

**DEPARTMENT OF JUSTICE****28 CFR Part 35**

[CRT Docket No. 105; AG Order No. 2967–2008]

RIN 1190-AA46

**Nondiscrimination on the Basis of Disability in State and Local Government Services****AGENCY:** Department of Justice, Civil Rights Division.**ACTION:** Notice of proposed rulemaking.

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

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

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

**DATES:** All comments must be received by August 18, 2008.**ADDRESSES:** Submit electronic comments and other data to <http://www.regulations.gov>. Address written comments concerning this NPRM to: ADA NPRM, P.O. Box 2846, Fairfax, VA

22031–0846. Overnight deliveries should be sent to the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, located at 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005. All comments will be made available for public viewing online at <http://www.regulations.gov>.

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

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

**SUPPLEMENTARY INFORMATION:****Electronic Submission and Posting of Public Comments**

You may submit electronic comments to <http://www.regulations.gov>. When submitting comments electronically, you must include CRT Docket No. 105 in the subject box, and you must include your full name and address.

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

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively

redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

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

**Overview**

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

In performing the required periodic review of its existing regulations, the Department has reviewed its title II regulation section by section, and, as a result, proposes several clarifications and amendments in this NPRM. In addition, the Department’s initial, formal benefit-cost analysis dealing with the Department’s NPRMs for both titles II and III is included in this NPRM. See E.O. 12866, 58 FR 51735 (Sept. 30, 1993), amended by E.O. 13258, 67 FR 9385 (Feb. 26, 2002), and E.O. 13422, 72 FR 2763 (Jan. 18, 2007); 5 U.S.C. 601, 603, 610(a); and OMB Circular A–4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>. The NPRM was submitted to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, for review and approval prior to publication in the **Federal Register**.

**Purpose**

On July 26, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, a comprehensive civil rights law prohibiting discrimination on the basis of disability. At the beginning of his administration, President George W. Bush underscored the nation’s commitment to ensuring the rights of over 50 million individuals with disabilities nationwide by announcing the New Freedom Initiative (available at <http://www.whitehouse.gov/infocus/newfreedom>). The Access Board’s

publication of the 2004 ADAAG is the culmination of a long-term effort to facilitate ADA compliance and enforcement by eliminating, to the extent possible, inconsistencies among federal accessibility requirements and between federal accessibility requirements and state and local building codes. In support of this effort, the Department is announcing its intention to adopt standards consistent with Parts I and III of the 2004 ADAAG as the ADA Standards for Accessible Design. To facilitate this process, the Department is seeking public comment on the issues discussed in this notice.

### The ADA and Department of Justice Regulations

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

The Department is also proposing amendments to its title III regulation, which prohibits discrimination on the basis of disability in public accommodations and commercial facilities, published concurrently with the publication of this NPRM, in this issue of the **Federal Register**.

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 of 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.

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 current 1991 Standards, which were

based upon the version of ADAAG published by the Access Board on the same date. Under the current regulation, title II entities are required to comply either with the 1991 Standards or with the Uniform Federal Accessibility Standards (UFAS), 41 CFR part 101–19.6, App. A—which many public entities were accustomed to following under section 504—with respect to newly constructed or altered facilities.

### Relationship to Other Laws

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

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

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

Nothing in this proposed rule will alter this relationship. The Department recognizes that public entities subject to title II of the ADA may also be subject to title I of the ADA, which prohibits discrimination on the basis of disability in employment, section 504, which prohibits discrimination on the basis of disability in the programs and activities of recipients of federal financial assistance, and other federal statutes such as the Air Carrier Access Act, 49 U.S.C. 41705, and the Fair Housing Act, 42 U.S.C. 3601 *et seq.* Compliance with the Department's regulations under the ADA does not necessarily ensure compliance with other federal statutes. Public entities that are subject both to the Department's regulations and to regulations published by other federal agencies must ensure that they comply with the requirements of both regulations. If there is a direct conflict between the regulations, the regulation that provides greater accessibility will prevail. When different statutes apply to entities that routinely interact, each entity must follow the regulation that specifically applies to it. For example, a public airport is a title II facility that houses air carriers subject to the Air Carrier Access Act (ACAA). The public airport operator would comply with the title II requirements, not with the ACAA requirements. Conversely, the air carrier is required to comply with the ACAA, not with the ADA.

In addition, public entities (including AMTRAK) that provide public

transportation services that are subject to subtitle B of title II should be reminded that the Department's regulation, at 28 CFR 35.102, provides that—

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

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, 42 U.S.C. 12141, they are not subject to the requirements of this part.

Nothing in this proposed rule alters that provision. To the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR part 37 and are not covered by this proposed rule. Matters not covered by subtitle B are covered by this rule. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Airports operated by public entities are not subject to DOT's ADA regulation, but they are subject to subpart A of title II and to this rule.

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

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

architecture and design, transportation, and communication, to individuals with disabilities.” 42 U.S.C. 12204. The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the minimum guidelines issued by the Access Board. *Id.* at 12134, 12186.

The Department was extensively involved in the development of the 2004 ADAAG. As a federal member of the Access Board, the Attorney General’s representative voted to approve the revised guidelines. Although the enforceable standards issued by the Department under title II and title III must be consistent with the minimum guidelines published by the Access Board, it is the responsibility solely of the Attorney General to promulgate standards and to interpret and enforce those standards.

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

#### **The Revised Guidelines (2004 ADAAG)**

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

The revised 2004 ADAAG is the culmination of a ten-year effort to improve ADA compliance and enforcement. In 1994, the Access Board began the process of updating the original ADAAG by establishing an advisory committee composed of members of the design and construction

industry, the building code community, state and local government entities, and individuals with disabilities. In 1999, based largely on the report and recommendations of the advisory committee,<sup>1</sup> the Access Board issued a proposed rule to jointly update and revise its ADA and ABA accessibility guidelines. 64 FR 62248 (Nov. 16, 1999). In response to its rule, the Access Board received more than 2,500 comments from individuals with disabilities, affected industries, state and local governments, and others. The Access Board provided further opportunity for participation by holding public hearings throughout the nation. The Access Board worked vigorously from the beginning to harmonize the ADA and ABA Accessibility Guidelines with industry standards and model codes that form the basis for many state and local building codes. The Access Board released an interim draft of its guidelines to the public on April 2, 2002, 67 FR 15509, in order to provide an opportunity for entities with model codes to consider amendments that would promote further harmonization. By the date of its final publication on July 23, 2004, 69 FR 44084, the 2004 ADAAG had been the subject of extraordinary public participation and review.

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

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

#### **The Advance Notice of Proposed Rulemaking**

The Department published an advance notice of proposed rulemaking (ANPRM) regarding its ADA regulation on September 30, 2004, 69 FR 58768, for two reasons: (1) To begin the process of adopting the Access Board’s 2004

ADAAG by soliciting public input on issues relating to the potential application of the Access Board’s revisions once the Department adopts them as revised standards; and (2) to request background information that would assist the Department in preparing a regulatory analysis under the guidance provided in OMB Circular A-4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>, Sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs). While underscoring that the Department, as a member of the Access Board, had already reviewed comments provided to the Access Board during its development of the 2004 ADAAG, the Department specifically requested public comment on the potential application of the 2004 ADAAG to existing facilities. The extent to which the 2004 ADAAG is used with respect to the program access requirement in title II (like the readily achievable barrier removal requirement applicable to existing facilities under title III) is solely within the discretion of the Department. The ANPRM dealt with the Department’s responsibilities under both title II and title III.

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

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

Comments also dealt with the specific requirements of the 2004 ADAAG.

Many commenters requested clarification of or changes to the Department's title II regulation. Commenters observed that now, more than seventeen years after the enactment of the ADA, as facilities are becoming physically accessible to individuals with disabilities, the Department needs to focus on second-generation issues that ensure individuals with disabilities actually gain access to the accessible elements. So, for example, commenters asked the Department to focus on such issues as ticketing in assembly areas and reservations of boat slips. The public asked about captioning and the division of responsibility between the Department and the Access Board for fixed and non-fixed (or free-standing) equipment. Finally, commenters asked for clarification on some issues in the existing regulations, such as title III's requirements regarding service animals.

All of the issues raised in the public comments are addressed, in turn, in this NPRM or in the NPRM for title III. Issues involving title III of the ADA, such as readily achievable barrier removal, are addressed in the NPRM for title III, published concurrently with this NPRM in this issue of the **Federal Register**.

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

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

The Department leaves open the possibility that, as a result of the receipt of comments on an issue raised by the 2004 ADAAG, or if the Department's Regulatory Impact Analysis reveals that the costs of making a particular feature or facility accessible are disproportionate to the benefits to persons with disabilities, the Attorney General, as a member of the Access Board, may return the issue to the

Access Board for further consideration of the particular feature or facility. In such a case, the Department would delay adoption of the accessibility requirement for the particular feature or facility in question in its final rule and await Access Board action before moving to consider any final action.

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

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

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

According to the Department's initial Regulatory Impact Analysis ("RIA"), it is estimated that the incremental costs of the proposed requirements for each of the following eight existing elements will exceed monetized benefits by more

than \$100 million when using the 1991 Standards as the comparative baseline: Side reach; water closet clearances in single-user toilet rooms with in-swinging doors; stairs; elevators; location of accessible routes to stages; accessible attorney areas and witness stands; assistive listening systems; and accessible teeing grounds, putting greens, and weather shelters at golf courses. However, this baseline figure does not take into account the fact that, since 1991, various model codes and consensus standards—such as the model International Building Codes ("IBC") published by the International Codes Council and the consensus accessibility standards developed by the American National Standards Institute ("ANSI")—have been adopted by a majority of states (in whole or in part) and that these codes have provisions mirroring the substance of the Department's proposed regulations. Indeed, such regulatory overlap is intentional since harmonization among federal accessibility standards, state and local building codes, and model codes is one of the goals of the Department's rulemaking efforts.

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

For example, the Department's proposed standards for existing stairs and elevators have identical counterparts in one or more IBC versions put in place before the 2004 ADAAG (2000 or 2003). Please note, however, that the IBC 2006 version bases a number of its provisions on guidelines in the 2004 ADAAG. These IBC versions, in turn, have been adopted collectively by forty-six (46) states and the District of Columbia on a statewide basis. In the four (4) remaining states (Colorado, Delaware, Illinois, and Mississippi), while IBC adoption is left to the discretion of local jurisdictions, the vast majority of these local jurisdictions have elected to adopt IBC as their local code. Thus, given that nearly all jurisdictions in the country currently enforce a version of the IBC as their building code, and to the extent that the IBC building codes may be settled in this area and would not be further modified to be consistent if they differ from the final version of these regulations, the incremental costs and benefits attributable to the Department's proposed regulations governing alterations to existing stairs and elevators may be less significant than the RIA suggests over the life of the regulation.

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

*Question 1: The Department believes it would be useful to solicit input from the public to inform us on the anticipated costs or benefits for certain requirements. The Department therefore invites comment as to what actual costs and benefits would be for these eight existing elements, in particular as applied to alterations, in compliance*

*with the proposed regulations (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses), as well as additional practical benefits from these requirements, which are often difficult to adequately monetize.*

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

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

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

proposed requirement mandates that, when a direct circulation path (for audience members) connects the seating area to a stage, the accessible route to the stage must also be direct.

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

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

The Department's RIA also estimates significant costs, regardless of the baseline used, for the proposed requirement that court facilities must provide an accessible route to a witness stand or attorney area and clear floor space to accommodate a wheelchair. These costs arise both in the new construction and alteration contexts. If the witness stand is raised, then either a ramp or lift must be provided to ensure access to the witness stand. While the RIA quantifies the benefits for

this proposed requirement (as it does for all of the proposed requirements) primarily in terms of time savings, the Department fully appreciates that such a methodology does not capture the intangible benefits that accrue when persons with mobility disabilities are able to participate in the court process as conveniently as any other witness or party. Without access to the witness stand, for example, a wheelchair user, or a witness who uses other mobility devices such as a walker or crutches, may have to sit at floor level. If the witness with a mobility disability testifies from a floor level position, the witness could be placed at a disadvantage in communicating with the judge and jury, who may no longer be able to see the witness as easily, or, potentially, at all. This may create a reciprocal difficulty for the judge and jurors who lose the sightline normally provided by the raised witness stand that enables them to see and hear the witness in order to evaluate his or her demeanor and credibility—difficulty that redounds to the detriment of litigants themselves and ultimately our system of justice.

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

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

hear or understand the audible portion of the presentation.

From an economic perspective, the cost of a single hearing-aid compliant ALS is not high—about \$500 more than a non-compliant system—and compliant equipment is readily available on the retail market. As estimated in the RIA, the high overall costs for the revised technical requirements for ALS are instead driven by the assumption that entities with large assembly areas (such as universities, stadiums, and auditoriums) will be required to purchase a relatively large number of compliant systems. On the other hand, the overall scoping for ALS has been reduced in the Department’s proposed requirement, thus mitigating the cost to covered entities. The proposed revision to the technical requirement merely specifies that 25% (or at least two) of the required ALS receivers must be hearing-aid compatible. The RIA estimates that a significant part of the cost of this requirement will come from the replacement of individual ALS receivers and system maintenance.

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

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

From an economic perspective, the Department’s RIA assumes that virtually every tee and putting green on an existing course will need to be regraded in order to provide compliant accessible (pedestrian) routes to these features. However, the Department’s proposal also excuses compliance with the requirement for an accessible (pedestrian) route so long as a “golf car passage” (*i.e.*, the path typically used by golf cars) is otherwise provided to the teeing ground, putting green, or other accessible element on a course. Because it is likely that most public and private golf courses in the United States already provide golf passages to most or all holes, the actual costs of this requirement for owners and operators of

existing golf courses should be reduced with little or no practical loss in accessibility.

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

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

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

### Organization of This NPRM

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

The section of the NPRM entitled, "General Issues," briefly introduces topics that are noteworthy because they are new to the title II regulation or have been the subject of attention or comment. The topics introduced in the general issues section include: Safe harbor, service animals, wheelchairs and other power-driven mobility devices, effective communication and auxiliary aids, alterations to prison cells, and equipment.

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

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

The Department's proposed changes to the actual regulatory text of title II that follow the section-by-section analysis are entitled, "Part 35: Nondiscrimination on the Basis of Disability in State and Local Government Services."

### General Issues

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

*Safe harbor.* One of the most important issues the Department must address in proposing to adopt the 2004 ADAAG as its new ADA Standards for Accessible Design is the effect that the proposed standards will have on existing facilities under title II. This issue was not addressed in the 2004 ADAAG because it is outside of the scope of the Access Board's authority under the ADA.

Under title II, program accessibility requires that state and local government agencies provide individuals with disabilities with access to their programs when "viewed in their entirety." Title II does not require structural modifications in all circumstances in order to provide program access. As a result of this flexibility, the Department believes that the program accessibility requirement as it is codified in the current regulation may appropriately mitigate any burdens on public entities without additional regulatory safeguards. Nevertheless, in order to provide certainty and clarity, the Department is proposing a safe harbor for elements in existing facilities that are in compliance with either the 1991 Standards or the Uniform Federal Accessibility Standards (UFAS), 41 CFR part 101-19.6, App. A. This proposal is discussed below in § 35.150(b)(2) of the section-by-section analysis.

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

*Question 7: Should the Department exempt public entities from specific compliance with the supplemental requirements for play areas and recreation facilities, and instead*

*continue to determine accessibility in these facilities on a case-by-case basis under existing law? Please provide information on the effect of such a proposal on people with disabilities and public entities.*

*Service animals.* The Department wishes to clarify the obligations of public entities to accommodate individuals with disabilities who use service animals. The Department continues to receive a large number of complaints from individuals with service animals. It appears, therefore, that many covered entities are confused about their obligations under the ADA in this area. At the same time, some individuals with impairments—who would not be covered as qualified individuals with disabilities—are claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access to the facilities of public entities. Another trend is the use of wild or exotic animals, many of which are untrained, as service animals. In order to clarify its position and avoid further misapplication of the ADA, the Department is proposing amendments to its regulation with regard to service animals.

*Minimal protection.* In the Department's *ADA Business Brief on Service Animals*, which was published in 2002, the Department interpreted the minimal protection language in its definition of service animals within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). Although the Department received comments urging it to eliminate the phrase "providing minimal protection" from its regulation, the Department continues to believe that the language serves the important function of excluding from coverage so-called "attack dogs" that pose a direct threat to others.

*Guidance on permissible service animals.* The existing regulation implementing title III defines a "service animal" as "any guide dog, signal dog, or other animal." At the time the regulation was promulgated, the Department believed that leaving the species selection up to the discretion of the individual with a disability was the best course of action. Due to the proliferation of animal types that have been used as "service animals," including wild animals, the Department believes that this area needs established parameters. Therefore, the Department is proposing to eliminate certain species from coverage under the ADA even if the other elements of the definition are satisfied.

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

Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.

The Department is proposing new regulatory text in § 35.104 to formalize its position on emotional support or comfort animals, which is that “[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.” The Department wishes to underscore that the exclusion of emotional support animals from ADA coverage does not mean that persons with psychiatric, cognitive, or mental disabilities cannot use service animals. The Department proposes specific regulatory text in § 35.104 to make this clear: “[t]he term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities.” This language simply clarifies the Department's longstanding position.

The Department's rule is based on the assumption that the title II and title III regulations govern a wider range of public settings than the settings that allow for emotional support animals. The Department recognizes, however, that there are situations not governed exclusively by the title II and title III regulations, particularly in the context of residential settings and employment

where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.

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

Detailed regulatory text changes and the Department's response to public comments on these issues and others are discussed below in the definitions § 35.104 and in a newly-proposed § 35.136.

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

EPAMDs illustrate some of the challenges posed by new mobility devices. The basic Segway® model is a two-wheeled, gyroscopically stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. The EPAMD can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of 3 to 4 miles per hour and the approximate maximum speed

for power-operated wheelchairs of 6 miles per hour. In a study of trail and other nonmotorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of people using EPAMDs ranged from 68¼ inches to 79½ inches. See Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 2004), available at <http://www.tfhr.gov/safety/pubs/04103>. Thus, EPAMDs can operate at much greater speeds than wheelchairs, and the average user is much taller than most wheelchair users.

