

provides that no funds available to DoD may be provided by contract or contract modification, nor may contract payments be made, to an institution of higher education that has a policy of denying or that effectively prevents the Secretary of Defense from obtaining for military recruiting purposes—

(A) Entry to campuses or access to students on campuses; or

(B) Access to directory information pertaining to students. (See 209.470.)

(iii) Pursuant to 10 U.S.C. 983, no funds may be obligated by contract or contract modification to an institution of higher education that has an anti-ROTC policy. (See 209.470.)

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BILLING CODE 5000-04-M

**48 CFR Part 242**

[DFARS Case 96-D007]

**Defense Federal Acquisition Regulation Supplement; Direct Submission of Vouchers to Disbursing Office**

AGENCY: Department of Defense (DOD).

ACTION: Final rule.

**SUMMARY:** The Director of Defense Procurement is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to allow the contract auditor to authorize direct submission of interim vouchers for provisional payment to the disbursing office, for contractors with approved billing systems.

**EFFECTIVE DATE:** May 21, 1996.

**FOR FURTHER INFORMATION CONTACT:** Rick Laysner, PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telefax (703) 602-0350. Please cite DFARS Case 96-D007.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule amends DFARS 242.803 to reduce unnecessary review and approval, by the contract auditor, of interim vouchers for provisional payment under DoD contracts.

**B. Regulatory Flexibility Act**

This final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501 and Public Law 98-577 and publication for public comment is not required. Therefore, the Regulatory Flexibility Act does not apply. However, comments from small entities concerning the affected DFARS subpart will be considered in accordance with 5 U.S.C. 610. Such

comments should cite DFARS Case 96-D007 in correspondence.

**C. Paperwork Reduction Act**

This rule does not impose any new information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

**List of Subjects in 48 CFR Part 242**

Government procurement.

Michele P. Peterson,

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, 48 CFR Part 242 is amended as follows:

**PART 242—CONTRACT ADMINISTRATION**

1. The authority citation for 48 CFR Part 242 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

2. Section 242.803 is amended by redesignating paragraphs (b)(i)(C) and (b)(i)(D) as paragraphs (b)(i)(D) and (b)(i)(E), respectively, and by adding a new paragraph (b)(i)(C) to read as follows:

**242.803 Disallowing costs after incurrence.**

\* \* \* \* \*

(b) \* \* \*

(i) \* \* \*

(C) Authorizing direct submission of interim vouchers for provisional payment to the disbursing office for contractors with approved billing systems.

\* \* \* \* \*

[FR Doc. 96-12765 Filed 5-20-96; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**49 CFR Parts 37 and 38**

[Docket No. 49658]

RIN 2105-AC13

**Transportation for Individuals With Disabilities**

AGENCY: Department of Transportation (DOT), Office of the Secretary.

ACTION: Final rule.

**SUMMARY:** The Department is amending several provisions of its rules implementing the Americans with Disabilities Act (ADA). Some of the changes are being made in response to petitions received by the Department.

The first change will ensure that the rule treats independent private schools similarly to other schools. The second change will apply the same gap standard to high speed automated guideway transit (AGT) systems as is applied to other rapid and light rail systems. The third petition granted in this rule will give local jurisdictions more discretion with respect to advance reservation systems for paratransit services. However, the Department is withdrawing a proposal that would have permitted transit authorities to determine that certain bus stops may be designated as non-accessible stops.

This rule will also make six amendments that derive from the Department's own proposals. The first will decrease the paperwork burden of producing annual paratransit plan updates once the paratransit system reaches full compliance with ADA regulations. The second will clarify a visitor's eligibility for paratransit services. The third will clarify the vehicle acquisition requirements for private entities not primarily engaged in the business of transporting people. The fourth amendment will remove "inability to comply" as a condition of gaining a determination of equivalent facilitation. The final two amendments will eliminate confusion in a cross reference within the regulation and correct a typographical error. The Department has concluded that no change is warranted in the regulatory definition of a personal care attendant.

**EFFECTIVE DATE:** This final rule is effective June 20, 1996.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590. (202) 366-9306 (voice); (202) 755-7687 (TDD); or Richard Wong, Office of Chief Counsel, Federal Transit Administration, same street address, Room 9316. (202) 366-4011.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The Department published its notice of proposed rulemaking (NPRM) on the issues covered by this rule on July 21, 1994. The NPRM included proposed amendments that were petitioned for by the public on which the Department took no initial position and proposals that the Department generated internally. The Department received over 275 comments on the NPRM, most of which came from individuals with disabilities, organizations representing them and transit authorities. Additional

comments were received from state disability advocates, engineering groups, paratransit providers and equipment manufacturers, as well as others.

## II. Petitions for Rulemaking

### 1. Bus Stops

This issue, raised in the NPRM on the basis of a petition from Seattle Metro, was the most controversial in the rulemaking. Disability community commenters were virtually unanimous in strongly opposing Seattle's suggestion that transit authorities be authorized to declare a bus stop "off limits" to wheelchair users, or in some cases, to all lift users, on the basis that conditions at the stop made its use too dangerous for such passengers. These commenters included disability advocacy organizations, individuals, the U.S. Department of Justice, and state and local government agencies. A few transit agencies also shared their point of view.

