

### F. Defenses

The title II rule does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. 28 CFR 35.164. The Department has taken a long-standing position that, because of the essential nature of 9-1-1 services, that limitation would rarely be applied to the obligation to ensure effective communication in the context of 9-1-1.

*Question 19.* The Department seeks comments on whether there are certain circumstances where providing direct access to emerging NG 9-1-1 would be considered a fundamental alteration to the nature of the 9-1-1 service or be an undue financial or administrative burden on the PSAP. Please provide as much detail as possible.

### G. Cost and Benefits of NG 9-1-1 Regulations

Because this is an ANPRM, the Department is not required, at this time, to conduct certain economic analyses or written assessments that otherwise may be required for other more formal types of agency regulatory actions (*e.g.*, notices of proposed rulemaking or final rules) that, for example, are deemed to be economically “significant” regulatory actions with an annual economic impact of \$100 million or more or that are expected to have a significant economic effect on a substantial number of small entities or non-Federal governmental jurisdictions (such as State, local, or Tribal governments). *See, e.g.*, Regulatory Flexibility Act of 1980, 5 U.S.C. 603–04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002); E.O. 12866, 58 FR 51735 (Sept. 30, 1993), as amended by E.O. 13497, 74 FR 6113 (Jan. 30, 2009); OMB Budget Circular A–4, <http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf> (last visited June 5, 2010). The Department does not currently believe that any future proposed rules relating to the accessibility of NG 9-1-1 services will likely meet the economic threshold for these types of formal economic analyses and written assessments.

Nonetheless, one of the purposes of this ANPRM is to seek public comment on various topics relating to NG 9-1-1 services, including perspectives from stakeholders concerning the benefits and costs of revising the Department’s title II regulation to ensure the accessibility of NG 9-1-1 services (from both a quantitative and qualitative perspective), particularly from members of the disability community,

governmental entities, and public safety organizations. The Department thus asks for information so that the Department can determine whether such a proposed rule (1) should be deemed an economically “significant regulatory action” as defined in section 3(f) of E.O. 12866; or (2) would have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA) and, if so, suggested alternative regulatory approaches to minimize any such impact. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

*Question 20.* The Department encourages commenters, whenever possible, to submit detailed quantitative or qualitative information along with their respective comments relating to: the cost of NG 9-1-1 technology or services; the incremental impact on covered governmental entities to transition from current requirements for accessible analog 9-1-1 services to proposed accessible NG 9-1-1 services, including but not limited to training PSAP employees and updating 9-1-1 plans and operating procedures; personal anecdotes or experiences of individuals with disabilities illustrating the potential benefits of accessible NG 9-1-1 services; and any other information that would assist the Department in assessing the benefits and costs of proposed regulatory revisions for NG 9-1-1.

### H. Other Issues

*Question 21.* Are there additional issues or information not addressed by the Department’s questions that are important for the Department to consider? Please provide as much detail as possible in your response.

Dated: July 21, 2010.

**Thomas E. Perez,**

*Assistant Attorney General, Civil Rights Division.*

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## DEPARTMENT OF JUSTICE

### 28 CFR Parts 35 and 36

[CRT Docket No. 113]

RIN 1190–AA64

### Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation; Equipment and Furniture

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

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** The Department of Justice (Department) is considering possible changes to requirements under titles II and III of the Americans with Disabilities Act (ADA) to ensure that equipment and furniture used in programs and services provided by public entities and public accommodations are accessible to individuals with disabilities. In this Advance Notice of Proposed Rulemaking (ANPRM), the Department is seeking public input on issues relating to possible revisions of ADA regulations to ensure the accessibility of equipment and furniture in such programs and services and also is seeking background information for the regulatory assessment that the Department may need to prepare if it revises its regulations.

**DATES:** The Department invites written comments from members of the public. Written comments must be postmarked and electronic comments must be submitted on or before January 24, 2011. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

**ADDRESSES:** You may submit comments, identified by RIN 1190–AA64 (or Docket ID No. 113), by any one of the following methods:

- *Federal eRulemaking Web site:* [www.regulations.gov](http://www.regulations.gov). Follow the Web site instructions for submitting comments.

- *Regular U.S. mail:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031–0885.

- *Overnight, courier, or hand delivery:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005.

**FOR FURTHER INFORMATION CONTACT:**

Sarah DeCosse, Attorney Advisor, Disability Rights Section, Civil Rights

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

You may obtain copies of this ANPRM in large print or Braille or on audiotape or computer disk by calling the ADA Information Line at (800) 514-0301 (voice) and (800) 514-0383 (TTY). This ANPRM is also available on the ADA Home Page at <http://www.ada.gov>.

#### **SUPPLEMENTARY INFORMATION:**

#### **I. Electronic Submission of Comments 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. 113 in the subject box, and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

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>. Submission postings will include any personal identifying information (such as your name, address, etc.) included in the text of your comment. If you include personal identifying information (such as your name, address, etc.) in the text 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 include all the personal identifying information you want redacted along with this phrase. Similarly, if you 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>.

Comments on this ANPRM will also be made available for public viewing by appointment at the Disability Rights Section, located at 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005, during normal business hours. To arrange an appointment to review the comments, please contact the

ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

The reason that the Civil Rights Division is requesting electronic comments before midnight Eastern Time on the day the comment period closes is because the inter-agency Regulations.gov/Federal Docket Management System (FDMS) which receives electronic comments terminates the public's ability to submit comments at midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov/FDMS system do not apply to U.S. postal comments, which will be considered as timely filed if they are postmarked before midnight on the day the comment period closes.

