disabilities, including those who are blind or have low vision. Commenters argued that the cost of making Web sites accessible, through Web site design, is minimal, yet critical to enabling individuals with disabilities to benefit from the entity's programs and services. Internet Web sites, when accessible, provide individuals with disabilities great independence, and have become an essential tool for many Americans. Commenters recommended that the Department require covered entities, at a minimum, to meet the section 508 Standard for Electronic and Information Technology for Internet accessibility. Under section 508 of the Rehabilitation Act of 1973, Federal agencies are required to make their Web sites accessible. 29 U.S.C. 794(d); 36 CFR 1194.

The Department agrees that the ability to access, on an equal basis, the programs and activities offered by public entities through Internet-based Web sites is of great importance to individuals with disabilities, particularly those who are blind or who have low vision. When the ADA was enacted in 1990, the Internet was unknown to most Americans. Today, the Internet plays a critical role in daily life for personal, civic, commercial, and business purposes. In a period of shrinking resources, public entities increasingly rely on the web as an efficient and comprehensive way to deliver services and to inform and communicate with their citizens and the general public. In light of the growing importance Web sites play in providing access to public services and to disseminating the information citizens need to participate fully in civic life, accessing the Web sites of public entities can play a significant role in fulfilling the goals of the ADA.

Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title II covers Internet Web site access. Public entities that choose to provide services through web-based applications (*e.g.,* renewing library books or driver's licenses) or that communicate with their constituents or provide information through the Internet must ensure that individuals with disabilities have equal access to such services or information, unless doing so would result in an undue financial and administrative burden or a fundamental alteration in the nature of the programs, services, or activities being offered. The Department has issued guidance on the ADA as applied to the Web sites of public entities in a 2003 publication entitled, *Accessibility of State and Local Government Web sites to People with Disabilities,* (June 2003) available at *http://www.ada.gov/websites2.htm.* As the Department stated in that publication, an agency with an inaccessible Web site may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line. However, such an alternative must provide an equal degree of access in terms of hours of operation and the range of options and programs available. For example, if job announcements and application forms are posted on an inaccessible Web site that is available 24 hours a day, seven days a week to individuals without disabilities, then the alternative accessible method must also be available 24 hours a day, 7 days a week. Additional guidance is available in the Web Content Accessibility Guidelines (WCAG), (May 5, 1999) available at *http://www.w3.org/TR/WAI–WEBCONTENT* (last visited June 24, 2010) which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).

The Department expects to engage in rulemaking relating to website accessibility under the ADA in the near future. The Department has enforced the ADA in the area of website accessibility on a case-by-case basis under existing rules consistent with the guidance noted above, and will continue to do so until the issue is addressed in a final regulation.

Multiple chemical sensitivities. The Department received comments from a number of individuals asking the Department to add specific language to the final rule addressing the needs of individuals with chemical sensitivities. These commenters expressed concern that the presence of chemicals interferes with their ability to participate in a wide range of activities. These commenters also urged the Department to add multiple chemical sensitivities to the definition of a disability.

The Department has determined not to include specific provisions addressing multiple chemical sensitivities in the final rule. In order to be viewed as a disability under the ADA, an impairment must substantially limit one or more major life activities. An individual's major life activities of respiratory or neurological functioning may be substantially limited by allergies or sensitivity to a degree that he or she is a person with a disability. When a person has this type of disability, a covered entity may have to make reasonable modifications in its policies and practices for that person. However, this determination is an individual assessment and must be made on a case-by-case basis.

Examinations and Courses. The Department received one comment requesting that it specifically include language regarding examinations and courses in the title II regulation. Because section 309 of the ADA 42 U.S.C. 12189, reaches "[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post secondary education, professional, or trade purposes," public entities also are covered by this section of the ADA. Indeed, the requirements contained in title II (including the general prohibitions against discrimination, the program access requirements, the reasonable modifications requirements, and the communications requirements) apply to courses and examinations administered by public entities that meet the requirements of section 309. While the Department considers these requirements to be sufficient to ensure that examinations and courses administered by public entities meet the section 309 requirements, the Department acknowledges that the title III regulation, because it addresses examinations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations. *See* 28 CFR 36.309.

Hotel Reservations. In the NPRM, at § 36.302(e), the Department proposed adding specific language to title III addressing the requirements that hotels, timeshare resorts, and other places of lodging make reasonable modifications to their policies, practices, or procedures, when necessary to ensure that individuals with disabilities are able to reserve accessible hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. The NPRM did not propose adding comparable language to the title II regulation as the Department believes that the general nondiscrimination, program access, effective communication, and reasonable modifications requirements of title II provide sufficient guidance to public entities that operate places of lodging (*i.e.,* lodges in State parks, hotels on public college campuses). The Department received no public comments suggesting that it add language on hotel reservations comparable to that proposed for the title III regulation. Although the Department continues to believe that it is unnecessary to add specific language to the title II regulation on this issue, the Department acknowledges that the title III regulation, because it addresses hotel reservations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity that operates a reservation system serving a place of lodging. *See* 28 CFR 36.302(e).

■ 18. Revise the heading to Appendix B to read as follows:

Appendix B to Part 35—Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991

Dated: July 23, 2010.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2010–21821 Filed 9–14–10; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

28 CFR Part 36

[CRT Docket No. 106; AG Order No. 3181–2010]

RIN 1190–AA44

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

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Justice (Department) regulation that implements title III of the Americans with Disabilities Act

(ADA), relating to nondiscrimination on the basis of disability by public accommodations and in commercial facilities. The Department is issuing this final rule 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, and to update or amend certain provisions of the title III regulation so that they comport with the Department's legal and practical experiences in enforcing the ADA since 1991. Concurrently with the publication of the final rule for title III, the Department is publishing a final rule amending its ADA title II regulation, which covers nondiscrimination on the basis of disability in State and local government services.

DATES: *Effective Date:* March 15, 2011.

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

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

SUPPLEMENTARY INFORMATION:

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 13 public members appointed by the President, the majority of whom must be individuals with disabilities, and the heads of 12 Federal departments and agencies specified by statute, including the heads of the Department of Justice and the Department of Transportation (DOT). Originally, the Access Board was established to develop and maintain accessibility guidelines for facilities designed, constructed, altered, or leased with Federal dollars 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, 42 U.S.C. 12134(c), 12186(c), but vests in the Attorney General sole responsibility for the promulgation of those standards that fall within the Department's jurisdiction and enforcement of the regulations.

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

Enactment of the ADA and Issuance of the 1991 Regulations

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability.[1] The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires newly designed and constructed or altered State and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Section 306(a) of the ADA directs the Secretary of Transportation to issue regulations for demand responsive or fixed route systems operated by private entities not primarily engaged in the business of transporting people (sections 302(b)(2)(B) and (C)) and for private entities that are primarily engaged in the business of transporting people (section 304). *See* 42 U.S.C. 12182(b), 12184, 12186(a). Section 306(b) directs the Attorney General to promulgate regulations to carry out the provisions of the rest of title III. 42 U.S.C. 12186(b).

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

Title III, which this rule addresses, prohibits discrimination on the basis of disability in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181–89.

On July 26, 1991, the Department issued 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 1991 title III regulation, which is republished as Appendix D to 28 CFR part 36, contains the ADA Standards for Accessible Design (1991 Standards), which were based upon the version of the Americans with Disabilities Act Accessibility Guidelines (1991 ADAAG) published by the Access Board on the same date. Under the Department's 1991 title III regulation, places of public accommodation and commercial facilities currently are required to comply with the 1991 Standards with respect to newly constructed or altered facilities.

The Access Board's publication of the 2004 ADA/ABA Guidelines was the culmination of a long-term effort to facilitate ADA compliance by eliminating, to the extent possible, inconsistencies among Federal accessibility requirements and between

[1] On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Amendments Act of 2008 (ADA Amendments Act), Public Law 110–325. The ADA Amendments Act amended the ADA definition of disability to clarify its coverage of persons with disabilities and to provide guidance on the application of the definition. This final rule does not contain regulatory language implementing the ADA Amendments Act. The Department intends to publish a supplemental rule to amend the regulatory definition of "disability" to implement the changes mandated by that law.

Federal accessibility requirements and State and local building codes. In support of this effort, the Department is amending its regulation implementing title III and adopting standards consistent with ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines. The Department is also amending its title II regulation, which prohibits discrimination on the basis of disability in State and local government services, concurrently with the publication of this rule in this issue of the **Federal Register**.

Development of the 2004 ADA/ABA Guidelines

In 1994, the Access Board began the process of updating the 1991 ADAAG by establishing an advisory committee composed of members of the design and construction industry, the building code community, and State and local government entities, as well as individuals with disabilities. In 1998, the Access Board 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). In 1999, based largely on the report and recommendations of the advisory committee, the Access Board issued a notice of proposed rulemaking (NPRM) to update and revise its ADA and ABA Accessibility Guidelines. *See* 64 FR 62248 (Nov. 16, 1999). In 2000, the Access Board added specific guidelines on play areas. *See* 65 FR 62498 (Oct. 18, 2000). 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. In September of 2002, the Access Board set forth specific guidelines on recreation facilities. 67 FR 56352 (Sept. 3, 2002).

By the date of its final publication on July 23, 2004, the 2004 ADA/ABA Guidelines had been the subject of extraordinary review and public participation. 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.

The Department was involved extensively in the development of the 2004 ADA/ABA Guidelines. As a Federal member of the Access Board, the Attorney General's representative voted to approve the revised guidelines. ADA Chapter 1 and ADA Chapter 2 of the 2004 ADA/ABA Guidelines provide scoping requirements for facilities subject to the ADA; "scoping" is a term used in the 2004 ADA/ABA Guidelines to describe requirements that prescribe which elements and spaces—and, in some cases, how many—must comply with the technical specifications. ABA Chapter 1 and ABA Chapter 2 provide scoping requirements for facilities subject to the ABA (*i.e.,* facilities designed, built, altered, or leased with Federal funds). Chapters 3 through 10 of the 2004 ADA/ABA Guidelines provide uniform technical specifications for facilities subject to either the ADA or the ABA. This revised format is designed to eliminate unintended conflicts between the two sets of 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. For the purposes of this final rule, the Department will refer to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as the 2004 ADAAG.

These amendments to the 1991 ADAAG have not been adopted previously by the Department as ADA Standards. Through this rule, the Department is adopting revised ADA Standards consistent with the 2004 ADAAG, including all of the amendments to the 1991 ADAAG since 1998. For the purposes of this part, the Department's revised standards are entitled "The 2010 Standards for Accessible Design" and consist of the 2004 ADAAG and the requirements contained in subpart D of 28 CFR part 36. Because the Department has adopted the 2004 ADAAG as part of its title II and title III regulations, once the Department's final rules become effective, the 2004 ADAAG will have legal effect with respect to the Department's title II and title III regulations and will cease to be mere guidance for those areas regulated by the Department. In 2006, DOT adopted the 2004 ADAAG. With respect to those areas regulated by DOT, these guidelines, as adopted by DOT, have had legal effect since 2006.

Under this regulation, the Department of Justice covers passenger vessels operated by private entities not primarily engaged in the business of transporting people with respect to the provision of goods and services of a public accommodation on the vessel. For example, a vessel operator whose vessel departs from Point A, takes passengers on a recreational trip, and returns passengers to Point A without ever providing for disembarkation at a Point B (*e.g.,* a dinner or harbor cruise, a fishing charter) is a public accommodation operated by a private entity not primarily engaged in the business of transporting people. This regulation covers those aspects of the vessel's operation relating to the use and enjoyment of the public accommodation, including, for example, the boarding process, safety policies, accessible routes on the vessel, and the provision of effective communication. Persons with complaints or concerns about discrimination on the basis of disability by vessel operators who are private entities not primarily engaged in the business of transporting people, or questions about how this regulation applies to such operators and vessels, should contact the Department of Justice.

Vessels operated by private entities primarily engaged in the business of transporting people and that provide the goods and services of a public accommodation are covered by this regulation and the Department of Transportation's passenger vessel rule, 49 CFR part 39. A vessel operator whose vessel takes passengers from Point A to Point B (*e.g.,* a cruise ship that sails from Miami to one or more Caribbean islands, a private ferry boat between two points on either side of a river or bay, a water taxi between two points in an urban area) is most likely a private entity primarily engaged in the business of transporting people. Persons with questions about how this regulation applies to such operators and vessels may contact the Department of Justice or the Department of Transportation for guidance or further information. However, the Department of Justice has enforcement authority for all private entities under title III of the ADA, so individuals with complaints about noncompliance with part 39 should provide those complaints to the Department of Justice.

The provisions of this rule and 49 CFR part 39 are intended to be substantively consistent with one another. Consequently, in interpreting the application of this rule to vessel operators who are private entities not primarily engaged in the business of transporting people, the Department of Justice views the obligations of those vessel operators as being similar to those of private entities primarily engaged in the business of transporting people under the provisions of 49 CFR part 39.

The Department's Rulemaking History

The Department published an advance notice of proposed rulemaking (ANPRM) on September 30, 2004, 69 FR

58768, for two reasons: (1) To begin the process of adopting the 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 Office of Management and Budget (OMB) Circular A–4 sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs) (Sept. 17, 2003), available at *http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf* (last visited June 24, 2010). While underscoring that the Department, as a member of the Access Board, already had reviewed comments provided to the Access Board during its development of the 2004 ADAAG, the Department specifically requested public comment on the potential application of the 2004 ADAAG to existing facilities. The extent to which the 2004 ADAAG is used with respect to the barrier removal requirement applicable to existing facilities under title III (as well as with respect to the program access requirement in title II) is within the sole discretion of the Department. The ANPRM dealt with the Department's responsibilities under both title II and title III.

The public response to the ANPRM was substantial. 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. Many of the commenters responded to questions posed specifically by the Department, including questions regarding the Department's application of the 2004 ADAAG once adopted by the Department and the Department's regulatory assessment of the costs and benefits of particular elements. Many other commenters addressed areas of desired regulation or of particular concern.

To enhance accessibility strides made since the enactment of the ADA, commenters asked the Department to focus on previously unregulated areas, such as ticketing in assembly areas; reservations for hotel rooms, rental cars, and boat slips; and captioning. They also asked for clarification on some issues in the 1991 regulations, such as the requirements regarding service animals. Other commenters dealt with specific requirements in the 2004 ADAAG or responded to questions regarding elements scoped for the first time in the 2004 ADAAG, including recreation facilities and play areas. Commenters also provided some information on how to assess the cost of elements in small facilities, office buildings, hotels and motels, assembly areas, hospitals and long-term care facilities, residential units, recreation facilities, and play areas. Still other commenters addressed the effective date of the proposed standards, the triggering event by which the effective date is calculated for new construction, and variations on a safe harbor that would excuse elements built in compliance with the 1991 Standards from compliance with the proposed standards.

After careful consideration of the public comments in response to the ANPRM, on June 17, 2008, the Department published an NPRM covering title III. 73 FR 34508. The Department also published an NPRM on that day covering title II. 73 FR 34466. The NPRMs addressed the issues raised in the public's comments to the ANPRM and sought additional comment, generally and in specific areas, such as the Department's adoption of the 2004 ADAAG, the Department's regulatory assessment of the costs and benefits of the rule, its updates and amendments of certain provisions of the existing title II and III regulations, and areas that were in need of additional clarification or specificity.

A public hearing was held on July 15, 2008, in Washington, DC. Forty-five individuals testified in person or by phone. The hearing was streamed live over the Internet. By the end of the 60-day comment period, the Department had received 4,435 comments addressing a broad range of issues, many of which were common to the title II and title III NPRMs, from representatives of businesses and industries, State and local government agencies, disability advocacy organizations, and private individuals.

The Department notes that this rulemaking was unusual in that much of the proposed regulatory text and many of the questions asked across titles II and III were the same. Consequently, many of the commenters did not provide separate sets of documents for the proposed title II and title III rules, and in many instances, the commenters did not specify which title was being commented upon. As a result, where comments could be read to apply to both titles II and III, the Department included them in the comments and responses for each final rule.

Most of the commenters responded to questions posed specifically by the Department, including what were the most appropriate definitions for terms such as "wheelchair," "mobility device," and "service animal"; how to quantify various benefits that are difficult to monetize; what requirements to adopt for ticketing and assembly areas; whether to adopt safe harbors for small businesses; and how best to regulate captioning. Some comments addressed specific requirements in the 2004 ADAAG or responded to questions regarding elements scoped for the first time in the 2004 ADAAG, including recreation facilities and play areas. Other comments responded to questions posed by the Department concerning certain specific requirements in the 2004 ADAAG.

Relationship to Other Laws

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

(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) or the regulations issued by Federal agencies pursuant to that title.

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

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

These provisions remain unchanged by the final rule. The Department recognizes that public accommodations subject to title III of the ADA may also be subject to title I of the ADA, which prohibits discrimination on the basis of disability in employment; section 504 of the Rehabilitation Act of 1973 and other Federal statutes that prohibit 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 (ACAA), 49 U.S.C. 41705 *et seq.,* and the Fair Housing Act (FHAct), 42 U.S.C. 3601 *et seq.* Compliance with the Department's title II and title III regulations does not ensure compliance with other Federal statutes.

Public accommodations that are subject to the ADA as well as other Federal disability discrimination laws

must be aware of the requirements of all applicable laws and must comply with these laws and their implementing regulations. Although in many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity, or because of distinctions between the statutes. For example, emotional support animals that do not qualify as service animals under the Department's title III regulations may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct and the ACAA. *See, e.g., Overlook Mutual Homes, Inc.* v. *Spencer,* 666 F. Supp. 2d 850 (S.D. Ohio 2009). Public accommodations that operate housing facilities must ensure that they apply the reasonable accommodation requirements of the FHAct in determining whether to allow a particular animal needed by a person with a disability into housing and may not use the ADA definition as a justification for reducing their FHAct obligations. In addition, nothing in the ADA prevents a public accommodation subject to one statute from modifying its policies and providing greater access in order to assist individuals with disabilities in achieving access to entities subject to other Federal statutes. For example, a quick service restaurant at an airport is, as a public accommodation, subject to the title III requirements, not to the ACAA requirements. Conversely, an air carrier that flies in and out of the same airport is required to comply with the ACAA, but is not covered by title III of the ADA. If a particular animal is a service animal for purposes of the ACAA and is thus allowed on an airplane, but is not a service animal for purposes of the ADA, nothing in the ADA prohibits an airport restaurant from allowing a ticketed passenger with a disability who is traveling with a service animal that meets the ACAA's definition of a service animal to bring that animal into the facility even though under the ADA's definition of service animal the animal lawfully could be excluded.

Organization of This Rule

Throughout this rule, the original ADA Standards, which are republished as Appendix D to 28 CFR part 36, will be referred to as the "1991 Standards." The original title III regulation, codified at 28 CFR part 36 (2009), will be referred to as the "1991 regulation" or the "1991 title III regulation." ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines, 36 CFR part 1191, app. B and D (2009), will be referred to as the "2004 ADAAG." The Department's Notice of Proposed Rulemaking, 73 FR 34508 (June 17, 2008), will be referred to as the "NPRM." As noted above, the 2004 ADAAG, taken together with the requirements contained in subpart D of 28 CFR part 36 (New Construction and Alterations) of the final rule, will be referred to as the "2010 Standards." The amendments made to the 1991 title III regulation and the adoption of the 2004 ADAAG, taken together, will be referred to as the "final rule."

In performing the required periodic review of its existing regulation, the Department has reviewed the title III regulation section by section, and, as a result, has made several clarifications and amendments in this rule. Appendix A of the final rule, "Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities," codified as Appendix A to 28 CFR part 36, provides the Department's response to comments and its explanations of the changes to the regulation. The section entitled "Section-by-Section Analysis and Response to Comments" in Appendix A provides a detailed discussion of the changes to the title III regulation. The Section-by-Section Analysis follows the order of the 1991 title III regulation, except that regulatory sections that remain unchanged are not referenced. The discussion within each section explains the changes 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 also discusses many of the questions asked by the Department for specific public response. The section of Appendix A entitled "Other Issues" discusses public comment on several issues of concern to the Department that were the subject of questions that are not specifically addressed in the Section-by-Section Analysis.

The Department's description of the 2010 Standards, as well as a discussion of the public comments on specific sections of the 2004 ADAAG, is found in Appendix B of this final rule, "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," codified as Appendix B to 28 CFR part 36.

The provisions of this rule generally take effect six months from its publication in the **Federal Register**. The Department has determined, however, that compliance with the requirements related to new construction and alterations and reservations at a place of lodging shall not be required until 18 months from the publication date of this rule. These exceptions are set forth in §§ 36.406(a) and 36.302(e)(3), respectively, and are discussed in greater detail in Appendix A. *See* discussions in Appendix A entitled "Section 36.406 Standards for New Construction and Alterations" and "Section 36.302(e) Hotel Reservations."

This final rule only addresses issues that were identified in the NPRM as subjects the Department intended to regulate through this rulemaking proceeding. Because the Department indicated in the NPRM that it did not intend to regulate certain areas, including equipment and furniture, accessible golf cars, and movie captioning and video description, as part of this rulemaking proceeding, the Department believes it would be appropriate to solicit more public comment about these areas prior to making them the subject of a rulemaking. The Department intends to engage in additional rulemaking in the near future addressing accessibility in these areas and others, including next generation 9–1–1 and accessibility of Web sites operated by covered public entities and public accommodations.

ADDITIONAL INFORMATION:

Regulatory Process Matters (SBREFA, Regulatory Flexibility Act, and Executive Orders)

The Department must provide two types of assessments as part of its final rule: An analysis of the costs and benefits of adopting the changes contained in this rule, 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. *See* E.O. 12866, 58 FR 51735, 3 CFR, 1994 Comp., p. 638, as amended; Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 610(a); OMB Circular A–4, available at *http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf* (last visited June 24, 2010); E.O. 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247.

In the NPRM, the Department kept open the possibility that, if warranted by public comments received on an issue raised by the 2004 ADAAG or by the results of the Department's Initial Regulatory Impact Analysis (Initial RIA), available at *http://www.ada.gov/NPRM2008/ria.htm,* showing that the

likely costs of making a particular feature or facility accessible were disproportionate to the benefits (including both monetized and non-monetized benefits) to persons with disabilities, the Attorney General, as a member of the Access Board, could return the issue to the Access Board for further consideration. After careful consideration, the Department has determined that it is unnecessary to return any issues to the Access Board for additional consideration.

Executive Order 12866

This rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Department has evaluated its existing regulations for title II and title III section by section, and many of the provisions in the final rule for both titles reflect its efforts to mitigate any negative effects on small entities. A Final Regulatory Impact Analysis (Final RIA or RIA) was prepared by the Department's contractor, HDR|HLB Decision Economics, Inc. (HDR). In accordance with Executive Order 12866, as amended, and OMB Circular A–4, the Department has reviewed and considered the Final RIA and has accepted the results of this analysis as its assessment of the benefits and costs of the final rules.

Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to "distributive impacts" and "equity," *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. The ADA states, "[i]t is the purpose of this [Act] (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]" 42 U.S.C. 12101(b). Many of the benefits of this rule stem from the provision of such standards, which will promote inclusion, reduce stigma and potential embarrassment, and combat isolation, segregation, and second-class citizenship of individuals with disabilities. Some of these benefits are, in the words of Executive Order 12866, "difficult to quantify, but nevertheless essential to consider." E.O. 12866, section 1(a). The Department has considered such benefits here.

Final Regulatory Impact Analysis

The Final RIA embodies a comprehensive benefit-cost analysis of the final rules for both title II and title III and assesses the incremental benefits and costs of the 2010 Standards relative to a primary baseline scenario (1991 Standards). In addition, the Department conducted additional research and analyses for requirements having the highest negative net present values under the primary baseline scenario. This approach was taken because, while the 1991 Standards are the only uniform set of accessibility standards that apply to public accommodations, commercial facilities, and State and local government facilities nationwide, it is also understood that many State and local jurisdictions have already adopted IBC/ANSI model code provisions that mirror those in the 2004 ADAAG. The assessments based on this approach assume that covered entities currently implementing codes that mirror the 2004 ADAAG will not need to modify their code requirements once the rules are finalized. They also assume that, even without the final rules, the current level of compliance would be unchanged. The Final RIA contains specific information, including data in chart form, detailing which States have already adopted the accessibility standards for this subset of six requirements. The Department believes that the estimates resulting from this approach represent a reasonable upper and lower measure of the likely effects these requirements will have that the Department was able to quantify and monetize.

The Final RIA estimates the benefits and costs for all new (referred to as "supplemental") requirements and revised requirements across all types of newly constructed and existing facilities. The Final RIA also incorporates a sophisticated risk analysis process that quantifies the inherent uncertainties in estimating costs and benefits and then assesses (through computer simulations) the relative impact of these factors when varied simultaneously. A copy of the Final RIA will be made available online for public review on the Department's ADA Home Page (*http://www.ada.gov*).

From an economic perspective (as specified in OMB Circular A–B4), the results of the Final RIA demonstrate that the Department's final rules increase social resources and thus represent a public good because monetized benefits exceed monetized costs—that is, the regulations have a positive net present value (NPV). Indeed, under every scenario assessed in the Final RIA, the final rules have a positive NPV. The Final RIA's first scenario examines the incremental impact of the final rules using the "main" set of assumptions (*i.e.,* assuming a primary baseline (1991 Standards), that the safe harbor applies, and that for title III entities barrier removal is readily achievable for 50 percent of elements subject to supplemental requirements).

EXPECTED IMPACT OF THE RULES [2]

[In billions]

Discount rate	Expected NPV	Total expected PV (benefits)	Total expected PV (costs)
3%	$40.4	$66.2	$25.8
7	9.3	22.0	12.8

Under this set of assumptions, the final rules have an expected NPV of $9.3 billion (7 percent discount rate) and $40.4 billion (3 percent discount rate). *See* Final RIA, table ES–1 & figure ES–2.

Water Closet Clearances

The Department gave careful consideration to the costs and benefits of its adoption of the standards relating to water closet clearances in single-user toilet rooms. The primary effect of the Department's proposed final rules governing water closet clearances in single-user toilet rooms with in-swinging and out-swinging doors is to allow sufficient room for "side" or "parallel" methods of transferring from a wheelchair to a toilet. Under the current 1991 Standards, the requisite clearance space in single-user toilet rooms between and around the toilet and the lavatory does not permit these methods of transfer. Side or parallel transfers are used by large numbers of persons who use wheelchairs and are regularly taught in rehabilitation and occupational therapy. Currently, persons who use side or parallel transfer methods from their wheelchairs are faced with a stark choice at establishments with single-user toilet rooms—*i.e.,* patronize the establishment but run the risk of needing assistance when using the restroom, travel with someone who would be able to provide assistance in toileting, or forgo the visit entirely. The revised water closet clearance regulations would make single-user toilet rooms accessible to all persons

[2] The analysis assumes these regulations will be in force for 15 years. Incremental costs and benefits are calculated for all construction, alterations, and barrier removal that is expected to occur during these 15 years. The analysis also assumes that any new or revised ADA rules enacted 15 years from now will include a safe harbor provision. Thus, any facilities constructed in year 14 of the final rules are assumed to continue to generate benefits to users, and to incur any operating or replacement costs for the life of these buildings, which is assumed to be 40 years.

who use wheelchairs, not just those with the physical strength, balance, and dexterity and the training to use a front-transfer method. Single-user toilet rooms are located in a wide variety of public and private facilities, including restaurants, fast-food establishments, schools, retail stores, parks, sports stadiums, and hospitals. Final promulgation of these requirements might thus, for example, enable a person who uses a side or parallel transfer method to use the restroom (or use the restroom independently) at his or her local coffee shop for the first time.

Because of the complex nature of its cost-benefit analysis, the Department is providing "plain language" descriptions of the benefits calculations for the two revised requirements with the highest estimated total costs: Water closet clearance in single-user toilet rooms with out-swinging doors (RIA Req. #28) (section 604.3 of the 2010 Standards) and water closet clearance in single-user toilet rooms with in-swinging doors (RIA Req. #32) (sections 604.3 and 603.2.3 Exception 2 of the 2010 Standards). Since many of the concepts and calculations in the Final RIA are highly technical, it is hoped that, by providing "lay" descriptions of how benefits are monetized for an illustrative set of requirements, the Final RIA will be more transparent and afford readers a more complete understanding of the benefits model generally. Because of the widespread adoption of the water closet clearance standards in existing State and local building codes, the following calculations use the IBC/ANSI baseline.

General description of monetized benefits for water closet clearance in single-user toilet rooms—out-swinging doors (Req. #28). In order to assess monetized benefits for the requirement covering water closet clearances in single-user toilet rooms with out-swinging doors, a determination needed to be made concerning the population of users with disabilities who would likely benefit from this revised standard. Based on input received from a panel of experts jointly convened by HDR and the Department to discuss benefits-related estimates and assumptions used in the RIA model, it was assumed that accessibility changes brought about by this requirement would benefit persons with any type of ambulatory (*i.e.,* mobility-related) disability, such as persons who use wheelchairs, walkers, or braces. Recent census figures estimate that about 11.9 percent of Americans ages 15 and older have an ambulatory disability, or about 35 million people. This expert panel also estimated that single-user toilet rooms with out-swinging doors would be used slightly less than once every other visit to a facility with such toilet rooms covered by the final rules (or, viewed another way, about once every two hours spent at a covered facility assumed to have one or more single-user toilet rooms with out-swinging doors) by an individual with an ambulatory disability. The expert panel further estimated that, for such individuals, the revised requirement would result in an average time savings of about five and a half minutes when using the restroom. This time savings is due to the revised water closet clearance standard, which permits, among other things, greater flexibility in terms of access to the toilet by parallel or side transfer, thereby perhaps reducing the wait for another person to assist with toileting and the need to twist or struggle to access the toilet independently. Based on average hourly wage rates compiled by the U.S. Department of Labor, the time savings for Req. #28 is valued at just under $10 per hour.

For public and private facilities covered by the final rules, it is estimated that there are currently about 11 million single-user toilet rooms with out-swinging doors. The majority of these types of single-user toilet rooms, nearly 7 million, are assumed to be located at "Indoor Service Establishments," a broad facility group that encompasses various types of indoor retail stores such as bakeries, grocery stores, clothing stores, and hardware stores. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with out-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. #28, it is further understood that about half of all existing facilities assumed to have single-user toilet rooms with out-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

With respect to new construction, it is assumed that each single-user toilet room with an out-swinging door will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the building (*i.e.,* a period of time between 1 and 39 years).

Summing up monetized benefits to users with disabilities across all types of public and private facilities covered by the final rules, and assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, it is expected that the revised requirement for water closet clearance in single-user toilet rooms with out-swinging doors will result in net benefits of approximately $900 million over the life of these regulations.

General description of monetized benefits for water closet clearance in single-user toilet rooms—in-swinging doors (Req. # 32). For the water closet clearance in single-user toilet rooms with the in-swinging door requirement (Req. #32), the expert panel determined that the primary beneficiaries would be persons who use wheelchairs. As compared to single-user toilet rooms with out-swinging doors, those with in-swinging doors tend to be larger (in terms of square footage) in order to accommodate clearance for the in-swinging door and, thus, are already likely to have adequate clear floor space for persons with disabilities who use other types of mobility aids such as walkers and crutches.

The expert benefits panel estimated that single-user toilet rooms with in-swinging doors are used less frequently on average—about once every 20 visits to a facility with such a toilet room by a person who uses a wheelchair—than their counterpart toilet rooms with out-swinging doors. This panel also determined that, on average, each user would realize a time savings of about 9 minutes as a result of the enhanced clearances required by this revised standard.

The RIA estimates that there are about 4 million single-user toilet rooms with in-swinging doors in existing facilities. About half of the single-user toilet rooms with in-swinging doors are assumed to be located in single-level stores, and about a quarter of them are assumed to be located in restaurants. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with in-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. #32, it is further understood that slightly more than 70 percent of all

existing facilities assumed to have single-user toilet rooms with in-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

Similar to the assumptions for Req. #28, it is assumed that newly constructed single-user toilet rooms with in-swinging doors will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the building (*i.e.,* a period of time between 1 and 39 years). Over this time period, the total estimated value of benefits to users of water closets with in-swinging doors from the time they will save and decreased discomfort they will experience is nearly $12 million.

Additional benefits of water closet clearance standards. The standards requiring sufficient space in single-user toilet rooms for a wheelchair user to effect a side or parallel transfer are among the most costly (in monetary terms) of the new provisions in the Access Board's guidelines that the Department adopts in this rule—but also, the Department believes, one of the most beneficial in non-monetary terms. Although the monetized costs of these requirements substantially exceed the monetized benefits, the additional benefits that persons with disabilities will derive from greater safety, enhanced independence, and the avoidance of stigma and humiliation—benefits that the Department's economic model could not put in monetary terms—are, in the Department's experience and considered judgment, likely to be quite high. Wheelchair users, including veterans returning from our Nation's wars with disabilities, are taught to transfer onto toilets from the side. Side transfers are the safest, most efficient, and most independence-promoting way for wheelchair users to get onto the toilet. The opportunity to effect a side transfer will often obviate the need for a wheelchair user or individual with another type of mobility impairment to obtain the assistance of another person to engage in what is, for most people, among the most private of activities. Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to "distributive impacts" and "equity," *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. These water closet clearance provisions will have non-monetized benefits that promote equal access and equal opportunity for individuals with disabilities, and will further the ADA's purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

The Department's calculations indicated that, in fact, people with the relevant disabilities would have to place only a very small monetary value on these quite substantial benefits for the costs and benefits of these water closet clearance standards to break even. To make these calculations, the Department separated out toilet rooms with out-swinging doors from those with in-swinging doors, because the costs and benefits of the respective water closet clearance requirements are significantly different. The Department estimates that, assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, the costs of the requirement as applied to toilet rooms with out-swinging doors will exceed the monetized benefits by $454 million, an annualized net cost of approximately $32.6 million. But a large number of people with disabilities will realize benefits of independence, safety, and avoided stigma and humiliation as a result of the requirement's application in this context. Based on the estimates of its expert panel and its own experience, the Department believes that both wheelchair users and people with a variety of other mobility disabilities will benefit. The Department estimates that people with the relevant disabilities will use a newly accessible single-user toilet room with an out-swinging door approximately 677 million times per year. Dividing the $32.6 million annual cost by the 677 million annual uses, the Department concludes that for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at just under 5 cents per visit. The Department believes, based on its experience and informed judgment, that 5 cents substantially understates the value people with the relevant disabilities would place on these benefits in this context.

There are substantially fewer single-user toilet rooms with in-swinging doors, and substantially fewer people with disabilities will benefit from making those rooms accessible. While both wheelchair users and individuals with other ambulatory disabilities will benefit from the additional space in a room with an out-swinging door, the Department believes, based on the estimates of its expert panel and its own experience, that wheelchair users likely will be the primary beneficiaries of the in-swinging door requirement. The Department estimates that people with the relevant disabilities will use a newly accessible single-user toilet room with an in-swinging door approximately 8.7 million times per year. Moreover, the alteration costs to make a single-user toilet room with an in-swinging door accessible are substantially higher (because of the space taken up by the door) than the equivalent costs of making a room with an out-swinging door accessible. Thus, the Department calculates that, assuming 72 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, the costs of applying the toilet room accessibility standard to rooms with in-swinging doors will exceed the monetized benefits of doing so by $266.3 million over the life of the regulations, or approximately $19.14 million per year. Dividing the $19.14 million annual cost by the 8.7 million annual uses, the Department concludes that for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at approximately $2.20 per visit. The Department believes, based on its experience and informed judgment, that this figure approximates, and probably understates, the value wheelchair users place on safety, independence, and the avoidance of stigma and humiliation in this context.

Alternate Scenarios

Another scenario in the Final RIA explores the incremental impact of varying the assumptions concerning the percentage of existing elements subject to supplemental requirements for which barrier removal would be readily achievable. Readily achievable barrier removal rates are modeled at 0 percent, 50 percent, and 100 percent levels. The results of this scenario show that the expected NPV is positive for each readily achievable barrier removal rate and that varying this assumed rate has little impact on expected NPV. *See* Final RIA, figure ES–3.

A third set of analyses in the Final RIA demonstrates the impact of using alternate baselines based on model codes instead of the primary baseline.

The IBC model codes, which have been widely adopted by State and local jurisdictions around the country, are significant because many of the requirements in the final rules mirror accessibility provisions in the IBC model codes (or standards incorporated therein by reference, such as ANSI A117.1). The actual economic impact of the Department's final rules is, therefore, tempered by the fact that many jurisdictions nationwide have already adopted and are enforcing portions of the final rules—indeed, this was one of the goals underlying the Access Board's efforts to harmonize the 2004 ADAAG Standards with the model codes. However, capturing the economic impact of this reality poses a difficult modeling challenge due to the variety of methods by which States and localities have adopted the IBC/ANSI model codes (*e.g.,* in whole, in part, and with or without amendments), as well as the lack of a national "facility census" establishing the location, type, and age of existing ADA-covered facilities.

As a result, in the first set of alternate IBC baseline analyses, the Final RIA assumes that all of the three IBC model codes—IBC 2000, IBC 2003, and IBC 2006—have been fully adopted by all jurisdictions and apply to all facilities nationwide. As with the primary baseline scenarios examined in the Final RIA, use of these three alternate IBC baselines results in positive expected NPVs in all cases. *See* Final RIA, figure ES–4. These results also indicate that IBC 2000 and IBC 2006 respectively have the highest and lowest expected NPVs. These results are due to changes in the make-up of the set of requirements that is included in each alternative baseline.

Additionally, a second, more limited alternate baseline analysis in the Final RIA uses a State-specific and requirement-specific alternate IBC/ANSI baseline in order to demonstrate the likely actual incremental impact of an illustrative subset of 20 requirements under current conditions nationwide. For this analysis, research was conducted on a subset of 20 requirements in the final rules that have negative net present values under the primary baseline and readily identifiable IBC/ANSI counterparts to determine the extent to which they each respectively have been adopted at the State or local level. With respect to facilities, the population of adopting jurisdictions was used as a proxy for facility location. In other words, it was assumed that the number of ADA-covered facilities respectively compliant with these 20 requirements was equal to the percentage of the United States population (based on statistics from the Census Bureau) currently residing in those States or local jurisdictions that have adopted the IBC/ANSI counterparts to these requirements. The results of this more limited analysis, using State-specific and requirement-specific alternate IBC/ANSI baselines for these 20 requirements, demonstrate that the widespread adoption of IBC model codes by States and localities significantly lessens the financial impact of these specific requirements. Indeed, the Final RIA estimates that, if the NPVs for these 20 requirements resulting from the requirement-specific alternate IBC/ANSI baseline are substituted for their respective results under the primary baseline, the overall NPV for the final rules increases from $9.2 billion to $12.0 billion. *See* Final RIA, section 6.2.2 & table 10.

Benefits Not Monetized in the Formal Analysis

Finally, the RIA recognizes that additional benefits are likely to result from the new standards. Many of these benefits are more difficult to quantify. Among the potential benefits that have been discussed by researchers and advocates are reduced administrative costs due to harmonized guidelines, increased business opportunities, increased social development, and improved health benefits. For example, the final rules will substantially increase accessibility at newly scoped facilities such as recreation facilities and judicial facilities, which previously have been very difficult for persons with disabilities to access. Areas where the Department believes entities may incur benefits that are not monetized in the formal analysis include, but may not be limited to, the following:

Use benefits accruing to persons with disabilities. The final rules should improve the overall sense of well-being of persons with disabilities, who will know that public entities and places of public accommodation are generally accessible, and who will have improved individual experiences. Some of the most frequently cited qualitative benefits of increased access are the increase in one's personal sense of dignity that arises from increased access and the decrease in possibly humiliating incidents due to accessibility barriers. Struggling to join classmates on a stage, to use a bathroom with too little clearance, or to enter a swimming pool all negatively affect a person's sense of independence and can lead to humiliating accidents, derisive comments, or embarrassment. These humiliations, together with feelings of being stigmatized as different or inferior from being relegated to use other, less comfortable or pleasant elements of a facility (such as a bathroom instead of a kitchen sink for rinsing a coffee mug at work), all have a negative effect on persons with disabilities.

Use benefits accruing to persons without disabilities. Improved accessibility can affect more than just the rule's target population; persons without disabilities may also benefit from many of the requirements. Even though the requirements were not designed to benefit persons without disabilities, any time savings or easier access to a facility experienced by persons without disabilities are also benefits that should properly be attributed to that change in accessibility. Curb cuts in sidewalks make life easier for those using wheeled suitcases or pushing a baby stroller. For people with a lot of luggage or a need to change clothes, the larger bathroom stalls can be highly valued. A ramp into a pool can allow a child (or adult) with a fear of water to ease into that pool. All are examples of "unintended" benefits of the rule. And ideally, all should be part of the calculus of the benefits to society of the rule.

Social benefits. Evidence supports the notion that children with and without disabilities benefit in their social development from interaction with one another. Therefore, there will likely be social development benefits generated by an increase in accessible play areas. However, these benefits are nearly impossible to quantify for several reasons. First, there is no guarantee that accessibility will generate play opportunities between children with and without disabilities. Second, there may be substantial overlap between interactions at accessible play areas and interactions at other facilities, such as schools and religious facilities. Third, it is not certain what the unit of measurement for social development should be.

Non-use benefits. There are additional, indirect benefits to society that arise from improved accessibility. For instance, resource savings may arise from reduced social service agency outlays when people are able to access centralized points of service delivery rather than receiving home-based care. Home-based and other social services may include home health care visits and welfare benefits. Third-party employment effects can arise when enhanced accessibility results in increasing rates of consumption by disabled and non-disabled populations, which in turn results in reduced unemployment.

Two additional forms of benefits are discussed less often, let alone quantified: Option value and existence value. Option value is the value that people with and without disabilities derive from the option of using accessible facilities at some point in the future. As with insurance, people derive benefit from the knowledge that the option to use the accessible facility exists, even if it ultimately goes unused. Simply because an individual is a non-user of accessible elements today does not mean that he or she will remain so tomorrow. In any given year, there is some probability that an individual will develop a disability (either temporary or permanent) that will necessitate use of these features. For example, the 2000 Census found that 41.9 percent of adults 65 years and older identified themselves as having a disability. Census Bureau figures, moreover, project that the number of people 65 years and older will more than double between 2000 and 2030—from 35 million to 71.5 million. Therefore, even individuals who have no direct use for accessibility features today get a direct benefit from the knowledge of their existence should such individuals need them in the future.

Existence value is the benefit that individuals get from the plain existence of a good, service or resource—in this case, accessibility. It can also be described as the value that people both with and without disabilities derive from the guarantees of equal treatment and non-discrimination that are accorded through the provision of accessible facilities. In other words, people value living in a country that affords protections to individuals with disabilities, whether or not they themselves are directly or indirectly affected. Unlike use benefits and option value, existence value does not require an individual ever to use the resource or plan on using the resource in the future. There are numerous reasons why individuals might value accessibility even if they do not require it now and do not anticipate needing it in the future.

Costs Not Monetized in the Formal Analysis

The Department also recognizes that in addition to benefits that cannot reasonably be quantified or monetized, there may be negative consequences and costs that fall into this category as well. The absence of a quantitative assessment of such costs in the formal regulatory analysis is not meant to minimize their importance to affected entities; rather, it reflects the inherent difficulty in estimating those costs. Areas where the Department believes entities may incur costs that are not monetized in the formal analysis include, but may not be limited to, the following:

Costs from deferring or forgoing alterations. Entities covered by the final rules may choose to delay otherwise desired alterations to their facilities due to the increased incremental costs imposed by compliance with the new requirements. This may lead to facility deterioration and decrease in the value of such facilities. In extreme cases, the costs of complying with the new requirements may lead some entities to opt to not build certain facilities at all. For example, the Department estimates that the incremental costs of building a new wading pool associated with the final rules will increase by about $142,500 on average. Some facilities may opt to not build such pools to avoid incurring this increased cost.

Loss of productive space while modifying an existing facility. During complex alterations, such as where moving walls or plumbing systems will be necessary to comply with the final rules, productive space may be unavailable until the alterations are complete. For example, a hotel altering its bathrooms to comply with the final rules will be unable to allow guests to occupy these rooms while construction activities are underway, and thus the hotel may forgo revenue from these rooms during this time. While the amount of time necessary to perform alterations varies significantly, the costs associated with unproductive space could be high in certain cases, especially if space is already limited or if an entity or facility is located in an area where real estate values are particularly high (*e.g.,* New York or San Francisco).

Expert fees. Another type of cost to entities that is not monetized in the formal analysis is legal fees to determine what, if anything, a facility needs to do in order to comply with the new rules or to respond to lawsuits. Several commenters indicated that entities will incur increased legal costs because the requirements are changing for the first time since 1991. Since litigation risk could increase, entities could spend more on legal fees than in the past. Likewise, covered entities may face incremental costs when undertaking alterations because their engineers, architects, or other consultants may also need to consider what modifications are necessary to comply with the new requirements. The Department has not quantified the incremental costs of the services of these kinds of experts.

Reduction in facility value and losses to individuals without disabilities due to the new accessibility requirements. It is possible that some changes made by entities to their facilities in order to comply with the new requirements may result in fewer individuals without disabilities using such facilities (because of decreased enjoyment) and may create a disadvantage for individuals without disabilities, even though the change might increase accessibility for individuals with disabilities. For example, the new requirements for wading pools might decrease the value of the pool to the entity that owns it due to fewer individuals using it (because the new requirements for a sloped entry might make the pool too shallow). Similarly, several commenters from the miniature golf industry expressed concern that it would be difficult to comply with the regulations for accessible holes without significantly degrading the experience for other users. Finally, with respect to costs to individuals who do not have disabilities, a very tall person, for example, may be inconvenienced by having to reach further for a lowered light switch.

Section 610 Review

The Department also is required to conduct a periodic regulatory review pursuant to section 610 of the RFA, as amended by the SBREFA.

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 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.* 610(a).

In developing the 2010 Standards, the Department reviewed the 1991 Standards section by section, and, as a result, has made several clarifications and amendments in both the title II and title III implementing regulations. The changes reflect the Department's analysis and review of complaints or comments from the public, as well as changes in technology. Many of the

amendments 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 also has 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 are functionally equivalent to the process required to complete a section 610 review. Therefore, this rulemaking fulfills the Department's obligations under the RFA.

Final Regulatory Flexibility Analysis

This final rule also has been reviewed by the Small Business Administration's Office of Advocacy (Advocacy) in accordance with Executive Order 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247. Chapter Seven of the Final RIA demonstrates that the final rule will not have a significant economic impact on a substantial number of small entities. The Department has also conducted a final regulatory flexibility analysis (FRFA) as a component of this rulemaking. Collectively, the ANPRM, NPRM, Initial RIA, Final RIA, and 2010 Standards include all of the elements of a FRFA required by the RFA. *See* 5 U.S.C. 604(a)(1)–(5).

Section 604(a) lists the specific requirements for a FRFA. The Department has addressed these RFA requirements throughout the ANPRM, NPRM, the 2010 Standards, and the RIA. In summary, the Department has satisfied its FRFA obligations under section 604(a) by providing the following:

1. *Succinct summaries of the need for, and objectives of, the final rule.* The Department is issuing this final rule in order to comply with its obligations under both the ADA and the SBREFA. The Department is also updating or amending certain provisions of the existing title III regulation so that they are consistent with the title II regulations and comport with the Department's legal and practical experiences in enforcing the ADA.

The ADA requires the Department to adopt enforceable accessibility standards under the ADA that are consistent with the Access Board's minimum accessibility guidelines and requirements. Accordingly, this rule adopts ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as part of the 2010 Standards, which will give the guidelines legal effect with respect to the Department's title II and title III regulations.

Under the SBREFA, the Department is required to perform a periodic review of its 1991 rule because the rule may have a significant economic impact on a substantial number of small entities. The SBREFA also requires the Department to make a regulatory assessment of the costs and benefits of any significant regulatory action. *See* preamble sections of the final rules for titles II and III entitled "Summary"; Department of Justice Advanced Notice of Proposed Rulemaking, 69 FR 58768, 58768B70, (Sept. 30, 2004) (outlining the regulatory history, goals, and rationale underlying the Department's proposal to revise its regulations implementing titles II and III of the ADA); and Department of Justice Notice of Proposed Rulemaking, 73 FR 34508, 34508B14 (June 17, 2008) (outlining the regulatory history and rationale underlying the Department's proposal to revise its regulations implementing titles II and III of the ADA).

2. *Summaries of significant issues raised by public comments in response to the Department's initial regulatory flexibility analysis (IRFA) and discussions of regulatory revisions made as a result of such comments.* The majority of the comments received by the Department addressing its IRFA set forth in the title III NPRM were submitted by the Advocacy. Advocacy acknowledged that the Department took into account the comments and concerns of small businesses; however, Advocacy remained concerned about certain items in the Department's NPRM and requested clarification or additional guidance on certain items.

General Safe Harbor. Advocacy expressed support for the Department's proposal to allow an element-by-element safe harbor for elements that now comply with the 1991 Standards and encouraged the Department to include specific technical assistance in the Small Business Compliance Guide that the Department is required to publish pursuant to section 212 of the SBREFA, 5 U.S.C. 610 *et seq.* Advocacy requested that technical assistance outlining which standards are subject to the safe harbor be included in the Department's guidance. The Department has provided a list of the new requirements in the 2010 Standards that are not eligible for the safe harbor in § 36.304(d)(2)(iii)(A)–(L) of the final rule and plans to include additional information about the application of the safe harbor in the Department's Small Business Compliance Guide. Advocacy also requested that guidance regarding the two effective dates for regulations also be provided, and the Department plans to include such guidance in its Small Business Compliance Guide.

Small Business Safe Harbor. Advocacy expressed disappointment that the Department did not include a small business safe harbor in the final rule. In the NPRM, the Department proposed to include a small business safe harbor. Advocacy conceptually supported this safe harbor but had concerns regarding its application. Commenters from both the disability community and the business community uniformly, and quite adamantly, opposed the Department's proposal. Some business commenters suggested alternative safe harbors, but there was no common thread among their suggestions that would enable the Department to craft a proposal that would draw support from the affected communities.

Advocacy recommended that the Department continue to study how the proposed small business safe harbor might be made workable in future rulemakings, and recommended that the Department also seek other alternatives that minimize the economic impact of the ADA rulemakings in the future. The Department is mindful of its obligations under the SBREFA and will be sensitive to the need to mitigate costs for small businesses in any future rulemaking; however, based on the information currently available, the Department has declined to commit to a specific regulatory approach in the final rule.

Indirect Costs. Advocacy and other commenters representing business interests expressed concern that businesses would incur substantial indirect costs under the final rule for accessibility consultants, legal counsel, training, and the development of new policies and procedures. The Department believes that such "indirect costs," even assuming they would occur as described by these commenters, are not properly attributed to the Department's final rule implementing the ADA.

The vast majority of the new requirements are incremental changes subject to a safe harbor. All businesses

currently in compliance with the 1991 Standards will neither need to undertake further retrofits nor require the services of a consultant to tell them so. If, on the other hand, elements at an existing facility are *not* currently in compliance with the 1991 Standards, then the cost of making such a determination and bringing these elements into compliance are not properly attributed to the final rule, but to lack of compliance with the 1991 Standards.

For the limited number of requirements in the final rule that are supplemental, the Department believes that covered entities simply need to determine whether they have an element covered by a supplemental requirement (*e.g.,* a swimming pool) and then conduct any necessary barrier removal work either in-house or by contacting a local contractor. Determining whether such an element exists is expected to take only a minimal amount of staff time. Nevertheless, Chapter 5 of the Final RIA has a high-end estimate of the additional management costs of such evaluation (from 1 to 8 hours of staff time).

The Department also anticipates that businesses will incur minimal costs for accessibility consultants to ensure compliance with the new requirements for New Construction and Alterations in the final rule. Both the 2004 ADAAG and the proposed requirements have been made public for some time and are already being incorporated into design plans by architects and builders. Further, in adopting the final rule, the Department has sought to harmonize, to the greatest extent possible, the ADA Standards with model codes that have been adopted on a widespread basis by State and local jurisdictions across the country. Accordingly, many of the requirements in the final rule are already incorporated into building codes nationwide. Additionally, it is assumed to be part of the regular course of business—and thereby incorporated into standard professional services or construction contracts—for architects and contractors to keep abreast of changes in applicable Federal, State, and local laws and building codes. Given these considerations, the Department has determined that the additional costs, if any, for architectural or contractor services that arise out of the final rule should be minimal.

Some commenters stated that the final rule would require them to develop new policies or manuals to retrain employees on the revised ADA standards. However, it is the Department's view that because the revised and supplemental requirements address architectural issues and features, the final rule would require minimal, if any, changes to the overall policies and procedures of covered entities.