The first point these commenters made was that individuals with disabilities—not transit agencies—should decide when a given stop is appropriate for them to use. Individuals with disabilities know their own abilities better than anyone else, and can make reasonable choices about what is or is not safe for them. Allowing other parties, such as transit agencies, to make these choices smacks of paternalism and is the sort of well-intended constraint on the activities of persons with disabilities that the ADA is specifically intended to prevent. Providing discretion to transit authorities to deny to passengers with disabilities the use of facilities that other passengers are allowed to use is a clear violation of the ADA's nondiscrimination mandate, many commenters said.

What made the proposal additionally objectionable, many of these commenters said, was that there was no empirical evidence that there was a significant safety problem at bus stops. There might be speculation that a safety problem existed, and worry about potential liability, but there were few, if any, facts presented that the problem was real. When there is a nondiscrimination mandate like that of the ADA, any classification that denies services to the protected class must be based on demonstrated facts, they said, not on fear. Many of these commenters pointed to the ADA's "direct threat" concept as a model for determining when it is acceptable to deny services or facilities to individuals with disabilities based on a safety risk. This concept, they noted, focuses on the individual situation of each disabled person, not on

the presumed abilities of a class of persons with disabilities.

Finally, a number of these commenters noted that, if individuals are denied use of stops, they will become eligible for paratransit, which will increase costs to transit authorities. There could also be situations in which people would be denied service altogether because of limited capacity on paratransit systems, one commenter noted. (Two transit authority commenters said, on the other hand, that transit authorities' desire to avoid adding to paratransit costs would be a deterrent to abuse of discretion to limit passengers' use of unsafe stops.)

Many disability community commenters, and several transit authorities as well, opposed the petitioner's suggestion that the standard for determining the suitability of a stop for disabled passengers be the new construction standard for bus stops in the Americans with Disabilities Act Accessibility Guidelines (AADAG). This standard, they said, was of questionable relevance to streetside bus stops in mass transit systems, and was inappropriate for use in a situation involving existing facilities in any event. The obligation that public entities have for existing facilities, they noted, is to make them program accessible, not necessarily to bring them up to new construction standards. The new construction standard was never intended to be a safety standard, or a criterion to determine when an individual with disabilities would be allowed to use a facility. The petitioner was the only commenter to support the proposal to use the new construction standard.

A large majority of the transit providers that commented supported the idea that they should have discretion to declare stops "off limits" to lift users on the basis of safety. Because some stops had hazards that affect passengers with disabilities in ways that other passengers are not affected (e.g., stops that have a narrow area for maneuvering that present a problem to wheelchair users but not ambulatory persons, stops with a drop-off that can result in a wheelchair overturning), it is rational to prevent accidents and injuries by denying use of these stops to persons for whom the hazards are serious. Concern about liability was another reason advanced by many transit commenters. Seattle said it had experienced seven accidents because of bus stop problems since 1987, including one serious injury that resulted in a settlement of over \$400,000.

While the transit community generally supported Seattle's petition,

there were a number of interesting nuances in transit provider comments. Some emphasized the necessity of working with the disability community on bus stop access issues, including public hearings or other opportunities for public participation. Improving or moving existing bus stops was a step mentioned by others. Differences among buses and passengers need to be taken into consideration, others said. Prodding the Department of Justice to issue regulations requiring local governments to work on making bus stops under their control program accessible was another suggestion. Better training for drivers on how to deploy lifts safely in a variety of situations was also recommended. Some commenters also mentioned (but apparently did not favor) the possibility of closing stops to all passengers if they were not safely usable by passengers with disabilities.

This is a case in which both sides of the debate have genuine concerns. The petitioner and comments supporting its position worry, in good faith, about potential safety problems facing wheelchair users at some bus stops and about ensuing liability problems that may result for transit providers. In the absence of legal constraints on the use of classifications based on disability, it could arguably be rational for transit providers to take the kind of action that the petition proposes.

However, the ADA imposes strong legal constraints on the use of classifications based on disability. Under the ADA, a proposed action which treats a disability-based class of persons differently from the rest of the public cannot be accepted merely because it may assuage a party's good faith concerns about safety. This is a position that the Department has taken consistently as it has developed and implemented its ADA regulations.

For example, before and during the development of Part 37, there was considerable discussion of transit providers' good-faith safety concerns about transporting three-wheeled "scooters." Many commenters asserted that these devices were unstable and difficult to secure, and asked that transit providers have the discretion to exclude them on the basis of these safety-related concerns. The Department required that providers carry such mobility devices, noting the absence of "information in the record that would support a finding that carrying non-traditional wheelchairs would constitute a 'direct threat' to the safety of others. \* \* \*" (56 FR 45617; September 6, 1991).