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

While there may be legitimate safety issues for EPAMD users and bystanders, EPAMDs and other nontraditional mobility devices can deliver real benefits to individuals with disabilities. For example, individuals with severe respiratory conditions who can walk limited distances and individuals with multiple sclerosis have reported benefitting significantly from EPAMDs. Such individuals often find that EPAMDs are more comfortable and easier to use than wheelchairs, and assist with balance, circulation, and digestion in ways that wheelchairs do not. See Rachel Metz, *Disabled Embrace Segway*, New York Times, Oct. 14, 2004.

The Department has received questions and complaints from individuals with disabilities and covered entities about which mobility aids must be accommodated and under what circumstances. While some

individuals with disabilities support the use of unique mobility devices, other individuals with disabilities are concerned about their personal safety when others are using such devices. There is also concern about the impact of such mobility devices on facilities, such as the weight of the device on fragile floor surfaces.

The Department intends to address these issues and proposes to adopt a policy that sets the parameters for when these devices must be accommodated. Toward that end, the Department proposes new definitions of the terms “wheelchair”—which includes manually and power-driven wheelchairs and mobility scooters—and “other power-driven mobility device” and accompanying regulatory text. The proposed definitions are discussed in the section-by-section analysis of § 35.104, and the proposed regulatory text is discussed in the section-by-section analysis of § 35.137.

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

*Effective communication and auxiliary aids.* Revised § 35.160(a) of the title II regulation requires a public entity to take appropriate steps to ensure that communications with individuals with disabilities, including applicants, participants, members of the public, and their companions, are as effective as communications with others. The Department has investigated hundreds of complaints alleging that public entities have failed to provide effective communication, many of which resulted in settlement agreements and consent decrees. During the course of its

investigations, the Department has determined that public entities sometimes misunderstand the scope of their obligations under the statute and the regulation. Moreover, the number of individuals with hearing loss continues to grow in this country as a large segment of the population ages and as individuals live longer.

The Department is proposing several changes and additions to §§ 35.104, 35.160, and 35.161 of the title II regulation to address these issues. Among other amendments, these changes update the regulatory language in response to numerous technological advances and breakthroughs in the area of auxiliary aids and services since the regulation was promulgated sixteen years ago. The most significant changes relate to video interpreting services (VIS) and the provision of effective communication for companions.

A technology that has emerged since promulgation of the original regulation is video interpreting services (VIS), and the Department proposes to include it in the regulation. VIS permits an individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location) who can see and sign to the individual through a camera located on or near the monitor. VIS can provide immediate, effective access to interpreting services seven days a week, twenty-four hours a day in a variety of situations by allowing individuals in separate locations to have live, face-to-face communications.

The specific amendments to the section on auxiliary aids and services, in addition to the provision of VIS, are described in §§ 35.104, 35.160, and 35.161 of the section-by-section analysis below.

*Alterations to prison cells.* The 2004 ADAAG establishes requirements for the design and construction of cells in correctional facilities. When the Access Board adopted these new requirements, it deferred one decision to the Attorney General, specifically: “Alterations to cells shall not be required to comply except to the extent determined by the Attorney General.” The unique environment and security concerns of a correctional facility present challenges that are not an issue in other government buildings, so the Department must strike a balance between the accessibility needs of inmates with disabilities and the concerns of the prison officials and staff that run the facilities. Therefore, in the ANPRM, the Department sought public comment about the most effective means to ensure that existing correctional facilities are made

accessible to prisoners with disabilities and presented three options: (1) Require all altered elements to be accessible, which would maintain the current policy that applies to other ADA alterations requirements; (2) permit substitute cells to be made accessible within the same facility, which would permit correctional authorities to meet their obligation by providing the required accessible features in cells within the same facility, other than those specific cells in which alterations are planned; or (3) permit substitute cells to be made accessible within a prison system, which would focus on ensuring that prisoners with disabilities are housed in facilities that best meet their needs, since alterations within a prison environment often result in piecemeal accessibility. Discussion of the proposed options and submitted comments are described below in the section-by-section analysis of § 35.152, a newly proposed section on matters related to detention and correctional facilities.

*Equipment and furniture.* Question seven of the ANPRM asked for comment on whether regulatory guidance is needed with respect to the acquisition and use of mobile, portable, and other free-standing equipment or furnishings used by covered entities to provide services, and asked for specific examples of situations that should be addressed. The ANPRM explained that free-standing equipment was already addressed in the regulations in several different contexts, but that since covered entities continue to raise questions about the extent of their obligation to provide accessible free-standing equipment, the Department was considering adding specific language on equipment.

The Department received comments both in favor and against this proposal with a majority of comments in favor of requiring accessible equipment and furniture. However, the Department has decided to add no new regulatory text with respect to equipment at this time. A few title II entities submitted very brief comments, with about half in favor of specific requirements for free-standing equipment and half opposed. Most individuals and organizations representing individuals with disabilities were in favor of adding or clarifying requirements for accessible equipment. Disability organizations pointed out that from the user’s perspective, it is irrelevant whether the equipment (*e.g.*, ATMs or vending machines) is free-standing or fixed, since the equipment must be accessible in order for them to use it.

The Department believes that accessible equipment and furnishings are required when appropriate under the existing regulations governing modifications of policies, practices, and procedures, and in the requirement for program accessibility. 28 CFR 35.130(7); 35.150. In addition, some equipment may also be subject to the effective communication requirements. 28 CFR 35.160. The existing regulation at § 35.150(a) requires that entities operate each service, program, or activity so that, when viewed in its entirety, each is readily accessible to and usable by individuals with disabilities, subject to a defense of fundamental alteration or undue burden. 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.” Section 35.160(a) requires covered entities to provide effective communication to program participants. Consequently, providing accessible equipment is required when appropriate under the existing regulations. The Department has decided to continue with this approach and not to add any specific regulatory guidance addressing equipment at this time.

The 2004 ADAAG includes revised requirements for some types of fixed equipment that are specifically addressed in the 1991 Standards, such as ATMs and vending machines, as well as detailed requirements for fixed equipment that is not addressed by name in the current Standards, such as depositories, change machines, and fuel dispensers. Because the 2004 ADAAG provides detailed requirements for many types of fixed equipment, covered entities should consult those requirements in determining what steps are appropriate for making free-standing equipment accessible. The Department also agrees that when federal guidance for accessibility exists for equipment required to be accessible to individuals who are blind or have low vision, entities should consult such guidance (e.g., federal standards implementing section 508 of the Rehabilitation Act, 36 CFR part 1194, or the guidelines that specify communication accessibility for ATMs and fare card machines in the 2004 ADAAG, 36 CFR part 1191, App. D). The Department intends to continue to monitor the use of accessible equipment by covered entities and to analyze the economic impact of possibly providing more detailed requirements in future regulations governing specific types of free-standing equipment.

*Accessible golf cars.* Question six of the ANPRM asked whether golf courses should be required to make at least one,

and possibly two, specialized golf cars available for the use of individuals with disabilities, with no greater advance notice required to obtain them than for use of other golf cars. The Department also asked about the golf car’s safety and use on golf course greens. Accessible single-user golf cars are cars for use by individuals with mobility impairments that are driven with hand controls, and from which a person with a disability can hit the golf ball while remaining in the seat of the car. Some golf cars have a swivel, elevated seat that allows the golfer to play from a semi-standing position. These cars can be used by individuals without disabilities as well.

The Department received many comments regarding accessible golf cars, with the majority of commenters in favor of requiring accessible golf cars. The comments in opposition to requiring accessible golf cars came from some individuals and from entities covered by title III. The Department has decided to propose no new regulations specific to accessible golf cars at this time.

Many commenters in favor of requiring accessible golf cars noted the social aspect of golf, generally, and its specific—albeit informal—importance, in many business transactions, thus affecting both the social lives and the careers of some individuals with disabilities.

Comments opposed to requiring accessible golf cars generally came from individuals and golf course owners and associations covered by title III. Some commenters believed that there is little demand for accessible golf cars, or that the problem is solved by putting “medical” flags on traditional cars to identify individuals with disabilities who are then permitted to drive onto the greens, which otherwise would not be permitted. Others stated that accessible golf cars were too expensive or were specialized equipment that individuals with disabilities should purchase for themselves. One city representative commented that courses that do not provide golf cars should not be required to provide accessible golf cars.

Safety and the impact on golf course grounds were other areas addressed by the comments. Again, opinions were divided. Some commenters said that the single-user golf cars are safe, do not damage the greens, and speed up the pace of play. Others argued that the cars should pass the American National Standards Institute (ANSI) standards<sup>2</sup> for traditional golf cars, and that the single-user cars should not be required

until there are safety standards for these cars.

Other concerns raised by public comments were the effect of allowing accessible golf car use on the greens and their impact on maintenance of the course. Some commenters suggested that the cars would damage the greens and that the repair costs would be more significant than for traditional golf cars. In addition, one commenter suggested that courses exceeding certain slope and degree standards be exempted from having single-user cars because of safety concerns. Comments from golf courses that have provided accessible golf cars were generally positive in terms of safety and maintenance of the course. Further, courses that provide accessible cars do not report any safety issues or more than minimal damage to the greens.

With respect to making golf cars available, most supporters of providing accessible golf cars believe that no advance notice should be required to reserve the golf cars. One association supported requiring golf courses to have accessible cars with advance notice, which could be achieved through pooling arrangements with other courses. Some commenters explained that at least two cars per course should be required so that golfers with disabilities can play together.

Commenters also addressed whether courses that provide no cars at all should provide accessible cars. Some commenters supported requiring every golf course, whether or not it provides traditional golf cars, to provide accessible cars because individuals with disabilities will not be able to play without an accessible car.

The Department has decided not to add a regulation specifically addressing accessible golf cars at this time. The existing regulation, which requires that entities 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, will continue to govern this issue. 28 CFR 35.150(a).

The Department is aware that the Department of Defense has recently undertaken an extensive study of the accessibility of golf courses operated for military personnel. As a result of its study, the Department of Defense plans to provide two accessible golf cars at each of the 174 golf courses that the Department of Defense operates, except those at which it would be unsafe to operate such golf cars because of the terrain of the course. See U.S. Department of Defense, *Report to*

<sup>2</sup> ANSI Z130.1–1999.

*Congress: Access of Disabled Persons to Morale, Recreation, and Welfare (MRW) Facilities and Activities* (Sept. 25, 2007). The Department of Justice plans to study the Defense Department's implementation of its plan to determine if it provides an effective framework for ensuring golf course accessibility.

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

This section provides a detailed description of the Department's proposed changes to the title II regulation, the reasoning behind the proposals, and responses to public comments received on the topic. The section-by-section analysis follows the order of the current title II regulation, except that if the Department is not proposing a change to a regulation section, the unchanged section is not discussed. In addition, this section includes specific questions for which the Department requests public response. These questions are numbered and italicized in order to make them easier for readers to locate and reference.

#### Subpart A—General

##### *Section 35.104 Definitions*

“1991 Standards” and “2004 ADAAG”

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

“Auxiliary Aids and Services”

Several types of auxiliary aids that have become more readily available have been added to § 35.104 under the definition of auxiliary aids and services.

For purposes of clarification, the Department has added the exchange of written notes as an example of an auxiliary aid or service. This common-sense example is a codification of the Department's longstanding policy with regard to title III entities. See *The Americans with Disabilities Act, Title III Technical Assistance Manual, Covering Public Accommodations and*

*Commercial Facilities* (Title III TA Manual), III–4.300, available at <http://www.ada.gov/taman3.html>. The title III definition of auxiliary aids and services provided the framework for the same definition in title II. See 56 FR 35544, 35565 (July 26, 1991) and 56 FR 35694, 35697 (July 26, 1991). This additional example of an appropriate auxiliary aid and service was inserted because many public entities do not realize that this easy and efficient technique is available to them. While the exchange of written notes is inappropriate for lengthy or complicated communications, it can be appropriate for situations such as routine requests for written information, for a police officer issuing a speeding ticket, or as a means of communication while awaiting the arrival of an interpreter.

Also in paragraph (1) of the definition, the Department has replaced the term “telecommunications devices for deaf persons (TDD)” with “text telephones (TTYs).” Although “TDD” is the term used in the ADA, the use of “TTY” has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. The Department has also included in paragraph (1) “accessible electronic and information technology” as another example of auxiliary aids and services. Lastly, “computer-aided” has been added to describe “transcription services” to make it consistent with title III.

The Department has added to paragraph (1) a new technology, video interpreting services (VIS), which consists of a video phone, video monitors, cameras, a high speed Internet connection, and an interpreter. VIS is specifically discussed below in the proposed definition of VIS.

In paragraph (2) of the definition, the Department proposes to insert additional examples of auxiliary aids and services for individuals who are blind or have low vision. The preamble to the original regulation makes clear that the original list in the regulation was “not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology.” See 56 FR 35694, 35697 (July 26, 1991). Because technological advances in the seventeen years since the ADA was enacted have increased the range of auxiliary aids and services for those who are blind or have low vision, the Department has added additional examples, including brailled displays, screen reader software, magnification software, optical readers,

secondary auditory programs (SAP), and accessible electronic and information technology.

“Direct Threat”

In the Department's proposed § 35.136(b)(3), a service animal may be removed from the premises of a public entity if the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications. Direct threat is not defined in title II, but it is defined in § 36.208(b) of the current title III regulation as “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.” The Department proposes taking the definition from its current location in title III and placing it in the definitions section in both title II (§ 35.104) and title III (§ 36.104).

“Existing Facility”

Under the ADA, a facility may be one or more of three types at different points in time: (1) An existing facility, (2) an altered facility, or (3) a newly designed and constructed facility. In the current regulation, title II defines new construction at § 35.151(a) and alterations at § 35.151(b). In contrast, the term “existing facility” is not defined although it is used in the statute and in the regulations for titles II and III. 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR 35.150.

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

The added definition of “existing facility” in the proposed regulation clarifies that the term means exactly what it says: A facility in existence on any given date is an existing facility under the ADA. If a facility exists, it is an existing facility whether it was built in 1989, 1999, or 2009. Of course, if the construction of a facility at issue begins after the triggering dates for the new construction standards, then the facility is subject to the new construction standards, and if it is altered, it is subject to the alterations standards.

**“Other Power-Driven Mobility Device”**

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

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

The Department’s proposed regulatory text on accommodating wheelchairs and other power-driven mobility devices is discussed below in § 35.137 of the section-by-section analysis.

**“Proposed Standards”**

The Department has added the term “proposed standards” to mean the 2004 ADAAG as revised or amended by the Department in this rulemaking. The full text of the 2004 ADAAG is available for review at <http://www.access-board.gov> along with a detailed comparison of the 1991 Standards and the 2004 ADAAG that identifies the differences between the two documents.

**“Qualified Interpreter”**

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

Not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily

qualified to interpret orally. Also, someone with just a rudimentary familiarity with sign language or finger spelling is not a qualified sign language interpreter. Likewise, a qualified sign language interpreter would not include someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

The revised definition includes examples of different types of interpreters. An oral interpreter has special skill and training to mouth a speaker’s words silently for individuals who are deaf or hard of hearing, many of whom were raised orally and were taught to read lips or were diagnosed with hearing loss later in life and do not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker’s voice is unclear, there is a quick-paced exchange of communication (e.g., in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code, or cue, to represent each speech sound.

**“Qualified Reader”**

The current regulation identifies a qualified reader as an auxiliary aid, but it does not define the term. See 28 CFR 35.104(2). Based upon the Department’s investigation of complaints alleging that some entities have provided ineffective readers, the Department proposes to define “qualified reader” similarly to “qualified interpreter” to ensure that entities select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. Failing to provide a qualified reader to a person with a disability could amount to discrimination based upon disability.

**“Service Animal”**

Although there is no specific language in the current title II regulation concerning service animals, title II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary to avoid discrimination on the basis of disability, unless the modifications would fundamentally alter the nature of the service, program, or activity. 28 CFR 35.130(b)(7). In order to qualify for coverage under title II, a person must be a “qualified individual with a disability,” which is defined as “an individual with a disability who, with or without reasonable

modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 28 CFR 35.104. The Department is proposing to add to the title II regulation the same definition of “service animal” that it will propose for the title III regulation. The title III regulation currently contains a definition of “service animal” in § 36.104.

The current definition of “service animal” in § 36.104 is, “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.” The Department would modify that current definition, and add the same definition, as modified, to the title II regulation at § 35.104. The changes that would be made to the title III definition, and that would be incorporated in the title II definition are as follows:

1. Remove “guide” or “signal” as descriptions of types of service dogs, add “other common domestic” animal, and add “qualified” to “individual” in the Department’s current definition;
2. Remove “individuals with impaired vision” and replace it with “individuals who are blind or have low vision;”
3. Change “individuals with impaired hearing” to “individuals who are deaf or hard of hearing;”
4. Replace the term “intruders” with the phrase “the presence of people” in the section on alerting individuals who are deaf or hard of hearing;
5. Add the following to the list of work and task examples: Assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support to assist with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation;
6. Add that “service animal” includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, or mental disabilities;
7. Add that “service animal” does not include wild animals (including nonhuman primates born in captivity),

reptiles, rabbits, farm animals (including any breed of horse, pony, miniature horse, pig, and goat), ferrets, amphibians, and rodents; and

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

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

*"Minimal protection."* There were many comments by service dog users urging the Department to remove from the definition the phrase "providing minimal protection." The commenters set forth the following reasons for why the phrase should be deleted: (1) The current phrase can be interpreted to apply coverage under the ADA to "protection dogs" that are trained to be aggressive and protective, so long as they are paired with a person with a disability; and (2) since some view the minimal protection language to mean that a dog's very presence can act as a crime deterrent, the language may be interpreted to allow any untrained pet dog to provide minimal protection by its mere presence. These interpretations were not contemplated by the ADA.

*Question 9: Should the Department clarify the phrase "providing minimal protection" in the definition or remove it? Are there any circumstances where a service animal providing "minimal protection" would be appropriate or expected?*

*"Alerting to intruders."* Some commenters expressed a similar concern regarding the phrase "alerting \* \* \* to intruders" in the current text as the concern expressed by commenters regarding the phrase "providing minimal protection." Commenters indicated that "alerting to intruders" has been misinterpreted by some individuals to apply to a special line of protection dogs that are trained to be aggressive. People have asserted, incorrectly, that use of such animals is protected under the ADA. The Department reiterates that public entities are not required to admit any animal that poses a direct threat to the health or safety of others. The Department has proposed removing "intruders" and replacing it with "the presence of people."