#### **II. Public Hearing**

The Department will hold at least one public hearing to solicit comments on the issues presented in this notice. The Department plans to hold the public hearing during the 180-day public comment period. The date, time, and location of the public hearing will be announced to the public in the **Federal Register** and on the Department's ADA Home Page: <http://www.ada.gov>.

#### **III. Proposed Action/Summary**

The Department is seeking information to assist it in determining if it should propose specific accessibility requirements for non-fixed equipment and furniture, including medical equipment, exercise equipment, accessible golf cars, accessible beds, and electronic and information technology, by entities subject to title II or title III of the ADA.

#### **IV. Background**

##### *A. Statutory and Rulemaking History*

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability. The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires newly designed and constructed or altered State and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Section 204 (a) of title II and section 306(b) of title III

direct the Attorney General to promulgate regulations to carry out the provisions of titles II and III, other than certain provisions dealing specifically with transportation. 42 U.S.C. 12134; 42 U.S.C. 12186(b).

Title II applies to State and local government entities, and, in Subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (section 504), to all activities of State and local governments regardless of whether these entities receive Federal financial assistance. 42 U.S.C. 12131-65.

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation (private entities whose operations affect commerce 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 such as 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 ADA Standards for Accessible Design (1991 Standards). These Standards resulted from the Department's incorporation into the rule of the 1991 ADA Accessibility Guidelines (1991 ADAAG) promulgated by the U.S. Architectural and Transportation Barriers Compliance Board (Access Board). The Department is a member of the Access Board and participates in its development of accessibility guidelines. On September 30, 2004, the Department published an advance notice of proposed rulemaking (2004 ANPRM) to begin the process of updating the 1991 regulations and to adopt revised ADA Standards based on the relevant parts of the Access Board's 2004 ADA/Architectural Barriers Act (ABA) Accessibility Guidelines. 69 FR 44084. The Department issued Notices of Proposed Rulemaking (NPRMs) to revise the title II and title III regulations and these incorporated the 2004 ADA/ABA Accessibility Guidelines into the revised ADA Standards. 73 FR 34466

(June 17, 2008). The NPRMs addressed the issues raised in the comments to the ANPRM and sought additional comment.

The 2004 ANPRM asked for public comment on a range of issues not specifically addressed in the ADA regulations, including coverage of movable or portable equipment and furniture. 59 FR 58768. Although the Department received public comments in response to the ANPRM supporting its regulation of equipment and furniture, when the Department issued its 2008 NPRM, it announced its decision not to address equipment at that time. 73 FR 34466, 34474–75 (June 17, 2008). Instead, the Department continued its approach of requiring accessible equipment and furniture on a case-by-case basis. Under the regulatory provisions governing reasonable modifications of policies, practices, or procedures, program accessibility, effective communication, and barrier removal, the Department has continued its long-standing practice of requiring accessible equipment and furniture.

The Department received numerous comments urging it to issue equipment and furniture regulations. Based on these comments and for the reasons detailed below, the Department has decided to begin the process of soliciting comments and suggestions with respect to what an NPRM regarding equipment and furniture should contain.

#### *B. Legal Foundation for Equipment and Furniture Coverage*

The ADA prohibits discrimination on the basis of disability in all services, programs, and activities offered by public entities and in the operation of privately owned places of public accommodation. The provision of accessible equipment and furniture has always been required by the ADA and the Department's implementing regulations under the program accessibility, reasonable modification, auxiliary aids and services, and barrier removal requirements. Each of the types of equipment and furniture discussed in this ANPRM is subject to coverage under both title II and title III of the ADA.

Title II of the ADA applies to services, programs, or activities of public entities within the meaning of 42 U.S.C. 12133(1)(A). The program accessibility requirement of Title II mandates public entities to operate each service, program, or activity so that, when viewed in its entirety, the service, program, or activity is readily accessible to and usable by individuals with disabilities, subject to a defense of

fundamental alteration or undue burden. 28 CFR 35.150(a). Section 35.150(b) specifies that such entities may meet their obligation to make each program accessible to individuals with disabilities through the "redesign of equipment." If an entity invokes a fundamental alteration defense, the entity nonetheless must take other steps that would not fundamentally alter the nature of the services provided. For example, the provision of a height adjustable examination table in a doctor's office may meet the requirement for program accessibility. However, if the provision of an adjustable examination table in a doctor's office would fundamentally alter the nature of the services provided, based on a fact specific inquiry, then the use instead of a nonadjustable examining table of suitable height, might afford an individual with a disability an equal opportunity to participate in the services, programs, and activities offered by that entity.

Title II entities also must ensure that communications with individuals with disabilities are as effective as communications with others and provide appropriate auxiliary aids and services where necessary to ensure that individuals with disabilities have an equal opportunity to participate in and benefit from a service, program, or activity. 28 CFR 35.160. These auxiliary aids include the "[a]cquisition or modification of equipment or devices." 28 CFR 35.104. In addition, equipment and personal property, such as furniture, is specifically included in the definition of "facility" in title II. 28 CFR 35.104. There is an identical definition of "facility" in the regulation implementing title III. 28 CFR 36.104.