Subsequently, transit community commenters raised the issue of the use

of lifts by standees, which the original version of Part 37 required. The commenters expressed the concern that standees could fall off the lifts or hit their heads, resulting in injury to passengers and liability for providers. With one exception (concerning a particular lift model that was no longer being manufactured), there was little information in the record demonstrating that a real safety problem, as distinct from speculation or fears concerning potential safety problems, existed. The Department rejected the proposal, saying that—

[t]he ADA is a nondiscrimination statute, intended to ensure \* \* \* that people with disabilities have access to transportation services. To permit a transportation provider to exclude a category of persons with disabilities from \* \* \* access to a vehicle on the basis of a perceived safety hazard, absent information in the record that the hazard is real, would be inconsistent with the statute. \* \* \* While we understand the concerns of transit agency commenters about the potential safety risks that may be involved, the Department does not have a basis in the rulemaking record for authorizing a restriction on lift use by standees. (58 FR 63096; November 30, 1993).

The Department's analysis of the Seattle petition is very similar to its response to these two previous issues. The petition presents a genuine, good-faith concern that a certain condition (here, terrain or other problems at particular bus stops) may create a safety hazard for a class of persons with disabilities. There is, in the comments favoring the petition, agreement that difficult conditions at some stops might, indeed, create some safety risks for wheelchair users or other persons with disabilities. But there is little in the record to suggest that there is substantial, pervasive, or strong evidence that a real, as distinct from speculative, safety problem exists.

To its credit, the petitioner attempted to show the Department that problem stops existed for which the petitioner's proposed remedy was needed. The petitioner provided a videotaped demonstration of wheelchair users attempting to get on and off buses using lifts at several problem stops. After reviewing the tape, the Department concluded that it is reasonable to believe that at such stops, wheelchair users may well have greater difficulty, and take longer, in using bus lifts than at other stops. In some of the situations, there could be a higher risk to wheelchair users than at other, more "normal," stops. The Department does not find this evidence sufficient, however, to justify carving out an

exception to the nondiscrimination mandate of the ADA.

In thinking about situations in which safety reasons are advanced for using disability-based classifications, the Department finds it useful to consider the "direct threat" provisions that exist in other provisions of the ADA. "Direct threat" permits exceptions—specific to an individual—to be made to ADA nondiscrimination requirements on the basis of safety. The Department of Justice (DOJ) rule implementing Title III of the ADA in the context of public accommodations defines the concept as follows:

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. In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on a reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. (28 CFR 36.208 (b)-(c)).

Very similar regulatory language appears in the Equal Employment Opportunity Commission (EEOC) rules implementing Title I of the ADA in the context of employment (29 CFR 1630.2(r); see also discussion 56 FR 35745; July 26, 1991). The Department of Justice regulation implementing Title II of the ADA in the context of state and local government programs does not include "direct threat" language in its regulatory text, but the preamble applies the concept to the essential eligibility requirements for participating in state and local programs (56 FR 35701; July 26, 1991).

While the DOJ and EEOC language concerning "direct threat" does not necessarily apply in its entirety to transportation issues, the Department believes that it is appropriate, and in keeping with the language and intent of the statute, to determine that disability-based classifications in transportation having a safety rationale are supportable only on the basis of analysis that incorporates the essentials of the "direct threat" concept in a way consistent with the nature of transportation programs. The petition at issue in this rulemaking does not, in the Department's view, closely approach what is necessary to be adopted under such an analysis.

As a general matter, the points raised by commenters opposed to the proposal, as described above, have been more

persuasive to the Department than those points made by its proponents. These points add to the discussion above as reasons for the Department's decision.

The Department believes that transit providers which, like Seattle, sincerely desire both to provide nondiscriminatory service to individuals with disabilities and to maximize bus stop safety have some means available to achieve these objectives. For example, a transit provider could provide information to lift users about potential hazards at certain stops and offer informational on alternative stops or routings to such passengers, where alternatives were available. The provider could also offer paratransit to those passengers who chose to avoid using the stops as a result.

The transit provider could make operational modifications to mitigate potential hazards. For example, if there is limited space or a potential hazard at a stop, the bus could let a wheelchair user board at a nearby area that was easier to use or stop at a greater distance from the curb. We are aware that transit providers are often reluctant to depart from normal practices in this regard (although such deviations appear commonplace during inclement weather, such as when bottomless puddles, "Blizzard of '96"-size snowbanks, or carnivorous potholes make access to normal stops difficult for all passengers). Nevertheless, these are among the kinds of "reasonable modifications of policies, practices, or procedures [to] mitigate the risk" that the ADA calls for.

Transit providers can also urge local governments to improve accessibility to bus stops, mitigate hazards at stops, or, if need be, move stops to better locations. The Department is aware that transit providers often do not control the placement of stops or the land on which they are located, though we believe that transit providers should continue the effort to work with their local governments on these matters.

For these reasons, the Department is withdrawing the proposal, based on the Seattle petition, to permit transit providers to limit the use of certain bus stops by lift users. The existing rule's language (49 CFR 37.167(g)) will remain in effect, without change. Any transit provider that may have instituted limits on the use of particular stops by lift users, except as authorized by this provision, must cease implementing the limits, as they are explicitly contrary to the Department's ADA rule.

