demand without eliminating blocks of wheelchair seating at a time, converting only those seats

that are needed for ambulatory spectators and are not wanted by individuals who use wheelchairs and their companions.

For these reasons, the Department believes that it is necessary and appropriate to prohibit the use of temporary platforms in fixed seating areas. Nothing in this section is intended to prohibit the use of temporary platforms to increase the available seating, e.g., platforms that cover a basketball court or hockey rink when the arena is being used for a concert. These areas of temporary seating do not remove required wheelchair locations and, therefore, would not violate the requirements of this regulation. In addition, covered entities would still be permitted to use individual movable seats to infill any wheelchair locations that are not sold to wheelchair users.

Proposed § 36.406(f)(3) requires facilities that have more than 5,000 seats to provide at least five wheelchair locations with at least three companion seats for each wheelchair space. The Department is proposing this requirement to address complaints from many wheelchair users that the practice of providing a strict one-to-one relationship between wheelchair locations and companion seating often prevents family members from attending events together.

Proposed § 36.406(f)(4) provides more precise guidance for designers of stadium-style movie theaters by requiring such facilities to locate wheelchair seating spaces and companion seating on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria:

- (i) It is located within the rear sixty percent (60%) of the seats provided in an auditorium; or
- (ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

#### *Section 36.406(g) Medical Care Facilities*

The Department is aware that the Access Board sought comment on how dispersion of accessible sleeping rooms can effectively be achieved and maintained in medical care facilities such as hospitals. In response, commenters representing people with disabilities supported a requirement for dispersion of accessible sleeping rooms among all types of medical specialty areas, such as obstetrics, orthopedics, pediatrics, and cardiac care. Conversely,

commenters representing the health care industry pointed out that treatment areas in health care facilities can be very fluid due to fluctuation in the population and other demographic and medical funding trends. The Access Board decided not to add a dispersion requirement because compliance over the lifetime of the facility could prove difficult given the need for flexibility of spaces within such facilities. The Department recognizes that it may be difficult to ensure a perfect distribution of rooms throughout all specialty areas in a hospital, but the Department is concerned that the absence of any dispersion requirement may result in inappropriate concentrations of accessible rooms.

*Question 58: Is there a way to ensure that accessible hospital rooms are dispersed throughout the facility in a way that will not unduly restrain the ability of hospital administrators to allocate space as needed? The 1991 Standards require that ten percent (10%) of the patient bedrooms be accessible. If it is not feasible to distribute these rooms among each of the specialty areas, would it be appropriate that required accessible rooms be dispersed so that there are accessible patient rooms on each floor? Are there other methods of dispersal that would be more effective?*

#### *Section 36.407 Temporary Suspension of Certain Detectable Warning Requirements*

The Department has removed § 36.407, entitled, "Temporary suspension of certain detectable warning requirements," because the suspension has expired.

#### **Other**

*Miniature Golf Courses.* The Department proposes to adopt the requirements for miniature golf courses in the 2004 ADAAG. However, it requests public comment on a suggested change to the requirement for holes to be consecutive. A commenter association argued that the "miniature golf experience" includes not only putting but also enjoyment of "beautiful landscaping, water elements that include ponds, fountain displays, and lazy rivers that matriculate throughout the course and themed structures that allow players to be taken into a 'fantasy-like' area." Thus, requiring a series of consecutive accessible holes would limit the experience of guests with disabilities to one area of the course. To remedy this situation, the association suggests allowing multiple breaks in the sequence of accessible holes while maintaining the requirement that the

accessible holes are connected by an accessible route.

The suggested change would need to be made by the Access Board and then adopted by the Department, and if adopted, it would apply to all miniature golf courses, not only existing miniature golf facilities.

*Question 59: The Department would like to hear from the public about the suggestion of allowing multiple breaks in the sequence of accessible holes, provided that the accessible holes are connected by an accessible route. Should the Department ask the Access Board to change the current requirement in the 2004 ADAAG?*

#### **Subpart F—Certification of State Laws or Local Building Codes**

Subpart F contains procedures implementing section 308(b)(1)(A)(ii) of the ADA, which provides that, on the application of a state or local jurisdiction, the Attorney General may certify that a state or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the Act. In enforcement proceedings, this certification will constitute rebuttable evidence that the law or code meets or exceeds the ADA's requirements. In its ANPRM, the Department proposed changes that would streamline the process for public entities seeking certification.

In response to the comments received, the Department proposes three changes in Subpart F. First, the Department proposes to delete § 36.603, which establishes the obligations of a submitting authority that is seeking certification of its code. Due to the proposed deletion of § 36.603, §§ 36.604 through 36.608 are renumbered, and § 36.603 in the proposed rule is modified to indicate that the Assistant Attorney General for the Civil Rights Division (Assistant Attorney General) shall make a preliminary determination of equivalency after "receipt and review of all information relevant to a request filed by a submitting official for certification of a code." Second, the Department proposes that the requirement in § 36.605 (proposed § 36.604) (*i.e.*, if the Assistant Attorney General makes a preliminary determination of equivalency, he or she shall hold an informal hearing in Washington, DC) be changed to a requirement that the hearing be held in the state or local jurisdiction charged with administration and enforcement of the code. Third, the Department proposes adding language to § 36.607 (proposed § 36.606) to explain the effect of the proposed standards on the codes of state or local jurisdictions that were

determined in the past to meet or exceed the 1991 Standards. Once the proposed standards take effect, certifications issued under the 1991 Standards would not have any future effect, and states and local jurisdictions with codes certified under the 1991 Standards would need to reapply for certification under the proposed standards once adopted. The Department will make every effort to give these requests priority in the review process. With regard to elements of existing buildings and facilities constructed in compliance with a code when a certification of equivalency was in effect, the proposed rule would require that in any enforcement action this would be treated as rebuttable evidence of compliance with the Act's standards then in effect, which may implicate the barrier removal obligations of existing facilities and the "safe harbor" approach.

Many commenters, including business organizations, a professional association, disability rights groups, and individuals with disabilities, urged that the Department take steps overall to streamline the certification process—including the initial request for certification process—and make it less time consuming and easier to "navigate" for state and local jurisdictions. In response to these comments, the Department has deleted the current language in § 36.603, which established the obligations of a submitting authority seeking certification of its code. The Department anticipates that in place of § 36.603, it will issue regulatory guidance in conjunction with the publication of the final rule that will provide more streamlined submission requirements and greater flexibility in the submission process.