Finally, commenters representing business interests expressed the view that the final rule would cause businesses to incur significant legal costs in order to defend ADA lawsuits. However, regulatory impact analyses are not an appropriate forum for assessing the cost covered entities may bear, or the repercussions they may face, for failing to comply (or allegedly failing to comply) with current law. *See* Final RIA, Ch. 3, section 3.1.4, "Other Management Transition Costs"; Ch. 5, "Updates to the Regulatory Impact Analysis"; and table 15, "Impact of NPV of Estimated Managerial Costs for Supplemental Requirements at All Facilities."

3. *Estimates of the number and type of small entities to which the final rule will apply.* The Department estimates that the final rule will apply to approximately three million small entities or facilities covered by title III. *See* Final RIA, Ch. 7, "Small Business Impact Analysis," table 17, and app. 5, "Small Business Data"; *see also* 73 FR 36964, 36996–37009 (June 30, 2008) (estimating the number of small entities the Department believes may be impacted by the NPRM and calculating the likely incremental economic impact of the rule on small facilities/entities versus "typical" (*i.e.,* average-sized) facilities/entities).

4. *A description of the projected reporting, record-keeping, and other compliance requirements of the final 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.* The final rule imposes no new record-keeping or reporting requirements. *See* preamble section entitled "Paperwork Reduction Act." Small entities may incur costs as a result of complying with the final rules. These costs are detailed in the Final RIA, Chapter 7, "Small Business Impact Analysis" and accompanying Appendix 5, "Small Business Data."

5. *Descriptions of the steps taken by the Department to minimize any significant economic impact on small entities consistent with the stated objectives of the ADA, including the reasons for selecting the alternatives adopted in the final rule and for rejecting other significant alternatives.* From the outset of this rulemaking, the Department has been mindful of small entities and has taken numerous steps to minimize the impact of the final rule on small businesses. Several of these steps are summarized below.

As an initial matter, the Department—as a voting member of the Access Board—was extensively involved in the development of the 2004 ADAAG. These guidelines, which are incorporated into the 2010 Standards, reflect a conscious effort to mitigate any significant economic impact on small businesses in several respects. First, one of the express goals of the 2004 ADAAG is harmonization of Federal accessibility guidelines with industry standards and model codes that often form the basis of State and local building codes, thereby minimizing the impact of these guidelines on all covered entities, but especially small businesses. Second, the 2004 ADAAG is the product of a 10-year rulemaking effort in which a host of private and public entities, including small business groups, worked cooperatively to develop accessibility guidelines that achieved an appropriate balance between accessibility and cost. For example, as originally recommended by the Access Board's Recreation Access Advisory Committee, all holes on a miniature golf course would be required to be accessible except for sloped surfaces where the ball could not come to rest. *See, e.g.,* "ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities and Outdoor Developed Areas," Access Board Advance Notice of Proposed Rulemaking, 59 FR 48542 (Sept. 21, 1994). Miniature golf trade groups and facility operators, who are nearly all small businesses, expressed significant concern that such requirements would be prohibitively expensive, would require additional space, and might fundamentally alter the nature of their courses. *See, e.g.,* "ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities," Access Board Notice of Proposed Rulemaking, 64 FR 37326 (July 9, 1999). In consideration of such concerns and after holding informational meetings with miniature golf representatives and persons with disabilities, the Access Board significantly revised the final miniature golf guidelines. The final guidelines not only reduced significantly the number of holes required to be accessible to 50 percent of all holes (with one break in the sequence of consecutive holes permitted), but also added an exemption for carpets used on playing surfaces, modified ramp landing slope and size requirements, and reduced the space required for start of play areas. *See, e.g.,* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings

and Facilities—Recreation Facilities Final Rule, 36 CFR parts 1190 and 1191.

The Department also published an ANPRM to solicit public input on the adoption of the 2004 ADAAG as the revised Federal accessibility standards implementing titles II and III of the ADA. Among other things, the ANPRM specifically invited comment from small entities regarding the proposed rule's potential economic impact and suggested regulatory alternatives to ameliorate any such impact. *See* "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," Department of Justice Advance Notice of Proposed Rulemaking, 69 FR 58768, 58778–79 (Sept. 30, 2004). The Department received over 900 comments, and small business interests figured prominently. *See* "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," Department of Justice Notice of Proposed Rulemaking, 73 FR 34508, 34511, 34550 (June 17, 2008).

Subsequently, when the Department published its NPRM in June 2008, several regulatory proposals were included to address concerns raised by the small business community in ANPRM comments. First, to mitigate costs to existing facilities, the Department proposed an element-by-element safe harbor that would exempt elements in compliance with applicable technical and scoping requirements in the 1991 Standards from any retrofit obligations under the revised title III rule. *Id.* at 34514–15, 34532–33. While this proposed safe harbor applied to title III covered entities irrespective of size, it was small businesses that especially stood to benefit since, according to comments from small business advocates, small businesses are more likely to operate in older buildings and facilities. The title III NPRM also offered for public comment a novel safe harbor provision specifically designed to address small business advocates' request for clearer guidance on the readily achievable barrier removal requirement. This proposal provided that qualified small businesses would be deemed to have satisfied their readily achievable barrier removal obligations for a given year if, during that tax year, they had spent at least 1 percent of their respective gross revenues undertaking measures in compliance with title III barrier removal requirements. *Id.* at 34538–39. Lastly, the NPRM sought public input on the inclusion of reduced scoping provisions for certain types of small existing recreation facilities (*i.e.,* swimming pools, play areas, and saunas). *Id.* at 34515, 34534–37.

During the NPRM comment period, the Department engaged in considerable public outreach to the small business community. A public hearing was held in Washington, D.C., during which nearly 50 persons, including several small business owners, testified in person or by phone. *See Transcript of the Public Hearing on Notices of Proposed Rulemaking* (July 15, 2008), available at *www.ada.gov/NPRM2008/public_hearing_transcript.htm.* This hearing was also streamed live over the Internet. By the end of the 60-day comment period, the Department had also received nearly 4,500 public comments on the title III NPRM, including a significant number of comments reflecting small businesses' perspectives on a wide range of regulatory issues.

In addition to soliciting input from small entities through the formal process for public comment, the Department also targeted the small business community with less formal regulatory discussions, including a Small Business Roundtable convened by the Office of Advocacy and held at the offices of the Small Business Administration in Washington, D.C., and an informational question-and-answer session concerning the titles II and III NPRMs at the Department of Justice in which business representatives attended in-person and by telephone. These outreach efforts provided the small business community with information on the NPRM proposals being considered by the Department and gave small businesses the opportunity to ask questions of the Department and provide feedback.

As a result of the feedback provided by representatives of small business interests on the title III NPRM, the Department was able to assess the impact of various alternatives on small businesses before adopting its final rule and took steps to minimize any significant impact on small entities. Most notably, the final rule retains the element-by-element safe harbor for which the small business community voiced strong support. *See* Appendix A discussion of removal of barriers (§ 36.304). The Department believes that this element-by-element safe harbor provision will go a long way toward mitigating the economic impact of the final rule on existing facilities owned or operated by small businesses. Indeed, as demonstrated in the Final RIA, the element-by-element safe harbor will provide substantial relief to small businesses that is estimated at $ 7.5 billion over the expected life of the final rule.

Additional regulatory measures mitigating the economic impact of the final rule on title III-covered entities (including small businesses) include deletion of the proposed requirement for captioning of safety and emergency information on scoreboards at sporting venues, retention of the proposed path of travel safe harbor, extension of the compliance date of the 2010 Standards as applied to new construction and alterations from 6 months to 18 months after publication of the final rule, and, in response to public comments, modification of the triggering event for application of the 2010 Standards to new construction and alterations from a unitary approach (commencement of physical construction) to a two-pronged approach (date of last application for building permit or commencement of physical construction) depending on whether a building permit is or is not required for the type of construction at issue by State or local building authorities. *See* Appendix A discussions of captioning at sporting venues (§ 36.303), alterations and path of travel (§ 36.403), and compliance dates and triggering events for new construction and alterations (§ 36.406).

Two sets of proposed alternative measures that would have potentially provided some cost savings to small businesses—the safe harbor for qualified small businesses and reduced scoping for certain existing recreation facilities—were not adopted by the Department in the final rule. As discussed in more depth previously, the safe harbor for qualified small businesses was omitted from the final rule because the general safe harbor already provides significant relief for small businesses located in existing facilities, the proposed safe harbor provision lacked support from the small business community and no consensus emerged from business commenters concerning feasible bases for the final regulatory provision, and commenters noted practical considerations that would potentially make some small businesses incur greater expense or administrative burden. *See* Appendix A discussion of the safe harbor for qualified small businesses (§ 36.304).

The Department also omitted the proposals to reduce scoping for certain existing recreation facilities in the final rule. While these proposals were not specific to small entities, they nonetheless might have mitigated the impact of the final rule for some small businesses that owned or operated existing facilities at which these recreational elements were located. *See*

Appendix A discussion of reduced scoping for play areas and other recreation facilities (§ 36.304). The Department gave careful consideration to how best to insulate small businesses from overly burdensome barrier removal costs under the 2010 Standards for existing small play areas, swimming pools, and saunas, while still providing accessible and integrated recreation facilities that are of great importance to persons with disabilities. The Department concluded that the existing readily achievable barrier removal standard, rather than specific exemptions for these types of existing facilities, is the most efficacious method by which to protect small businesses.

Once the final rule is promulgated, small businesses will also have a wealth of documents to assist them in complying with the 2010 Standards. For example, accompanying the final rule in the **Federal Register** is the Department's "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," which provides a plain language description of the revised scoping and technical requirements in these Standards and provides illustrative figures. The Department also expects to publish guidance specifically tailored to small businesses in the form of a small business compliance guide, as well as to publish technical assistance materials of general interest to all covered entities following promulgation of the final rule. Additionally, the Access Board has published a number of guides that discuss and illustrate application of the 2010 Standards to play areas and various types of recreation facilities.

Executive Order 13132: Federalism

Executive Order 13132, 64 FR 43255, 3 CFR, 2000 Comp., p. 206, requires executive branch agencies to consider whether a 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 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 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 2010 Standards set minimum civil rights protections for individuals with disabilities that in turn may affect the implementation of State and local laws, particularly building codes. The 2010 Standards address federalism concerns and mitigate federalism implications, particularly the provisions that streamline the administrative process for State and local governments seeking ADA code certification under title III.

As a member of the Access Board, the Department was privy to substantial feedback from State and local governments throughout the development of the Board's 2004 guidelines. Before those guidelines were finalized as the 2004 ADA/ABA Guidelines, they addressed and minimized federalism concerns expressed by State and local governments during the development process. Because the Department adopted ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as part of the 2010 Standards, the steps taken in the 2004 ADA/ABA Guidelines to address federalism concerns are reflected in the 2010 Standards.

The Department also solicited and received input from public entities in the September 2004 ANPRM and the June 2008 NPRM. Through the ANPRM and NPRM processes, the Department solicited comments from elected State and local officials and their representative national organizations about the potential federalism implications. The Department received comments addressing whether the ANPRM and NPRM directly affected State and local governments, the relationship between the Federal government and the States, and the distribution of power and responsibilities among the various levels of government. The rule preempts State laws affecting entities subject to the ADA only to the extent that those laws conflict with the requirements of the ADA, as set forth in the rule.

National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that, as a general matter, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally non-profit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities. Public Law 104–113 section 12(d)(1) (15 U.S.C. 272 Note). In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources. *Id.* section 12(d)(1). 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 2010 Standards are based. As part of this update, the Board has made its guidelines more consistent with model building codes, such as the IBC, and industry standards. It coordinated extensively with model code groups and standard-setting bodies throughout the process so that differences could be reconciled. As a result, an historic level of harmonization has been achieved that has brought about improvements to the guidelines, as well as to counterpart provisions in the IBC and key industry standards, including those for accessible facilities issued through the American National Standards Institute.

Plain Language Instructions

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

Paperwork Reduction Act

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

Unfunded Mandates Reform Act

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

List of Subjects for 28 CFR Part 36

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

■ By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 306 of the Americans with Disabilities Act of 1990, Public Law 101–336 (42 U.S.C. 12186), and for the reasons set forth in Appendix A to 28 CFR part 36, chapter I of title 28 of the Code of Federal Regulations is amended as follows:

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

Subpart A—General

■ 1. The authority citation for 28 CFR part 36 is revised to read as follows:

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

■ 2. Amend § 36.104 by adding the following definitions of *1991 Standards, 2004 ADAAG, 2010 Standards, direct threat, existing facility, housing at a place of education, other power-driven mobility device, qualified reader, video remote interpreting (VRI) service,* and *wheelchair* in alphabetical order and revising the definitions of *place of public accommodation, qualified interpreter,* and *service animal* to read as follows:

§ 36.104 Definitions.

1991 Standards means requirements set forth in the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to this part.

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in subpart D of this part.

* * * * *

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, as provided in § 36.208.

* * * * *

Existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.

* * * * *

Housing at a place of education means housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.

* * * * *

Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

* * * * *

Place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories—

(1) Place of lodging, except for an establishment located within a facility that contains not more than five rooms for rent or hire and that actually is occupied by the proprietor of the establishment as the residence of the proprietor. For purposes of this part, a facility is a "place of lodging" if it is—

(i) An inn, hotel, or motel; or

(ii) A facility that—

(A) Provides guest rooms for sleeping for stays that primarily are short-term in nature (generally 30 days or less) where the occupant does not have the right to return to a specific room or unit after the conclusion of his or her stay; and

(B) Provides guest rooms under conditions and with amenities similar to a hotel, motel, or inn, including the following—

(*1*) On- or off-site management and reservations service;

(*2*) Rooms available on a walk-up or call-in basis;

(*3*) Availability of housekeeping or linen service; and

(*4*) Acceptance of reservations for a guest room type without guaranteeing a particular unit or room until check-in, and without a prior lease or security deposit.

* * * * *

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

* * * * *

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

* * * * *

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

* * * * *

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 36.303(f).

* * * * *

Wheelchair means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

Subpart B—General Requirements

■ 3. Amend § 36.208 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b) and by revising redesignated paragraph (b) to read as follows:

§ 36.208 Direct threat.

* * * * *

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

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

§ 36.211 Maintenance of accessible features.

* * * * *

(c) If the 2010 Standards reduce the technical requirements or the number of required accessible elements below the number required by the 1991 Standards, the technical requirements or the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the 2010 Standards.

Subpart C—Specific Requirements

■ 5. Amend § 36.302 as follows:

■ a. Revise paragraph (c)(2); and

■ b. Add paragraphs (c)(3) through (c)(9) and paragraphs (e) and (f) to read as follows:

§ 36.302 Modifications in policies, practices, or procedures.

(c) * * *

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

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

(ii) The animal is not housebroken.

(3) *If an animal is properly excluded.* If a public accommodation properly excludes a service animal under § 36.302(c)(2), it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises.

(4) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means).

(5) *Care or supervision.* A public accommodation is not responsible for the care or supervision of a service animal.

(6) *Inquiries.* A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.,* the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(7) *Access to areas of a public accommodation.* Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go.

(8) *Surcharges.* A public accommodation shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

(9) *Miniature horses.* (i) A public accommodation shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(ii) *Assessment factors.* In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public accommodation shall consider—

(A) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

(B) Whether the handler has sufficient control of the miniature horse;

(C) Whether the miniature horse is housebroken; and

(D) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(iii) *Other requirements.* Sections 36.302(c)(3) through (c)(8), which apply to service animals, shall also apply to miniature horses.

* * * * *

(e)(1) *Reservations made by places of lodging.* A public accommodation that owns, leases (or leases to), or operates a place of lodging shall, with respect to reservations made by telephone, in-person, or through a third party—

(i) Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms;

(ii) Identify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs;

(iii) Ensure that accessible guest rooms are held for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type;

(iv) Reserve, upon request, accessible guest rooms or specific types of guest rooms and ensure that the guest rooms requested are blocked and removed from all reservations systems; and

(v) Guarantee that the specific accessible guest room reserved through its reservations service is held for the reserving customer, regardless of whether a specific room is held in response to reservations made by others.

(2) *Exception.* The requirements in paragraphs (iii), (iv), and (v) of this section do not apply to reservations for individual guest rooms or other units not owned or substantially controlled by the entity that owns, leases, or operates the overall facility.

(3) *Compliance date.* The requirements in this section will apply to reservations made on or after March 15, 2012.

(f) *Ticketing.* (1)(i) For the purposes of this section, "accessible seating" is defined as wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (4) of this section.

(ii) *Ticket sales.* A public accommodation that sells tickets for a single event or series of events shall modify its policies, practices, or procedures to ensure that individuals with disabilities have an equal opportunity to purchase tickets for accessible seating—

(A) During the same hours;

(B) During the same stages of ticket sales, including, but not limited to, pre-sales, promotions, lotteries, wait-lists, and general sales;

(C) Through the same methods of distribution;

(D) In the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons; and

(E) Under the same terms and conditions as other tickets sold for the same event or series of events.

(2) *Identification of available accessible seating.* A public accommodation that sells or distributes tickets for a single event or series of events shall, upon inquiry—

(i) Inform individuals with disabilities, their companions, and third parties purchasing tickets for accessible seating on behalf of individuals with disabilities of the locations of all unsold or otherwise available accessible seating for any ticketed event or events at the facility;

(ii) Identify and describe the features of available accessible seating in enough detail to reasonably permit an individual with a disability to assess independently whether a given accessible seating location meets his or her accessibility needs; and

(iii) Provide materials, such as seating maps, plans, brochures, pricing charts, or other information, that identify accessible seating and information relevant thereto with the same text or visual representations as other seats, if such materials are provided to the general public.

(3) *Ticket prices.* The price of tickets for accessible seating for a single event or series of events shall not be set higher than the price for other tickets in the same seating section for the same event or series of events. Tickets for accessible seating must be made available at all price levels for every event or series of events. If tickets for accessible seating at a particular price level cannot be provided because barrier removal in an existing facility is not readily achievable, then the percentage of tickets for accessible seating that should have been available at that price level but for the barriers (determined by the ratio of the total number of tickets at that price level to the total number of tickets in the assembly area) shall be offered for purchase, at that price level, in a nearby or similar accessible location.

(4) *Purchasing multiple tickets.* (i) *General.* For each ticket for a wheelchair space purchased by an individual with a disability or a third-party purchasing such a ticket at his or her request, a public accommodation shall make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. A public accommodation is not required to provide more than three contiguous seats for each wheelchair space. Such seats may include wheelchair spaces.

(ii) *Insufficient additional contiguous seats available.* If patrons are allowed to purchase at least four tickets, and there are fewer than three such additional contiguous seat tickets available for purchase, a public accommodation shall offer the next highest number of such seat tickets available for purchase and shall make up the difference by offering tickets for sale for seats that are as close as possible to the accessible seats.

(iii) *Sales limited to fewer than four tickets.* If a public accommodation limits sales of tickets to fewer than four seats per patron, then the public accommodation is only obligated to offer as many seats to patrons with disabilities, including the ticket for the wheelchair space, as it would offer to patrons without disabilities.

(iv) *Maximum number of tickets patrons may purchase exceeds four.* If patrons are allowed to purchase more than four tickets, a public accommodation shall allow patrons with disabilities to purchase up to the same number of tickets, including the ticket for the wheelchair space.

(v) *Group sales.* If a group includes one or more individuals who need to use accessible seating because of a mobility disability or because their disability requires the use of the accessible features that are provided in accessible seating, the group shall be placed in a seating area with accessible seating 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.

(5) *Hold and release of tickets for accessible seating.* (i) *Tickets for accessible seating may be released for sale in certain limited circumstances.* A public accommodation may release unsold tickets for accessible seating for sale to individuals without disabilities for their own use for a single event or series of events only under the following circumstances—

(A) When all non-accessible tickets (excluding luxury boxes, club boxes, or suites) have been sold;

(B) When all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area; or

(C) When all non-accessible tickets in a designated price category have been sold and the tickets for accessible seating are being released within the same designated price category.

(ii) *No requirement to release accessible tickets.* Nothing in this paragraph requires a facility to release tickets for accessible seating to individuals without disabilities for their own use.

(iii) *Release of series-of-events tickets on a series-of-events basis.* (A) *Series-of-events tickets sell-out when no ownership rights are attached.* When series-of-events tickets are sold out and a public accommodation releases and sells accessible seating to individuals without disabilities for a series of events, the public accommodation shall establish a process that prevents the automatic reassignment of the accessible

seating to such ticket holders for future seasons, future years, or future series, so that individuals with disabilities who require the features of accessible seating and who become newly eligible to purchase tickets when these series-of-events tickets are available for purchase have an opportunity to do so.

(B) *Series-of-events tickets when ownership rights are attached.* When series-of-events tickets with an ownership right in accessible seating areas are forfeited or otherwise returned to a public accommodation, the public accommodation shall make reasonable modifications in its policies, practices, or procedures to afford individuals with mobility disabilities or individuals with disabilities that require the features of accessible seating an opportunity to purchase such tickets in accessible seating areas.

(6) *Ticket transfer.* Individuals with disabilities who hold tickets for accessible seating shall be permitted to transfer tickets to third parties under the same terms and conditions and to the same extent as other spectators holding the same type of tickets, whether they are for a single event or series of events.

(7) *Secondary ticket market.* (i) A public accommodation shall modify its policies, practices, or procedures to ensure that an individual with a disability may use a ticket acquired in the secondary ticket market under the same terms and conditions as other individuals who hold a ticket acquired in the secondary ticket market for the same event or series of events.

(ii) If an individual with a disability acquires a ticket or series of tickets to an inaccessible seat through the secondary market, a public accommodation shall make reasonable modifications to its policies, practices, or procedures to allow the individual to exchange his ticket for one to an accessible seat in a comparable location if accessible seating is vacant at the time the individual presents the ticket to the public accommodation.

(8) *Prevention of fraud in purchase of tickets for accessible seating.* A public accommodation may not require proof of disability, including, for example, a doctor's note, before selling tickets for accessible seating.

(i) *Single-event tickets.* For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the tickets for accessible seating has a mobility disability or a disability that requires the use of the accessible features that are provided in accessible seating, or is purchasing the tickets for an individual who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

(ii) *Series-of-events tickets.* For series-of-events tickets, it is permissible to ask the individual purchasing the tickets for accessible seating to attest in writing that the accessible seating is for a person who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

(iii) *Investigation of fraud.* A public accommodation may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

■ 6. Amend § 36.303 as follows:

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

■ b. Redesignate paragraph (f) as paragraph (g); and

■ c. Add paragraph (f) to read as follows:

§ 36.303 Auxiliary aids and services.

* * * * *

(b) * * *

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time 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, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

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

* * * * *

(c) *Effective communication.*

(1) A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities.

(i) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

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

(3) A public accommodation shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication, except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(4) A public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) *Telecommunications.* (1) When a public accommodation uses an automated-attendant system, including, but not limited to, voicemail and messaging, or an interactive voice

response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including text telephones (TTYs) and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.

(2) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls using the public accommodation's equipment on more than an incidental convenience basis shall make available accessible public telephones, TTYs, or other telecommunications products and systems for use by an individual who is deaf or hard of hearing, or has a speech impairment.

(3) A public accommodation may use relay services in place of direct telephone communication for receiving or making telephone calls incident to its operations.

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

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

* * * * *

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

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

* * * * *

■ 7. Amend § 36.304 as follows:

■ a. Revise paragraph (d)(1);

■ b. Redesignate paragraph (d)(2) as (d)(3);

■ c. Amend newly redesignated paragraph (d)(3) by removing the reference to "(d)(1)" and adding "(d)(1) and (d)(2)" in its place;

■ d. Add paragraphs (d)(2) and (g)(4); and

■ e. Add an Appendix to paragraph (d) to read as follows:

§ 36.304 Removal of barriers.

* * * * *

(d) * * * (1) Except as provided in paragraph (d)(3) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404 through 36.406 of this part for the element being altered. The path of travel requirements of § 36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section.

(d)(2)(i) *Safe harbor.* Elements that have not been altered in existing facilities on or after March 15, 2012 and that comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

(ii)(A) Before March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with either the 1991 Standards or the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

(B) On or after March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with the requirements set forth in the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

(iii) The safe harbor provided in § 36.304(d)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (*i.e.,* elements for which there are neither technical nor scoping specifications in the 1991 Standards), and therefore those elements must be modified to the extent readily achievable to comply with the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows—

(A) *Residential facilities and dwelling units,* sections 233 and 809.

(B) *Amusement rides,* sections 234 and 1002; 206.2.9; 216.12.

(C) *Recreational boating facilities,* sections 235 and 1003; 206.2.10.

(D) *Exercise machines and equipment,* sections 236 and 1004; 206.2.13.

(E) *Fishing piers and platforms,* sections 237 and 1005; 206.2.14.

(F) *Golf facilities,* sections 238 and 1006; 206.2.15.

(G) *Miniature golf facilities,* sections 239 and 1007; 206.2.16.

(H) *Play areas,* sections 240 and 1008; 206.2.17.

(I) *Saunas and steam rooms,* sections 241 and 612.

(J) *Swimming pools, wading pools, and spas,* sections 242 and 1009.

(K) *Shooting facilities with firing positions,* sections 243 and 1010.

(L) *Miscellaneous.*

(*1*) Team or player seating, section 221.2.1.4.

(*2*) Accessible route to bowling lanes, section 206.2.11.

(*3*) Accessible route in court sports facilities, section 206.2.12.

* * * * *

Appendix to § 36.304(d)

COMPLIANCE DATES AND APPLICABLE STANDARDS FOR BARRIER REMOVAL AND SAFE HARBOR

Date	Requirement	Applicable standards
Before March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards must be modified to the extent readily achievable.	1991 Standards or 2010 Standards.

COMPLIANCE DATES AND APPLICABLE STANDARDS FOR BARRIER REMOVAL AND SAFE HARBOR—Continued

Date	Requirement	Applicable standards
	Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	
On or after March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards or that do not comply with the supplemental requirements (*i.e.,* elements for which there are neither technical nor scoping specifications in the 1991 Standards) must be modified to the extent readily achievable.	2010 Standards.
	Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	
Elements not altered after March 15, 2012	Elements that comply with the requirements for those elements in the 1991 Standards do not need to be modified.	Safe Harbor.

* * * * *

(g) * * *

(4) This requirement does not apply to guest rooms in existing facilities that are places of lodging where the guest rooms are not owned by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners.

■ 8. Revise § 36.308 to read as follows:

§ 36.308 Seating in assembly areas.

A public accommodation shall ensure that wheelchair spaces and companion seats are provided in each specialty seating area that provides spectators with distinct services or amenities that generally are not available to other spectators. If it is not readily achievable for a public accommodation to place wheelchair spaces and companion seats in each such specialty seating area, it shall provide those services or amenities to individuals with disabilities and their companions at other designated accessible locations at no additional cost. The number of wheelchair spaces and companion seats provided in specialty seating areas shall be included in, rather than in addition to, wheelchair space requirements set forth in table 221.2.1.1 in the 2010 Standards.

■ 9. Amend § 36.309 by adding paragraphs (b)(1)(iv) through (vi) to read as follows:

§ 36.309 Examinations and courses.

* * * * *

(b)(1)* * *

(iv) Any request for documentation, if such documentation is required, is reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested.

(v) When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan).

(vi) The entity responds in a timely manner to requests for modifications, accommodations, or aids to ensure equal opportunity for individuals with disabilities.

* * * * *

10. Add § 36.311 to read as follows:

§ 36.311 Mobility devices.

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

(b)(1) *Use of other power-driven mobility devices.* A public accommodation shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public accommodation can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public accommodation has adopted pursuant to § 36.301(b).

(2) *Assessment factors.* In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public accommodation shall consider—

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics (*e.g.,* whether its business is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.

(c)(1) *Inquiry about disability.* A public accommodation shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) *Inquiry into use of other power-driven mobility device.* A public accommodation may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A public accommodation that permits the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation

of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a public accommodation shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards.

Subpart D—New Construction and Alterations

■ 11. Amend § 36.403 by retaining the heading of paragraph (a), designating the text of paragraph (a) as paragraph (a)(1), adding paragraph (a)(2), and revising paragraph (f)(2)(iii) to read as follows:

§ 36.403 Alterations: Path of travel.

(a) *General.* (1) * * *

(2) If a private entity has constructed or altered required elements of a path of travel at a place of public accommodation or commercial facility in accordance with the specifications in the 1991 Standards, the private entity is not required to retrofit such elements to reflect the incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

* * * * *

(f) * * *

(2) * * *

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

* * * * *

■ 12. Revise § 36.405 to read as follows:

§ 36.405 Alterations: Historic preservation.

(a) Alterations to buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act, 16 U.S.C. 470 *et seq.,* or are designated as historic under State or local law, shall comply to the maximum extent feasible with this part.

(b) If it is determined that it is not feasible to provide physical access to an historic property that is a place of public accommodation in a manner that will not threaten or destroy the historic significance of the building or the facility, alternative methods of access shall be provided pursuant to the requirements of subpart C of this part.

■ 13. Revise § 36.406 to read as follows:

§ 36.406 Standards for new construction and alterations.

(a) *Accessibility standards and compliance date.* (1) New construction and alterations subject to §§ 36.401 or 36.402 shall comply with the 1991 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is before September 15, 2010, or if no permit is required, if the start of physical construction or alterations occurs before September 15, 2010.

(2) New construction and alterations subject to §§ 36.401 or 36.402 shall comply either with the 1991 Standards or with the 2010 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after September 15, 2010 and before March 15, 2012, or if no permit is required, if the start of physical construction or alterations occurs on or after September 15, 2010 and before March 15, 2012.

(3) New construction and alterations subject to §§ 36.401 or 36.402 shall comply with the 2010 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after March 15, 2012, or if no permit is required, if the start of physical construction or alterations occurs on or after March 15, 2012.

(4) For the purposes of this section, "start of physical construction or alterations" does not mean ceremonial groundbreaking or razing of structures prior to site preparation.

(5) *Noncomplying new construction and alterations.* (i) Newly constructed or altered facilities or elements covered by §§ 36.401 or 36.402 that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards or the 2010 Standards.

(ii) Newly constructed or altered facilities or elements covered by §§ 36.401 or 36.402 that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

Appendix to § 36.406(a)

Compliance dates for new construction and alterations	Applicable standards
On or after January 26, 1993 and before September 15, 2010	1991 Standards.
On or after September 15, 2010 and before March 15, 2012	1991 Standards or 2010 Standards.
On or after March 15, 2012	2010 Standards.

(b) *Scope of coverage.* The 1991 Standards and the 2010 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, the advisory notes, appendix notes, and figures contained in the 1991 Standards and 2010 Standards explain or illustrate the requirements of the rule; they do not establish enforceable requirements.

(c) *Places of lodging.* Places of lodging subject to this part shall comply with the provisions of the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806 of the 2010 Standards.

(1) *Guest rooms.* Guest rooms with mobility features in places of lodging subject to the transient lodging

requirements of 2010 Standards shall be provided as follows—

(i) Facilities that are subject to the same permit application on a common site that each have 50 or fewer guest rooms may be combined for the purposes of determining the required number of accessible rooms and type of accessible bathing facility in accordance with table 224.2 to section 224.2 of the 2010 Standards.

(ii) Facilities with more than 50 guest rooms shall be treated separately for the purposes of determining the required number of accessible rooms and type of accessible bathing facility in accordance with table 224.2 to section 224.2 of the 2010 Standards.

(2) *Exception.* Alterations to guest rooms in places of lodging where the guest rooms are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners are not required to comply with § 36.402 or the alterations requirements in section 224.1.1 of the 2010 Standards.

(3) *Facilities with residential dwelling units and transient lodging units.* Residential dwelling units that are designed and constructed for residential use exclusively are not subject to the transient lodging standards.

(d) *Social service center establishments.* Group homes, halfway houses, shelters, or similar social service center establishments that provide either temporary sleeping accommodations or residential dwelling units that are subject to this part shall comply with the provisions of the 2010 Standards applicable to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

(1) In sleeping rooms with more than 25 beds covered by this part, a minimum of 5% of the beds shall have clear floor space complying with section 806.2.3 of the 2010 Standards.

(2) Facilities with more than 50 beds covered by this part that provide common use bathing facilities shall provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group.

(e) *Housing at a place of education.* Housing at a place of education that is subject to this part shall comply with the provisions of the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806, subject to the following exceptions. For the purposes of the application of this section, the term "sleeping room" is intended to be used interchangeably with the term "guest room" as it is used in the transient lodging standards.

(1) Kitchens within housing units containing accessible sleeping rooms with mobility features (including suites and clustered sleeping rooms) or on floors containing accessible sleeping rooms with mobility features shall provide turning spaces that comply with section 809.2.2 of the 2010 Standards and kitchen work surfaces that comply with section 804.3 of the 2010 Standards.

(2) Multi-bedroom housing units containing accessible sleeping rooms with mobility features shall have an accessible route throughout the unit in accordance with section 809.2 of the 2010 Standards.

(3) Apartments or townhouse facilities that are provided by or on behalf of a place of education, which are leased on a year-round basis exclusively to graduate students or faculty and do not contain any public use or common use areas available for educational programming, are not subject to the transient lodging standards and shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

(f) *Assembly areas.* Assembly areas that are subject to this part shall comply with the provisions of the 2010 Standards applicable to assembly areas, including, but not limited to, sections 221 and 802. In addition, assembly areas shall ensure that—

(1) In stadiums, arenas, and grandstands, wheelchair spaces and companion seats are dispersed to all levels that include seating served by an accessible route;

(2) In assembly areas that are required to horizontally disperse wheelchair spaces and companion seats by section 221.2.3.1 of the 2010 Standards and that have seating encircling, in whole or in part, a field of play or performance, wheelchair spaces and companion seats are dispersed around that field of play or performance area;

(3) Wheelchair spaces and companion seats are not located on (or obstructed by) temporary platforms or other movable structures, except that when an entire seating section is placed on temporary platforms or other movable structures in an area where fixed seating is not provided, in order to increase seating for an event, wheelchair spaces and companion seats may be placed in that section. When wheelchair spaces and companion seats are not required to accommodate persons eligible for those spaces and seats, individual, removable seats may be placed in those spaces and seats;

(4) In stadium-style movie theaters, wheelchair spaces and companion seats are located 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 60% of the seats provided in an auditorium; or

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

(g) *Medical care facilities.* Medical care facilities that are subject to this part shall comply with the provisions of the 2010 Standards applicable to medical care facilities, including, but not limited to, sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 of the 2010 Standards in a manner that is proportionate by type of medical specialty.

§ 36.407 [Removed and Reserved]

■ 14. Remove and reserve § 36.407.

Subpart F—Certification of State Laws or Local Building Codes

§ 36.603 [Removed]

■ 15. Remove § 36.603.

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

§ 36.603 Preliminary determination.

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

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

§ 36.604 Procedure following preliminary determination of equivalency.

(a) If the Assistant Attorney General makes a preliminary determination of equivalency under § 36.603, he or she

shall inform the submitting official, in writing, of that preliminary determination. The Assistant Attorney General also shall—

* * * * *

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

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

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

§ 36.605 Procedure following preliminary denial of certification.

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

* * * * *

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

§ 36.606 Effect of certification.

* * * * *

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

§ 36.608 [Redesignated as § 36.607]

■ 20. Redesignate § 36.608 as § 36.607.

■ 21. Redesignate Appendix A to part 36 as Appendix D to part 36 and add Appendix A to part 36 to read as follows:

Appendix A to Part 36—Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities

Note: This Appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR part 36 published on September 15, 2010.

Section-By-Section Analysis and Response to Public Comments

This section provides a detailed description of the Department's changes to the title III regulation, the reasoning behind those changes, and responses to public comments received on these topics. The Section-by-Section Analysis follows the order of the title III regulation itself, except that if the Department has not changed a regulatory section, the unchanged section has not been mentioned.

Subpart A—General

Section 36.104 Definitions

"1991 Standards" and "2004 ADAAG"

The Department has included in the final rule new definitions of both the "1991 Standards" and the "2004 ADAAG." The term "1991 Standards" refers to the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to 28 CFR part 36. The term "2004 ADAAG" refers to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the Americans with Disabilities Act and the Architectural Barriers Act Accessibility Guidelines, which were issued by the Access Board on July 23, 2004, codified at 36 CFR 1191, app. B and D (2009), and which the Department has adopted in this final rule. These terms are included in the definitions section for ease of reference.

"2010 Standards"

The Department has added to the final rule a definition of the term "2010 Standards." The term "2010 Standards" refers to the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in subpart D of 28 CFR part 36.

"Direct Threat"

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

"Existing Facility"

The 1991 title III regulation provided definitions for "new construction" at § 36.401(a) and "alterations" at § 36.402(b). In contrast, the term "existing facility" was not explicitly defined, although it is used in the statute and regulations for titles II and III. *See, e.g.,* 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR 35.150. It has been the Department's view that newly constructed or altered facilities are also existing facilities subject to title III's continuing barrier removal obligation, and that view is made explicit in this rule.

The classification of facilities under the ADA is neither static nor mutually exclusive. Newly constructed or altered facilities are also existing facilities. A newly constructed facility remains subject to the accessibility standards in effect at the time of design and construction, with respect to those elements for which, at that time, there were applicable ADA Standards. That same facility, however, after construction, is *also* an existing facility, and subject to the public accommodation's continuing obligation to remove barriers where it is readily achievable to do so. The fact that the facility is also an existing facility does not relieve the public accommodation of its obligations under the new construction requirements of this part. Rather, it means that in addition to the new construction requirements, the public accommodation has a continuing obligation to remove barriers that arise, or are deemed barriers, only after construction. Such barriers include but are not limited to the elements that are first covered in the 2010 Standards, as that term is defined in § 36.104.

At some point, the same facility may undergo alterations, which are subject to the alterations requirements in effect at that time. This facility remains subject to its original new construction standards for elements and spaces not affected by the alterations; the facility is subject to the alterations requirements and standards in effect at the time of the alteration for the elements and spaces affected by the alteration; *and,* throughout, the facility remains subject to the continuing barrier removal obligation.

The Department's enforcement of the ADA is premised on a broad understanding of "existing facility." The ADA contemplates that as the Department's knowledge and understanding of accessibility advances and evolves, this knowledge will be incorporated into and result in increased accessibility in the built environment. Title III's barrier removal provisions strike the appropriate balance between ensuring that accessibility advances are reflected in the built environment and mitigating the costs of those advances to public accommodations. With adoption of the final rule, public accommodations engaged in barrier removal measures will now be guided by the 2010 Standards, defined in § 36.104, and the safe harbor in § 36.304(d)(2).

The NPRM included the following proposed definition of "existing facility": "[A] facility that has been constructed and remains in existence on any given date." 73 FR 34508, 34552 (June 17, 2008). While the Department intended the proposed definition to provide clarity with respect to public accommodations' continuing obligation to remove barriers where it is readily achievable to do so, some commenters pointed out arguable ambiguity in the language and the potential for misapplication of the rule in practice.

The Department received a number of comments on this issue. The commenters urged the Department to clarify that all buildings remain subject to the standards in effect at the time of their construction, that is, that a facility designed and constructed for first occupancy between January 26, 1993, and the effective date of the final rule is still considered "new construction" and that alterations occurring between January 26, 1993, and the effective date of the final rule are still considered "alterations."

The final rule includes clarifying language to ensure that the Department's interpretation is accurately reflected. As established by this rule, existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part. Thus, this definition reflects the Department's longstanding interpretation that public accommodations have obligations in existing facilities that are independent of but may coexist with requirements imposed by new construction or alteration requirements in those same facilities.

"Housing at a Place of Education"

The Department has added a new definition to § 36.104, "housing at a place of education," to clarify the types of educational housing programs that are covered by this title. This section defines "housing at a place of education" as "housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence." This definition does not apply to social service programs that combine residential housing with social services, such as a residential job training program.

"Other Power-Driven Mobility Device" and "Wheelchair"

Because relatively few individuals with disabilities were using nontraditional mobility devices in 1991, there was no pressing need for the 1991 title III regulation to define the terms "wheelchair" or "other power-driven mobility device," to expound on what would constitute a reasonable modification in policies, practices, or procedures under § 36.302, or to set forth within that section specific requirements for the accommodation of mobility devices. Since the issuance of the 1991 title III regulation, however, the choices of mobility devices available to individuals with disabilities have increased dramatically. The Department has received complaints about and has become aware of situations where individuals with mobility disabilities have utilized devices that are not designed primarily for use by an individual with a mobility disability, including the Segway® Personal Transporter (Segway® PT), golf cars, all-terrain vehicles (ATVs), and other locomotion devices.

The Department also has received questions from public accommodations and individuals with mobility disabilities concerning which mobility devices must be accommodated and under what circumstances. Indeed, there has been litigation concerning the legal obligations of covered entities to accommodate individuals with mobility disabilities who wish to use an electronic personal assistance mobility device (EPAMD), such as the Segway® PT, as a mobility device. The Department has participated in such litigation as amicus curiae. *See Ault* v. *Walt Disney World Co.,* No. 6:07–cv–1785–Orl–31KRS, 2009 WL

3242028 (M.D. Fla. Oct. 6, 2009). Much of the litigation has involved shopping malls where businesses have refused to allow persons with disabilities to use EPAMDs. *See, e.g., McElroy* v. *Simon Property Group,* No. 08–404 RDR, 2008 WL 4277716 (D. Kan. Sept. 15, 2008) (enjoining mall from prohibiting the use of a Segway® PT as a mobility device where an individual agrees to all of a mall's policies for use of the device, except indemnification); 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* (last visited June 24, 2010).

In response to questions and complaints from individuals with disabilities and covered entities concerning which mobility devices must be accommodated and under what circumstances, the Department began developing a framework to address the use of unique mobility devices, concerns about their safety, and the parameters for the circumstances under which these devices must be accommodated. As a result, the Department's NPRM proposed two new approaches to mobility devices. First, the Department proposed a two-tiered mobility device definition that defined the term "wheelchair" separately from "other power-driven mobility device." Second, the Department proposed requirements to allow the use of devices in each definitional category. In § 36.311(a), the NPRM proposed that wheelchairs and manually-powered mobility aids used by individuals with mobility disabilities shall be permitted in any areas open to pedestrian use. Section 36.311(b) of the NPRM proposed that a public accommodation "shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation's goods, services, facilities, privileges, advantages, or accommodations." 73 FR 34508, 34556 (June 17, 2008).

The Department sought public comment with regard to whether these steps would, in fact, achieve clarity on these issues. Toward this end, the Department's NPRM asked several questions relating to the definitions of "wheelchair," "other power-driven mobility device," and "manually-powered mobility aids"; the best way to categorize different classes of mobility devices, the types of devices that should be included in each category; and the circumstances under which certain types of mobility devices must be accommodated or may be excluded pursuant to the policy adopted by the public accommodation.

Because the questions in the NPRM that concerned mobility devices and their accommodation were interrelated, many of the commenters' responses did not identify the specific question to which they were responding. Instead, commenters grouped the questions together and provided comments accordingly. Most commenters spoke to the issues addressed in the Department's questions in broad terms and using general concepts. As a result, the responses to the questions posed are discussed below in broadly grouped issue categories rather than on a question-by-question basis.

Two-tiered definitional approach. Commenters supported the Department's proposal to use a two-tiered definition of mobility device. Commenters nearly universally said that wheelchairs always should be accommodated and that they should never be subject to an assessment with regard to their admission to a particular public accommodation. In contrast, the vast majority of commenters indicated they were in favor of allowing public accommodations to conduct an assessment as to whether, and under which circumstances, other power-driven mobility devices will be allowed on-site.

Many commenters also indicated their support for the two-tiered approach in responding to questions concerning the definition of "wheelchair" and "other power-driven mobility device." Nearly every disability advocacy group said that the Department's two-tiered approach strikes the proper balance between ensuring access for individuals with disabilities and addressing fundamental alteration and safety concerns held by public accommodations; however, a minority of disability advocacy groups wanted other power-driven mobility devices to be included in the definition of "wheelchair." Most advocacy, nonprofit, and individual commenters supported the concept of a separate definition for "other power-driven mobility device" because a separate definition would maintain existing legal protections for wheelchairs while recognizing that some devices that are not designed primarily for individuals with mobility disabilities have beneficial uses for individuals with mobility disabilities. They also favored this concept because it recognizes technological developments and that innovative uses of varying devices may provide increased access to individuals with mobility disabilities.

While two business associations indicated that they opposed the concept of "other power-driven mobility device" in its entirety, other business commenters expressed general and industry-specific concerns about permitting their use. They indicated that such devices create a host of safety, cost, and fraud issues that do not exist with wheelchairs. On balance, however, business commenters indicated that they support the establishment of a two-tiered regulatory approach because defining "other power-driven mobility device" separately from "wheelchair" means that businesses will be able to maintain some measure of control over the admission of the former. Virtually all of these commenters indicated that their support for the dual approach and the concept of other power-driven mobility devices was, in large measure, due to the other power-driven mobility device assessment factors in § 36.311(c) of the NPRM.

By maintaining the two-tiered approach to mobility devices and defining "wheelchair" separately from "other power-driven mobility device," the Department is able to preserve the protection users of traditional wheelchairs and other manually-powered mobility aids have had since the ADA was enacted, while also recognizing that human ingenuity, personal choice, and new technologies have led to the use of devices that may be more beneficial for individuals with certain mobility disabilities.

Moreover, the Department believes the two-tiered approach gives public accommodations guidance to follow in assessing whether reasonable modifications can be made to permit the use of other power-driven mobility devices on-site and to aid in the development of policies describing the circumstances under which persons with disabilities may use such devices. The two-tiered approach neither mandates that all other power-driven mobility devices be accommodated in every circumstance, nor excludes these devices from all protection. This approach, in conjunction with the factor assessment provisions in § 36.311(b)(2), will serve as a mechanism by which public accommodations can evaluate their ability to accommodate other power-driven mobility devices. As will be discussed in more detail below, the assessment factors in § 36.311(b)(2) are specifically designed to provide guidance to public accommodations regarding whether it is permissible to bar the use of a specific other power-driven mobility device in a specific facility. In making such a determination, a public accommodation must consider the device's type, size, weight dimensions, and speed; the facility's volume of pedestrian traffic; the facility's design and operational characteristics; whether the device conflicts with legitimate safety requirements; and whether the device poses a substantial risk of serious harm to the immediate environment or natural or cultural resources, or conflicts with Federal land management laws or regulations. In addition, under § 36.311(b)(i) if the public accommodation claims that it cannot make reasonable modifications to its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with disabilities, the burden of proof to demonstrate that such devices cannot be operated in accordance with legitimate safety requirements rests upon the public accommodation.

Categorization of wheelchair versus other power-driven mobility devices. Implicit in the creation of the two-tiered mobility device concept is the question of how to categorize which devices are wheelchairs and which are other power-driven mobility devices. Finding weight and size to be too restrictive, the vast majority of advocacy, nonprofit, and individual commenters opposed using the Department of Transportation's definition of "common wheelchair" to designate the mobility device's appropriate category. Business commenters who generally supported using weight and size as the method of categorization did so because of their concerns about having to make physical changes to their facilities to accommodate oversized devices. The vast majority of business commenters also favored using the device's intended use to categorize which devices constitute wheelchairs and which are other power-driven mobility devices.

Furthermore, the intended-use determinant received a fair amount of support from advocacy, nonprofit, and individual commenters, either because they sought to preserve the broad accommodation of wheelchairs or because they sympathized with concerns about individuals without mobility disabilities fraudulently bringing other power-driven mobility devices into places of public accommodation.

Commenters seeking to have the Segway® PT included in the definition of "wheelchair" objected to classifying mobility devices on the basis of their intended use because they felt that such a classification would be unfair and prejudicial to Segway® PT users and would stifle personal choice, creativity, and innovation. Other advocacy and nonprofit commenters objected to employing an intended-use approach because of concerns that the focus would shift to an assessment of the device, rather than the needs or benefits to the individual with the mobility disability. They were of the view that the mobility-device classification should be based on its function—whether it is used to address a mobility disability. A few commenters raised the concern that an intended-use approach might embolden public accommodations to assess whether an individual with a mobility disability really needs to use the other power-driven mobility device at issue or to question why a wheelchair would not provide sufficient mobility. Those citing objections to the intended-use determinant indicated it would be more appropriate to make the categorization determination based on whether the device is being used for a mobility disability in the context of the impact of its use in a specific environment. Some of these commenters preferred this approach because it would allow the Segway® PT to be included in the definition of "wheelchair."

Some commenters were inclined to categorize mobility devices by the way in which they are powered, such as battery-powered engines versus fuel or combustion engines. One commenter suggested using exhaust level as the determinant. Although there were only a few commenters who would make the determination based on indoor or outdoor use, there was nearly universal support for banning from indoor use devices that are powered by fuel or combustion engines.

A few commenters thought it would be appropriate to categorize the devices based on their maximum speed. Others objected to this approach, stating that circumstances should dictate the appropriate speed at which mobility devices should be operated—for example, a faster speed may be safer when crossing streets than it would be for sidewalk use—and merely because a device can go a certain speed does not mean it will be operated at that speed.

The Department has decided to maintain the device's intended use as the appropriate determinant for which devices are categorized as "wheelchairs." However, because wheelchairs may be intended for use by individuals who have temporary conditions affecting mobility, the Department has decided that it is more appropriate to use the phrase "primarily designed" rather than "solely designed" in making such categorizations. The Department will not foreclose any future technological developments by identifying or banning specific devices or setting restrictions on size, weight, or dimensions. Moreover, devices designed primarily for use by individuals with mobility disabilities often are considered to be medical devices and are generally eligible for insurance reimbursement on this basis. Finally, devices designed primarily for use by individuals with mobility disabilities are less subject to fraud concerns because they were not designed to have a recreational component. Consequently, rarely, if ever, is any inquiry or assessment as to their appropriateness for use in a public accommodation necessary.

Definition of "wheelchair." In seeking public feedback on the NPRM's definition of "wheelchair," the Department explained its concern that the definition of "wheelchair" in section 508(c)(2) of the ADA (formerly section 507(c)(2), July 26, 1990, 104 Stat. 372, 42 U.S.C. 12207, renumbered section 508(c)(2), Public Law 110–325 section 6(a)(2), Sept. 25, 2008, 122 Stat. 3558), which pertains to Federal wilderness areas, is not specific enough to provide clear guidance in the array of settings covered by title III and that the stringent size and weight requirements for the Department of Transportation's definition of "common wheelchair" are not a good fit in the context of most public accommodations. The Department noted in the NPRM that it sought a definition of "wheelchair" that would include manually-operated and power-driven wheelchairs and mobility scooters (*i.e.,* those that typically are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas), as well as a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. The NPRM defined a wheelchair as "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." 73 FR 34508, 34553 (June 17, 2008). Although the NPRM's definition of "wheelchair" excluded mobility devices that are not designed solely for use by individuals with mobility disabilities, the Department, noting that the use of the Segway® PT by individuals with mobility disabilities is on the upswing, inquired as to whether this device should be included in the definition of "wheelchair."

Most business commenters wished the definition of "wheelchair" had included size, weight, and dimension maximums. Ultimately, however, they supported the definition because it excludes other power-driven mobility devices and enables them to engage in an assessment to determine whether a particular device can be allowed as a reasonable modification. These commenters felt this approach gave them some measure of control over whether, and under what circumstances, other power-driven mobility devices may be used in their facilities by individuals with mobility disabilities. Two commenters noted that because many mobility scooters are oversized, they are misplaced in the definition of "wheelchair" and belong with other power-driven mobility devices. Another commenter suggested using maximum size and weight requirements to allocate which mobility scooters should be categorized as wheelchairs, and which should be categorized as other power-driven mobility devices.

Many advocacy, nonprofit, and individual commenters indicated that as long as the Department intends the scope of the term "mobility impairments" to include other disabilities that cause mobility impairments (*e.g.,* respiratory, circulatory, stamina, etc.), they were in support of the language. Several commenters indicated a preference for the definition of "wheelchair" in section 508(c)(2) of the ADA. One commenter indicated a preference for the term "assistive device," as it is defined in the Rehabilitation Act of 1973, over the term "wheelchair." A few commenters indicated that strollers should be added to the preamble's list of examples of wheelchairs because parents of children with disabilities frequently use strollers as mobility devices until their children get older.