*"Task" emphasis.* Many commenters followed the lead of an umbrella service dog organization and suggested that the phrase "performing tasks" should form the basis of the service animal definition, that "do work" should be

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

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

*Define "animal" or what qualifies certain species as "service animals."* When the regulation was promulgated in 1991, the Department did not define the parameters of acceptable animal species, and few anticipated the variety of animals that would be used in the future, ranging from pigs and miniature horses to snakes and iguanas. One commenter suggested defining "animal" (in the context of service animals) or the parameters of acceptable species to reduce the confusion over whether a particular service animal is covered. One service dog organization commented that other species would be acceptable if those animals could meet the behavioral standards of trained service dogs. Other commenters asserted that there are certain animals (*e.g.*, reptiles) that cannot be trained to do work or perform tasks, so these animals would not be covered. The Department has followed closely this particular

issue (*i.e.*, how many unusual animals are now claimed as service animals) and believes that this aspect of the regulation needs clarification.

To establish a practical and reasonable species parameter, the Department proposes to narrow the definition of acceptable animal species to "dog or other common domestic animal" by excluding the following animals: Wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents. Many commenters asserted that limiting the number of allowable species would help stop erosion of the public's trust, which results in reduced access for many individuals with disabilities, despite the fact that they use trained service animals that adhere to high behavioral standards. The Department is compelled to take into account practical considerations of certain animals and contemplate their suitability in a variety of public contexts, such as libraries or courtrooms.

In addition, the Department believes that it is necessary to eliminate from coverage all wild animals, whether born or bred in captivity or the wild. Some animals, such as nonhuman primates, pose a direct threat to safety based on behavior that can be aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement against the use of monkeys as service animals, stating, "[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, the potential for serious injury, and zoonotic [animal-to-human disease transmission] risks." See the AVMA 2005 position statement, *Nonhuman Primates as Assistance Animals*, available at [http://www.avma.org/issues/policy/nonhuman\\_primates.asp](http://www.avma.org/issues/policy/nonhuman_primates.asp). The potential for nonhuman primates to transmit dangerous diseases to humans has been documented in scientific journals.

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

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

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

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

The difference between an emotional support animal and a psychiatric service animal is the service that is provided, *i.e.*, the actual work or task performed by the service animal. Another critical factor rests on the severity of the individual's impairment. For example, only individuals with conditions that substantially limit them in a major life activity qualify for coverage under the ADA, and only those individuals' use of a service animal will be covered under the ADA. *See* definition of disability, 42 U.S.C. 12102(2) and 28 CFR 35.104. Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Many Americans have some type of physical or mental impairment (*e.g.*, arthritis, anxiety, back pain, imperfect vision, etc.), but establishing a physical or mental disability also requires a substantial limitation of a major life activity. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulations were promulgated, service animals have been trained to assist individuals with different types of disabilities. As a result, individuals with minor impairments may mistakenly conclude that any type of impairment qualifies them for ADA coverage.

*Change "service animal" to "assistance animal."* Some commenters asserted that "assistance animal" is a term of art and should replace "service animal." While some agencies, like the Department of Housing and Urban Development (HUD), use the term "assistance animal," that term is used to denote a broader category of animals than is covered by the ADA. The Department believes that changing the term used under the ADA would create confusion, particularly in view of the broader parameters for coverage under the Fair Housing Act (FHA) (*cf.*, HUD

Handbook No. 4350.3 Rev-1, Chg-2, *Occupancy Requirements of Subsidized Multifamily Housing Programs* (June 2007), available at <http://www.hudclips.org>.) Moreover, the Department's proposal to change the definition of "service animal" under the ADA is not intended to affect the rights of people with disabilities who use assistance animals in their homes under the FHA.

In addition, the term "psychiatric service animal" describes a service animal that does work or performs a task for the benefit of an individual with a psychiatric disability. This contrasts with "emotional support" animals that are covered under the Air Carrier Access Act, 49 U.S.C. 41705 *et seq.*, and its implementing regulations, 14 CFR 382.7, *see also* 68 FR 24874, 24877 (May 9, 2003) (guidance on accommodation of service animals and emotional support animals on air transportation) and qualify as "assistance animals" under the FHA, but do not qualify as "service animals" under the ADA.

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

The Department has added a definition of video interpreting services (VIS), a technology composed of a video phone, video monitors, cameras, a high speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image.

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

In addition to adding the specific definition of VIS, the Department proposes to add VIS to the definition of "auxiliary aids and services" (discussed above in § 35.104) and to set out

performance standards for VIS at § 35.160.

#### "Wheelchair"

The Department proposes the following definition of "wheelchair" in § 35.104: "Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven."

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

The other existing federal definition of "wheelchair" that the Department reviewed is in the Department of Transportation regulation implementing the transportation provisions under title II and title III of the ADA. The Department of Transportation's definition of "wheelchair" is "a mobility aid belonging to any class of three or four-wheeled devices, usable indoors, designed for and used by individuals with mobility impairments, whether operated manually or powered." 49 CFR 37.3. The Department has adopted much of the language from this definition. Under the proposed definition, wheelchairs include manually operated and power-driven wheelchairs and mobility scooters. Mobility devices such as golf cars, bicycles, and electronic personal assistance mobility devices (EPAMDs) are inherently excluded from the proposed definition. Typically, the devices covered under the proposed definition are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas. However, it could include a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. "Typical indoor and outdoor pedestrian areas" refer to locations and surfaces used by and intended for pedestrians, including sidewalks, paved paths, floors of buildings, elevators, and other circulation routes, but would not

include such areas as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians.

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

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

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

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

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

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

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

*a definition would better serve the public.*

The proposed regulation regarding mobility devices, including wheelchairs, is discussed below in the section-by-section analysis for § 35.137.

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

##### *Section 35.130 General Prohibitions Against Discrimination*

##### *Section 35.133 Maintenance of Accessible Features*

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

The Department has noticed that some covered entities do not understand what is required by § 35.133, and it would like to take the opportunity presented by this NPRM to clarify the requirement. Section 35.133(a) broadly covers all features that are required to be accessible under the ADA, from accessible routes and elevators to roll-in showers and signage. It is not sufficient for a building or other feature to be built in compliance with the ADA, only to be changed or blocked later so that it becomes inaccessible. A common problem observed by the Department is that covered facilities do not maintain accessible routes. For example, the accessible routes in offices or hallways are commonly obstructed by boxes, furniture, or other items so that the routes are inaccessible to individuals who use wheelchairs. Under the ADA, the accessible route must be maintained and therefore these items are required to be removed. If the items are placed there temporarily—for example, if an office receives multiple boxes of supplies and is moving them from the hall to the storage room—then § 35.133(b) excuses such "isolated or temporary interruptions." Other common examples of features that must be maintained, and often are not, are platform lifts and elevators. Public entities must ensure that these features are operable, and to meet this requirement, regular servicing and making repairs quickly will be necessary.

The Department proposes to amend the rule by adding § 35.133(c) to address the discrete situation in which the scoping requirements provided in the proposed standards may reduce the number of required elements below that are required by the 1991 Standards. In

that discrete event, a public entity may reduce such accessible features in accordance with the requirements in the proposed standards.

##### *Section 35.136 Service Animals*

The Department's title II regulation now states that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR 35.130(b)(7). In the proposed title II language, the Department intends to provide the broadest feasible access to individuals with disabilities who use service animals, unless a public entity can demonstrate that making the modifications would fundamentally alter the nature of the public entity's service, program, or activity.

The proposed section regarding service animals would incorporate the Department's policy interpretations as outlined in its published technical assistance *Commonly Asked Questions about Service Animals* (1996) (available at <http://www.ada.gov/qasrvc.htm>), and *ADA Business Brief: Service Animals* (2002) (available at <http://www.ada.gov/svcanimb.htm>), as well as make changes based on public comment. Proposed § 35.136 would:

1. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance and add that a public entity may ask an individual with a disability to remove a service animal from the premises if: (i) The animal is out of control and the animal's handler does not take effective action to control it; (ii) the animal is not housebroken; (iii) the animal's presence or behavior fundamentally alters the nature of the service the public entity provides (e.g., repeated barking); or (iv) the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications in § 35.136(b);

2. Add in § 35.136(c) that if a public entity properly excludes a service animal, the public entity must give the individual with a disability the opportunity to participate in or benefit from the services, programs, or activities without having the service animal on the premises;

3. Add in § 35.136(d) requirements that the work or tasks performed by a service animal must be directly related to the handler's disability; that a service animal that accompanies an individual with a disability into a public entity's

facility must be individually trained to do work or perform a task, be housebroken, and be under the control of its owner; and that a service animal must have a harness, leash, or other tether;

4. Add in § 35.136(e) specific language clarifying that “[a] public entity is not responsible for caring for or supervising a service animal.” This proposed language does not require that the person with a disability care for his or her service animal if care can be provided by a family member, friend, attendant, volunteer, or anyone acting on behalf of the person with a disability. This provision is a variation on the existing title III language in § 36.302(c)(2), which states, “[n]othing in this part requires a public accommodation to supervise or care for a service animal.” The Department is proposing similar modifications to the title III requirements on service animals in the NPRM for title III, published concurrently with this NPRM.

5. Expressly incorporate the Department’s policy interpretations as outlined in its published technical assistance that a public entity must not ask what the person’s disability is or about the nature of the person’s disability, nor require proof of service animal certification or licensing, but that a public entity may ask (i) if the animal is required because of a disability; and (ii) what work or tasks the animal has been trained to perform in § 35.136(f);

6. Expressly incorporate the Department’s policy interpretations as outlined in its published technical assistance and add that a public entity must not require an individual with a disability to pay a fee or surcharge or post a deposit as a condition of permitting a service animal to accompany its handler in a public entity’s facility, even if such deposits are required for pets, and that if a public entity normally charges its citizens for damage that they cause, a citizen with a disability may be charged for damage caused by his or her service animal in § 35.136(h).

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

*Proposed behavior or training standards.* Some commenters proposed behavior or training standards for the Department to adopt in its revised regulation, not only to remain in keeping with the requirement for individual training, but also on the basis that without training standards the public has no way to differentiate between untrained pets and service

animals. Because of the variety of individual training that a service animal can receive—from formal licensing at an academy to individual training on how to respond to the onset of medical conditions, such as seizures—the Department is not inclined to establish a standard that all service animals must meet. Some of the behavioral standards that the Department is proposing actually relate to suitability for public access, such as being housebroken and under the control of its handler.

*Hospital and healthcare settings.* Public entities, including public hospitals, must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. 28 CFR 35.130(b)(7). The exception to this requirement is if making the modification would fundamentally alter the nature of the service, program, or activity. The Department generally follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting.

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

Under the ADA, the only circumstances under which a person with a disability may not be entitled to be accompanied by his or her service animal are those rare circumstances in which it has been determined that the animal poses a direct threat to the health or safety of others. A direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated or mitigated by a modification of policies, practices, or procedures. Based on CDC guidance, it is generally appropriate to exclude a service animal from areas that require a protected environment, including

operating rooms, holding and recovery areas, labor and delivery suites, newborn intensive care nurseries, and sterile processing departments. See Centers for Disease Control, *Guidelines for Environmental Infection Control in Health Care Facilities* (June 2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5210a1.htm>.

#### Section 35.137 Mobility Devices

Proposed § 35.137 has been added to provide additional guidance to public entities about the circumstances in which power-driven mobility devices must be accommodated.

As discussed earlier in this NPRM, this proposal is in response to growing confusion about what types of mobility devices must be accommodated. The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized for locomotion purposes riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices that are not designed for use or exclusively used by people with disabilities. Indeed, there has been litigation about whether the ADA requires covered entities to allow people with disabilities to use their EPAMDs like users of traditional wheelchairs. Individuals with disabilities have sued several shopping malls in which businesses refused to allow a person with a disability to use an EPAMD. See, e.g., Sarah Antonacci, *White Oaks Faces Lawsuit over Segway*, State Journal-Register, Oct. 9, 2007, available at <http://www.sj-r.com/news/stories/17784.asp>; Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE 6 News, July 26, 2005, available at <http://www.wate.com/Global/story.asp?s=3643674>. The Department believes clarification on what the ADA requires is necessary at this juncture.

Section 35.137(a) reiterates the general rule that public entities shall permit individuals using wheelchairs, scooters, and manually powered mobility aids, including walkers, crutches, canes, braces, and similar devices, in any areas open to pedestrians. The regulation underscores this general proposition because the great majority of mobility scooters and wheelchairs must be accommodated under nearly all circumstances in which title II applies.

Section 35.137(b) adopts the general requirement in the ADA that public entities must make reasonable modifications to their policies, practices, and procedures when necessary to enable an individual with

a disability to use a power-driven mobility device to participate in its services, programs, or activities unless doing so would result in a fundamental alteration of their services, programs, or activities.

If a public entity restricts the use of power-driven mobility devices by people without disabilities, then it must develop policies addressing which devices and under what circumstances individuals with disabilities may use power-driven mobility devices for the purpose of mobility. Under the Department's proposed regulation in § 35.137(c), public entities must adopt policies and procedures regarding the accommodation of power-driven mobility devices other than wheelchairs and scooters that are designed to assess whether allowing an individual with a disability to use a power-driven mobility device is reasonable and does not result in a fundamental alteration to its programs, services, or activities. Public entities may establish policies and procedures that address and distinguish among types of mobility devices.

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

Section 35.137(c) lists permissible factors that a public entity may consider in determining whether the use of different types of power-driven mobility devices by individuals with disabilities may be permitted. In developing policies, public entities should group power-driven mobility devices by type (e.g., EPAMDs, golf cars, gasoline-powered vehicles, wheelchairs designed for outdoor use, and other devices). A blanket exclusion of all devices that fall under the definition of other power-driven mobility devices in all locations would likely violate the proposed regulation.

The factors listed in § 35.137(c)(1)–(3) may be used in order to develop policies regarding the use of other power-driven mobility devices by people with disabilities. The dimensions, weight, and other characteristics of the mobility device in relation to a wheelchair or scooter, as well as the device's maneuverability and speed, may be considered. Another permissible factor is the risk of potential harm to others. The use of gas-powered golf cars by

people with disabilities inside a building may be prohibited, for example, because the exhaust may be harmful to others. A mobility device that is unsafe to others would not be reasonable under the proposed regulation. Additionally, the risk of harm to the environment or natural or cultural resources or conflicts with federal land management laws and regulations are also to be considered. The final consideration is the ability of the public entity to stow the mobility device when not in use, if requested by the user.

While a public entity may inquire into whether the individual is using the device due to a disability, the entity may not inquire about the nature and extent of the disability, as provided in § 35.137(d).

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

Consider the following examples:

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

*Example 2:* The city has developed a policy specific to city hall regarding the use of EPAMDs (i.e., users who do not need the devices due to disability are required to leave the devices outside the building). While most of city hall is spacious, the city has determined that it is not reasonable to allow people with disabilities to bring their EPAMDs into the recorder of deeds office, which is quite small, and the device's dimensions make it unsafe and unwieldy in this situation. If it is not possible for the

individual with a disability to park the mobility device and walk into the recorder of deeds office, the city government would still be required to provide services to the person through program access by meeting the individual in an adjacent, more spacious office, allowing him or her to obtain services over the phone, sending an employee to the individual's home, or through other means.

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

*Question 17:* Are there types of personal mobility devices that must be accommodated under nearly all circumstances? Conversely, are there types of mobility devices that almost always will require an assessment to determine whether they should be accommodated? Please provide examples of devices and circumstances in your responses.

*Question 18:* Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?

*Question 19:* Should personal mobility devices used by individuals with disabilities be categorized by intended purpose or function, by indoor or outdoor use, or by some other factor? Why or why not?

#### Section 35.138 Ticketing

The ticketing policies and practices of public entities are subject to title II's nondiscrimination provisions. See 42 U.S.C. 12132. Through the investigation of complaints, its enforcement actions, and public comments related to ticketing, the Department is aware of the need to provide regulatory guidance to entities involved in the sale or distribution of tickets. With this NPRM, the Department proposes to include a section on ticketing within the general requirements of subpart B.

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

The Department agrees that more explicit regulation is needed to ensure that individuals with disabilities are not

improperly denied access to events because of discriminatory procedures for the sale of wheelchair spaces. The Department's enforcement actions have demonstrated that some venue operators, ticket sellers, and distributors are not properly implementing title II's general nondiscrimination provisions.

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

The proposed rule clarifies the application of title II with respect to ticketing issues in certain contexts, and is intended to strike a balance between a covered entity's desire to maximize ticket sales and the rights of individuals with disabilities to attend events in assembly areas in a manner that is equal to that afforded to individuals without disabilities. The proposed rule does not, however, purport to cover or clarify all aspects or applications of title II to ticketing issues. Moreover, the rule applies only to the sale or distribution of tickets that are sold or distributed on a preassigned basis.

Because this rule addresses ticketing policies and practices for stadiums, arenas, theaters, and other facilities in which entertainment and sporting events are held, its provisions are related to and informed by those in proposed § 35.151(g), which establishes design requirements for seating in assembly areas. (Section 35.151(g) is discussed below in the section-by-section analysis.) After the proposed standards are finalized, the scoping reduction will apply to all public entities. See proposed 28 CFR 35.133(c) (discussed earlier in the section-by-section analysis).

*Ticket distribution methods.* Section 35.138(a) states the general rule that a public entity shall modify its policies, practices, and procedures to ensure that individuals with disabilities can purchase single or multi-event tickets for accessible seating in the same way as others (*i.e.*, during the same hours and through the same distribution methods as other seating is sold) unless doing so would fundamentally alter the nature of its ticketing service, program, or activity. The proposed rule makes clear that it is meant to reach all public

entities that provide a service or system by which individuals can purchase event tickets, and is not limited to a venue's operation of its own ticketing systems.