Title III of the ADA applies to persons who own, lease or lease to, or operate places of public accommodation, such as doctors' offices, hospitals, nursing homes, hotels and motels, shopping centers, specified public transportation terminals, recreational facilities, such as health clubs or golf courses, restaurants, movie theaters, schools, and day care facilities. 42 U.S.C. 12182(a). Public accommodations discriminate against individuals with disabilities when they enact discriminatory policies or practices, or fail to remove barriers or make requested reasonable modifications in order to accommodate an individual's disability, unless barrier removal is not readily achievable or a modification would fundamentally alter the nature of the business. See 28 CFR 36.304 (barrier removal) and 36.302(a) (reasonable modification). If barrier removal is not readily achievable, then an alternative means must be provided

if that alternative means is readily achievable. For example, a standard-height, nonadjustable examining table constitutes an architectural barrier to persons with certain mobility impairments. Therefore, an adjustable table must be provided if it is readily achievable. If it is not readily achievable to obtain such a table, then an alternative, such as a nonadjustable lower height table, must be provided if that alternative is readily achievable.

Public accommodations also must ensure that no individuals with disabilities are excluded, denied services, segregated or otherwise treated differently from other individuals because of the absence of auxiliary aids and services, unless taking such steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or result in an undue burden. 28 CFR 36.303(a). The preamble to the Department's 1991 regulation clarified the manner in which equipment and furniture are covered by the title III regulation. 28 CFR part 36, app. B, at 733 (Proposed Section 36.309 Purchase of Furniture and Equipment). Some types of equipment and furniture are covered specifically by the Department's adoption of the 1991 ADAAG as the ADA Standards for Accessible Design. Equipment and furniture may also be covered by other regulatory provisions including reasonable modifications, 28 CFR 36.302; auxiliary aids, 28 CFR 36.303; and barrier removal, 28 CFR 36.304.

While some types of fixed equipment and furniture are explicitly covered by the 1991 Standards, there are no specific provisions in the regulations governing the accessibility of equipment and furniture that are not fixed. See 28 CFR pt. 36, app. A. (Automatic Teller Machines (ATMs) and Fixed or Built-in Seating or Tables). A fixed item is something that is built into the facility, for example, through plumbing. In contrast, an item that is not fixed is not attached to the facility. In order to ensure that not only fixed equipment and furniture be accessible, the Department seeks to provide specific regulatory guidance for the accessibility of equipment and furniture that are not fixed. Whether a type of equipment or furniture is fixed or not is generally not relevant from the perspective of the user. For example, an ATM or vending machine that is fixed is used for the same purpose and in the same manner as an equivalent ATM or vending machine that is not fixed. To the extent that ADA standards apply requirements for fixed equipment and furniture, the Department will look to those standards

for guidance on accessibility standards for equipment and furniture that are not fixed.

With regard to making electronic or information technology equipment and furniture accessible to individuals with disabilities, including individuals who are blind or have low vision, Section 508 of the Rehabilitation Act of 1973, which applies to federal agencies, provides guidance for the public on how to make electronic and information technology accessible. *See, e.g.*, 29 U.S.C. 794d.

The Department's experience in the twenty years since the ADA was enacted has given it a better understanding of the barriers posed by inaccessible equipment and furniture and the solutions provided by accessible equipment and furniture. Accessible equipment and furniture is often critical to an entity's ability to provide a person with a disability equal access to its services. Changes in technology have resulted in the development and improved availability of accessible equipment and furniture that benefit individuals with disabilities. Use of the Internet, video interpreting services, screen readers, and text messaging, are just a few examples of technologies that were rare or nonexistent twenty years ago, but are now widely used by individuals with disabilities. New technologies have led to accessible equipment and furniture ranging from accessible medical exam tables for individuals who use wheelchairs to "talking" ATMs and interactive kiosks, which can be used independently and while preserving privacy through the use of headphones by individuals who are blind or have low vision.

Consequently, it is easier now to specify appropriate accessibility standards for such equipment and furniture, as the Access Board has done for several types of fixed equipment and furniture, including ATMs, washing machines, dryers, tables, benches, and vending machines. *See* sections 903, 902, 707, 611, and 228 of the ADA/ABA Accessibility Guidelines.

For all of these reasons, the Department believes that providing specific requirements for accessible equipment and furniture is consistent with the mandates of the ADA and necessary and appropriate at this time.

## V. Request for Public Comments

The Department seeks input from the public and from those in the disability community, representatives of Federal, State, or local governments, public safety organizations, and industry professionals. The Department invites comments on types and features of

equipment and furniture that will effectively provide equal opportunity to access all services and programs covered by titles II and III of the ADA, on scoping (which refers to the amount of equipment or furniture that should be provided in different types of facilities in order to meet the needs of individuals with disabilities needing access to those facilities), on events or time frames that should trigger the replacement or modification of inaccessible equipment or furniture with accessible equipment or furniture, and on the costs and benefits of accessible equipment and furniture. In your responses to the questions presented below, please refer to each question by number. Please provide any additional information that you believe will be helpful.

### A. Medical Equipment and Furniture

Without accessible medical examination tables, dental chairs, radiological diagnostic equipment, scales, and rehabilitation equipment, individuals with disabilities do not have an equal opportunity to receive medical care. Individuals with disabilities may be less likely to get routine preventative medical care than people without disabilities because of barriers to accessing that care. The Department has entered into settlement agreements with several medical care providers that have required the medical care provider to purchase accessible equipment and furniture for its facilities, including at least one accessible examination table in each medical department and additional accessible examination tables, radiologic equipment, scales, beds, and lifting devices, as needed. These settlement agreements are available to the public at <http://www.ada.gov>. The Department has also issued technical assistance on this issue. *See Access to Medical Care for Individuals with Mobility Disabilities*, on May 17, 2010.