In the final rule, the Department has rearranged some wording and has made some changes in the terminology used in the definition of "wheelchair," but essentially has retained the definition, and therefore the rationale, that was set forth in the NPRM. Again, the text of the ADA makes the definition of "wheelchair" contained in section 508(c)(2) applicable only to the specific context of uses in designated wilderness areas, and therefore does not compel the use of that definition for any other purpose. Moreover, the Department maintains that limiting the definition to devices suitable for use in an "indoor pedestrian area" as provided for in section 508(c)(2) of the ADA would ignore the technological advances in wheelchair design that have occurred since the ADA went into effect and that the inclusion of the phrase "indoor pedestrian area" in the definition of "wheelchair" would set back progress made by individuals with mobility disabilities who, for many years now, have been using devices designed for locomotion in indoor *and* outdoor settings. The Department has concluded that same rationale applies to placing limits on the size, weight, and dimensions of wheelchairs.

With regard to the term "mobility impairments," the Department intended a broad reading so that a wide range of disabilities, including circulatory and respiratory disabilities, that make walking difficult or impossible, would be included. In response to comments on this issue, the Department has revisited the issue and has concluded that the most apt term to achieve this intent is "mobility disability."

In addition, the Department has decided that it is more appropriate to use the phrase, "primarily" designed for use by individuals with disabilities in the final rule, rather than, "solely" designed for use by individuals with disabilities—the phrase, proposed in the NPRM. The Department believes that this

phrase more accurately covers the range of devices the Department intends to fall within the definition of "wheelchair."

After receiving comments that the word "typical" is vague and the phrase "pedestrian areas" is confusing to apply, particularly in the context of similar, but not identical, terms used in the proposed Standards, the Department decided to delete the term "typical indoor and outdoor pedestrian areas" from the final rule. Instead, the final rule references "indoor or * * * both indoor and outdoor locomotion," to make clear that the devices that fall within the definition of "wheelchair" are those that are used for locomotion on indoor and outdoor pedestrian paths or routes and not those that are intended exclusively for traversing undefined, unprepared, or unimproved paths or routes. Thus, the final rule defines the term "wheelchair" to mean "a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion."

Whether the definition of "wheelchair" includes the Segway® PT. As discussed above, because individuals with mobility disabilities are using the Segway® PT as a mobility device, the Department asked whether it should be included in the definition of "wheelchair." The basic Segway® PT 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. Most Segway® PTs 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 non-motorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of individuals using EPAMDs ranged from approximately 69 to 80 inches. *See* Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 14, 2004), available at *http://www.tfhrc.gov/safety/pubs/04103* (last visited June 24, 2010). Thus, the Segway® PT can operate at much greater speeds than wheelchairs, and the average user stands much taller than most wheelchair users.

The Segway® PT has been the subject of debate among users, pedestrians, disability advocates, State and local governments, businesses, and bicyclists. The fact that the Segway® PT is not designed primarily for use by individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of to what extent individuals with disabilities should be allowed to operate them in areas and facilities where other power-driven mobility devices are not allowed. Those who question the use of the Segway® PT 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.

Comments regarding whether to include the Segway® PT in the definition of "wheelchair" were, by far, the most numerous received in the category of comments regarding wheelchairs and other power-driven mobility devices. Significant numbers of veterans with disabilities, individuals with multiple sclerosis, and those advocating on their behalf made concise statements of general support for the inclusion of the Segway® PT in the definition of "wheelchair." Two veterans offered extensive comments on the topic, along with a few advocacy and nonprofit groups and individuals with disabilities for whom sitting is uncomfortable or impossible.

While there may be legitimate safety issues for EPAMD users and bystanders in some circumstances, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. Among the reasons given by commenters to include the Segway® PT in the definition of "wheelchair" were that the Segway® PT is well-suited for individuals with particular conditions that affect mobility including multiple sclerosis, Parkinson's disease, chronic obstructive pulmonary disease, amputations, spinal cord injuries, and other neurological disabilities, as well as functional limitations, such as gait limitation, inability to sit or discomfort in sitting, and diminished stamina issues. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. *See* Rachel Metz, *Disabled Embrace Segway,* New York Times, Oct. 14, 2004. Commenters specifically cited pressure relief, reduced spasticity, increased stamina, and improved respiratory, neurologic, and muscular health as secondary medical benefits from being able to stand.

Other arguments for including the Segway® PT in the definition of "wheelchair" were based on commenters' views that the Segway® PT offers benefits not provided by wheelchairs and mobility scooters, including its intuitive response to body movement, ability to operate with less coordination and dexterity than is required for many wheelchairs and mobility scooters, and smaller footprint and turning radius as compared to most wheelchairs and mobility scooters. Several commenters mentioned improved visibility, either due to the Segway® PT's raised platform or simply by virtue of being in a standing position. And finally, some commenters advocated for the inclusion of the Segway® PT simply based on civil rights arguments and the empowerment and self-esteem obtained from having the power to select the mobility device of choice.

Many commenters, regardless of their position on whether to include the Segway® PT in the definition of "wheelchair," noted that the Segway® PT's safety record is as good as, if not better, than the record for wheelchairs and mobility scooters.

Most business commenters were opposed to the inclusion of the Segway® PT in the definition of "wheelchair" but were supportive of its inclusion as an "other power-driven mobility device." They raised industry- or venue-specific concerns about including the Segway® PT in the definition of "wheelchair." For example, civic centers, arenas, and theaters were concerned about the impact on sight-line requirements if Segway® PT users remain on their devices in a designated wheelchair seating area; amusement parks expressed concern that rides have been designed, purchased, and installed to enable wheelchair users to transfer easily or to accommodate wheelchairs on the ride itself; and retail stores mentioned size constraints in some stores. Nearly all business commenters expressed concern—and perceived liability issues—related to having to store or stow the Segway® PT, particularly if it could not be stored in an upright position. These commenters cited concerns about possible damage to the device, injury to customers who may trip over it, and theft of the device as a result of not being able to stow the Segway® PT securely.

Virtually every business commenter mentioned concerns about rider safety, as well as concerns for pedestrians unexpectedly encountering these devices or being hit or run over by these devices in crowded venues where maneuvering space is limited. Their main safety objection to the inclusion of the Segway® PT in the definition of "wheelchair" was that the maximum speed at which the Segway® PT can operate is far faster than that of motorized wheelchairs. There was a universal unease among these commenters with regard to relying on the judgment of the Segway® PT user to exercise caution because its top speed is far in excess of a wheelchair's top speed. Many other safety concerns were industry-specific. For example, amusement parks were concerned that the Segway® PT is much taller than children; that it is too quiet to warn pedestrians, particularly those with low vision or who are blind, of their presence; that it may keep moving after a rider has fallen off or power system fails; and that it has a full-power override which automatically engages when an obstacle is encountered. Hotels and retail stores mentioned that maneuvering the Segway® PT through their tight quarters would create safety hazards.

Business commenters also expressed concern that if the Segway® PT were included in the definition of "wheelchair" they would have to make physical changes to their facilities to accommodate Segway® PT riders who stand much taller in these devices than do users of wheelchairs. They also were concerned that if the Segway®7 PT was included in the definition of "wheelchair," they would have no ability to assess whether it is appropriate to allow the entry of the Segway® PT into their facilities the way they would have if the device is categorized as an "other power-driven mobility device."

Many disability advocacy and nonprofit commenters did not support the inclusion of the Segway® PT in the definition of "wheelchair." Paramount to these commenters was the maintenance of existing protections for wheelchair users. Because there was unanimous agreement that wheelchair use rarely, if ever, may be restricted, these commenters strongly favored

categorizing wheelchairs separately from the Segway® PT and other power-driven mobility devices and applying the intended-use determinant to assign the devices to either category. They indicated that while they support the greatest degree of access in public accommodations for all persons with disabilities who require the use of mobility devices, they recognize that under certain circumstances allowing the use of other power-driven mobility devices would result in a fundamental alteration or run counter to legitimate safety requirements necessary for the safe operation of a public accommodation. While these groups supported categorizing the Segway® PT as an "other power-driven mobility device," they universally noted that because the Segway® PT does not present environmental concerns and is as safe to use as, if not safer than, a wheelchair, it should be accommodated in most circumstances.

The Department has considered all the comments and has concluded that it should not include the Segway® PT in the definition of "wheelchair." The final rule provides that the test for categorizing a device as a wheelchair or an other power-driven mobility device is whether the device is designed primarily for use by individuals with mobility disabilities. Mobility scooters are included in the definition of "wheelchair" because they are designed primarily for users with mobility disabilities. However, because the current generation of EPAMDs, including the Segway® PT, was designed for recreational users and not primarily for use by individuals with mobility disabilities, the Department has decided to continue its approach of excluding EPAMDs from the definition of "wheelchair" and including them in the definition of "other power-driven mobility device." Although EPAMDs, such as the Segway® PT, are not included in the definition of a "wheelchair," public accommodations must assess whether they can make reasonable modifications to permit individuals with mobility disabilities to use such devices on their premises. The Department recognizes that the Segway® PT provides many benefits to those who use them as mobility devices, including a measure of privacy with regard to the nature of one's particular disability, and believes that in the vast majority of circumstances, the application of the factors described in § 36.311 for providing access to other-powered mobility devices will result in the admission of the Segway® PT.

Treatment of "manually-powered mobility aids." The Department's NPRM did not define the term "manually-powered mobility aids." Instead, the NPRM included a non-exhaustive list of examples in § 36.311(a). The NPRM queried whether the Department should maintain this approach to manually-powered mobility aids or whether it should adopt a more formal definition.

Only a few commenters addressed "manually-powered mobility aids." Virtually all commenters were in favor of maintaining a non-exhaustive list of examples of "manually-powered mobility aids" rather than adopting a definition of the term. Of those who commented, a couple sought clarification of the term "manually-powered." One commenter suggested that the term be changed to "human-powered." Other commenters requested that the Department include ordinary strollers in the non-exhaustive list of manually-powered mobility aids. Since strollers are not devices designed primarily for individuals with mobility disabilities, the Department does not consider them to be manually-powered mobility aids; however, strollers used in the context of transporting individuals with disabilities are subject to the same assessment required by the ADA's reasonable modification standards at § 36.302. The Department believes that because the existing approach is clear and understood easily by the public, no formal definition of the term "manually-powered mobility aids" is required.

Definition of "other power-driven mobility device." The Department's NPRM defined the term "other power-driven mobility device" in § 36.104 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), or any mobility aid designed to operate in areas without defined pedestrian routes." 73 FR 34508, 34552 (June 17, 2008).

Business commenters mostly were supportive of the definition of "other power-driven mobility device" because it gave them the ability to develop policies pertaining to the admission of these devices, but they expressed concern that individuals will feign mobility disabilities so that they can use devices that are otherwise banned in public accommodations. Advocacy, nonprofit, and several individual commenters supported the definition of "other power-driven mobility device" because it allows new technologies to be added in the future, maintains the existing legal protections for wheelchairs, and recognizes that some devices, particularly the Segway® PT, which are not designed primarily for individuals with mobility disabilities, have beneficial uses for individuals with mobility disabilities.

Despite support for the definition of "other power-driven mobility device," however, most advocacy and nonprofit commenters expressed at least some hesitation about the inclusion of fuel-powered mobility devices in the definition. While virtually all of these commenters noted that a blanket exclusion of any device that falls under the definition of "other power-driven mobility device" would violate basic civil rights concepts, they also specifically stated that certain devices, particularly off-highway vehicles, cannot be permitted in certain circumstances. They also made a distinction between the Segway® PT and other power-driven mobility devices, noting that the Segway® PT should be accommodated in most circumstances because it satisfies the safety and environmental elements of the policy analysis. These commenters indicated that they agree that other power-driven mobility devices must be assessed, particularly as to their environmental impact, before they are accommodated.

Business commenters were even less supportive of the inclusion of fuel-powered devices in the other power-driven mobility devices category. They sought a complete ban on fuel-powered devices because they believe they are inherently dangerous and pose environmental and safety concerns.

Although many commenters had reservations about the inclusion of fuel-powered devices in the definition of other power-driven mobility devices, the Department does not want the definition to be so narrow that it would foreclose the inclusion of new technological developments, whether powered by fuel or by some other means. It is for this reason that the Department has maintained the phrase "any mobility device designed to operate in areas without defined pedestrian routes" in the final rule's definition of other power-driven mobility devices. The Department believes that the limitations provided by "fundamental alteration" and the ability to impose legitimate safety requirements will likely prevent the use of fuel and combustion engine-driven devices indoors, as well as in outdoor areas with heavy pedestrian traffic. The Department notes, however, that in the future technological developments may result in the production of safe fuel-powered mobility devices that do not pose environmental and safety concerns. The final rule allows consideration to be given as to whether the use of a fuel-powered device would create a substantial risk of serious harm to the environment or natural or cultural resources, and to whether the use of such a device conflicts with Federal land management laws or regulations; this aspect of the final rule will further limit the inclusion of fuel-powered devices where they are not appropriate. Consequently, the Department has maintained fuel-powered devices in the definition of "other power-driven mobility devices." The Department has also added language to the definition of "other power-driven mobility device" to reiterate that the definition does not apply to Federal wilderness areas, which are not covered by title II of the ADA; the use of wheelchairs in such areas is governed by section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

"Place of Public Accommodation"

Definition of "place of lodging." The NPRM stated that a covered "place of lodging" is a facility that provides guest rooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less), to which the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay, and which operates under conditions and with amenities similar to a hotel, motel, or inn, particularly including factors such as: (1) An on-site proprietor and reservations desk; (2) rooms available on a walk-up basis; (3) linen service; and (4) a policy of accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit. The NPRM stated that timeshares and condominiums or corporate hotels that did not meet this definition would not be covered by § 36.406(c) of the proposed regulation, but may be covered by the

requirements of the Fair Housing Act (FHAct).

In the NPRM, the Department sought comment on its definition of "place of lodging," specifically seeking public input on whether the most appropriate time period for identifying facilities used for stays that primarily are short-term in nature should be set at 2 weeks or 30 days.

The vast majority of the comments received by the Department supported the use of a 30-day limitation on places of lodging as more consistent with building codes, local laws, and common real estate practices that treat stays of 30 days or less as transient rather than residential use. One commenter recommended using the phrase "fourteen days or less." Another commenter objected to any bright line standard, stating that the difference between two weeks and 30 days for purposes of title III is arbitrary, viewed in light of conflicting regulations by the States. This commenter argued the Department should continue its existing practice under title III of looking to State law as one factor in determining whether a facility is used for stays that primarily are short-term in nature.

The Department is persuaded by the majority of commenters to adopt a 30-day guideline for the purposes of identifying facilities that primarily are short-term in nature and has modified the section accordingly. The 30-day guideline is intended only to determine when the final rule's transient lodging provisions apply to a facility. It does not alter an entity's obligations under any other applicable statute. For example, the Department recognizes that the FHAct does not employ a bright line standard for determining which facilities qualify as residential facilities under that Act and that there are circumstances where units in facilities that meet the definition of places of lodging will be covered under both the ADA and the FHAct and will have to comply with the requirements of both laws.

The Department also received comments about the factors used in the NPRM's definition of "place of lodging." One commenter proposed modifications to the definition as follows: changing the words "guest rooms" to "accommodations for sleeping"; and adding a fifth factor that states that "the in-room decor, furnishings and equipment being specified by the owner or operator of the lodging operation rather than generally being determined by the owner of the individual unit or room." The Department does not believe that "guest room" should be changed to "accommodations for sleeping." Such a change would create confusion because the transient lodging provisions in the 2004 ADAAG use the term "guest rooms" and not "accommodations for sleeping." In addition, the Department believes that it would be confusing to add a factor relating to who dictates the in-room decor and furnishings in a unit or room, because there may be circumstances where particular rental programs require individual owners to use certain decor and furnishings as a condition of participating in that program.

One commenter stated that the factors the Department has included for determining whether a rental unit is a place of lodging for the purposes of title III, and therefore a "place of public accommodation" under the ADA, address only the way an establishment appears to the public. This commenter recommended that the Department also consider the economic relationships among the unit owners, rental managers, and homeowners' associations, noting that where revenues are not pooled (as they are in a hotel), the economic relationships do not make it possible to spread the cost of providing accessibility features over the entire business enterprise. Another commenter argued that private ownership of sleeping accommodations sets certain facilities apart from traditional hotels, motels, and inns, and that the Department should revise the definition of places of lodging to exempt existing places of lodging that have sleeping accommodations separately owned by individual owners (*e.g.,* condominiums) from the accessible transient lodging guest room requirements in sections 224 and 806 of the 2004 ADAAG, although the commenter agreed that newly constructed places of lodging should meet those standards.

One commenter argued that the Department's proposed definition of place of lodging does not reflect fully the nature of a timeshare facility and one single definition does not fit timeshares, condo hotels, and other types of rental accommodations. This commenter proposed that the Department adopt a separate definition for timeshare resorts as a subcategory of place of lodging. The commenter proposed defining timeshare resorts as facilities that provide the recurring right to occupancy for overnight accommodations for the owners of the accommodations, and other occupancy rights for owners exchanging their interests or members of the public for stays that primarily are short-term in nature (generally 30 consecutive days or less), where neither the owner nor any other occupant has the right or intent to use the unit or room on other than a temporary basis for vacation or leisure purposes. This proposed definition also would describe factors for determining when a timeshare resort is operating in a manner similar to a hotel, motel, or inn, including some or all of the following: rooms being available on a walk-in or call-in basis; housekeeping or linen services being available; on-site management; and reservations being accepted for a room type without guaranteeing any guest or owner use of a particular unit or room until check-in, without a prior lease or security deposit. Timeshares that do not meet this definition would not be subject to the transient lodging standards.

The Department has considered these comments and has revised the definition of "place of accommodation" in § 36.104 to include a revised subcategory (B), which more clearly defines the factors that must be present for a facility that is not an inn, motel, or hotel to qualify as a place of lodging. These factors include conditions and amenities similar to an inn, motel, or hotel, including on- or off-site management and reservations service, rooms available on a walk-up or call-in basis, availability of housekeeping or linen service, and accepting reservations for a room type without guaranteeing a particular unit or room until check-in without a prior lease or security deposit.

Although the Department understands some of the concerns about the application of the ADA requirements to places of lodging that have ownership structures that involve individually owned units, the Department does not believe that the definitional section of the regulation is the place to address these concerns and has addressed them in § 36.406(c)(2) and the accompanying discussion in Appendix A.

"Qualified Interpreter"

In the NPRM, the Department proposed adding language 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. As the Department explained, 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. In addition, someone with only a rudimentary familiarity with sign language or finger spelling is not qualified, nor is someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

As further explained, different situations will require different types of interpreters. For example, an oral interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing may be necessary for an individual who was raised orally and taught to read lips or was diagnosed with hearing loss later in life and does 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, if 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.

The Department received many comments regarding the proposed modifications to the definition of "qualified interpreter." Many commenters requested that the Department include within the definition a requirement that interpreters be certified, particularly if they reside in a State that licenses or certifies interpreters. Other commenters opposed a certification requirement as unduly limiting, noting that an interpreter may well be qualified even if that same interpreter is not certified. These commenters noted the absence of nationwide standards or universally accepted criteria for certification.

On review of this issue, the Department has decided against imposing a certification requirement under the ADA. It is sufficient under the ADA that the interpreter be qualified. With respect to the proposed additions to the rule, most commenters supported the expansion of the list of qualified interpreters, and some advocated for the inclusion of other types of interpreters

on the list as well, such as deaf-blind interpreters, certified deaf interpreters, and speech-to-speech interpreters. As these commenters explained, deaf-blind interpreters are interpreters who have specialized skills and training to interpret for individuals who are deaf and blind. Certified deaf interpreters are deaf or hard of hearing interpreters who work with hearing sign language interpreters to meet the specific communication needs of deaf individuals. Speech-to-speech interpreters have special skill and training to interpret for individuals who have speech disabilities.

The list of interpreters in the definition of "qualified interpreter" is illustrative, and the Department does not believe it is necessary or appropriate to attempt to provide an exhaustive list of qualified interpreters. Accordingly, the Department has decided not to expand the proposed list. However, if a deaf and blind individual needs interpreting services, an interpreter who is qualified to handle the interpreting needs of that individual may be required. The guiding criterion is that the public accommodation must provide appropriate auxiliary aids and services to ensure effective communication with the individual.

Commenters also suggested various definitions for the term "cued-speech interpreters," and different descriptions of the tasks they performed. After reviewing the various comments, the Department has determined that it is more accurate and appropriate to refer to such individuals as "cued-language transliterators." Likewise, the Department has changed the term "oral interpreters" to "oral transliterators." These two changes have been made to distinguish between sign language interpreters, who translate one language into another language (*e.g.,* ASL to English and English to ASL), from transliterators, who interpret within the same language between deaf and hearing individuals. A cued-language transliterator is an interpreter who has special skill and training in the use of the Cued Speech system of handshapes and placements, along with non-manual information, such as facial expression and body language, to show auditory information visually, including speech and environmental sounds. An oral transliterator is an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. While the Department included definitions for "cued-speech interpreter" and "oral interpreter" in the regulatory text proposed in the NPRM, the Department has decided that it is unnecessary to include such definitions in the text of the final rule.

Many commenters questioned the proposed deletion of the requirement that a qualified interpreter be able to interpret both receptively and expressively, noting the importance of both these skills. Commenters noted that this phrase was carefully crafted in the original regulation to make certain that interpreters both (1) are capable of understanding what a person with a disability is saying and (2) have the skills needed to convey information back to that individual. These are two very different skill sets and both are equally important to achieve effective communication. For example, in a medical setting, a sign language interpreter must have the necessary skills to understand the grammar and syntax used by an ASL user (receptive skills) and the ability to interpret complicated medical information—presented by medical staff in English—back to that individual in ASL (expressive skills). The Department agrees and has put the phrase "both receptively and expressively" back in the definition.

Several advocacy groups suggested that the Department make clear in the definition of qualified interpreter that the interpreter may appear either on-site or remotely using a video remote interpreting (VRI) service. Given that the Department has included in this rule both a definition of VRI services and standards that such services must satisfy, such an addition to the definition of qualified interpreter is appropriate.

After consideration of all relevant information submitted during the public comment period, the Department has modified the definition from that initially proposed in the NPRM. The final definition now states that "[q]ualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators."

"Qualified Reader"

The 1991 title III regulation identified a qualified reader as an auxiliary aid, but did not define the term. Based upon the Department's investigation of complaints alleging that some entities have provided ineffective readers, the Department proposed in the NPRM to define "qualified reader" similarly to "qualified interpreter" to ensure that public accommodations select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. This proposal was suggested in order to make clear to public accommodations that a failure to provide a qualified reader to a person with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

The Department received comments supporting the inclusion in the regulation of a definition of a "qualified reader." Some commenters suggested the Department add to the definition a requirement prohibiting the use of a reader whose accent, diction, or pronunciation makes full comprehension of material being read difficult. Another commenter requested that the Department include a requirement that the reader "will follow the directions of the person for whom he or she is reading." Commenters also requested that the Department define "accurately" and "effectively" as used in this definition.

While the Department believes that the regulatory definition proposed in the NPRM adequately addresses these concerns, the Department emphasizes that a reader, in order to be "qualified," must be skilled in reading the language and subject matter and must be able to be easily understood by the individual with the disability. For example, if a reader is reading aloud the questions for a bar examination, that reader, in order to be qualified, must know the proper pronunciation of all legal terminology used and must be sufficiently articulate to be easily understood by the individual with a disability for whom he or she is reading. In addition, the terms "effectively" and "accurately" have been successfully used and understood in the Department's existing definition of "qualified interpreter" since 1991 without specific regulatory definitions. Instead, the Department has relied upon the common use and understanding of those terms from standard English dictionaries. Thus, the definition of "qualified reader" has not been changed from that contained in the NPRM. The final rule defines a "qualified reader" to mean "a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary."

"Service Animal"

Section 36.104 of the 1991 title III regulation defines a "service animal" as "any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." Section 36.302(c)(1) of the 1991 title III regulation requires that "[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability." Section 36.302(c)(2) of the 1991 title III regulation states that "a public accommodation [is not required] to supervise or care for a service animal."

The Department has issued guidance and provided technical assistance and publications concerning service animals since the 1991 regulations became effective. In the NPRM, the Department proposed to modify the definition of service animal and asked for public input on several issues related to the service animal provisions of the 1991 title III regulation: whether the Department should clarify the phrase "providing minimal protection" in the definition or remove it; whether there are any circumstances where a service animal "providing minimal protection" would be appropriate or expected; whether certain species should be eliminated from the definition of "service animal," and, if so, which types of animals should be excluded; whether "common domestic animal" should be part of the definition; and whether a size or weight limitation should be imposed for common domestic animals, even if the animal satisfies the "common domestic animal" part of the NPRM definition.

The Department received extensive comments on these issues, as well as requests to clarify the obligations of public accommodations to accommodate individuals with disabilities who use service animals, and has modified the final rule in response. In the interests of avoiding unnecessary repetition, the Department has

elected to discuss the issues raised in the NPRM questions about service animals and the corresponding public comments in the following discussion of the definition of "service animal."

The Department's final rule defines "service animal" as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition."

This definition has been designed to clarify a key provision of the ADA. Many covered entities indicated that they are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals. Individuals with disabilities who use trained guide or service dogs are concerned that if untrained or unusual animals are termed "service animals," their own right to use guide or service dogs may become unnecessarily restricted or questioned. Some individuals who are not individuals with disabilities have claimed, whether fraudulently or sincerely (albeit mistakenly), that their animals are service animals covered by the ADA, in order to gain access to hotels, restaurants, and other places of public accommodation. The increasing use of wild, exotic, or unusual species, many of which are untrained, as service animals has also added to the confusion.

Finally, individuals with disabilities who have the legal right under the Fair Housing Act (FHAct) to use certain animals in their homes as a reasonable accommodation to their disabilities have assumed that their animals also qualify under the ADA. This is not necessarily the case, as discussed below.

The Department recognizes the diverse needs and preferences of individuals with disabilities protected under the ADA, and does not wish to unnecessarily impede individual choice. Service animals play an integral role in the lives of many individuals with disabilities, and with the clarification provided by the final rule, individuals with disabilities will continue to be able to use their service animals as they go about their daily activities. The clarification will also help to ensure that the fraudulent or mistaken use of other animals not qualified as service animals under the ADA will be deterred. A more detailed analysis of the elements of the definition and the comments responsive to the service animal provisions of the NPRM follows.

Providing minimal protection. The 1991 title III regulation included language stating that "minimal protection" was a task that could be performed by an individually trained service animal for the benefit of an individual with a disability. In the Department's "ADA Business Brief on Service Animals" (2002), the Department interpreted the "minimal protection" language within the context of a seizure (*i.e.,* alerting and protecting a person who is having a seizure). The Department received many comments in response to the question of whether the "minimal protection" language should be clarified. Many commenters urged the removal of the "minimal protection" language from the service animal definition for two reasons: (1) The phrase can be interpreted to allow any dog that is trained to be aggressive to qualify as a service animal simply by pairing the animal with a person with a disability; and (2) The phrase can be interpreted to allow any untrained pet dog to qualify as a service animal, since many consider the mere presence of a dog to be a crime deterrent, and thus sufficient to meet the minimal protection standard. These commenters argued, and the Department agrees, that these interpretations were not contemplated under the original title III regulation.

While many commenters stated that they believe that the "minimal protection" language should be eliminated, other commenters recommended that the language be clarified, but retained. Commenters favoring clarification of the term suggested that the Department explicitly exclude the function of attack or exclude those animals that are trained solely to be aggressive or protective. Other commenters identified non-violent behavioral tasks that could be construed as minimally protective, such as interrupting self-mutilation, providing safety checks and room searches, reminding the handler to take medications, and protecting the handler from injury resulting from seizures or unconsciousness.

Several commenters noted that the existing direct threat defense, which allows the exclusion of a service animal if the animal exhibits unwarranted or unprovoked violent behavior or poses a direct threat, prevents the use of "attack dogs" as service animals. One commenter noted that the use of a service animal trained to provide "minimal protection" may impede access to care in an emergency, for example, where the first responder is unable or reluctant to approach a person with a disability because the individual's service animal is in a protective posture suggestive of aggression.

Many organizations and individuals stated that in the general dog training community, "protection" is code for attack or aggression training and should be removed from the definition. Commenters stated that there appears to be a broadly held misconception that aggression-trained animals are appropriate service animals for persons with post traumatic stress disorder (PTSD). While many individuals with PTSD may benefit by using a service animal, the work or tasks performed appropriately by such an animal would not involve unprovoked aggression but could include actively cuing the handler by nudging or pawing the handler to alert to the onset of an episode and removing the individual from the anxiety-provoking environment.

The Department recognizes that despite its best efforts to provide clarification, the "minimal protection" language appears to have been misinterpreted. While the Department maintains that protection from danger is one of the key functions that service animals perform for the benefit of persons with disabilities, the Department recognizes that an animal individually trained to provide aggressive protection, such as an attack dog, is not appropriately considered a service animal. Therefore, the Department has decided to modify the "minimal protection" language to read "non-violent protection," thereby excluding so-called "attack dogs" or dogs with traditional "protection training" as service animals. The Department believes that this modification to the service animal definition will eliminate confusion, without restricting unnecessarily the type of work or tasks that service animals may perform. The Department's modification also clarifies that the crime-deterrent effect of a dog's presence, by itself, does not qualify as work or tasks for purposes of the service animal definition.

Alerting to intruders. The phrase "alerting to intruders" is related to the issues of minimal protection and the work or tasks an animal may perform to meet the definition of a service animal. In the original 1991 regulatory text, this phrase was intended to identify service animals that alert individuals who are deaf or hard of hearing to the presence of others. This language has been misinterpreted by some to apply to dogs that are trained specifically to provide aggressive protection, resulting in the assertion that such training qualifies a dog as a service animal under the ADA. The Department reiterates that public accommodations are not required to admit any animal whose use poses a direct threat. In addition, the Department has decided to remove the word "intruders" from the service animal definition and replace it with the phrase "the presence of people or sounds." The Department believes this clarifies that so-called "attack training" or other aggressive response types of training that cause a dog to provide an aggressive response do not qualify a dog as a service animal under the ADA.

Conversely, if an individual uses a breed of dog that is perceived to be aggressive because of breed reputation, stereotype, or the history or experience the observer may have with other dogs, but the dog is under the control of the individual with a disability and does not exhibit aggressive behavior, the public accommodation cannot exclude the individual or the animal from the place of public accommodation. The animal can only be removed if it engages in the behaviors

mentioned in § 36.302(c) (as revised in the final rule) or if the presence of the animal constitutes a fundamental alteration to the nature of the goods, services, facilities, and activities of the place of public accommodation.

"*Doing work*" *or* "*performing tasks.*" The NPRM proposed that the Department maintain the requirement first articulated in the 1991 title III regulation that in order to qualify as a service animal, the animal must "perform tasks" or "do work" for the individual with a disability. The phrases "perform tasks" and "do work" describe what an animal must do for the benefit of an individual with a disability in order to qualify as a service animal.

The Department received a number of comments in response to the NPRM proposal urging the removal of the term "do work" from the definition of a service animal. These commenters argued that the Department should emphasize the performance of tasks instead. The Department disagrees. Although the common definition of work includes the performance of tasks, the definition of work is somewhat broader, encompassing activities that do not appear to involve physical action.

One service dog user stated that, 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. The Department agrees with this statement but cautions that unless the animal is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal. A pet or support animal may be able to discern that the handler is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal.

The NPRM contained an example of "doing work" that stated "a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place." 73 FR 34508, 34521 (June 17, 2008). Several commenters objected to the use of this example, arguing that grounding was not a "task" and therefore the example inherently contradicted the basic premise that a service animal must perform a task in order to mitigate a disability. Other commenters stated that "grounding" should not be included as an example of "work" because it could lead to some individuals claiming that they should be able to use emotional support animals in public because the dog makes them feel calm or safe. By contrast, one commenter with experience in training service animals explained that grounding is a trained task based upon very specific behavioral indicators that can be observed and measured. These tasks are based upon input from mental health practitioners, dog trainers, and individuals with a history of working with psychiatric service dogs.

It is the Department's view that an animal that is trained to "ground" a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: Recognition and response. For example, if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond, for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event.

One commenter suggested defining the term "task," presumably to improve the understanding of the types of services performed by an animal that would be sufficient to qualify the animal for coverage. The Department believes that the common definition of the word "task" is sufficiently clear and that it is not necessary to add to the definitions section. However, the Department has added examples of other kinds of work or tasks to help illustrate and provide clarity to the definition. After careful evaluation of this issue, the Department has concluded that the phrases "do work" and "perform tasks" have been effective during the past two decades to illustrate the varied services provided by service animals for the benefit of individuals with all types of disabilities. Thus, the Department declines to depart from its longstanding approach at this time.

Species limitations. When the Department originally issued its title III regulation in the early 1990s, the Department did not define the parameters of acceptable animal species. At that time, few anticipated the variety of animals that would be promoted as service animals in the years to come, which ranged from pigs and miniature horses to snakes, iguanas, and parrots. The Department has followed this particular issue closely, keeping current with the many unusual species of animals represented to be service animals. Thus, the Department has decided to refine further this aspect of the service animal definition in the final rule.

The Department received many comments from individuals and organizations recommending species limitations. Several of these commenters asserted that limiting the number of allowable species would help stop erosion of the public's trust, which has resulted in reduced access for many individuals with disabilities who use trained service animals that adhere to high behavioral standards. Several commenters suggested that other species would be acceptable if those animals could meet nationally recognized behavioral standards for trained service dogs. Other commenters asserted that certain species of animals (*e.g.,* reptiles) cannot be trained to do work or perform tasks, so these animals would not be covered.

In the NPRM, the Department used the term "common domestic animal" in the service animal definition and excluded reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents from the service animal definition. 73 FR 34508, 34553 (June 17, 2008). However, the term "common domestic animal" is difficult to define with precision due to the increase in the number of domesticated species. Also, several State and local laws define a "domestic" animal as an animal that is not wild.

The Department is compelled to take into account the practical considerations of certain animals and to contemplate their suitability in a variety of public contexts, such as restaurants, grocery stores, hospitals, and performing arts venues, as well as suitability for urban environments. The Department agrees with commenters' views that limiting the number and types of species recognized as service animals will provide greater predictability for public accommodations as well as added assurance of access for individuals with disabilities who use dogs as service animals. As a consequence, the Department has decided to limit this rule's coverage of service animals to dogs, which are the most common service animals used by individuals with disabilities.

Wild animals, monkeys, and other nonhuman primates. Numerous business entities endorsed a narrow definition of acceptable service animal species, and asserted that there are certain animals (*e.g.,* reptiles) that cannot be trained to do work or perform tasks. Other commenters suggested that the Department should identify excluded animals, such as birds and llamas, in the final rule. Although one commenter noted that wild animals bred in captivity should be permitted to be service animals, the Department has decided to make clear that all wild animals, whether born or bred in captivity or in the wild, are eliminated from coverage as service animals. The Department believes that this approach reduces risks to health or safety attendant with wild animals. Some animals, such as certain nonhuman primates, including certain monkeys, pose a direct threat; their behavior can be unpredictably aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement advising against the use of monkeys as service animals, stating that "[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, and the potential for serious injury and zoonotic [animal to human disease transmission] risks." AVMA Position Statement, *Nonhuman Primates as Assistance Animals* (2005), available at *http://www.avma.org/issues/policy/nonhuman_primates.asp* (last visited June 24, 2010).

An organization that trains capuchin monkeys to provide in-home services to individuals with paraplegia and quadriplegia was in substantial agreement with the AVMA's views but requested a limited recognition in the service animal definition for the capuchin monkeys it trains to provide assistance for persons with disabilities. The organization commented that its trained capuchin monkeys undergo scrupulous veterinary examinations to ensure that the animals pose no health risks, and are used by individuals with disabilities exclusively in their homes. The organization acknowledged

that the capuchin monkeys it trains are not necessarily suitable for use in a place of public accommodation but noted that the monkeys may need to be used in circumstances that implicate title III coverage, *e.g.,* in the event the handler had to leave home due to an emergency, to visit a veterinarian, or for the initial delivery of the monkey to the individual with a disability. The organization noted that several State and local government entities have local zoning, licensing, health, and safety laws that prohibit non-human primates, and that these prohibitions would prevent individuals with disabilities from using these animals even in their homes.

The organization argued that including capuchin monkeys under the service animal umbrella would make it easier for individuals with disabilities to obtain reasonable modifications of State and local licensing, health, and safety laws that would permit the use of these monkeys. The organization argued that this limited modification to the service animal definition was warranted in view of the services these monkeys perform, which enable many individuals with paraplegia and quadriplegia to live and function with increased independence.

The Department has carefully considered the potential risks associated with the use of nonhuman primates as service animals in places of public accommodation, as well as the information provided to the Department about the significant benefits that trained capuchin monkeys provide to certain individuals with disabilities in residential settings. The Department has determined, however, that nonhuman primates, including capuchin monkeys, will not be recognized as service animals for purposes of this rule because of their potential for disease transmission and unpredictable aggressive behavior. The Department believes that these characteristics make nonhuman primates unsuitable for use as service animals in the context of the wide variety of public settings subject to this rule. As the organization advocating the inclusion of capuchin monkeys acknowledges, capuchin monkeys are not suitable for use in public facilities.

The Department emphasizes that it has decided only that capuchin monkeys will not be included in the definition of service animals for purposes of its regulation implementing the ADA. This decision does not have any effect on the extent to which public accommodations are required to allow the use of such monkeys under other Federal statutes, like the FHAct or the Air Carrier Access Act (ACAA). For example, a public accommodation that also is considered to be a "dwelling" may be covered under both the ADA and the FHAct. While the ADA does not require such a public accommodation to admit people with service monkeys, the FHAct may. Under the FHAct an individual with a disability may have the right to have an animal other than a dog in his or her home if the animal qualifies as a "reasonable accommodation" that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming that the use of the animal does not pose a direct threat. In some cases, the right of an individual to have an animal under the FHAct may conflict with State or local laws that prohibit all individuals, with or without disabilities, from owning a particular species. However, in this circumstance, an individual who wishes to request a reasonable modification of the State or local law must do so under the FHAct, not the ADA.

Having considered all of the comments about which species should qualify as service animals under the ADA, the Department has determined the most reasonable approach is to limit acceptable species to dogs.

Size or weight limitations. The vast majority of commenters did not support a size or weight limitation. Commenters were typically opposed to a size or weight limit because many tasks performed by service animals require large, strong dogs. For instance, service animals may perform tasks such as providing balance and support or pulling a wheelchair. Small animals may not be suitable for large adults. The weight of the service animal user is often correlated with the size and weight of the service animal. Others were concerned that adding a size and weight limit would further complicate the difficult process of finding an appropriate service animal. One commenter noted that there is no need for a limit because "if, as a practical matter, the size or weight of an individual's service animal creates a direct threat or fundamental alteration to a particular public entity or accommodation, there are provisions that allow for the animal's exclusion or removal." Some common concerns among commenters in support of a size and weight limit were that a larger animal may be less able to fit in various areas with its handler, such as toilet rooms and public seating areas, and that larger animals are more difficult to control.

Balancing concerns expressed in favor of and against size and weight limitations, the Department has determined that such limitations would not be appropriate. Many individuals of larger stature require larger dogs. The Department believes it would be inappropriate to deprive these individuals of the option of using a service dog of the size required to provide the physical support and stability these individuals may need to function independently. Since large dogs have always served as service animals, continuing their use should not constitute fundamental alterations or impose undue burdens on public accommodations.

Breed limitations. A few commenters suggested that certain breeds of dogs should not be allowed to be used as service animals. Some suggested that the Department should defer to local laws restricting the breeds of dogs that individuals who reside in a community may own. Other commenters opposed breed restrictions, stating that the breed of a dog does not determine its propensity for aggression and that aggressive and non-aggressive dogs exist in all breeds.

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others. Breed restrictions differ significantly from jurisdiction to jurisdiction. Some jurisdictions have no breed restrictions. Others have restrictions that, while well-meaning, have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades without a history of the type of unprovoked aggression or attacks that would pose a direct threat, *e.g.,* German Shepherds. Other jurisdictions prohibit animals over a certain weight, thereby restricting breeds without invoking an express breed ban. In addition, deference to breed restrictions contained in local laws would have the unacceptable consequence of restricting travel by an individual with a disability who uses a breed that is acceptable and poses no safety hazards in the individual's home jurisdiction but is nonetheless banned by other jurisdictions. Public accommodations have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

Recognition of psychiatric service animals, but not "emotional support animals." The definition of "service animal" in the NPRM stated the Department's longstanding position that emotional support animals are not included in the definition of "service animal." The proposed text provided that "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals." 73 FR 34508, 34553 (June 17, 2008).

Many advocacy organizations expressed concern and disagreed with the exclusion of comfort and emotional support animals. Others have been more specific, stating that individuals with disabilities may need their emotional support animals in order to have equal access. Some commenters noted that individuals with disabilities use animals that have not been trained to perform tasks directly related to their disability. These animals do not qualify as service animals under the ADA. These are emotional support or comfort animals.

Commenters asserted that excluding categories such as "comfort" and "emotional support" animals recognized by laws such as the FHAct or the ACAA is confusing and burdensome. Other commenters noted that emotional support and comfort animals perform an important function, asserting that animal companionship helps individuals who experience depression resulting from multiple sclerosis.

Some commenters explained the benefits emotional support animals provide, including emotional support, comfort, therapy, companionship, therapeutic benefits, and the promotion of emotional

well-being. They contended that without the presence of an emotional support animal in their lives they would be disadvantaged and unable to participate in society. These commenters were concerned that excluding this category of animals will lead to discrimination against and excessive questioning of individuals with non-visible or non-apparent disabilities. Other commenters expressing opposition to the exclusion of individually trained "comfort" or "emotional support" animals asserted that the ability to soothe or de-escalate and control emotion is "work" that benefits the individual with the disability.

Many commenters requested that the Department carve out an exception that permits current or former members of the military to use emotional support animals. They asserted that a significant number of service members returning from active combat duty have adjustment difficulties due to combat, sexual assault, or other traumatic experiences while on active duty. Commenters noted that some current or former members of the military service have been prescribed animals for conditions such as PTSD. One commenter stated that service women who were sexually assaulted while in the military use emotional support animals to help them feel safe enough to step outside their homes. The Department recognizes that many current and former members of the military have disabilities as a result of service-related injuries that may require emotional support and that such individuals can benefit from the use of an emotional support animal and could use such animal in their home under the FHAct. However, having carefully weighed the issues, the Department believes that its final rule appropriately addresses the balance of issues and concerns of both the individual with a disability and the public accommodation. The Department also notes that nothing in this part prohibits a public entity from allowing current or former military members or anyone else with disabilities to utilize emotional support animals if it wants to do so.

Commenters asserted the view that if an animal's "mere presence" legitimately provides such benefits to an individual with a disability and if those benefits are necessary to provide equal opportunity given the facts of the particular disability, then such an animal should qualify as a "service animal." Commenters noted that the focus should be on the nature of a person's disability, the difficulties the disability may impose and whether the requested accommodation would legitimately address those difficulties, not on evaluating the animal involved. The Department understands this approach has benefitted many individuals under the FHAct and analogous State law provisions, where the presence of animals poses fewer health and safety issues and where emotional support animals provide assistance that is unique to residential settings. The Department believes, however, that the presence of such animals is not required in the context of public accommodations, such as restaurants, hospitals, hotels, retail establishments, and assembly areas.

Under the Department's previous regulatory framework, some individuals and entities assumed that the requirement that service animals must be individually trained to do work or perform tasks excluded all individuals with mental disabilities from having service animals. Others assumed that any person with a psychiatric condition whose pet provided comfort to them was covered by the 1991 title III regulation. The Department reiterates that psychiatric service animals that are trained to do work or perform a task for individuals whose disability is covered by the ADA are protected by the Department's present regulatory approach. Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine, providing safety checks or room searches for persons with PTSD, interrupting self-mutilation, and removing disoriented individuals from dangerous situations.

The difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulation was promulgated, service animals have been trained to assist individuals with many different types of disabilities.

In the final rule, the Department has retained its position on the exclusion of emotional support animals from the definition of "service animal." The definition states that "[t]he provision of emotional support, well-being, comfort, or companionship * * * do[es] not constitute work or tasks for the purposes of this definition." The Department notes, however, that the exclusion of emotional support animals from coverage in the final rule does not mean that individuals with psychiatric or mental disabilities cannot use service animals that meet the regulatory definition. The final rule defines service animal as follows: "Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." This language simply clarifies the Department's longstanding position.

The Department's position is based on the fact that the title II and title III regulations govern a wider range of public settings than the housing and transportation settings for which the Department of Housing and Urban Development (HUD) and the DOT regulations allow emotional support animals or comfort animals. The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities. Accordingly, other Federal agency regulations, case law, and possibly State or local laws governing those situations may provide appropriately for increased access for animals other than service animals as defined under the ADA. Public officials, housing providers, and others who make decisions relating to animals in residential and transportation settings should consult the Federal, State, and local laws that apply in those areas (*e.g.,* the FHAct regulations of HUD and the ACAA) and not rely on the ADA as a basis for reducing those obligations.

Retain term "service animal." Some commenters asserted that the term "assistance animal" is a term of art and should replace the term "service animal"; however, the majority of commenters preferred the term "service animal" because it is more specific. The Department has decided to retain the term "service animal" in the final rule. While some agencies, like HUD, use the terms "assistance animal," "assistive animal," or "support animal," these terms are used to denote a broader category of animals than is covered by the ADA. The Department has decided that changing the term used in the final rule would create confusion, particularly in view of the broader parameters for coverage under the FHAct, *cf.* Preamble to HUD's Final Rule for Pet Ownership for the Elderly and Persons with Disabilities, 73 FR 63834–38 (Oct. 27, 2008); HUD Handbook No. 4350.3 Rev–1, Chapter 2, *Occupancy Requirements of Subsidized Multifamily Housing Programs* (June 2007), available at *http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4350.3* (last visited June 24, 2010). Moreover, as discussed above, the Department's definition of "service animal" in the final rule does not affect the rights of individuals with disabilities who use assistance animals in their homes under the FHAct or who use "emotional support animals" that are covered under the ACAA and its implementing regulations. *See* 14 CFR 382.7 *et seq.; see also* Department of Transportation, *Guidance Concerning Service Animals in Air Transportation,* 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on aircraft).

"Video Remote Interpreting (VRI) Services"

In the NPRM, the Department proposed adding "Video Interpreting Services (VIS)" to the list of auxiliary aids available to provide effective communication. In the preamble to the NPRM, VIS was defined as "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." 73 FR 34508, 34522 (June 17, 2008). Comments from advocacy organizations and individuals unanimously requested that the Department use the term "video remote interpreting (VRI)," instead of

VIS, for consistency with Federal Communications Commission (FCC) regulations, FCC Public Notice, DA–0502417 (Sept. 7, 2005), and with common usage by consumers. The Department has made that change throughout the regulation to avoid confusion and to make the regulation more consistent with existing regulations.

Many commenters also requested that the Department distinguish between VRI and "video relay service (VRS)." Both VRI and VRS use a remote interpreter who is able to see and communicate with a deaf person and a hearing person, and all three individuals may be connected by a video link. VRI is a fee-based interpreting service conveyed via videoconferencing where at least one person, typically the interpreter, is at a separate location. VRI can be provided as an on-demand service or by appointment. VRI normally involves a contract in advance for the interpreter who is usually paid by the covered entity.

VRS is a telephone service that enables persons with disabilities to use the telephone to communicate using video connections and is a more advanced form of relay service than the traditional voice to text telephones (TTY) relay systems that were recognized in the 1991 title III regulation. More specifically, VRS is a video relay service using interpreters connected to callers by video hook-up and is designed to provide telephone services to persons who are deaf and use American Sign Language that are functionally equivalent to those services provided to users who are hearing. VRS is funded through the Interstate Telecommunications Relay Services Fund and overseen by the FCC. *See* 47 CFR 64.601(a)(26). There are no fees for callers to use the VRS interpreters and the video connection, although there may be relatively inexpensive initial costs to the title III entities to purchase the videophone or camera for on-line video connection, or other equipment to connect to the VRS service. The FCC has made clear that VRS functions as a telephone service and is not intended to be used for interpreting services where both parties are in the same room; the latter is reserved for VRI. The Department agrees that VRS cannot be used as a substitute for in-person interpreters or for VRI in situations that would not, absent one party's disability, entail use of the telephone.

Many commenters strongly recommended limiting the use of VRI to circumstances where it will provide effective communication. Commenters from advocacy groups and persons with disabilities expressed concern that VRI may not always be appropriate to provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who could not see the image because the signal was interrupted, causing unnatural pauses in the communication, or the image was grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI and some recommended requirements for equipment maintenance, high-speed, wide-bandwidth video links using dedicated lines or wireless systems, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's face, head, arms, hands, and eyes in all transmissions.

After consideration of the comments and the Department's own research and experience, the Department has determined that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. For example, VRI should be effective in many situations involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is available; however, VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals. To ensure that VRI is effective in situations where it is appropriate, the Department has established performance standards in § 36.303(f).

Subpart B—General Requirements

Section 36.208(b) Direct Threat

The Department has revised the language of § 36.208(b) (formerly § 36.208(c) in the 1991 title III regulation) to include consideration of whether the provision of auxiliary aids or services will mitigate the risk that an individual will pose a direct threat to the health or safety of others. Originally, the reference to auxiliary aids or services as a mitigating factor was part of § 36.208. However, that reference was removed from the section when, for editorial purposes, the Department removed the definition of "direct threat" from § 36.208 and placed it in § 36.104. The Department has put the reference to auxiliary aids or services as a mitigating factor back into § 36.208(b) in order to maintain consistency with the current regulation.

Section 36.211 Maintenance of Accessible Features

Section 36.211 of the 1991 title III regulation provides that a public accommodation must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by individuals with disabilities. 28 CFR 36.211. In the NPRM, the Department clarified the application of this provision and proposed one change to the section to address the discrete situation in which the scoping requirements provided in the 2010 Standards reduce the number of required elements below the requirements of the 1991 Standards. In that discrete event, a public accommodation may reduce such accessible features in accordance with the requirements in the 2010 Standards.

The Department received only four comments on this proposed amendment. None of the commenters opposed the change. In the final rule, the Department has revised the section to make it clear that if the 2010 Standards reduce either the technical requirements or the number of required accessible elements below that required by the 1991 Standards, then the public accommodation may reduce the technical requirements or the number of accessible elements in a covered facility in accordance with the requirements of the 2010 Standards. One commenter, an association of convenience stores, urged the Department to expand the language of the section to include restocking of shelves as a permissible activity for isolated or temporary interruptions in service or access. It is the Department's position that a temporary interruption that blocks an accessible route, such as restocking of shelves, is already permitted by existing § 36.211(b), which clarifies that "isolated or temporary interruptions in service or access due to maintenance or repairs" are permitted. Therefore, the Department will not make any additional changes in the language of § 36.211 other than those discussed in the preceding paragraph.

Subpart C—Specific Requirements

Section 36.302 Modifications in Policies, Practices, or Procedures

Section 36.302(c) Service Animals

Section 36.302(c)(1) of the 1991 title III regulation states that "[g]enerally, a public accommodation shall modify [its] policies, practices, or procedures to permit the use of service animals by an individual with a disability." Section 36.302(c)(2) of the 1991 title III regulation states that "[n]othing in this part requires a public accommodation to supervise or care for a service animal." The Department has decided to retain the scope of the 1991 title III regulation while clarifying the Department's longstanding policies and interpretations. Toward that end, the final rule has been revised to include the Department's policy interpretations as outlined in published technical assistance, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at *http://www.ada.gov/qasrvc.htm,* and *ADA Guide for Small Businesses* (1999), available at *http://www.ada.gov/smbustxt.htm,* and to add that a public accommodation may exclude a service animal in certain circumstances where the service animal fails to meet certain behavioral standards. The Department received extensive comments in response to proposed § 36.302(c) from individuals, disability advocacy groups, organizations involved in training service animals, and public accommodations. Those comments and the Department's response are discussed below.

Exclusion of service animals. The 1991 regulatory provision in § 36.302(c) addresses reasonable modification and remains unchanged in the final rule. However, based

on comments received and the Department's analysis, the Department has decided to clarify those circumstances where otherwise eligible service animals may be excluded by public accommodations.

In the NPRM, in § 36.302(c)(2)(i), the Department proposed that a public accommodation may ask an individual with a disability to remove a service animal from the place of public accommodation if "[t]he animal is out of control and the animal's handler does not take effective action to control it." 73 FR 34508, 34553 (June 17, 2008). The Department has long held that a service animal must be under the control of the handler at all times. Commenters overwhelmingly were in favor of this language, but noted that there are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched. While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the public accommodation must give the handler a reasonable opportunity to gain control of the animal. Further, if the individual with a disability asserts that the animal was provoked or injured, or if the public accommodation otherwise has reason to suspect that provocation or injury has occurred, the public accommodation should seek to determine the facts and, if provocation or injury occurred, the public accommodation should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the place of public accommodation. This language is unchanged in the final rule.