The Department has received numerous complaints from individuals who were denied the opportunity to acquire tickets for accessible seats through avenues such as ticketing pre-sales, promotions, lotteries, or wait lists. The proposed rule, at § 35.138(b), makes clear that public entities must include accessible seating in all stages of the ticketing process, including pre-sales, promotions, lotteries, or wait lists.

*Identification of available accessible seating.* Section 35.138(c) of the proposed rule requires a facility to identify available accessible seating if seating maps, brochures, or other information is provided to the general public. In the Department's investigations of theaters and stadiums, it has discovered that many facilities lack an accurate inventory of the accessible seating in their venues, and that this information gap results in lost opportunities for patrons who need accessible seating. For some public entities, multiple inventories may be required to account for different uses of the facilities because the locations of accessible seating may change in an arena depending on whether it is used for a hockey game, a basketball game, or a concert. The proposed rule further provides that the facility identify the accessible seating on publicly available seating charts. This transparency will facilitate the accurate sale of accessible seating.

Section 35.138(d) requires public entities to provide individuals with disabilities with accurate information about the location of accessible seating. The proposed rule specifically prohibits the practice of "steering" individuals with disabilities to certain wheelchair spaces so that the facility can maximize potential ticket sales for other unsold wheelchair spaces.

*Season tickets and multiple event tickets.* Section 35.138(e) addresses the sale of season tickets and other tickets for multiple events. The proposed rule provides that public entities must sell season tickets or tickets for multiple events for accessible seating in the same manner that such tickets are sold to those purchasing general seating. The rule also states that spectators purchasing tickets for accessible seating on a multi-event basis shall be permitted to transfer tickets for single-event use by friends or associates in the same fashion and to the same extent other spectators holding tickets for the same type of ticketing plan are

permitted to do. A facility must provide a portable seat for the transferee to use if necessary.

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

*Question 20: If an individual resells a ticket for accessible seating to someone who does not need accessible seating, should the secondary purchaser be required to move if the space is needed for someone with a disability?*

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

*Release of unsold accessible seats.* Section 35.138(f) provides regulatory guidance regarding the release of unsold accessible seats. Through its investigations, the Department has become familiar with the problem of designated accessible seating being sold to the general public before people who need accessible seating can buy tickets. As a result, individuals who need to use the accessible seating cannot attend an event.

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

according to the venue size and event type.

*Facility sell-out.* The approach in § 35.138(f)(1) allows for the release of unsold accessible seating once standard seats in the facility have been sold. (Luxury boxes, club boxes, or suites are not required to be sold out before the remaining accessible seats are released.) To implement this option, the release of unsold accessible seating should be done according to an established, written schedule. Blocks of seats should be released in stages, and should include tickets in a range of price categories and locations that is representative of the range of seating that remains available to other patrons.

*Sell-outs in specific seating areas.* Under the second option, § 35.138(f)(2), a facility could release unsold accessible seating in a specific seating area once all of the standard seats in that location were sold out. For example, if all standard seats in the orchestra level are sold, the unsold accessible seats in the orchestra level could be released for sale to the general public.

*Sell-outs of specific price ranges.* The third approach described at § 35.138(f)(3) would permit a public entity to release unsold accessible seats in a specific price range if all other standard seats in that price range were sold out. For example, if all \$50 seats were sold, regardless of their location, the unsold \$50 accessible seats would be released for sale to the general public.

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

*Ticket pricing.* Section 35.138(g) of the proposed rule addresses ticket pricing. The proposed rule codifies the Department's longstanding policy that public entities cannot impose a surcharge for wheelchair spaces. Accessible seating must be made available at all price levels for an event. If an existing facility has barriers to accessible seating at a particular price

level for an event, then a percentage (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) of the number of accessible seats must be provided at that price level in an accessible location. For example, many theaters built prior to the passage of the ADA have balconies that are inaccessible to individuals who use wheelchairs, and the only wheelchair spaces are located in the orchestra level where tickets are more expensive. If a comparably sized balcony in a theater built under the ADA's new construction standards would have two wheelchair spaces, the older theater must sell two orchestra wheelchair spaces at the balcony price on a first come, first served basis.

*Fraudulent purchase of designated accessible seating.* The Department has received numerous comments regarding fraudulent attempts to purchase wheelchair spaces for patrons other than those who use wheelchairs. Moreover, the Department recognizes that implementation of some of its proposals, such as public identification of accessible seating, increases the potential for the fraudulent purchase of accessible seats by those who do not need them. The Department continues to believe that requiring an individual to provide proof that he or she is a person with a disability is an unnecessary and burdensome invasion of privacy and may unfairly deter individuals with disabilities from purchasing tickets to an event.

Notwithstanding this position, the proposed rule at § 35.138(h) would permit public entities to take certain steps to address potential ticket fraud. Under proposed § 35.138(h)(1), a covered entity may inquire at the time of the ticket purchase for single-event tickets whether the wheelchair space is for someone who uses a wheelchair. Section 35.138(h)(2) addresses potential ticket fraud for season or subscription tickets. Under this provision, a facility may require the purchaser to attest in writing that a wheelchair space is for someone who uses a wheelchair. However, the regulation preserves the right of an individual with a disability to transfer his or her ticket for individual events and clarifies that the intermittent use of the wheelchair space by a person who does not use a wheelchair does not constitute fraud.

*Purchase of multiple tickets.* The Department has received numerous complaints stating that assembly operators are unfairly restricting the number of tickets that can be purchased by individuals with disabilities. Many venues limit an individual requiring

wheelchair seating to purchase no more than two tickets (for him or herself and a companion), while other patrons have significantly higher purchase limits (if any). This is particularly difficult for families, friends, or other groups larger than two that include a person who requires accessible seating. If the ticket number is limited, the result for wheelchair users is that parents and children, friends, classmates, and others are separated. Section 35.138(i) clarifies application of title II to ameliorate such a situation.

There are various ways that covered entities can accommodate groups that require at least one wheelchair space. The proposed regulation at § 35.138(i)(1) would require a public entity to permit up to three companions to sit in a designated wheelchair area, platform, or cross-over aisle that is designated as a wheelchair area, even if the number of companions outnumber the individuals requiring a wheelchair space. For example, a parent who uses a wheelchair could attend a concert with his or her spouse and their two children, and all four could sit together in the wheelchair area. The Department recognizes that some advocates may object to this use of designated wheelchair areas because it will reduce the amount of accessible seating available for those who need it. On balance, however, the Department believes that the opportunity to sit with family and friends, as other patrons do, is an integral element of the experience of attending a ticketed event, and it is an element that is often denied to individuals with disabilities.

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

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

*Group ticket sales.* Group ticket sales present another area in which the Department believes additional regulatory guidance is appropriate. The purpose of the proposed rule at

§ 35.138(i)(2) is to prevent the current practice of separating groups in a way that isolates or segregates those in the group who require wheelchair seating. If a group includes one or more individuals who use a wheelchair, the proposed rule requires the facility to place that group in a seating area that includes wheelchair spaces so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use a wheelchair are not isolated from the group. In existing facilities that lack accessible seating in certain areas, *e.g.*, a theater with an inaccessible balcony, the proposed regulation would require covered entities to seat at least three companions with the individuals using a wheelchair in the accessible seating area of the orchestra.

#### Subpart D—Program Accessibility

##### Section 35.150(b)(2) *Safe Harbor*

Under the “program accessibility” requirement in title II, each service, program, or activity, *when viewed in its entirety*, must be readily accessible to and usable by individuals with disabilities. 28 CFR 35.150 (emphasis added). The title II regulation makes clear that, unlike public accommodations under title III, a public entity is not required to make each of its existing facilities accessible to and usable by individuals with disabilities. 28 CFR 35.150(a)(1). Moreover, public entities are not required to make structural changes to existing facilities where other methods are effective in ensuring program accessibility. 28 CFR 35.150(b)(1).

Given that program accessibility is not an element-by-element inquiry, but rather looks to the program when “viewed in its entirety,” and that structural changes are not always required in order to provide access to the programs, services, or activities of a public entity, the Department believes that the program accessibility requirement, itself, may appropriately mitigate any burdens on public entities with respect to their existing facilities.

Nevertheless, in order to provide certainty to public entities and individuals with disabilities alike, the Department proposes to add a provision to the program accessibility requirement in § 35.150 that would clarify that public entities that have brought elements into compliance in existing facilities are not, simply because of the Department’s adoption of the 2004 ADAAG as its new standards, required to modify those elements in order to reflect incremental changes in the

proposed standards. In these circumstances, the public entity is entitled to a safe harbor, and is only required to modify elements to comply with the proposed standards if the public entity is, independently, planning an alteration that is not undertaken in fulfillment of its program accessibility obligations. *See* 28 CFR 35.151(b). The proposed safe harbor for title II operates only with respect to elements that are in compliance with the scoping and technical specifications in either the 1991 Standards or the UFAS; it does not apply to elements that are addressed by supplemental requirements in the 2004 ADAAG. The Department proposes a new § 35.150(b)(2), denominated *Safe Harbor*, to § 35.150 (*Program Accessibility*). Section 35.150(a) includes general provisions, and paragraph (b) of that section describes the methods by which a public entity complies with the program accessibility requirements. Historic preservation programs, which are addressed in § 35.150(b)(2) in the current regulation, have been moved to § 35.150(b)(3) in the proposed rule.

The Department proposes in § 35.150(b)(2) that if elements in an existing facility are in compliance with either the 1991 Standards or UFAS, the public entity is not required to alter—or retrofit again—such elements to reflect incremental changes in the 2004 ADAAG simply because the Department is adopting new ADA Standards. As explained above, this safe harbor operates on an element-by-element basis, and does not apply to elements subject to requirements that are not included in the current ADA Standards for Accessible Design, but rather are supplemental requirements in the 2004 ADAAG.

##### Section 35.150(b)(4) and (5) *Existing Play Areas and Recreation Facilities*

*Play areas.* Sections 206.2.17, 206.7.8, and 240.1 of the 2004 ADAAG provide a detailed set of requirements for newly constructed and altered play areas. Section 240.2.1.1 of the 2004 ADAAG requires that at least one ground level play component of each type provided (*e.g.*, for different experiences such as rocking, swinging, climbing, spinning, and sliding) must be accessible and connected to an accessible route. In addition, if elevated play components are provided, entities must make at least fifty percent (50%) of the elevated play components accessible and connect them to an accessible route, and may have to make an additional number of ground level play components (representing different types) accessible

as well. There are a number of exceptions to the technical specifications for accessible routes, and there are special rules (incorporated by reference from nationally recognized standards for accessibility and safety in play areas) for accessible ground surfaces. Accessible ground surfaces must be inspected and maintained regularly and frequently to ensure continued compliance.

The Department is concerned about the potential impact of these supplemental requirements on existing play areas that are not otherwise being altered. The program accessibility requirement does not require public entities to make structural modifications to existing facilities except where such modifications may be necessary to make the program or service, when considered as a whole, accessible to individuals with disabilities. Although play areas may be more likely than other types of facilities to require structural modifications, this does not mean that every existing playground operated by a city or county must be made accessible. Compliance with the program accessibility requirement turns on the accessibility of the program—*i.e.*, the program of providing and maintaining public playgrounds—rather than the accessibility of each particular facility used to provide that program. Where a public entity provides and maintains multiple play areas as part of its program of providing public playgrounds, for purposes of the program accessibility requirement, only a reasonable number but at least one of such play areas would be required to undertake structural modifications to provide access for individuals with disabilities. The same reasoning would apply where an existing site (*e.g.*, a state park) provides multiple play areas designed for the same age group.

The Department notes that the requirement to provide a reasonable number of accessible play areas is consistent with the longstanding program accessibility rules, which provide that it is not necessary for every facility to be accessible, provided that the program, when viewed in its entirety, is readily accessible to individuals with disabilities. In situations where a public entity provides the services of one program at multiple sites (*e.g.*, a town with ten parks), the public entity would focus on whether the number and location of the accessible parks offer comparable convenience to persons with disabilities and whether the range of programs and services offered at the accessible parks are equivalent to the range offered at the inaccessible parks. At a minimum, a

public entity must provide at least one accessible facility unless the public entity can demonstrate that providing the accessible facility would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. However, determining how many more than one would be "reasonable" requires a careful analysis of factors in order to determine how many accessible facilities are necessary to ensure that the covered program is accessible. Factors to be considered include, but are not limited to, the size of the public entity, geographical distance between sites, travel times to the sites, the number of sites, and availability of public transportation to the sites.

The Department is proposing several specific provisions and posing additional questions in an effort to both mitigate and gather information about the potential burden of the supplemental requirements on existing public facilities.

*Question 24: Is a "reasonable number, but at least one" a workable standard for determining the appropriate number of existing play areas that a public entity must make accessible for its program to be accessible? Should the Department provide a more specific scoping standard? Please suggest a more specific standard if appropriate. In the alternative, should the Department provide a list of factors that a public entity could use to determine how many of its existing play areas to make accessible, e.g., number of play areas, travel times, or geographic distances between play areas, and the size of the public entity?*

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

*Question 25: The Department would welcome comment on whether there are state and local standards specifically regarding play and recreation area accessibility. To the extent that there are such standards, we would welcome comment on whether facilities currently governed by, and in compliance with, such state and local standards or codes should be subject to a safe harbor from compliance with applicable requirements in the 2004 ADAAG. We would also welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines that would permit such a safe harbor with respect to play and recreation areas undertaking alterations.*

*Question 26: The Department requests public comment with respect to the application of these requirements to existing play areas. What is the "tipping point" at which the costs of compliance with the new requirements for existing play areas would be so burdensome that the entity would simply shut down the playground?*

The Department is proposing two specific provisions to reduce the impact on existing facilities that undertake structural modifications pursuant to the program accessibility requirement. First, the Department proposes to add § 35.150(b)(5)(i) to provide that existing play areas that are less than 1,000 square feet in size and are not otherwise being altered need not comply with the scoping and technical requirements for play areas in section 240 of the 2004 ADAAG. The Department selected this size based on the provision in section 1008.2.4.1 of the 2004 ADAAG, Exception 1, permitting play areas less than 1,000 square feet in size to provide accessible routes with a reduced clear width (44 inches instead of 60 inches). In its 2000 regulatory assessment for the play area guidelines, the Access Board assumed that such "small" play areas represented only about twenty percent (20%) of the play areas located in public schools, and none of the play areas located in city and state parks (which the Board assumed were typically larger than 1,000 square feet). If these assumptions are correct, the proposed exemption would have relatively little impact on most existing play areas operated by public entities, while still mitigating the burden on those smaller public entities to which it did apply.

*Question 27: The Department would like to hear from public entities and individuals with disabilities about the potential effect of this approach. Should existing play areas less than 1,000 square feet be exempt from the requirements applicable to play areas?*

Secondly, the Department proposes to add § 35.150(b)(4)(i) to provide that existing play areas that are not being altered will be permitted to meet a reduced scoping requirement with respect to their elevated play components. Elevated play components, which are found on most playgrounds, are the individual components that are linked together to form large-scale composite playground equipment (e.g., the monkey bars attached to the suspension bridge attached to the tube slide, etc.). The proposed standards provide that a play area that includes both ground level and elevated play components must ensure that a specified number of the ground level play components and at least fifty

percent (50%) of the elevated play components are accessible.

Many commenters advised the Department that making elevated play components accessible in existing play areas that are not otherwise being altered would impose an undue burden on most facilities. Given the nature of the element at issue, retrofitting existing elevated play components in play areas to meet the scoping and technical specifications in the alteration standard would be difficult and costly, and in some instances, infeasible. In response to expressed concerns, the Department proposes to reduce the scoping for existing play areas that are not being altered by permitting entities to substitute ground level play components for elevated play components. Entities that provide elevated play components that do not comply with section 240.2.2 of the 2004 ADAAG would be deemed in compliance for purposes of the program accessibility requirement as long as the number of accessible ground level play components is equal to the sum of (a) the number of ground level play components required to comply with section 240.2.1 of the 2004 ADAAG (as provided by Table 240.2.1.2, but at least one of each type) and (b) the number of elevated play components required to comply with 2004 ADAAG section 240.2.2 (namely, fifty percent (50%) of all elevated play components). In existing play areas that provide a limited number of ground level play components, qualifying for this exception may require providing additional ground level play components.

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

*Question 28: The Department would like to hear from public entities and individuals with disabilities about the potential effect of this approach. Should*

existing play areas be permitted to substitute additional ground level play components for the elevated play components it would otherwise have been required to make accessible? Are there other select requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping?

*Question 29: The Department would welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines for play and recreational facilities undertaking alterations that would permit reduced scoping of requirements or substitution of ground level play components in lieu of elevated play components, as the Department is proposing with respect to barrier removal obligations for certain play or recreational facilities.*

*Swimming pools.* As noted earlier, the program accessibility requirement does not require public entities to make structural modifications to existing facilities except where such modifications may be necessary to make the program or service, when considered as a whole, accessible to individuals with disabilities. Although swimming pools, like play areas, may be more likely than other types of facilities to require structural modifications, this does not mean that every existing swimming pool operated by a city or county must be made accessible. Compliance with the program accessibility requirement turns on the accessibility of the program—*i.e.*, the program of providing and maintaining public swimming pools—rather than the accessibility of each particular facility used to provide that program. Where a public entity provides and maintains multiple swimming pools as part of its program of providing public swimming pools, for purposes of the program accessibility requirement, only a reasonable number but at least one of such swimming pools would be required to undertake structural modifications to provide access for individuals with disabilities. The same reasoning would apply where an existing site (*e.g.*, a city recreation center) provides multiple swimming pools serving the same purpose.

*Question 30: Is a "reasonable number, but at least one" a workable standard for determining the appropriate number of existing swimming pools that a public entity must make accessible for its program to be accessible? Should the Department provide a more specific scoping standard? Please suggest a more specific standard if appropriate. In the alternative, should the Department*

*provide a list of factors that a public entity could use to determine how many of its existing swimming pools to make accessible, e.g., number of swimming pools, travel times or geographic distances between swimming pools, and the size of the public entity?*

The Department is proposing two specific provisions to minimize the potential impact of the new requirements on existing swimming pools that undertake structural modifications pursuant to the program accessibility requirement. First, the Department is proposing to add § 35.150(b)(5)(ii) to provide that swimming pools that have over 300 linear feet of swimming pool wall and are not being altered will be required to provide only one (rather than two) accessible means of entry, at least one of which must be a sloped entry or a pool lift. This provision represents a less stringent requirement than the requirement in 2004 ADAAG section 242.2, which requires such pools, when newly constructed or altered, to provide two accessible means of entry. Under this proposal, for purposes of the program accessibility requirement, swimming pools operated by public entities would be required to have *at least one* accessible entry.