The Department believes that with the adoption of the proposed standards, the certification process will take significantly less time to complete and will be a more straightforward process. In addition, it will be easier for jurisdictions to identify inconsistencies with the ADA in advance of requesting certification, thereby facilitating the certification review process. The Department anticipates these results because of the extensive efforts made by the Access Board, working in conjunction with model code organizations, to harmonize the 2004 ADAAG with the accessibility provisions of the model codes, which form the basis of many state codes.

The Department also supports the views of commenters who stressed the importance of continued harmonization efforts by the Access Board, in addition

to the benefits of providing more technical guidance regarding the consistency of model codes with the ADA's requirements. In that regard, the Department expects to make available, in conjunction with its publication of the proposed standards, information indicating differences between the 1991 Standards and the proposed standards, and the model code of the International Code Council and other model codes.

Many commenters, including a state enforcement agency, business organizations, and individuals with disabilities, urged the Department to eliminate the requirement that an informal hearing be held in Washington, DC, after issuance of a preliminary determination of equivalency, and to add a requirement that the hearing be held within the affected jurisdiction, since it would provide better opportunities for interested parties to attend and participate. Consistent with these comments, the Department has renumbered § 36.605 as § 36.604, and has proposed a new requirement: If the Assistant Attorney General makes a preliminary determination of equivalency, a hearing will be held in the state or local jurisdiction charged with administration and enforcement of the code.

Two commenters, a professional association and a model code organization, urged the Department to add to the process for certifying state and local codes a procedure for determining ADA-compliant design and construction alternatives or equivalent facilitation, or alternatively, to adopt a separate mechanism for such determinations modeled after a state "barrier free" design board. One of these commenters also expressed frustration that local building code officials in jurisdictions with certified codes lacked the authority to issue binding interpretations of ADA compliance and suggested the transfer of such authority in conjunction with a certification determination.

The Department has considered these proposals, but notes that the approaches suggested are not consistent with or permissible under the statutory scheme established by the ADA. Under the ADA, certification of state and local codes serves, to some extent, to mitigate the absence of a federal mechanism for reviewing nationally all architectural plans and inspecting all covered buildings under construction to ensure compliance with the ADA. In this regard, certification operates as a bridge between the obligation to comply with the 1991 Standards in new construction and alterations, and the administrative schemes of state and local governments



that regulate the design and construction process. By ensuring consistency between state or local codes and federal accessibility standards, certification has the additional benefit of streamlining the "regulatory process," thereby making it easier for those in the design and construction industry to satisfy both state and federal requirements.

Although certification has the potential to increase compliance with the ADA, this result, however desirable, is not guaranteed. The ADA contemplated that there could be enforcement actions brought even in states with certified codes, and provided some protection in litigation to builders who adhered to the provisions of the code certified to be ADA-equivalent, without resorting to waivers or variances. The certified code, however, remains within the authority of the adopting state or local jurisdiction to interpret and enforce: certification does not transform a state's building code into federal law. Nor can certification alone authorize state and local building code officials implementing a certified code to do more than they are authorized to do under state or local law, and these officials cannot acquire authority through certification to render binding interpretations of federal law. Therefore, the Department, while understanding the interest in obtaining greater assurance of compliance with the ADA through the interpretation and enforcement of a certified code by local code officials, declines to amend the regulation to reach what are purely state and local processes of code enforcement and administration or to attempt to confer on local officials authority not granted to them under the ADA.

The Department also declines to propose modifications to the regulation to require, as one individual commenter suggested, that the receipt of federal funds be made contingent upon a state or local government's willingness to bring its building code into compliance with the ADA and, ostensibly, obtain certification. The ADA establishes certification as a voluntary process; altering the statutory scheme is beyond the Department's authority.

A comment received from a firm representing several business organizations questioned whether the current certification process could ever provide states with certified codes the opportunity to keep current with changes in model codes because of inflexibility in either the federal rulemaking process or the certification process itself. The commenter also pointed out that there are a number of states with codes that follow the current

"guidelines" but have not received certification. All of these circumstances require that "the certification process \* \* \* start over under a new process." The Department shares the commenter's concern regarding the importance of states with certified codes to update and keep their code certifications current. In that regard, the Department has undertaken significant outreach to remind states of the need to request review from the Department for changes or amendments to a certified code. The Department also has written to states that have not sought code certification to encourage them to do so. However, certification is a voluntary process, and the Department cannot require that states with certified codes submit amendments to a certified code any more than it can require the initial code certification. The Department will continue to remind states with certified codes that the protection in litigation available through compliance with a certified code does not extend to uncertified code amendments.

The Department requested comment in its ANPRM on what impact the proposed standards should have on the status of accessibility requirements that were previously determined to have met or exceeded the 1991 Standards. A number of commenters, including business groups, retail associations, hotel chains, associations of amusement parks, and a national chamber of commerce, urged the Department to allow each jurisdiction with a certified accessibility code to retain its certification after the adoption of the proposed standards under "safe harbor" provisions. Many of the same commenters urged the Department to provide facilities constructed in accordance with currently certified accessibility codes meaningful protection from litigation.

Other commenters expressed a different view concerning the impact the proposed standards should have on currently certified codes. A state enforcement agency urged the Department to allow each jurisdiction with a certified accessibility code to retain its certification only if the relevant jurisdiction could show that its accessibility code meets the proposed standards. An organization representing people with disabilities urged the Department to require each jurisdiction with a certified accessibility code to amend its accessibility code to meet the proposed standards thirty days after they are adopted. Another commenter, an individual with a disability, urged the Department to allow each jurisdiction with a certified accessibility code to retain its certification for a

period of five years so that the relevant jurisdiction could amend its accessibility code to meet the proposed standards once adopted.

Two commenters, an architectural firm and an organization of disability access professionals, suggested that the Department implement a re-certification process to:

(1) Expedite those jurisdictions now certified; and (2) allow those jurisdictions to retain their certifications while amending their accessibility codes to meet the proposed standards. While the Department understands the substantial commitment of time and effort expended by states that have obtained certification of their codes, the Department anticipates requiring certification of equivalency for the accessibility requirements for construction and alteration of title III facilities on the basis of the proposed standards once they take effect. Thus, states with codes certified under the 1991 Standards will need to conform their codes to the proposed standards and obtain certification for the revised code. Any other approach would place the Department in the untenable position of the appearance of sanctioning the continued use of codes in certain parts of the country that are based upon outdated federal standards, while requiring compliance with the proposed standards in the rest of the country. With regard to facilities constructed in compliance with a certified code prior to the proposed standards, and during the period when a certification of equivalency was in effect, the Department is considering an approach that may merge with the basic safe harbor discussed in § 36.304 with respect to existing facilities constructed in compliance with the 1991 Standards. So, for example, if the Department adopts a safe harbor provision for all elements in existing facilities constructed in compliance with the 1991 Standards, then existing facilities in states with certified codes would be eligible for a safe harbor if they were constructed in compliance with an ADA-certified code. In this scenario, compliance with the certified code would be treated as evidence of compliance with the 1991 Standards for purposes of determining the application of the safe harbor provisions. Similarly, the Department believes that builders who constructed in compliance with a certified code should retain the protections in litigation that certification conferred, but only with regard to the ADA Standards in effect at the time. Therefore, in an enforcement action involving elements of existing facilities constructed in compliance

with a certified code, compliance with the certified code would continue to constitute rebuttable evidence of compliance with the ADA Standards then in effect, which could be relevant to a number of issues in the future such as barrier removal and good faith on the part of builders or business owners. Builders of newly constructed or altered facilities, however, would only receive protection in litigation if they constructed in compliance with a code certified as equivalent to the proposed standards.