The NPRM also proposed language at § 36.302(c)(2)(ii) to permit a public accommodation to exclude a service animal if the animal is not housebroken (*i.e.,* trained so that, absent illness or accident, the animal controls its waste elimination) or the animal's presence or behavior fundamentally alters the nature of the service the public accommodation provides (*e.g.,* repeated barking during a live performance). Several commenters were supportive of this NPRM language, but cautioned against overreaction by the public accommodation in these instances. One commenter noted that animals get sick, too, and that accidents occasionally happen. In these circumstances, simple clean up typically addresses the incident. Commenters noted that the public accommodation must be careful when it excludes a service animal on the basis of "fundamental alteration," asserting for example, that a public accommodation should not exclude a service animal for barking in an environment where other types of noise, such as loud cheering or a child crying, is tolerated. The Department maintains that the appropriateness of an exclusion can be assessed by reviewing how a public accommodation addresses comparable situations that do not involve a service animal. The Department has retained in § 36.302(c)(2) of the final rule the exception requiring animals to be housebroken. The Department has not retained the specific NPRM language stating that animals can be excluded if their presence or behavior fundamentally alters the nature of the service provided by the public accommodation, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 36.302(c)(1).

The NPRM also proposed in § 36.302(c)(2)(iii) that a service animal can be excluded where "[t]he animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications." 73 FR 34508, 34553 (June 17, 2008). Commenters were universally supportive of this provision as it makes express the discretion of a public accommodation to exclude a service animal that poses a direct threat. Several commenters cautioned against the overuse of this provision and suggested that the Department provide an example of the rule's application. The Department has decided not to include regulatory language specifically stating that a service animal can be excluded if it poses a direct threat. The Department believes that the direct threat provision in § 36.208 already provides this exception to public accommodations.

Access to a public accommodation following the proper exclusion of a service animal. The NPRM proposed that in the event a public accommodation properly excludes a service animal, the public accommodation must give the individual with a disability the opportunity to obtain the goods and services of the public accommodation without having the service animal on the premises. Most commenters welcomed this provision as a common sense approach. These commenters noted that they do not wish to preclude individuals with disabilities from the full and equal enjoyment of the goods and services simply because of an isolated problem with a service animal. The Department has elected to retain this provision in § 36.302(c)(2).

Other requirements. The NPRM also proposed that the regulation include the following requirements: that the work or tasks performed by the service animal must be directly related to the handler's disability; that a service animal must be individually trained to do work or perform a task, be housebroken, and be under the control of the handler; and that a service animal must have a harness, leash, or other tether. Most commenters addressed at least one of these issues in their responses. Most agreed that these provisions are important to clarify further the 1991 service animal regulation. The Department has moved the requirement that the work or tasks performed by the service animal must be related directly to the handler's disability to the definition of "service animal" in § 36.104. In addition, the Department has modified the proposed language relating to the handler's control of the animal with a harness, leash, or other tether to state that "[a] service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means)." The Department has retained the requirement that the service animal must be individually trained, as well as the requirement that the service animal be housebroken.

Responsibility for supervision and care of a service animal. The 1991 title III regulation, in § 36.302(c)(2), states that "[n]othing in this part requires a public accommodation to supervise or care for a service animal." The NPRM modified this language to state that "[a] public accommodation is not responsible for caring for or supervising a service animal." 73 FR 34508, 34553 (June 17, 2008). Most commenters did not address this particular provision. The Department notes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with a disability, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied. The language of this section is retained, with minor modifications, in § 36.302(c)(5) of the final rule.

Inquiries about service animals. The NPRM proposed language at § 36.302(c)(6) setting forth parameters about how a public accommodation may determine whether an animal qualifies as a service animal. The proposed section stated that a public accommodation may ask if the animal is required because of a disability and what task or work the animal has been trained to do but may not require proof of service animal certification or licensing. Such inquiries are limited to eliciting the information necessary to make a decision without requiring disclosure of confidential disability-related information that a public accommodation does not need.

This language is consistent with the policy guidance outlined in two Department publications, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at *http://www.ada.gov/qasrvc.htm,* and *ADA Guide for Small Businesses* (1999), available at *http://www.ada.gov/smbustxt.htm.*

Although some commenters contended that the NPRM service animal provisions leave unaddressed the issue of how a public accommodation can distinguish between a psychiatric service animal, which is covered under the final rule, and a comfort animal, which is not, other commenters noted that the Department's published guidance has helped public accommodations to distinguish between service animals and pets on the basis of an individual's response to these questions. Accordingly, the Department has retained the NPRM language incorporating its guidance concerning the permissible questions into the final rule.

Some commenters suggested that a title III entity be allowed to require current

documentation, no more than one year old, on letterhead from a mental health professional stating the following: (1) That the individual seeking to use the animal has a mental health-related disability; (2) that having the animal accompany the individual is necessary to the individual's mental health or treatment or to assist the person otherwise; and (3) that the person providing the assessment of the individual is a licensed mental health professional and the individual seeking to use the animal is under that individual's professional care. These commenters asserted that this will prevent abuse and ensure that individuals with legitimate needs for psychiatric service animals may use them. The Department believes that this proposal would treat persons with psychiatric, intellectual, and other mental disabilities less favorably than persons with physical or sensory disabilities. The proposal would also require persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities—something individuals without disabilities have not been required to do. Accordingly, the Department has concluded that a documentation requirement of this kind would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.

Service animal access to areas of a public accommodation. The NPRM proposed at § 36.302(c)(7) that an individual with a disability who uses a service animal has the same right of access to areas of a public accommodation as members of the public, program participants, and invitees. Commenters indicated that allowing individuals with disabilities to go with their service animals into the same areas as members of the public, program participants, clients, customers, patrons, or invitees is accepted practice by most places of public accommodation. The Department has included a slightly modified version of this provision in § 36.302(c)(7) of the final rule.

The Department notes that under the final rule, a healthcare facility must also permit a person with a disability to be accompanied by a service animal in all areas of the facility in which that person would otherwise be allowed. There are some exceptions, however. The Department follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting. Zoonotic diseases can be transmitted to humans through bites, scratches, direct contact, arthropod vectors, or aerosols.

Consistent with CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, such as operating rooms and burn units. *See* Centers for Disease Control and Prevention, *Guidelines for Environmental Infection Control in Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee* (June 2003), available at *http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf* (last visited June 24, 2010). A service animal may accompany its handler 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, restrooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without taking added precautions.

Prohibition against surcharges for use of a service animal. In the NPRM, the Department proposed to incorporate the previously mentioned policy guidance, which prohibits the assessment of a surcharge for the use of a service animal, into proposed § 36.302(c)(8). Several commenters agreed that this provision makes clear the obligation of a place of public accommodation to admit an individual with a service animal without surcharges, and that any additional costs imposed should be factored into the overall cost of doing business and passed on as a charge to all participants, rather than an individualized surcharge to the service animal user. Commenters also noted that service animal users cannot be required to comply with other requirements that are not generally applicable to other persons. If a public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animals. The Department has retained this language, with minor modifications, in the final rule at § 36.302(c)(8).

Training requirement. Certain commenters recommended the adoption of formal training requirements for service animals. The Department has rejected this approach and will not impose any type of formal training requirements or certification process, but will continue to require that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability. While some groups have urged the Department to modify this position, the Department has determined that such a modification would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal to perform tasks or do work to accommodate their disability. A training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.

Some commenters proposed specific behavior or training standards for service animals, arguing that without such standards, the public has no way to differentiate between untrained pets and service animals. Many of the suggested behavior or training standards were lengthy and detailed. The Department believes that this rule addresses service animal behavior sufficiently by including provisions that address the obligations of the service animal user and the circumstances under which a service animal may be excluded, such as the requirements that an animal be housebroken and under the control of its handler.

Miniature horses. The Department has been persuaded by commenters and the available research to include a provision that would require public accommodations to make reasonable modifications to policies, practices, or procedures to permit the use of a miniature horse by a person with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The traditional service animal is a dog, which has a long history of guiding individuals who are blind or have low vision, and over time dogs have been trained to perform an even wider variety of services for individuals with all types of disabilities. However, an organization that developed a program to train miniature horses, modeled on the program used for guide dogs, began training miniature horses in 1991.

Although commenters generally supported the species limitations proposed in the NPRM, some were opposed to the exclusion of miniature horses from the definition of a service animal. These commenters noted that these animals have been providing assistance to persons with disabilities for many years. Miniature horses were suggested by some commenters as viable alternatives to dogs for individuals with allergies, or for those whose religious beliefs preclude the use of dogs. Another consideration mentioned in favor of the use of miniature horses is the longer life span and strength of miniature horses in comparison to dogs. Specifically, miniature horses can provide service for more than 25 years while dogs can provide service for approximately seven years, and, because of their strength, miniature horses can provide services that dogs cannot provide. Accordingly, use of miniature horses reduces the cost involved to retire, replace, and train replacement service animals.

The miniature horse is not one specific breed, but may be one of several breeds, with distinct characteristics that produce animals suited to service animal work. These animals generally range in height from 24 inches to 34 inches measured to the withers, or shoulders, and generally weigh between 70 and 100 pounds. These characteristics are similar to those of large breed dogs, such as Labrador Retrievers, Great Danes, and Mastiffs. Similar to dogs, miniature horses can be trained through behavioral reinforcement to be "housebroken." Most miniature service horse handlers and organizations recommend that when the animals are not doing work or performing tasks, the miniature horses should be kept outside in a designated area instead of indoors in a house.

According to information provided by an organization that trains service horses, these miniature horses are trained to provide a wide array of services to their handlers, primarily guiding individuals who are blind or have low vision, pulling wheelchairs, providing stability and balance for individuals with disabilities that impair the ability to walk, and supplying leverage that enables a person with a mobility disability to get up after a fall. According to the commenter, miniature horses are particularly effective for large stature individuals. The animal can be trained to stand (and in some cases, lie down) at the handler's feet in venues where space is at a premium, such as assembly areas or inside some vehicles that

provide public transportation. Some individuals with disabilities have traveled by train and have flown commercially with their miniature horses.

The miniature horse is not included in the definition of service animal, which is limited to dogs. However, the Department has added a specific provision at § 36.302(c)(9) of the final rule covering miniature horses. Under this provision, public accommodations must make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The public accommodation may take into account a series of assessment factors in determining whether to allow a miniature horse into a specific facility. These include the type, size, and weight of the miniature horse, whether the handler has sufficient control of the miniature horse, whether the miniature horse is housebroken, and whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)(3)B–(8) of this section, which are applicable to dogs, also apply to miniature horses.

Ponies and full-size horses are not covered by § 36.302(c)(9). Also, because miniature horses can vary in size and can be larger and less flexible than dogs, covered entities may exclude this type of service animal if the presence of the miniature horse, because of its larger size and lower level of flexibility, results in a fundamental alteration to the nature of the services provided.

Section 36.302(e) Hotel Reservations

Section 36.302 of the 1991 title III regulation requires public accommodations to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford access to any goods, services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations. Hotels, timeshare resorts, and other places of lodging are subject to this requirement and must make reasonable modifications to reservations policies, practices, or procedures when necessary to ensure that individuals with disabilities are able to reserve accessible hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms.

Each year the Department receives many complaints concerning failed reservations. Most of these complaints involve individuals who have reserved an accessible hotel room only to discover upon arrival that the room they reserved is either not available or not accessible. Although problems with reservations services were not addressed in the ANPRM, commenters independently noted an ongoing problem with hotel reservations and urged the Department to provide regulatory guidance. In response, the Department proposed specific language in the NPRM to address hotel reservations. In addition, the Department posed several questions regarding the current practices of hotels and other reservations services including questions about room guarantees and the holding and release of accessible rooms. The Department also questioned whether public accommodations that provide reservations services for a place or places of lodging but do not own, lease (or lease to), or operate a place of lodging—referred to in this discussion as "third-party reservations services"—should also be subject to the NPRM's proposals concerning hotel reservations.

Although reservations issues were discussed primarily in the context of traditional hotels, the new rule modifies the definition of "places of lodging" to clarify the scope of the rule's coverage of rental accommodations in timeshare properties, condominium hotels, and mixed-use and corporate hotel facilities that operate as places of public accommodation (as that term is now defined in § 36.104), and the Department received detailed comments, discussed below, regarding the application of reservations requirements to this category of rental accommodations.

General rule on reservations. Section 36.302(e)(1) of the NPRM required a public accommodation that owns, leases (or leases to), or operates a place of lodging to:

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

73 FR 34508, 34553 (June 17, 2008).

Most individual commenters and organizations that represent individuals with disabilities strongly supported the requirement that individuals with disabilities should be able to make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms. In many cases individuals with disabilities expressed frustration because, while they are aware of improvements in architectural access brought about as a result of the ADA, they are unable to take advantage of these improvements because of shortcomings in current hotel reservations systems. A number of these commenters pointed out that it can be difficult or impossible to obtain information about accessible rooms and hotel features and that even when information is provided it often is found to be incorrect upon arrival. They also noted difficulty reserving accessible rooms and the inability to guarantee or otherwise ensure that the appropriate accessible room is available when the guest arrives. The ability to obtain information about accessible guest rooms, to make reservations for accessible guest rooms in the same manner as other guests, and to be assured of an accessible room upon arrival was of critical importance to these commenters.

Other commenters, primarily hotels, resort developers, travel agencies, and organizations commenting on their behalf, did not oppose the general rule on reservations, but recommended that the language requiring that reservations be made "in the same manner" be changed to require that reservations be made "in a substantially similar manner." These commenters argued that hotel reservations are made in many different ways and through a variety of systems. In general, they argued that current reservations database systems may not contain sufficient information to permit guests, travel agents, or other third-party reservations services to select the most appropriate room without consulting directly with the hotel, and that updating these systems might be expensive and time consuming. They also noted that in some cases, hotels do not always automatically book accessible rooms when requested to do so. Instead, guests may select from a menu of accessibility and other room options when making reservations. This information is transmitted to the hotel's reservations staff, who then contact the individual to verify the guest's accessibility needs. Only when such verification occurs will the accessible room be booked.

The Department is not persuaded that individuals who need to reserve accessible rooms cannot be served in the same manner as those who do not, and it appears that there are hotels of all types and sizes that already meet this requirement. Further, the Department has been able to accomplish this goal in settlement agreements resolving complaints about this issue. As stated in the preamble to the NPRM, basic nondiscrimination principles mandate that individuals with disabilities should be able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. The regulation does not require reservations services to create new methods for reserving hotel rooms or available timeshare units; instead, covered entities must make the modifications needed to ensure that individuals who need accessible rooms are able to reserve them in the same manner as other guests. If, for example, hotel reservations are not final until all hotel guests have been contacted by the hotel to discuss the guest's needs, a hotel may follow the same process when reserving accessible rooms. Therefore, the Department declines to change this language, which has been moved to § 36.302(e)(1)(i). However, in response to the commenters who recommended a transition period that would allow reservations services time to modify existing reservations systems to meet the requirements of this rule, § 36.302(e)(3) now provides a 18-month transition period before the requirements of § 36.302(e)(1) will be enforced.

Hotels and organizations commenting on their behalf also requested that the language be changed to eliminate any liability for reservations made through third parties, arguing that they are unable to control the actions of unrelated parties. The rule, both as proposed and as adopted, requires covered public accommodations to ensure that reservations made on their behalf by third parties are made in a manner that results in parity between those who need accessible rooms and those who do not.

Hotels and other places of lodging that use third-party reservations services must make reasonable efforts to make accessible rooms available through at least some of these services and must provide these third-party services with information concerning the accessible features of the hotel and the accessible rooms. To the extent a hotel or other place of lodging makes available such rooms and information to a third-party reservation provider, but the third party fails to provide the information or rooms to people with disabilities in accordance with this section, the hotel or other place of lodging will not be responsible.

Identification of accessible features in hotels and guest rooms. NPRM § 36.302(e)(2) required public accommodations that provide hotel reservations services to identify and describe the accessible features in the hotels and guest rooms offered through that service. This requirement is essential to ensure that individuals with disabilities receive the information they need to benefit from the services offered by the place of lodging. As a practical matter, a public accommodation's designation of a guest room as "accessible" will not ensure necessarily that the room complies with all of the 1991 Standards. In older facilities subject to barrier removal requirements, strict compliance with the 1991 Standards is not required. Instead, public accommodations must remove barriers to the extent that it is readily achievable to do so.

Further, hotel rooms that are in full compliance with current standards may differ, and individuals with disabilities must be able to ascertain which features—in new and existing facilities—are included in the hotel's accessible guest rooms. For example, under certain circumstances, an accessible hotel bathroom may meet accessibility requirements with either a bathtub or a roll-in shower. The presence or absence of particular accessible features such as these may be the difference between a room that is usable by a particular person with a disability and one that is not.

Individuals with disabilities strongly supported this requirement. In addition to the importance of information about specific access features, several commenters pointed out the importance of knowing the size and number of beds in a room. Many individuals with disabilities travel with family members, personal care assistants, or other companions and require rooms with at least two beds. Although most hotels provide this information when generally categorizing the type or class of room (*e.g.,* deluxe suite with king bed), as described below, all hotels should consider the size and number of beds to be part of the basic information they are required to provide.

Comments made on behalf of reservations services expressed concern that unless the word "hotels" is stricken from the text, § 36.302(e)(2) of the NPRM essentially would require reservations systems to include a full accessibility report on each hotel or resort property in its system. Along these lines, commenters also suggested that the Department identify the specific accessible features of hotel rooms that must be described in the reservations system. For example, commenters suggested limiting features that must be included to bathroom type (tub or roll-in shower) and communications features.

The Department recognizes that a reservations system is not intended to be an accessibility survey. However, specific information concerning accessibility features is essential to travelers with disabilities. Because of the wide variations in the level of accessibility that travelers will encounter, the Department cannot specify what information must be included in every instance. For hotels that were built in compliance with the 1991 Standards, it may be sufficient to specify that the hotel is accessible and, for each accessible room, to describe the general type of room (*e.g.,* deluxe executive suite), the size and number of beds (*e.g.,* two queen beds), the type of accessible bathing facility (*e.g.,* roll-in shower), and communications features available in the room (*e.g.,* alarms and visual notification devices). Based on that information, many individuals with disabilities will be comfortable making reservations.

For older hotels with limited accessibility features, information about the hotel should include, at a minimum, information about accessible entrances to the hotel, the path of travel to guest check-in and other essential services, and the accessible route to the accessible room or rooms. In addition to the room information described above, these hotels should provide information about important features that do not comply with the 1991 Standards. For example, if the door to the "accessible" room or bathroom is narrower than required, this information should be included (*e.g.,* door to guest room measures 30 inches clear). This width may not meet current standards but may be adequate for some wheelchair users who use narrower chairs. In many cases, older hotels provide services through alternatives to barrier removal, for example, by providing check-in or concierge services at a different, accessible location. Reservations services for these entities should include this information and provide a way for guests to contact the appropriate hotel employee for additional information. To recognize that the information and level of detail needed will vary based on the nature and age of the facility, § 36.302(e)(2) has been moved to § 36.302(e)(1)(ii) in the final rule and modified to require reservations services to:

Identify and describe accessible features in the hotels and guest rooms offered through its reservations service *in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs.* [Emphasis added]

As commenters representing hotels have described, once reservations are made, some hotels may wish to contact the guest to offer additional information and services. Or, many individuals with disabilities may wish to contact the hotel or reservations service for more detailed information. At that point, trained staff (including staff located on-site at the hotel and staff located off-site at a reservations center) should be available to provide additional information such as the specific layout of the room and bathroom, shower design, grab-bar locations, and other amenities available (*e.g.,* bathtub bench).

In the NPRM, the Department sought guidance concerning whether this requirement should be applied to third-party reservations services. Comments made by or on behalf of hotels, resort managers, and other members of the lodging and resort industry pointed out that, in most cases, these third parties do not have direct access to this information and must obtain it from the hotel or other place of lodging. Because third-party reservations services must rely on the place of lodging to provide the requisite information and to ensure that it is accurate and timely, the Department has declined to extend this requirement directly to third-party reservations services.

Hold and release of accessible guest rooms. The Department has addressed the hold and release of accessible guest rooms in settlement agreements and recognizes that current practices vary widely. The Department is concerned about current practices by which accessible guest rooms are released to the general public even though the hotel is not sold out. In such instances, individuals with disabilities may be denied an equal opportunity to benefit from the services offered by the public accommodation, *i.e.,* a hotel guest room. In the NPRM, the Department requested information concerning the current practices of hotels and third-party reservations services with respect to (1) holding accessible rooms for individuals with disabilities and (2) releasing accessible rooms to individuals without disabilities.

Individuals with disabilities and organizations commenting on their behalf strongly supported requiring accessible rooms to be held back for rental by individuals with disabilities. In some cases commenters supported holding back all accessible rooms until all non-accessible rooms were rented. Others supported holding back accessible rooms in each category of rooms until all other rooms of that type were reserved. This latter position was also supported in comments received on behalf of the lodging industry; commenters also noted that this is the current practice of many hotels. In general, holding accessible rooms until requested by an individual who needs a room with accessible features or until it is the only available room of its type was viewed widely as a sensible approach to allocating scarce accessible rooms without imposing unnecessary costs on hotels.

The Department agrees with this latter approach and has added § 36.302(e)(1)(iii), which requires covered entities to hold accessible rooms for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type. For example, if there are 25 rooms of a given type and two of these rooms are accessible, the reservations service is required to rent all 23 non-accessible rooms before it is permitted to rent these two accessible rooms to individuals without disabilities. If a one-of-a-kind room is accessible, that room is available to the first party to request it. The Department believes that this is the fairest approach available

since it reserves accessible rooms for individuals who require them until all non-accessible rooms of that type have been reserved, and then provides equal access to any remaining rooms. It is also fair to hotels because it does not require them to forego renting a room that actually has been requested in favor of the possibility that an individual with a disability may want to reserve it at a later date.

Requirement to block accessible guest room reservations. NPRM § 36.302(e)(3) required a public accommodation that owns, leases (or leases to), or operates a place of lodging to guarantee accessible guest rooms that are reserved through a reservations service to the same extent that it guarantees rooms that are not accessible. In the NPRM, the Department sought comment on the current practices of hotels and third party reservations services with respect to "guaranteed" hotel reservations and on the impact of requiring a public accommodation to guarantee accessible rooms to the extent it guarantees other rooms.

Comments received by the Department by and on behalf of both individuals with disabilities and public accommodations that provide reservations services made clear that, in many cases, when speaking of room guarantees, parties who are not familiar with hotel terminology actually mean to refer to policies for blocking and holding specific hotel rooms. Several commenters explained that, in most cases, when an individual makes "reservations," hotels do not reserve specific rooms; rather the individual is reserving a room with certain features at a given price. When the hotel guest arrives, he or she is provided with a room that has those features.

In most cases, this does not pose a problem because there are many available rooms of a given type. However, in comparison, accessible rooms are much more limited in availability and there may be only one room in a given hotel that meets a guest's needs. As described in the discussion on the identification of accessible features in hotels and guest rooms, the presence or absence of particular accessible features may be the difference between a room that is usable by a particular person with a disability and one that is not.

For that reason, the Department has added § 36.302(e)(1)(iv) to the final rule. Section 36.302(e)(1)(iv) requires covered entities to reserve, upon request, accessible guest rooms or specific types of guest rooms and ensure that the guest rooms requested are blocked and removed from all reservations systems (to eliminate double-booking, which is a common problem that arises when rooms are made available to be reserved through more than one reservations service). Of course, if a public accommodation typically requires a payment or deposit from its patrons in order to reserve a room, it may require the same payment or deposit from individuals with disabilities before it reserves an accessible room and removes it from all its reservations systems. These requirements should alleviate the widely-reported problem of arriving at a hotel only to discover that, although an accessible room was reserved, the room available is not accessible or does not have the specific accessible features needed. Many hotels already have a similar process in place for other guest rooms that are unique or one-of-a-kind, such as "Presidential" suites. The Department has declined to extend this requirement directly to third-party reservations services. Comments the Department received in response to the NPRM indicate that most of the actions required to implement these requirements primarily are within the control of the entities that own the place of lodging or that manage it on behalf of its owners.

Guarantees of reservations for accessible guest rooms. The Department recognizes that not all reservations are guaranteed, and the rule does not impose an affirmative duty to guarantee reservations. When a public accommodation does guarantee hotel or other room reservations, it must provide the same guarantee for accessible guest rooms as it makes for other rooms, except that it must apply that guarantee to the specific room reserved and blocked, even if in other situations, its guarantee policy only guarantees that a room of a specific type will be available at the guaranteed price. Without this reasonable modification to its guarantee policy, any guarantee for accessible rooms would be meaningless. If, for example, a hotel makes reservations for an accessible "Executive Suite" but, upon arrival, offers its guest an inaccessible Executive Suite that the guest is unable to enter, it would be meaningless to consider the hotel's guarantee fulfilled. As with the requirements for identifying, holding, and blocking accessible rooms, the Department has declined to extend this requirement directly to third-party reservations services because the fulfillment of guarantees largely is beyond their power to control.

Application to rental units in timeshare, vacation communities, and condo-hotels. Because the Department has revised the definition of "Places of Lodging" in the final rule, the reservations requirements now apply to guest rooms and other rental units in timeshares, vacation communities, and condo-hotels where some or all of the units are owned and controlled by individual owners and rented out some portion of time to the public, as compared to traditional hotels and motels that are owned, controlled, and rented to the public by one entity. If a reservations service owns and controls one or more of the guest rooms or other units in the rental property (*e.g.,* a developer who retains and rents out unsold inventory), it is subject to the requirements set forth in § 36.302(e).

Several commenters expressed concern about any rule that would require accessible units that are owned individually to be removed from the rental pool and rented last. Commenters pointed out that this would be a disadvantage to the owners of accessible units because they would be rented last, if at all. Further, certain vacation property managers consider holding specific units back to be a violation of their ethical responsibility to present all properties they manage at an equal advantage. To address these concerns, the Department has added § 36.302(e)(2), which exempts reservations for individual guest rooms and other units that are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility from the requirement that accessible guest rooms be held back from rental until all other guest rooms of that type have been rented. Section 36.302(e)(2) also exempts such rooms from requirements for blocking and guaranteeing reserved rooms. In resort developments with mixed ownership structures, such as a resort where some units are operated as hotel rooms and others are owned and controlled individually, a reservations service operated by the owner of the hotel portion may apply the exemption only to the rooms that are not owned or substantially controlled by the entity that owns, manages, or otherwise controls the overall facility.

Other reservations-related comments made on behalf of these entities reflected concerns similar to the general concerns expressed with respect to traditional hotel properties. For example, commenters noted that because of the unique nature of the timeshare industry, additional flexibility is needed when making reservations for accessible units. One commenter explained that reservations are sometimes made through unusual entities such as exchange companies, which are not public accommodations and which operate to trade ownership interests of millions of individual owners. The commenter expressed concern that developers or resort owners would be held responsible for the actions of these exchange entities. If, as described, the choice to list a unit with an exchange company is made by the individual owner of the property and the exchange company does not operate on behalf of the reservations service, the reservations service is not liable for the exchange company's actions.

As with hotels, the Department believes that within the 18-month transition period these reservations services should be able to modify their systems to ensure that potential guests with disabilities who need accessible rooms can make reservations during the same hours and in the same manner as those who do not need accessible rooms.

Section 36.302(f) Ticketing

The 1991 title III regulation did not contain specific regulatory language on ticketing. The ticketing policies and practices of public accommodations, however, are subject to title III's nondiscrimination provisions. Through the investigation of complaints, enforcement actions, and public comments related to ticketing, the Department became aware that some venue operators, ticket sellers, and distributors were violating title III's nondiscrimination mandate by not providing individuals with disabilities the same opportunities to purchase tickets for accessible seating as provided to spectators purchasing conventional seats. In the NPRM, the Department proposed § 36.302(f) to provide explicit direction and guidance on discriminatory practices for entities involved in the sale or distribution of tickets.

The Department received comments from advocacy groups, assembly area trade associations, public accommodations, and individuals. Many commenters supported the addition of regulatory language pertaining to ticketing and urged the Department to retain

it in the final rule. Several commenters, however, questioned why there were inconsistencies between the title II and title III provisions and suggested that the same language be used for both titles. The Department has decided to retain ticketing regulatory language and to ensure consistency between the ticketing provisions in title II and title III.

Because many in the ticketing industry view season tickets and other multi-event packages differently from individual tickets, the Department bifurcated some season ticket provisions from those concerning single-event tickets in the NPRM. This structure, however, resulted in some provisions being repeated for both types of tickets but not for others even though they were intended to apply to both types of tickets. The result was that it was not entirely clear that some of the provisions that were not repeated also were intended to apply to season tickets. The Department is addressing the issues raised by these commenters using a different approach. For the purposes of this section, a *single event* refers to an individual performance for which tickets may be purchased. In contrast, a *series of events* includes, but is not limited to, subscription events, event packages, season tickets, or any other tickets that may be purchased for multiple events of the same type over the course of a specified period of time whose ownership right reverts to the public accommodation at the end of each season or time period. Series-of-events tickets that give their holders an enhanced ability to purchase such tickets from the public accommodation in seasons or periods of time that follow, such as a right of first refusal or higher ranking on waiting lists for more desirable seats, are subject to the provisions in this section. In addition, the final rule merges together some NPRM paragraphs that dealt with related topics and has reordered and renamed some of the paragraphs that were in the NPRM.

Ticket sales. In the NPRM, the Department proposed, in § 36.302(f)(1), a general rule that a public accommodation shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating for an event or series of events in the same way as others (*i.e.,* during the same hours and through the same distribution methods as other seating is sold). "Accessible seating" is defined in § 36.302(f)(1)(i) of the final rule to mean "wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (4) of this section." The defined term does not include designated aisle seats. A "wheelchair space" refers to a space for a single wheelchair and its occupant.

The NPRM proposed requiring that accessible seats be sold through the "same methods of distribution" as non-accessible seats. 73 FR 34508, 34554 (June 17, 2008). Comments from venue managers and others in the business community, in general, noted that multiple parties are involved in ticketing, and because accessible seats may not be allotted to all parties involved at each stage, such parties should be protected from liability. For example, one commenter noted that a third-party ticket vendor, like Ticketmaster, can only sell the tickets it receives from its client. Because § 36.302(f)(1) of the final rule requires venue operators to make available accessible seating through the same methods of distribution they use for their regular tickets, venue operators that provide tickets to third-party ticket vendors are required to provide accessible seating to the third-party ticket vendor. This provision will enhance third-party ticket vendors' ability to acquire and sell accessible seating for sale in the future. The Department notes that once third-party ticket vendors acquire accessible tickets, they are obligated to sell them in accordance with these rules.

The Department also has received frequent complaints that individuals with disabilities have not been able to purchase accessible seating over the Internet, and instead have had to engage in a laborious process of calling a customer service line, or sending an email to a customer service representative and waiting for a response. Not only is such a process burdensome, but it puts individuals with disabilities at a disadvantage in purchasing tickets for events that are popular and may sell out in minutes. Because § 36.302(f)(5) of the final rule authorizes venues to release accessible seating in case of a sell-out, individuals with disabilities effectively could be cut off from buying tickets unless they also have the ability to purchase tickets in real time over the Internet. The Department's new regulatory language is designed to address this problem.

Several commenters representing assembly areas raised concerns about offering accessible seating for sale over the Internet. They contended that this approach would increase the incidence of fraud since anyone easily could purchase accessible seating over the Internet. They also asserted that it would be difficult technologically to provide accessible seating for sale in real time over the Internet, or that to do so would require simplifying the rules concerning the purchase of multiple additional accompanying seats. Moreover, these commenters argued that requiring an individual purchasing accessible seating to speak with a customer service representative would allow the venue to meet the patron's needs most appropriately and ensure that wheelchair spaces are reserved for individuals with disabilities who require wheelchair spaces. Finally, these commenters argued that individuals who can transfer effectively and conveniently from a wheelchair to a seat with a movable armrest seat could instead purchase designated aisle seats.

The Department considered these concerns carefully and has decided to continue with the general approach proposed in the NPRM. Although fraud is an important concern, the Department believes that it is best combated by other means that would not have the effect of limiting the ability of individuals with disabilities to purchase tickets, particularly since restricting the purchase of accessible seating over the Internet will, of itself, not curb fraud. In addition, the Department has identified permissible means for covered entities to reduce the incidence of fraudulent accessible seating ticket purchases in § 36.302(f)(8) of the final rule.

Several commenters questioned whether ticket Web sites themselves must be accessible to individuals who are blind or have low vision, and if so, what that requires. The Department has consistently interpreted the ADA to cover Web sites that are operated by public accommodations and stated that such sites must provide their services in an accessible manner or provide an accessible alternative to the Web site that is available 24 hours a day, seven days a week. The final rule, therefore, does not impose any new obligation in this area. The accessibility of Web sites is discussed in more detail in the section entitled "Other Issues."

In § 36.302(f)(2) of the NPRM, the Department also proposed requiring public accommodations to make accessible seating available during all stages of tickets sales including, but not limited to, presales, promotions, lotteries, waitlists, and general sales. For example, if tickets will be presold for an event that is open only to members of a fan club, or to holders of a particular credit card, then tickets for accessible seating must be made available for purchase through those means. This requirement does not mean that any individual with a disability would be able to purchase those seats. Rather, it means that an individual with a disability who meets the requirement for such a sale (*e.g.,* who is a member of the fan club or holds that credit card) will be able to participate in the special promotion and purchase accessible seating. The Department has maintained the substantive provisions of the NPRM's §§ 36.302(f)(1) and (f)(2) but has combined them in a single paragraph at § 36.302(f)(1)(ii) of the final rule so that all of the provisions having to do with the manner in which tickets are sold are located in a single paragraph.

Identification of available accessible seating. In the NPRM, the Department proposed § 36.302(f)(3), which, as modified and renumbered § 36.302(f)(2)(iii) in the final rule, requires a facility to identify available accessible seating through seating maps, brochures, or other methods if that information is made available about other seats sold to the general public. This rule requires public accommodations to provide information about accessible seating to the same degree of specificity that it provides information about general seating. For example, if a seating map displays color-coded blocks pegged to prices for general seating, then accessible seating must be similarly color-coded. Likewise, if covered entities provide detailed maps that show exact seating and pricing for general seating, they must provide the same for accessible seating.

The NPRM did not specify a requirement to identify prices for accessible seating. The final rule requires that if such information is provided for general seating, it must be provided for accessible seating as well.

In the NPRM, the Department proposed in § 36.302(f)(4) that a public accommodation, upon being asked, must inform persons with disabilities and their companions of the locations of all unsold or otherwise available seating. This provision is intended to prevent

the practice of "steering" individuals with disabilities to certain accessible seating so that the facility can maximize potential ticket sales by releasing unsold accessible seating, especially in preferred or desirable locations, for sale to the general public. The Department received no significant comment on this proposal. The Department has retained this provision in the final rule but has added it, with minor modifications, to § 36.302(f)(2) as paragraph (i).

Ticket prices. In the NPRM, the Department proposed § 36.302(f)(7) requiring that ticket prices for accessible seating be set no higher than the prices for other seats in that seating section for that event. The NPRM's provision also required that accessible seating be made available at every price range, and if an existing facility has barriers to accessible seating within a particular price range, a proportionate amount of seating (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) must be offered in an accessible location at that same price. Under this rule, for example, if it is not readily achievable for a 20,000-seat facility built in 1980 to place accessible seating in the $20-price category, which is on the upper deck, it must place a proportionate number of seats in an accessible location for $20. If the upper deck has 2,000 seats, then the facility must place 10 percent of its accessible seating in an accessible location for $20 provided that it is part of a seating section where ticket prices are equal to or more than $20—a facility may not place the $20-accessible seating in a $10-seating section. The Department received no significant comment on this rule, and it has been retained, as amended, in the final rule in § 36.302(f)(3).

Purchase of multiple tickets. In the NPRM, the Department proposed § 36.302(f)(9) to address one of the most common ticketing complaints raised with the Department: that individuals with disabilities are not able to purchase more than two tickets. The Department proposed this provision to facilitate the ability of individuals with disabilities to attend events with friends, companions, or associates who may or may not have a disability by enabling individuals with disabilities to purchase the maximum number of tickets allowed per transaction to other spectators; by requiring venues to place accompanying individuals in general seating as close as possible to accessible seating (in the event that a group must be divided because of the large size of the group); and by allowing an individual with a disability to purchase up to three additional contiguous seats per wheelchair space if they are available at the time of sale. Section 36.302(f)(9)(ii) of the NPRM required that a group containing one or more wheelchair users must be placed together, if possible, and that in the event that the group could not be placed together, the individuals with disabilities may not be isolated from the rest of the group.

The Department asked in the NPRM whether this rule was sufficient to effectuate the integration of individuals with disabilities. Many advocates and individuals praised it as a welcome and much-needed change, stating that the trade-off of being able to sit with their family or friends was worth reducing the number of seats available for individuals with disabilities. Some commenters went one step further and suggested that the number of additional accompanying seats should not be restricted to three.

Although most of the substance of the proposed provision on the purchase of multiple tickets has been maintained in the final rule, it has been renumbered as § 36.302(f)(4), reorganized, and supplemented. To preserve the availability of accessible seating for other individuals with disabilities, the Department has not expanded the rule beyond three additional contiguous seats. Section 36.302(f)(4)(i) of the final rule requires public accommodations to make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. The requirement that the additional seats be "contiguous with the wheelchair space" does not mean that each of the additional seats must be in actual contact or have a border in common with the wheelchair space; however, at least one of the additional seats should be immediately adjacent to the wheelchair space. The Department recognizes that it will often be necessary to use vacant wheelchair spaces to provide for contiguous seating.

The Department has added paragraphs (4)(ii) and (4)(iii) to clarify that in situations where there are insufficient unsold seats to provide three additional contiguous seats per wheelchair space or a ticket office restricts sales of tickets to a particular event to less than four tickets per customer, the obligation to make available three additional contiguous seats per wheelchair space would be affected. For example, if at the time of purchase, there are only two additional contiguous seats available for purchase because the third has been sold already, then the ticket purchaser would be entitled to two such seats. In this situation, the public entity would be required to make up the difference by offering one additional ticket for sale that is as close as possible to the accessible seats. Likewise, if ticket purchases for an event are limited to two per customer, a person who uses a wheelchair who seeks to purchase tickets would be entitled to purchase only one additional contiguous seat for the event.

The Department has also added paragraph (4)(iv) to clarify that the requirement for three additional contiguous seats is not intended to serve as a cap if the maximum number of tickets that may be purchased by members of the general public exceeds the four tickets an individual with a disability ordinarily would be allowed to purchase (*i.e.,* a wheelchair space and three additional contiguous seats). If the maximum number of tickets that may be purchased by members of the general public exceeds four, an individual with a disability is to be allowed to purchase the maximum number of tickets; however, additional tickets purchased by an individual with a disability beyond the wheelchair space and the three additional contiguous seats provided in § 36.302(f)(4)(i) do not have to be contiguous with the wheelchair space.

The NPRM proposed at § 36.302(f)(9)(ii) that for group sales, if a group includes one or more individuals who use a wheelchair, then the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from the rest of the members of their group. The final rule retains the NPRM language in paragraph (4)(v).

Hold and release of unsold accessible seating. The Department recognizes that not all accessible seating will be sold in all assembly areas for every event to individuals with disabilities who need such seating and that public accommodations may have opportunities to sell such seating to the general public. The Department proposed in the NPRM a provision aimed at striking a balance between affording individuals with disabilities adequate time to purchase accessible seating and the entity's desire to maximize ticket sales. In the NPRM, the Department proposed § 36.302(f)(6), which allowed for the release of accessible seating under the following circumstances: (i) When all seating in the facility has been sold, excluding luxury boxes, club boxes, or suites; (ii) when all seating in a designated area has been sold and the accessible seating being released is in the same area; or (iii) when all seating in a designated price range has been sold and the accessible seating being released is within the same price range.

The Department's NPRM asked "whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches described above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?" 73 FR 34508, 34527 (June 17, 2008).

The Department received comments both supporting and opposing the inclusion of a hold-and-release provision. One side proposed loosening the restrictions on the release of unsold accessible seating. One commenter from a trade association suggested that tickets should be released regardless of whether there is a sell-out, and that these tickets should be released according to a set schedule. Conversely, numerous individuals, advocacy groups, and at least one public entity urged the Department to tighten the conditions under which unsold tickets for accessible seating may be released. These commenters suggested that venues should not be permitted to release tickets during the first two weeks of sale, or alternatively, that they should not be permitted to be released earlier than 48 hours before a sold-out event. Many of these commenters criticized the release of accessible seating under the second and third prongs of § 36.302(f)(6) in the NPRM (when there is a sell-out in general seating in a

designated seating area or in a price range), arguing that it would create situations where general seating would be available for purchase while accessible seating would not be.

Numerous commenters—both from the industry and from advocacy groups—asked for clarification of the term "sell-out." Business groups commented that industry practice is to declare a sell-out when there are only "scattered singles" available—isolated seats that cannot be purchased as a set of adjacent pairs. Many of those same commenters also requested that "sell-out" be qualified with the phrase "of all seating available for sale" since it is industry practice to hold back from release tickets to be used for groups connected with that event (*e.g.,* the promoter, home team, or sports league). They argued that those tickets are not available for sale and any return of these tickets to the general inventory happens close to the event date. Noting the practice of holding back tickets, one advocacy group suggested that covered entities be required to hold back accessible seating in proportion to the number of tickets that are held back for later release.

The Department has concluded that it would be inappropriate to interfere with industry practice by defining what constitutes a "sell-out" and that a public accommodation should continue to use its own approach to defining a "sell-out." If, however, a public accommodation declares a sell-out by reference to those seats that are available for sale, but it holds back tickets that it reasonably anticipates will be released later, it must hold back a proportional percentage of accessible seating to be released as well.

Adopting any of the alternatives proposed in the comments summarized above would have upset the balance between protecting the rights of individuals with disabilities and meeting venues' concerns about lost revenue from unsold accessible seating. As a result, the Department has retained § 36.302(f)(6) renumbered as § 36.302(f)(5) in the final rule. The Department has, however, modified the regulation text to specify that accessible seating may be released only when "all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area." As stated in the NPRM, the Department intended for this provision to allow, for example, the release of accessible seating at the orchestra level when all other seating at the orchestra level is sold. The Department has added this language to the final rule at § 36.302(f)(5)(B) to clarify that venues cannot designate or redesignate seating areas for the purpose of maximizing the release of unsold accessible seating. So, for example, a venue may not determine on an ad hoc basis that a group of seats at the orchestra level is a designated seating area in order to release unsold accessible seating in that area.

The Department also has maintained the hold-and-release provisions that appeared in the NPRM, but has added a provision to address the release of accessible seating for series-of-events tickets on a series-of-events basis. Many commenters asked the Department whether unsold accessible seating may be converted to general seating and released to the general public on a season-ticket basis or longer when tickets typically are sold as a season-ticket package or other long-term basis. Several disability rights organizations and individual commenters argued that such a practice should not be permitted, and, if it were, that conditions should be imposed to ensure that individuals with disabilities have future access to those seats.

The Department interprets the fundamental principle of the ADA as a requirement to give individuals with disabilities equal, not better, access to those opportunities available to the general public. Thus, for example, a public accommodation that sells out its facility on a season-ticket only basis is not required to leave unsold its accessible seating if no persons with disabilities purchase those season-ticket seats. Of course, public accommodations may choose to go beyond what is required by reserving accessible seating for individuals with disabilities (or releasing such seats for sale to the general public) on an individual-game basis.

If a covered entity chooses to release unsold accessible seating for sale on a season-ticket or other long-term basis, it must meet at least two conditions. Under § 36.302(f)(5)(iii) of the final rule, public accommodations must leave flexibility for game-day change-outs to accommodate ticket transfers on the secondary market. And public accommodations must modify their ticketing policies so that, in future years, individuals with disabilities will have the ability to purchase accessible seating on the same basis as other patrons (*e.g.,* as season tickets). Put differently, releasing accessible seating to the general public on a season-ticket or other long-term basis cannot result in that seating being lost to individuals with disabilities in perpetuity. If, in future years, season tickets become available and persons with disabilities have reached the top of the waiting list or have met any other eligibility criteria for season ticket purchases, public accommodations must ensure that accessible seating will be made available to the eligible individuals. In order to accomplish this, the Department has added § 36.302(f)(5)(iii)(A) to require public accommodations that release accessible season tickets to individuals who do not have disabilities that require the features of accessible seating to establish a process to prevent the automatic reassignment of such ticket holders to accessible seating. For example, a public accommodation could have in place a system whereby accessible seating that was released because it was not purchased by individuals with disabilities is not in the pool of tickets available for purchase for the following season unless and until the conditions for ticket release have been satisfied in the following season. Alternatively, a public accommodation might release tickets for accessible seating only when a purchaser who does not need its features agrees that he or she has no guarantee of or right to the same seats in the following season, or that if season tickets are guaranteed for the following season, the purchaser agrees that the offer to purchase tickets is limited to non-accessible seats with, to the extent practicable, comparable price, view, and amenities to the accessible seats such individuals held in the prior year. The Department is aware that this rule may require some administrative changes but believes that this process will not create undue financial and administrative burdens. The Department believes that this approach is balanced and beneficial. It will allow public accommodations to sell all of their seats and will leave open the possibility, in future seasons or series of events, that persons who need accessible seating may have access to it.

The Department also has added § 36.302(f)(5)(iii)(B) to address how season tickets or series-of-events tickets that have attached ownership rights should be handled if the ownership right returns to the public accommodation (*e.g.,* when holders forfeit their ownership right by failing to purchase season tickets or sell their ownership right back to a public accommodation). If the ownership right is for accessible seating, the public accommodation is required to adopt a process that allows an eligible individual with a disability who requires the features of such seating to purchase the rights and tickets for such seating.

Nothing in the regulatory text prevents a public accommodation from establishing a process whereby such ticket holders agree to be voluntarily reassigned from accessible seating to another seating area so that individuals with mobility disabilities or disabilities that require the features of accessible seating and who become newly eligible to purchase season tickets have an opportunity to do so. For example, a public accommodation might seek volunteers to relocate to another location that is at least as good in terms of its location, price, and amenities or a public accommodation might use a seat with forfeited ownership rights as an inducement to get a ticket holder to give up accessible seating he or she does not need.

Ticket transfer. The Department received many comments asking whether accessible seating has the same transfer rights as general seats. The proposed regulation at § 36.302(f)(5) required that individuals with disabilities must be allowed to purchase season tickets for accessible seating on the same terms and conditions as individuals purchasing season tickets for general seating, including the right—if it exists for other ticket-holders—to transfer individual tickets to friends or associates. Some commenters pointed out that the NPRM proposed explicitly allowing individuals with disabilities holding season tickets to transfer tickets but did not address the transfer of tickets purchased for individual events. Several commenters representing assembly areas argued that persons with disabilities holding tickets for an individual event should not be allowed to sell or transfer them to third parties because such ticket transfers would increase the risk of fraud or would make unclear the obligation of the entity to accommodate secondary ticket transfers. They argued that individuals holding accessible seating should either be required to transfer their tickets to another individual with a disability or return them to the facility for a refund.

Although the Department is sympathetic to concerns about administrative burden, curtailing transfer rights for accessible seating when other ticket holders are permitted to transfer tickets would be inconsistent with the ADA's guiding principle that individuals with disabilities must have rights equal to others. Thus, the Department has added language in the final rule in § 36.302(f)(6) that requires that individuals with disabilities holding accessible seating for any event have the same transfer rights accorded other ticket holders for that event. Section 36.302(f)(6) also preserves the rights of individuals with disabilities who hold tickets to accessible seats for a series of events to transfer individual tickets to others, regardless of whether the transferee needs accessible seating. This approach recognizes the common practice of individuals splitting season tickets or other multi-event ticket packages with friends, colleagues, or other spectators to make the purchase of season tickets affordable; individuals with disabilities should not be placed in the burdensome position of having to find another individual with a disability with whom to share the package.

This provision, however, does not require public accommodations to seat an individual who holds a ticket to an accessible seat in such seating if the individual does not need the accessible features of the seat. A public accommodation may reserve the right to switch these individuals to different seats if they are available, but a public accommodation is not required to remove a person without a disability who is using accessible seating from that seating, even if a person who uses a wheelchair shows up with a ticket from the secondary market for a non-accessible seat and wants accessible seating.

Secondary ticket market. Section 36.302(f)(7) is a new provision in the final rule that requires a public accommodation to modify its policies, practices, or procedures to ensure that an individual with a disability, who acquires a ticket in the secondary ticket market, may use that ticket under the same terms and conditions as other ticket holders who acquire a ticket in the secondary market for an event or series of events. This principle was discussed in the NPRM in connection with § 36.302(f)(5), pertaining to season-ticket sales. There, the Department asked for public comment regarding a public accommodation's proposed obligation to accommodate the transfer of accessible seating tickets on the secondary ticket market to those who do not need accessible seating and vice versa.

The secondary ticket market, for the purposes of this rule, broadly means any transfer of tickets after the public accommodation's initial sale of tickets to individuals or entities. It thus encompasses a wide variety of transactions, from ticket transfers between friends to transfers using commercial exchange systems. Many commenters noted that the distinction between the primary and secondary ticket market has become blurred as a result of agreements between teams, leagues, and secondary market sellers. These commenters noted that the secondary market may operate independently of the public accommodation, and parts of the secondary market, such as ticket transfers between friends, undoubtedly are outside the direct jurisdiction of the public accommodation. To the extent that venues seat persons who have purchased tickets on the secondary market, they must similarly seat persons with disabilities who have purchased tickets on the secondary market. In addition, some public accommodations may acquire ADA obligations directly by formally entering the secondary ticket market.

The Department's enforcement experience with assembly areas also has revealed that venues regularly provide for and make last-minute seat transfers. As long as there are vacant wheelchair spaces, requiring venues to provide wheelchair spaces for patrons who acquired inaccessible seats and need wheelchair spaces is an example of a reasonable modification of a policy under title III of the ADA. Similarly, a person who has a ticket for a wheelchair space but who does not require its accessible features could be offered non-accessible seating if such seating is available.

The Department's longstanding position that title III of the ADA requires venues to make reasonable modifications in their policies to allow individuals with disabilities who acquired non-accessible tickets on the secondary ticket market to be seated in accessible seating, where such seating is vacant, is supported by the only Federal court to address this issue. *See Independent Living Resources* v. *Oregon Arena Corp.,* 1 F. Supp. 2d 1159, 1171 (D. Or. 1998). The Department has incorporated this position into the final rule at § 36.302(f)(7)(ii).

The NPRM contained two questions aimed at gauging concern with the Department's consideration of secondary ticket market sales. The first question asked whether a secondary purchaser who does not have a disability and who buys an accessible seat should be required to move if the space is needed for someone with a disability.

Many disability rights advocates answered that the individual should move provided that there is a seat of comparable or better quality available for him and his companion. Some venues, however, expressed concerns about this provision, and asked how they are to identify who should be moved and what obligations apply if there are no seats available that are equivalent or better in quality.

The Department's second question asked whether there are particular concerns about the obligation to provide accessible seating, including a wheelchair space, to an individual with a disability who purchases an inaccessible seat through the secondary market.

Industry commenters contended that this requirement would create a "logistical nightmare," with venues scrambling to reseat patrons in the short time between the opening of the venues' doors and the commencement of the event. Furthermore, they argued that they might not be able to reseat all individuals and that even if they were able to do so, patrons might be moved to inferior seats (whether in accessible or non-accessible seating). These commenters also were concerned that they would be sued by patrons moved under such circumstances.

These commenters seem to have misconstrued the rule. Covered entities are not required to seat every person who acquires a ticket for inaccessible seating but needs accessible seating, and are not required to move any individual who acquires a ticket for accessible seating but does not need it. Covered entities that allow patrons to buy and sell tickets on the secondary market must make reasonable modifications to their policies to allow persons with disabilities to participate in secondary ticket transfers. The Department believes that there is no one-size-fits-all rule that will suit all assembly areas. In those circumstances where a venue has accessible seating vacant at the time an individual with a disability who needs accessible seating presents his ticket for inaccessible seating at the box office, the venue must allow the individual to exchange his ticket for an accessible seat in a comparable location if such an accessible seat is vacant. Where, however, a venue has sold all of its accessible seating, the venue has no obligation to provide accessible seating to the person with a disability who purchased an inaccessible seat on the secondary market. Venues may encourage individuals with disabilities who hold tickets for inaccessible seating to contact the box office before the event to notify them of their need for accessible seating, even though they may not require ticketholders to provide such notice.