Commenters responding to the ANPRM noted that the two-means-of-entry-standard, if applied to existing swimming pools, will disproportionately affect small public entities, both in terms of the cost of implementing the standard and anticipated litigation costs. Larger public entities benefit from economies of scale, which are not available to small entities. Although complying with the alteration standard would impose an undue burden on many small public entities, the litigation-related costs of proving that such compliance is not necessary to provide program access may be significant. Moreover, these commenters argue, the immediacy of perceived noncompliance with the standard—it will usually be readily apparent whether a public entity has the required accessible entry or entries—makes this element particularly vulnerable to serial ADA litigation. The reduced scoping would apply to all public entities, regardless of size.

The Department recognizes that this approach could reduce the accessibility of larger swimming pools compared to the requirements in the 2004 ADAAG. Individuals with disabilities and advocates were particularly concerned about the accessibility of pools, and noted that for many people with disabilities, swimming is one of the few types of exercise that is generally

accessible and, for some people, can be an important part of maintaining health. Other commenters noted that having two accessible means of egress from a pool can be a significant safety feature in the event of an emergency. It may be, however, that as a practical matter the reduction in scoping may not be significant, as the measures required to meet the alteration standards for accessible entries would often impose an undue burden even if considered on a case-by-case basis.

*Question 31: The Department would like to hear from public entities and individuals with disabilities about this exemption. Should the Department allow existing public entities to provide only one accessible means of access to swimming pools more than 300 linear feet long?*

Secondly, the Department proposes to add § 35.150(b)(5)(ii) to provide that existing swimming pools that have less than 300 linear feet of swimming pool wall and are not being altered need not undertake structural modifications to comply with the scoping and technical requirements for swimming pools in section 242.2 of the 2004 ADAAG. In its 2002 regulatory assessment for the recreation guidelines, the Access Board assumed that pools with less than 300 feet of linear pool wall would represent ninety percent (90%) of the pools in public high schools; forty percent (40%) of the pools in public parks and community centers; and thirty percent (30%) of the pools in public colleges and universities. If these assumptions are correct, the proposed exemption would have the greatest impact on the accessibility of swimming pools in public high schools.

*Question 32: The Department would like to hear from public entities and individuals with disabilities about the potential effect of this approach. Should existing swimming pools with less than 300 linear feet of pool wall be exempt from the requirements applicable to swimming pools?*

*Wading pools.* Section 242.3 of the 2004 ADAAG provides that newly constructed or altered wading pools must provide at least one sloped means of entry to the deepest part of the pool. The Department is concerned that installing a sloped entry in existing wading pools may not be feasible for a significant proportion of public entities and is considering creating an exemption for existing wading pools that are not being altered.

*Question 33: What site constraints exist in existing facilities that could make it difficult or infeasible to install a sloped entry in an existing wading pool? Should existing wading pools that*

are not being altered be exempt from the requirement to provide a sloped entry?

*Saunas and steam rooms.* The Department is proposing one specific provision to minimize the potential impact of the new requirements on existing saunas and steam rooms. Section 241 of the 2004 ADAAG requires newly constructed or altered saunas and steam rooms to meet accessibility requirements, including accessible turning space and an accessible bench. Where saunas or steam rooms are provided in clusters, five percent (5%), but at least one sauna or steam room in each cluster, will have to be accessible. The Department understands that many saunas are manufactured (pre-fabricated) and come in standard sizes (e.g., two-person or four-person), and that the two-person size may not be large enough to meet the turning space requirement. Therefore, the Department proposes in § 35.150(b)(5)(iii) to specify that existing saunas or steam rooms that have a capacity of only two persons and are not being altered need not undertake structural modifications to comply with the scoping and technical requirements for saunas and steam rooms in section 241 of the 2004 ADAAG. While this exception may limit the accessibility of small existing saunas or steam rooms in public facilities, such facilities would remain subject to the ADA's general requirement to ensure that individuals with disabilities have an equal opportunity to enjoy the services and amenities of their facilities.

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

*Question 34: Will existing facilities have to reduce the number of available exercise equipment and machines in order to comply? What types of space limitations would affect compliance?*

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

*Question 35: Are team or player seating areas in certain types of existing facilities (e.g., ice hockey rinks) more difficult to make accessible due to existing designs? What types of existing facilities typically have design*

*constraints that would make compliance with this requirement infeasible?*

*Areas of sport activity.* Sections 206.2.2 and 206.2.12 of the 2004 ADAAG require each area of sport activity (e.g., courts and playing fields, whether indoor or outdoor) to be served by an accessible route. In court sports, the accessible route would also have to directly connect both sides of the court. For purposes of the program accessibility requirement, as with play areas and swimming pools, where an existing facility provides multiple areas of sport activity that serve the same purpose (e.g., multiple soccer fields), only a reasonable number but at least one (rather than all) would need to meet accessibility requirements.

*Question 36: Should the Department create an exception to this requirement for existing courts (e.g., tennis courts) that have been constructed back-to-back without any space in between them?*

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

*Question 37: The Department is interested in collecting data regarding the impact of these requirements in existing boating facilities. Are there issues (e.g., space limitations) that would make it difficult to provide an accessible route to existing boat slips and boarding piers at boat launch ramps? To what extent do the exceptions for existing facilities (i.e., with respect to boat slips and gangways) mitigate the burden on existing facilities?*

*Fishing piers and platforms.* Sections 206.2.14 and 237 of the 2004 ADAAG

require at least twenty-five percent (25%) of railings at fishing piers and platforms to be no higher than 34 inches high, so that a person seated in a wheelchair can fish over the railing, to be dispersed along the pier or platform, and to be on an accessible route. (An exception permits railings to comply, instead, with the model codes, which permit railings to be 42 inches high.) If gangways (where only one end of route is attached to land) and floating piers (where neither end is attached to land) are involved, a number of exceptions are provided from the general standards for accessible routes in order to take into account the difficulty of meeting accessibility slope requirements due to fluctuations in water level. In existing facilities, moreover, gangways need not be lengthened to meet the requirement (except, in an alteration, as may be required by the path of travel requirement).

*Question 38: The Department is interested in collecting data regarding the impact of this requirement on existing facilities. Are there issues (e.g., space limitations) that would make it difficult to provide an accessible route to existing fishing piers and platforms?*

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

*Question 39: The Department is considering creating an exception for existing miniature golf facilities that are of a limited total square footage, have a limited amount of available space within the course, or were designed with extreme elevation changes. If the Department were to create such an exception, what parameters should the Department use to determine whether a miniature golf course should be exempt?*

#### *Section 35.151 New Construction and Alterations*

Section 35.151, which provides that those buildings that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities, is unchanged in the proposed rule, but current § 35.151(a) will be redesignated as § 35.151(a)(1). The Department will add a new section, designated as § 35.151(a)(2), to provide that full compliance with the

requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. This exception is now contained in the title III regulation and in the 1991 Standards (applicable to both public accommodations and facilities used by public entities), so it has applied to any covered facility that was constructed under the 1991 Standards since the effective date of the ADA. The Department is adding it to the text of § 35.151 to maintain consistency between the design requirements that apply under title II and those that apply under title III.

#### *Section 35.151(b) Alterations*

The Department's proposed rule would amend § 35.151(b)(2) to make clear that the path of travel requirements of § 35.151(b)(4) do not apply to measures taken solely to comply with program accessibility requirements. This amendment is consistent with § 36.304(d)(1) of the title III regulation, which states that "[t]he path of travel requirements of § 36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section."

The two requirements for alterations to historic facilities enumerated in current § 35.151(d)(1) and (2) have been combined under proposed § 35.151(b)(3), and one substantive change is proposed. Proposed § 35.151(b)(3) provides that alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c). Currently, the regulation provides that alterations to historic facilities shall comply with section 4.1.7 of UFAS or section 4.1.7 of the 1991 Standards. *See* 28 CFR 35.151(d)(1). However, the proposed regulation requires that alterations to historic properties on or after six months after the effective date of the proposed regulation comply with the proposed standards, not UFAS or the 1991 Standards. *See* § 35.151(c). The substantive requirement in current § 35.151(d)(2)—that alternative methods of access shall be provided pursuant to the requirements of § 35.150 if it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility—is unchanged.

The Department proposes to add § 35.151(b)(4) in order to make the path of travel requirement in title II consistent with that in title III. Both the Uniform Federal Accessibility Standards (UFAS) and the title III regulation contain requirements for provision of an accessible "path of travel" to the altered area when an existing facility is altered, although the circumstances that trigger the requirements are somewhat different under each statute. Under section 4.1.6(3) of UFAS, an accessible route to the altered area, an accessible entrance, and (where applicable) accessible toilet facilities must be provided when a substantial alteration is made to an existing building. An alteration is considered "substantial" if the total cost of all alterations within any twelve month period amounts to fifty percent (50%) or more of the full and fair cash value of the building. The proposed rule eliminates the UFAS "substantial alteration" basis for path of travel requirements because it eliminates UFAS as an option.

The path of travel requirements of the Department's proposed title II rule are based on section 303(a)(2) of the ADA, which provides that when an entity undertakes an alteration to a place of public accommodation or commercial facility that affects or could affect the usability of or access to an area that contains a primary function, the entity shall ensure that, to the maximum extent feasible, the path of travel to the altered area—and the restrooms, telephones, and drinking fountains serving it—is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The Department proposes to add a provision to the path of travel requirement in § 35.151(b)(4)(ii)(C) that would clarify that public entities that have brought required elements of the path of travel into compliance are not required to modify those elements in order to reflect incremental changes in the proposed standards when the public entity alters a primary function area that is served by the element. In these circumstances, the public entity is entitled to a safe harbor, and is only required to modify elements to comply with the proposed standards if the public entity is planning an alteration to the element.

The proposed rule provides that areas such as mechanical rooms, boiler rooms, supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Nor are restroom areas containing a primary

function unless the provision of restrooms is the major reason that the facility is maintained by a public entity, such as at a highway rest stop. In that situation, a restroom would be considered to be an "area containing a primary function" of the facility.

The requirement for an accessible path of travel does not apply, however, to the extent that the cost and scope of alterations to the path of travel is disproportionate to the cost of the overall alteration, as determined under criteria established by the Attorney General. Sections 227, 42 U.S.C. 12147, and 242, 42 U.S.C. 12162, of the ADA adopt the same requirement for public transportation facilities under title II.

Section 202.4 of the proposed standards adopts the statutory path of travel requirement, and § 36.403 of the Department's title III regulation establishes the criteria for determining when the cost of alterations to the path of travel is "disproportionate" to the cost of the overall alteration. The Department's proposed § 35.151(b)(4) will adopt the language now contained in the title III regulation in its entirety, including the disproportionality limitation (*i.e.*, alterations made to provide an accessible path of travel to the altered area would be deemed disproportionate to the overall alteration when the cost exceeds twenty percent (20%) of the cost of the alteration to the primary function area).

#### *Section 35.151(c) Accessibility Standards for New Construction and Alterations*

Section 35.151(c) proposes to adopt Parts I and III of the Americans with Disabilities Act and Architectural Barriers Act Guidelines, 69 FR 44084 (July 23, 2004) (2004 ADAAG) as the ADA Standards for Accessible Design (proposed standards). As the Department noted above, the development of these proposed standards represents the culmination of a lengthy effort by the Access Board to update its guidelines, to make the federal guidelines consistent to the extent permitted by law, and to harmonize the federal requirements with the private sector model codes that form the basis of many state and local building code requirements. The full text of the 2004 ADAAG is available for public review on the ADA Home Page (<http://www.ada.gov>) and on the Access Board's Web site (<http://www.access-board.gov>). The Access Board site also includes an extensive discussion of the development of the 2004 ADAAG, and a detailed comparison of the 1991 Standards, the 2004 ADAAG, and the 2003 International Building Code.

Appendix A to this proposed rule is an analysis of the major changes in the proposed standards and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. Comments discussing the costs and benefits of the proposed standards have been considered and taken into account by the Department's regulatory impact analysis. Comments on the effect of the proposed standards on existing facilities are discussed in conjunction with the analysis of § 35.150 of this proposed rule.

The remaining comments addressed global issues, such as the Department's proposal to adopt the 2004 ADAAG as the ADA Standards for Accessible Design without significant changes.

Section 204 of the ADA, 42 U.S.C. 12134, directs the Attorney General to issue regulations to implement title II that are consistent with the guidelines published by the Access Board. Commenters suggested that the Department should not adopt the 2004 ADAAG, but should develop an independent regulation. The Department is a statutory member of the Access Board and was actively involved in the development of the 2004 ADAAG. Because of its long involvement with the process, the Department does not believe that it is necessary or appropriate to begin that lengthy development process again. Nevertheless, during the process of drafting this NPRM, the Department has reviewed the 2004 ADAAG to determine if additional regulatory provisions are necessary. As a result of this review, the Department decided to propose new sections, which are contained in § 35.151(d)–(h), to clarify how the Department will apply the proposed standards to social service establishments, housing at places of education, assembly areas, and medical care facilities. Each of these provisions is discussed below.

Another general comment suggested that the Department should adopt a system for providing formal interpretations of the standards, analogous to the code interpretation systems used by states and the major model codes. Because the ADA is a civil rights statute, not a building code, the statute does not contemplate or authorize a formal code interpretation system. The ADA anticipated that there would be a need for close coordination of the ADA building requirements with the state and local requirements. Therefore, the statute authorized the Attorney General to establish an ADA code certification process under title III of the ADA. That process is addressed

in 28 CFR part 36, subpart F. Revisions to that process are being proposed in an NPRM to amend the title III regulation that is being published elsewhere in the **Federal Register** today. In addition, the Department operates an extensive technical assistance program. The Department anticipates that once this rule is final, it will issue revised technical assistance material to provide guidance about the implementation of this rule.

Current § 35.151(c) establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) or with the 1991 Standards (which, at the time of the publication of the rule were also referred to as the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG)) is deemed to comply with the requirements of this section with respect to those facilities (except that if the 1991 Standards are chosen, the elevator exemption does not apply). The 1991 Standards were based on the ADAAG that were initially developed by the Access Board as guidelines for the accessibility of buildings and facilities that are subject to title III. The Department adopted the ADAAG as the standards for places of public accommodation and commercial facilities under title III of the ADA and it was published as Appendix A to the Department's regulation implementing title III, 28 CFR part 36, and amended on Jan. 18, 1994, 59 FR 2674.

The Department's proposed rule would revise the existing § 35.151(c) to adopt the 2004 ADAAG as the ADA Standards for Accessible Design. The proposed rule amends current § 35.151(c)(1) by revising the current language to limit its application to facilities on which construction commences within six months of the publication of the final rule adopting revised standards. The proposed rule adds paragraph (c)(2) to § 35.151, which states that facilities on which construction commences on or after the date six months following the publication of the final rule shall comply with the proposed standards adopted by that rule.

As a result, for the first six months after the effective date of the proposed regulation, public entity recipients can continue to use either UFAS or the 1991 Standards and be in compliance with title II. Six months after the effective date of the rule, the new standards will take effect. Construction in accordance with UFAS will no longer satisfy ADA

requirements. To avoid placing the burden of complying with both standards on public entities, the Department will coordinate a government-wide effort to revise federal agencies' section 504 regulations to adopt the 2004 ADAAG as the standard for new construction and alterations.

The purpose of the six-month delay in requiring compliance with the 2004 Standards is to allow covered entities a reasonable grace period to transition between the existing and the proposed standards. For that reason, if a title II entity prefers to use the 2004 ADAAG as the standard for new construction or alterations commenced within the six-month period after the effective date of the proposed regulation, such entity will be considered in compliance with title II of the ADA.

#### *Section 35.151(d) Scope of Coverage*

The Department is proposing § 35.151(d) to clarify that the requirements established by this section, including those contained in the proposed standards, prescribe what is necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to individuals with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established in this regulation. Although the Department often chooses to use the requirements of the 1991 Standards as a guide to determining when and how to make equipment and furnishings accessible, those determinations fall within the discretionary authority of the Department and do not flow automatically from the Standards.

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

#### *Section 35.151(e) Social Service Establishments*

The Department is proposing a new § 35.151(e) that provides that group homes, halfway houses, shelters, or similar social service establishments

that provide temporary sleeping accommodations or residential dwelling units shall comply with the provisions of the proposed standards that apply to residential facilities, including, but not limited to, the provisions in §§ 233 and 809 of the 2004 ADAAG.

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

The Department proposed in the ANPRM that the establishments currently covered by section 9.5 be covered as residential dwelling units in the 2004 ADAAG (section 233), rather than as transient lodging guest rooms in section 224. The Department believes this is a prudent action based on its effect on social service providers. Transferring coverage of social service establishments from transient lodging to residential dwelling units will alleviate conflicting requirements for social service providers. The Department believes that a substantial percentage of social service providers are recipients of federal financial assistance from the HUD. The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, they are covered both by the ADA and section 504. The two design standards for accessibility—*i.e.*, the 1991 Standards and UFAS—have confronted many social service providers with separate, and sometimes conflicting, requirements for design and construction of facilities. To resolve these conflicts, the residential dwelling unit standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the 1991 Standards from the 2004 ADAAG presented two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential dwelling unit section, which harmonizes the regulatory requirements under the ADA and section 504. The Department chose

the option that harmonizes the regulatory requirements: Coverage under the residential dwelling units requirements.

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

The commenters are correct that in some circumstances, the residential requirements are less stringent, particularly with respect to accessibility for individuals with communication-related disabilities. Other differences between the residential standards and the transient lodging standards include: The residential guidelines do not require elevator access to upper floors if the required accessible features can be provided on a single, accessible level; and the residential guidelines do not expressly require roll-in showers. Despite this, the Department still believes that applying the residential dwelling unit requirements to homeless shelters and similar social service establishments is appropriate to the nature of the services being offered at those facilities, and that it will harmonize the ADA and section 504 requirements applicable to those facilities. In addition, the Department believes that the proposal is consistent with its obligations under the Regulatory Flexibility Act to provide some regulatory relief to small entities that operate on limited budgets.