The Department has amended § 36.607 (proposed § 36.606) that explains the effect of the proposed standards on existing certifications of equivalency issued under the 1991 Standards.

In addition, the Department has considered proposals that the Department “fast-track” a request for re-certification and give greater priority to states seeking re-certification for their codes. The Department plans to facilitate the efforts of states with codes certified under the 1991 Standards to obtain certification under the proposed standards. After publication of the proposed standards, but before their effective date, the Department will concentrate its efforts on assisting states with certified codes to identify the changes needed to conform their existing codes to the proposed standards. Priority in the review process will be given to states with certified codes interested in obtaining re-certification pursuant to the proposed standards. In addition, the Department will consider approaches internally that could result in a more efficient process for satisfying the procedural requirements for issuance of preliminary determinations, such as consolidating the **Federal Register** notices for the comment periods of two or more states if determinations are issued in close proximity to one another, and scheduling informal hearings in a manner that maximizes the ability of the Department’s staff to conduct them within a relatively short time period.

*Effect on the certification process of using more than one regulatory scheme at the state or local level to establish accessibility requirements for title III facilities with new design requirements in the proposed standards.* The proposed standards will include requirements for elements and spaces that are not addressed specifically in the 1991 Standards, including elements within recreational facilities and play areas such as swimming pools, spas, miniature golf courses, components in play areas, amusement rides, boating

facilities, and fishing piers or platforms. Many of these will be constructed as components of buildings and facilities regulated by state and local governments through their building codes. In other instances, they may not occur in conjunction with a building or facility that is traditionally regulated through the building code. The Department understands that state and local governments may differ in their choices regarding how to incorporate new accessibility requirements for recreational facilities and play areas. The opportunity to seek certification is not limited to jurisdictions that incorporate accessibility requirements into building codes and enforce them through a building code authority. Jurisdictions can adopt legally enforceable accessibility requirements through a variety of regulatory schemes, including the building code, and lodge oversight authority in a governmental entity other than a code authority, such as a human relations commission, a department of public safety, the office of a local fire marshal, or an office that issues business licenses.

The Department is considering what impact the administration of accessibility requirements through more than one regulatory scheme under the authority of more than one state or local agency should have on the certification review process. The Department contemplates that when a jurisdiction uses more than one regulatory scheme to incorporate its accessibility requirements for title III facilities, all of the requirements would be the subject of a request for certification, even if there are “joint” submitting officials representing the respective agencies with enforcement responsibility.

#### *Additional Information:*

#### **Withdrawal of Outstanding NPRMs**

With the publication of this NPRM, the Department is withdrawing three outstanding NPRMs: the joint NPRM of the Department and the Access Board dealing with children’s facilities, published on July 22, 1996, at 61 FR 37964; the Department’s proposal to extend the time period for providing curb ramps at existing pedestrian walkways, published on November 27, 1995, at 60 FR 58462; and the Department’s proposal to adopt the Access Board’s accessibility guidelines and specifications for state and local government facilities, published as an interim final rule by the Access Board on June 20, 1994, at 59 FR 31676, and by the Department as a proposed rule on June 20, 1994, at 59 FR 31808. To the extent that those proposals were incorporated in the 2004 ADAAG, they

will all be included in the Department’s proposed standards.

#### **Regulatory Process Matters**

This NPRM has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. 58 FR 51735 (Sept. 30, 1993). The Department has evaluated its existing regulations for title II and title III section by section, and many of the proposals in its NPRMs for both titles reflect its efforts to mitigate any negative effects on small entities. The Department has also prepared an initial regulatory impact analysis (RIA), as directed by Executive Order 12866 (amended without substantial change by E.O. 13258, 67 FR 9385 (Feb. 26, 2002), and E.O. 13422, 72 FR 2763 (Jan. 18, 2007)), and OMB Circular A–4.

The Department’s initial regulatory impact analysis measures the incremental benefits and costs of the proposed standards relative to the benefits and costs of the 1991 Standards. The assessment has estimated the benefits and costs of all new and revised requirements as they would apply to newly constructed facilities, altered facilities, and facilities that are removing barriers to access.

A summary of the regulatory assessment, including the Department’s responses to public comments addressing its proposed methodology and approach, is attached as Appendix B to this NPRM. The complete, formal report of the initial regulatory impact analysis is available online for public review on the Department’s ADA Home Page (<http://www.ada.gov>) and at <http://www.regulations.gov>. The report is the work product of the Department’s contractor, HDR/HLB Decision Economics, Inc. The Department has adopted the results of this analysis as its assessment of the benefits and costs that the proposed standards will confer on society. The Department invites the public to read the full report and to submit electronic comments at <http://www.regulations.gov>.

#### **Regulatory Flexibility Act**

This NPRM has also been reviewed by the Small Business Administration’s Office of Advocacy pursuant to Executive Order 13272, 67 FR 53461 (Aug. 13, 2002). Because the proposed rule, if adopted, may have a significant economic impact on a substantial number of small entities, the Department has conducted an Initial Regulatory Flexibility Analysis (IRFA) as a component of this rulemaking. The Department’s ANPRM, NPRM, and the RIA include all of the elements of the IRFA required by the Regulatory

Flexibility Act (RFA). See 5 U.S.C. 601 *et seq.*, as amended by the SBREFA, 5 U.S.C. 603(b)(1)–(5), 603(c).