The Department notes that public accommodations are permitted, though not required, to adopt policies regarding moving patrons who do not need the features of an accessible seat. If a public accommodation chooses to do so, it might mitigate administrative concerns by marking tickets for accessible seating as such, and printing on the ticket that individuals who purchase such seats but who do not need accessible seating are subject to being moved to other seats in the facility if the accessible seating is required for an individual with a disability. Such a venue might also develop and publish a ticketing policy to provide transparency to the general public and to put holders of tickets for accessible seating who do not require it on notice that they may be moved.

Prevention of fraud in purchase of accessible seating. Assembly area managers and advocacy groups have informed the Department that the fraudulent purchase of accessible seating is a pressing concern. Curbing fraud is a goal that public accommodations and individuals with disabilities share. Steps taken to prevent fraud, however, must be balanced carefully against the privacy rights of individuals with disabilities. Such measures also must not impose burdensome requirements upon, nor restrict the rights of, individuals with disabilities.

In the NPRM, the Department struck a balance between these competing concerns by proposing § 36.302(f)(8), which prohibited public accommodations from asking for proof of disability before the purchase of accessible seating but provided guidance in two

paragraphs on appropriate measures for curbing fraud. Paragraph (i) proposed allowing a public accommodation to ask individuals purchasing single-event tickets for accessible seating whether they are wheelchair users. Paragraph (ii) proposed allowing a public accommodation to require individuals purchasing accessible seating for season tickets or other multi-event ticket packages to attest in writing that the accessible seating is for a wheelchair user. Additionally, the NPRM proposed to permit venues, when they have good cause to believe that an individual has fraudulently purchased accessible seating, to investigate that individual.

Several commenters objected to this rule on the ground that it would require a wheelchair user to be the purchaser of tickets. The Department has reworded this paragraph to reflect that the individual with a disability does not have to be the ticket purchaser. The final rule allows third parties to purchase accessible tickets at the request of an individual with a disability.

Commenters also argued that other individuals with disabilities who do not use wheelchairs should be permitted to purchase accessible seating. Some individuals with disabilities who do not use wheelchairs urged the Department to change the rule, asserting that they, too, need accessible seating. The Department agrees that such seating, although designed for use by a wheelchair user, may be used by non-wheelchair users, if those persons are persons with a disability who need to use accessible seating because of a mobility disability or because their disability requires the use of the features that accessible seating provides (*e.g.,* individuals who cannot bend their legs because of braces, or individuals who, because of their disability, cannot sit in a straight-back chair).

Some commenters raised concerns that allowing venues to ask questions to determine whether individuals purchasing accessible seating are doing so legitimately would burden individuals with disabilities in the purchase of accessible seating. The Department has retained the substance of this provision in § 36.302(f)(8) of the final rule, but emphasizes that such questions should be asked at the initial time of purchase. For example, if the method of purchase is via the Internet, then the question(s) should be answered by clicking a yes or no box during the transaction. The public accommodation may warn purchasers that accessible seating is for individuals with disabilities and that individuals purchasing such tickets fraudulently are subject to relocation.

One commenter argued that face-to-face contact between the venue and the ticket holder should be required in order to prevent fraud and suggested that individuals who purchase accessible seating should be required to pick up their tickets at the box office and then enter the venue immediately. The Department has declined to adopt that suggestion. It would be discriminatory to require individuals with disabilities to pick up tickets at the box office when other spectators are not required to do so. If the assembly area wishes to make face-to-face contact with accessible seating ticket holders to curb fraud, it may do so through its ushers and other customer service personnel located within the seating area.

Some commenters asked whether it is permissible for assembly areas to have voluntary clubs where individuals with disabilities self-identify to the public accommodation in order to become a member of a club that entitles them to purchase accessible seating reserved for club members or otherwise receive priority in purchasing accessible seating. The Department agrees that such clubs are permissible, provided that a reasonable amount of accessible seating remains available at all prices and dispersed at all locations for individuals with disabilities who are non-members.

Section 36.303 Auxiliary Aids and Services

Section 36.303(a) of the 1991 title III regulation requires a public accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with customers, clients, patients, companions, or participants who have disabilities affecting hearing, vision, or speech. The Department notes that § 36.303(a) does not require public accommodations to provide assistance to individuals with disabilities that is unrelated to effective communication, although requests for such assistance may be otherwise subject to the reasonable modifications or barrier removal requirements.

The Department has investigated hundreds of complaints alleging that public accommodations have failed to provide effective communication, and many of these investigations have resulted in settlement agreements and consent decrees. During the course of these investigations, the Department has determined that public accommodations sometimes misunderstand the scope of their obligations under the statute and the regulation. Section 36.303 in the final rule codifies the Department's longstanding policies in this area, and includes provisions based on technological advances and breakthroughs in the area of auxiliary aids and services that have occurred since the 1991 title III regulation was published.

Video remote interpreting (VRI). Section 36.303(b)(1) sets out examples of auxiliary aids and services. In the NPRM, the Department proposed adding video remote services (hereafter referred to as "video remote interpreting" or "VRI") and the exchange of written notes among the examples. The Department also proposed amending the provision to reflect technological advances, such as the wide availability of real-time capability in transcription services and captioning.

VRI is defined in the final rule at § 36.104 as "an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images as provided in § 36.303(f)." The Department notes that VRI generally consists of a videophone, monitors, cameras, a high-speed video connection, and an interpreter provided by the public accommodation pursuant to a contract for services. The term's inclusion within the definition of "qualified interpreter" makes clear that a public accommodation's use of VRI satisfies its title III obligations only where VRI affords effective communication. Comments from advocates and persons with disabilities expressed concern that VRI may not always provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who cannot see the screen because the signal is interrupted, causing unnatural pauses in communication, or the image is grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI, and some recommended requirements for equipment maintenance, dedicated high-speed, wide-bandwidth video connections, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's face, head, arms, hands, and eyes in all transmissions.

The Department has determined that VRI can be an effective method of providing interpreting service in certain situations, particularly when a live interpreter cannot be immediately on the scene. To ensure that VRI is effective, the Department has established performance standards for VRI in § 36.303(f). The Department recognizes that reliance on VRI may not be effective in certain situations, such as those involving the exchange of complex information or involving multiple parties, and for some individuals, such as for persons who are deaf-blind, and using VRI in those circumstances would not satisfy a public accommodation's obligation to provide effective communication.

Comments from several disability advocacy organizations and individuals discouraged the Department from adding the exchange of written notes to the list of available auxiliary aids in § 36.303(b). The Department consistently has recognized that the exchange of written notes may provide effective communication in certain contexts. The NPRM proposed adding an explicit reference to written notes because some title III entities do not understand that exchange of written notes using paper and pencil may be an available option in some circumstances. Advocates and persons with disabilities requested explicit limits on the use of written notes as a form of auxiliary aid because, they argued, most exchanges are not simple, and handwritten notes do not afford effective

communication. One major advocacy organization, for example, noted that the speed at which individuals communicate orally or use sign language averages about 200 words per minute or more, and thus, the exchange of notes may provide only truncated or incomplete communication. For persons whose primary language is American Sign Language (ASL), some commenters pointed out, using written English in exchange of notes often is ineffective because ASL syntax and vocabulary is dissimilar from English. By contrast, some commenters from professional medical associations sought more specific guidance on when notes are allowed, especially in the context of medical offices and health care situations.

Exchange of notes likely will be effective in situations that do not involve substantial conversation, for example, when blood is drawn for routine lab tests or regular allergy shots are administered. However, interpreters should be used when the matter involves more complexity, such as in communication of medical history or diagnoses, in conversations about medical procedures and treatment decisions, or in communication of instructions for care at home or elsewhere. The Department discussed in the NPRM the kinds of situations in which use of interpreters or captioning is necessary. Additional guidance on this issue can be found in a number of agreements entered into with health care providers and hospitals that are available on the Department's Web site at *http://www.ada.gov.*

In addition, commenters requested that the Department include "real-time" before any mention of "computer-aided" or "captioning" technology to highlight the value of simultaneous translation of any communication. The Department has added to the final rule appropriate references to "real-time" to recognize this aspect of effective communication. Lastly, in this provision and elsewhere in the title III regulation, the Department has replaced the term "telecommunications devices for deaf persons (TDD)" with "text telephones (TTYs)." As noted in the NPRM, TTY has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. Comments from advocates and persons with disabilities expressed approval of the substitution of TTY for TDD in the proposed regulation, but expressed the view that the Department should expand the definition to "voice, text, and video-based telecommunications products and systems, including TTY's, videophones, and captioned telephones, or equally effective telecommunications systems." The Department has expanded its definition of "auxiliary aids and services" in § 36.303 to include those examples in the final rule. Other additions proposed in the NPRM, and retained in the final rule, include Brailled materials and displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP), and accessible electronic and information technology.

As the Department noted in the preamble to the NPRM, the list of auxiliary aids in § 36.303(b) is merely illustrative. The Department does not intend that every public accommodation covered by title III must have access to every device or all new technology at all times, as long as the communication provided is effective.

Companions who are individuals with disabilities. The Department has added several new provisions to § 36.303(c), but these provisions do not impose new obligations on places of public accommodation. Rather, these provisions simply codify the Department's longstanding positions. Section 36.303(c)(1) now states that "[a] public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities." Section 36.303(c)(1)(i) defines "companion" as "a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate."

This provision makes clear that if the companion is someone with whom the public accommodation normally would or should communicate, then the public accommodation must provide appropriate auxiliary aids and services to that companion to ensure effective communication with the companion. This commonsense rule provides the necessary guidance to public accommodations to implement properly the nondiscrimination requirements of the ADA. Commenters also questioned why, in the NPRM, the Department defined companion as "a family member, friend, or associate of a program participant * * *," noting that the scope of a public accommodation's obligation is not limited to "program participants" but rather includes all individuals seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of the public accommodation. 73 FR 34508, 34554 (June 17, 2008). The Department agrees and has amended the regulatory language accordingly. Many commenters supported inclusion of companions in the rule and requested that the Department clarify that a companion with a disability may be entitled to effective communication from the public accommodation, even though the individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of the public accommodation is not an individual with a disability. Some commenters asked the Department to make clear that if the individual seeking access to or participating in the public accommodation's program or services is an individual with a disability and the companion is not, the public accommodation may not limit its communication to the companion, instead of communicating directly with the individual with a disability, when it would otherwise be appropriate to communicate with the individual with the disability.

Most entities and individuals from the medical field objected to the Department's proposal, suggesting that medical and health care providers, and they alone, should determine to whom medical information should be communicated and when auxiliary aids and services should be provided to companions. Others asked that the Department limit the public accommodation's obligation to communicate effectively with a companion to situations where such communication is necessary to serve the interests of the person who is receiving the public accommodation's services. It also was suggested that companions should receive auxiliary aids and services only when necessary to ensure effective communication with the person receiving the public accommodation's services, with an emphasis on the particular needs of the patient requiring assistance, not the patient's family or guardian.

Some in the medical community objected to the inclusion of any regulatory language regarding companions, asserting that such language is overbroad, seeks services for individuals whose presence is neither required by the public accommodation nor necessary for the delivery of the services or good, places additional burdens on the medical community, and represents an uncompensated mandate. One medical association commenter stated that such a mandate was particularly burdensome in situations where a patient is fully and legally capable of participating in the decision-making process and needs little or no assistance in obtaining care and following through on physician's instructions.

The final rule codifies the Department's longstanding interpretation of the ADA, and clarifies that public accommodations have effective communication obligations with respect to companions who are individuals with disabilities even where the individual seeking to participate in or benefit from what a public accommodation offers does not have a disability. There are many instances in which such an individual may not be an individual with a disability but his or her companion is an individual with a disability. The effective communication requirement applies equally to that companion.

Effective communication with companions is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion 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 need to 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. Furthermore, the companion could be a family member with whom

hospital personnel normally would communicate. It has been the Department's longstanding position that public accommodations are required to provide effective communication to companions when they accompany patients to medical care providers for treatment.

The individual with a disability does not need to be present physically to trigger the public accommodation's obligation to provide effective communication to a companion. The controlling principle regarding whether appropriate auxiliary aids and services should be provided is whether the companion is an appropriate person with whom the public accommodation should communicate. Examples of such situations include back-to-school night or parent-teacher conferences at a private school. If the faculty writes on the board or otherwise displays information in a visual context during back-to-school night, this information must be communicated effectively to parents or guardians who are blind or have low vision. At a parent-teacher conference, deaf parents or guardians are to be provided with appropriate auxiliary aids and service to communicate effectively with the teacher and administrators. Likewise, when a deaf spouse attempts to communicate with private social service agencies about the services necessary for the hearing spouse, appropriate auxiliary aids and services must be provided to the deaf spouse by the public accommodation to ensure effective communication.

One medical association sought approval to impose a charge against an individual with a disability, either the patient or the companion, where that person had stated he or she needed an interpreter for a scheduled appointment, the medical provider had arranged for an interpreter to appear, and then the individual requiring the interpreter did not show up for the scheduled appointment. Section 36.301(c) of the 1991 title III regulation prohibits the imposition of surcharges to cover the costs of necessary auxiliary aids and services. As such, medical providers cannot pass along to their patients with disabilities the cost of obtaining an interpreter, even in situations where the individual cancels his or her appointment at the last minute or is a "no-show" for the scheduled appointment. The medical provider, however, may charge for the missed appointment if all other patients are subject to such a charge in the same circumstances.

Determining appropriate auxiliary aids. The type of auxiliary aid the public accommodation provides is dependent on which auxiliary aid is appropriate under the particular circumstances. Section 36.303(c)(1)(ii) codifies the Department's longstanding interpretation 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. As the Department explained in the NPRM, this provision lists factors the public accommodation should consider in determining which type of auxiliary aids and services are necessary. For example, an individual with a disability who is deaf or hard of hearing may need a qualified interpreter to discuss with hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (*e.g.,* dosage, side effects, drug interactions, etc.). In comparison, an individual who is deaf or hard of hearing who purchases an item in the hospital gift shop may need only an exchange of written notes to achieve effective communication.

The language in the first sentence of § 36.303(c)(1)(ii) is derived from the Department's Technical Assistance Manual. *See* Department of Justice, Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities,* III–4.3200, available at *http://www.ada.gov/taman3.html.* There were few comments regarding inclusion of this policy in the regulation itself, and those received were positive.

Many advocacy groups, particularly those representing blind individuals and those with low vision, urged the Department to add language in the final rule requiring the provision of accessible material in a manner that is timely, accurate, and private. This, they argued, would be especially important with regard to billing information, other time-sensitive material, or confidential information. The Department has added a provision in § 36.303(c)(1)(ii) stating that in "order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way so as to protect the privacy and independence of the individual with a disability."

The second sentence of § 36.303(c)(1)(ii) states that "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." Many commenters urged the Department to amend this provision to require public accommodations to give primary consideration to the expressed choice of an individual with a disability. However, as the Department explained when it initially promulgated the 1991 title III regulation, the Department believes that Congress did not intend under title III to impose upon a public accommodation the requirement that it give primary consideration to the request of the individual with a disability. *See* 28 CFR part 36, app. B at 726 (2009). The legislative history does, however, demonstrate congressional intent to strongly encourage consulting with persons with disabilities. *Id.* As the Department explained in the 1991 preamble, "the House Education and Labor Committee stated that it 'expects' that 'public accommodation(s) will consult with the individual with a disability before providing a particular auxiliary aid or service.' (Education and Labor report at 107)." *Id.*

The commenters who urged that primary consideration be given to the individual with a disability noted, for example, that a public accommodation would not provide effective communication by using written notes where the individual requiring an auxiliary aid is in severe pain, or by providing a qualified ASL interpreter when an individual needs an oral interpreter instead. Both examples illustrate the importance of consulting with the individual with a disability in order to ensure that the communication provided is effective. When a public accommodation ignores the communication needs of the individual requiring an auxiliary aid or service, it does so at its peril, for if the communication provided is not effective, the public accommodation will have violated title III of the ADA.

Consequently, the regulation strongly encourages the public accommodation to engage in a dialogue with the individual with a disability to determine what auxiliary aids and services are appropriate under the circumstances. This dialogue should include a communication assessment of the individual with a disability initially, regularly, and as needed, because the auxiliary aids and services necessary to provide effective communication to the individual may fluctuate. For example, a deaf individual may go to a private community health center with what is at first believed to be a minor medical emergency, such as a sore knee, and the individual with a disability and the community health center both may believe that exchanging written notes will be effective; however, during that individual's visit, it may be determined that the individual is, in fact, suffering from an anterior cruciate ligament tear and must have surgery to repair the torn ligament. As the situation develops and the diagnosis and recommended course of action evolve into surgery, an interpreter likely will be necessary. The community health center has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess what measures are required to ensure effective communication.

Similarly, the Department strongly encourages public accommodations to keep individuals with disabilities apprised of the status of the expected arrival of an interpreter or the delivery of other requested or anticipated auxiliary aids and services. Also, when the public accommodation decides not to provide the auxiliary aids and services requested by an individual with a disability, the public accommodation should provide that individual with the reason for its decision.

Family members and friends as interpreters. Section 36.303(c)(2), which was proposed in the NPRM, has been included in the final rule to make clear that a public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her. The Department has added this regulatory requirement to emphasize that when a public accommodation is interacting with a person with a disability, it is the public accommodation's responsibility to provide an interpreter to ensure effective communication. It is not appropriate to require the person with a disability to bring another individual to provide such services.

Many commenters supported inclusion of this language in the new rule. A representative from a cruise line association opined, however, that if a guest chose to cruise without an interpreter or companion, the ship would not be compelled to provide an interpreter for the medical facility. On the contrary, when an individual with a disability goes on a cruise, the cruise ship has an obligation to provide effective communication, including, if necessary, a qualified interpreter as defined in the rule.

Some representatives of pediatricians objected to this provision, stating that parents of children with disabilities often know best how to interpret their children's needs and health status and relay that information to the child's physician, and to remove that parent, or add a stranger into the examining room, may frighten children. These commenters requested clarification in the regulation that public accommodations should permit parents, guardians, or caregivers of children with disabilities to accompany them in medical settings to ensure effective communication. The regulation does not prohibit parents, guardians, or caregivers from being present or providing effective communication for children. Rather, it prohibits medical professionals (and other public accommodations) from requiring or forcing individuals with disabilities to bring other individuals with them to facilitate communication so that the public accommodation will not have to provide appropriate auxiliary aids and services. The public accommodation cannot avoid its obligation to provide an interpreter except under the circumstances described in § 36.303(c)(3)–(4).

A State medical association also objected to this provision, opining that medical providers should have the authority to ask patients to bring someone with them to provide interpreting services if the medical provider determines that such a practice would result in effective communication and that patient privacy and confidentiality would be maintained. While the public accommodation has the obligation to determine what type of auxiliary aids and services are necessary to ensure effective communication, it cannot unilaterally determine whether the patient's privacy and confidentiality would be maintained.

Section 36.303(c)(3) of the final rule codifies the Department's position that there are certain limited instances when a public accommodation may rely on an accompanying adult to interpret or facilitate communication: (1) In an emergency involving an imminent threat to the safety or welfare of an individual or the public; or (2) if the individual with a disability specifically requests it, the accompanying adult agrees to provide the assistance, and reliance on that adult for this assistance is appropriate under the circumstances. In such instances, the public accommodation should first offer to provide appropriate auxiliary aids and services free of charge.

Commenters requested that the Department make clear that the public accommodation cannot request, rely on, or coerce an accompanying adult to provide effective communication for an individual with a disability, and that only a voluntary offer of assistance is acceptable. The Department states unequivocally that consent of, and for, the accompanying adult to facilitate communication must be provided freely and voluntarily both by the individual with a disability and the accompanying adult—absent an emergency involving an imminent threat to the safety or welfare of an individual or the public. The public accommodation cannot coerce or attempt to persuade another adult to provide effective communication for the individual with a disability.

Several commenters asked that the Department make clear that children are not to be used to provide effective communication for family members and friends and that it is the responsibility of the public accommodation to provide effective communication, stating that interpreters often are needed in settings where it would not be appropriate for children to be interpreting, such as those involving medical issues, domestic violence, or other situations involving the exchange of confidential or adult-related material. Children often are hesitant to decline requests to provide communication services, which puts them in a very difficult position vis-a-vis family members and friends. The Department agrees. It is the Department's position that a public accommodation shall not rely on a minor child to facilitate communication with a family member, friend, or other individual except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where no interpreter is available. Accordingly, the Department has revised the rule to state that "[a] public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available." § 36.303(c)(4). Sections 36.303(c)(3) and (c)(4) have no application in circumstances where an interpreter would not otherwise be required in order to provide effective communication (*e.g.,* in simple transactions such as purchasing movie tickets at a theater).

The Department stresses that privacy and confidentiality must be maintained but notes that covered entities, such as hospitals, that are subject to the Privacy Rules, 45 CFR parts 160 and 164, of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, are permitted to disclose to a patient's relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. *See* 45 CFR parts 160 and 164. The agreement need not be in writing. Covered entities should consult the HIPAA Privacy Rules regarding other ways disclosures may be made to such persons.

With regard to emergency situations, proposed § 36.303(c)(3) permitted reliance on an individual accompanying an individual with a disability to interpret or facilitate communication in an emergency involving a threat to the safety or welfare of an individual or the public. Commenters requested that the Department make clear that often a public accommodation can obtain appropriate auxiliary aids and services in advance of an emergency, particularly in anticipated emergencies, such as predicted dangerous weather, or in certain medical situations, such as pending childbirth, by making necessary pre-arrangements. These commenters did not want public accommodations to be relieved of their responsibilities to provide effective communication in emergency situations, noting that the need for effective communication in emergencies is heightened. For the same reason, several commenters requested a separate rule that requires public accommodations to provide timely and effective communication in the event of an emergency.

One group of commenters asked that the Department narrow the regulation permitting reliance on a companion to interpret or facilitate communication in emergency situations so that it is not available to entities with responsibilities for emergency preparedness and response. Some commenters noted that certain exigent circumstances, such as those that exist during and, perhaps, immediately after a major hurricane, temporarily may excuse public accommodations of their responsibilities to provide effective communication. However, they asked that the Department clarify that these obligations are ongoing, and that as soon as such situations begin to abate or become stabilized, the public accommodation must provide effective communication.

The Department recognizes the need for effective communication is critical in emergency situations. After due consideration of all of these concerns raised by commenters, the Department has revised § 36.303(c) to narrow the exception permitting reliance on individuals accompanying the individual with a disability during an emergency to make it clear that it applies only to emergencies involving an "imminent threat to the safety or welfare of an individual or the public * * *." § 36.303(c)(3)–(4). The Department wishes to emphasize, however, that application of this exception is narrowly tailored to emergencies involving an imminent threat to the safety or welfare of individuals or the public. Arguably, all visits to an emergency room are by definition emergencies. Likewise, an argument can be made that most situations to which emergency workers respond involve, in one way or another, a threat to the safety or welfare of an individual or the public. The imminent threat exception in § 36.303(c)(3)–(4) is not intended to apply to typical and foreseeable emergency situations that are part of the normal operations of these institutions. As such, a public accommodation may rely on an accompanying individual to interpret or facilitate communication under the § 36.303(c)(3)–(4) imminent threat exception only where there is a true emergency, *i.e.,* where any delay in providing immediate services to the individual could have life-altering or life-ending consequences.

Telecommunications. In addition to the changes discussed in § 36.303(b) regarding

telecommunications, telephones, and text telephones, the Department has adopted provisions in § 36.303(d) of the final rule (which also were included in the NPRM) requiring that public accommodations must not disconnect or refuse to take calls from FCC-approved telecommunications relay systems, including Internet-based relay systems. Commenters from some State agencies, many advocacy organizations, and individuals strongly urged the Department to mandate such action because of the high proportion of TTY calls and relay service calls to title III entities that are not completed because of phone systems or employees not taking the calls. This refusal presents a significant obstacle for persons using TTYs who do business with public accommodations and denies persons with disabilities telephone access for business that typically is handled over the telephone.

Section 36.303(d)(1)(ii) of the NPRM added public telephones equipped with volume control mechanisms and hearing aid-compatible telephones to the examples of types of telephone equipment to be provided. Commenters from the disability community and from telecommunications relay service providers argued that requirements for these particular features on telephones are obsolete not only because the deaf and hard of hearing community uses video technology more frequently than other types of telecommunication, but also because all public coin phones have been hearing aid compatible since 1983, pursuant to the Telecommunications for the Disabled Act of 1982, 47 U.S.C. 610. The Hearing Aid Compatibility Act of 1988, 47 U.S.C. 610, extended this requirement to all wireline telephones imported into or manufactured in the United States since 1989. In 1997, the FCC further required that all such phones also be equipped with volume control. *See* 47 CFR 68.6. Given these existing statutory obligations, the proposed language is unnecessary. Accordingly, the Department has deleted that language from the final rule.

The Department understands that there are many new devices and advances in technology that should be included in the definition of available auxiliary aids and is including many of the telecommunications devices and some new technology. While much of this technology is not expensive and should be available to most title III entities, there may be legitimate reasons why in a particular situation some of these new and developing auxiliary aids may not be available, may be prohibitively costly (thus supporting an undue burden defense), or may otherwise not be suitable given other circumstances related to the particular terrain, situation, or functionality in specialized areas where security, among other things, may be a factor limiting the appropriateness of the use of a particular technology or device. The Department recognizes that the available new technology may provide more effective communication than existing technology and that providing effective communication often will include use of new technology and video relay services, as well as interpreters. However, the Department has not mandated that title III entities make all technology or services available upon demand in all situations. When a public accommodation provides the opportunity to make outgoing phone calls on more than an incidental-convenience basis, it shall make available accessible public telephones, TTYs, or other telecommunications products and systems for use by an individual who is deaf or hard of hearing, or has a speech impairment.

Video remote interpreting (VRI) services. In § 36.303(f) of the NPRM, the Department proposed the inclusion of four performance standards for VRI (which the NPRM termed video interpreting services (VIS)), for 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 their body position; (3) clear transmission of voices; and (4) persons who are trained to set up and operate the VIS quickly and efficiently.

Commenters generally approved of these proposed performance standards, but recommended that some additional standards be included in the final rule. For persons who are deaf with limited vision, commenters requested that the Department include an explicit requirement that interpreters wear high-contrast clothing with no patterns that might distract from their hands as they are interpreting, so that a person with limited vision could still see the signs made by the interpreter. While the Department reiterates the importance of such practices in the delivery of effective VRI as well as in-person interpreting, the Department declines to adopt such performance standards as part of this rule. In general, professional interpreters already follow such practices, as the Code of Professional Conduct for interpreters developed by the Registry of Interpreter for the Deaf and the National Association of the Deaf incorporates attire considerations into their standards of professionalism and conduct. Moreover, as a result of this code, many VRI agencies have adopted detailed dress standards that interpreters hired by the agency must follow. Commenters also urged explicit requirement of a clear image of the face and eyes of the interpreter and others. Because the face includes the eyes, the Department has amended § 36.303(f)(2) of the final rule to include a requirement that the interpreter's face be displayed. Other commenters requested requirement of a wide-bandwidth video connection for the VRI system, and the Department has included this requirement in § 36.303(f)(1) of the final rule.

ATMs. The 2010 Standards set out detailed requirements for ATMs, including communication-related requirements to make ATMs usable by individuals who are blind or have low vision. In the NPRM, the Department discussed the application of a safe harbor to the communication-related elements of ATMs. The NPRM explained that the Department considers the communication-related elements of ATMs to be auxiliary aids and services, to which the safe harbor for elements built in compliance with the 1991 standards does not apply.

The Department received several comments regarding this issue. Several commenters representing banks objected to the exclusion of communication-related aspects of ATMs from the safe harbor provision. They explained that the useful life of ATMs—on average 10 years—was longer than the Department noted; thus, without the safe harbor, banks would be forced to retrofit many ATMs in order to comply with the proposed regulation. Such retrofitting, they noted, would be costly to the industry. A few representatives of the disability community commented that communication-related aspects of ATMs should be excluded from the safe harbor.

The Department consistently has taken the position that the communication-related elements of ATMs are auxiliary aids and services, rather than structural elements. *See* 28 CFR part 36, app. B at 728 (2009). Thus, the safe harbor provision does not apply to these elements. The Department believes that the limitations on the effective communication requirements, which provide that a covered entity does not have to take measures that would result in a fundamental alteration of its program or would cause undue burdens, provide adequate protection to covered entities that operate ATMs.

Captioning at sporting venues. In § 36.303(g) of the NPRM, the Department proposed that sports stadiums that have a capacity of 25,000 or more shall provide captioning for safety and emergency information on scoreboards and video monitors. In addition, the Department posed four questions about captioning of information, especially safety and emergency information announcements, provided over public address (PA) systems. The Department received many detailed and divergent responses to each of the four questions and the proposed regulatory text. Because comments submitted on the Department's title II and title III proposals were intertwined, because of the similarity of issues involved for title II entities and title III entities, and in recognition of the fact that many large sports stadiums are covered by both title II and title III as joint operations of State or local government and one or more public accommodations, the Department presents here a single consolidated review and summary of the issues raised in comments.

The Department asked whether requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 would create an undue burden for smaller entities, and whether it would be feasible for small stadiums to provide such captioning, or whether a larger threshold, such as sports stadiums with a capacity of 50,000 or more, would be appropriate.

There was a consensus among the commenters, including disability advocates as well as venue owners and stadium designers and operators, that using the stadium size or seating capacity should not be the exclusive deciding factor for any obligation to provide captioning for safety and emergency information broadcast over the PA system. Most disability advocacy organizations and individuals with

disabilities complained that using size or seating capacity as a threshold for captioning safety and emergency information would undermine the "undue burden" defense found in both titles II and III. Many commenters provided examples of facilities such as professional hockey arenas that seat less than 25,000 fans but that, commenters argued, should be able to provide real-time captioning. Other commenters suggested that some high school or college stadiums, for example, may hold 25,000 fans or more and yet lack the resources to provide real-time captioning. Many commenters noted that real-time captioning would require use of trained stenographers, and that most high school and college sports facilities rely upon volunteers to operate scoreboards and PA systems and they would not be qualified stenographers, especially in case of an emergency. One national association noted that the typical stenographer expense for a professional football game in Washington, DC, is about $550 per game. Similarly, one trade association representing venues estimated that the cost for a professional stenographer at a sporting event runs between $500 and $1,000 per game or event, the cost of which, they argued, would be unduly burdensome in many cases. Some commenters posited that schools that do not sell tickets to athletic events would be challenged to meet such expenses, in contrast to major college athletic programs and professional sports teams, which would be less likely to prevail using an "undue burden" defense.

Some venue owners and operators and other covered entities also argued that stadium size should not be the key consideration for whether scoreboard captioning will be required. Instead, these entities suggested that equipment already installed in the stadium, including necessary electrical equipment and backup power supply, should be the determining factor for whether captioning is mandated. Many commenters argued that the requirement to provide captioning should apply only to stadiums with scoreboards that meet the National Fire Protection Association (NFPA) National Fire Alarm Code. Commenters reported that NFPA 72 requires at least two independent and reliable power supplies for emergency information systems, including one source that is a generator or a battery sufficient to run the system in the event the primary power fails. Alternatively, some stadium designers and title II entities commented that the requirement should arise when the facility has at least one elevator providing firefighter emergency operation, along with approval of authorities with responsibility for fire safety. An organization concerned with fire safety codes commented that the Department lacks the expertise to regulate on this topic. Other commenters argued for flexibility in the requirements for providing captioning and contended that any requirement should apply only to stadiums constructed after the effective date of the regulation.

In the NPRM, the Department also asked whether the rule should address the specific means of captioning equipment, whether captioning should be provided through any effective means (*e.g.,* scoreboards, line boards, handheld devices, or other means), or whether some means, such as handheld devices, should be eliminated as options. This question elicited many comments from advocates for persons with disabilities as well as from covered entities. Advocacy organizations and individuals with experience using handheld devices argued that such devices do not provide effective communication. These commenters noted that information is often delayed in the transmission to such devices, making them hard to use when following action on the playing field or in the event of an emergency when the crowd is already reacting to aural information provided over the PA system well before it is received on the handheld device.

Several venue owners and operators and others commented that handheld technology offers advantages of flexibility and portability so that it may be used successfully regardless of where in the facility the user is located, even when not in the line of sight of a scoreboard or other captioning system. Still other commenters urged the Department not to regulate in such a way as to limit innovation and use of such technology now and in the future. Cost considerations were included in comments from some stadium designers and venue owners and operators who reported that the cost of providing handheld systems is far less than the cost of providing real-time captioning on scoreboards, especially in facilities that do not currently have the capacity to provide real-time captions on existing equipment. Others noted that handheld technology is not covered by fire and safety model codes, including the NFPA, and thus would be more easily adapted into existing facilities if captioning were required by the Department.

The Department also asked about requiring open captioning of all public address announcements, rather than limiting the captioning requirement to safety and emergency information. A variety of advocates and persons with disabilities argued that all information broadcast over a PA system should be captioned in real time at all facilities in order to provide effective communication, and that a requirement only to provide emergency and safety information would not be sufficient. A few organizations representing persons with disabilities commented that installation of new systems should not be required, but that all systems within existing facilities that are capable of providing captioning should provide captioning of information to the maximum extent possible. Several organizations for persons with disabilities commented that all facilities should include in their safety planning measures a requirement that all aurally provided information for patrons with communication disabilities be captioned. Some advocates suggested that demand for captions will only increase as the number of deaf and hard of hearing persons grows with the aging of the general population and with increasing numbers of veterans returning from war with disabilities. Multiple commenters noted that the captioning would benefit others as well as those with communication disabilities.

By contrast, venue owners and operators and others commented that the action on the sports field is self-explanatory and does not require captioning. These commenters objected to an explicit requirement to provide real-time captioning for all information broadcast on the PA system at a sporting event. Other commenters objected to requiring captioning even for emergency and safety information over the scoreboard rather than through some other means. By contrast, venue operators, State government agencies, and some model code groups, including the NFPA, commented that emergency and safety information must be provided in an accessible format and that public safety is a paramount concern. Other commenters argued that the best method to deliver safety and emergency information would be television monitors showing local TV broadcasts with captions already mandated by the FCC. Some commenters posited that the most reliable information about a major emergency would be provided on the television news broadcasts. They argued that television monitors may be located throughout the facility, improving line of sight for patrons, some of whom might not be able to see the scoreboard from their seats or elsewhere in the facility. Some stadium designers, venue operators, and model code groups pointed out that video monitors are not regulated by the NFPA or other agencies, so that such monitors could be more easily provided. Video monitors may receive transmissions from within the facility and could provide real-time captions if there is the necessary software and equipment to feed the captioning signal to a closed video network within the facility. Several commenters suggested that using monitors would be preferable to requiring captions on the scoreboard if the regulation mandates real-time captioning. Some venue owners and operators argued that retrofitting existing stadiums with new systems could easily cost in the hundreds of thousands of dollars per scoreboard or system. Some stadium designers and others argued that captioning should be required only in stadiums built after the effective date of the regulation. For stadiums with existing systems that allow for real-time captioning, one commenter posited that dedicating the system exclusively to real-time captioning would lead to an annual loss of between two and three million dollars per stadium in revenue from advertising currently running in that space.

After carefully considering the wide range of public comments on this issue, the Department has concluded that the final rule will not provide additional requirements for effective communication or emergency information provided at sports stadiums at this time. The 1991 title II and title III regulations and statutory requirements are not in any way affected by this decision. The decision to postpone rulemaking on this complex issue is based on a number of factors, including the multiple layers of existing regulations by various agencies and levels of government, and the wide array of information, requests, and recommendations related to developing technology offered by the public. The diversity of existing information and communication systems and

other characteristics among sports stadiums also complicates the regulation of captioning. The Department has concluded that further consideration and review is prudent before it issues specific regulatory requirements.

Movie captioning. In the NPRM, the Department stated that options were being considered to require movie theater owners and operators to exhibit movies that are captioned for patrons who are deaf or hard of hearing. Captioning makes films accessible to individuals whose hearing is too limited to benefit from assistive listening devices. Both open and closed captioning are examples of auxiliary aids and services required under the Department's 1991 title III regulation. *See* 28 CFR 36.303(b)(1). Open captions are similar to subtitles in that the text is visible to everyone in the theater, while closed captioning displays the written text of the audio only to those individuals who request it.

In the NPRM, the Department also stated that options were being considered to require movie theater owners and operators to exhibit movies with video description,[3] a technology that enables individuals who are blind or have low vision to enjoy movies by providing a spoken interpretation of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. The descriptions are narrated and recorded onto an audiotape or disk that can be synchronized with the film as it is projected. An audio recording is an example of an auxiliary aid and service required under the Department's 1991 title III regulation. *See* 28 CFR 36.303(b)(2).

The NPRM stated that technological advances since the early 1990s have made open and closed captioning and video description for movies more readily available and effective and noted that the Department was considering options to require captioning and video description for movies exhibited by public accommodations. The NPRM also noted that the Department is aware that the movie industry is transitioning, in whole or in part, to movies in digital format and that movie theater owners and operators are beginning to purchase digital projectors. The Department noted in the NPRM that movie theater owners and operators with digital projectors may have available to them different capabilities than those without digital projectors. The Department sought comment regarding whether and how to require captioning and video description while the film industry makes this transition. In addition, the NPRM stated the Department's concern about the potential cost to exhibit captioned movies, noting that cost may vary depending upon whether open or closed captioning is used and whether or not digital projectors are used, and stated that the cost of captioning must stay within the parameters of the undue burden requirement in 28 CFR 36.303(a). The Department further noted that it understands the cost of video description equipment to be less than that for closed captioning. The Department then stated that it was considering the possibility of requiring public accommodations to exhibit all new movies in captioned format and with video description at every showing. The NPRM stated that the Department would not specify the types of captioning required, leaving such decisions to the discretion of the movie theater owners and operators.

In the NPRM, the Department requested public comment as to whether public accommodations should be required to exhibit all new movies in captioned format at every showing, whether it would be more appropriate to require captioning less frequently, and, if so, with what frequency captioning should be provided. The Department also inquired as to whether the requirement for captioning should be tied to the conversion of movies from film to the use of a digital format. The Department also asked for public comment regarding the exhibition of all new movies with narrative description, whether it would it be more appropriate to require narrative description less frequently, and whether narrative description of movies should be tied to the use of a digital format.

Representatives from the movie industry, a commenter from a non-profit organization, and a disability rights advocacy group provided information in their comments on the status of captioning and video description technology today as well as an update on the transition to digital cinema in the industry. A representative of major movie producers and distributors commented that traditionally open captions were created by "burning" the captions onto a special print of a selected movie, which the studios would make available to the exhibitors (movie theater owners and operators). Releases with open captions typically would be presented at special screenings. More recently, according to this commenter, alternative methods have been developed for presenting movies with open captions, but their common feature is that the captions are visible to all theater-goers. Closed captioning is an innovation in technology that was first made available in a feature film presentation in late 1997. Closed captioning technology currently in use allows viewers to see captions using a clear panel that is mounted in front of the viewer's seat.[4] According to commenters from the industry, the panel reflects captions that are shown in reverse on an LED display in the back of the theater, with captions appearing on or near the movie image. Moviegoers may use this technology at any showing at a theater that has been equipped with the technology, so that the theater does not have to arrange limited special screenings.

Video description technology also has existed since 1997, according to a commenter who works with the captioning and video description industry. According to a movie industry commenter, video description requires the creation of a separate script written by specially trained writers called "describers." As the commenter explained, a describer initially listens to the movie without watching it in order to approximate the experience of an audience member who is blind or has low vision. Using software to map out the pauses in the soundtrack, the describer writes a description in the space available. After an initial script is written for video description, it is edited and checked for timing, continuity, accuracy, and a natural flow. A narrator then records the new script to match the corresponding movie. This same industry commenter said that video description currently is provided in theaters through screens equipped with the same type of technology as that used for closed captioning. As commenters explained, technologies in use today deliver video descriptions via infrared or FM listening systems to headsets worn by individuals who are blind or have low vision.

According to the commenter representing major movie producers and distributors, the percentage of motion pictures produced with closed captioning by its member studios had grown to 88 percent of total releases by 2007; the percentage of motion pictures produced with open captioning by its member studios had grown to 78 percent of total releases by 2007; and the percentage of motion pictures provided with video description has ranged consistently between 50 percent and 60 percent of total releases. It is the movie producers and distributors, not the movie theater owners and operators, who determine what to caption and describe, the type of captioning to use, and the content of the captions and video description script. These same producers and distributors also assume the costs of captioning and describing movies. Movie theater owners and operators simply purchase the equipment to display the captions and play the video description in their auditoria.

The transition to digital cinema, considered by the industry to be one of the most profound advancements in motion picture production and technology of the last 100 years, will provide numerous advantages both for the industry and the audience. According to one commenter, currently there are sufficient standards and interim solutions to support captioning and video description now in digital format. Additionally, movie studios are supporting those efforts by providing accessibility tracks (captioning and video description) in many digital cinema content packages. Moreover, a group of industry commenters composed in pertinent part of members of the motion picture industry, the central standards organizations for this industry, and key digital equipment vendors, noted that they are participating in a joint venture to establish the remaining accessibility specifications and standards for access audio tracks. Access audio tracks are supplemental sound audio tracks for the hard of hearing and narrative audio tracks for individuals who have vision disabilities. According to a commenter and to industry documents, these standards were expected to

[3] In the NPRM, the Department referred to this technology as "narrative description." 73 FR 34508, 34531 (June 17, 2008). Several commenters informed the Department that the more accurate and commonly understood term is "video description," even though the subject is movies, not video, and so the Department decided to employ that term.

[4] Other closed captioning technologies for movies that have been developed but are not in use at this time include hand-held displays similar to a PDA (personal digital assistant); eyeglasses fitted with a prism over one lens; and projected bitmap captions. The PDA and eyeglass systems use a wireless transmitter to send the captions to the display device.

be in place by spring 2009. According to a commenter, at that time, all of the major digital cinema equipment vendors were expected to have support for a variety of closed caption display and video description products. This same commenter stated that these technologies will be supported by the studios that produce and distribute feature films, by the theaters that show these films to the public, and by the full complement of equipment in the production, distribution, and display chain.

The initial investment for movie theater owners and operators to convert to digital cinema is expensive. One industry commenter estimated that converting theaters to digital projection costs between $70,000 and $100,000 per screen and that maintenance costs for digital projectors are estimated to run between $5,000 and $10,000 a year—approximately five times as expensive as the maintenance costs for film projectors. According to this same commenter, while there has been progress in making the conversion, only approximately 5,000 screens out of 38,794 nationwide have been converted, and the cost to make the remaining conversions involves a total investment of several billion dollars. According to another commenter, predictions as to when more than half of all screens will have been converted to digital projection are 10 years or more, depending on the finances of the movie theater owners and operators, the state of the economy, and the incentives supporting conversion. That said, according to one commenter who represents movie theater owners and operators, the majority of screens in the United States were expected to enter into agreements by the end of 2008 to convert to digital cinema. Most importantly, however, according to a few commenters, the systems in place today for captioning and video description will not become obsolete once a theater has converted to digital cinema but still can be used by the movie theater owner and operator to exhibit captions and video description. The only difference for a movie theater owner or operator will be the way the data is delivered to the captioning and video description equipment in place in an auditorium.

Despite the current availability of movies that are captioned and provide video description, movie theater owners and operators rarely exhibit the captions or descriptions. According to several commenters, less than 1 percent of all movies being exhibited in theaters are shown with captions.

Individuals with disabilities, advocacy groups, the representative from a non-profit, and representatives of State governments, including 11 State attorneys general, overwhelmingly supported issuance of a regulation requiring movie theater owners and operators to exhibit captioned and video described movies at all showings unless doing so would result in an undue burden or fundamental alteration of the goods and services offered by the public accommodation. In addition, this same group of commenters urged that any such regulation should be made effective now, and should not be tied to the conversion to digital cinema by the movie theater owners and operators. In support of such arguments, these commenters stated that the technology exists now to display movies with captions and video descriptions, regardless of whether the movie is exhibited on film or using digital cinema. Moreover, since the technology in use for displaying captions and video descriptions on film will be compatible with digital projection systems, they argued, there is no need to postpone implementation of a captioning or video description regulation until the conversion to digital has been made. Furthermore, since the conversion to digital may take years, commenters urged the Department to issue a regulation requiring captioning and video description now, rather than several years from now.

Advocacy groups and the 11 State attorneys general also requested that any regulation include factors describing what constitutes effective captioning and video description. Recommendations included requiring that captioning be within the same line of sight to the screen as the movie so that individuals who are deaf or hard of hearing can watch the movie and read the captions at the same time; that the captioning be accessible from each seat; that the captions be of sufficient size and contrast to the background so as to be readable easily; and that the recent recommendations of the Telecommunications and Electronics and Information Technology Advisory Committee Report to the Access Board that captions be "timely, accurate, complete, and efficient" [5] also be included.

The State attorneys general supported the Department's statement in the NPRM that the Department did not anticipate specifying which type of captioning to provide or what type of technology to use to provide video description, but would instead leave that to the discretion of the movie theater owners and operators. These State attorneys general opined that such discretion in the selection of the type of technology was consistent with the statutory and regulatory scheme of the ADA and would permit any new regulation to keep pace with future advancements in captioning and video description technology. These same commenters stated that such discretion may result in a mixed use of both closed captioning and open captioning, affording more choices both for the movie theater owners and operators and for individuals who are deaf or hard of hearing.

The representatives from the movie theater industry strongly urged the Department against issuing a regulation requiring captioning or video description. These commenters argued that the legislative history of the ADA expressly precluded regulating in the area of captioning. (These same commenters were silent with regard to video description on this issue.) The industry commenters also argued that to require movie theater owners and operators to exhibit captioned and video described movies would constitute a fundamental alteration in the nature of the goods and services offered by the movie theater owners and operators. In addition, some industry commenters argued that any such regulation by the Department would be inconsistent with the Access Board's guidelines. Also, these commenters noted the progress that has been made in the industry in making cinema more accessible even though there is no mandate to caption or describe movies, and they questioned whether any mandate is necessary. Finally, all the industry commenters argued that to require captioning or video description in 100 percent of movie theater screens for all showings would constitute an undue burden.

The comments have provided the Department with significant information on the state of the movie industry with regard to the availability of captioning and video description, the status of closed captioning technology, and the status of the transition to digital cinema. The Department also has given due consideration to the comments it has received from individuals, advocacy groups, governmental entities, and representatives of the movie industry. Recently, the United States Court of Appeals for the Ninth Circuit held that the ADA requires a chain of movie theaters to exhibit movies with closed captioning and video description unless the theaters can show that to do so would amount to a fundamental alteration or undue burden. *Arizona ex rel. Goddard* v. *Harkins Amusement Enterprises, Inc.,* 603 F.3d 666 (9th Cir. 2010). However, rather than issue specific regulatory text at this time, the Department has determined that it should obtain additional information regarding issues raised by commenters that were not contemplated at the time of the 2008 NPRM, supplemental technical information, and updated information regarding the current and future status of the conversion to digital cinema by movie theater owners and operators. To this end, the Department is planning to engage in rulemaking relating specifically to movie captioning under the ADA in the near future.

Section 36.304 Removal of Barriers

With the adoption of the 2010 Standards, an important issue that the Department must address is the effect that the new (referred to as "supplemental") and revised ADA Standards will have on the continuing obligation of public accommodations to remove architectural, transportation, and communication barriers in existing facilities to the extent that it is readily achievable to do so. *See* 42 U.S.C. 12182(b)(2)(A)(iv). This issue was not addressed in the 2004 ADAAG because it was outside the scope of the Access Board's statutory authority under the ADA and section 502 of the Rehabilitation Act of 1973. *See* 29 U.S.C. 792(b)(3)(A)–(B) (authorizing the Access Board to establish and maintain minimum guidelines for the standards issued pursuant to the Architectural Barriers Act of 1968 and titles II and III of the ADA). Responsibility for implementing title III's requirement that public accommodations eliminate barriers in existing facilities where such removal is readily achievable rests solely with the Department. The term "existing facility" is defined in § 36.104 of the final rule. This definition is discussed in more detail above.

[5] *Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology* (April 2008), available at *http://www.access-board.gov/sec508/refresh/report/* (last visited June 24, 2010).

See Appendix A discussion of definitions (§ 36.104).

The requirements for barrier removal by public accommodations are established in the Department's title III regulation. 28 CFR 36.304. Under this regulation, the Department used the 1991 Standards as a guide to identify what constitutes an architectural barrier, as well as the specifications that covered entities must follow in making architectural changes to remove the barrier to the extent that such removal is readily achievable. 28 CFR 36.304(d); 28 CFR part 36, app. A (2009). With adoption of the final rule, public accommodations will now be guided by the 2010 Standards, defined in § 36.104 as the 2004 ADAAG and the requirements contained in subpart D of 28 CFR part 36.

The 2010 Standards include technical and scoping specifications for a number of elements that were not addressed specifically in the 1991 Standards; these new requirements were identified as "supplemental requirements" in the NPRM. The 2010 Standards also include revisions to technical or scoping specifications for certain elements that were addressed in the 1991 Standards, *i.e.,* elements for which there already were technical and scoping specifications. Requirements for which there are revised technical or scoping specifications in the 2010 Standards are referred to in the NPRM as "incremental changes."

The Department expressed concern that requiring barrier removal for incremental changes might place unnecessary cost burdens on businesses that already had removed barriers in existing facilities in compliance with the 1991 Standards. With this rulemaking, the Department sought to strike an appropriate balance between ensuring that individuals with disabilities are provided access to facilities and mitigating potential financial burdens from barrier removal on existing places of public accommodation that satisfied their obligations under the 1991 Standards.

In the NPRM, the Department proposed several potential additions to § 36.304(d) that might reduce such financial burdens. First, the Department proposed a safe harbor for elements in existing facilities that were compliant with the 1991 Standards. Under this approach, an element that is not altered after the effective date of the 2010 Standards and that complies with the scoping and technical requirements for that element in the 1991 Standards would not be required to undergo modification to comply with the 2010 Standards to satisfy the ADA's barrier removal obligations. The public accommodation would thus be deemed to have met its barrier removal obligation with respect to that element.

The Department received many comments on this issue during the 60-day public comment period. After consideration of all relevant information presented on the issue, it is the Department's view that this element-by-element safe harbor provision should be retained in the final rule. This issue is discussed further below.

Second, the NPRM proposed several exceptions and exemptions from certain supplemental requirements to mitigate the barrier removal obligations of existing play areas and recreation facilities under the 2004 ADAAG. These proposals elicited many comments from both the business and disability communities. After consideration of all relevant information presented on the issue, it is the Department's view that these exceptions and exemptions should not be retained in the final rule. The specific proposals and comments, and the Department's conclusions, are discussed below.

Third, the NPRM proposed a new safe harbor approach to readily achievable barrier removal as applied to qualified small businesses. This proposed small business safe harbor was based on suggestions from small business advocacy groups that requested clearer guidance on the barrier removal obligations for small businesses. According to these groups, the Department's traditional approach to barrier removal disproportionately affects small businesses. They argued that most small businesses owners neither are equipped to understand the ADA Standards nor can they afford the architects, consultants, and attorneys that might provide some level of assurance of compliance with the ADA. For these same reasons, these commenters contended, small business owners are vulnerable to litigation, particularly lawsuits arising under title III, and often are forced to settle because the ADA Standards' complexity makes inadvertent noncompliance likely, even when a small business owner is acting in good faith, or because the business cannot afford the costs of litigation.

To address these and similar concerns, the NPRM proposed a level of barrier removal expenditures at which qualified small businesses would be deemed to have met their readily achievable barrier removal obligations for certain tax years. This safe harbor would have provided some protection from litigation because compliance could be assessed easily. Such a rule, the Department believed, also could further accessibility, because qualified small businesses would have an incentive to incorporate barrier removal into short- and long-term planning. The Department recognized that a qualified small business safe harbor would be a significant change to the Department's title III enforcement scheme. Accordingly, the Department sought comment on whether such an approach would further the aims underlying the statute's barrier removal provisions, and, if so, the appropriate parameters of the provision.

After consideration of the many comments received on this issue, the Department has decided not to include a qualified small business safe harbor in the final rule. This decision is discussed more fully below.