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

*Question 40: To what extent have conflicts between the ADA and section 504 affected these facilities? What would be the effect of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms?*

Another commenter expressed concern about how the Department would address dormitory-style settings in homeless shelters, transient group homes, halfway houses, and other social service establishments if they are scoped as residential dwelling units. The commenter noted that the transient lodging requirements include a specific

provision that in guest rooms with more than twenty-five beds, at least five percent (5%) of the beds must have parallel clear floor space enabling a person using a wheelchair to access and transfer to the bed. *See* sections 224.3, 806.2.3, 305 of the 2004 ADAAG. The residential dwelling unit section does not explicitly include a similar provision.

In response to this concern, the Department has added § 35.151(e)(1), which states that in settings where the sleeping areas include more than twenty-five beds, and in which the residential dwelling unit requirements apply, five percent (5%) of the beds must comply with section 806.2.3 of the 2004 ADAAG (*i.e.*, at least five percent (5%) must have parallel clear floor space on both sides of the bed enabling a person using a wheelchair to access and transfer to the bed).

*Definitions of residential facilities and transient lodging.* The 2004 ADAAG adds a definition of “residential dwelling unit” and modifies the current definition of “transient lodging.”

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

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

Several commenters stated that the definitions of residential dwellings and

transient lodging in the 2004 ADAAG are not clear and will confuse social service providers. They noted that including “primarily long-term” and “primarily short-term” in the respective definitions creates confusion when applied to the listed facilities because they serve individuals for widely varying lengths of time.

The Department is aware of the wide range and duration of services provided by social service establishments. Therefore, rather than focus on the length of a person’s stay at a facility, the Department believes that it makes more sense to look at a facility according to the type of services provided. For that reason, rather than saying that social service establishments “are” residential facilities, the Department has drafted the proposed § 35.151(e) to provide that group homes, and other listed facilities, shall comply with the provisions in the 2004 ADAAG that would apply to residential facilities.

Finally, the Department received comments from code developers and architects commending the decision to coordinate the 2004 ADAAG with the requirements of section 504, and asking the Department to coordinate the 2004 ADAAG with the Fair Housing Act’s accessibility requirements. The Department believes that the coordination of the Fair Housing Act with the other applicable disability rights statutes is within the jurisdiction of HUD. HUD is the agency charged with the responsibility to develop regulations to implement the Fair Housing Act, the Architectural Barriers Act, and the provisions of section 504 applicable to federally funded housing programs.

*Scoping of residential dwelling units for sale to individual owners.* In the 2004 ADAAG, the Access Board deferred to the Department and to HUD, the standard-setting agency under the ABA, to decide the appropriate scoping for residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners. These programs include, for example, HUD’s HOME program. In addition, some states have their own state-funded programs to construct units for sale to individuals. The Department expects that, after consultation and coordination with HUD, the Department will make a determination in the final rule.

*Question 41: The Department would welcome recommendations from individuals with disabilities, public housing authorities, and other interested parties that have experience with these programs. Please comment on the appropriate scoping for*

*residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners.*

*Section 35.151(f) Housing at a Place of Education*

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

Since the enactment of the ADA, the Department has received many questions about how the ADA applies to educational settings, including school dormitories. Neither the 1991 Standards nor the 2004 ADAAG specifically addresses how it applies to housing in educational settings. Therefore, the Department is proposing a new § 35.151(f) that provides that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG. Housing provided via individual apartments or townhouses will be subject to the requirements for residential dwelling units.

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

Public schools are subject to title II and program access requirements. Throughout the school year and the

summer, school dormitories become program areas where small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms, both accessible rooms and standard rooms, in order to socialize, to study, and to use all public and common use areas is an essential part of having access to these educational programs and activities.

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

*Question 42: Would the residential facility requirements or the transient lodging requirements in the 2004 ADAAG be more appropriate for housing at places of education? How would the different requirements affect the cost when building new dormitories and other student housing? Please provide examples, if possible.*

*Section 35.151(g) Assembly Areas*

The Department is proposing a new § 35.151(g) to supplement the assembly area requirements in the proposed standards. This provision would add five additional requirements.

Section 35.151(g)(1) would require wheelchair and companion seating locations to be dispersed so that some seating is available on each level served by an accessible route. This requirement should have the effect of ensuring the full range of ticket prices, services, and amenities offered in the facility. Factors distinguishing specialty seating areas are generally dictated by the type of facility or event, but may include, for example, such distinct services and amenities as reserved seating (when other seats are sold on a first-come-first-served basis only); reserved seating in sections or rows located in premium locations (e.g., behind home plate or near the home team’s end zone) that are not otherwise available for purchase by other spectators; access to wait staff for in-seat food or beverage service; availability of catered food or beverages for pre-game, intermission, or post-game meals; restricted access to lounges with special amenities, such as couches or

flat screen televisions; or access to team personnel or facilities for team-sponsored events (e.g., autograph sessions, sideline passes, or facility tours) not otherwise available to other spectators.

Section 35.151(g)(2) adds the prohibition that the seating may not be placed on temporary platforms or other movable structures. The Department has become aware that a growing trend in the design of large sports facilities is to provide wheelchair seating on removable platforms that seat four or more wheelchair users and their companions. These platforms cover one or more rows of non-wheelchair seating. The platforms are designed to be removed so that the part of the seating bowl that they cover can be used to seat additional ambulatory spectators. The sale of any seats in the covered area requires removal of the platform, thereby eliminating some of the required wheelchair seating locations. In another design that produces a similar result, removable platforms configured to provide multiple, non-wheelchair seats, are installed over some or all of the required wheelchair seating locations. In this configuration, selling a ticket for one wheelchair location requires the removal of multiple non-wheelchair seats.

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

For these reasons, the Department believes that it is necessary and

appropriate to prohibit the use of temporary platforms in fixed seating areas. Nothing in § 35.151(g) is intended to prohibit the use of temporary platforms to increase the available seating, e.g., platforms that cover a basketball court or hockey rink when the arena is being used for a concert. These areas of temporary seating do not remove required wheelchair locations and, therefore, would not violate the requirements of this regulation. In addition, covered entities would still be permitted to use individual movable seats to infill any wheelchair locations that are not sold to wheelchair users.

Section 35.151(g)(3) would require facilities that have more than 5,000 seats to provide at least five wheelchair locations with at least three companion seats for each wheelchair space. The Department is proposing this requirement to address complaints from many wheelchair users that the practice of providing a strict one-to-one relationship between wheelchair locations and companion seating often prevents family members from attending events together.

Section 35.151(g)(4) would provide more precise guidance for designers of stadium-style movie theaters by requiring such facilities to locate wheelchair seating spaces and companion seating on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria:

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

#### *Section 35.151(h) Medical Care Facilities*

The Department is proposing a new § 35.151(h) on medical care facilities, which now must comply with the applicable sections of the proposed standards. The Department also proposes that medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 of the proposed standards in a manner that enables patients with disabilities to have access to appropriate specialty services.

The Department is aware that the Access Board sought comment on how dispersion of accessible sleeping rooms can effectively be achieved and

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

*Question 43: The Department is seeking information from hospital designers and hospital administrators that will help it determine how to ensure that accessible hospital rooms are dispersed throughout the facility in a way that will not unduly restrain the ability of hospital administrators to allocate space as needed. The proposed standards require that ten percent (10%) of the patient bedrooms in hospitals that do not specialize in treating conditions that affect mobility be accessible. If it is not feasible to distribute these rooms among each of the specialty areas, would it be appropriate to require the accessible rooms to be dispersed so that there are accessible patient rooms on each floor? Are there other methods of dispersal that would be more effective?*

#### *Section 35.151(i) Curb Ramps*

The current § 35.151(e) on curb ramps has been redesignated as § 35.151(i). The Department has made a minor editorial change, deleting the phrase "other sloped areas" from the two places in which it appears in the current rule. The phrase "other sloped areas" lacks technical precision. Both the 1991 Standards and the proposed standards provide technical guidance for the installation of curb ramps.

#### **Miniature Golf Courses**

The Department proposes to adopt the requirements for miniature golf courses in the 2004 ADAAG. However, it requests public comment on a suggested change to the requirement for holes to

be consecutive. A commenter association argued that the "miniature golf experience" includes not only putting but also enjoyment of "beautiful landscaping, water elements that include ponds, fountain displays, and lazy rivers that matriculate throughout the course and themed structures that allow players to be taken into a 'fantasy-like' area." Thus, requiring a series of consecutive accessible holes would limit the experience of guests with disabilities to one area of the course. To remedy this situation, the association suggests allowing multiple breaks in the sequence of accessible holes while maintaining the requirement that the accessible holes are connected by an accessible route.

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

*Question 44: The Department would like to hear from the public about the suggestion of allowing multiple breaks in the sequence of accessible holes, provided that the accessible holes are connected by an accessible route. Should the Department ask the Access Board to change the current requirement in the 2004 ADAAG?*

#### **Accessible Cells in Detention and Correctional Facilities**

Through complaints received, investigations, and compliance reviews of jails, prisons, and other detention and correctional facilities, the Department has found that many detention and correctional facilities have too few or no accessible cells and shower facilities to meet the needs of their inmates with mobility disabilities. The insufficient numbers of accessible cells are, in part, due to the fact that most jails and prisons were built long before the ADA became law and, since then, have undergone few alterations. However, the Department believes that the unmet demand for accessible cells is also due to the changing demographics of the inmate population. With thousands of prisoners serving life sentences without eligibility for parole, prisoners are aging, and the prison population of individuals with disabilities and elderly individuals is growing. A recent article illustrates this change. Since 1990, the number of Oklahoma inmates age 45 or older has quadrupled, and, in 2006, ten percent (10%) of the Oklahoma state prison population was elderly. Angel Riggs, *Now in Business: Handicapped Accessible Prison: State Opens First Prison for Disabled*, in *Tulsa World* (Feb. 20, 2007). Reflecting this trend of

aging inmate populations, corrections conferences now routinely include workshops on strategies to address the needs of elderly prisoners, including the increased health care needs. In addition, the Federal Bureau of Prisons requires that three percent (3%) of inmate housing at BOP facilities is accessible. Bureau of Prisons, Design Construction Branch, *Design Guidelines, Attachment A: Accessibility Guidelines for Design, Construction, and Alteration of Federal Bureau of Prisons* (Oct. 31, 2006).

The lack of sufficient accessible cells is further demonstrated by complaints received by the Department. The Department receives dozens of complaints per year alleging that detention and correctional facilities have too few accessible cells, toilets, and showers for inmates with mobility disabilities. Other complaints allege that inmates with mobility disabilities are housed in medical units or infirmaries separate from the general population simply because there are no accessible cells. Another common complaint to the Department is from inmates alleging that they are housed at a more restrictive classification level simply because no accessible housing exists at the appropriate classification level.

Further, the Department's onsite reviews and investigations of detention and correctional facilities confirm the complaints that there are too few accessible cells. The need for accessible cells can vary widely from facility to facility, depending on the population housed. While the requirement that two percent (2%) of the cells have mobility features would be adequate to meet current needs in some facilities the Department has reviewed, it would not begin to meet current needs at other facilities. For example, at one facility with a population of almost 300 inmates, ten percent (10%) of the inmates use wheelchairs. The requirement that two percent (2%) of cells at this facility must be accessible would not meet the needs of inmates with mobility disabilities, since it would not be adequate to meet the needs of wheelchair users alone. Another facility has a geriatric unit for 60 inmates. A two percent (2%) standard would fall far short of meeting the needs of this largely bedridden population. Another building at this same facility has 600 cells and houses more than 18 inmates who need accessible cells. Under the two percent (2%) standard, only twelve accessible cells would be required.

According to the Bureau of Justice Statistics (BJS) 2002 survey of jail inmates, "two percent of jail inmates said they had a mobility impairment,

requiring the use of a cane, walker, wheelchair, or other aids to do daily activities." Laura M. Maruschak, Bureau of Justice Statistics (BJS), *Medical Problems of Jail Inmates* (2006), available at <http://www.ojp.usdoj.gov/bjs/abstract/mpji.htm>. In a 1997 survey, BJS reported that among state prison inmates age 45 or older, twenty-five percent (25%) said they had a "physical condition." Laura M. Maruschak and Allen J. Beck, Ph.D., Bureau of Justice Statistics, *Medical Problems of Inmates, 1997* (2001), available at <http://www.ojp.usdoj.gov/bjs/abstract/mpi97.htm>.

*Number of accessible cells.* Section 232.2.1 of the 2004 ADAAG requires at least two percent (2%), but no fewer than one, of the cells in newly constructed detention and correctional facilities to have accessibility features for individuals with mobility disabilities. Section 232.3 provides that, where special holding cells or special housing cells are provided, at least one cell serving each purpose shall have mobility features. While the 2004 ADAAG establishes these requirements for cells in newly constructed detention and correctional facilities, it does not establish requirements for accessible cells in alterations to existing facilities, deferring that decision to the Attorney General.

The Department seeks input on how best to meet the needs of inmates with mobility disabilities in the design, construction, and alteration of detention and correctional facilities. The Department seeks comments on the following issues:

*Question 45: Are the requirements for accessible cells in sections 232.2 and 232.3 of the 2004 ADAAG adequate to meet the needs of the aging inmate population in prisons? If not, should the percentage of cells required to have accessible features for individuals with mobility disabilities be greater and, if so, what is the appropriate percentage? Should the requirement be different for prisons than for other detention and correctional facilities?*

*Question 46: Should the Department establish a program accessibility requirement that public entities modify additional cells at a detention or correctional facility to incorporate the accessibility features needed by specific inmates with mobility disabilities when the number of cells required by sections 232.2 and 232.3 of the 2004 ADAAG are inadequate to meet the needs of their inmate population? Under this option, additional cells provided for inmates with mobility disabilities would not necessarily be required to comply with all requirements of section 807.2 of the*

2004 ADAAG, so long as a cell had the mobility features needed by the inmate it housed.

*Dispersion of cells.* In the 2004 ADAAG, Advisory 232.2 recommends that “[a]ccessible cells or rooms should be dispersed among different levels of security, housing categories, and holding classifications (e.g., male/female and adult/juvenile) to facilitate access.” In explaining the basis for recommending, but not requiring, this type of dispersal, the Access Board stated that “[m]any detention and correctional facilities are designed so that certain areas (e.g., ‘shift’ areas) can be adapted to serve as different types of housing according to need” and that “[p]lacement of accessible cells or rooms in shift areas may allow additional flexibility in meeting requirements for dispersion of accessible cells or rooms.” During its onsite reviews of detention and correctional facilities, the Department has observed that male and female inmates, adult and juvenile inmates, and inmates at different security classifications are typically housed in separate areas of detention and correctional facilities. In many instances, detention and correctional facilities have housed inmates in inaccessible cells, even though accessible cells were available elsewhere in the facility, because there were no cells in the areas where they needed to be housed, such as the women’s section of the facility, the juvenile section of the facility, or in a particular security classification area.

*Question 47: Please comment on whether the dispersal of accessible cells recommended in Advisory 232.2 of the 2004 ADAAG should be required.*

*Alterations to cells.* In section 232.2 of the 2004 ADAAG, the Access Board deferred one decision to the Attorney General, specifically: “Alterations to cells shall not be required to comply except to the extent determined by the Attorney General.” The security concerns of detention and correctional facilities present challenges that do not exist in other government buildings, so the Department must strike a balance that accommodates the accessibility needs of inmates with disabilities while addressing security concerns. Therefore, in the ANPRM, the Department sought public comment on three options for the most effective means of ensuring that existing detention and correctional facilities are made accessible to inmates with disabilities. The proposed options and submitted comments are discussed below in the section-by-section analysis for a new proposed section on detention and correctional facilities.

*Introduction of new § 35.152 for detention and correctional facilities.* In view of the statistics regarding the current percentage of inmates with mobility disabilities, the fact that prison populations include large numbers of aging inmates who are not eligible for parole, the allegations in complaints received by the Department from inmates, and the Department’s own experience with detention and correctional facilities, the Department is proposing regulatory language in a new section (§ 35.152) on correctional facilities, and seeking public comment on these issues.

The proposed rule at § 35.152 is intended to address these frequent problems for inmates with disabilities by: (1) Proposing specific requirements to ensure accessibility when a correctional or detention facility alters cells; (2) specifying that public entities shall not place inmates or detainees with disabilities in locations that exceed their security classification in order to provide accessible cells; (3) requiring that public entities shall not place inmates in designated medical units and infirmaries solely due to disability; (4) specifying that public entities shall not relocate inmates and detainees solely based on disability to different, accessible facilities without equivalent programs than where they would ordinarily be housed; and (5) requiring that public entities shall not deprive inmates or detainees from visitation with family members by placing them in distant facilities based on their disabilities. The additions to the existing title II regulation, including each of these proposals and any public comments received on this topic, are discussed in turn below.

*Contractual arrangements with private entities.* Prisons that are built or run by private entities have caused some confusion with regard to requirements under the ADA. The Department believes that title II obligations extend to the public entity as soon as the building is used by or on behalf of a state or local government entity, irrespective of whether the public entity contracts with a private entity to run the correctional facility. The power to incarcerate citizens rests with the state, not a private entity. As the Department stated in the preamble to the current title II regulation, “[a]ll governmental activities of public entities are covered, even if they are carried out by contractors.” 56 FR 35694, 35696 (July 26, 1991). If a prison is occupied by state prisoners and is inaccessible, the state is responsible under title II of the ADA. In essence, the private builder or contractor that

operates the correctional facility does so at the direction of the state government, unless the private entity elects to use the facility for something other than incarceration, in which case title III may apply. For that reason, the proposed § 35.152(a) makes it clear that this section’s requirements will apply to prisons operated by public entities directly or through contractual or other relationships.

*Alterations to cells and program access.* When addressing the issue of alterations of prison cells, the Department must consider the realities of many inaccessible state prisons and strained budgets against the title II program access requirement for existing facilities under § 35.150(a), which states: “A public entity shall operate each service, program, or activity, so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” The Supreme Court, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), unanimously held that the ADA unmistakably covers state prisons and prisoners, so program access does apply to state correctional facilities; the question remains how best to achieve that within the unique confines of a prison system.