## 2. Requirements for Private School Transportation

The Department has decided to grant the petition of the National Association of Independent Schools (NAIS) and adopt the proposed private school exemption. In doing so, the Department emphasizes the importance of ensuring that schools provide disabled students with equal access to all of the schools' academic and extracurricular programs. Private schools will therefore have to provide equivalent transportation services to disabled students in order to be eligible for the exemption. The final rule will apply the same standard for equivalent service as is found in § 37.105.

This change is being made because the current requirement that all new buses purchased be lift equipped does not apply to most schools. Public schools are exempt because their transportation services are excluded from the ADA's definition of "designated public transportation." Schools with a religious affiliation are exempt based on the ADA's exemption for religious organizations. Private elementary and secondary schools that receive Federal financial assistance get the same exemption as public schools if they provide equivalent transportation services to students with disabilities and are covered by section 504 of the Rehabilitation Act of 1973. By now, the Department's regulation exempts all schools except private, non-religious schools that receive no Federal financial assistance.

The NAIS petition pointed out the anomalous result of the regulation applying more stringent and costly standards to schools that receive no Federal financial assistance than is applied to schools that do receive assistance. In response to the NAIS petition, the NPRM proposed amending § 37.27 to apply the same equivalent services standard to independent schools as is applied to private schools that receive Federal assistance. The majority of the comments received on this aspect of the proposal supported extending the private school exemption. However, many commenters did express concerns about disabled students' access to school events. This concern was shared by the few commenters who opposed the exemption.

The Department also shares these concerns. The independent private schools will be subject to the same equivalent service standard that other private schools must meet, namely that "when viewed in [their] entirety" transportation services must be "provided in the most integrated setting

appropriate to the needs of the individual and is equivalent to the service provided other individuals \* \* \* 49 C.F.R. § 37.105. Any test for equivalence under § 37.105 would go beyond providing equal access to transportation to and from school and include transportation to and from all of the school's extracurricular activities. This approach is consistent with the Department of Education's requirement that non-academic and extracurricular activities and services be provided in such a way as to ensure disabled students an equal opportunity for participation. See 34 C.F.R. § 104.37(a)(1). In fact, the Department of Education goes so far as to include transportation itself as a covered non-academic service. See *id.* at § 104.37(a)(2).

One commenter raised the possibility that a school that does not purchase lift equipped buses because it has no disabled students might exclude disabled applicants in the future to avoid the expense of purchasing lifts. This concern could be valid. However, the possibility of the rule change encouraging future discrimination in the admissions process is speculative and the Department has neither the authority nor the expertise to address admissions discrimination.

### 3. People Mover Gap Standards

The Department has decided to adopt the NPRM's proposal to allow high speed AGT systems to comply with the same train door to platform gap standard as other high speed rail systems. The petition was submitted by the American Society of Civil Engineers (ASCE). ASCE cited the wide variation in AGT system speed—5 to 80 miles per hour—and requested that faster AGT systems be subjected to the less stringent requirements applied to rapid and light rail systems. ASCE had studied existing AGT systems and claimed that most do not meet current AGT standards of one inch horizontal and half inch vertical gaps between the train door and the platform edge. According to ASCE's analysis, AGT systems that run at under 20 miles per hour can reasonably be expected to meet the current gap standards. Faster AGT systems, however, require vehicles with larger, more complicated suspensions that make it more difficult to meet the smaller gap standard.

The proposal was not controversial. Only one of the 17 comments received objected to the principle of a speed division and two objected to the proposed 3-inch gap standard for the higher speed trains. The proposal would allow AGT systems that operate at over

20 mph at any point on the system to comply with the rapid/light rail gap standards of a 3 inch horizontal gap and 5/8 inch vertical gap. One commenter suggested that the larger gap only be permitted on sections of the track on which the AGT system actually ran at over 20 mph. The suggestion is being rejected because it ignores the underlying rationale for the speed division. If the AGT vehicle is to be capable of traveling at higher speeds on other segments of the system, it will require the more sophisticated suspension, which will in turn make the smaller gap standard more difficult to meet at all stops.

ASCE pointed out that the Access Board's preamble discussion refers to "AGT vehicles that travel at slow speed," and subsequent Access Board manuals suggest that the rapid/light rail gap standard should apply to faster AGT vehicles. The Access Board has interpreted its guidelines as permitting the construction that ASCE urges and the Department's action today will prevent any conflict or confusion between the guidelines and the rule.

### 4. 14-Day Advance Reservations

The proposal to remove the 14-day advance reservation requirement generated significant interest among commenters of all types. While approximately 130 commenters advocated keeping the reservation requirement, most expressed dissatisfaction with current reservation systems, suggested different reservation times, capacity allotments for advanced reservations or demonstration projects before a change in the requirement is made. Of the approximately 60 commenters who advocated repealing the requirement, many made similar recommendations.

Approximately 45 commenters made 11 different suggestions for changing the number of days allowed for advance reservations. Ten of these commenters believed that the number of days should be flexible and made no specific suggestion, five others suggested a range of 1 to 3 days, one commenter suggested 3 to 7 days and one suggested 7 to 8 days. Among the 27 commenters who endorsed a specific number of days, there were seven different recommendations, ranging from 1 day to 10 days, with 7 days being the most popular (13 commenters).