Section 603(b) lists specific requirements for an IRFA regulatory analysis. The Department has addressed these IRFA issues throughout the ANPRM, NPRM, and the RIA. In summary, the Department has satisfied its IRFA obligations under section 603(b) by providing the following:

1. *Description of the reasons that action by the agency is being considered.* See, e.g., “The Roles of the Access Board and the Department of Justice,” “The Revised Guidelines,” and “The Advance Notice of Proposed Rulemaking” sections of the titles II and III NPRMs; Section 2.1, “Access Board Regulatory Assessment” of the initial regulatory impact analysis; see also Department of Justice ADA Advanced Notice of Proposed Rulemaking, 69 FR 58768, 58768–70, (Sept. 30, 2004) (outlining the regulatory history and rationale underlying DOJ’s proposal to revise its regulations implementing titles II and III of the ADA);

2. *Succinct statement of the objectives of, and legal basis for, the proposed rule.* See, e.g., titles II and III NPRM sections entitled, “Summary,” “Overview,” “Purpose,” “The ADA and Department of Justice Regulations,” “The Roles of the Access Board and the Department of Justice,” “Background (SBREFA, Regulatory Flexibility Act, and Executive Order) Reviews,” and “Regulatory Impact Analysis”; App. B: Regulatory Assessment sections entitled, “Background,” “Regulatory Alternatives,” “Regulatory Proposals with Cost Implications,” and “Measurement of Incremental Benefits”; see also 69 FR at 58768–70, 58778–79 (outlining the goals and statutory directives for the regulations implementing titles II and III of the ADA);

3. *Description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.* See Section 6, “Small Business Impact Analysis” and App. 5, “Small Business Data of the RIA” (available for review at <http://www.ada.gov>); see also App. B: Regulatory Assessment sections entitled, “Regulatory Alternatives,” “Regulatory Proposals with Cost Implications,” and “Measurement of Incremental Benefits” (estimating the number of small entities the Department believes may be impacted by the proposed rules and calculating the likely incremental economic impact of these rules on small facilities/entities versus “typical” (*i.e.*, average-sized) facilities/entities);

4. *Description of the projected reporting, record-keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* See titles II and III NPRM sections entitled, “Paperwork Reduction Act” (providing that no new record-keeping or reporting requirements will be imposed by the NPRMs). The Department acknowledges that there are other compliance requirements in the NPRMs that may impose costs on small entities. These costs are presented in the Department’s Initial Regulatory Impact Analysis, Chapter 6, “Small Business Impact Analysis” and accompanying App. 5, “Small Business Data” (available for review at <http://www.ada.gov>);

5. *Identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.* See, e.g., title II NPRM sections entitled, “Analysis of Impact on Small Entities” (generally describing DOJ efforts to eliminate duplication or overlap in federal accessibility guidelines), “The ADA and Department of Justice Regulations,” “Social Service Establishments” (§ 35.151(e)), “Streamlining Complaint Investigations and Designated Agency Authority” (§§ 35.171, 35.172, and 35.190), “Executive Order 13132: Federalism” (discussing interplay of section 504 and ADA Standards), “Alterations” (§ 35.151(b)) (discussing interplay of UFAS and ADA Standards); title III NPRM sections entitled, “Analysis of Impact on Small Entities” (generally describing DOJ’s harmonization efforts with other federal accessibility guidelines), “Social Service Establishments” (§ 36.406(d)), “Definitions of Residential Facilities and Transient Lodging,” “Housing at a Place of Education” (§ 36.406(e)) (discussing section 504), “Change ‘Service Animal’ to ‘Assistance Animal,’” “Scope of Coverage” (discussing Fair Housing Act), “Effective Date: Time Period,” and “Social Service Establishments” (discussing UFAS); and

6. *Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize any significant impact of the proposed rule on small entities, including alternatives considered, such as: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) use of performance rather than design standards; and (3)*

*any exemption from coverage of the rule, or any part thereof, for such small entities.*

The Department’s rulemaking efforts satisfy the IRFA requirements for consideration of significant regulatory alternatives. In September 2004, the Department issued an ANPRM to commence the process of revising its regulations implementing titles II and III of the ADA. See 69 FR 58768 (Sept. 30, 2004). Among other things, the ANPRM sought public comment on 54 specific questions. Prominent among these questions was the issue of whether (and how) to craft a “safe harbor” provision for existing title III-covered facilities/entities that would reduce the financial burden of complying with the 2004 ADAAG. See *id.* at 58771–58772. The ANPRM also specifically invited comment from small entities concerning the proposed rules’ potential economic impact and suggested regulatory alternatives to ameliorate such impact. *Id.* at 58779 (Question 10). By the end of the comment period, the Department had received over 900 comments, including comments from SBA’s Office of Advocacy and small entities. See, e.g., title II NPRM Preamble and title III NPRM Preamble sections entitled, “The Advance Notice of Proposed Rulemaking” (summarizing public response to the ANPRM). Many small business advocates expressed concern regarding the cost of making older existing title III-covered buildings compliant with new regulations (since many small businesses operate in such facilities) and urged DOJ to issue clearer guidance on barrier removal. See title III NPRM Preamble discussion of “Safe harbor and other proposed limitations on barrier removal.” In drafting the NPRMs for titles II and III, the Department expressly addressed small businesses’ collective ANPRM comments and proposed regulatory alternatives to help mitigate the economic impact of the proposed regulations on small entities. For example, the Department’s regulatory proposals:

- Provide a “safe harbor” provision whereby elements in existing title II- or title III-covered buildings or facilities that are compliant with the current 1991 Standards or UFAS need not be modified to comply with the standards in the proposed regulations (see “Safe Harbor” and § 35.150(b)(2) of the title II NPRM “Safe Harbor and Other Proposed Limitations on Barrier Removal” and § 36.304 of the title III NPRM);
- Adopt a regulatory alternative for barrier removal that, for the first time, provides a specific annual monetary “cost cap” for barrier removal

obligations for qualified small businesses (*see* title III NPRM sections entitled, “Safe Harbor and Other Proposed Limitations on Barrier Removal” and “Safe Harbor for Qualified Small Businesses Regarding What Is Readily Achievable”);

- Exempt certain existing small recreational facilities (*i.e.*, play areas, swimming pools, saunas, and steam rooms) which, in turn, are often owned or operated by small entities, from barrier removal obligations in order to comply with the standards in the proposed regulations (*see* title II NPRM at § 35.150(b)(4) and (5) and title III NPRM section entitled, “Reduced Scoping for Public Accommodations, Small Facilities, and Qualified Small Businesses”); and
- Reduce scoping for certain other existing recreational facilities (*i.e.*, play areas over 1,000 square feet and swimming pools with over 300 linear feet of pool wall) operated by either title II or title III entities (*see* title II NPRM at § 35.150(b)(4) and (5) and title III NPRM section entitled, “Reduced Scoping for Public Accommodations, Small Facilities, and Qualified Small Businesses”).

Taken together, the foregoing regulatory proposals amply demonstrate that the Department was sensitive to the potential economic impact of the revised regulations on small businesses and attempted to mitigate this impact with a variety of provisions that, to the extent consistent with the ADA, impose reduced compliance standards on small entities.