Correctional and detention facilities commonly provide a variety of different programs for education, training, counseling, or other purposes related to rehabilitation. Some examples of programs generally available to inmates include: Programs to obtain G.E.D.s; English as a second language; computer training; job skill training and on-the-job training; religious instruction and guidance; alcohol and substance abuse groups; anger management; and other programs. Historically, individuals with disabilities have been excluded from such programs because they are not located in accessible locations, or inmates with disabilities have been segregated to units without equivalent programs. In light of the Supreme Court’s decision in *Yeskey* and the requirements of title II, however, it is critical that public entities provide these opportunities. The Department’s proposed rule aims to specifically require equivalent opportunities to such programs.

The Department wishes to emphasize that detention and correctional facilities are unique facilities under title II. Inmates cannot leave the facilities and must have their needs met—including those relating to a disability—by the state corrections system. If the state fails to accommodate prisoners with disabilities, these individuals have little

recourse, particularly when the need is urgent (e.g., an accessible toilet or clean needles for insulin injections for prisoners with diabetes).

In light of a public entity's obligation to provide program access to prisoners with disabilities, coupled with the Department's proposal for a more flexible alterations standard, the Department believes that the state has a higher responsibility to provide accommodations based on disability. Therefore, it is essential that state corrections systems fulfill their program access requirements by adequately addressing the needs of prisoners with disabilities, which include, but are not limited to, proper medication and medical treatment, accessible toilet and shower facilities, devices such as a bed transfer or a shower chair, and assistance with hygiene methods for prisoners with physical disabilities. Therefore, the Department is proposing a new § 35.152 that will require public entities to ensure that inmates with disabilities do not experience discrimination because the prison facilities or programs are not accessible to them.

*Integration of inmates and detainees with disabilities.* The Department is also proposing a specific application of the ADA's general integration mandate. Section 35.152(b)(2) would require public entities to ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individual. Unless the public entity can demonstrate that it is appropriate for a specific individual, a public entity—

(1) Should not place inmates or detainees with disabilities in locations that exceed their security classification because there are no accessible cells or beds in the appropriate classification;

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

(3) Should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed;

(4) Should not place inmates or detainees with disabilities in facilities further away from their families in order to provide accessible cells or beds, thus diminishing their opportunity for visitation based on their disability.

The Department recognizes that there are a wide range of considerations that affect decisions to house inmates or detainees and that in specific cases there may be compelling reasons why a placement that does not follow the provisions of § 35.152(b) may, nevertheless, comply with the ADA. However, the Department believes that

it is essential that the planning process initially assume that inmates or detainees with disabilities will be assigned within the system under the same criteria that would be applied to inmates who do not have disabilities. Exceptions may be made on a case-by-case basis if the specific situation warrants different treatment. For example, if an inmate is deaf and communicates only using sign language, a prison may consider whether it is more appropriate to give priority to housing the prisoner in a facility close to his family that houses no other deaf inmates, or if it would be preferable to house the prisoner in a setting where there are other sign language users with whom he can communicate.

*Question 48: The Department is particularly interested in hearing from prison administrators and from the public about the potential effect of the assignment scheme proposed here on inmates and detainees who are deaf or who have other disabilities. Are there other, more appropriate tests to apply?*

*Alterations to cells.* In the ANPRM, the Department proposed three options for altering cells. The vast majority of commenters (numbering three to one) supported Option II, which would allow substitute cells to be made accessible within the same facility, over Option III. Only one commenter expressed support for Option I, and a handful of commenters supported Option III. The comments on each option are discussed below.

*Option I: Require all altered elements to be accessible.* Only one commenter supported this option, stating that providing alternative approaches could allow those running the prison to provide a lower level of accessibility, and that any deviation from the 1991 Standards on alterations should be addressed through a barrier removal plan, transition plan, or a claim of technical infeasibility. A few commenters argued that this option would result in piecemeal accessibility, which would be inadequate. As one commenter stated, "providing an accessible lavatory or water closet (often a single unit) in an inaccessible cell makes no sense."

*Option II: Permit substitute cells to be made accessible within the same facility.* Commenters supporting Option II favored the more flexible plan to achieve accessibility within a prison context. Many expressed support for this option because it would allow individuals with disabilities to remain close to their families. One commenter requested accessible cells by type (e.g., women's, men's, juvenile, different security levels, etc.). Another

commenter offered that the unique safety concerns of a correctional facility require a balance between staff and inmate safety and accessibility. One advocacy group reasoned that Option II was best because it would allow prison operators to determine the most appropriate location for the accessible cells. One group commented that this option would allow the prison officials more flexibility, which is necessary in a correctional environment. Equally important, keeping inmates in the same facility may allow them to remain closer to their homes; the third option could create segregated facilities. In the end, this group asserted that each facility—rather than each system—should be looked at "in its entirety."

One large advocacy group stated that Option II was acceptable, stressing that program access requires the same training and work opportunities that other prisoners have. An architectural association asserted that this option should only apply to existing correctional cells, but that any other part of a correctional facility should be made accessible when it is altered. The Department, however, is only addressing the alterations of prison cells in this rulemaking. While expressing support for Option II, a few commenters stressed that cells made accessible in a different location in the facility must provide equal access to dining, recreational, educational, medical, and visitor areas as the former location. Another commenter stated that the alternate cell location should not require longer travel distances.

The Department has evaluated all of the comments and proposes regulatory language reflecting Option II, which provides an appropriate balance between the needs of prisoners with disabilities and the unique requirements of detention and correctional facilities.

*Option III: Permit substitute cells to be made accessible within a prison system.* The biggest problem that commenters had with Option III was that it would be more likely to separate prisoners from their families and communities. One advocacy group asserted that this option could lead to the illegal segregation of inmates with disabilities; moreover, some of the accessible facilities may not have the same programs or services (e.g., Alcoholics Anonymous, etc.). One group argued that this option would give preference to the needs of the prison system over the needs of individuals with disabilities, while another group found this option unacceptable because it had seen its own state correctional system "funneling" its wheelchair-using inmates into a few facilities, which

sometimes exceeded the prisoners' security level requirements. Moreover, some prisoners with disabilities are sent to "special housing" units in a facility because they are the only areas with accessible cells.

In support of Option III, one state building code commissioner stressed that this plan would maximize the flexibility of corrections officials to place individuals with disabilities in facilities best suited to their needs; prison accessibility extends far beyond cells; and barrier removal in a very old prison could be cost prohibitive. Another commenter, a state department of labor representative, argued that Option III is the most reasonable for state-run facilities (but that Option I should extend to private correctional facilities) due to tremendous budget constraints. As the Department expressed initially, the same title II accessibility requirements apply to a facility, irrespective of whether it is run directly by the state or a private entity with which the state contracts.

While expressing some support for Option II, one public interest law firm representing individuals with disabilities stated that Option III is the best, because many older prisons are inaccessible. "Simply having one accessible cell in an otherwise inaccessible facility does little good." Therefore, requiring an entire prison system to have at least one fully accessible facility is the better approach.

The Department appreciates that Option III affords state corrections systems the maximum amount of flexibility with regard to placement of individuals with disabilities. Unfortunately, many commenters expressed legitimate concerns, most significantly that prisoners will, more likely, be separated from family, friends, and community, which is critical to their rehabilitation and successful release, and many programs at the new facility will not be the same. Lastly, the fact that certain facilities could become exclusively, or largely, designated for prisoners with disabilities would result in segregation, even if it is not intended.

*Proposed requirement for cell alterations.* The Department has concluded that Option II provides the best balance. Therefore, the Department is proposing § 35.152(c) that would provide that when cells are being altered, a covered entity may satisfy its obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (*i.e.*, cells other than those where alterations are originally planned), provided that: Each substitute cell is located within the

same facility; is integrated with other cells to the maximum extent feasible; and has, at a minimum, equal physical access as the original cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees.

### Subpart E—Communications

#### Section 35.160 Communications

The Department proposes to expand § 35.160(a) to clarify that a public entity's obligation to ensure effective communication extends not just to applicants, participants, and members of the public with disabilities, but to their companions as well.

The Department also proposes to add a new § 35.160(a)(2) that will define "companion" for the purposes of this section as a person who is a family member, friend, or associate of a program participant who, along with the participant, is an appropriate person with whom the public entity should communicate.

The Department is proposing to add companions to the scope of coverage of § 35.160 to emphasize that the ADA applies in some instances in which a public entity needs to communicate with a family member, friend, or associate of the program participant in order to provide its services. Examples of such situations include when a school communicates with the parent of a child during a parent-teacher meeting; in a life-threatening situation, when a hospital needs to communicate with an injured person's companion to obtain necessary information; or when a person may need to communicate with a parole officer about a relative's release conditions. In such situations, if the companion is deaf or hard of hearing, blind, has low vision, or has a disability that affects his or her speech, it is the public entity's responsibility to provide an appropriate auxiliary aid or service to communicate effectively with the companion. Where communication with a companion is necessary to serve the interests of a person who is participating in a public entity's services, programs, or activities, effective communication must be assured.

This issue is particularly important in health care settings. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligations with respect to such companions. Effective communication with a companion with a disability is necessary in a variety of

circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. In addition, a companion may be the patient's next of kin or health care surrogate with whom hospital personnel communicate concerning the patient's medical condition. Moreover, a companion could be designated by the patient to communicate with hospital personnel about the patient's symptoms, needs, condition, or medical history. It has been the Department's longstanding position that public entities are required to provide effective communication to companions who are themselves deaf, hard of hearing, or who have other communication-related disabilities when they accompany patients to medical care providers for treatment.

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

The Department is proposing to amend § 35.160(b)(2) to recognize that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. This addition is a codification of the Department's longstanding position, which is included in the Department of Justice's *The Americans with Disabilities Act, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services* (Title II TA Manual), II-7.1000, available at <http://www.ada.gov/taman2.html>. For example, an individual who is deaf or hard of hearing may need a qualified

interpreter to discuss with municipal hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (e.g., dosage, side effects, drug interactions, etc.), or to explain follow-up treatments, therapies, test results, or recovery. In comparison, in a simpler, shorter interaction, the method to achieve effective communication can be more basic. For example, an individual who is seeking local tax forms may only need an exchange of written notes to achieve effective communication.

The Department proposes adding § 35.160(c) to codify its longstanding policy that it is the obligation of the public entity, not the individual with a disability, to provide auxiliary aids and services when needed for effective communication. In particular, the Department receives many complaints from individuals who are deaf or hard of hearing alleging that public entities expect them to provide their own sign language interpreters. This burden is misplaced. As such, § 35.160(c)(1) makes clear that a public entity may not require an individual with a disability to bring another individual to interpret for him or her.

Section 35.160(c)(2) codifies the Department's policy that there are very limited instances when a public entity may rely on an accompanying individual to interpret or facilitate communication: (1) In an emergency involving a threat to public safety or welfare; or (2) if the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances. In such instances, the public entity is still required to offer to provide an interpreter free of charge. In no circumstances should a child be used to facilitate communication with a parent about a sensitive matter. The Department has produced a video and several publications that explain this and other ADA obligations in law enforcement settings. They may be viewed at <http://www.ada.gov> or ordered from the ADA Information Line (800-514-0301 (voice) or 800-514-0383 (TTY)).

*Video interpreting services.* Section 35.160(d) has been added to establish performance standards for video interpreting services (VIS), a system the Department recognizes as a means to provide qualified interpreters quickly and easily. (The mechanics of VIS are discussed above in the definition of VIS in the section-by-section analysis of § 35.104.) VIS also has economic advantages, is readily available, and

because of advances in video technology, can provide a high quality interpreting experience. VIS can circumvent the difficulty of providing live interpreters quickly, which is why more public entities are providing qualified interpreters via VIS.

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

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

*Captioning at sporting venues.* The Department is aware that individuals who are deaf or hard of hearing have expressed concerns that they are unaware of information that is provided over the public address systems. Therefore, the Department is proposing requiring that sports stadiums with a capacity of 25,000 or more provide captioning for patrons who are deaf or hard of hearing for safety and emergency information announcements made over the public address system. There are various options that could be used for providing captioning, such as on a scoreboard, on a line board, on a handheld device, or other methods.

*Question 49: The Department believes that requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 has the potential of creating an undue burden for smaller entities. However, the Department requests public comment about the effect of requiring captioning of emergency announcements in all stadiums, regardless of size. Would such a request be feasible for small stadiums?*

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

*Question 51: If the Department adopted a requirement for captioning at sports stadiums, should there be a specific means required? That is, should it be provided through any effective means (scoreboards, line boards, handheld devices, or other means), or are there problems with some means, such as handheld devices, that should eliminate them as options?*

*Question 52: The Department is aware that several major stadiums that host sporting events, including National Football League football games at Fed Ex Field in Prince Georges County, Maryland, currently provide open captioning of all public address announcements, and do not limit captioning to safety and emergency information. What would be the effect of a requirement to provide captioning for patrons who are deaf or hard of hearing for game-related information (e.g., penalties), safety and emergency information, and any other relevant announcements?*

#### Section 35.161 Telecommunications

The Department proposes to retitle this section "Telecommunications" to reflect situations in which a public entity must provide an effective means to communicate by telephone for individuals with disabilities, and proposes several other changes.

The Department proposes to redesignate current § 35.161 as § 35.161(a), and to replace the term "Telecommunication devices for the deaf (TDD's)" with "text telephones (TTYs)." Although "TDD" is the term used in the ADA, "TTY" has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. In addition, the proposed regulation updates the terminology in light of modern usage from "individuals with impaired hearing or speech" to "individuals with hearing or speech disabilities."

In § 35.161(b), the Department addresses automated attendant systems that handle telephone calls electronically. These automated systems are a common method for answering and directing incoming calls to public

entities. The Department has become aware that individuals with disabilities who use TTYs or the telecommunications relay services—primarily those who are deaf or hard of hearing or who have speech-related disabilities—have been unable to use automated telephone trees systems, because they are not compatible with TTYs or a telecommunications relay service. Automated attendant systems often disconnect before the individual using one of these calling methods can complete the communication.

In addition, the Department proposes a new § 35.161(c) that would require that individuals using telecommunications relay services or TTYs be able to connect to and use effectively any automated attendant system used by a public entity. The Department declined to address this issue in the 1991 regulation because it believed that it was more appropriate for the Federal Communications Commission (FCC) to address this in its rulemaking under title IV, 56 FR 35694, 35712 (July 26, 1991). Because the FCC has since raised this concern with the Department and requested that the Department address it, it is now appropriate to raise this issue in the title III regulation.

The Department has proposed § 35.161(c), which requires that a public entity must respond to telephone calls from a telecommunications relay service established under title IV of the Americans with Disabilities Act in the same manner that it responds to other telephone calls. The Department proposes adding this provision to address a series of complaints from those who use TTYs or the telecommunications relay systems that many public entities refuse to accept those calls.

#### *Section 35.170 Complaints—Prison Litigation Reform Act*

In the ANPRM, the Department proposed addressing the effect of the Prison Litigation Reform Act (PLRA) on complaints by prisoners alleging unlawful discrimination on the basis of disability under title II of the ADA. The PLRA provides, in relevant part, that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. 1997e(a). As a result of this language, the Department proposed requiring those prisoners alleging title II violations to file an administrative complaint with the

Department prior to filing a lawsuit, and that a complainant would satisfy this requirement if no action was taken by the Department within sixty days. The Department has considered the comments that it received by a variety of groups and has decided not to propose an exhaustion requirement exclusively for prisoners in the regulation.

#### *Sections 35.171, 35.172, and 35.190 Streamlining Complaint Investigations and Designated Agency Authority*

The Department is proposing modifications to its current procedures with respect to the investigation of complaints alleging discrimination on the basis of disability by public entities under title II of the ADA. Specifically, the Department is proposing several amendments to its enforcement procedures in order to streamline both its internal procedures for investigating complaints and its procedures with regard to the other designated agencies with enforcement responsibilities under title II. These proposals will reduce the administrative burdens associated with implementing the statute and ensure that the Department retains the flexibility to allocate its limited enforcement resources effectively and productively.

Subtitle A of title II of the ADA defines the remedies, procedures, and rights provided for qualified individuals with disabilities who are discriminated against on the basis of disability in the services, programs, or activities of state and local governments. 42 U.S.C. 12131–12134. Subpart F of the current regulation establishes administrative procedures for the enforcement of title II of the ADA. Subpart G identifies eight “designated agencies,” including the Department, that have responsibility for investigating complaints under title II.

The Department’s current title II regulation is based on the enforcement procedures established in regulations implementing section 504. Thus, the Department’s current regulation provides that the designated agency “shall investigate each complete complaint” alleging a violation of title II and shall “attempt informal resolution” of such complaint. 28 CFR 35.172(a).

In the years since the current regulation went into effect, the Department has received many more complaints alleging violations of title II than its resources permit it to resolve. The Department has reviewed each complaint that it has received and directed its resources to resolving the most critical matters. The Department proposes to clarify in its revised regulation that designated agencies may

exercise discretion in selecting title II complaints for resolution by deleting the term “each” as it appears before “complaint” in § 35.172(a). The proposed rule at § 35.172(a) would read that, “[t]he designated agency shall investigate complaints” rather than “investigate each complaint.”

The Department also proposes to change the language in § 35.171(a)(2)(i) regarding misdirected complaints to make it clear that, if an agency receives a complaint for which it lacks jurisdiction either under section 504 or as a designated agency under the ADA, the agency may refer the complaint to the appropriate agency. The current language requires the agency to refer the complaint to the Department, which, in turn, refers the complaint. The proposed revisions to § 35.171 make it clear that an agency can refer a misdirected complaint either directly to the appropriate agency or to the Department. This amendment is intended to protect against the unnecessary backlogging of complaints and to prevent undue delay in an agency taking action on a complaint.