Eight commenters suggested limiting the percentage of paratransit capacity which could be reserved in advance. Most of these eight commenters did not offer a specific percentage limit, those who did were split between 40 and 50 percent. Three other commenters

suggested capping the number of trips an individual rider could reserve in advance. Similarly, these commenters did not agree on any one number.

The most common complaint about advance reservations was that they caused an unmanageable number of cancellations and no-shows. Twenty one commenters suggested penalties for riders who failed to show up for scheduled rides. Twelve other commenters suggested that this problem could be solved by requiring confirmation. Among these twelve comments were three different suggestions for when the confirmation should be made; there was also disagreement over whether the rider or the transit provider should be responsible for making the confirmation call.

Finally, ten commenters complained that long reservation times created prioritization, illegally favoring individuals with certain types of disabilities or favoring certain types of trips. Eight commenters pointed out that advance reservations drain the capacity of paratransit systems, but seven others countered that the real problem is limited capacity, which in turn causes reservation problems.

In light of the substantial dissatisfaction with the current 14-day reservation requirement evident from the comments and the abundant and varied suggestions for improving reservation systems, the Department has decided to remove the requirement and allow local transit providers, in conjunction with the riding public, the discretion to establish reservation systems that best meet local needs. Under the amended rule, transit systems can establish any reservation system that meets the other requirements of this part, with a maximum 14-day advance reservation period. Paratransit systems that wish to take advantage of the flexibility provided by this amendment by changing their reservation systems will have to ensure public participation in the decision to change and local review of the functioning of the new system. The public participation requirements of § 37.137(b) will apply.

One of the points commenters made in favor of retaining some advance reservation capacity in paratransit systems was the added security it affords concerning occasional, important, time-sensitive trips. For example, if someone has airline reservations, the person needs to be at the airport at a particular time on a particular day. The person is likely to be more comfortable if he or she knows, prior to the day before travel, that a paratransit reservation is confirmed.

While we do not believe that this kind of situation is sufficient, given the downsides of an advance reservation requirement, to justify mandating advance reservations, we suggest that, as transit providers consult with their communities about reservation system changes, that they explore means of addressing this concern.

It should be emphasized that, in order to meet Part 37 requirements, all paratransit systems must provide at least one-day advance reservations at all times. One of the apparent reasons that users take advantage of existing advance reservation systems in large numbers is their apprehension that, if they wait until the day before travel, the capacity of the system to serve them will have been exhausted. This can lead, in turn, to the scheduling, no-show, and cancellation problems cited in many comments. To make a short-term reservation or real-time scheduling system work properly, transit providers need to make sure that adequate vehicle and communications capacity is available, such that systematic denials of service do not exist to an extent that would constitute a capacity constraint (see § 37.131(f)(3)(i)(B)).

### III. DOT-Proposed Adjustments to the Rule

#### 1. *Reduction of Paperwork for Paratransit Plan Updates*

The NPRM proposed that transit authorities that had fully implemented the paratransit requirements of the rule would no longer have to send in annual updates to FTA. The thinking behind this proposal was that, once full compliance had been achieved, annual updates, and the process required to generate them, would become an unnecessary administrative burden. Instead, there would be a simple certification of compliance. If, for any reason, a transit authority slipped out of full compliance, it would have to inform FTA and file updates until it was once again in full compliance.

Transit agencies generally supported the proposed change, citing the difficulty that many small providers have with annual paperwork submissions. Some of these commenters said, however, that there should be other means (e.g., additions to the National Transportation Database) of monitoring and reporting data on paratransit costs and service. Disability community commenters, on the other hand, favored retention of the existing requirement. Some were suspicious of claims by transit authorities that they were really in full compliance. A common theme in these comments was

that the public participation requirements accompanying the annual update was a good opportunity for the disability community to have input concerning service problems. Indeed, some commenters said, public participation provisions should be strengthened.

Some of the comments also pointed to a statutory issue. Section 233(c)(7)(B) of the ADA provides that the Department's regulations shall require each public entity that operates fixed route service to submit a paratransit plan to the Secretary within 18 months after the effective date of the section and "on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing [paratransit] services." In its original ADA rule, the Department implemented this requirement by establishing the annual plan update requirement.

This requirement makes sense during the phase-in period for paratransit service. While a transit authority is gradually building up its paratransit service to the point where it meets all service criteria, it is reasonable for the transit authority to send in annual progress reports that have been developed through the public participation process set forth in the rule. Once the transit authority has fully met all the service criteria, however, there is no new "progress" to report. There is no implementation to "commence," since the service required by the rule is already up and running, and need only be continued for the transit authority to meet its ADA paratransit obligations.

Once the transit authority is fully meeting all service criteria (including the criterion concerning capacity constraints), submitting an annual certification that it is continuing to meet all these criteria as provided in its previously-approved plan meets the letter and intent of § 223(c)(7)(B). Of course, should the transit authority fall below full compliance with all criteria, it would need to inform FTA and resume substantive annual updates until it was once again in full compliance.

In response to comments, the Department will make two modifications to the proposed regulatory language. First, as noted above, there would need to be a report to FTA if the transit authority fell out of compliance. Second, we are adding a provision authorizing FTA to direct a transit authority to conduct a public participation process and submit a plan update if, in FTA's judgment (based, for example, on consumer complaints about service), there is a reasonable basis for

concern about continuing full compliance.