The health care reform law, the Patient Protection and Affordable Care Act, added a new Section 510 to the Rehabilitation Act of 1973. Section 510 directs the Access Board to promulgate regulatory standards setting forth the minimum technical criteria for medical diagnostic equipment used in (or in conjunction with) physician's offices, clinics, emergency rooms, hospitals, and other medical settings. The standards shall ensure that such equipment is accessible to, and usable by, individuals with accessibility needs, and shall allow independent entry to, use of, and exit from the equipment or furniture by such individuals to the maximum extent possible. The Access Board has announced that it will draft new design

standards for medical diagnostic equipment to satisfy this requirement. As an Access Board member, the Department will work closely with the Board in the development of these design standards. The Department will not issue a final rule on medical equipment until the Access Board has completed its medical diagnostic equipment standards. When the standards are completed, the Department will have the option to adopt them for ADA implementation and, if it does so, will, at that time, develop specific scoping requirements to establish the required number of accessible diagnostic elements for specific facility types. In addition, the Department may propose regulations to ensure the accessibility of medical equipment that is used for treatment, rehabilitative or other purposes.

### i. Medical Examination and Treatment Tables and Chairs

Healthcare providers use examination and treatment tables and chairs for many different types of medical and dental examinations and treatments. Examples of specialty areas using examination or treatment tables or chairs include ophthalmology, optometry, podiatry, oncology, physical therapy, chiropractic, rehabilitation medicine, urology, and obstetrics and gynecology. If a person with a disability cannot get onto an examination table or chair and is thus not examined (as occurs, for example, with some women with disabilities who cannot access ob-gyn tables) or is examined in a wheelchair, any examination that does occur likely will be less thorough than it would have been on an examination table, and the medical provider may miss important medical information.

The Department has received complaints and learned in the course of its enforcement efforts that medical and dental examination tables and chairs often are too high to be accessible, lack stabilization elements, and do not have adequate clear floor space nearby to permit access. Although Section 510 of the Rehabilitation Act does not specifically address tables and chairs used solely for treatment purposes, the Department anticipates that such treatment equipment would be subject to similar accessibility requirements, such as adjustable heights.

### ii. Accessible Scales

Medical providers often do not weigh individuals who use wheelchairs because they do not have an accessible scale, even though that information is a routine part of medical examinations and is important to the patient's health

and medical care. Patient weight can serve as a health indicator for many conditions, including depression, diabetes, cancer, cardiovascular disease, high blood pressure, and pregnancy. Correct patient weight is crucial to correctly prescribing medicine. Scales should be accessible to individuals who use wheelchairs or have other mobility disabilities that would impede the use of step-on scales.

Several different types of scales offer different means of accommodating patients with mobility disabilities while also affording flexibility to medical providers. Wheelchair scales are currently available as stand-alone devices or as equipment that is integrated into other medical equipment. Stand-alone wheelchair scales include wall-mounted stationary (folding or not folding), platform (in ground), and portable platform (folding or not folding).

### iii. Radiological Diagnostic Equipment

Some types of radiological diagnostic equipment, such as Magnetic Resonance Imaging (MRI), Positron Emission Tomography (PET), and X-rays, including Computerized Axial Tomography (CAT) scans and mammography, are difficult to access for individuals with disabilities because of the height, shape, or configuration of the equipment. The Department has reached settlements with medical offices and hospitals providing diagnostic services because patients with mobility disabilities could not access medical diagnostic equipment. Some individuals with disabilities had difficulty transferring from wheelchairs onto scanning tables and were denied staff assistance or not provided access to medical equipment and furniture, such as gurneys or lifts, to facilitate the transfer to the diagnostic equipment and furniture. Different types of diagnostic equipment and furniture pose different challenges. For example, MRIs typically require individuals with disabilities to climb onto an MRI table and remain on the table while it is moved into and out of a scanning tube, a process that can take one to two hours. Mammograms may be inaccessible to individuals with mobility disabilities who cannot stand for the duration of the examination.

### iv. Lifts

Medical providers may need lifts to transfer some patients with mobility disabilities safely to examination or treatment tables or chairs or to gurneys or hospital beds. The kind of assistance needed will depend on a patient's disability. Using lifts may provide more security for a patient than being lifted

by medical staff and may reduce the risk of injury to medical staff. Concerns about lifting injuries have given rise to proposed legislation at the federal and state levels designed to increase safety for patients and medical staff. *See, e.g.*, Nurse and Health Care Worker Protection Act of 2009 (S. 1788); Recognizing the Need for Safe Patient Handling and Movement (H. Res. 510). There are several different types of patient lifts available now on the market, including free-standing, ceiling-mounted, and sling lifts. The use of lifts by medical and dental providers may improve accessibility to medical and dental examination and treatments.

### v. Infusion Pumps

Infusion pumps infuse fluids such as chemotherapy drugs, pain medications, or nutrients into the circulatory system in a controlled manner. Several kinds of infusion pumps, including Patient Controlled Analgesia pumps, are available. Problems can arise with infusion pumps when there are errors in dosing rate or fluid volume. Infusion pumps often rely on patients controlling settings on difficult-to-reach buttons or flat screens that may not be accessible to individuals with disabilities. Integrated alarms may not be audible to individuals with hearing disabilities.

### vi. Rehabilitation Equipment

Medical providers offering rehabilitative services must make those services equally available to individuals with disabilities. Rehabilitation and exercise equipment and furniture, including balance equipment, cardiopulmonary equipment, exercise pulleys and stretching equipment, resistance equipment, and general exercise equipment, should be available to individuals with disabilities requiring such rehabilitative treatment on an equal basis with other patients. For example, individuals with hearing impairments or blindness or low vision might require equipment or furniture to permit their full participation in cardiopulmonary rehabilitative services.