Section 610 Review. The Department is also required to conduct a periodic regulatory review pursuant to section 610 of the RFA, 5 U.S.C. 601 *et seq.*, as amended by the SBREFA, 5 U.S.C. 610 *et seq.*

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

In developing these proposed rules, the Department has gone through its regulations section by section, and, as a result, proposes several clarifications and amendments in both the title II and title III implementing regulations. The proposals reflect the Department’s analysis and review of complaints or comments from the public as well as changes in technology. Many of the proposals aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, one significant goal of the development of the 2004 ADAAG was to eliminate duplication or overlap in federal accessibility guidelines as well as to harmonize the federal guidelines with model codes. The Department has also worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

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

#### **Executive Order 13132: Federalism**

Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), requires executive branch agencies to consider whether a proposed rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on state and local governments, a substantial direct effect on the relationship between the federal government and the states and localities, or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a proposed rule is likely to have federalism implications, it must consult with state and local elected officials about how to minimize or eliminate the effects.

Title II of the ADA covers state and local government programs, services, and activities and, therefore, clearly has some federalism implications. State and local governments have been subject to the ADA since 1991, and the majority

have also been required to comply with the requirements of section 504. Hence, the ADA and the title II regulations are not novel for state and local governments. This proposed rule will preempt state laws affecting entities subject to the ADA only to the extent that those laws directly conflict with the statutory requirements of the ADA. But the Department believes it is prudent to consult with public entities about the potential federalism implications of the proposed title II regulations.

Title III of the ADA covers public accommodations and commercial facilities. These facilities are generally subject to regulation by different levels of government, including federal, state, and local governments. The ADA and the Department’s implementing regulations set minimum civil rights protections for individuals with disabilities that in turn may affect the implementation of state and local laws, particularly building codes. For these reasons, the Department has determined that this NPRM may have federalism implications and requires intergovernmental consultation in compliance with Executive Order 13132.

The Department intends to amend the regulations in a manner that meets the objectives of the ADA while also minimizing conflicts between state law and federal interests. To that end, as a member of the Access Board, the Department has been privy to substantial feedback from state and local governments through the development of the 2004 ADAAG. In addition, the Department solicited and received input from public entities in the September 2004 ANPRM. Some elements of the proposed rules reflect the Department’s work to mitigate federalism implications, particularly the provisions that streamline the administrative process for state and local governments seeking ADA code certification under title III.

The Department is now soliciting comments from elected state and local officials and their representative national organizations through this NPRM. The Department seeks comment from all interested parties, but especially state and local elected officials, about the potential federalism implications of the proposed rule. The Department welcomes comments on whether the proposed rule may have direct effects on state and local governments, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

## National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that all federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally non-profit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities. Public Law 104–113 (15 U.S.C. 272(b)). In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources.

The Department, as a member of the Access Board, was an active participant in the lengthy process of developing the 2004 ADAAG, on which the proposed standards are based. As part of this update, the Board has made its guidelines more consistent with model building codes, such as the International Building Code (IBC), and industry standards. It coordinated extensively with model code groups and standard-setting bodies throughout the process so that differences could be reconciled. As a result, an historic level of harmonization has been achieved that has brought about improvements to the guidelines, as well as to counterpart provisions in the IBC and key industry standards, including those for accessible facilities issued through the American National Standards Institute.

### Plain Language Instructions

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

in the introductory section of this rule, entitled, **FOR FURTHER INFORMATION CONTACT.**

### Paperwork Reduction Act

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

### Unfunded Mandates Reform Act

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

### List of Subjects for 28 CFR Part 36

Administrative practice and procedure, Buildings and facilities, Business and industry, Civil rights, Individuals with disabilities, Penalties, Reporting and recordkeeping requirements.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 306 of the Americans with Disabilities Act, Public Law 101–336, 42 U.S.C. 12186, and for the reasons set forth in the preamble, Chapter I of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

## PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

### Subpart A—General

1. The authority citation for 28 CFR part 36 continues to read as follows:

**Authority:** 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b).

2–3. Amend § 36.104 by adding the following definitions of *1991 Standards*, *2004 ADAAG*, *direct threat*, *existing facility*, *other power-driven mobility device*, *place of lodging*, *proposed standards*, *qualified reader*, *qualified small business*, *video interpreting services (VIS)*, and wheelchair in alphabetical order and revising the definitions of *qualified interpreter* and *service animal* to read as follows:

### § 36.104 Definitions.

*1991 Standards* means the ADA Standards for Accessible Design, as defined in 28 CFR part 36, Appendix A.

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

\* \* \* \* \*

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

\* \* \* \* \*

*Existing facility* means a facility that has been constructed and remains in existence on any given date.

\* \* \* \* \*

*Other power-driven mobility device* means any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes.

\* \* \* \* \*

*Place of lodging.* For purposes of this part, a facility is a *place of lodging* if it—

(1) Provides guestrooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less) where the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay;

(2) Under conditions and with amenities similar to a hotel, motel, or inn, including—

(i) An on-site proprietor and reservations desk,

(ii) Rooms available on a walk-up basis,

(iii) Linen service, and

(iv) Accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit.

\* \* \* \* \*

*Proposed standards* means the requirements set forth in appendices B and D to 36 CFR part 1191 as adopted by the Department of Justice.

\* \* \* \* \*

*Qualified interpreter* means an interpreter who is able to interpret effectively, accurately, and impartially using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language

interpreters, oral interpreters, and cued speech interpreters. Oral interpreter means an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. Cued speech interpreter means an interpreter who functions in the same manner as an oral interpreter except that he or she also uses a hand code, or cue, to represent each speech sound.

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

*Qualified small business* means a public accommodation that meets the definition of "business concern" in 13 CFR 121.105 and that, together with its Affiliates, as determined pursuant to the criteria set forth in 13 CFR 121.103, meets the small business size standards established in 13 CFR 121.201, for the industry in which it is primarily engaged, as amended from time to time by the Small Business Administration. The term "primarily engaged" for purposes of this definition is defined in 13 CFR 121.107.

*Service animal* means any dog or other common domestic animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing minimal protection or rescue work, pulling a wheelchair, fetching items, assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation. The term *service animal* includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities. The term *service animal* does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents. Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals.

*Video interpreting services (VIS)* means an interpreting service that uses video conference technology over high-speed internet lines. VIS generally consists of a videophone, monitors, cameras, a high-speed internet connection, and an interpreter.

*Wheelchair* means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven.