Because the regulation already requires a mechanism for continuing public participation (see § 37.137(c)), the Department is not persuaded that the public participation process accompanying plan updates is essential to provide public input to providers about paratransit service. While changes to National Transit Database reporting concerning paratransit are outside the scope of this rulemaking, the Federal Transit Administration will consider whether some modifications to this report to provide more data about paratransit service are desirable.

## 2. Visitor Eligibility

The NPRM requested comment on its proposal to clarify the eligibility of visitors to use paratransit services. The proposed change would have specified that the 21 days that transit operators must provide service to eligible visitors was 21 days within a year period, as opposed to 21 continuous days. The proposed regulatory text would have read: "A public entity is not required to provide service to a visitor for more than 21 days per year from the date of the first paratransit trip used by the visitor." (emphasis added). The Department has decided to clarify the provision by specifying that the maximum amount of service which transit providers must provide eligible visitors is 21 days per calendar year. The Department will further amend the rule to allow local providers the option of restricting the 21 days of service use to 21 continuous service days following the first trip.

Transit providers were split on whether visitors should be eligible for 21 continuous days or 21 days per year. Approximately half of the providers who commented complained of administrative difficulties inherent in keeping track of 21 days of service spread out over an entire year. It was also pointed out that with 21 days per year, paratransit operators have more difficulty managing capacity because they cannot predict demand. Other providers disagreed, reporting no administrative burden or capacity drain from allowing visitors 21 days per year. Capital Metro of Austin, Texas believes that 21 continuous days of eligibility is insufficient to meet the needs of frequent visitors, such as college students returning home on breaks, and instead allows visitors six months of service before requiring them to apply for local eligibility. Individuals with disabilities and advocacy groups almost all favored 21 days per year.

When an individual with a disability travels to another city, it remains the Department's policy that he or she have open and ready access to local mass transit without any need to have planned the trip in advance. Indeed, often the traveler will be unfamiliar with the new city and have no way to know in advance what his or her travel needs will be. For this reason, the Department's amendment to this provision emphasizes that in no case may a transit provider require a visitor to apply for or be granted eligibility certification before being able to use the provider's paratransit service as provided in § 37.127.

Given the desire commenters expressed for clarification of how the visitor eligibility provision is intended to work, and the likelihood that there may be many situations in which individuals (e.g., business travelers, weekend trip visitors) will make repeat trips to a given city during a year, the Department has decided to require that transit authorities permit a visitor to use the service on any combination of 21 days throughout a 365-day period. For example, if Ms. Smith first uses the service on April 1, she could use the service on April 2–6, May 17, July 10–15, October 7, etc. until she had used the service on 21 days in the period extending through March 31 of the next calendar year. The way that XYZ chooses to implement visitor eligibility should be made part of its paratransit program and visitors should be provided materials clearly explaining how XYZ's visitor policy works.

## 3. Vehicle Acquisition for "Private Not Primarily Engaged" Providers

Section 37.101 contains the vehicle acquisition requirements for private entities not primarily engaged in the business of transporting people. Paragraph (d) of the section applies to private entities which operate demand responsive systems which purchase vehicles with seating capacity over 16. When these entities purchase such a vehicle, it must be accessible to individuals who use wheelchairs, unless the entity can show that when viewed in its entirety, its system provides equivalent service to individuals with disabilities. The standard for equivalent service is found in § 37.105, to which paragraph (d) refers the reader.

Neither § 37.101 nor the ADA has any vehicle acquisition requirement for private entities not primarily engaged in transporting people which operate demand responsive systems which purchase vehicles with seating capacity of 16 or less. This has created the

mistaken impression that there are no service standards which apply to these systems. The ADA does require private operators of demand responsive systems to provide equivalent service to individuals with disabilities regardless of whether or not they purchase any new vehicles. This requirement is contained in Section 302(b)(2)(C) of the ADA and is reflected in the Department's regulations in § 37.171. Section 37.171 applies the same standard for overall equivalent service as is found in § 37.105.

To eliminate the confusion which has resulted from these requirements, this final rule adds a new paragraph to § 37.101 which explicitly states that private entities operating demand responsive systems that purchase vehicles with capacity of 16 or fewer must provide equivalent service to individuals with disabilities. The new paragraph refers the reader to both the requirement stated in § 37.171 and the standard articulated in § 37.105.

## 4. Personal Care Attendants

The NPRM requested comments on the question of how to define a personal care attendant (PCA), and whether further definition was necessary, for the purposes of determining eligibility to ride paratransit free while accompanying a paratransit eligible individual. Half of all comments received on the NPRM addressed this issue. Individuals with disabilities and advocacy groups were overwhelmingly opposed to any attempt to further define a PCA, often expressing the opinion that further definition would constitute an invasion of privacy.