Element-by-element safe harbor for public accommodations. Public accommodations have a continuing obligation to remove certain architectural, communications, and transportation barriers in existing facilities to the extent readily achievable. 42 U.S.C. 12182(b)(2)(A)(iv). Because the Department uses the ADA Standards as a guide to identifying what constitutes an architectural barrier, the 2010 Standards, once they become effective, will provide a new reference point for assessing an entity's barrier removal obligations. The 2010 Standards introduce technical and scoping specifications for many elements that were not included in the 1991 Standards. Accordingly, public accommodations will have to consider these supplemental requirements when evaluating whether there are covered barriers in existing facilities, and, if so, remove them to the extent readily achievable. Also included in the 2010 Standards are revised technical and scoping requirements for elements that were addressed in the 1991 Standards. These incremental changes were made to address technological changes that have occurred since the promulgation of the 1991 Standards, to reflect additional study by the Access Board, and to harmonize ADAAG requirements with the model codes.

In the NPRM, the Department sought input on a safe harbor in proposed § 36.304(d)(2) intended to address concerns about the practical effects of the incremental changes on public accommodations' readily achievable barrier removal obligations. The proposed element-by-element safe harbor provided that in existing facilities elements that are, as of the effective date of the 2010 Standards, fully compliant with the applicable technical and scoping requirements in the 1991 Standards, need not be modified or retrofitted to meet the 2010 Standards, until and unless those elements are altered. The Department posited that it would be an inefficient use of resources to require covered entities that have complied with the 1991 Standards to retrofit already compliant elements when the change might only provide a minimal improvement in accessibility. In addition, the Department was concerned that covered entities would have a strong disincentive for voluntary compliance if every time the applicable standards were revised covered entities would be required once again to modify elements to keep pace with new requirements. The Department recognized that revisions to some elements might confer a significant benefit on some individuals with disabilities and because of the safe harbor these benefits would be unavailable until the facility undergoes alterations.

The Department received many comments on this issue from the business and disability communities. Business owners and operators, industry groups and trade associations, and business advocacy organizations strongly supported the element-by-element safe harbor. By contrast, disability advocacy organizations and individuals commenting on behalf of the disability community were opposed to this safe harbor with near unanimity.

Businesses and business groups agreed with the concerns outlined by the Department in the NPRM, and asserted that the element-by-element safe harbor is integral to ensuring continued good faith compliance efforts by covered entities. These commenters argued that the financial cost and business disruption resulting from retrofitting elements constructed or previously modified to comply with 1991 Standards would be detrimental to nearly all businesses and not

readily achievable for most. They contended that it would be fundamentally unfair to place these entities in a position where, despite full compliance with the 1991 Standards, the entities would now, overnight, be vulnerable to barrier removal litigation. They further contended that public accommodations will have little incentive to undertake large barrier removal projects or incorporate barrier removal into long-term planning if there is no assurance that the actions taken and money spent for barrier removal would offer some protection from litigation. One commenter also pointed out that the proposed safe harbor would be consistent with practices under other Federal accessibility standards, including the Uniform Federal Accessibility Standards (UFAS) and the ADAAG.

Some business commenters urged the Department to expand the element-by-element safe harbor to include supplemental requirements. These commenters argued that imposing the 2010 Standards on existing facilities will provide a strong incentive for such facilities to eliminate some elements entirely, particularly where the element is not critical to the public accommodation's business or operations (*e.g.,* play areas in fast food restaurants) or the cost of retrofitting is significant. Some of these same commenters urged the Department to include within the safe harbor those elements not covered by the 1991 Standards, but which an entity had built in compliance with State or local accessibility laws. Other commenters requested safe harbor protection where a business had attempted barrier removal prior to the establishment of technical and scoping requirements for a particular element (*e.g.,* play area equipment) if the business could show that the element now covered by the 2010 Standards was functionally accessible.

Other commenters noted ambiguity in the NPRM as to whether the element-by-element safe harbor applies only to elements that comply fully with the 1991 Standards, or also encompasses elements that comply with the 1991 Standards to the extent readily achievable. Some commenters proposed that the safe harbor should exist in perpetuity—that an element subject to a safe harbor at one point in time also should be afforded the same protection with respect to all future revisions to the ADA Standards (as with many building codes). These groups contended that allowing permanent compliance with the 1991 Standards will ensure readily accessible and usable facilities while also mitigating the need for expensive and time-consuming documentation of changes and maintenance.

A number of commenters inquired about the effect of the element-by-element safe harbor on elements that are not in strict compliance with the 1991 Standards, but conform to the terms of settlement agreements or consent decrees resulting from private litigation or Federal enforcement actions. These commenters noted that litigation or threatened litigation often has resulted in compromise among parties as to what is readily achievable. Business groups argued that facilities that have made modifications subject to those negotiated agreements should not be subject to the risk of further litigation as a result of the 2010 Standards.

Lastly, some business groups that supported the element-by-element safe harbor nevertheless contended that a better approach would be to separate barrier removal altogether from the 2010 Standards, such that the 2010 Standards would not be used to determine whether access to an existing facility is impeded by architectural barriers. These commenters argued that application of the 2010 Standards to barrier removal obligations is contrary to the ADA's directive that barrier removal is required only where "easily accomplishable and able to be carried out without much difficulty or expense," 42 U.S.C. 12181(9).

Nearly all commenters from the disability community objected to the proposed element-by-element safe harbor. These commenters asserted that the adoption of this safe harbor would permit and sanction the retention of outdated access standards even in cases where retrofitting to the 2010 Standards would be readily achievable. They argued that title III's readily achievable defense is adequate to address businesses' cost concerns, and rejected the premise that requiring businesses to retrofit currently compliant elements would be an inefficient use of resources where readily achievable to do so. The proposed regulations, these commenters asserted, incorporate advances in technology, design, and construction, and reflect congressional and societal understanding that accessibility is not a static concept and that the ADA is a civil rights law intended to maximize accessibility. Additionally, these commenters noted that since the 2004 revision of the ADAAG will not be the last, setting a precedent of safe harbors for compliant elements will have the effect of preserving and protecting layers of increasingly outdated accessibility standards.

Many commenters objected to the Department's characterization of the requirements subject to the safe harbor as reflecting only incremental changes and asserted that many of these incremental changes will result in significantly enhanced accessibility at little cost. The requirement concerning side-reach ranges was highlighted as an example of such requirements. Commenters from the disability community argued that the revised maximum side-reach range (from 54 inches to 48 inches) will result in a substantial increase in accessibility for many persons with disabilities—particularly individuals of short stature, for whom the revised reach range represents the difference between independent access to many features and dependence—and that the revisions should be made where readily achievable to do so. Business commenters, on the other hand, contended that application of the safe harbor to this requirement is critical because retrofitting items, such as light switches and thermostats often requires work (*e.g.,* rewiring, patching, painting, and re-wallpapering), that would be extremely burdensome for entities to undertake. These commenters argued that such a burden is not justified where many of the affected entities already have retrofitted to meet the 1991 Standards.

Some commenters that were opposed to the element-by-element safe harbor proposed that an entity's past efforts to comply with the 1991 Standards might appropriately be a factor in the readily achievable analysis. Several commenters proposed a temporary 5-year safe harbor that would provide reassurance and stability to covered entities that have recently taken proactive steps for barrier removal, but would also avoid the problems of preserving access deficits in perpetuity and creating multiple standards as subsequent updates are adopted.

After consideration of all relevant information presented on this issue during the comment period, the Department has decided to retain the proposed element-by-element safe harbor. Title III's architectural-barrier provisions place the most significant requirements of accessibility on new construction and alterations. The aim is to require businesses to make their facilities fully accessible at the time they are first constructing or altering those facilities, when burdens are less and many design elements will necessarily be in flux, and to impose a correspondingly lesser duty on businesses that are not changing their facilities. The Department believes that it would be consistent with this statutory structure not to change the requirements for design elements that were specifically addressed in our prior standards for those facilities that were built or altered in full compliance with those standards. The Department similarly believes it would be consistent with the statutory scheme not to change the requirements for design elements that were specifically addressed in our prior standards for those existing facilities that came into full compliance with those standards. Accordingly, the final rule at § 36.304(d)(2)(i) provides that elements that have not been altered in existing facilities on or after March 15, 2012 and that comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards are not required to be modified in order to comply with the requirements set forth in the 2010 Standards. The safe harbor adopted is consistent in principle with the proposed provision in the NPRM, and reflects the Department's determination that this approach furthers the statute's barrier removal provisions and promotes continued good-faith compliance by public accommodations.

The element-by-element safe harbor adopted in this final rule is a narrow one. The Department recognizes that this safe harbor will delay, in some cases, the increased accessibility that the incremental changes would provide and that for some individuals with disabilities the impact may be significant. This safe harbor, however, is not a blanket exemption for every element in existing facilities. Compliance with the 1991 Standards is determined on an element-by-element basis in each existing facility.

Section 36.304(d)(2)(ii)(A) provides that prior to the compliance date of the rule March 15, 2012, noncompliant elements that have not been altered are obligated to be modified to the extent readily achievable to comply with the requirements set forth in the 1991 Standards or the 2010 Standards.

Section 36.304(d)(2)(ii)(B) provides that after the date the 2010 Standards take effect (18 months after publication of the rule), noncompliant elements that have not been altered must be modified to the extent readily achievable to comply with the requirements set forth in the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

The Department has not expanded the scope of the element-by-element safe harbor beyond those elements subject to the incremental changes. The Department has added § 36.304(d)(2)(iii), explicitly clarifying that existing elements subject to supplemental requirements for which scoping and technical specifications are provided for the first time in the 2010 Standards (*e.g.,* play area requirements) are not covered by the safe harbor and, therefore, must be modified to comply with the 2010 Standards to the extent readily achievable. Section 36.304(d)(2)(iii) also identifies the elements in the 2010 Standards that are not eligible for the element-by-element safe harbor. The safe harbor also does not apply to the accessible routes not previously scoped in the 1991 standards, such as those required to connect the boundary of each area of sport activity, including soccer fields, basketball courts, baseball fields, running tracks, skating rinks, and areas surrounding a piece of gymnastic equipment. *See* Advisory note to section F206.2.2 of the 2010 Standards. The resource and fairness concerns underlying the element-by-element safe harbor are not implicated by barrier removal involving supplemental requirements. Public accommodations have not been subject previously to technical and scoping specifications for these supplemental requirements. Thus, with respect to supplemental requirements, the existing readily achievable standard best maximizes accessibility in the built environment without imposing unnecessary burdens on public accommodations.

The Department also has declined to expand the element-by-element safe harbor to cover existing elements subject to supplemental requirements that also may have been built in compliance with State or local accessibility laws. Measures taken to remove barriers under a Federal accessibility provision logically must be considered in regard to Federal standards, in this case the 2010 Standards. This approach is based on the Department's determination that reference to ADA Standards for barrier removal will promote certainty, safety, and good design while still permitting slight deviations through readily achievable alternative methods. The Department continues to believe that this approach provides an appropriate and workable framework for implementation of title III's barrier removal provisions. Because compliance with State or local accessibility codes is not a reliable indicator of effective access for purposes of the ADA Standards, the Department has decided not to include reliance on such codes as part of the safe harbor provision.

Only elements compliant with the 1991 Standards are eligible for the safe harbor. Thus, where a public accommodation attempted barrier removal but full compliance with the 1991 Standards was not readily achievable, the modified element does not fall within the scope of the safe harbor provision. A public accommodation at any point in time must remove barriers to the extent readily achievable. For existing elements, for which removal is not readily achievable at any given time, the public accommodation must provide its goods, services, facilities, privileges, advantages, or accommodations through alternative methods that are readily achievable. *See* 42 U.S.C. 12182(b)(2)(A)(iv), (v).

One-time evaluation and implementation of the readily achievable standard is not the end of the public accommodation's barrier-removal obligation. Public accommodations have a continuing obligation to reevaluate barrier removal on a regular basis. For example, if a public accommodation identified barriers under the 1991 Standards but did not remove them because removal was not readily achievable based on cost considerations, it has a continuing obligation to remove these barriers if the economic considerations for the public accommodation change. The fact that the public accommodation has been providing its goods or services through alternative methods does not negate the continuing obligation to assess whether removal of the barrier at issue has become readily achievable. Public accommodations should incorporate consideration of their continuing barrier removal obligations in both short-term and long-term business planning.

The Department notes that commenters across the board expressed concern with recordkeeping burdens implicated by the element-by-element safe harbor. Businesses noted the additional costs and administrative burdens associated with identifying elements that fall within the element-by-element safe harbor, as well as tracking, documenting, and maintaining data on installation dates. Disability advocates expressed concern that varying compliance standards will make enforcement efforts more difficult, and urged the Department to clarify that title III entities bear the burden of proof regarding entitlement to safe harbor protection. The Department emphasizes that public accommodations wishing to benefit from the element-by-element safe harbor must demonstrate their safe harbor eligibility. The Department encourages public accommodations to take appropriate steps to confirm and document the compliance of existing elements with the 1991 Standards. Finally, while the Department has decided not to adopt in this rulemaking the suggestion by some commenters to make the protection afforded by the element-by-element safe harbor temporary, the Department believes this proposal merits further consideration. The Department, therefore, will continue to evaluate the efficacy and appropriateness of a safe harbor expiration or sunset provision.

Application to specific scenarios raised in comments. In response to the NPRM, the Department received a number of comments that raised issues regarding application of the element-by-element safe harbor to particular situations. Business commenters requested guidance on whether the replacement for a broken or malfunctioning element that is covered by the 1991 Standards would have to comply with the 2010 Standards. These commenters expressed concern that in some cases replacement of a broken fixture might necessitate moving a number of other accessible fixtures (such as in a bathroom) in order to comply with the fixture and space requirements of the 2010 Standards. Others questioned the effect of the new standards where an entity replaces an existing element currently protected by the safe harbor provision for water or energy conservation reasons. The Department intends to address these types of scenarios in technical guidance.

Effective date for barrier removal. Several commenters expressed concern that the NPRM did not propose a transition period for applying the 2004 ADAAG to barrier removal in existing facilities in cases where the safe harbors do not apply. These commenters argued that for newly covered elements, they needed time to hire attorneys and consultants to assess the impact of the new requirements, determine whether they need to make additional retrofits, price those retrofits, assess whether the change actually is "readily achievable," obtain approval for the removal from owners who must pay for the changes, obtain permits, and then do the actual work. The commenters recognized that there may be some barrier removal actions that require little planning, but stated that other actions cost significantly more and require more budgeting, planning, and construction time.

Barrier removal has been an ongoing requirement that has applied to public accommodations since the original regulation took effect on January 26, 1992. The final rule maintains the existing regulatory provision that barrier removal does not have to be undertaken unless it is "readily achievable." The Department has provided in § 36.304(d)(2)(ii)(B) that public accommodations are not required to apply the 2010 Standards to barrier removal until 18 months after the publication date of this rule. It is the Department's view that 18 months is a sufficient amount of time for application of the 2010 Standards to barrier removal for those elements not subject to the safe harbor. This is also consistent with the compliance date the Department has specified for applying the 2010 Standards to new construction and alterations.

Reduced scoping for play areas and other recreation facilities.

Play areas. The Access Board published final guidelines for play areas in October 2000. 65 FR 62498 (Oct. 18, 2000). The guidelines include requirements for ground-level and elevated play components, accessible routes connecting the components, accessible ground surfaces, and maintenance of those surfaces. They have been referenced in Federal playground construction and safety guidelines and in some State and local codes and have been used voluntarily when many play areas across the country have been altered or constructed.

In adopting the 2004 ADAAG (which includes the play area guidelines published in 2000), the Department acknowledges both

the importance of integrated, full access to play areas for children and parents with disabilities as well as the need to avoid placing an untenable fiscal burden on businesses. Consequently, the Department asked seven questions in the NPRM related to existing play areas. Two questions related to safe harbors: one on the appropriateness of a general safe harbor for existing play areas and another on public accommodations that have complied with State or local standards specific to play areas. The others related to reduced scoping, limited exemptions, and whether there is a "tipping point" at which the costs of compliance with supplemental requirements would be so burdensome that a public accommodation would shut down a program rather than comply with the new requirements. In the nearly 100 comments received on title III play areas, the majority of commenters strongly opposed all safe harbors, exemptions, and reductions in scoping, and questioned the feasibility of determining a tipping point. A smaller number of commenters advocated for a safe harbor from compliance with the 2004 ADAAG play area requirements along with reduced scoping and exemptions for both readily achievable barrier removal and alterations.

Commenters were split as to whether the Department should exempt owners and operators of public accommodations from 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. Many commenters were of the view that the exemption was not necessary because concerns of financial burden are addressed adequately by the defenses inherent in the standard for what constitutes readily achievable barrier removal. A number of commenters found the exemption inappropriate because no standards for play areas previously existed. Commenters also were concerned that a safe harbor applicable only to play areas and recreation facilities (but not to other facilities operated by a public accommodation) would create confusion, significantly limit access for children and parents with disabilities, and perpetuate the discrimination and segregation individuals with disabilities face in the important social arenas of play and recreation—areas where little access has been provided in the absence of specific standards. Many commenters suggested that instead of an exemption, the Department should provide guidance on barrier removal with respect to play areas and other recreation facilities.

Several commenters supported the exemption, mainly on the basis of the cost of barrier removal. More than one commenter noted that the most expensive aspect of barrier removal on existing play areas is the surfaces for the accessible routes and use zones. Several commenters expressed the view that where a play area is ancillary to a public accommodation (*e.g.,* in quick service restaurants or shopping centers), the play area should be exempt from compliance with the supplemental requirements because barrier removal would be too costly, and as a result, the public accommodation might eliminate the area.

The Department has been persuaded that the ADA's approach to barrier removal, the readily achievable standard, provides the appropriate balance for the application of the 2010 Standards to existing play areas. Thus, in existing playgrounds, public accommodations will be required to remove barriers to access where these barriers can be removed without much difficulty or expense.

The NPRM asked if there are State and local standards specifically regarding play and recreation area accessibility and 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 similar applicable requirements in the 2004 ADAAG. The Department also requested comments on whether it would be appropriate for the Access Board to consider the implementation of guidelines that would extend such a safe harbor to play and recreation areas undertaking alterations. In response, no comprehensive State or local codes were identified, and commenters generally noted that because the 2004 ADAAG contained comprehensive accessibility requirements for these unique areas, public accommodations should not be afforded a safe harbor from compliance with them when altering play and recreation areas. The Department is persuaded by these comments that there is insufficient basis to apply a safe harbor for readily achievable barrier removal or alterations for play areas built in compliance with State or local laws.

In the NPRM, the Department requested that public accommodations identify a "tipping point" at which the costs of compliance with the supplemental requirements for existing play areas would be so burdensome that the entity simply would shut down the playground. In response, no tipping point was identified. Some commenters noted, however, that the scope of the requirements may create the choice between wholesale replacement of play areas and discontinuance of some play areas, while others speculated that some public accommodations may remove play areas that are merely ancillary amenities rather than incur the cost of barrier removal under the 2010 Standards. The Department has decided that the comments did not establish any clear tipping point and therefore that no regulatory response is appropriate in this area.

The NPRM also asked for comment about the potential effect of exempting existing play areas of less than 1,000 square feet in size from the requirements applicable to play areas. Many trade and business associations favored exempting these small play areas, with some arguing that where the play areas are only ancillary amenities, the cost of barrier removal may dictate that they be closed down. Some commenters sought guidance on the definition of a 1,000-square-foot play area, seeking clarification that seating and bathroom spaces associated with a play area are not included in the size definition. Disability rights advocates, by contrast, overwhelmingly opposed this exemption, arguing that these play areas may be some of the few available in a community; that restaurants and day care facilities are important places for socialization between children with disabilities and those without disabilities; that integrated play is important to the mission of day care centers and that many day care centers and play areas in large cities, such as New York City, have play areas that are less than 1,000 square feet in size; and that 1,000 square feet was an arbitrary size requirement.

The Department agrees that children with disabilities are entitled to access to integrated play opportunities. However, the Department is aware that small public accommodations are concerned about the costs and efforts associated with barrier removal. The Department has given careful consideration as to how best to insulate small entities from overly burdensome costs and undertakings and has concluded that the existing readily achievable standard, not a separate exemption, is an effective and employable method by which to protect these entities. Under the existing readily achievable standard, small public accommodations would be required to comply only with the scoping and technical requirements of the 2010 Standards that are easily accomplishable and able to be carried out without much difficulty or expense. Thus, concerns about prohibitive costs and efforts clearly are addressed by the existing readily achievable standard. Moreover, as evidenced by comments inquiring as to how 1,000-square-foot play areas are to be measured and complaining that the 1,000-square-foot cut-off is arbitrary, the exemption posited in the NPRM would have been difficult to apply. Finally, a separate exemption would have created confusion as to whether, or when, to apply the exemption or the readily achievable standard. Consequently, the Department has decided that an exemption, separate and apart from the readily achievable standard, is not appropriate or necessary for small private play areas.

In the NPRM, the Department requested public comment as to whether existing play areas should be permitted to substitute additional ground-level play components for the elevated play components that they otherwise would have been required to make accessible. Most commenters opposed this substitution because the guidelines as well as considerations of "readily achievable barrier removal" inherently contain the flexibility necessary for a variety of situations. Such commenters also noted that the Access Board adopted extensive guidelines with ample public input, including significant negotiation and balancing of costs. In addition, commenters advised that including additional ground level play components might result in higher costs because more accessible route surfaces might be required. A limited number of commenters favored substitution. The Department is persuaded by these comments that the proposed substitution of elements may not be beneficial. The current rules applicable to readily achievable barrier removal will be used to determine the number and type of accessible elements appropriate for a specific facility.

In the NPRM, the Department requested public comment on whether it would be

appropriate for the Access Board to consider issuing guidelines for alterations to play and recreation facilities that would permit reduced scoping of accessible components or substitution of ground level play components in lieu of elevated play components. The Department received little input on this issue, and most commenters disfavored the suggestion. One commenter that supported this approach conjectured that it would encourage public accommodations to maintain and improve their playgrounds as well as provide more accessibility. The Department is persuaded that it is not necessary to ask the Access Board to revisit this issue.

The NPRM also asked whether only one play area of each type should be required to comply at existing sites with multiple play areas and whether there are other select requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping. Some commenters were opposed to the concept of requiring compliance at one play area of each type at a site with multiple play areas, citing lack of choice and ongoing segregation of children and adults with disabilities. Other commenters who supported an exemption and reduced scoping for alterations noted that the play equipment industry has adjusted to, and does not take issue with, the provisions of the 2004 ADAAG; however, they asked for some flexibility in the barrier removal requirements as applied to play equipment, arguing that augmentation of the existing equipment and installation of accessible play surfacing equates to wholesale replacement of the play equipment. The Department is persuaded that the current rules applicable to readily achievable barrier removal should be used to decide which play areas must comply with the supplemental requirements presented in the 2010 Standards.

Swimming pools, wading pools, saunas, and steam rooms. Section 36.304(d)(3)(ii) in the NPRM specified that for measures taken to comply with the barrier removal requirements, existing swimming pools with at least 300 linear feet of swimming pool wall would need to provide only one accessible means of entry that complies with section 1009.2 or section 1009.3 of the 2004 ADAAG, instead of the two means required for new construction. Commenters opposed the Department's reducing the scoping from that required in the 2004 ADAAG. The following were among the factors cited in comments: that swimming is a common therapeutic form of exercise for many individuals with disabilities; that the cost of a swimming pool lift or other options for pool access is readily achievable and can be accomplished without much difficulty or expense; and that the readily achievable standard already provides public accommodations with a means to reduce their scoping requirements. A few commenters cited safety concerns resulting from having just one accessible means of access, and stated that because pools typically have one ladder for every 75 linear feet of pool wall, they should have more than one accessible means of egress. Other commenters either approved or did not oppose providing one accessible means of access for larger pools so long as a lift was used.

Section 36.304(d)(4)(ii) of the NPRM proposed to exempt existing swimming pools with fewer than 300 linear feet of swimming pool wall from the obligation to provide an accessible means of entry. Most commenters strongly opposed this provision, arguing that aquatic activity is a safe and beneficial form of exercise that is particularly appropriate for individuals with disabilities. Many argued that the readily achievable standard for barrier removal is available as a defense and is preferable to creating an exemption for pool operators for whom providing an accessible means of entry would be readily achievable. Commenters who supported this provision apparently assumed that providing an accessible means of entry would be readily achievable and that therefore the exemption is needed so that small pool operators do not have to provide an accessible means of entry.

The Department has carefully considered all the information available to it as well as the comments submitted on these two proposed exemptions for swimming pools owned or operated by title III entities. The Department acknowledges that swimming provides important therapeutic, exercise, and social benefits for many individuals with disabilities and is persuaded that exemption of the vast majority of privately owned or operated pools from the 2010 Standards is neither appropriate nor necessary. The Department agrees with the commenters that title III already contains sufficient limitations on private entities' obligations to remove barriers. In particular, the Department agrees that those public accommodations that can demonstrate that making particular existing swimming pools accessible in accordance with the 2010 Standards is not readily achievable are sufficiently protected from excessive compliance costs. Thus, the Department has eliminated proposed § 36.304(d)(3)(ii) and (d)(4)(ii) from the final rule.

Proposed § 36.304(d)(4)(iii) would have exempted existing saunas and steam rooms that seat only two individuals from the obligation to remove barriers. This provision generated far fewer comments than the provisions for swimming pools. People who commented were split fairly evenly between those who argued that the readily achievable standard for barrier removal should be applied to all existing saunas and steam rooms and those who argued that all existing saunas and steam rooms, regardless of size, should be exempt from any barrier removal obligations. The Department considered these comments and has decided to eliminate the exemption for existing saunas and steam rooms that seat only two people. Such an exemption for saunas and steam rooms that seat only two people is unnecessary because the readily achievable standard provides sufficient protection against barrier removal that is overly expensive or too difficult. Moreover, the Department believes barrier removal likely will not be readily achievable for most of these small saunas because the nature of their prefabricated forms, which include built-in seats, make it either technically infeasible or too difficult or expensive to remove barriers. Consequently a separate exemption for saunas and steam rooms would have been superfluous. Finally, employing the readily achievable standard for small saunas and steam rooms is consistent with the Department's decisions regarding the proposed exemptions for play areas and swimming pools.

Several commenters also argued in favor of a specific exemption for existing spas. The Department notes that the technically infeasible and readily achievable defenses are applicable equally to existing spas and declines to adopt such an exemption.

The Department also solicited comment on the possibility of exempting existing wading pools from the obligation to remove barriers where readily achievable. Most commenters stated that installing a sloped entry in an existing wading pool is not likely to be feasible. Because covered entities are not required to undertake modifications that are not readily achievable or that would be technically infeasible, the Department believes that the rule as drafted provides sufficient protection from unwarranted expense to the operators of small existing wading pools. Other existing wading pools, particularly those large wading pools found in facilities such as water parks, must be assessed on a case-by-case basis. Therefore, the Department has not included an exemption for wading pools in its final rule.

The Department received several comments recommending that existing wave pools be exempt from barrier removal requirements. The commenters pointed out that existing wave pools often have a sloped entry, but do not have the handrails, level landings, or edge protection required for accessible entry. Because pool bottom slabs are structural, they could be subject to catastrophic failure if the soil pressure stability or the under slab dewatering are not maintained during the installation of these accessibility features in an already-constructed pool. They also argue that the only safe design scenario is to design the wheelchair ramp, pool lift, or transfer access in a side cove where the mean water level largely is unaffected by the wave action, and that this additional construction to an existing wave pool is not readily achievable. If located in the main pool area, the handrails, stanchions, and edge protection for sloped entry will become underwater hazards when the wave action is pushing onto pool users, and the use of a pool lift will not be safe without a means of stabilizing the person against the forces of the waves while using the lift. They also pointed out that a wheelchair would pose a hazard to all wave pool users, in that the wave action might push other pool users into the wheelchair or push the wheelchair into other pool users. The wheelchair would have to be removed from the pool after the user has entered (and has transferred to a flotation device if needed). The commenters did not specify if these two latter concerns are applicable to all wave pools or only to those with more aggressive wave action. The Department has decided that the issue of modifications to wave pools is best addressed on a case-by-case basis, and therefore, this rule does not contain barrier removal exemptions applicable to wave pools.

The Department also received comments suggesting that it is not appropriate to require two accessible means of entry to wave pools, lazy rivers, sand bottom pools, and other water amusements that have only one point of entry. The Department agrees. The 2010 Standards (at section 242.2, Exception 2) provide that only one means of entry is required for wave pools, lazy rivers, sand bottom pools, and other water amusement where user access is limited to one area.

Other recreation facilities. In the NPRM, the Department asked about a number of issues relating to recreation facilities, such as team or player seating areas, areas of sport activity, exercise machines, boating facilities, fishing piers and platforms, golf courses, and miniature golf courses. The Department asked for public comment on the costs and benefits of applying the 2004 ADAAG to these spaces and facilities. The discussion of the comments received by the Department on these issues and the Department's response to those comments can be found in either the section entitled "Other Issues" of Appendix A to this final rule.

Safe harbor for qualified small businesses. Section 36.304(d)(5) of the NPRM would have provided that a qualified small business would meet its obligation to remove architectural barriers where readily achievable for a given year if, during that tax year, the entity spent at least 1 percent of its gross revenue in the preceding tax year on measures undertaken in compliance with barrier removal requirements. Proposed § 36.304(d)(5) has been omitted from the final rule.

The qualified small business safe harbor was proposed in response to small business advocates' requests for clearer guidance on when barrier removal is, and is not, readily achievable. According to these groups, the Department's approach to readily achievable barrier removal disproportionately affects small business for the following reasons: (1) Small businesses are more likely to operate in older buildings and facilities; (2) the 1991 Standards are too numerous and technical for most small business owners to understand and determine how they relate to State and local building or accessibility codes; and (3) small businesses are vulnerable to title III litigation and often are compelled to settle because they cannot afford the litigation costs involved in proving that an action is not readily achievable.

The 2010 Standards go a long way toward meeting the concern of small businesses with regard to achieving compliance with both Federal and State accessibility requirements, because the Access Board harmonized the 2004 ADAAG with the model codes that form the basis of most State and local accessibility codes. Moreover, the element-by-element safe harbor will ensure that unless and until a small business engages in alteration of affected elements, the small business will not have to retrofit elements that were constructed in compliance with the 1991 Standards or, with respect to elements in an existing facility, that were retrofitted to the 1991 Standards in conjunction with the business's barrier removal obligation prior to the rule's compliance date.

In proposing an additional safe harbor for small businesses, the Department had sought to promulgate a rule that would provide small businesses a level of certainty in short-term and long-term planning with respect to barrier removal. This in turn would benefit individuals with disabilities in that it would encourage small businesses to consider and incorporate barrier removal in their yearly budgets. Such a rule also would provide some protection, through diminished litigation risks, to small businesses that undertake significant barrier removal projects.

As proposed in the NPRM, the qualified small business safe harbor would provide that a qualified small business has met its readily achievable barrier removal obligations for a given year if, during that tax year, the entity has spent at least 1 percent of its gross revenue in the preceding tax year on measures undertaken to comply with title III barrier removal requirements. (Several small business advocacy organizations pointed out an inconsistency between the Department's description of the small business safe harbor in the Section-by-Section Analysis for § 36.304 and the proposed regulatory text for that provision. The proposed regulatory text sets out the correct parameters of the proposed rule. The Department does not believe that the error substantively affected the comments on this issue. Some commenters noted the discrepancy and commented on both; others commented more generally on the proposal, so the discrepancy was not relevant.) The Department noted that the efficacy of any proposal for a small business safe harbor would turn on the following two determinations: (1) The definition of a qualified small business, and (2) the formula for calculating what percentage of revenue is sufficient to satisfy the readily achievable presumption.

As proposed in § 36.104 in the NPRM, a "qualified small business" is a business entity defined as a small business concern under the regulations promulgated by the Small Business Administration (SBA) pursuant to the Small Business Act. *See* 15 U.S.C. 632; 13 CFR part 121. The Department noted that under section 3(a)(2)(C) of the Small Business Act, Federal departments and agencies are prohibited from prescribing a size standard for categorizing a business concern as a small business unless the department or agency has been authorized specifically to do so or has proposed a size standard in compliance with the criteria set forth in the SBA regulations, has provided an opportunity for public notice and comment on the proposed standard, and has received approval from the Administrator of the SBA to use the standard. *See* 15 U.S.C. 632(a)(2)(C). The Department further noted that Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria, and they otherwise must be prepared to justify how they arrived at a different standard and why the SBA's regulations do not satisfy the agency's program requirements. *See* 13 CFR 121.903. The ADA does not define "small business" or specifically authorize the Department to prescribe size standards.

In the NPRM, the Department indicated its belief that the size standards developed by the SBA are appropriate for determining which businesses subject to the ADA should be eligible for the small business safe harbor provisions, and proposed to adopt the SBA's size standards to define small businesses for purposes of the qualified small business safe harbor. The SBA's small business size standards define the maximum size that a concern, together with all of its affiliates, may be if it is to be eligible for Federal small business programs or to be considered a small business for the purpose of other Federal agency programs. Concerns primarily engaged in the same kind of economic activity are classified in the same industry regardless of their types of ownership (such as sole proprietorship, partnership, or corporation). Approximately 1200 industries are described in detail in the North American Industry Classification System—United States, 2007. For most businesses, the SBA has established a size standard based on average annual receipts. The majority of places of public accommodation will be classified as small businesses if their average annual receipts are less than $6.5 million. However, some will qualify with higher annual receipts. The SBA small business size standards should be familiar to many if not most small businesses, and using these standards in the ADA regulation would provide some certainty to owners, operators, and individuals because the SBA's current size standards can be changed only after notice and comment rulemaking.

The Department explained in the NPRM that the choice of gross revenue as the basis for calculating the safe harbor threshold was intended to avoid the effect of differences in bookkeeping practices and to maximize accessibility consistent with congressional intent. The Department recognized, however, that entities with similar gross revenue could have very different net revenue, and that this difference might affect what is readily achievable for a particular entity. The Department also recognized that adopting a small business safe harbor would effect a marked change to the Department's current position on barrier removal. Accordingly, the Department sought public comment on whether a presumption should be adopted whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during that tax year, the entity spent at least 1 percent of its gross revenue in the preceding tax year on barrier removal, and on whether 1 percent is an appropriate amount or whether gross revenue would be the appropriate measure.

The Department received many comments on the proposed qualified small business safe harbor. From the business community, comments were received from individual business owners and operators, industry and trade groups, and advocacy organizations for business and industry. From the disability community, comments were received from individuals, disability advocacy groups, and nonprofit organizations involved in providing services for persons with disabilities or involved in disability-related fields. The Department has considered all relevant matter submitted on this issue during the 60-day public comment period.

Small businesses and industry groups strongly supported a qualified small business

safe harbor of some sort, but none supported the structure proposed by the Department in the NPRM. All felt strongly that clarifications and modifications were needed to strengthen the provision and to provide adequate protection from litigation.

Business commenters' objections to the proposed qualified small business safe harbor fell generally into three categories: (1) That gross revenue is an inappropriate and inaccurate basis for determining what is readily achievable by a small business since it does not take into account expenses that may result in a small business operating at a loss; (2) that courts will interpret the regulation to mean that a small business *must* spend 1 percent of gross revenue each year on barrier removal, *i.e.,* that expenditure of 1 percent of gross revenue on barrier removal is always "readily achievable"; and (3) that a similar misinterpretation of the 1 percent gross revenue concept, *i.e.,* that 1 percent of gross revenue is always "readily achievable," will be applied to public accommodations that are not small businesses and that have substantially larger gross revenue. Business groups also expressed significant concern about the recordkeeping burdens they viewed as inherent in the Department's proposal.

Across the board, business commenters objected to the Department's proposed use of gross revenue as the basis for calculating whether the small business safe harbor has been met. All contended that 1 percent of gross revenue is too substantial a trigger for safe harbor protection and would result in barrier removal burdens far exceeding what is readily achievable or "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9). These commenters further pointed out that gross revenue and receipts vary considerably from industry to industry depending on the outputs sold in each industry, and that the use of gross revenue or receipts would therefore result in arbitrary and inequitable burdens on those subject to the rule. These commenters stated that the readily achievable analysis, and thus the safe harbor threshold, should be premised on a business's net revenue so that operating expenses are offset before determining what amount might be available for barrier removal. Many business commenters contended that barrier removal is not readily achievable if an entity is operating at a loss, and that a spending formula premised on net revenue can reflect more accurately businesses' ability to engage in barrier removal.

There was no consensus among the business commenters as to a formula that would reflect more accurately what is readily achievable for small businesses with respect to barrier removal. Those that proposed alternative formulas offered little in the way of substantive support for their proposals. One advocacy organization representing a large cross-section of small businesses provided some detail on the gross and net revenue of various industry types and sizes in support of its position that for nearly all small businesses, net revenue is a better indicator of a business's financial ability to spend money on barrier removal. The data also incidentally highlighted the importance and complexity of ensuring that each component in a safe harbor formula accurately informs and contributes to the ultimate question of what is and is not readily achievable for a small business.

Several business groups proposed that a threshold of 0.5 percent (or one-half of 1 percent) of gross revenue, or 2.5 percent of net revenue, spent on ADA compliance might be a workable measure of what is "readily achievable" for small businesses. Other groups proposed 3 to 5 percent of net revenue as a possible measure. Several commenters proposed affording small businesses an option of using gross or net revenue to determine safe harbor eligibility. Another commenter proposed premising the safe harbor threshold on a designated percentage of the amount spent on renovation in a given year. Others proposed averaging gross or net revenue over a number of years to account for cyclical changes in economic and business environments. Additionally, many proposed that an entity should be able to roll over expenditures in excess of the safe harbor for inclusion in safe harbor analysis in subsequent years, to facilitate barrier removal planning and encourage large-scale barrier removal measures.

Another primary concern of many businesses and business groups is that the 1 percent threshold for safe harbor protection would become a de facto "floor" for what is readily achievable for any small business entity. These commenters urged the Department to clarify that readily achievable barrier removal remains the standard, and that in any given case, an entity retains the right to assert that barrier removal expenditures below the 1 percent threshold are not readily achievable. Other business groups worried that courts would apply the 1 percent calculus to questions of barrier removal by businesses too large to qualify for the small business safe harbor. These commenters requested clarification that the rationale underlying the Department's determination that a percentage of gross revenue can appropriately approximate readily achievable barrier removal for small businesses does not apply outside the small business context.

Small businesses and business groups uniformly requested guidance as to what expenses would be included in barrier removal costs for purposes of determining whether the safe harbor threshold has been met. These commenters contended that any and all expenses associated with ADA compliance—*e.g.,* consultants, architects, engineers, staff training, and recordkeeping—should be included in the calculation. Some proposed that litigation-related expenses, including defensive litigation costs, also should be accounted for in a small business safe harbor. Additionally, several commenters urged the Department to issue a small business compliance guide with detailed guidance and examples regarding application of the readily achievable barrier removal standard and the safe harbor. Some commenters felt that the Department's regulatory efforts should be focused on clarifying the readily achievable standard rather than on introducing a safe harbor based on a set spending level.

Businesses and business groups expressed concern that the Department's proposed small business safe harbor would not alleviate small business vulnerability to litigation. Individuals and advocacy groups were equally concerned that the practical effect of the Department's proposal likely would be to accelerate or advance the initiation of litigation. These commenters pointed out that an individual encountering barriers in small business facilities will not know whether the entity is noncompliant or entitled to safe harbor protection. Safe harbor eligibility can be evaluated only after review of the small business's barrier removal records *and* financial records. Individuals and advocacy groups argued that the Department should not promulgate a rule by which individuals must file suit to obtain the information needed to determine whether a lawsuit is appropriate in a particular case, and that, therefore, the rule should clarify that small businesses are required to produce such documentation to any individual upon request.

Several commenters noted that a small business safe harbor based on net, rather than gross, revenue would complicate exponentially its efficacy as an affirmative defense, because accounting practices and asserted expenses would be subject to discovery and dispute. One business advocacy group representing a large cross-section of small businesses noted that some small business owners and operators likely would be uncomfortable with producing detailed financial information, or could be prevented from using the safe harbor because of inadvertent recordkeeping deficiencies.

Individuals, advocacy groups, and nonprofit organizations commenting on behalf of the disability community uniformly and strongly opposed a safe harbor for qualified small businesses, saying it is fundamentally at odds with the intent of Congress and the plain language of the ADA. These commenters contended that the case-specific factors underlying the statute's readily achievable standard cannot be reconciled with a formulaic accounting approach, and that a blanket formula inherently is less fair, less flexible, and less effective than the current case-by-case determination for whether an action is readily achievable. Moreover, they argued, a small business safe harbor for readily achievable barrier removal is unnecessary because the statutory standard explicitly provides that a business need only spend what is readily achievable—an amount that may be more or less than 1 percent of revenue in any given year.

Several commenters opined that the formulaic approach proposed by the Department overlooks the factors that often prove most conducive and integral to readily achievable barrier removal—planning and prioritization. Many commenters expressed concern that the safe harbor creates an incentive for business entities to forego large-scale barrier removal in favor of smaller, less costly removal projects, regardless of the relative access the measures might provide. Others commented that an emphasis on a formulaic amount rather than readily achievable barrier removal might result in

competition among types of disabilities as to which barriers get removed first, or discrimination against particular types of disabilities if barrier removal for those groups is more expensive.

Many commenters opposed to the small business safe harbor proposed clarifications and limiting rules. A substantial number of commenters were strongly opposed to what they perceived as a vastly overbroad and overly complicated definition of "qualified small business" for purposes of eligibility for the safe harbor, and urged the Department to limit the qualified small business safe harbor to those businesses eligible for the ADA small business tax credit under section 44 of the Tax Code. Some commenters from the disability community contended that the spending level that triggers the safe harbor should be cumulative, to reflect the continuing nature of the readily achievable barrier obligation and to preclude a business from erasing years of unjustifiable inaction or insufficient action by spending up to the safe harbor threshold for one year. These commenters also sought explicit clarification that the small business safe harbor is an affirmative defense.

A number of commenters proposed that a business seeking to use the qualified small business safe harbor should be required to have a written barrier removal plan that contains a prioritized list of significant access barriers, a schedule for removal, and a description of the methods used to identify and prioritize barriers. These commenters argued that only spending consistent with the plan should count toward the qualified small business threshold.

After consideration of all relevant matter presented, the Department has concluded that neither the qualified small business safe harbor proposed in the NPRM nor any of the alternatives proposed by commenters will achieve the Department's intended results. Business and industry commenters uniformly objected to a safe harbor based on gross revenue, argued that 1 percent of gross revenue was out of reach for most, if not all, small businesses, and asserted that a safe harbor based on net revenue would better capture whether and to what extent barrier removal is readily achievable for small businesses. Individuals and disability advocacy groups rejected a set formula as fundamentally inconsistent with the case-specific approach reflected in the statute.

Commenters on both sides noted ambiguity as to which ADA-related costs appropriately should be included in the calculation of the safe harbor threshold, and expressed concern about the practical effect of the proposed safe harbor on litigation. Disability organizations expressed concern that the proposal might increase litigation because individuals with disabilities confronted with barriers in places of public accommodation would not be able to independently assess whether an entity is noncompliant or is, in fact, protected by the small business safe harbor. The Department notes that the concerns about enforcement-related complexity and expense likely would increase exponentially with a small business safe harbor based on net revenue.

The Department continues to believe that promulgation of a small business safe harbor would be within the scope of the Attorney General's mandate under 42 U.S.C. 12186(b) to issue regulations to carry out the provisions of title III. Title III defines "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense," 42 U.S.C. 12181(9), and sets out factors to consider in determining whether an action is readily achievable. While the statutory factors reflect that whether an action is readily achievable is a fact-based determination, there is no inherent inconsistency with the Department's proposition that a formula based on revenue and barrier removal expenditure could accurately approximate the high end of the level of expenditure that can be considered readily achievable for a circumscribed subset of title III entities defined, in part, by their maximum annual average receipts. Moreover, the Department's obligation under the SBREFA to consider alternative means of compliance for small businesses, *see* 5 U.S.C. 603(c), further supports the Department's conclusion that a well-targeted formula is a reasonable approach to implementation of the statute's readily achievable standard. While the Department ultimately has concluded that a small business safe harbor should not be included in the final rule, the Department continues to believe that it is within the Department's authority to develop and implement such a safe harbor.

As noted above, the business community strongly objected to a safe harbor premised on gross revenue, on the ground that gross revenue is an unreliable indicator of an entity's ability to remove barriers, and urged the Department to formulate a safe harbor based on net revenue. The Department's proposed use of gross revenue was intended to offer a measure of certainty for qualified small businesses while ensuring that those businesses continue to meet their ongoing obligation to remove architectural barriers where doing so is readily achievable.

The Department believes that a qualified small business safe harbor based on net revenue would be an unreliable indicator of what is readily achievable and would be unworkable in practice. Evaluation of what is readily achievable for a small business cannot rest solely on a business's net revenue because many decisions about expenses are inherently subjective, and in some cases a net loss may be more beneficial (in terms of taxes, for example) than a small net profit. The Department does not read the ADA's readily achievable standard to mean necessarily that architectural barrier removal is to be, or should be, a business's last concern, or that a business can claim that every barrier removal obligation is not readily achievable. Therefore, if a qualified small business safe harbor were to be premised on net revenue, assertion of the affirmative defense would trigger discovery and examination of the business's accounting methods and the validity or necessity of offsetting expenses. The practical benefits and legal certainty intended by the NPRM would be lost.

Because there was little to no support for the Department's proposed use of gross revenue and no workable alternatives are available at this time, the Department will not adopt a small business safe harbor in this final rule. Small business public accommodations are subject to the barrier removal requirements set out in § 36.304 of the final rule. In addition, the Department plans to provide small businesses with more detailed guidance on assessing and meeting their barrier removal obligations in a small business compliance guide.

Section 36.308 Seating in Assembly Areas

In the 1991 rule, § 36.308 covered seating obligations for public accommodations in assembly areas. It was bifurcated into (a) existing facilities and (b) new construction and alterations. The new construction and alterations provision, § 36.308(b), merely stated that assembly areas should be built or altered in accordance with the applicable provisions in the 1991 Standards. Section 36.308(a), by contrast, provided detailed guidelines on what barrier removal was required.

The Department explained in the preamble to the 1991 rule that § 36.308 provided specific rules on assembly areas to ensure that wheelchair users, who typically were relegated to inferior seating in the back of assembly areas separate from their friends and family, would be provided access to seats that were integrated and equal in quality to those provided to the general public. Specific guidance on assembly areas was desirable because they are found in many different types of places of public accommodation, ranging from opera houses (places of exhibition or entertainment) to private university lecture halls (places of education), and include assembly areas that range in size from small movie theaters of 100 or fewer seats to 100,000-seat sports stadiums.

In the NPRM, the Department proposed to update § 36.308(a) by incorporating some of the applicable assembly area provisions from the 2010 Standards. Upon further review, however, the Department has determined that the need to provide special guidance for assembly areas in a separate section no longer exists, except for specialty seating areas, as discussed below. Since enactment of the ADA, the Department has interpreted the 1991 Standards as a guide for determining the existence of barriers. Courts have affirmed this interpretation. *See, e.g., Colorado Cross Disability Coalition* v. *Too, Inc.,* 344 F. Supp. 2d 707 (D. Colo. 2004); *Access Now, Inc.* v. *AMH CGH, Inc.,* 2001 WL 1005593 (S.D. Fla. 2001); *Pascuiti* v. *New York Yankees,* 87 F. Supp. 2d 221 (S.D.N.Y. 1999). The 2010 Standards now establish detailed guidance for newly constructed and altered assembly areas, which is provided in § 36.406(f), and these Standards will serve as a new guide for barrier removal. Accordingly, the former § 36.308(a) has been replaced in the final rule. Assembly areas will benefit from the same safe harbor provisions applicable to barrier removal in all places of public accommodations as provided in § 36.304(d)(2) of the final rule.

The Department has also decided to remove proposed § 36.308(c)(2) from the final rule. This provision would have required assembly areas with more than 5,000 seats to provide five wheelchair spaces with at least

three designated companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating already is addressed more appropriately in ticketing under § 36.302(f).

The Department has determined that proposed § 36.308(c)(1), addressing specialty seating in assembly areas, should remain as § 36.308 in the final rule with additional language. This paragraph is designed to ensure that individuals with disabilities have an opportunity to access specialty seating areas that entitle spectators to distinct services or amenities not generally available to others. This provision is not, as several commenters mistakenly thought, designed to cover luxury boxes and suites. Those areas have separate requirements outlined in section 221 of the 2010 Standards.

Section 36.308 requires only that accessible seating be provided in each area with *distinct* services or amenities. To the extent a covered entity provides multiple seating areas with the same services and amenities, each of those areas would not be distinct and thus all of them would not be required to be accessible. For example, if a facility has similar dining service in two areas, both areas would not need to be made accessible; however, if one dining service area is open to families, while the other is open only to individuals over the age of 21, both areas would need to be made accessible. Factors distinguishing specialty seating areas generally are dictated by the type of facility or event, but may include, for example, such distinct services and amenities as access to wait staff for in-seat food or beverage service; availability of catered food or beverages for pre-game, intermission, or post-game events; 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.

The NPRM required public accommodations to locate wheelchair seating spaces and companion seats in each specialty seating area within the assembly area. The Department has added language in the final rule stating that public accommodations that cannot place wheelchair seating spaces and companion seats in each specialty area because it is not readily achievable to do so may meet their obligation by providing specialty services or amenities to individuals with disabilities and their companions at other designated accessible locations at no additional cost. For example, if a theater that only has barrier removal obligations provides wait service to spectators in the mezzanine, and it is not readily achievable to place accessible seating there, it may meet its obligation by providing wait service to patrons with disabilities who use wheelchairs and their companions at other designated accessible locations at no additional cost. This provision does not obviate the obligation to comply with applicable requirements for new construction and alterations, including dispersion of accessible seating.

Section 36.309 Examinations and Courses

Section 36.309(a) sets forth the general rule that any private entity that offers examinations or courses relating to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals. In the NPRM preamble and proposed regulatory amendment and in this final rule, the Department relied on its history of enforcement efforts, research, and body of knowledge of testing and modifications, accommodations, and aids in detailing steps testing entities should take to ensure that persons with disabilities receive appropriate modifications, accommodations, or auxiliary aids in examination and course settings as required by the ADA. The Department received comments from disability rights groups, organizations that administer tests, State governments, professional associations, and individuals on the language appearing in the NPRM preamble and amended regulation and has carefully considered these comments.

The Department initially set out the parameters of appropriate documentation requests relating to examinations and courses covered by this section in the 1991 preamble at 28 CFR part 36, stating that "requests for documentation must be reasonable and must be limited to the need for the modification or aid requested." *See* 28 CFR part 36, app. B at 735 (2009). Since that time, the Department, through its enforcement efforts pursuant to section 309, has addressed concerns that requests by testing entities for documentation regarding the existence of an individual's disability and need for a modification or auxiliary aid or service were often inappropriate and burdensome. The Department proposed language stating that while it may be appropriate for a testing entity to request that an applicant provide documentation supporting the existence of a disability and the need for a modification, accommodation, or auxiliary aid or service, the request by the testing entity for such documentation must be reasonable and limited. The NPRM proposed that testing entities should narrowly tailor requests for documentation, limiting those requests to materials that will allow the testing entities to ascertain the nature of the disability and the individual's need for the requested modification, accommodation, or auxiliary aid or service. This proposal codified the 1991 rule's preamble language regarding testing entities' requests for information supporting applicants' requests for testing modifications or accommodations.