### vii. Ancillary Equipment

Ancillary equipment is equipment used with other medical equipment, such as examination tables or chairs or MRIs, and adapted to or adjustable for use by individuals with disabilities. Ancillary equipment includes items such as positioning straps or cushions; protective padding; adjustable, padded leg supports for gynecological examinations; and additional supports, rails, or bars needed to ensure the safety and comfort of patients with disabilities. Sliding boards or sheets and gait belts

may assist in transfers of patients with disabilities to and from examination or treatment tables and chairs. Individuals with mobility disabilities may require air mattresses and cushions, stools, or other pressure relief equipment to aid in the avoidance or treatment of pressure sores. Accessible call buttons and telephones can address communication difficulties for patients with mobility or other types of disabilities.

### viii. Hospital Beds and Gurneys

Hospital beds and gurneys can be inaccessible to individuals with mobility disabilities. Medical care and long-term care facilities do not always provide accessible beds in the patient and resident sleeping rooms required to be accessible. In order to permit transfers by individuals with mobility disabilities, including those using wheelchairs, accessible height-adjustable beds would allow persons using wheelchairs and other mobility devices to transfer in and out of bed as independently as possible. Gurneys used to transport patients from place to place in a medical facility or used in certain diagnostic procedures may need to meet the same height requirements. Hospital bed control devices, for raising and lowering the bed and for other functions, as well as call buttons, also should be accessible to patients with disabilities.

### ix. Medical Equipment Questions

To assist the Department to develop appropriate requirements for medical equipment and furniture, we are seeking information that will inform the rulemaking process. With respect to medical equipment, for each type of medical equipment it would be helpful to know details about the accessible features and if particular types of equipment with accessible features are currently available. The Department is seeking the following information:

*Question 1.* The Department is considering adopting the Access Board's standards for medical diagnostic equipment. What other types of medical equipment and furniture should the Department include in its proposed regulation? What modifications to other types of medical equipment and furniture, including equipment and furniture used for treatment or other non-diagnostic purposes, such as hospital beds, should be included in the Department's proposed regulations?

*Question 2.* The Access Board is expected to promulgate design standards for medical and dental diagnostic tables and chairs. Are there tables or chairs used for medical, dental, ophthalmology, or optometry

treatments, which are not typically used for diagnostic purposes, that would pose unique accessibility challenges? What modified features would make these tables or chairs accessible? What features would enhance patient stability and facilitate correct positioning?

*Question 3.* What types of lifts are the safest, most efficient, and most cost effective in transferring patients with disabilities in different medical or dental settings? Should the use of lifts or staff to lift patients be considered a substitute for providing independent access to medical equipment?

*Question 4.* If a hospital or medical provider uses staff to lift patients onto and off of medical equipment and furniture, should it be excused from the requirement of having lifts in any or all situations? What types of training programs are available to provide information to staff on lifting and transferring patients with disabilities? Are there any particular situations where lifting by staff should not be allowed?

*Question 5.* What features, such as low bed heights, can best enhance the accessibility of hospital beds and gurneys? Are these features available on products currently available?

*Question 6.* What technologies are currently available to increase the accessibility of infusion pumps? What types of infusion pumps are partially or fully operated by patients in the normal course of treatment?

*Question 7.* What are the greatest difficulties facing individuals with disabilities in accessing rehabilitative and exercise equipment and furniture in a therapeutic setting? What equipment and furniture most effectively permits accessibility for different types of rehabilitative needs? Can different types of equipment meet different access needs of, for example, people with low-vision who need access to visual displays on equipment? Are there differences between exercise equipment in therapeutic settings and exercise equipment in non-therapeutic settings (e.g., gym or fitness center)? What exercise equipment or machines are available to meet the needs of individuals with mobility impairments?

*Question 8.* What types of ancillary equipment are most effective in different types of medical or dental examination or treatment settings?

*Question 9.* Is there a need for separate standards for bariatric medical equipment and furniture in the Department's equipment and furniture regulation? If so, what equipment and furniture are necessary to address the needs of patients with disabilities who are obese?

x. Scoping and Triggering Events for Medical Equipment and Furniture

If the Department proposes a rule recommending regulations requiring accessible medical equipment and furniture, it should provide guidance on the appropriate amount of different types of medical equipment and furniture that must be accessible. In making this determination, the Department might consider the size of a medical practice or the patient population and other factors. For example, in a doctor's office with two exam rooms, one accessible examination table might be a reasonable number of accessible examination tables. However, in a hospital with multiple medical departments, a reasonable number might include at least one accessible examination table in each department. Radiologic and other diagnostic equipment is highly specialized and a reasonable number of accessible diagnostic equipment in a radiology department might be one of each type of diagnostic equipment.

The Department is considering proposing that entities have eighteen months from the date of the publication of a rule to come into compliance with medical equipment and furniture requirements. The timeframes for replacing different types of medical equipment and furniture may vary widely. The very high cost of some radiological and diagnostic equipment, such as MRI machines and CAT scans, which often leads medical providers to lease rather than buy them, might require a later effective date.

*Question 10.* What are the key criteria for scoping in different types of medical settings? What are appropriate scoping requirements for each of the types of medical equipment and furniture discussed above?