The Department is also proposing to make clear that the same procedures that apply to complaint investigations also apply to compliance reviews that are not initiated by receipt of a complaint, but rather are based on other information indicating that discrimination exists in a service, program, or activity covered by this part. This provision is consistent with the Department’s procedures for enforcing title III of the ADA as well as title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, and section 504. Section 203 of the ADA provides that those same rights, remedies, and procedures shall apply to title II of the ADA, 42 U.S.C. 12133. The Department’s proposed rule renames § 35.172(a), “Investigations and Compliance Reviews,” and provides in new paragraph (b) that “[t]he designated agency may conduct compliance reviews of public entities based on information indicating a possible failure to comply with the nondiscrimination requirements of this part.”

Finally, the Department is proposing to streamline the requirements for letters of findings. Section 35.172 of the Department’s current regulation requires designated agencies to investigate all complete complaints for which they are responsible as determined under § 35.171. Specifically, a designated agency must issue a letter of findings at the conclusion of the investigation if the complaint was not resolved informally and attempt to negotiate a voluntary compliance agreement if a violation was

found. The Department's proposal will clarify that letters of finding are only required when a violation is found. The discussion of letters of finding is moved to a new paragraph (c) in the proposed rule, and provides the same language as in the current regulation with the exception that the phrase "and a violation is found" is added following the phrase "if resolution is not achieved."

Subpart G of the existing regulation deals with the various agency designations that the Department proposed in promulgating the regulation for title II of the ADA. Current § 35.190 lays out all of the agency designations. Paragraphs 35.190(c) and (d), respectively, leave to the discretion of the Attorney General decisions where delegations are not specifically assigned or where there are apparent conflicts of jurisdiction. The Department's proposed rule would add a new § 35.190(e) in order to deal with the situation in which a complainant has sought the assistance of the Department of Justice. The proposed rule at § 35.190(e) provides that when the Department receives a complaint alleging a violation of title II that is directed to the Attorney General that may fall within the jurisdiction of a designated agency or another federal agency that has jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part. The Department would, of course, consult with the designated agency regarding its intention to review when it plans to retain the complaint. In appropriate circumstances, the Department and the designated agency may conduct a joint investigation. Finally, the Department also proposes to amend § 35.171(a)(2)(i) to be consistent with the changes in the proposed rule at § 35.190(e).

#### Additional Information

##### *Withdrawal of Outstanding NPRMs*

With the publication of this NPRM, the Department is withdrawing three outstanding NPRMs: The joint NPRM of the Department and the Access Board dealing with children's facilities, published on July 22, 1996, at 61 FR 37964; the Department's proposal to extend the time period for providing curb ramps at existing pedestrian walkways, published on November 27, 1995, at 60 FR 58462; and the Department's proposal to adopt the Access Board's accessibility guidelines and specifications for state and local government facilities, published as an interim final rule by the Access Board on June 20, 1994, at 59 FR 31676, and

by the Department as a proposed rule on June 20, 1994, at 59 FR 31808. To the extent that those proposals were incorporated in the 2004 ADAAG, they will all be included in the Department's proposed standards.

##### *Regulatory Process Matters*

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

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

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

##### *Regulatory Flexibility Act*

This NPRM has also been reviewed by the Small Business Administration's Office of Advocacy pursuant to Executive Order 13272, 67 FR 53461 (Aug. 13, 2002). Because the proposed rule, if adopted, may have a significant economic impact on a substantial number of small entities, the Department has conducted an Initial Regulatory Flexibility Analysis (IRFA)

as a component of this rulemaking. The Department's ANPRM, NPRM, and the RIA include all of the elements of the IRFA required by the Regulatory Flexibility Act (RFA). See 5 U.S.C. 601 *et seq.*, as amended by SBREFA, 5 U.S.C. 603(b)(1)–(5), 603(c).

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

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

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

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

these rules on small facilities/entities versus “typical” (*i.e.*, average-sized) facilities/entities);

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

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

6. *Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize any significant impact of the proposed rule on small entities, including alternatives considered, such as: (1) Establishment of differing compliance or reporting requirements or timetables that take*

*into account the resources available to small entities; (2) use of performance rather than design standards; and (3) any exemption from coverage of the rule, or any part thereof, for such small entities.*

The Department’s rulemaking efforts satisfy the IRFA requirement for consideration of significant regulatory alternatives. In September 2004, the Department issued an ANPRM to commence the process of revising its regulations implementing titles II and III of the ADA. See 69 FR 58768 (Sept. 30, 2004). Among other things, the ANPRM sought public comment on 54 specific questions. Prominent among these questions was the issue of whether (and how) to craft a “safe harbor” provision for existing title III-covered facilities/entities that would reduce the financial burden of complying with the 2004 ADAAG. See *id.* at 58771–72. The ANPRM also specifically invited comment from small entities concerning the proposed rules’ potential economic impact and suggested regulatory alternatives to ameliorate such impact. *Id.* at 58779 (Question 10). By the end of the comment period, the Department had received over 900 comments, including comments from SBA’s Office of Advocacy and small entities. See, *e.g.*, title II NPRM Preamble and title III NPRM Preamble sections entitled, “The Advance Notice of Proposed Rulemaking” (summarizing public response to the ANPRM). Many small business advocates expressed concern regarding the cost of making older existing title III-covered buildings compliant with new regulations (since many small businesses operate in such facilities) and urged DOJ to issue clearer guidance on barrier removal. See title III NPRM Preamble discussion of “Safe harbor and other proposed limitations on barrier removal.”

In drafting the NPRMs for titles II and III, the Department expressly addressed small businesses’ collective ANPRM comments and proposed regulatory alternatives to help mitigate the economic impact of the proposed regulations on small entities. For example, the Department’s regulatory proposals:

- Provide a “safe harbor” provision whereby elements in existing title II- or title III-covered buildings or facilities that are compliant with the current 1991 Standards or UFAS need not be modified to comply with the standards in the proposed regulations (see “Safe Harbor” and § 35.150(b)(2) of the title II NPRM; “Safe Harbor and Other Proposed Limitations on Barrier Removal” and § 36.304 of the title III NPRM);

- Adopt a regulatory alternative for barrier removal that, for the first time, provides a specific annual monetary “cost cap” for barrier removal obligations for qualified small businesses (see title III NPRM sections entitled, “Safe Harbor and Other Proposed Limitations on Barrier Removal” and “Safe Harbor for Qualified Small Businesses Regarding What Is Readily Achievable”);

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

- Reduce scoping for certain other existing recreational facilities (*i.e.*, play areas over 1,000 square feet and swimming pools with over 300 linear feet of pool wall) operated by either title II or title III entities (see title II NPRM at § 35.150(b)(4) and (5); title III NPRM section entitled, “Reduced Scoping for Public Accommodations, Small Facilities, and Qualified Small Businesses”).

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

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

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

amend or rescind the rule, to minimize any significant economic impact of the rule on a substantial number of small entities. *See id.* at 610 (a).

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

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

#### *Executive Order 13132: Federalism*

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

Title II of the ADA covers state and local government programs, services,

and activities, and, therefore, clearly has some federalism implications. State and local governments have been subject to the ADA since 1991, and the majority have also been required to comply with the requirements of section 504. Hence, the ADA and the title II regulations are not novel for state and local governments. This proposed rule will preempt state laws affecting entities subject to the ADA only to the extent that those laws directly conflict with the statutory requirements of the ADA. But the Department believes it is prudent to consult with public entities about the potential federalism implications of the proposed title II regulations.

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

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

The Department is now soliciting comments from elected state and local officials and their representative national organizations through this NPRM. The Department seeks comment from all interested parties, but especially state and local elected officials, about the potential federalism implications of the proposed rule. The Department will welcome comments on whether the proposed rule may have

direct effects on state and local governments, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

#### *National Technology Transfer and Advancement Act of 1995*

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

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

#### *Plain Language Instructions*

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward that also gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800-514-0301 (voice); 800-514-0383 (TTY)) that the public is welcome to call during normal business hours to obtain

assistance in understanding anything in this rule. If any commenter has suggestions for how the regulation could be written more clearly, please contact Janet L. Blizard, Deputy Chief, Disability Rights Section, whose contact information is provided in the introductory section of this rule, entitled, **FOR FURTHER INFORMATION CONTACT.**

#### *Paperwork Reduction Act*

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

#### *Unfunded Mandates Reform Act*

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

#### **List of Subjects in 28 CFR Part 35**

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

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 204 of the Americans with Disabilities Act, Public Law 101–336, 42 U.S.C. 12134, and for the reasons set forth in the preamble, chapter I of Title 28 of the Code of Federal Regulations is proposed to be amended as follows:

#### **PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES**

1. The authority citation for 28 CFR part 35 continues to read as follows:

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

#### **Subpart A—General**

2–3. Amend § 35.104 by adding the following definitions of *1991 Standards*, *2004 ADAAG*, *direct threat*, *existing facility*, *other power-driven mobility device*, *proposed standards*, *service animal*, *qualified reader*, *video interpreting services (VIS)*, and

*wheelchair* in alphabetical order and revising the definitions of *auxiliary aids and services* and *qualified interpreter* to read as follows:

#### **§ 35.104 Definitions.**

*1991 Standards* means the ADA Standards for Accessible Design, codified at 28 CFR part 36, Appendix A.

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

\* \* \* \* \*

*Auxiliary aids and services* includes—

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

\* \* \* \* \*

*Qualified interpreter* means an interpreter who is able to interpret effectively, accurately, and impartially using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral interpreters, and cued speech interpreters. Oral interpreter means an interpreter who has special skill and training to mouth a speaker’s words silently for individuals who are deaf or hard of hearing. Cued speech interpreter means an interpreter who functions in the same manner as an oral interpreter except that he or she also uses a hand code, or cue, to represent each speech sound.

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

*Video interpreting services (VIS)* means an interpreting service that uses video conference technology over high

speed Internet lines. VIS generally consists of a videophone, monitors, cameras, a high speed Internet connection, and an interpreter.

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

#### Subpart B—General Requirements

4. Amend § 35.133 by adding paragraph (c) to read as follows:

##### § 35.133 Maintenance of accessible features.

\* \* \* \* \*

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

5. Amend 28 CFR part 35 by adding § 35.136 to read as follows:

##### § 35.136 Service animals.

(a) *General.* Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability, unless the public entity can demonstrate that the use of a service animal would fundamentally alter the public entity's service, program, or activity.

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

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

(2) The animal is not housebroken or the animal's presence or behavior fundamentally alters the nature of the service the public entity provides; or

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

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

(d) *General requirements.* The work or tasks performed by a service animal shall be directly related to the handler's disability. A service animal that accompanies an individual with a disability into a facility of a public entity shall be individually trained to do

work or perform a task, housebroken, and under the control of its handler. A service animal shall have a harness, leash, or other tether.

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

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

(g) *Access to areas open to the public, program participants, and invitees.* Individuals with disabilities who are accompanied by service animals may access all areas of a public entity's facility where members of the public, program participants and invitees are allowed to go, unless the public entity can demonstrate that individuals accompanied by service animals would fundamentally alter the public entity's service, program, or activity.

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

6. Amend 28 CFR part 35 by adding § 35.137 to read as follows:

##### § 35.137 Mobility devices.

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

(b) *Other power-driven mobility devices.* A public entity shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in

a fundamental alteration of the public entity's service, program, or activity.

(c) *Development of policies permitting the use of other power-driven mobility devices.* A public entity shall establish policies to permit the use of other power-driven mobility devices by individuals with disabilities when it is reasonable to allow an individual with a disability to participate in a service, program, or activity. Whether a modification is reasonable to allow the use of a class of power-driven mobility device by an individual with a disability in specific venues (e.g., parks, courthouses, office buildings, etc.) shall be determined based on:

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

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

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

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

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

7. Amend 28 CFR part 35 by adding § 35.138 to read as follows:

##### § 35.138 Ticketing.

(a) *General.* A public entity that sells tickets on a preassigned basis shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating during the same hours, through the same methods of distribution, and in the same types and numbers of ticketing sales outlets as other patrons, unless the modification would fundamentally alter the nature of the ticketing service, program, or activity.

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

(c) *Identification of accessible seating.* If seating maps, plans, brochures, or other information is provided to the general public, wheelchair seating and companion seats shall be identified.

(d) *Notification of accessible seating locations.* A public entity that sells or distributes tickets for seating at

assembly areas shall, upon inquiry, inform spectators with disabilities and their companions of the locations of all unsold or otherwise available accessible seating for any ticketed event at the facility.

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

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

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

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

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

(g) *Ticket prices.* The price of tickets for accessible seating shall not be set higher than for tickets to seating located in the same seating section for the same event. Accessible seating must be made available at all price levels for an event. If an existing facility has barriers to accessible seating at a particular price level for an event, then a percentage (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) of the number of accessible seats must be provided at that price level in an accessible location.

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

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

(2) For season tickets, subscriptions, or other multi-events, it is permissible to ask the individual to attest in writing that the wheelchair space is for an

individual who utilizes a wheelchair. A public entity may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

(i) *Purchasing multiple tickets.* (1) Individuals with disabilities and their companions shall be permitted to purchase the same maximum number of tickets for an event per sales transaction as other spectators seeking to purchase seats for the same event. If there is an insufficient number of seats for all members of a party to sit together, seats shall be provided that are as close as possible to the wheelchair spaces. For accessible seating in a designated wheelchair area, a public entity shall provide up to three companion seats for each person with a disability who requires a wheelchair space, provided that at the time of purchase there are sufficient available wheelchair spaces.

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

#### Subpart D—Program Accessibility

8. Amend § 35.150 as follows:

a. Redesignate paragraph (b)(2) as paragraph (b)(3);

b. Add the words “or acquisition” after the word “redesign” in the first sentence of paragraph (b)(1) and add paragraphs (b)(2), (b)(4), and (b)(5) to read as follows:

#### § 35.150 Existing facilities.

\* \* \* \* \*

(b) \* \* \*

(2) *Safe harbor.* If a public entity has constructed or altered elements in an existing facility in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standard, such public entity is not, solely because of the Department’s adoption of the proposed standards, required to retrofit such elements to reflect incremental changes in the proposed standards.

\* \* \* \* \*

(4) *Reduced scoping for existing facilities.* For measures taken to comply with the program accessibility requirements of this section, existing facilities shall comply with the applicable requirements for alterations in § 35.151 of this part, except as follows:

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

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

(5) *Exemption for small facilities.* For measures taken to comply with the program accessibility requirements of this section, existing facilities shall comply with the applicable requirements for alterations in § 35.151 of this part, except as follows:

(i) Where an existing play area has less than 1000 square feet, it shall be exempt from the provisions of section 240 of the proposed standards;

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

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

\* \* \* \* \*

9. Revise § 35.151 to read as follows:

#### § 35.151 New construction and alterations.

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

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

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

be made accessible shall be made accessible to the extent that it is not structurally impracticable.

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

(2) The path of travel requirements of § 35.151(b)(4) shall not apply to measures taken solely to comply with the program accessibility requirements of this section.

(3) Alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c). If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

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

(i) *Primary function.* A primary function is a major activity for which the facility is intended. Areas that contain a primary function include, but are not limited to, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public entity using the facility are carried out.

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

(B) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations

that affect the usability of or access to an area containing a primary function.

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

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

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

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

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

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

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

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

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

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

(iv) *Duty to provide accessible features in the event of disproportionality.* (A) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel

shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

(B) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order:

- (1) An accessible entrance;
- (2) An accessible route to the altered area;
- (3) At least one accessible restroom for each sex or a single unisex restroom;
- (4) Accessible telephones;
- (5) Accessible drinking fountains; and
- (6) When possible, additional accessible elements such as parking, storage, and alarms.

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

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

(2) Only alterations undertaken after the effective date of this part shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.

(c) *Accessibility standards.* (1) For facilities on which construction commences before [date six months after the effective date of the final rule], design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (Appendix A to the Department of Justice's final rule implementing title III of the ADA, 56 FR 35544) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(j) of the 1991 Standards shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to

the facility or part of the facility is thereby provided.

(2) Facilities on which construction commences on or after [date six months after the effective date of the final rule] shall comply with the proposed standards.

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

(e) *Social service establishments.* Group homes, halfway houses, shelters, or similar social service establishments that provide temporary sleeping accommodations or residential dwelling units subject to the proposed standards shall comply with the provisions of the proposed standards that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

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

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

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

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

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

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

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

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

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

(h) *Medical care facilities.* Medical care facilities subject to the proposed standards shall comply with the provisions applicable to medical care facilities, including, but not limited to, sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient rooms required by section 223.2.1 in a manner that enables patients with disabilities to have access to appropriate specialty services.

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

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

10. Amend 28 CFR part 35 by adding § 35.152 to read as follows:

**§ 35.152 Detention and correctional facilities.**

(a) *General.* Public entities that are responsible for the operation or management of detention and correctional facilities, either directly or through contracts or other arrangements, shall comply with this section.

(b) *Discrimination prohibited.* (1) Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because that facility is inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity unless the public entity can demonstrate that the required actions would result in a fundamental alteration or undue burden.

(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless the public entity

can demonstrate that it is appropriate to make an exception for a specific individual, a public entity—

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

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

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

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

(c) *Alterations to detention and correctional facilities.* Alterations to jails, prisons, and other detention and correctional facilities will comply with the requirements of § 35.151(b).

However, when alterations are made to specific cells, detention and correctional facility operators may satisfy their obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (*i.e.*, cells other than those where alterations are originally planned), provided that each substitute cell—

(1) Is located within the same facility;

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

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

**Subpart E—Communications**

11. Revise § 35.160 to read as follows:

**§ 35.160 General.**

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

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

(b) A public entity shall furnish appropriate auxiliary aids and services

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

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

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

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

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

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

(3) Clear transmission of voices; and

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

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

12. Revise § 35.161 to read as follows:

**§ 35.161 Telecommunications.**

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

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

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

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

**Subpart F—Compliance Procedures**

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

**§ 35.171 Acceptance of complaints.**

(a) \* \* \*

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

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

\* \* \* \* \*

14. Revise § 35.172 to read as follows:

**§ 35.172 Investigations and compliance reviews.**

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

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

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

(1) Findings of fact and conclusions of law;

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

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

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

**Subpart G—Designated Agencies**

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

**§ 35.190 Designated agencies.**

\* \* \* \* \*

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

Dated: May 30, 2008.

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

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**DEPARTMENT OF JUSTICE**

**28 CFR Part 36**

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

RIN 1190–AA44

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

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

**ACTION:** Notice of proposed rulemaking.

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

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