Overall, most commenters supported this addition to the regulation. These commenters generally agreed that documentation sought by testing entities to support requests for modifications and testing accommodations should be reasonable and tailored. Commenters noted, for example, that the proposal to require reasonable and tailored documentation requests "is not objectionable. Indeed, it largely tracks DOJ's long-standing informal guidance that 'requests for documentation must be reasonable and limited to the need for the modification or aid requested.' "

Commenters including disability rights groups, State governments, professional associations, and individuals made it clear that, in addition to the proposed regulatory change, other significant problems remain for individuals with disabilities who seek necessary modifications to examinations and courses. These problems include detailed questions about the nature of documentation materials submitted by candidates, testing entities' questioning of documentation provided by qualified professionals with expertise in the particular disability at issue, and lack of timeliness in determining whether to provide requested accommodations or modifications. Several commenters expressed enthusiasm for the preamble language addressing some of these issues, and some of these commenters recommended the incorporation of portions of this preamble language into the regulatory text. Some testing entities expressed concerns and uncertainty about the language in the preamble and sought clarifications about its meaning. These commenters focused most of their attention on the following language from the NPRM preamble:

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

73 FR 34508, 34539 (June 17, 2008).

Professional organizations, State governments, individuals, and disability rights groups fully supported the Department's preamble language and recommended further modification of the regulations to encompass the issues raised in the preamble. A disability rights group recommended that the Department incorporate the preamble language into the regulations to ensure that "documentation demands are strictly limited in scope and met per se when documentation of previously provided accommodations or aids is provided." One professional education organization noted that many testing corporations disregard the documented diagnoses of qualified professionals, and instead substitute their own, often unqualified diagnoses of individuals with disabilities. Commenters confirmed that testing entities sometimes ask for unreasonable information that is either impossible, or extremely onerous, to provide. A disability rights organization supported the Department's proposals and noted that private testing companies impose burdensome documentation requirements upon applicants with disabilities seeking accommodations and that complying with

the documentation requests is frequently so difficult, and negotiations over the requests so prolonged, that test applicants ultimately forgo taking the test. Another disability rights group urged the Department to "expand the final regulatory language to ensure that regulations accurately provide guidance and support the comments made about reducing the burden of documenting the diagnosis and existence of a disability."

Testing entities, although generally supportive of the proposed regulatory amendment, expressed concern regarding the Department's proposed preamble language. The testing entities provided the Department with lengthy comments in which they suggested that the Department's rationale delineated in the preamble potentially could limit them from gathering meaningful and necessary documentation to determine whether, in any given circumstance, a disability is presented, whether modifications are warranted, and which modifications would be most appropriate. Some testing entities raised concerns about individuals skewing testing results by falsely claiming or feigning disabilities as an improper means of seeking advantage on an examination. Several testing entities raised concerns about and sought clarification regarding the Department's use of certain terms and concepts in the preamble, including "without further inquiry," "appropriate documentation," "qualified professional," "individualized assessment," and "consider." These entities discussed the preamble language at length, noting that testing entities need to be able to question some aspects of testing applicants' documentation or to request further documentation from some candidates when the initial documentation is unclear or incomplete. One testing entity expressed concern that the Department's preamble language would require the acceptance of a brief note on a doctor's prescription pad as adequate documentation of a disability and the need for an accommodation. One medical examination organization stated that the Department's preamble language would result in persons without disabilities receiving accommodations and passing examinations as part of a broad expansion of unwarranted accommodations, potentially endangering the health and welfare of the general public. Another medical board "strenuously objected" to the "without further inquiry" language. Several of the testing entities expressed concern that the Department's preamble language might require testing companies to accept documentation from persons with temporary or questionable disabilities, making test scores less reliable, harming persons with legitimate entitlements, and resulting in additional expense for testing companies to accommodate more test takers.

It remains the Department's view that, when testing entities receive documentation provided by a qualified professional who has made an individualized assessment of an applicant that supports the need for the modification, accommodation, or aid requested, they shall generally accept such documentation and provide the accommodation.

Several commenters sought clarifications on what types of documentation are acceptable to demonstrate the existence of a disability and the need for a requested modification, accommodation, or aid. The Department believes that appropriate documentation may vary depending on the nature of the disability and the specific modification or aid requested, and accordingly, testing entities should consider a variety of types of information submitted. Examples of types of information to consider include recommendations of qualified professionals familiar with the individual, results of psycho-educational or other professional evaluations, an applicant's history of diagnosis, participation in a special education program, observations by educators, or the applicant's past use of testing accommodations. If an applicant has been granted accommodations post-high school by a standardized testing agency, there is no need for reassessment for a subsequent examination.

Some commenters expressed concern regarding the use of the term "letter" in the proposed preamble sentence regarding appropriate documentation. The NPRM preamble language stated that "[a]ppropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, accommodation, or classification, such as eligibility for a special education program." 73 FR 34508, 34539 (June 17, 2008). Some testing entities posited that the preamble language would require them to accept a brief letter from a doctor or even a doctor's note on a prescription pad indicating "I've been treating (student) for ADHD and he/she is entitled to extend time on the ACT." The Department's reference in the NPRM preamble to letters from physicians or other professionals was provided in order to offer examples of some types of acceptable documentation that may be considered by testing entities in evaluating the existence of an applicant's disability and the need for a certain modification, accommodation, or aid. No one piece of evidence may be dispositive in make a testing accommodation determination. The significance of a letter or other communication from a doctor or other qualified professional would depend on the professional's relationship with the candidate and the specific content of the communication, as well as how the letter fits in with the totality of the other factors used to determine testing accommodations under this rule. Similarly, an applicant's failure to provide results from a specific test or evaluation instrument should not of itself preclude approval of requests for modifications, accommodations, or aids if the documentation provided by the applicant, in its entirety, is sufficient to demonstrate that the individual has a disability and requires a requested modification, accommodation, or aid on the relevant examination. This issue is discussed in more detail below.

One disability rights organization noted that requiring a 25-year old who was diagnosed in junior high school with a learning disability and accommodated ever since "to produce elementary school report cards to demonstrate symptomology before the age of seven is unduly burdensome." The same organization commented that requiring an individual with a long and early history of disability to be assessed within three years of taking the test in question is similarly burdensome, stating that "[t]here is no scientific evidence that learning disabilities abate with time, nor that Attention Deficits abate with time * * *." This organization noted that there is no justification for repeatedly subjecting people to expensive testing regimens simply to satisfy a disbelieving industry. This is particularly true for adults with, for example, learning disabilities such as dyslexia, a persistent condition without the need for retesting once the diagnosis has been established and accepted by a standardized testing agency.

Some commenters from testing entities sought clarification regarding who may be considered a "qualified professional." Qualified professionals are licensed or otherwise properly credentialed and possess expertise in the disability for which modifications or accommodations are sought. For example, a podiatrist would not be considered to be a qualified professional to diagnose a learning disability or support a request for testing accommodations on that basis. Types of professionals who might possess the appropriate credentials and expertise are doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, school counselors, and licensed mental health professionals. Additionally, while testing applicants should present documentation from qualified professionals with expertise in the pertinent field, it also is critical that testing entities that review documentation submitted by prospective examinees in support of requests for testing modifications or accommodations ensure that their own reviews are conducted by qualified professionals with similarly relevant expertise.

Commenters also sought clarification of the term individualized assessment. The Department's intention in using this term is to ensure that documentation provided on behalf of a testing candidate is not only provided by a qualified professional, but also reflects that the qualified professional has individually and personally evaluated the candidate as opposed to simply considering scores from a review of documents. This is particularly important in the learning disabilities context, where proper diagnosis requires face-to-face evaluation. Reports from experts who have personal familiarity with the candidate should take precedence over those from, for example, reviewers for testing agencies, who have never personally met the candidate or conducted the requisite assessments for diagnosis and treatment.

Some testing entities objected to the NPRM preamble's use of the phrase "without further inquiry." The Department's intention here is to address the extent to which testing entities should accept documentation provided by an applicant when the testing entity is determining the need for modifications, accommodations, or auxiliary aids or services. The Department's view is that applicants who submit appropriate documentation, *e.g.,* documentation that is

based on the careful individual consideration of the candidate by a professional with expertise relating to the disability in question, should not be subjected to unreasonably burdensome requests for additional documentation. While some testing commenters objected to this standard, it reflects the Department's longstanding position. When an applicant's documentation demonstrates a consistent history of a diagnosis of a disability, and is prepared by a qualified professional who has made an individualized evaluation of the applicant, there is little need for further inquiry into the nature of the disability and generally testing entities should grant the requested modification, accommodation, or aid.

After a careful review of the comments, the Department has decided to maintain the proposed regulatory language on the scope of appropriate documentation in § 36.309(b)(1)(iv). The Department has also added new regulatory language at § 36.309(b)(1)(v) that provides that testing entities shall give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act (IDEA) or a plan providing services pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan). These additions to the regulation are necessary because the Department's position on the bounds of appropriate documentation contained in Appendix B, 28 CFR part 36, app. B (2009), has not been implemented consistently and fully by organizations that administer tests.

The new regulatory language clarifies that an applicant's past use of a particular modification, accommodation, or auxiliary aid or service in a similar testing setting or pursuant to an IEP or Section 504 Plan provides critical information in determining those examination modifications that would be applicable in a given circumstance. The addition of this language and the appropriate weight to be accorded it is seen as important by the Department because the types of accommodations provided in both these circumstances are typically granted in the context of individual consideration of a student's needs by a team of qualified and experienced professionals. Even though these accommodations decisions form a common sense and logical basis for testing entities to rely upon, they are often discounted and ignored by testing entities.

For example, considerable weight is warranted when a student with a Section 504 Plan in place since middle school that includes the accommodations of extra time and a quiet room for testing is seeking these same accommodations from a testing entity covered by section 309 of the Act. In this example, a testing entity receiving such documentation should clearly grant the request for accommodations. A history of test accommodations in secondary schools or in post-secondary institutions, particularly when determined through the rigors of a process required and detailed by Federal law, is as useful and instructive for determining whether a specific accommodation is required as accommodations provided in standardized testing situations.

It is important to note, however, that the inclusion of this weight does not suggest that individuals without IEPs or Section 504 Plans are not also entitled to receive testing accommodations. Indeed, it is recommended that testing entities must consider the entirety of an applicant's history to determine whether that history, even without the context of a IEP or Section 504 Plan, indicates a need for accommodations. In addition, many students with learning disabilities have made use of informal, but effective accommodations. For example, such students often receive undocumented accommodations such as time to complete tests after school or at lunchtime, or being graded on content and not form or spelling of written work. Finally, testing entities shall also consider that because private schools are not subject to the IDEA, students at private schools may have a history of receiving accommodations in similar settings that are not pursuant to an IEP or Section 504 Plan.

Some testing entities sought clarification that they should only be required to consider particular use of past modifications, accommodations, auxiliary aids or services received by testing candidates for prior testing and examination settings. These commenters noted that it would be unhelpful to consider the classroom accommodations for a testing candidate, as those accommodations would not typically apply in a standardized test setting. The Department's history of enforcement in this area has demonstrated that a recent history of past accommodations is critical to an understanding of the applicant's disability and the appropriateness of testing accommodations.

The Department also incorporates the NPRM preamble's "timely manner" concept into the new regulatory language at § 36.309(b)(1)(vi). Under this provision, testing entities are required to respond in a timely manner to requests for testing accommodations in order to ensure equal opportunity for persons with disabilities. Testing entities are to ensure that their established process for securing testing accommodations provides applicants with a reasonable opportunity to supplement the testing entities' requests for additional information, if necessary, and still be able to take the test in the same testing cycle. A disability rights organization commented that testing entities should not subject applicants to unreasonable and intrusive requests for information in a process that should provide persons with disabilities effective modifications in a timely manner, fulfilling the core objective of title III to provide equal access. Echoing this perspective, several disability rights organizations and a State government commenter urged that testing entities should not make unreasonably burdensome demands for documentation, particularly where those demands create impediments to receiving accommodations in a timely manner. Access to examinations should be offered to persons with disabilities in as timely a manner as it is offered to persons without disabilities. Failure by a testing entity to act in a timely manner, coupled with seeking unnecessary documentation, could result in such an extended delay that it constitutes a denial of equal opportunity or equal treatment in an examination setting for persons with disabilities.

Section 36.311 Mobility Devices

Section 36.311 of the NPRM clarified the scope and circumstances under which covered entities are legally obligated to accommodate various "mobility devices." Section 36.311 set forth specific requirements for the accommodation of mobility devices, including wheelchairs, manually-powered mobility aids, and other power-driven mobility devices.

In both the NPRM and the final rule, § 36.311(a) states the general rule that in any areas open to pedestrians, public accommodations shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, including walkers, crutches, canes, braces, or similar devices. Because mobility scooters satisfy the definition of "wheelchair" (*i.e.,* "a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion"), the reference to them in § 36.311(a) of the final rule has been omitted to avoid redundancy.

Most business commenters expressed concern that permitting the use of other power-driven mobility devices by individuals with mobility disabilities would make such devices akin to wheelchairs and would require them to make physical changes to their facilities to accommodate their use. This concern is misplaced. If a facility complies with the applicable design requirements in the 1991 Standards or the 2010 Standards, the public accommodation will not be required to exceed those standards to accommodate the use of wheelchairs or other power-driven mobility devices that exceed those requirements.

Legal standard for other power-driven mobility devices. The NPRM version of § 36.311(b) provided that a public accommodation "shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation's goods, services, facilities, privileges, advantages, or accommodations." 73 FR 34508, 34556 (June 17, 2008). In other words, public accommodations are by default required to permit the use of other power-driven mobility devices; the burden is on them to prove the existence of a valid exception.

Most commenters supported the notion of assessing whether the use of a particular device is reasonable in the context of a particular venue. Commenters, however, disagreed about the meaning of the word "reasonable" as it is used in § 36.311(b) of the

NPRM. Virtually every business and industry commenter took the use of the word "reasonable" to mean that a general reasonableness standard would be applied in making such an assessment. Advocacy and nonprofit groups almost universally objected to the use of a general reasonableness standard with regard to the assessment of whether a particular device should be allowed at a particular venue. They argued that the assessment should be based on whether reasonable modifications could be made to allow a particular device at a particular venue, and that the only factors that should be part of the calculus that results in the exclusion of a particular device are undue burden, direct threat, and fundamental alteration.

A few commenters opposed the proposed provision requiring public accommodations to assess whether reasonable modifications can be made to allow other power-driven mobility devices, preferring instead that the Department issue guidance materials so that public accommodations would not have to incur the cost of such analyses. Another commenter noted a "fox guarding the hen house"-type of concern with regard to public accommodations developing and enforcing their own modification policy.

In response to comments received, the Department has revised § 36.311(b) to provide greater clarity regarding the development of legitimate safety requirements regarding other power-driven mobility devices. The Department has not retained the proposed NPRM language stating that an other power-driven mobility device can be excluded if a public accommodation can demonstrate that the use of the device is not reasonable or that its use fundamentally alters the nature of the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation because the Department believes that these exceptions are covered by the general reasonable modification requirement contained in § 36.302.

Assessment factors. Section 36.311(c) of the NPRM required public accommodations to "establish policies to permit the use of other power-driven mobility devices" and articulated four factors upon which public accommodations must base decisions as to whether a modification is reasonable to allow the use of a class of other power-driven mobility devices by individuals with disabilities in specific venues (*e.g.,* doctors' offices, parks, commercial buildings, etc.). 73 FR 34508, 34556 (June 17, 2008).

The Department has relocated and modified the NPRM text that appeared in § 36.311(c) to new paragraph § 36.311(b)(2) to clarify what factors the public accommodation shall use in determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification. Section 36.311(b)(2) now states that "[i]n determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under (b)(1), a public accommodation shall consider" certain enumerated factors. The assessment factors are designed to assist public accommodations in determining whether allowing the use of a particular other power-driven mobility device in a specific facility is reasonable. Thus, the focus of the analysis must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.

The NPRM proposed the following specific assessment factors: (1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair; (2) the potential risk of harm to others by the operation of the mobility device; (3) the risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and (4) the ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

Factor 1 was designed to help public accommodations assess whether a particular device was appropriate, given its particular physical features, for a particular location. Virtually all commenters said the physical features of the device affected their view of whether a particular device was appropriate for a particular location. For example, while many commenters supported the use of an other power-driven mobility device if the device were a Segway® PT, because of environmental and health concerns they did not offer the same level of support if the device were an off-highway vehicle, all-terrain vehicle (ATV), golf car, or other device with a fuel-powered or combustion engine. Most commenters noted that indicators such as speed, weight, and dimension really were an assessment of the appropriateness of a particular device in specific venues and suggested that factor 1 say this more specifically.

The term "in relation to a wheelchair" in the NPRM's factor 1 apparently created some concern that the same legal standards that apply to wheelchairs would be applied to other power-driven mobility devices. The Department has omitted the term "in relation to a wheelchair" from § 36.311(b)(2)(i) to clarify that if a facility that is in compliance with the applicable provisions of the 1991 Standards or the 2010 Standards grants permission for an other power-driven mobility device to go on-site, it is not required to exceed those standards to accommodate the use of other power-driven mobility devices.

In response to requests that NPRM factor 1 state more specifically that it requires an assessment of an other power-driven mobility device's appropriateness under particular circumstances or in particular venues, the Department has added several factors and more specific language. In addition, although the NPRM made reference to the operation of other power-driven mobility devices in "specific venues," the Department's intent is captured more clearly by referencing "specific facility" in paragraph (b)(2). The Department also notes that while speed is included in factor 1, public accommodations should not rely solely on a device's top speed when assessing whether the device can be accommodated; instead, public accommodations should also consider the minimum speeds at which a device can be operated and whether the development of speed limit policies can be established to address concerns regarding the speed of the device. Finally, since the ability of the public accommodation to stow the mobility device when not in use is an aspect of its design and operational characteristics, the text proposed as factor 4 in the NPRM has been incorporated in paragraph (b)(2)(iii).

The NPRM's version of factor 2 provided that the "potential risk of harm to others by the operation of the mobility device" is one of the determinants in the assessment of whether other power-driven mobility devices should be excluded from a site. With this language, the Department intended to incorporate the safety standard found in § 36.301(b), which provides that public accommodations may "impose legitimate safety requirements that are necessary for safe operation" into the assessment. However, several commenters indicated that they read this language, particularly the phrase "potential risk of harm" to mean that the Department had adopted a concept of risk analysis different from that which is in the existing standards. The Department did not intend to create a new standard and has changed the language in paragraphs (b)(1) and (b)(2) to clarify the applicable standards, thereby avoiding the introduction of new assessments of risk beyond those necessary for the safe operation of the public accommodation.

While all applicable affirmative defenses are available to public accommodations in the establishment and execution of their policies regarding other power-driven mobility devices, the Department did not explicitly incorporate the direct threat defense into the assessment factors because § 36.301(b) provides public accommodations the appropriate framework with which to assess whether legitimate safety requirements that may preclude the use of certain other power-driven mobility devices are necessary for the safe operation of the public accommodation. In order to be legitimate, the safety requirement must be based on actual risks and not mere speculation regarding the device or how it will be operated. Of course, public accommodations may enforce legitimate safety rules established for the operation of other-power driven mobility devices (*e.g.,* reasonable speed restrictions). Finally, NPRM factor 3 concerning environmental resources and conflicts of law has been relocated to paragraph (b)(2)(v).

As a result of these comments and requests, NPRM factors 1, 2, 3, and 4 have been revised and renumbered within paragraph 36.311(b)(2) in the final rule.

Several commenters requested that the Department provide guidance materials or more explicit concepts of which considerations might be appropriate for inclusion in a policy that allows the use of other power-driven mobility devices. A public accommodation that has determined that reasonable modifications can be made in its policies, practices, or procedures to allow the use of other power-driven mobility devices should develop a policy that clearly states the circumstances under which the use of other power-driven mobility devices by individuals with a mobility disability will be permitted. It also should include clear,

concise statements of specific rules governing the operation of such devices. Finally, the public accommodation should endeavor to provide individuals with disabilities who use other power-driven mobility devices with advanced notice of its policy regarding the use of such devices and what rules apply to the operation of these devices.

For example, the U.S. General Services Administration (GSA) has developed a policy allowing the use of the Segway® PT and other EPAMDs in all Federal buildings under GSA's jurisdiction. *See* General Services Administration, *Interim Segway® Personal Transporter Policy* (Dec. 3, 2007), available at *http://www.gsa.gov/graphics/pbs/Interim_Segway_Policy_121007.pdf* (last visited June 24, 2010). The GSA policy defines the policy's scope of coverage by setting out what devices are and are not covered by the policy. The policy also sets out requirements for safe operation, such as a speed limit, prohibits the use of EPAMDs on escalators, and provides guidance regarding security screening of these devices and their operators.

A public accommodation that determines that it can make reasonable modifications to permit the use of an other power-driven mobility device by an individual with a mobility disability might include in its policy the procedure by which claims that the other power-driven mobility device is being used for a mobility disability will be assessed for legitimacy (*i.e.,* a credible assurance that the device is being used for a mobility disability, including a verbal representation by the person with a disability that is not contradicted by observable fact, or the presentation of a disability parking space placard or card, or State-issued proof of disability); the type or classes of other power-driven mobility devices are permitted to be used by individuals with mobility disabilities; the size, weight, and dimensions of the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the speed limit for the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the places, times, or circumstances under which the use of the other power-driven mobility devices is or will be restricted or prohibited; safety, pedestrian, and other rules concerning the use of the other power-driven mobility devices; whether, and under which circumstances, storage for the other power-driven mobility devices will be made available; and how and where individuals with a mobility disability can obtain a copy of the other power-driven mobility device policy.

Public accommodations also might consider grouping other power-driven mobility devices by type (*e.g.,* EPAMDs, golf cars, gasoline-powered vehicles, and other devices). For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing use of EPAMDs by members of the general public who do not have mobility disabilities.

The Department anticipates that in many circumstances, public accommodations will be able to develop policies that will allow the use of other power-driven mobility devices by individuals with mobility disabilities without resulting in a fundamental alteration of a public accommodation's goods, services, facilities, privileges, advantages, or accommodations. Consider the following examples:

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

Example 2: A shopping mall has developed a policy whereby EPAMDs may be operated by individuals with mobility disabilities in the common pedestrian areas of the mall if the operator of the device agrees to the following: to operate the device no faster than the speed limit set by the policy; to use the elevator, not the escalator, to transport the EPAMD to different levels; to yield to pedestrian traffic; not to leave the device unattended unless it can stand upright and has a locking system; to refrain from using the device temporarily if the mall manager determines that the volume of pedestrian traffic is such that the operation of the device would interfere with legitimate safety requirements; and to present the mall management office with a valid, State-issued, disability parking placard (though presentation of such a placard is not necessary), or State-issued proof of disability, as a credible assurance that the use of the EPAMD is for the individual's mobility disability, upon entry to the mall.

Inquiry into the use of other power-driven mobility device. Section 36.311(d) of the NPRM provided that a "public accommodation may ask a person using a power-driven mobility device if the mobility device is required because of the person's disability. A public accommodation shall not ask a person using a mobility device questions about the nature and extent of the person's disability." 73 FR 34508, 34556 (June 17, 2008).

While business commenters did not take issue with applying this standard to individuals who use wheelchairs, they were not satisfied with the application of this standard to other power-driven mobility devices. Business commenters expressed concern about people feigning mobility disabilities to be able to use other power-driven mobility devices in public accommodations in which their use is otherwise restricted. These commenters felt that a mere inquiry into whether the device is being used for a mobility disability was an insufficient mechanism by which to detect fraud by other power-driven mobility device users who do not have mobility disabilities. These commenters believed they should be given more latitude to make inquiries of other power-driven mobility device users claiming a mobility disability than they would be given for wheelchair users. They sought the ability to establish a policy or method by which public accommodations may assess the legitimacy of the mobility disability. They suggested some form of certification, sticker, or other designation. One commenter suggested a requirement that a sticker bearing the international symbol for accessibility be placed on the device or that some other identification be required to signal that the use of the device is for a mobility disability. Other suggestions included displaying a disability parking placard on the device or issuing EPAMDs, like the Segway® PT, a permit that would be similar to permits associated with parking spaces reserved for those with disabilities.

Advocacy, nonprofit, and several individual commenters balked at the notion of allowing any inquiry beyond whether the device is necessary for a mobility disability and encouraged the Department to retain the NPRM's language on this topic. Other commenters, however, were empathetic with commenters who had concerns about fraud. At least one Segway® PT advocate suggested it would be permissible to seek documentation of the mobility disability in the form of a simple sign or permit.

The Department has sought to find common ground by balancing the needs of businesses and individuals with mobility disabilities wishing to use other power-driven mobility devices with the Department's longstanding, well-established policy of not allowing public accommodations or establishments to require proof of a mobility disability. There is no question that public accommodations have a legitimate interest in ferreting out fraudulent representations of mobility disabilities, especially given the recreational use of other power-driven mobility devices and the potential safety concerns created by having too many such devices in a specific facility at one time. However, the privacy of individuals with mobility disabilities and respect for those individuals are also vitally important.

Neither § 36.311(d) of the NPRM nor § 36.311(c) of the final rule permits inquiries into the nature of a person's mobility

disability. However, the Department does not believe it is unreasonable or overly intrusive for an individual with a mobility disability seeking to use an other power-driven mobility device to provide a credible assurance to verify that the use of the other power-driven mobility device is for a mobility disability. The Department sought to minimize the amount of discretion and subjectivity exercised by public accommodations in assessing whether an individual has a mobility disability and to allow public accommodations to verify the existence of a mobility disability. The solution was derived from comments made by several individuals who said they have been admitted with their Segway® PTs into public entities and public accommodations that ordinarily do not allow these devices on-site when they have presented or displayed State-issued disability parking placards. In the examples provided by commenters, the parking placards were accepted as verification that the Segway® PTs were being used as mobility devices.

Because many individuals with mobility disabilities avail themselves of State programs that issue disability parking placards or cards and because these programs have penalties for fraudulent representations of identity and disability, utilizing the parking placard system as a means to establish the existence of a mobility disability strikes a balance between the need for privacy of the individual and fraud protection for the public accommodation. Consequently, the Department has decided to include regulatory text in § 36.311(c)(2) of the final rule that requires public accommodations to accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as verification that an individual uses the other power-driven mobility device for his or her mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards. Public accommodations are required to accept a valid, State-issued disability parking placard or card, or State-issued proof of disability, as a credible assurance, but they cannot demand or require the presentation of a valid disability placard or card, or State-issued proof of disability, as a prerequisite for use of an other power-driven mobility device, because not all persons with mobility disabilities have such means of proof. If an individual with a mobility disability does not have such a placard or card, or State-issued proof of disability, he or she may present other information that would serve as a credible assurance of the existence of a mobility disability.

In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a verbal representation, not contradicted by observable fact, shall be accepted as a credible assurance that the other power-driven mobility device is being used because of a mobility disability. This does not mean, however, that a mobility disability must be observable as a condition for allowing the use of an other power-driven mobility device by an individual with a mobility disability, but rather that if an individual represents that a device is being used for a mobility disability and that individual is observed thereafter engaging in a physical activity that is contrary to the nature of the represented disability, the assurance given is no longer credible and the individual may be prevented from using the device.

Possession of a valid, State-issued disability parking placard or card or a verbal assurance does not trump a public accommodation's valid restrictions on the use of other power-driven mobility devices. Accordingly, a credible assurance that the other power-driven mobility device is being used because of a mobility disability is not a guarantee of entry to a public accommodation because notwithstanding such a credible assurance, use of the device in a particular venue may be at odds with the legal standard in § 36.311(b)(1) or with one or more of the § 36.311(b)(2) factors. Only after an individual with a disability has satisfied all of the public accommodation's policies regarding the use of other power-driven mobility devices does a credible assurance become a factor in allowing the use of the device. For example, if an individual seeking to use an other power-driven mobility device fails to satisfy any of the public accommodation's stated policies regarding the use of other power-driven mobility devices, the fact that the individual legitimately possesses and presents a valid, State-issued disability parking placard or card, or State-issued proof of disability, does not trump the policy and require the public accommodation to allow the use of the device. In fact, in some instances, the presentation of a legitimately held placard or card, or State-issued proof of disability, will have no relevance or bearing at all on whether the other power-driven mobility device may be used, because the public accommodation's policy does not permit the device in question on-site under any circumstances (*e.g.,* because its use would create a substantial risk of serious harm to the immediate environment or natural or cultural resources). Thus, an individual with a mobility disability who presents a valid disability placard or card, or State-issued proof of disability, will not be able to use an ATV as an other power-driven mobility device in a mall or a restaurant if the mall or restaurant has adopted a policy banning their use for any or all of the above-mentioned reasons.

However, an individual with a mobility disability who has complied with a public accommodation's stated policies cannot be refused use of the other power-driven mobility device if he or she has provided a credible assurance that the use of the device is for a mobility disability.

Subpart D—New Construction and Alterations

Subpart D establishes the title III requirements applicable to new construction and alterations. The Department has amended this subpart to adopt the 2004 ADAAG, set forth the effective dates for implementation of the 2010 Standards, and make related revisions as described below.

Section 36.403 Alterations: Path of Travel

In the NPRM, the Department proposed one change to § 36.403 on alterations and path of travel by adding a path of travel safe harbor. Proposed § 36.403(a)(1) stated that if a private entity has constructed or altered required elements of a path of travel in accordance with the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

A substantial number of commenters objected to the Department's creation of a safe harbor for alterations to required elements of a path of travel that comply with the current 1991 Standards. These commenters argued that if a public accommodation already is in the process of altering its facility, there should be a legal requirement that individuals with disabilities are entitled to increased accessibility provided by the 2004 ADAAG for path of travel work. These commenters also stated that they did not believe there was a statutory basis for "grandfathering" facilities that comply with the 1991 Standards. Another commenter argued that the updates incorporated into the 2004 ADAAG provide very substantial improvements for access, and that since there already is a 20 percent cost limit on the amount that can be expended on path of travel alterations, there is no need for a further limitation.

Some commenters supported the safe harbor as lessening the economic costs of implementing the 2004 ADAAG for existing facilities. One commenter also stated that without the safe harbor, entities that already have complied with the 1991 Standards will have to make and pay for compliance twice, as compared to those entities that made no effort to comply in the first place. Another commenter asked that the safe harbor be revised to include pre-ADA facilities that have been made compliant with the 1991 Standards to the extent "readily achievable" or, in the case of alterations, "to the maximum extent feasible," but that are not in full compliance with the 1991 Standards.

The final rule retains the safe harbor for required elements of a path of travel to altered primary function areas for private entities that already have complied with the 1991 Standards with respect to those required elements. As discussed with respect to § 36.304, the Department believes that this safe harbor strikes an appropriate balance between ensuring that individuals with disabilities are provided access to buildings and facilities and mitigating potential financial burdens on existing places of public accommodation that are undertaking alterations subject to the 2010 Standards. This safe harbor is not a blanket exemption for facilities. If a private entity undertakes an alteration to a primary function area, only the required elements of a path of travel to that area that already comply with the 1991 Standards are subject to the safe harbor. If a private entity undertakes an alteration to a primary function area and the required

elements of a path of travel to the altered area do not comply with the 1991 Standards, then the private entity must bring those elements into compliance with the 2010 Standards.

Section 36.405 Alterations: Historic Preservation

In the 1991 rule, the Department provided guidance on making alterations to buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act or that are designated as historic under State or local law. That provision referenced the 1991 Standards. Because those cross-references to the 1991 Standards are no longer applicable, it is necessary in this final rule to provide new regulatory text. No substantive change in the Department's approach in this area is intended by this revision.

Section 36.406 Standards for New Construction and Alterations

Applicable standards. Section 306 of the ADA, 42 U.S.C. 12186, directs the Attorney General to issue regulations to implement title III that are consistent with the guidelines published by the Access Board. As described in greater detail elsewhere in this Appendix, the Department is a statutory member of the Access Board and was involved significantly in the development of the 2004 ADAAG. Nonetheless, the Department has reviewed the standards and has determined that additional regulatory provisions are necessary to clarify how the Department will apply the 2010 Standards to places of lodging, social service center establishments, housing at a place of education, assembly areas, and medical care facilities. Those provisions are contained in § 36.406(c)–(g). Each of these provisions is discussed below.

Section 36.406(a) adopts the 2004 ADAAG as part of the 2010 Standards and establishes the compliance date and triggering events for the application of those standards to both new construction and alterations. Appendix B of this final rule (Analysis and Commentary on the 2010 ADA Standards for Accessible Design) provides a description of the major changes in the 2010 Standards (as compared to the 1991 ADAAG) and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. A number of commenters asked the Department to revise certain provisions in the 2004 ADAAG in a manner that would reduce either the required scoping or specific technical accessibility requirements. As previously stated, the ADA requires the Department to adopt standards consistent with the guidelines adopted by the Access Board. The Department will not adopt any standards that provide less accessibility than is provided under the guidelines contained in the 2004 ADAAG because the guidelines adopted by the Access Board are "minimum guidelines." 42 U.S.C. 12186(c).

In the NPRM, the Department specifically proposed amending § 36.406(a) by dividing it into two sections. Proposed § 36.406(a)(1) specified that new construction and alterations subject to this part shall comply with the 1991 Standards if physical construction of the property commences less than six months after the effective date of the rule. Proposed § 36.406(a)(2) specified that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences six months or more after the effective date of the rule. The Department also proposed deleting the advisory information now published in a table at § 36.406(b).

Compliance date. When the ADA was enacted, the compliance dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Titles II and III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. *See* 42 U.S.C. 12131 note; 42 U.S.C. 12181 note. New construction under title II and alterations under either title II or title III had to comply with the design standards on that date. *See* 42 U.S.C. 12131 note; 42 U.S.C. 12183(a)(2). For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—18 months after the 1991 Standards were published by the Department. *See* 42 U.S.C. 12183(a)(1).

The Department received numerous comments on the issue of effective date, many of them similar to those received in response to the ANPRM. A substantial number of commenters advocated a minimum of 18 months from publication of the final rule to the effective date for application of the standards to new construction, consistent with the time period used for implementation of the 1991 Standards. Many of these commenters argued that the 18-month period was necessary to minimize the likelihood of having to redesign projects already in the design and permitting stages at the time that the final rule is published. According to these commenters, large projects take several years from design to occupancy, and can be subject to delays from obtaining zoning, site approval, third-party design approval (*i.e.,* architectural review), and governmental permits. To the extent the new standards necessitate changes in any previous submissions or permits already issued, businesses might have to expend significant funds and incur delays due to redesign and resubmission.

Some commenters also expressed concern that a six-month period would be hard to implement given that many renovations are planned around retail selling periods, holidays, and other seasonal concerns. For example, hotels plan renovations during their slow periods, retail establishments avoid renovations during the major holiday selling periods, and businesses in certain parts of the country cannot do any major construction during parts of the winter.

Some commenters argued that chain establishments need additional time to redesign their "master facility" designs for replication at multiple locations, taking into account both the new standards and applicable State and local accessibility requirements.

Other commenters argued for extending the effective date from six months to a minimum of 12 months for many of the same reasons, and one commenter argued that there should be a tolling of the effective date for those businesses that are in the midst of the permitting process if the necessary permits are delayed due to legal challenges or other circumstances outside the business's control.

Several commenters took issue with the Department's characterization of the 2004 ADAAG and the 1991 Standards as two similar rules. These commenters argued that many provisions in the 2004 ADAAG represent a "substantial and significant" departure from the 1991 Standards and that it will take a great deal of time and money to identify all the changes and implement them. In particular, they were concerned that small businesses lacked the internal resources to respond quickly to the new changes and that they would have to hire outside experts to assist them. One commenter expressed concern that regardless of familiarity with the 2004 ADAAG, since the 2004 ADAAG standards are organized in an entirely different manner from the 1991 Standards, and contain, in the commenter's view, extensive changes, it will make the shift from the old to the new standards quite complicated.

Several commenters also took issue with the Department's proffered rationale that by adopting a six-month effective date, the Department was following the precedent of other Federal agencies that have adopted the 2004 ADAAG for facilities whose accessibility they regulate. These commenters argued that the Department's title III regulation applies to a much broader range and number of facilities and programs than the other Federal agencies (*i.e.,* Department of Transportation and the General Services Administration) and that those agencies regulate accessibility primarily in either governmental facilities or facilities operated by quasi-governmental authorities.

Several commenters representing the travel, vacation, and golf industries argued that the Department should adopt a two-year effective date for new construction. In addition to many of the arguments made by commenters in support of an 18-month effective date, these commenters also argued that a two-year time frame would allow States with DOJ-certified building codes to have the time to amend their codes to meet the 2004 ADAAG so that design professionals can work from compatible codes and standards.

Several commenters recommended treating alterations differently than new construction, arguing for a one-year effective date for alterations. Another commenter representing building officials argued that a minimum of a six-month phase-in for alterations was sufficient, since a very large percentage of alteration projects "are of a scale that they should be able to accommodate the phase-in."

In contrast, many commenters argued that the proposed six-month effective date should be retained in the final rule.

The Department has been persuaded by concerns raised by some of the commenters that the six month compliance date proposed in the NPRM for application of the 2010 Standards may be too short for certain projects that are already in the midst of the

design and permitting process. The Department has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. This is consistent with the amount of time given when the 1991 regulation was published. Since many State and local building codes contain provisions that are consistent with 2004 ADAAG, the Department has decided that public accommodations that choose to comply with the 2010 Standards as defined in § 36.104 before the compliance date will still be considered in compliance with the ADA. However, public accommodations that choose to comply with the 2010 Standards in lieu of the 1991 Standards prior to the compliance date described in this rule must choose one or the other standard, and may not rely on some of the requirements contained in one standard and some of the requirements contained in the other standard.

Triggering event. In the NPRM, the Department proposed using the start of physical construction as the triggering event for applying the proposed standards to new construction under title III. This triggering event parallels that for the alterations provisions (*i.e.,* the date on which construction begins), and would apply clearly across all types of covered public accommodations. The Department also proposed that for prefabricated elements, such as modular buildings and amusement park rides and attractions, or installed equipment, such as ATMs, the start of construction means the date on which the site preparation begins. Site preparation includes providing an accessible route to the element.

The Department's NPRM sought public comment on how to define the start of construction and the practicality of applying commencement of construction as a triggering event. The Department also requested input on whether the proposed definition of the start of construction was sufficiently clear and inclusive of different types of facilities. The Department also sought input about facilities subject to title III for which commencement of construction would be ambiguous or problematic.

The Department received numerous comments recommending that the Department adopt a two-pronged approach to defining the triggering event. In those cases where permits are required, the Department should use "date of permit application" as the effective date triggering event, and if no permit is required, the Department should use "start of construction." A number of these commenters argued that the date of permit application is appropriate because the applicant would have to consider the applicable State and Federal accessibility standards in order to submit the designs usually required with the application. Moreover, the date of permit application is a typical triggering event in other code contexts, such as when jurisdictions introduce an updated building code. Some commenters expressed concern that using the date of "start of construction" was problematic because the date can be affected by factors that are outside the control of the owner. For example, an owner can plan construction to start before the new standards take effect and therefore use the 1991 Standards in the design. If permits are not issued in a timely manner, then the construction could be delayed until after the effective date, and then the project would have to be redesigned. This problem would be avoided if the permit application date was the triggering event. Two commenters expressed concern that the term "start of construction" is ambiguous, because it is unclear whether start of construction means the razing of structures on the site to make way for a new facility or means site preparation, such as regrading or laying the foundation.

One commenter recommended using the "signing date of a construction contract," and an additional commenter recommended that the new standards apply only to "buildings permitted after the effective date of the regulations."

One commenter stated that for facilities that fall outside the building permit requirements (ATMs, prefabricated saunas, small sheds), the triggering event should be the date of installation, rather than the date the space for the facility is constructed.

The Department is persuaded by the comments to adopt a two-pronged approach to defining the triggering event for new construction and alterations. The final rule states that in those cases where permits are required, the triggering event shall be the date when the last application for a building permit application or permit extension is certified to be complete by a State, county, or local government, or in those jurisdictions where the government does not certify completion of applications, the date when the last application for a building permit or permit extension is received by the State, county, or local government. If no permits are required, then the triggering event shall be the "start of physical construction or alterations." The Department has also added clarifying language related to the term "start of physical construction or alterations" to make it clear that "start of physical construction or alterations" is not intended to mean the date of ceremonial groundbreaking or the date a structure is razed to make it possible for construction of a facility to take place.

Amusement rides. Section 234 of the 2010 Standards provides accessibility guidelines for newly designed and constructed amusement rides. The amusement ride provisions do not provide a "triggering event" for new construction or alteration of an amusement ride. An industry commenter requested that the triggering event of "first use" as noted in the Advisory note to section 234.1 of the 2004 ADAAG be included in the final rule. The Advisory note provides that "[a] custom designed and constructed ride is new upon its first use, which is the first time amusement park patrons take the ride." The Department declines to treat amusement rides differently than other types of new construction and alterations and under the final rule, they are subject to § 36.406(a)(3). Thus, newly constructed and altered amusement rides shall comply with the 2010 Standards if the start of physical construction or the alteration is on or after 18 months from the publication date of this rule. The Department also notes that section 234.4.2 of the 2010 Standards only applies where the structural or operational characteristics of an amusement ride are altered. It does not apply in cases where the only change to a ride is the theme.

Noncomplying new construction and alterations. The element-by-element safe harbor referenced in § 36.304(d)(2) has no effect on new or altered elements in existing facilities that were subject to the 1991 Standards on the date that they were constructed or altered, but do not comply with the technical and scoping specifications for those elements in the 1991 Standards. Section 36.406(a)(5) of the final rule sets forth the rules for noncompliant new construction or alterations in facilities that were subject to the requirements of this part. Under those provisions, noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012 shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards or the 2010 Standards. Noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012, shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

Section 36.406(b) Application of Standards to Fixed Elements

The final rule contains a new § 36.406(b) that clarifies that the requirements established by this section, including those contained in the 2004 ADAAG, prescribe the requirements 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 elsewhere in this final rule. Although the Department has often chosen to use the requirements of the 1991 Standards as a guide to determining when and how to make equipment and furnishings accessible, those coverage determinations fall within the discretionary authority of the Department.

The Department is also clarifying that the advisory notes, appendix notes, and figures that accompany the 1991 and 2010 Standards do not establish separately enforceable requirements unless otherwise specified in the text of the standards. This clarification has been made to address concerns expressed by ANPRM commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (*e.g.,* Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosings to make them more visible to individuals with low vision). The Department received no comments on this provision in the NPRM.

Section 36.406(c) Places of Lodging

In the NPRM, the Department proposed a new definition for public accommodations that are "places of lodging" and a new § 36.406(c) to clarify the scope of coverage for places of public accommodation that meet this definition. For many years the Department has received inquiries from members of the public seeking clarification of ADA coverage of rental accommodations in timeshares, condominium hotels, and mixed-use and corporate hotel facilities that operate as places of public accommodation (as that term is now defined in § 36.104). These facilities, which have attributes of both residential dwellings and transient lodging facilities, have become increasingly popular since the ADA's enactment in 1990 and make up the majority of new hotel construction in some vacation destinations. The hybrid residential and lodging characteristics of these new types of facilities, as well as their ownership characteristics, complicate determinations of ADA coverage, prompting questions from both industry and individuals with disabilities. While the Department has interpreted the ADA to encompass these hotel-like facilities when they are used to provide transient lodging, the regulation previously has specifically not addressed them. In the NPRM, the Department proposed a new § 36.406(c), entitled "Places of Lodging," which was intended to clarify that places of lodging, including certain timeshares, condominium hotels, and mixed-use and corporate hotel facilities, shall comply with the provisions of the proposed standards, including, but not limited to, the requirements for transient lodging in sections 224 and 806 of the 2004 ADAAG.

The Department's NPRM sought public input on this proposal. The Department received a substantial number of comments on these issues from industry representatives, advocates for persons with disabilities, and individuals. A significant focus of these comments was on how the Department should define and regulate vacation rental units in timeshares, vacation communities, and condo-hotels where the units are owned and controlled by individual owners and rented out some portion of time to the public, as compared to traditional hotels and motels that are owned, controlled, and rented to the public by one entity.

Scoping and technical requirements applicable to "places of lodging." In the NPRM, the Department asked for public comment on its proposal in § 36.406(c) to apply to places of lodging the scoping and technical requirements for transient lodging, rather than the scoping and technical requirements for residential dwelling units.

Commenters generally agreed that the transient lodging requirements should apply to places of lodging. Several commenters stated that the determination as to which requirements apply should be made based on the intention for use at the time of design and construction. According to these commenters, if units are intended for transient rentals, then the transient lodging standards should apply, and if they are intended to be used for residential purposes, the residential standards should apply. Some commenters agreed with the application of transient lodging standards to places of lodging in general, but disagreed about the characterization of certain types of facilities as covered places of lodging.

The Department agrees that the scoping and technical standards applicable to transient lodging should apply to facilities that contain units that meet the definition of "places of lodging."

Scoping for timeshare or condominium hotels. In the NPRM, the Department sought comment on the appropriate basis for determining scoping for a timeshare or condominium-hotel. A number of commenters indicated that scoping should be based on the usage of the facility. Only those units used for short-term stays should be counted for application of the transient lodging standards, while units sold as residential properties should be treated as residential units not subject to the ADA. One commenter stated that scoping should be based on the maximum number of sleeping units available for public rental. Another commenter pointed out that unlike traditional hotels and motels, the number of units available for rental in a facility or development containing individually owned units is not fixed over time. Owners have the right to participate in a public rental program some, all, or none of the time, and individual owner participation changes from year to year.

The Department believes that the determination for scoping should be based on the number of units in the project that are designed and constructed with the intention that their owners may participate in a transient lodging rental program. The Department cautions that it is not the number of owners that actually exercise their right to participate in the program that determines the scoping. Rather it is the units that could be placed into an on-site or off-site transient lodging rental program. In the final rule, the Department has added a provision to § 36.406(c)(3), which states that units intended to be used exclusively for residential purposes that are contained in facilities that also meet the definition of place of lodging are not covered by the transient lodging standards. Title III of the ADA does not apply to units designed and constructed with the intention that they be rented or sold as exclusively residential units. Such units are covered by the Fair Housing Act (FHAct), which contains requirements for certain features of accessible and adaptable design both for units and for public and common use areas. All units designed and constructed with the intention that they may be used for both residential and transient lodging purposes are covered by the ADA and must be counted for determining the required number of units that must meet the transient lodging standards in the 2010 Standards. Public use and common use areas in facilities containing units subject to the ADA also must meet the 2010 Standards. In some developments, units that may serve as residential units some of the time and rental units some of the time will have to meet both the FHAct and the ADA requirements. For example, all of the units in a vacation condominium facility whose owners choose to rent to the public when they are not using the units themselves would be counted for the purposes of determining the appropriate number of units that must comply with the 2010 Standards. In a newly constructed condominium that has three floors with units dedicated to be sold solely as residential housing and three floors with units that may be used as residences or hotel units, only the units on the three latter floors would be counted for applying the 2010 Standards. In a newly constructed timeshare development containing 100 units, all of which may be made available to the public through an exchange or rental program, all 100 units would be counted for purposes of applying the 2010 Standards.

One commenter also asked the Department for clarification of how to count individually owned "lock-off units." Lock-off units are units that are multi-bedroom but can be "locked off" into two separate units, each having individual external access. This commenter requested that the Department state in the final rule that individually owned lock-off units do not constitute multiple guest rooms for purposes of calculating compliance with the scoping requirements for accessible units, since for the most part the lock-off units are used as part of a larger accessible unit, and portions of a unit not locked off would constitute both an accessible one-bedroom unit or an accessible two-bedroom unit with the lock-off unit.

It is the Department's view that lock-off units that are individually owned that can be temporarily converted into two units do not constitute two separate guest rooms for purposes of calculating compliance with the scoping requirements.

One commenter asked the Department how developers should scope units where buildings are constructed in phases over a span of years, recommending that the scoping be based on the total number of units expected to be constructed at the project and not on a building-by-building basis or on a phase-by-phase basis. The Department does not think scoping should be based on planned number of units, which may or may not be actually constructed over a period of years. However, the Department recognizes that resort developments may contain buildings and facilities that are of all sizes from single-unit cottages to facilities with hundreds of units. The Department believes it would be appropriate to allow designers, builders, and developers to aggregate the units in facilities with 50 or fewer units that are subject to a single permit application and that are on a common site or that are constructed at the same time for the purposes of applying the scoping requirements in table 224.2. Facilities with more than 50 units should be scoped individually in accordance with the table. The regulation has been revised to reflect this application of the scoping requirements.

One commenter also asked the Department to use the title III regulation to declare that timeshares subject to the transient lodging standards are exempt from the design and construction requirements of the FHAct. The coverage of the FHAct is set by Congress and interpreted by regulations issued by the Department of Housing and Urban

Development. The Department has no authority to exempt anyone from coverage of the FHAct.

Application of ADA to places of lodging that contain individually owned units. The Department believes that regardless of ownership structure for individual units, rental programs (whether they are on- or off-site) that make transient lodging guest rooms available to the public must comply with the general nondiscrimination requirements of the ADA. In addition, as provided in § 36.406(c), newly constructed facilities that contain accommodations intended to be used for transient lodging purposes must comply with the 2010 Standards.

In the NPRM, the Department asked for public comment on several issues related to ensuring the availability of accessible units in a rental program operated by a place of lodging. The Department sought input on how it could address a situation in which a new or converted facility constructs the required number of accessible units, but the owners of those units choose not to participate in the rental program; whether the facility has an obligation to encourage or require owners of accessible units to participate in the rental program; and whether the facility developer, the condominium association, or the hotel operator has an obligation to retain ownership or control over a certain number of accessible units to avoid this problem.

In the NPRM, the Department sought public input on how to regulate scoping for a timeshare or condominium-rental facility that decides, after the sale of units to individual owners, to begin a rental program that qualifies the facility as a place of lodging, and how the condominium association, operator, or developer should determine which units to make accessible.

A number of commenters expressed concerns about the ability of the Department to require owners of accessible units to participate in the rental program, to require developers, condo associations, or homeowners associations to retain ownership of accessible units, and to impose accessibility requirements on individual owners who choose to place inaccessible units into a rental program after purchase. These commenters stated that individuals who purchase accessible vacation units in condominiums, individual vacation homes, and timeshares have ownership rights in their units and may choose lawfully to make their units available to the public some, all, or none of the time. Commenters advised the Department that the Securities and Exchange Commission takes the position that if condominium units are offered in connection with participation in a required rental program for any part of the year, require the use of an exclusive rental agent, or impose conditions otherwise restricting the occupancy or rental of the unit, then that offering will be viewed as an offering of securities in the form of an investment (rather than a real estate offering). SEC Release No. 33–5347, Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development (Jan. 4, 1973). Consequently, most condominium developers do not impose such restrictions at the time of sale. Moreover, owners who choose to rent their units as a short-term vacation rental can select any rental or management company to lease and manage their unit, or they may rent them out on their own. They also may choose never to lease those units. Thus, there are no guarantees that at any particular time, accessible units will be available for rental by the public. According to this commenter, providing incentives for owners of accessible units to place their units in the rental program will not work, because it does not guarantee the availability of the requisite number of rooms dispersed across the development, and there is not any reasonable, identifiable source of funds to cover the costs of such incentives.

A number of commenters also indicated that it potentially is discriminatory as well as economically infeasible to require that a developer hold back the accessible units so that the units can be maintained in the rental program year-round. One commenter pointed out that if a developer did not sell the accessible condominiums or timeshares in the building inventory, the developer would be subject to a potential ADA or FHAct complaint because persons with disabilities who wanted to buy accessible units rather than rent them each year would not have the option to purchase them. In addition, if a developer held back accessible units, the cost of those units would have to be spread across all the buyers of the inaccessible units, and in many cases would make the project financially infeasible. This would be especially true for smaller projects. Finally, this commenter argued that requiring units to be part of the common elements that are owned by all of the individual unit owners is infeasible because the common ownership would result in pooled rental income, which would transform the owners into participants in a rental pool, and thus turn the sale of the condominiums into the sale of securities under SEC Release 33–5347.

Several commenters noted that requiring the operator of the rental program to own the accessible units is not feasible either because the operator of the rental program would have to have the funds to invest in the purchase of all of the accessible units, and it would not have a means of recouping its investment. One commenter stated that in Texas, it is illegal for on-site rental programs to own condominium units. Another commenter noted that such a requirement might lead to the loss of on-site rental programs, leaving owners to use individual third-party brokers, or rent the units privately. One commenter acknowledged that individual owners cannot be required to place their units in a rental pool simply to offer an accessible unit to the public, since the owners may be purchasing units for their own use. However, this commenter recommended that owners who choose to place their units in a rental pool be required to contribute to a fund that would be used to renovate units that are placed in the rental pool to increase the availability of accessible units. One commenter argued that the legal entity running the place of lodging has an obligation to retain control over the required number of accessible units to ensure that they are available in accordance with title III.

A number of commenters also argued that the Department has no legal authority to require individual owners to engage in barrier removal where an existing development adds a rental program. One commenter stated that Texas law prohibits the operator of on-site rental program from demanding that alterations be made to a particular unit. In addition, under Texas law, condominium declarations may not require some units and not others to make changes, because that would lead to unequal treatment of units and owners, which is not permissible.

One commenter stated that since it was not possible for operators of rental programs offering privately owned condominiums to comply with accessible scoping, the Department should create exemptions from the accessible scoping, especially for existing facilities. In addition, this commenter stated that if an operator of an on-site rental program were to require renovations as a condition of participation in the rental program, unit owners might just rent their units through a different broker or on their own, in which case such requirements would not apply.