*Question 11.* How could medical providers time replacement or modification of equipment and furniture to ensure that individuals with disabilities receive equal access to healthcare without undue delay? What types of triggering events are appropriate for different types of medical equipment and furniture? Should the Department require the purchase rather than the replacement of some accessible equipment and furniture at a certain point? Should the replacement of inaccessible medical equipment or furniture be triggered only by the end of the useful life of the equipment or furniture?

#### *B. Exercise Equipment and Furniture*

Individuals with disabilities have expressed concerns over the years about

an inability to use exercise equipment and furniture in health clubs, hotel fitness centers, public recreation centers, public elementary, secondary, and postsecondary institutions, and other establishments that offer exercise facilities. The 1991 Standards contained no scoping or technical requirements relating to exercise facilities. The Department may propose additional regulations to enhance the accessibility and usability of exercise equipment by individuals with disabilities.

*Question 12.* What types of accessible exercise equipment and furniture are available on the commercial market? What types of equipment and furniture are already accessible to individuals with disabilities? Is independently operable equipment and furniture available for individuals who are blind or who have low vision, or who have manual dexterity issues.

*Question 13.* Should the Department require covered entities to provide accessible exercise equipment and furniture? How much of each type of equipment and furniture should be provided? Should the requirements for accessible equipment and furniture be the same for small and large exercise facilities, and if not, how should they differ?

#### *C. Accessible Golf Cars*

The Department is considering issuing regulations specific to golf cars and may propose requiring golf courses that provide golf cars, when replacing or acquiring additional standard golf cars, to provide accessible golf cars for use by individuals with disabilities.

An accessible golf car means a device that is designed and manufactured to be driven on all areas of a golf course, is independently usable by individuals with mobility disabilities, has a hand operated brake and accelerator, carries golf clubs in an accessible location, and has a seat that both swivels and rises to put the golfer in a standing or semi-standing position. The 1991 regulation contained no language specifically referencing accessible golf cars. Although the 2004 ANPRM raised the possibility of requiring that golf courses make at least one specialized golf car available for the use of individuals with disabilities, the Department stated in the 2008 NPRM that it was not going to propose a specific requirement at that time. The Department of Defense has required the use of single-rider accessible golf cars in federally-owned golf courses pursuant to Section 664 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364).

*Question 14.* What is the most effective means of addressing the needs of golfers with mobility disabilities? Are golf cars currently available that are readily adaptable for the addition of hand controls and swivel seats? If so, are those cars suitable for driving on greens? To what extent are accessible golf cars of all types stable, lightweight, and moderately priced?

*Question 15.* What are appropriate scoping requirements for accessible golf cars? Should the criteria used to determine scoping stem from factors including the number of golf course patrons, the number of golfing holes (e.g. nine, 18, or 27) at the facility, the number of inaccessible golf cars in use, or other criteria? Should each 18-hole course be required to provide a certain number of accessible golf cars?

#### *D. Beds in Accessible Guest Rooms and Sleeping Rooms*

The Department is considering regulating the accessibility of beds in accessible guest rooms and sleeping rooms, such as dormitories in educational institutions and social service establishments. Many individuals with disabilities have urged the Department to regulate the height of beds, particularly in accessible hotel guest rooms, and to require that such beds have clearance under the bed to accommodate a mechanical lift. In recent years, hotels have provided higher beds, using thicker mattresses that make it difficult or impossible for many individuals who use wheelchairs to transfer onto the beds. Some of these mattresses have pillow tops that raise the height of the bed by several inches and then, once the individual has transferred to it, compress and reduce the height of the bed. Thus, a bed with a pillow top that is low enough to transfer to from a wheelchair may be too low, once it is compressed, to transfer safely back to the wheelchair. In addition, many hotel beds use a solid-sided platform base for beds with no clearance underneath, which prevents the use of a portable lift to transfer an individual onto the bed.

*Question 16.* Should the Department develop a general standard that specifies requirements for beds wherever accessible sleeping accommodations are required? What are appropriate bed heights to ensure accessibility by individuals with mobility disabilities and should there be requirements for mattresses to ensure that the height of the mattress, even when compressed by the weight of a person sitting or laying down on it, remains within a certain range? Are there existing standards that the Department should look to for

developing standards for beds in accessible rooms? What is the optimal clearance needed under a bed to accommodate a mechanical lift? Should any such requirements apply to all accessible guestrooms or sleeping rooms or only to a percentage of them? What time line should the Department establish for requiring accessible beds in accessible guest rooms and sleeping rooms and should such a time line be phased in?

#### *E. Beds in Nursing Homes and Other Care Facilities*

Nursing homes, assisted living facilities, and other care facilities may have beds that are too high or too low, which can be a problem for individuals with disabilities. In addition, many of these beds have electronic controls and switches that may not be accessible for individuals with mobility, dexterity, or visual or auditory disabilities. The Department may propose regulations to ensure the accessibility of beds in nursing homes and other care facilities.

*Question 17.* Should the standards be different for adjustable beds, such as hospital beds, and for fixed height beds? Should the Department treat beds in nursing homes in the same manner as beds in hospitals? Should the Department treat beds in nursing homes or hospitals in the same manner as it treats beds in places of lodging? Should all accessible rooms have adjustable beds?

#### *F. Electronic and Information Technology*

The Department believes that it is important for individuals with disabilities to have an equal opportunity to use electronic and information technology (EIT) equipment and furniture, such as kiosks, interactive transaction machines (ITMs), point-of-sale (POS) devices, and automated teller machines (ATMs). Individuals with disabilities who engage in financial or other transactions should be able to do so independently and not have to provide third parties with private financial information, such as a personal identification number (PIN). Equipment and furniture are covered for both physical access and effective communication.