Transit authorities were divided on the question, with eight believing that there was no problem and no further action warranted, and more than a dozen believing that something should be done. Three transit authorities suggested registering the PCAs themselves, and three more believed that only PCAs needed for the trip should qualify, not those whose services were required at the destination. Several commenters suggested that individuals who needed PCAs should register that need as part of the application process—something that the Appendix already allows paratransit providers to require. Three of the transit authorities that supported requiring riders to register the need for a PCA went further to suggest that individuals who have registered a need for a PCA be denied service when riding alone.

The Department has decided not to amend the regulatory text regarding PCAs. We wish to reemphasize, however, that the existing definition of

a PCA does not distinguish between PCAs whose services are required during the paratransit ride and those required at the destination. Limiting riders to PCAs who were required on the paratransit trip could leave a rider unable to function at his or her destination, thereby making the trip meaningless.

Finally, several commenters suggested requiring those who register as using a PCA be denied service when riding alone. The Department did not adopt this suggestion. Riders who use a PCA for destination needs may well have varying needs depending on the trip purposes. Requiring these riders to be accompanied by a PCA even when they do not expect to require assistance will create unnecessary expenses for the rider and further burden the seating capacity of the transit provider. Other riders may have varying levels of assistance needs over time, and requiring these riders to either further define their needs in advance or always travel with a PCA is unjustifiably intrusive.

#### 5. Equivalent Facilitation

The final substantive change proposed in the NPRM was to delete the requirement that an entity demonstrate an inability to comply with existing requirements as a condition of obtaining a determination of equivalent facilitation. As explained in the NPRM, the original purpose of the provision was to limit departures from established regulatory standards and promote uniformity and predictability. The Department was concerned, however, that requiring a showing of inability to comply was having the effect of stifling innovation and discouraging the development of new technologies that might provide equal or even greater accessibility at a lower cost.

The discussion of this change that appeared in the preamble of the NPRM addressed only whether a petitioning entity should have to demonstrate its inability to comply. A drafting error in the proposed regulatory text created the impression that the amendment would have gone further, eliminating other reporting requirements associated with the petition for equivalent facilitation. The Department apologizes for the error and wishes to note that at no time were the other requirements considered for removal.

Commenters were split on this proposal. All commenting transit authorities and providers agreed with the proposal, as did a few other commenters. Many of these commenters clearly conditioned their support on the Department ensuring that the change

did not allow any decrease in accessibility. Members of the disability community voiced strong dissent to the proposal. Almost all of the comments filed by individuals with disabilities and their advocacy groups viewed the change as a weakening of the ADA's accessibility standards and many expressed distrust of the Department's ability to ensure legitimate equivalence.

Recognizing that significant costs can be associated with ADA compliance, the Department feels that to ensure the most widespread long-term compliance, it must allow as much flexibility as possible and encourage the development of new, more cost effective technologies. Accordingly, the requirement that an entity show that it is unable to comply with current standards is being eliminated from the petition for equivalent facilitation. Petitioning entities must continue to show that their alternative method actually provides equal or greater accessibility. This point protects the interests of the disability community concerning maintaining the strength of accessibility requirements. The other reporting requirements of the petition found in § 37.7 and § 37.9 will also remain, such as demonstrating the effectiveness of the alternative measures for compliance and documenting the public participation used in developing the alternative method. The Department notes that the original purpose of the requirement, encouraging uniformity and predictability, remains an important goal.

#### 6. Clarification of Appendix Statement on Vehicle Lift Dimensions

The NPRM proposed to clarify a reference to the Part 38 standards for accessible vehicles. Appendix D to Part 37 contains explanatory statements and guidelines for Part 37. In Appendix D, section 37.13, the discussion of section 37.13 of the rule refers to the "new 30" by 48" lift platform specifications." This statement was intended to refer to the Part 38 standards for lift platforms. The reference oversimplifies the Part 38 standard, which requires 30 × 48 inch dimensions at a height of 2 inches above the platform base, but only requires a width of 28.5 inches at the base itself. To eliminate the confusion created by the reference, section 37.13 of Part 37, Appendix D will be amended to replace the words "new 30" by 48"" with the words "Part 38".

#### 7. Typographical Errors

The typographical errors in §§ 37.3 and 37.11(a) will be corrected as described in the NPRM.

#### Regulatory Analyses and Notices

This final rule is not significant under Executive Order 12866. It is significant under the Department's Regulatory Policies and procedures, because it amends a significant rule having substantial public interest. We expect economic impacts to be minimal, so we have not prepared a regulatory evaluation. There are no Federalism impacts sufficient to warrant the preparation of a Federalism assessment. The Department certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Issued this 7th day of March, 1996, at Washington, DC.

Federico Peña,  
Secretary of Transportation.

For the reasons set forth in the preamble, the Department proposes to amend 49 CFR Part 37 and 49 CFR Part 38 as follows:

#### PART 37—[AMENDED]

1. The authority citation for 49 CFR Part 37 is proposed to continue to read as follows:

Authority: Americans with Disabilities Act of 1990 (42 U.S.C. 12101–12213); 49 U.S.C. 322.

2. The authority citation for 49 CFR Part 38 is proposed to be revised to read as follows:

Authority: Americans with Disabilities Act of 1990 (42 U.S.C. 12101–12213); 49 U.S.C. 322.