## Subpart B—General Requirements

### § 36.208 [Amended]

4. Amend § 36.208 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

5. Amend § 36.211 by adding paragraph (c) to read as follows:

### § 36.211 Maintenance of accessible features.

\* \* \* \* \*

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

## Subpart C—Specific Requirements

6. Amend § 36.302 as follows:

a. Revise paragraph (c)(2);

b. Add paragraphs (c)(3) through (c)(8) and paragraphs (e) and (f) to read as follows:

### § 36.302 Modifications in policies, practices, or procedures.

\* \* \* \* \*

(c) \* \* \*

(2) *Exceptions.* A public accommodation may ask an individual with a disability to remove a service animal from the premises if:

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

(ii) The animal is not housebroken or the animal's presence or behavior fundamentally alters the nature of the service the public accommodation provides (e.g., repeated barking during a live performance); or

(iii) The animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications.

(3) *If an animal is properly excluded.* If a place of accommodation properly excludes a service animal, it shall give the individual with a disability the opportunity to obtain goods, services,

and accommodations without having the service animal on the premises.

(4) *General requirements.* The work or tasks performed by a service animal shall be directly related to the handler's disability. A service animal that accompanies an individual with a disability into a place of public accommodation shall be individually trained to do work or perform a task, housebroken, and under the control of its handler. A service animal shall have a harness, leash, or other tether.

(5) *Care or supervision of service animals.* A public accommodation is not responsible for caring for or supervising a service animal.

(6) *Inquiries.* A public accommodation shall not ask about the nature or extent of a person's disability, but can determine whether an animal qualifies as a service animal. For example, a public accommodation may ask if the animal is required because of a disability; and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified or licensed as a service animal.

(7) *Access to areas open to the public, program participants, and invitees.* Individuals with disabilities who are accompanied by service animals may access all areas of a place of public accommodation where members of the public, program participants, and invitees are allowed to go.

(8) *Fees or surcharges.* A public accommodation shall not ask or require an individual with a disability to post a deposit, pay a fee or surcharge, or comply with other requirements not generally applicable to other patrons as a condition of permitting a service animal to accompany its handler in a place of public accommodation, even if people accompanied by pets are required to do so. If a public accommodation normally charges its clients or customers for damage that they cause, a customer with a disability may be charged for damage caused by his or her service animal.

\* \* \* \* \*

(e) *Hotel reservations.* A public accommodation that owns, leases (or leases to), or operates a place of lodging shall:

(1) Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations, including reservations made by telephone, in-person, or through a third party, for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms;

(2) Identify and describe accessible features in the hotels and guest rooms offered through the reservations service; and

(3) Guarantee that an accessible guest room reserved through the reservations service will be held for the reserving customer during the reservation period to the same extent that it guarantees reservations made by others.

(f) *Ticketing.* (1) *General.* A public accommodation shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating during the same hours, through the same methods of distribution, and in the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons.

(2) *Availability.* Tickets for accessible seating shall be made available during all stages of ticket sales, including, but not limited to, presales, promotions, lotteries, waitlists, and general sales.

(3) *Identification of accessible seating.* Wheelchair seating and companion seats shall be identified on seating maps, plans, brochures, or other information provided to the general public to describe the seating layout or configurations at an assembly area.

(4) *Notification of accessible seating locations.* A public accommodation that sells or distributes tickets for seating at assembly areas shall, upon inquiry, inform spectators with disabilities and their companions of the locations of all unsold or otherwise available accessible seating for any ticketed event at the facility.

(5) *Sale of season tickets or other tickets for multiple events.* Season tickets or other tickets sold on a multi-event basis to individuals with disabilities and their companions shall be sold under the same terms and conditions as other tickets sold for the same series of events. Spectators purchasing tickets for accessible seating on a multi-event basis shall also be permitted to transfer tickets for single-event use by friends or associates in the same fashion and to the same extent as permitted other spectators holding tickets for the same type of ticketing plan.

(6) *Hold and release of accessible seating.* A public accommodation may release unsold accessible seating to any person with or without a disability following any of the circumstances described below:

(i) When all seating (excluding luxury boxes, club boxes, or suites) for an event have been sold;

(ii) When all seating in a designated area in the facility has been sold and the accessible seating being released is in the same designated area; or

(iii) When all seating in a designated price range has been sold and the accessible seating being sold is within the same designated price range. Nothing in this provision requires a facility to release wheelchair seats for general sale.

(7) *Ticket prices.* The price of tickets for accessible seating shall not be set higher than for tickets to seating located in the same seating section for the same event. Accessible seating must be made available at all price levels for an event. If an existing facility has barriers to accessible seating at a particular price level for an event, then a percentage (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) of the number of accessible seats must be provided at that price level in an accessible location. In no case shall the price of any particular accessible seat exceed the price that would ordinarily be charged for an inaccessible seat in that location.

(8) *Prevention of fraudulent purchase of accessible seating.* A public accommodation may not require proof of disability before selling a wheelchair space.

(i) For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the wheelchair space uses a wheelchair.

(ii) For season tickets, subscriptions or other multi-events, it is permissible to ask the individual to attest in writing that the wheelchair space is for an individual who utilizes a wheelchair. A public accommodation may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

(9) *Purchasing multiple tickets.* (i) Individuals with disabilities and their companions shall be permitted to purchase the same maximum number of tickets for an event per sales transaction as other spectators seeking to purchase seats for the same event. If there is an insufficient number of seats for all members of a party to sit together, seats shall be provided that are as close as possible to the wheelchair spaces. For accessible seating in a designated wheelchair area, a public accommodation shall provide up to three companion seats for each person with a disability who requires a wheelchair space, provided that at the time of purchase there are sufficient available wheelchair spaces.

(ii) For group sales, if a group includes one or more individuals who use a wheelchair, the group shall be placed in a seating area that includes wheelchair spaces so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from their group.

7. Amend § 36.303 as follows:

a. Revise paragraphs (b) introductory text, (b)(1), (b)(2), (c), and (d);

b. Redesignate paragraph (f) as paragraph (h);

c. Add paragraphs (f) and (g) to read as follows:

**§ 36.303 Auxiliary aids and services**

\* \* \* \* \*

(b) *Examples.* The term *auxiliary aids and services* includes—

(1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, exchange of written notes, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, text telephones (TTYs), videotext displays, video interpreting services (VIS), accessible electronic and information technology, or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

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

(c) *Effective communication.* (1) A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities and their companions who are individuals with disabilities.

(i) For purposes of this section, *companion* means a family member, friend, or associate of a program participant who, along with the participant, is an appropriate person with whom the public accommodation should communicate.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length, and complexity of the

communication involved, and the context in which the communication is taking place. A public accommodation shall consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication.