Among the available equipment and furniture that use EIT are kiosks, which are interactive computer terminals that provide a wide range of services, including information sharing, ticketing, airline check-in, Internet access, movie ticket sales and DVD rentals, security screening, bill paying, and photo developing. ITMs include POS devices, such as credit card payment terminals,

retail store self-checkout stations, machines used for ordering food at quick service restaurants, and gas station pay-at-the-pump systems. The number of POS machines used by businesses and state and local programs and activities (such as at student unions at state colleges and universities) nationwide continues to increase, as does the range of transactions handled by these machines. With the advent of touch screen technology, customers are now required to enter data using a flat screen while reading changing visual information and instructions. Persons who cannot see the flat screen must rely on other people to input their information, including their personal identification numbers (PINs). At least one state (California) already requires all check-out locations with a flat screen POS device to have a permanently attached tactile keypad that is usable by individuals with visual disabilities. Cal. Fin. Code 13082 (West 2006). While some POS devices are mounted at a height that fits within current reach range guidelines, the Department is aware that the fixed upward orientation of some of these devices can impede their accessibility by making it difficult for a person with a mobility disability to view the screen, enter a PIN, or sign an authorization.

The Department's preamble to its 1991 regulations explained that, "[g]iven that § 36.304's 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. The 1991 Standards contained requirements for physical accessibility for ATMs and also required 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 4.34.5. The Department has traditionally taken the position that the communication-related elements of ATMs are auxiliary aids and services, and are not physical elements. On March 22, 2010, the Access Board published an ANPRM seeking public comment on its plans to amend the 2004 ADA/ABA Accessibility Guidelines to include technical guidelines for self-service machines used for ticketing, check-in or check-out, seat selection, boarding passes, or ordering food in restaurants and cafeterias. See 75 FR 13457. In the ANPRM, the Access Board noted the proliferation of inaccessible POS machines, kiosks, and other self-service machines and referenced ADA

litigation against various public accommodations over the past ten years that has resulted in numerous settlement agreements and structured negotiations requiring the installation of tactile POS devices.

*Question 18.* What are the challenges posed by the inaccessibility of EIT, including EIT kiosks, POS devices, and ITMs? Are there issues regarding other uses of EIT that the Department should consider adopting to ensure that EIT equipment is accessible?

i. EIT for Effective Communication in Accessible Rooms

The Department's title III regulation, 28 CFR 36.303(d)(1) requires places of public accommodation that provide customers, patients, or clients the opportunity to make outgoing telephone calls on more than an incidental convenience basis to make TTYs available for the use of customers, patients, or clients who have communication disabilities. It has been suggested that the Department should expand the coverage of this section to require covered entities to provide recognize that there are a wide range of devices now used as communication aids by individuals with disabilities. Therefore, the Department seeks comments regarding the incorporation of EIT into this requirement as it applies to accessible sleeping rooms in facilities such as hospitals, nursing homes, hotels, or other places of lodging to permit effective communication by individuals with disabilities, including those who are deaf or hard of hearing.

New technologies have emerged that permit the use of EIT for effective communication. As telecommunication technologies are developing, persons with disabilities are transitioning from analog or legacy devices to digital telecommunication devices. Among these devices are video phones (including web cam), text messaging pagers and computers, and captioned telephones. Video relay services (VRS) permit individuals who use sign language for communication to use a video remote interpreting service (VRI). The relay services are under the jurisdiction of the Federal Communications Commission. Text communications can be divided into two types: Real time, and non-real time. Real-time text communications refer to those that are sent and received on a character-by-character basis; the characters are sent immediately once typed and also displayed immediately to the receiving person. Non-real time communications rely on messaging capabilities where users "type-enter-wait-read-respond-reply"—*e.g.*, short

messages service (SMS) texts, multimedia messaging service (MMS), instant messaging (IM), text chat, and e-mail.

*Question 19.* What types of EIT would permit individuals with communication disabilities to most effectively communicate from an accessible hospital room, nursing home facility, guest or sleeping room? Should the Department regulate effective communication from such facilities? What are the costs associated with various types of EIT in such settings?

ii. Scoping and Triggering Events for EIT Equipment

The Department is considering possible criteria for establishing scoping and triggering events for EIT devices and for particular features of such devices, such as tactile controls or voice output. Such criteria might include the total number of EIT devices in a certain facility.

*Question 20.* What are appropriate scoping criteria for the availability of accessible EIT and triggering events for the replacement or refurbishing of EIT devices, including kiosks, ITMs and ATMs, to ensure accessibility?

G. Other Types of Equipment and Furniture

Different types of equipment and furniture can pose challenging accessibility problems or can serve as remedies to those problems. The Department welcomes public input on other types of equipment and furniture that warrant attention. For example, the Department is aware that equipment and furniture exists that may provide ready access for individuals with disabilities, including pool chairs that permit individuals who use wheelchairs to enter a pool with a sloped entrance without submerging their personal wheelchair and shower chairs for accessible hotel rooms with roll-in showers. The Department has learned that access to computer terminals in public libraries, which allow members of the public to access the Internet, often lack accessibility features (such as screen readers) and are in inaccessible locations. Another concern is access to television in hotels, hospitals, nursing homes, and other care facilities when certain television sets do not provide a way for consumers to turn closed captions on and off.

*Question 21.* Are there other types of equipment or furniture that impede accessibility that should be specifically addressed in the Department's regulation? What types of accessible equipment or furniture would effectively address any such concerns?