3. In part 37, § 37.27(b) is proposed to be revised to read as follows:

#### § 37.27 Transportation for elementary and secondary education systems.

\* \* \* \* \*

(b) The requirements of this part do not apply to the transportation of school children to and from a private elementary or secondary school, and its school-related activities, if the school is providing transportation service to students with disabilities equivalent to that provided to students without disabilities. The test of equivalence is the same as that provided in § 37.105. If the school does not meet the requirement of this paragraph for exemption from the requirements of this part, it is subject to the requirements of this part for private entities not primarily engaged in transporting people.

#### § 37.3 [Amended]

4. In part 37, § 37.3 the definition of the term "Designated public transportation" is amended by replacing

the word "containing" with the word "continuing."

5. In Part 37, § 37.7 is amended by revising paragraph (b)(2)(ii) and removing and reserving (b)(2)(iii) to read as follows:

§ 37.7 Standards for accessible vehicles.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) Specific provision of part 38 of this title concerning which the entity is seeking a determination of equivalent facilitation.

\* \* \* \* \*

6. In Part 37, § 37.9 is amended by revising paragraph (d)(2)(ii) to read as follows and removing and reserving (d)(2)(iii):

§ 37.9 Standards for accessible facilities.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) Specific provision of Appendix A to Part 37 concerning which the entity is seeking a determination of equivalent facilitation.

\* \* \* \* \*

§ 37.11 [Amended]

7. In part 37, § 37.11(a) is amended by replacing the words "subpart F" with the words "subpart C."

8. In Part 37, § 37.101 is amended by adding a new paragraph (e), to read as follows:

§ 37.101 Purchase or lease of vehicles by private entities not primarily engaged in the business of transporting people.

\* \* \* \* \*

(e) Demand Responsive System, Vehicle Capacity of 16 or Fewer. Entities providing demand responsive transportation covered under this section are not specifically required to ensure that new vehicles with seating capacity of 16 or fewer are accessible to individuals with wheelchairs. These entities are required to ensure that their systems, when viewed in their entirety, meet the equivalent service requirements of §§ 37.171 and 37.105, regardless of whether or not the entities purchase a new vehicle.

9. In Part 37, § 37.127(e) is revised to read as follows:

§ 37.127 Complementary paratransit service for visitors.

\* \* \* \* \*

(e) A public entity shall make the service to a visitor required by this section available for any combination of 21 days during any 365-day period beginning with the visitor's first use of the service during such 365-day period. In no case shall the public entity require a visitor to apply for or receive eligibility certification from the public entity before receiving the service required by this section.

10. In part 37, § 37.131(b)(4) is revised to read as follows:

§ 37.131 Service criteria for complementary paratransit.

\* \* \* \* \*

(b) \* \* \*

\* \* \* \* \*

(4) The entity may permit advance reservations to be made up to 14 days in advance of an ADA paratransit eligible individual's desired trips. When an entity proposes to change its reservations system, it shall comply with the public participation requirements equivalent to those of § 37.131(b) and (c).

11. In Part 37, § 37.135 is amended by revising paragraph (c) to read as follows:

§ 37.135 Submission of paratransit plan.

\* \* \* \* \*

(c) Annual Updates. Except as provided in this paragraph, each entity shall submit an annual update to its plan on January 26 of each succeeding year.

(1) If an entity has met and is continuing to meet all requirements for complementary paratransit in §§ 37.121-37.133 of this part, the entity may submit to FTA an annual certification of continued compliance in lieu of a plan update. Entities that have submitted a joint plan under § 37.141 may submit a joint certification under this paragraph. The requirements of §§ 37.137-37.139 do not apply when a certification is submitted under this paragraph.

(2) In the event of any change in circumstances that results in an entity which has submitted a certification of continued compliance falling short of compliance with §§ 37.121-37.133, the entity shall immediately notify FTA in writing of the problem. In this case, the entity shall also file a plan update meeting the requirements of §§ 37.137-37.139 of this part on the next following January 26 and in each succeeding year until the entity returns to full compliance.

(3) An entity that has demonstrated undue financial burden to the FTA shall file a plan update meeting the requirements of §§ 37.137-37.139 of this part on each January 26 until full compliance with §§ 37.121-37.133 is attained.

(4) If FTA reasonably believes that an entity may not be fully complying with all service criteria, FTA may require the entity to provide an annual update to its plan.

Appendix D [Amended]

12. In Part 37, Appendix D, the paragraph entitled "Section 37.13 Effective Date for Certain Vehicle Lift Specifications" is proposed to be amended by replacing the words "new 30" by 48"" with the words "Part 38."

§ 38.173 [Amended]

13. In part 38, § 38.173(a) is amended by adding the words "(i.e., at a speed of no more than 20 miles per hour at any location on their route during normal operation)" after the words "slow speed."

14. In part 38, § 38.173(d) is amended by adding the following sentence at the end thereof, to read as follows:

§ 38.173 Automated guideway transit vehicles and systems.

\* \* \* \* \*

(d) \* \* \* AGT systems whose vehicles travel at a speed of more than 20 miles per hour at any location on their route during normal operation are covered under this paragraph rather than under paragraph (a) of this section.