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

(3) A public accommodation shall not rely on an individual accompanying an individual with a disability to interpret or facilitate communication, except in an emergency involving a threat to public safety or welfare, or unless the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

(d) *Telecommunications*—(1) *Telephones*. (i) When a public accommodation uses an automated attendant system for receiving and directing incoming telephone calls, that automated attendant system must provide effective communication with individuals using TTYs or a telecommunications relay system.

(ii) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make available, upon request, public telephones equipped with volume control mechanisms, hearing aid compatible telephones, or text telephones (TTYs) for the use of an individual who is deaf or hard of hearing, or has a speech impairment.

(iii) This part does not require a public accommodation to use public telephones equipped with volume control mechanisms, hearing aid compatible telephones, or TTYs for receiving or making telephone calls incident to its operations.

(iv) A public accommodation shall respond to telephone relay from a telecommunications relay service established under title IV of the Americans with Disabilities Act in the same manner that it responds to other telephone calls.

(2) *Text telephones (TTYs)*. (i) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make

available, upon request, a TTY for the use of an individual who is deaf or hard of hearing, or has a speech impairment.

(ii) This part does not require a public accommodation to use a TTY for receiving or making telephone calls incident to its operations.

\* \* \* \* \*

(f) *Video interpreting services (VIS)*. A public accommodation that chooses to provide qualified interpreters via VIS shall ensure that it provides—

(1) High quality, clear, real-time, full-motion video and audio over a dedicated high-speed internet connection;

(2) A clear, sufficiently large, and sharply delineated picture of the interpreter's head and the participating individual's head, arms, hands, and fingers, regardless of his body position;

(3) Clear transmission of voices; and

(4) Training to nontechnicians so that they may quickly and efficiently set up and operate the VIS.

(g) *Sports stadiums*. One year after the effective date of this regulation, sports stadiums that have a seating capacity of 25,000 or more shall provide captioning on the scoreboards and video monitors for safety and emergency information.

\* \* \* \* \*

8. Amend § 36.304 as follows:

a. Redesignate paragraph (d)(2) as (d)(6) and in the first sentence remove the reference “(d)(1)” and add “(d)(1) through (5)” in its place;

b. Add paragraphs (d)(2) through (d)(5);

**§ 36.304 Removal of barriers.**

\* \* \* \* \*

(d)(2) *Safe harbor*. Elements in existing facilities that are not altered after [insert effective date of final rule], and that comply with the 1991 Standards, are not required to be modified in order to comply with the requirements set forth in the proposed standards.

(3) *Reduced scoping for public accommodations*. For measures taken to comply with the barrier removal requirements of this section, existing facilities shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404 through 36.406 of this part for the element being altered, except as follows:

(i) In addition to the provisions of section 240.2.1 of the proposed standards, where an existing play area provides elevated play components, an additional number of ground level play components may be substituted for the number of elevated play components that would have been required to comply with the provisions of section 240.2.2 of the proposed standards; and

(ii) Where an existing swimming pool has at least 300 linear feet of swimming pool wall, it shall comply with the applicable requirements for swimming pools, except that it shall be required to provide only one accessible means of entry that complies with section 1009.2 or section 1009.3 of the proposed standards.

(4) *Exemption for small facilities*. For measures taken to comply with the barrier removal requirements of this section, existing facilities shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404 through 36.406 of this part, except as follows:

(i) Where an existing play area has less than 1000 square feet or is located in a family child care facility where the proprietor actually resides, it shall be exempt from the provisions of section 240 of the proposed standards;

(ii) Where an existing swimming pool has less than 300 linear feet of swimming pool wall, it shall be exempt from the provisions of section 242.2 of the proposed standards; and

(iii) Where an existing sauna or steam room was designed and constructed to seat only two people, it shall be exempt from the provisions of section 241 of the proposed standards.

(5) *Qualified small business*. A qualified small business has met its obligation to remove architectural barriers where readily achievable for a given year if, during that tax year, the entity has spent an amount equal to at least one percent (1%) of its gross revenue in the preceding tax year on measures undertaken in compliance with the barrier removal requirements of this section.

\* \* \* \* \*

9. Amend § 36.308 as follows:

a. Revise paragraphs (a)(1)(i), (a)(1)(ii) introductory text, (A), and (B), and (b);

b. Add paragraphs (a)(1)(iii) and (c) to read as follows:

**§ 36.308 Seating in assembly areas.**

(a)(1) \* \* \*

(i) Provide a reasonable number of wheelchair seating spaces, companion seats, and designated aisle seats; and

(ii) Locate the wheelchair seating spaces and companion seats so that they:

(A) Are an integral part of the seating area and are dispersed to all accessible seating levels; and

(B) Provide viewing angles to the screen, performance area, or other focal point that are equivalent to or better than the average viewing angles provided to all other spectators;

\* \* \* \* \*



(iii) Companion seats shall be equivalent in size, quality, comfort, and amenities to the other seats in the assembly areas. Companion seats may be fixed or movable. \* \* \*

(b) *New construction and alterations.* The provision and location of wheelchair seating spaces and companion seats and designated aisle seats in newly constructed or altered assembly areas shall be governed by the standards for new construction and alterations in subpart D of this part.

(c) *Modifications of policy—(1) Seating areas.* When designating seating sections of assembly areas providing spectators with, or entitling them to, distinct services or amenities that are not generally available to other spectators, a public accommodation in assembly areas shall ensure that wheelchair seating spaces and companion seating are provided in each such specialty seating area. The number of wheelchair seating spaces and companion seating provided in specialty seating areas shall be included in, rather than in addition to, wheelchair space requirements set forth in Table 221.2.1.1 in the proposed standards.

(2) *Group ticket purchases.* To the extent possible, a public accommodation in assembly areas shall permit wheelchair users to purchase companion tickets on the same terms that tickets are made available to other members of the public. In assembly areas with seating capacities exceeding 5,000, designate at least three companion seats for each of five wheelchair seating spaces in order to provide more flexible seating arrangements for families and other small groups. The group companion seats required by this subsection may be located adjacent to either the wheelchair location or other companion seats.

10. Amend § 36.309 by adding paragraph (b)(1)(iv) to read as follows:

**§ 36.309 Examinations and courses.**

(b)(1) \* \* \* (iv) any request for documentation if such documentation is required is reasonable and limited to the need for the modification or aid requested. \* \* \*

11. Amend 28 CFR part 36 by adding § 36.311 to read as follows:

**§ 36.311 Mobility devices.**

(a) *Use of wheelchairs and manually powered mobility aids.* A public accommodation shall permit individuals with mobility impairments to use wheelchairs, scooters, walkers, crutches, canes, braces, or similar

devices in any areas open to pedestrian use.