What scoping would adequately address the impediments to accessibility and what triggering event would be appropriate for each type of other equipment or furniture? Are there particularly helpful types of equipment or furniture that are not generally available to the public that may assist individuals with disabilities, such as pool or shower chairs?

**VI. Regulatory Process Matters (SBREFA, Regulatory Flexibility Act, Executive Orders, Benefits and Costs)**

Since this proposal is an ANPRM, the Department is not required to conduct certain economic analyses or written assessments that otherwise may be required for more formal types of agency regulatory actions (*e.g.*, notices of proposed rulemaking or final rules) that are deemed to be economically significant regulatory actions with an annual economic impact of \$100 million or more or that are expected to have a significant economic effect on a substantial number of small entities or non-federal governmental jurisdictions (such as State, local, or tribal governments). *See, e.g.*, Regulatory Flexibility Act of 1980, 5 U.S.C. 603–04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002); E.O. 12866, 58 FR 51735 (Sept. 30, 1993), as amended by E.O. 13497, 74 FR 6113 (Jan. 30, 2009); OMB Budget Circular A–4, <http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf> (last visited June 25, 2010).

One of the purposes of this ANPRM is to seek public comment from members of the disability community, public accommodations, and governmental entities on various topics relating to accessible equipment and furniture, including perspectives from stakeholders concerning the benefits and costs of revising the Department's titles II and III regulations to ensure the accessibility of equipment and furniture.

*Question 22.* Do commenters have information available that can aid the Department in identifying existing accessible equipment and furniture? What are the costs of accessible equipment and furniture and how do these costs differ from the costs of inaccessible equipment and furniture? What are the normal replacement schedules for each of the types of equipment and furniture discussed in this ANPRM or other types proposed for coverage? What are the costs and benefits of different scoping requirements for different types of equipment and furniture? What are reasonable less costly or burdensome regulatory alternatives that would still achieve the objectives of the proposed

rules? What are the costs and benefits, both quantitatively and qualitatively, of providing individuals with disabilities an equal opportunity to access health care, recreational facilities, exercise equipment, furniture in hotels, nursing homes, and hospitals, and electronic information and transactions? The Department seeks specific cost information, including information on the costs and benefits, as well as anecdotal evidence of the costs and benefits of accessible equipment and furniture.

#### A. Impact on Small Entities

Consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. See 5 U.S.C. 603-04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002). The Department will make an initial determination as to whether any rule it proposes is likely to have a significant economic impact on a substantial number of small entities, and if so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small entities and regulatory alternatives that reduce the regulatory burden on small entities while achieving the goals of the regulation. In response to this ANPRM, the Department encourages small entities to provide cost data on the potential economic impact of adopting a specific requirement for Web site accessibility and recommendations on less burdensome alternatives, with cost information.

**Question 23.** The Department seeks input regarding the impact the measures being contemplated by the Department with regard to accessible equipment and furniture will have on small entities if adopted by the Department. The Department encourages you to include any cost data on the potential economic impact on small entities with your response.

**Question 24.** Are there alternatives that the Department can adopt, which were not previously discussed, that will alleviate the burden on small entities? Should there be different compliance requirements or timetables for small entities that take into account the resources available to small entities or should the Department adopt an exemption for certain or all small entities from coverage of the rule, in whole or in part. Please provide as much detail as possible in your response.

Dated: July 21, 2010.

**Thomas E. Perez,**

*Assistant Attorney General, Civil Rights Division.*

[FR Doc. 2010-18331 Filed 7-22-10; 4:15 pm]

**BILLING CODE 4410-13-P**

## DEPARTMENT OF JUSTICE

### 28 CFR Parts 35 and 36

[CRT Docket No. 110]

RIN 1190-AA61

#### **Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations**

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

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** The Department of Justice (Department) is considering revising the regulations implementing title III of the Americans with Disabilities Act (ADA or Act) in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web), accessible to individuals with disabilities. The Department is also considering revising the ADA's title II regulation to establish requirements for making the services, programs, or activities offered by State and local governments to the public via the Web accessible. The Department is issuing this advance notice of proposed rulemaking (ANPRM) in order to solicit public comment on various issues relating to the potential application of such requirements and to obtain background information for the regulatory assessment the Department must prepare if it were to adopt requirements that are economically significant according to Executive Order 12866.

**DATES:** The Department invites written comments from members of the public. Written comments must be postmarked and electronic comments must be submitted on or before January 24, 2011. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

**ADDRESSES:** You may submit comments, identified by RIN 1190-AA61 (or Docket ID No. 110), by any one of the following methods:

- *Federal eRulemaking Web site:* [www.regulations.gov](http://www.regulations.gov). Follow the Web site's instructions for submitting comments.

- *Regular U.S. mail:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031-0885.

- *Overnight, courier, or hand delivery:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005.

#### **FOR FURTHER INFORMATION CONTACT:**

Christina Galindo-Walsh, Attorney, 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).

You may obtain copies of this ANPRM in large print, audiotope, Braille, or computer disk by calling the ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY). This ANPRM is also available on the ADA Home Page at <http://www.ada.gov>.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Electronic Submission of Comments and Posting of Public Comments**

You may submit electronic comments to [www.regulations.gov](http://www.regulations.gov). When submitting comments electronically, you must include CRT Docket No. 110 in the subject box, and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and made available for public inspection online at [www.regulations.gov](http://www.regulations.gov). Submission postings will include any personal identifying information (such as your name, address, etc.) included in the text of your comment. If you include personal identifying information (such as your name, address, etc.) in the text 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 include all the personal identifying information you want redacted along with this phrase. Similarly, if you 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