(b) *Other power-driven mobility devices.* A public accommodation shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation's goods, services, facilities, privileges, advantages, or accommodations.

(c) *Development of policies permitting the use of other power-driven mobility devices.* A public accommodation shall establish policies to permit the use of other power-driven mobility devices by individuals with disabilities when it is reasonable to afford a public accommodation's goods, services, facilities, or accommodations to an individual with a disability. Whether a modification is reasonable to allow the use of a class of power-driven mobility device by an individual with a disability in specific venues (e.g., doctors' offices, parks, commercial buildings, etc.) shall be determined based on:

(1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair;

(2) The potential risk of harm to others by the operation of the mobility device;

(3) The risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and

(4) The ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

(d) *Inquiry into use of mobility device.* A public accommodation may ask a person using a power-driven mobility device if the mobility device is required because of the person's disability. A public accommodation shall not ask a person using a mobility device questions about the nature and extent of the person's disability.

**Subpart D—New Construction and Alterations**

12. Amend § 36.403 by adding paragraph (a)(1) and revising (f)(2)(iii) to read as follows:

**§ 36.403 Alterations: Path of travel.**

(a) \* \* \* (1) If a private entity has constructed or altered required elements of a path of travel at a place of public accommodation or commercial facility

in accordance with the specifications in the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the proposed standards solely because of an alteration to a primary function area served by that path of travel.

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

- 13. Amend § 36.406 as follows:
  - a. Add the heading “Applicable standards” to paragraph (a);
  - b. Redesignate paragraph (a) as paragraph (a)(1);
  - c. Revise paragraphs (a)(1) and (b);
  - d. Add paragraphs (a)(2), (c), (d), (e), (f), and (g);
  - e. Remove Appendix to § 36.406 to read as follows:

**§ 36.406 Standards for new construction and alterations.**

(a) *Applicable standards.* (1) New construction and alterations subject to this part shall comply with the 1991 Standards if physical construction of the property commences before [date six months after the effective date of the final rule.]

(2) New construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences on or after [date six months after the effective date of the final rule.]

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

(c) *Places of lodging.* Places of lodging, including inns, hotels, motels, time-shares, condominium hotels, mixed-use, and corporate hotel facilities subject to the proposed standards shall comply with the provisions of the proposed standards that apply to transient lodging, including, but not limited to the requirements for transient lodging guest rooms in sections 224 and 806.

(d) *Social service establishments.* Group homes, halfway houses, shelters, or similar social service establishments that provide temporary sleeping accommodations or residential dwelling units subject to the proposed standards

shall comply with the provisions of the proposed standards that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

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

(e) *Housing at a place of education.* Dormitories or residence halls operated by or on behalf of places of education that are subject to the proposed standards shall comply with the provisions applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806.

(f) *Assembly areas.* Assembly areas subject to the proposed standards shall comply with the provisions applicable to assembly areas, including, but not limited to, sections 221 and 804. In addition, assembly areas shall ensure that:

(1) Wheelchair and companion seating locations are dispersed to all levels of the facility that are served by an accessible route;

(2) Wheelchair and companion seating locations are not located on (or obstructed by) temporary platforms or other movable structures. When wheelchair seating locations are not required to accommodate people who use wheelchairs, individual, removable seats may be placed in those spaces;

(3) Facilities that have more than 5,000 seats shall provide at least five wheelchair spaces and at least three companion seats for each wheelchair space; and

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

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

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

(g) *Medical care facilities.* Medical care facilities subject to the proposed standards shall comply with the provisions applicable to medical care facilities, including, but not limited to,

sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 in a manner that enables patients with disabilities to have access to appropriate specialty services.

**§ 36.407 [Removed]**

14. Remove § 36.407.

**Subpart F—Certification of State Laws or Local Building Codes**

**§ 36.603 [Removed]**

15. Remove § 36.603.

**§ 36.604 [Redesignated as § 36.603]**

16. Redesignate § 36.604 as § 36.603 and revise it to read as follows:

**§ 36.603 Preliminary determination.**

Upon receipt and review of all information relevant to a request filed by a submitting official for certification of a code, and after consultation with the Architectural and Transportation Barriers Compliance Board, the Assistant Attorney General shall make a preliminary determination of equivalency or a preliminary determination to deny certification.

**§ 36.605 [Redesignated as § 36.604]**

17. Redesignate § 36.605 as § 36.604 and revise paragraphs (a), (a)(2), and (b) to read as follows:

**§ 36.604 Procedure following preliminary determination of equivalency.**

(a) If the Assistant Attorney General makes a preliminary determination of equivalency under § 36.603, he or she shall inform the submitting official, in writing, of that preliminary determination. The Assistant Attorney General also shall:

(1) After considering the information received in response to the notice described in paragraph (a) of this section, and after publishing a separate notice in the **Federal Register**, hold an informal hearing, in the State or local jurisdiction charged with administration and enforcement of the code, at which interested individuals, including individuals with disabilities, are provided an opportunity to express their views with respect to the preliminary determination of equivalency; and

(2) The Assistant Attorney General—after consultation with the Architectural and Transportation Barriers Compliance

Board and consideration of the materials and information submitted pursuant to this section, as well as information previously provided by the submitting official—shall issue either a certification of equivalency or a final determination to deny the request for certification. The Assistant Attorney General shall publish notice of the certification of equivalency or denial of certification in the **Federal Register**.

**§ 36.606 [Redesignated as § 36.605]**

18. Redesignate § 36.606 as § 36.605 and revise the first sentence of paragraph (a) to read as follows:

**§ 36.605 Procedure following preliminary denial of certification.**

(a) If the Assistant Attorney General makes a preliminary determination to deny certification of a code under § 36.603, he or she shall notify the submitting official of the determination.

\* \* \*

**§ 36.607 [Redesignated as § 36.606]**

19. Redesignate § 36.607 as § 36.606 and add a new paragraph (d) to read as follows:

**§ 36.606 Effect of certification.**

\* \* \*

(d) When the standards of the Act against which a code is deemed equivalent are substantially revised or amended, a certification of equivalency issued under the preexisting standards is no longer effective, as of the date the revised standards take effect. However, construction in compliance with a certified code during the period when a certification of equivalency was effective shall be considered rebuttable evidence of compliance with the Standards then in effect as to those elements of buildings and facilities that comply with the certified code. A submitting official may reapply for certification pursuant to the Act's revised standards, and, to the extent possible, priority will be afforded the request in the review process.

**§ 36.608 [Redesignated as § 36.607]**

20. Redesignate § 36.608 as § 36.607.

Dated: May 30, 2008.

**Michael B. Mukasey,**  
*Attorney General.*

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