A number of commenters argued that if a development decides to create a rental program, it must provide accessible units. Otherwise the development would have to ensure that units are retrofitted. A commenter argued that if an existing building is being converted, the Department should require that if alterations of the units are performed by an owner or developer prior to sale of the units, then the alterations requirements should apply, in order to ensure that there are some accessible units in the rental pool. This commenter stated that because of the proliferation of these type of developments in Hawaii, mandatory alteration is the only way to guarantee the availability of accessible units in the long run. In this commenter's view, since conversions almost always require makeover of existing buildings, this will not lead to a significant expense.

The Department agrees with the commenters that it would not be feasible to require developers to hold back or purchase accessible units for the purposes of making them available to the public in a transient lodging rental program, nor would it be feasible to require individual owners of accessible units to participate in transient lodging rental programs.

The Department recognizes that places of lodging are developed and financed under myriad ownership and management structures and agrees that there will be circumstances where there are legal barriers to requiring compliance with either the alterations requirements or the requirements related to barrier removal. The Department has added an exception to § 36.406(c), providing that in existing facilities that meet the definition of places of lodging, where the guest rooms are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners, the units are not subject to the alterations requirement, even where the owner rents the

unit out to the public through a transient lodging rental program. In addition, the Department has added an exception to the barrier removal requirements at § 36.304(g) providing that in existing facilities that meet the definition of places of lodging, where the guest rooms are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners, the units are not subject to the barrier removal requirement. The Department notes, however, that there are legal relationships for some timeshares and cooperatives where the ownership interests do not convey control over the physical features of units. In those cases, it may be the case that the facility has an obligation to meet the alterations or barrier removal requirements or to maintain accessible features.

Section 36.406(d) Social Service Center Establishments

In the NPRM, the Department proposed a new § 36.406(d) requiring group homes, halfway houses, shelters, or similar social service center establishments that provide temporary sleeping accommodations or residential dwelling units to comply with the provisions of the 2004 ADAAG that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

The NPRM explained that this proposal was based on two important changes in the 2004 ADAAG. First, for the first time, residential dwelling units are explicitly covered in the 2004 ADAAG in section 233. Second, the 2004 ADAAG eliminates the language contained in the 1991 Standards addressing scoping and technical requirements for homeless shelters, group homes, and similar social service center establishments. 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 NPRM explained the Department's belief that transferring coverage of social service center establishments from the transient lodging standards to the residential facilities standards would 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 Department of Housing and Urban Development (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. UFAS is currently the design standard for new construction and alterations for entities subject to section 504. The two design standards for accessibility—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 facilities 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 facilities standards, which would harmonizes the regulatory requirements under the ADA and section 504. The Department chose the option that harmonizes the regulatory requirements: coverage under the residential facilities standards.

In the NPRM, the Department expressed concern that the residential facilities standards do not include a requirement for clear floor space next to beds similar to the requirement in the transient lodging standards; as a result, the Department proposed adding a provision that would require certain social service center establishments that provide sleeping rooms with more than 25 beds to ensure that a minimum of 5 percent of the beds have clear floor space in accordance with section 806.2.3 of the 2004 ADAAG.

The Department requested information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service center establishments, and from the clients of these facilities who would be affected by this proposed change. In the NPRM, the Department asked to what extent conflicts between the ADA and section 504 have affected these facilities and what the effect would be of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms.

Many of the commenters supported applying the residential facilities requirements to social service center establishments stating that even though the residential facilities requirements are less demanding, in some instances, the existence of one clear standard will result in an overall increased level of accessibility by eliminating the confusion and inaction that are sometimes caused by the current existence of multiple requirements. One commenter stated that the residential facilities guidelines were more appropriate because individuals housed in social service center establishments typically stay for a prolonged period of time, and guests of a transient lodging facility typically are not housed to participate in a program or receive services.

One commenter opposed to the proposed section argued for the application of the transient lodging standards to all social service center establishments except those that were "intended as a person's place of abode," referencing the Department's question related to the definition of place of lodging in the title III NPRM. A second commenter stated that the use of transient lodging guidelines would lead to greater accessibility.

The Department continues to be concerned about alleviating the challenges for social service providers that are also subject to section 504 and that would likely be subject to conflicting requirements if the transient lodging standard were applied. Thus, the Department has retained the requirement that social service center establishments comply with the residential dwelling standards. The Department did not receive comments regarding adding a requirement for bathing options, such as a roll-in shower, in social service center establishments operated by public accommodations. The Department did, however, receive comments in support of adding such a requirement regarding public entities under title II. The Department believes that social service center establishments that provide emergency shelter to large transient populations should be able to provide bathing facilities that are accessible to persons with mobility disabilities who need roll-in showers. Because of the transient nature of the population of these large shelters, it will not be feasible to modify bathing facilities in a timely manner when faced with a need to provide a roll-in shower with a seat when requested by an overnight visitor. As a result, the Department has added a requirement that social service center establishments with sleeping accommodations for more than 50 individuals must provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower must be provided for each group. This supplemental requirement to the residential facilities standards is in addition to the supplemental requirement that was proposed in the NPRM for clear floor space in sleeping rooms with more than 25 beds.

The Department also notes that while dwelling units at some social service center establishments are also subject to FHAct design and construction requirements that require certain features of adaptable and accessible design, FHAct units do not provide the same level of accessibility that is required for residential facilities under the 2010 Standards. The FHAct requirements, where also applicable, should not be considered a substitute for the 2010 Standards. Rather, the 2010 Standards must be followed in addition to the FHAct requirements.

The Department also notes that while in the NPRM the Department used the term "social service establishment," the final rule uses the term "social service center establishment." The Department has made this editorial change so that the final rule is consistent with the terminology used in the ADA. *See* 42 U.S.C. 12181(7)(K).

Section 36.406(e) Housing at a Place of Education

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in postsecondary educational settings, including architectural features. Housing types in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In

addition to title III of the ADA, universities and schools that are recipients of Federal financial assistance also are subject to section 504, which contains its own accessibility requirements currently through the application of UFAS. Residential housing, including housing in an educational setting, is also covered by the FHAct, which requires newly constructed multifamily housing to include certain features of accessible and adaptable design. 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.

Although the 1991 Standards mention dormitories as a form of transient lodging, they do not specifically address how the ADA applies to dormitories and other types of residential housing provided in an educational setting. The 1991 Standards also do not contain any specific provisions for residential facilities, allowing covered entities to elect to follow the residential standards contained in UFAS. Although the 2004 ADAAG contains provisions for both residential facilities and transient lodging, the guidelines do not indicate which requirements apply to housing provided in an educational setting, leaving it to the adopting agencies to make that choice. After evaluating both sets of standards, the Department concluded that the benefits of applying the transient lodging standards outweighed the benefits of applying the residential facilities standards. Consequently, in the NPRM, the Department proposed a new § 36.406(e) that provided 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.

Private universities and schools covered by title III as public accommodations are required to make their programs and activities accessible to persons with disabilities. The housing facilities that they provide have varied characteristics. College and university housing facilities typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they often are used for short-term stays of one to three days, a week, or several months. Graduate and faculty housing often is provided year-round in the form of apartments, which may serve individuals or families with children. These housing facilities are diverse in their layout. Some are double-occupancy rooms with a shared toilet and bathing room, which may be inside or outside the unit. Others may contain cluster, suite, or group arrangements where several rooms are located inside a defined unit with bathing, kitchen, and similar common facilities. In some cases, these suites are indistinguishable in features from traditional apartments. Universities may build their own housing facilities or enter into agreements with private developers to build, own, or lease housing to the educational institution or to its students. Academic housing may be located on the campus of the university or may be located in nearby neighborhoods.

Throughout the school year and the summer, academic housing can become program areas in which small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms—both accessible rooms and standard rooms—in order to socialize, to study, and to use all public use and common use areas is an essential part of having access to these educational programs and activities. Academic housing also is used for short-term transient educational programs during the time students are not in regular residence and may be rented out to transient visitors in a manner similar to a hotel for special university functions.

The Department was concerned that applying the new construction requirements for residential facilities to educational housing facilities could hinder access to educational programs for students with disabilities. Elevators generally are not required under the 2004 ADAAG residential facilities standards unless they are needed to provide an accessible route from accessible units to public use and common use areas, while under the 2004 ADAAG as it applies to other types of facilities, multistory private facilities must have elevators unless they meet very specific exceptions. In addition, the residential facilities standards do not require accessible roll-in showers in bathrooms, while the transient lodging requirements require some of the accessible units to be served by bathrooms with roll-in showers. The transient lodging standards also require that a greater number of units have accessible features for persons with communication disabilities. The transient lodging standards provide for installation of the required accessible features so that they are available immediately, but the residential facilities standards allow for certain features of the unit to be adaptable. For example, only reinforcements for grab bars need to be provided in residential dwellings, but the actual grab bars must be installed under the transient lodging standards. By contrast, the residential facilities standards do require certain features that provide greater accessibility within units, such as usable kitchens and an accessible route throughout the dwelling. The residential facilities standards also require 5 percent of the units to be accessible to persons with mobility disabilities, which is a continuation of the same scoping that is currently required under UFAS and is therefore applicable to any educational institution that is covered by section 504. The transient lodging standards require a lower percentage of accessible sleeping rooms for facilities with large numbers of rooms than is required by UFAS. For example, if a dormitory has 150 rooms, the transient lodging standards would require 7 accessible rooms, while the residential standards would require 8. In a large dormitory with 500 rooms, the transient lodging standards would require 13 accessible rooms, and the residential facilities standards would require 25. There are other differences between the two sets of standards, including requirements for accessible windows, alterations, kitchens, an accessible route throughout a unit, and clear floor space in bathrooms allowing for a side transfer.

In the NPRM, the Department requested public comment on how to scope educational housing facilities, and it asked whether the residential facilities requirements or the transient lodging requirements in the 2004 ADAAG would be more appropriate for housing at places of education and asked how the different requirements would affect the cost of building new dormitories and other student housing. *See* 73 FR 34508, 34545 (June 17, 2008).

The Department received several comments on this issue under title III. One commenter stated that the Department should adopt the residential facilities standards for housing at a place of education. In the commenter's view, the residential facilities standards are congruent with overlapping requirements imposed by HUD, and the residential facilities requirements would ensure dispersion of accessible features more effectively. This commenter also argued that while the increased number of required accessible units for residential facilities as compared to transient lodging may increase the cost of construction or alteration, this cost would be offset by a reduced need later to adapt rooms if the demand for accessible rooms exceeds the supply. The commenter also encouraged the Department to impose a visitability (accessible doorways and necessary clear floor space for turning radius) requirement for both the residential facilities and transient lodging requirements to allow students with mobility impairments to interact and socialize in a fully integrated fashion. Another commenter stated that while dormitories should be treated like residences as opposed to transient lodging, the Department should ensure that "all floors are accessible," thus ensuring community integration and visitability. Another commenter argued that housing at a place of education is comparable to residential housing, and that most of the housing types used by schools do not have the same amenities and services or function like transient lodging and should not be treated as such.

Several commenters focused on the length of stay at this type of housing and suggested that if the facilities are subject to occupancy for greater than 30 days, the residential standards should apply. Another commenter supported the Department's adoption of the transient lodging standards, arguing this will provide greater accessibility and therefore increase opportunities for students with disabilities to participate. One commenter, while supporting the use of transient lodging standards in this area, argued that the Department also should develop regulations relating to the usability of equipment in housing facilities by persons who are blind or visually impaired. Another commenter argued that the Department should not impose the transient lodging requirements on K–12 schools because the cost of adding elevators can be prohibitive, and because there are safety concerns related to evacuating students in wheelchairs living on floors above the ground floor in emergencies causing elevator failures.

The Department has considered the comments recommending the use of the

residential facilities standards and acknowledges that they require certain features that are not included in the transient lodging standards and that should be required for housing provided at a place of education. In addition, the Department notes that since educational institutions often use their academic housing facilities as short-term transient lodging in the summers, it is important that accessible features be installed at the outset. It is not realistic to expect that the educational institution will be able to adapt a unit in a timely manner in order to provide accessible accommodations to someone attending a one-week program during the summer.

The Department has determined that the best approach to this type of housing is to continue to require the application of transient lodging standards but, at the same time, to add several requirements drawn from the residential facilities standards related to accessible turning spaces and work surfaces in kitchens, and the accessible route throughout the unit. This will ensure the maintenance of the transient lodging standard requirements related to access to all floors of the facility, roll-in showers in facilities with more than 50 sleeping rooms, and other important accessibility features not found in the residential facilities standards, but also will ensure usable kitchens and access to all the rooms in a suite or apartment.

The Department has added a new definition to § 36.104, "Housing at a Place of Education," and has revised § 36.406(e) to reflect the accessible features that now will be required in addition to the requirements set forth under the transient lodging standards. The Department also recognizes that some educational institutions provide some residential housing on a year-round basis to graduate students and staff that is comparable to private rental housing but contains no facilities for educational programming. Section 36.406(e)(3) exempts from the transient lodging standards apartments or townhouse facilities that are provided with a lease on a year-round basis exclusively to graduate students or faculty and that do not contain any public use or common use areas available for educational programming; instead, such housing must comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

The regulatory text uses the term "sleeping room" in lieu of the term "guest room," which is the term used in the transient lodging standards. The Department is using this term because it believes that for the most part, it provides a better description of the sleeping facilities used in a place of education than "guest room." The final rule states in § 36.406(e) that the Department intends the terms to be used interchangeably in the application of the transient lodging standards to housing at a place of education.

Section 36.406(f) Assembly Areas

In the NPRM, the Department proposed § 36.406(f) to supplement the assembly area requirements of the 2004 ADAAG, which the Department is adopting as part of the 2010 Standards. The NPRM proposed at § 36.406(f)(1) to require wheelchair spaces and companion seating locations to be dispersed to all levels of the facility that are served by an accessible route. The Department received no significant comments on this paragraph and has decided to adopt the proposed language with minor modifications.

Section 36.406(f)(1) ensures that there is greater dispersion of wheelchair spaces and companion seats throughout stadiums, arenas, and grandstands than would otherwise be required by sections 221 and 802 of the 2004 ADAAG. In some cases, the accessible route may not be the same route that other individuals use to reach their seats. For example, if other patrons reach their seats on the field by an inaccessible route (*e.g.,* by stairs), but there is an accessible route that complies with section 206.3 of the 2004 ADAAG that could be connected to seats on the field, wheelchair spaces and companion seats must be placed on the field even if that route is not generally available to the public.

Regulatory language that was included in the 2004 ADAAG advisory, but that did not appear in the NPRM, has been added by the Department in § 36.406(f)(2). Section 36.406(f)(2) now requires an assembly area that has seating encircling, in whole or in part, a field of play or performance area, such as an arena or stadium, to place wheelchair spaces and companion seats around the entire facility. This rule, which is designed to prevent a public accommodation from placing wheelchair spaces and companion seats on one side of the facility only, is consistent with the Department's enforcement practices and reflects its interpretation of section 4.33.3 of the 1991 Standards.

In the NPRM, the Department proposed § 36.406(f)(2), which prohibits wheelchair spaces and companion seating locations from being "located on (or obstructed by) temporary platforms * * *." 73 FR 34508, 34557 (June 17, 2008). Through its enforcement actions, the Department discovered that some venues place wheelchair spaces and companion seats on temporary platforms that, when removed, reveal conventional seating underneath, or cover the wheelchair spaces and companion seats with temporary platforms on top of which they place risers of conventional seating. These platforms cover groups of conventional seats and are used to provide groups of wheelchair seats and companion seats.

Several commenters requested an exception to the prohibition of the use of temporary platforms for public accommodations that sell most of their tickets on a season-ticket or other multi-event basis. Such commenters argued that they should be able to use temporary platforms because they know, in advance, that the patrons sitting in certain areas for the whole season do not need wheelchair spaces and companion seats. The Department declines to adopt such an exception. As it explained in detail in the NPRM, the Department believes that permitting the use of movable platforms that seat four or more wheelchair users and their companions have the potential to reduce the number of available wheelchair seating spaces below the level required, thus reducing the opportunities for persons who need accessible seating to have the same choice of ticket prices and amenities that are available to other patrons in the facility. In addition, use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of accessible seating will be lost when a platform is removed. *See* 73 FR 34508, 34546 (June 17, 2008). Further, use of temporary platforms allows facilities to limit persons who need accessible seating to certain seating areas, and to relegate accessible seating to less desirable locations. The use of temporary platforms has the effect of neutralizing dispersion and other seating requirements (*e.g.,* line of sight) for wheelchair spaces and companion seats. *Cf. Independent Living Resources* v. *Oregon Arena Corp.,* 1 F. Supp. 2d 1159, 1171 (D. Or. 1998) (holding that while a public accommodation may "infill" wheelchair spaces with removable seats when the wheelchair spaces are not needed to accommodate individuals with disabilities, under certain circumstances "[s]uch a practice might well violate the rule that wheelchair spaces must be dispersed throughout the arena in a manner that is roughly proportionate to the overall distribution of seating"). In addition, using temporary platforms to convert unsold wheelchair spaces to conventional seating undermines the flexibility facilities need to accommodate secondary ticket market exchanges as required by § 36.302(f)(7) of the final rule.

As the Department explained in the NPRM, however, this provision was not designed to prohibit temporary seating that increases seating for events (*e.g.,* placing temporary seating on the floor of a basketball court for a concert). Consequently, the final rule, at § 36.406(f)(3), has been amended to clarify that if an entire seating section is on a temporary platform for a particular event, then wheelchair spaces and companion seats may also be in that seating section. However, adding a temporary platform to create wheelchair spaces and companion seats that are otherwise dissimilar from nearby fixed seating and then simply adding a small number of additional seats to the platform would not qualify as an "entire seating section" on the platform. In addition, § 36.406(f)(3) clarifies that facilities may fill in wheelchair spaces with removable seats when the wheelchair spaces are not needed by persons who use wheelchairs.

The Department has been responsive to assembly areas' concerns about reduced revenues due to unused accessible seating. Accordingly, the Department has reduced scoping requirements significantly—by almost half in large assembly areas—and determined that allowing assembly areas to in-fill unsold wheelchair spaces with readily removable temporary individual seats appropriately balances their economic concerns with the rights of individuals with disabilities. *See* section 221.1 of the 2010 Standards.

For stadium-style movie theaters, in § 36.406(f)(4) of the NPRM the Department

proposed requiring placement of wheelchair seating spaces and companion seats on a riser or cross-aisle in the stadium section of the theater that satisfies at least one of the following criteria: (1) It is located within the rear 60 percent of the seats provided in the auditorium; or (2) It is located within the area of the auditorium where the vertical viewing angles are between the 40th and 100th percentile of vertical viewing angles for all seats in that theater as ranked from the first row (1st percentile) to the back row (100th percentile). The vertical viewing angle is the angle between a horizontal line perpendicular to the seated viewer's eye to the screen and a line from the seated viewer's eye to the top of the screen.

The Department proposed this bright-line rule for two reasons: (1) the movie theater industry petitioned for such a rule; and (2) the Department has acquired expertise in the design of stadium-style theaters during its litigation with several major movie theater chains. *See United States.* v. *AMC Entertainment, Inc.,* 232 F. Supp.2d 1092 (C.D. Cal. 2002), *rev'd in part,* 549 F.3d 760 (9th Cir. 2008); *United States* v. *Cinemark USA, Inc.,* 348 F.3d 569 (6th Cir. 2003). Two industry commenters—at least one of whom otherwise supported this rule—requested that the Department explicitly state that this rule does not apply retroactively to existing theaters. Although this provision on its face applies to new construction and alterations, these commenters were concerned that the rule could be interpreted to apply retroactively because of the Department's statements in the NPRM and ANPRM that this bright line rule, although newly articulated, is not a new standard but "merely codifi[es] longstanding Department requirement[s]," 73 FR 34508, 34534 (June 17, 2008), and does not represent a "substantive change from the existing line-of-sight requirements" of section 4.33.3 of the 1991 Standards, 69 FR 58768, 58776 (Sept. 30, 2004).

Although the Department intends for § 36.406(f)(4) of this rule to apply prospectively to new construction and alterations, this rule is not a departure from, and is consistent with, the line-of-sight requirements in the 1991 Standards. The Department has always interpreted the line-of-sight requirements in the 1991 Standards to require viewing angles provided to patrons who use wheelchairs to be comparable to those afforded to other spectators. Section 36.406(f)(4) merely represents the application of these requirements to stadium-style movie theaters.

One commenter from a trade association sought clarification whether § 36.406(f)(4) applies to stadium-style theaters with more than 300 seats, and argued that it should not since dispersion requirements apply in those theaters. The Department declines to limit this rule to stadium-style theaters with 300 or fewer seats; stadium-style theaters of all sizes must comply with this rule. So, for example, stadium-style theaters that must vertically disperse wheelchair spaces and companion seats must do so within the parameters of this rule.

The NPRM included a provision that required assembly areas with more than 5,000 seats to provide at least five wheelchair spaces with at least three companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating is better addressed through ticketing policies rather than design and has deleted that provision from this section of the final rule.

Section 36.406(g) Medical Care Facilities

In the 1991 title III regulation, there was no provision addressing the dispersion of accessible sleeping rooms in medical care facilities. The Department is aware, however, of problems that individuals with disabilities face in receiving full and equal medical care when accessible sleeping rooms are not adequately dispersed. When accessible rooms are not fully dispersed, a person with a disability is often placed in an accessible room in an area that is not medically appropriate for his or her condition, and is thus denied quick access to staff with expertise in that medical specialty and specialized equipment. While the Access Board did not establish specific design requirements for dispersion in the 2004 ADAAG, in response to extensive comments in support of dispersion it added an advisory note, Advisory 223.1 General, encouraging dispersion of accessible rooms within the facility so that accessible rooms are more likely to be proximate to appropriate qualified staff and resources.

In the NPRM, the Department sought additional comment on the issue, asking whether it should require medical care facilities, such as hospitals, to disperse their accessible sleeping rooms, and if so, by what method (by specialty area, floor, or other criteria). All of the comments the Department received on this issue supported dispersing accessible sleeping rooms proportionally by specialty area. These comments from individuals, organizations, and a building code association, argued that it would not be difficult for hospitals to disperse rooms by specialty area, given the high level of regulation to which hospitals are subject and the planning that hospitals do based on utilization trends. Further, comments suggest that without a requirement, it is unlikely that hospitals would disperse the rooms. In addition, concentrating accessible rooms in one area perpetuates segregation of individuals with disabilities, which is counter to the purpose of the ADA.

The Department has decided to require medical care facilities to disperse their accessible sleeping rooms in a manner that is proportionate by type of medical specialty. This does not require exact mathematical proportionality, which at times would be impossible. However, it does require that medical care facilities disperse their accessible rooms by medical specialty so that persons with disabilities can, to the extent practical, stay in an accessible room within the wing or ward that is appropriate for their medical needs. The language used in this rule ("in a manner that is proportionate by type of medical specialty") is more specific than that used in the NPRM ("in a manner that enables patients with disabilities to have access to appropriate specialty services") and adopts the concept of proportionality proposed by the commenters. Accessible rooms should be dispersed throughout all medical specialties, such as obstetrics, orthopedics, pediatrics, and cardiac care.

Subpart F—Certification of State Laws or Local Building Codes

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

First, the Department proposed deleting the existing § 36.603, which establishes the obligations of a submitting authority that is seeking certification of its code, and issue in its place informal regulatory guidance regarding certification submission requirements. Due to the deletion of § 36.603, §§ 36.604 through 36.608 are renumbered, and § 36.603 in the final rule is modified to indicate that the Assistant Attorney General for the Civil Rights Division (Assistant Attorney General) shall make a preliminary determination of equivalency after "receipt and review of all information relevant to a request filed by a submitting official for certification of a code." Second, the Department proposed that the requirement in renumbered § 36.604 (previously § 36.605) that an informal hearing be held in Washington, DC, if the Assistant Attorney General makes a preliminary determination of equivalency be changed to a requirement that the hearing be held in the State or local jurisdiction charged with administration and enforcement of the code. Third, the Department proposed adding language to renumbered § 36.606 (previously § 36.607) to explain the effect of the 2010 Standards on the codes of State or local jurisdictions that were determined in the past to meet or exceed the 1991 Standards. Once the 2010 Standards take effect, certifications issued under the 1991 Standards would not have any future effect, and States and local jurisdictions with codes certified under the 1991 Standards would need to reapply for certification under the 2010 Standards. With regard to elements of existing buildings and facilities constructed in compliance with a code when a certification of equivalency was in effect, the final rule requires that in any enforcement action this compliance would be treated as rebuttable evidence of compliance with the standards then in effect. The new provision added to § 36.606 may also have implications in determining an entity's eligibility for the element-by-element safe harbor.

No substantive comments were received regarding the Department's proposed changes in subpart F, and no other changes have been made to this subpart in the final rule. The

Department did receive several comments addressing other issues raised in the NPRM that are related to subpart F. Because the 2010 Standards include specific design requirements for recreation facilities and play areas that may be new to many title III facilities, the Department sought comments in the NPRM about how the certification review process would be affected if the State or local jurisdiction allocates the authority to implement the new requirements to State or local agencies that are not ordinarily involved in administering building codes. One commenter, an association of building owners and managers, suggested that because of the increased scope of the 2010 Standards, it is likely that parts of covered elements in the new standards will be under the jurisdiction of multiple State or local agencies. In light of these circumstances, the commenter recommended that the Department allow State or local agencies to seek certification even if only one State or local regulatory agency requests certification. For example, if a State agency that regulates buildings seeks certification of its building code, it should be able to do so, even if another State agency that regulates amusement rides and miniature golf courses does not seek certification.

The Department's discussion of this issue in the NPRM contemplated that all of a State or local government's accessibility requirements for title III facilities would be the subject of a request for certification. Any other approach would require the Department to certify only part of a State or local government's accessibility requirements as compared to the entirety of the revised ADA standards. As noted earlier, the Attorney General is authorized by section 308(b)(1)(A)(ii) of the ADA to certify that a State or local building code meets or exceeds the ADA's minimum accessibility requirements, which are contained in this regulation. The Department has concluded that this is a decision that must be made on a case-by-case basis because of the wide variety of enforcement schemes adopted by the States. Piecemeal certification of laws or codes that do not contain all of the minimum accessibility requirements could fail to satisfy the Attorney General's responsibility to ensure that a State or local building code meets or exceeds the minimum accessibility requirements of the Act before granting certification. However, the Department wants to permit State and local code administrators to have maximum flexibility, so the Department will leave open the possibility for case-by-case review to determine if a State has successfully met the burden of demonstrating that its accessibility codes or other laws meet or exceed the ADA requirements.

The commenter representing building owners and managers also urged the Department to extend the proposed effective date for the final rule. The commenter explained that a six-month phase-in period is inadequate for States to begin and complete a code amendment process. The commenter asserted that the inadequate phase-in period will place entities undertaking new construction and alterations, particularly in those States with certified codes, in a difficult position because State officials will continue to enforce previously certified State or local accessibility requirements that may be in conflict with the new 2010 Standards. The Department received numerous comments on the issue of the effective date, many of them similar to the concerns expressed above, in response to both the NPRM and the ANPRM. *See* Appendix A discussion of compliance dates for new construction and alterations (§ 36.406). The Department has been persuaded by the concerns raised by many commenters addressing the time and costs related to the design process for both new construction and alterations, and has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. For more information on the issue of the compliance date, refer to subpart D—New Construction and Alterations.

One commenter, an association of theater owners, recommended that the Department establish a training program for State building inspectors for those States that receive certification to ensure more consistent ADA compliance and to facilitate the review of builders' architectural plans. The commenter also recommended that State building inspectors, once trained, review architectural plans, and after completion and inspection of facilities, be authorized to certify that the inspected building or facility meets both the certified State and the Federal accessibility requirements. Although supportive of the idea of additional training for State and local building code officials regarding ADA compliance, the Department believes that the approach suggested by the commenter of allowing State and local code officials to determine if a covered facility is in compliance with Federal accessibility requirements is not consistent with or permissible under the statutory enforcement scheme established by the ADA. As the Department stated in the NPRM, certification of State and local codes serves, to some extent, to mitigate the absence of a Federal mechanism for conducting at the national level a review of all architectural plans and inspecting all covered buildings under construction to ensure compliance with the ADA. In this regard, certification operates as a bridge between the obligation to comply with the 1991 Standards in new construction and alterations, and the administrative schemes of State and local governments that regulate the design and construction process. By ensuring consistency between State or local codes and Federal accessibility standards, certification has the additional benefit of streamlining the regulatory process, thereby making it easier for those in the design and construction industry to satisfy both State and Federal requirements. The Department notes, however, that although certification has the potential to increase compliance with the ADA, this result, however desirable, is not guaranteed. The ADA contemplated that there could be enforcement actions brought even in States with certified codes, and it provided some protection in litigation to builders who adhered to the provisions of the code certified to be ADA-equivalent. The Department's certification determinations make it clear that to get the benefit of certification, a facility must comply with the applicable code requirements—without relying on waivers or variances. The certified code, however, remains within the authority of the adopting State or local jurisdiction to interpret and enforce: Certification does not transform a State's building code into Federal law. Nor can certification alone authorize State and local building code officials implementing a certified code to do more than they are authorized to do under State or local law, and these officials cannot acquire authority through certification to render binding interpretations of Federal law. Therefore, the Department, while understanding the interest in obtaining greater assurance of compliance with the ADA through the interpretation and enforcement of a certified code by local code officials, declined in the NPRM to confer on local officials the authority not granted to them under the ADA to certify the compliance of individual facilities. The Department in the final rule finds no reason to alter its position on this issue in response to the comments that were received.

The commenter representing theater owners also urged the Department to provide a safe harbor to facilities constructed in compliance with State or local building codes certified under the 1991 Standards. With regard to elements of facilities constructed in compliance with a certified code prior to the effective date of the 2010 Standards, and during the period when a certification of equivalency was in effect, the Department noted in the NPRM that its approach would be consistent with the approach to the safe harbor discussed in subpart C, § 36.304 of the NPRM, with respect to elements in existing facilities constructed in compliance with the 1991 Standards. For example, elements in existing facilities in States with codes certified under the 1991 Standards would be eligible for a safe harbor if they were constructed in compliance with an ADA-certified code. In this scenario, compliance with the certified code would be treated as evidence of compliance with the 1991 Standards for purposes of determining the application of the safe harbor provision to those elements. For more information on safe harbor, refer to subpart C, § 36.304 of the final rule.

One commenter, an advocacy group for the blind, suggested that, similar to the procedures for certifying a State or local building code, the Department should establish a program to certify an entity's obligation to make its goods and services accessible to persons with sensory disabilities. The Department believes that this commenter was suggesting that covered entities should be able to request that the Department review their business operations to determine if they have met their ADA obligations. As noted earlier, subpart F contains procedures implementing section 308(b)(1)(A)(ii) of the ADA, which provides that on the application of a State or local jurisdiction, the Attorney General may certify that a State or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the ADA. The

only mechanism through which the Department is authorized to ensure a covered entity's compliance with the ADA is the enforcement scheme established under section 308(b)(1)(A)(i) of the ADA. The Department notes, however, that title III of the ADA and its implementing regulation, which includes the standards for accessible design, already require existing, altered, and newly constructed places of public accommodation, such as retail stores, hotels, restaurants, movie theaters, and stadiums, to make their facilities readily accessible to and usable by individuals with disabilities, which includes individuals with sensory disabilities, so that individuals with disabilities have a full and equal opportunity to enjoy the benefits of a public accommodation's goods, services, facilities, privileges and advantages.

Other Issues

Questions Posed in the NPRM Regarding Costs and Benefits of Complying With the 2010 Standards

In the NPRM, the Department requested comments on various cost and benefit issues related to eight requirements in the Department's Initial RIA, that were projected to have incremental costs that exceeded monetized benefits by more than $100 million when using the 1991 Standards as a comparative baseline, *i.e.,* 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. 73 FR 34508, 34512 (June 17, 2008). The Department was particularly concerned about how these costs applied to alterations. The Department noted that pursuant to the ADA, the Department does not have statutory authority to modify the 2004 ADAAG and is required instead to issue regulations implementing the ADA that are consistent with the Board's guidelines. In that regard, the Department also requested comment about whether any of these eight elements in the 2010 Standards should be returned to the Access Board for further consideration, in particular as applied to alterations. Many of the comments received by the Department in response to these questions addressed both titles II and III. As a result, the Department's discussion of these comments and its response are collectively presented for both titles.

Side reach. The 1991 Standards at section 4.2.6 establish a maximum side-reach height of 54 inches. The 2010 Standards at section 308.3.1 reduce that maximum height to 48 inches. The 2010 Standards also add exceptions for certain elements to the scoping requirement for operable parts.

The vast majority of comments the Department received were in support of the lower side-reach maximum of 48 inches in the 2010 Standards. Most of these comments, but not all, were received from individuals of short stature, relatives of individuals of short stature, or organizations representing the interests of persons with disabilities, including individuals of short stature. Comments from individuals with disabilities and disability advocacy groups stated that the 48-inch side reach would permit independence in performing many activities of daily living for individuals with disabilities, including individuals of short stature, persons who use wheelchairs, and persons who have limited upper body strength. In this regard, one commenter who is a business owner pointed out that as a person of short stature there were many occasions when he was unable to exit a public restroom independently because he could not reach the door handle. The commenter said that often elevator control buttons are out of his reach, and, if he is alone, he often must wait for someone else to enter the elevator so that he can ask that person to press a floor button for him. Another commenter, who is also a person of short stature, said that he has on several occasions pulled into a gas station only to find that he was unable to reach the credit card reader on the gas pump. Unlike other customers who can reach the card reader, swipe their credit or debit cards, pump their gas, and leave the station, he must use another method to pay for his gas. Another comment from a person of short stature pointed out that as more businesses take steps to reduce labor costs—a trend expected to continue—staffed booths are being replaced with automatic machines for the sale, for example, of parking tickets and other products. He observed that the "ability to access and operate these machines becomes ever more critical to function in society," and, on that basis, urged the Department to adopt the 48-inch side-reach requirement. Another individual commented that persons of short stature should not have to carry with them adaptive tools in order to access building or facility elements that are out of their reach, any more than persons in wheelchairs should have to carry ramps with them in order to gain access to facilities.

Many of the commenters who supported the revised side-reach requirement pointed out that lowering the side-reach requirement to 48 inches would avoid a problem sometimes encountered in the built environment when an element was mounted for a parallel approach at 54 inches, only to find afterwards that a parallel approach was not possible. Some commenters also suggested that lowering the maximum unobstructed side reach to 48 inches would reduce confusion among design professionals by making the unobstructed forward and side-reach maximums the same (the unobstructed forward reach in both the 1991 and 2010 Standards is 48 inches maximum). These commenters also pointed out that the ICC/ANSI A117.1 Standard, which is a private sector model accessibility standard, has included a 48-inch maximum high side-reach requirement since 1998. Many jurisdictions have already incorporated this requirement into their building codes, which these commenters believed would reduce the cost of compliance with the 2010 Standards. Because numerous jurisdictions have already adopted the 48-inch side-reach requirement, the Department's failure to adopt the 48-inch side-reach requirement in the 2010 Standards, in the view of many commenters, would result in a significant reduction in accessibility, and would frustrate efforts that have been made to harmonize private sector model construction and accessibility codes with Federal accessibility requirements. Given these concerns, they overwhelmingly opposed the idea of returning the revised side-reach requirement to the Access Board for further consideration.

The Department also received comments in support of the 48-inch side-reach requirement from an association of professional commercial property managers and operators and from State governmental entities. The association of property managers pointed out that the revised side-reach requirement provided a reasonable approach to "regulating elevator controls and all other operable parts" in existing facilities in light of the manner in which the safe harbor, barrier removal, and alterations obligations will operate in the 2010 Standards. One governmental entity, while fully supporting the 48-inch side-reach requirement, encouraged the Department to adopt an exception to the lower reach range for existing facilities similar to the exception permitted in the ICC/ANSI A117.1 Standard. In response to this latter concern, the Department notes that under the safe harbor, existing facilities that are in compliance with the 1991 Standards, which required a 54-inch side-reach maximum, would not be required to comply with the lower side-reach requirement, unless there is an alteration. *See* § 36.304(d)(2)(i).

A number of commenters expressed either concern with, or opposition to, the 48-inch side-reach requirement and suggested that it be returned to the Access Board for further consideration. These commenters included trade and business associations, associations of retail stores, associations of restaurant owners, retail and convenience store chains, and a model code organization. Several businesses expressed the view that the lower side-reach requirement would discourage the use of their products and equipment by most of the general public. In particular, concerns were expressed by a national association of pay phone service providers regarding the possibility that pay telephones mounted at the lower height would not be used as frequently by the public to place calls, which would result in an economic burden on the pay phone industry. The commenter described the lower height required for side reach as creating a new "barrier" to pay phone use, which would reduce revenues collected from pay phones and, consequently, further discourage the installation of new pay telephones. In addition, the commenter expressed concern that phone service providers would simply decide to remove existing pay phones rather than incur the costs of relocating them at the lower height. With regard to this latter concern, the commenter misunderstood the manner in which the safe harbor and barrier removal obligations under § 36.304 will operate in the revised title III regulation for elements that comply with the 1991 Standards. The Department does not anticipate that wholesale relocation of pay telephones in existing facilities will be required under the final rule where the telephones in existing facilities already are in

compliance with the 1991 Standards. If the pay phones comply with the 1991 Standards, the adoption of the 2010 Standards does not require retrofitting of these elements to reflect incremental changes in the 2010 Standards. *See* § 36.304(d)(2). However, pay telephones that were required to meet the 1991 Standards as part of new construction or alterations, but do not in fact comply with those standards, will need to be brought into compliance with the 2010 Standards as of 18 months from the publication date of this final rule. *See* § 36.406(a)(5).

The Department does not agree with the concerns expressed by the commenter about reduced revenues from pay phones mounted at lower heights. The Department believes that while given the choice some individuals may prefer to use a pay phone that is at a higher height, the availability of some phones at a lower height will not deter individuals from making needed calls.

The 2010 Standards will not require every pay phone to be installed or moved to a lowered height. The table accompanying section 217.2 of the 2010 Standards makes clear that where one or more telephones are provided on a floor, level, or an exterior site, only one phone per floor, level, or exterior site must be placed at an accessible height. Similarly, where there is one bank of phones per floor, level, or exterior site, only one phone per floor, level, or exterior site must be accessible. And if there are two or more banks of phones per floor, level, or exterior site, only one phone per bank must be placed at an accessible height.

Another comment in opposition to the lower reach range requirement was submitted on behalf of a chain of convenience stores with fuel stops. The commenter expressed the concern that the 48-inch side reach "will make it uncomfortable for the majority of the public," including persons of taller stature who would need to stoop to use equipment such as fuel dispensers mounted at the lower height. The commenter offered no objective support for the observation that a majority of the public would be rendered uncomfortable if, as required in the 2010 Standards, at least one of each type of fuel dispenser at a facility was made accessible in compliance with the lower reach range. Indeed, the Department received no comments from any individuals of tall stature expressing concern about accessible elements or equipment being mounted at the 48-inch height.

Several retail, convenience store, restaurant, and amusement park commenters expressed concern about the burden the lower side-reach requirement would place on their businesses in terms of self-service food stations and vending areas if the 48-inch requirement were applied retroactively. The cost of lowering counter height, in combination with the lack of control businesses exercise over certain prefabricated service or vending fixtures, outweighed, they argued, any benefits to persons with disabilities. For this reason, they suggested the lower side-reach requirement be referred back to the Access Board.

These commenters misunderstood the safe harbor and barrier removal obligations that will be in effect under the 2010 Standards. Those existing self-service food stations and vending areas that already are in compliance with the 1991 Standards will not be required to satisfy the 2010 Standards unless they engage in alterations. With regard to prefabricated vending machines and food service components that will be purchased and installed in businesses after the 2010 Standards become effective, the Department expects that companies will design these machines and fixtures to comply with the 2010 Standards in the future, as many have already done in the 10 years since the 48-inch side-reach requirement has been a part of the model codes and standards used by many jurisdictions as the basis for their construction codes.

A model code organization commented that the lower side-reach requirement would create a significant burden if it required entities to lower the mounting height for light switches, environmental controls, and outlets when an alteration did not include the walls where these elements were located, such as when "an area is altered or as a path of travel obligation." The Department believes that the final rule adequately addresses those situations about which the commenter expressed concern by not requiring the relocation of existing elements, such as light switches, environmental controls, and outlets, unless they are altered. Moreover, under § 36.403 of the 1991 rule, costs for altering the path of travel to an altered area of primary function that exceed 20 percent of the overall costs of the alteration will continue to be deemed disproportionate.

The Department has determined that the revised side-reach requirement should not be returned to the Access Board for further consideration based in large part on the views expressed by a majority of the commenters regarding the need for, and importance of, the lower side-reach requirement to ensure access for persons with disabilities.

Alterations and water closet clearances in single-user toilet rooms with in-swinging doors. The 1991 Standards allow a lavatory to be placed a minimum of 18 inches from the water closet centerline and a minimum of 36 inches from the side wall adjacent to the water closet, which precludes side transfers. The 1991 Standards do not allow an in-swinging door in a toilet or bathing room to overlap the required clear floor space at any accessible fixture. To allow greater transfer options, section 604.3.2 of the 2010 Standards prohibits lavatories from overlapping the clear floor space at water closets, except in certain residential dwelling units. Section 603.2.3 of the 2010 Standards maintains the prohibition on doors swinging into the clear floor space or clearance required for any fixture, except that they permit the doors of toilet or bathing rooms to swing into the required turning space, provided that there is sufficient clearance space for the wheelchair outside the door swing. In addition, in single-user toilet or bathing rooms, exception 2 of section 603.2.3 of the 2010 Standards permits the door to swing into the clear floor space of an accessible fixture if a clear floor space that measures at least 30 inches by 48 inches is available outside the arc of the door swing.

The majority of commenters believed that this requirement would increase the number of toilet rooms accessible to individuals with disabilities who use wheelchairs or mobility scooters, and will make it easier for them to transfer. A number of commenters stated that there was no reason to return this provision to the Access Board. Numerous commenters noted that this requirement is already included in other model accessibility standards and many State and local building codes and that the adoption of the 2010 Standards is an important part of harmonization efforts.

Other commenters, mostly trade associations, opposed this requirement, arguing that the added cost to the industry outweighs any increase in accessibility. Two commenters stated that these proposed requirements would add two feet to the width of an accessible single-user toilet room; however, another commenter said the drawings in the proposed regulation demonstrated that there would be no substantial increase in the size of the toilet room. Several commenters stated that this requirement would require moving plumbing fixtures, walls, or doors at significant additional expense. Two commenters wanted the permissible overlap between the door swing and clearance around any fixture eliminated. One commenter stated that these new requirements will result in fewer alterations to toilet rooms to avoid triggering the requirement for increased clearances, and suggested that the Department specify that repairs, maintenance, or minor alterations would not trigger the need to provide increased clearances. Another commenter requested that the Department exempt existing guest room bathrooms and single-user toilet rooms that comply with the 1991 Standards from complying with the increased clearances in alterations.

After careful consideration of these comments, the Department believes that the revised clearances for single-user toilet rooms will allow safer and easier transfers for individuals with disabilities, and will enable a caregiver, aide, or other person to accompany an individual with a disability into the toilet room to provide assistance. The illustrations in Appendix B to this final rule, "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," describe several ways for public entities and public accommodations to make alterations while minimizing additional costs or loss of space. Further, in any isolated instances where existing structural limitations may entail loss of space, the public entity and public accommodation may have a technical infeasibility defense for that alteration. The Department has, therefore, decided not to return this requirement to the Access Board.

Alterations to stairs. The 1991 Standards only require interior and exterior stairs to be accessible when they provide access to levels that are not connected by an elevator, ramp, or other accessible means of vertical access. In contrast, section 210.1 of the 2010 Standards requires all newly constructed stairs that are part of a means of egress to be accessible. However, exception 2 of section 210.1 of the 2010 Standards provides that in alterations, stairs between levels connected by an accessible route need not be accessible, except that handrails shall be provided. Most

commenters were in favor of this requirement for handrails in alterations, and stated that adding handrails to stairs during alterations was not only feasible and not cost prohibitive, but also provided important safety benefits. One commenter stated that making all points of egress accessible increased the number of people who could use the stairs in an emergency. A majority of the commenters did not want this requirement returned to the Access Board for further consideration.

The International Building Code (IBC), which is a private sector model construction code, contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, thereby minimizing the impact of this provision on public entities and public accommodations. The Department believes that by requiring only the addition of handrails to altered stairs where levels are connected by an accessible route, the costs of compliance for public entities and public accommodations are minimized, while safe egress for individuals with disabilities is increased. Therefore, the Department has decided not to return this requirement to the Access Board.

Alterations to elevators. Under the 1991 Standards, if an existing elevator is altered, only that altered elevator must comply with the new construction requirements for accessible elevators to the maximum extent feasible. It is therefore possible that a bank of elevators controlled by a single call system may contain just one accessible elevator, leaving an individual with a disability with no way to call an accessible elevator and thus having to wait indefinitely until an accessible elevator happens to respond to the call system. In the 2010 Standards, when an element in one elevator is altered, section 206.6.1 will require the same element to be altered in all elevators that are programmed to respond to the same call button as the altered elevator. Almost all commenters favored the proposed requirement. This requirement, according to these commenters, is necessary so a person with a disability need not wait until an accessible elevator responds to his or her call. One commenter suggested that elevator owners also could comply by modifying the call system so the accessible elevator could be summoned independently. One commenter suggested that this requirement would be difficult for small businesses located in older buildings, and one commenter suggested that this requirement be sent back to the Access Board.

After considering the comments, the Department agrees that this requirement is necessary to ensure that when an individual with a disability presses a call button, an accessible elevator will arrive. The IBC contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, minimizing the impact of this provision on public entities and public accommodations. Public entities and small businesses located in older buildings need not comply with this requirement where it is technically infeasible to do so. Further, as pointed out by one commenter, modifying the call system so the accessible elevator can be summoned independently is another means of complying with this requirement in lieu of altering all other elevators programmed to respond to the same call button. Therefore, the Department has decided not to return this requirement to the Access Board.

Location of accessible routes to stages. The 1991 Standards, at section 4.33.5, require an accessible route to connect the accessible seating and the stage, as well as other ancillary spaces used by performers. The 2010 Standards, at section 206.2.6, provide in addition that where a circulation path directly connects the seating area and the stage, the accessible route must connect directly the accessible seating and the stage, and, like the 1991 Standards, an accessible route must connect the stage with the ancillary spaces used by performers.

In the NPRM, the Department asked operators of auditoria about the extent to which auditoria already provide direct access to stages and whether there were planned alterations over the next 15 years that included accessible direct routes to stages. The Department also asked how to quantify the benefits of this requirement for persons with disabilities, and invited commenters to provide illustrative anecdotal experiences about the requirement's benefits.

The Department received many comments regarding the costs and benefits of this requirement. Although little detail was provided, many industry and governmental entity commenters anticipated that the costs of this requirement would be great and that it would be difficult to implement. They noted that premium seats may have to be removed and that load-bearing walls may have to be relocated. These commenters suggested that the significant costs would deter alterations to the stage area for a great many auditoria. Some commenters suggested that ramps to the front of the stage may interfere with means of egress and emergency exits. Several commenters requested that the requirement apply to new construction only, and one industry commenter requested an exemption for stages used in arenas or amusement parks where there is no audience participation or where the stage is a work area for performers only. One commenter requested that the requirement not apply to temporary stages.

The final rule does not require a direct accessible route to be constructed where a direct circulation path from the seating area to the stage does not exist. Consequently, those commenters who expressed concern about the burden imposed by the revised requirement (*i.e.,* where the stage is constructed with no direct circulation path connecting the general seating and performing area) should note that the final rule will not require the provision of a direct accessible route under these circumstances. The final rule applies to permanent stages, as well as "temporary stages," if there is a direct circulation path from the seating area to the stage. However, the Department recognizes that in some circumstances, such as an alteration to a primary function area, the ability to provide a direct accessible route to a stage may be costly or technically infeasible, and the auditorium owner is not precluded by the revised requirement from asserting defenses available under the regulation. In addition, the Department notes that since section 4.33.5 of the 1991 Standards requires an accessible route to a stage, the safe harbor will apply to existing facilities whose stages comply with the 1991 Standards.

Several governmental entities supported accessible auditoria and the revised requirement. One governmental entity noted that its State building code already required direct access, that it was possible to provide direct access, and that creative solutions had been found to do so.

Many advocacy groups and individual commenters strongly supported the revised requirement, discussing the acute need for direct access to stages, as such access has an impact on a great number of people at important life events, such as graduations and awards ceremonies, at collegiate and competitive performances and other school events, and at entertainment events that include audience participation. Many commenters expressed the belief that direct access is essential for integration mandates to be satisfied, and that separate routes are stigmatizing and unequal. The Department agrees with these concerns.

Commenters described the impact felt by persons in wheelchairs who are unable to access the stage at all when others are able to do so. Some of these commenters also discussed the need for the performers and production staff who use wheelchairs to have direct access to the stage, and they provided a number of examples that illustrated the importance of the rule proposed in the NPRM. Personal anecdotes were provided in comments and at the Department's public hearing on the NPRM. One mother spoke passionately and eloquently about the unequal treatment experienced by her daughter, who uses a wheelchair, at awards ceremonies and band concerts. Her daughter was embarrassed and ashamed to be carried by her father onto a stage at one band concert. When the venue had to be changed for another concert to an accessible auditorium, the band director made sure to comment that he was unhappy with the switch. Rather than endure the embarrassment and indignities, her child dropped out of band the following year.

Another father commented about how he was unable to speak from the stage at a PTA meeting at his child's school. Speaking from the floor limited his line of sight and his participation. Several examples were provided of children who could not participate on stage during graduation, awards programs, or special school events, such as plays and festivities. One student did not attend his college graduation because he would not be able to get on stage. Another student was unable to participate in the class Christmas programs or end-of-year parties unless her father could attend and lift her onto the stage. These commenters did not provide a method to quantify the benefits that would accrue by having direct access to stages. One commenter stated, however, that "the cost of dignity and respect is without measure."

Many industry commenters and governmental entities suggested that the

requirement be sent back to the Access Board for further consideration. One industry commenter mistakenly noted that some international building codes do not incorporate the requirement and that, therefore, there is a need for further consideration. However, the Department notes that both the 2003 and 2006 editions of the IBC include scoping provisions that are almost identical to this requirement and that these editions of the model code are the most frequently used. Many individuals and advocacy group commenters requested that the requirement be adopted without further delay. These commenters spoke of the acute need for direct access to stages and the amount of time it would take to resubmit the requirement to the Access Board. Several commenters noted that the 2004 ADAAG tracks recent model codes, and that there is thus no need for further consideration. The Department agrees that no further delay is necessary and therefore has decided it will not return the requirement to the Access Board for further consideration.

Assistive listening systems. The 1991 Standards at sections 4.33.6 and 4.33.7 require assistive listening systems (ALS) in assembly areas and prescribe general performance standards for ALS systems. In the NPRM, the Department proposed adopting the technical specifications in the 2004 ADAAG for ALS that are intended to ensure better quality and effective delivery of sound and information for persons with hearing impairments, especially those using hearing aids. The Department noted in the NPRM that since 1991, advancements in ALS and the advent of digital technology have made these systems more amenable to uniform standards, which, among other things, should ensure that a certain percentage of required ALS systems are hearing-aid compatible. 73 FR 34508, 34513 (June 17, 2008). The 2010 Standards at section 219 provide scoping requirements and at section 706 address receiver jacks, hearing aid compatibility, sound pressure level, signal-to-noise ratio, and peak clipping level. The Department requested comments specifically from arena and assembly area administrators on the cost and maintenance issues associated with ALS, and asked generally about the costs and benefits of ALS, and asked whether, based upon the expected costs of ALS, the issue should be returned to the Access Board for further consideration.

Commenters from advocacy organizations noted that persons who develop significant hearing loss often discontinue their normal routines and activities, including meetings, entertainment, and large group events, due to a sense of isolation caused by the hearing loss or embarrassment. Individuals with longstanding hearing loss may never have participated in group activities for many of the same reasons. Requiring ALS may allow individuals with disabilities to contribute to the community by joining in government and public events, and through increased economic activity associated with community activities and entertainment. Making public events and entertainment accessible to persons with hearing loss also brings families and other groups that include persons with hearing loss into more community events and activities, thus exponentially increasing the benefit from ALS.

Many commenters noted that when a person has significant hearing loss, that person may be able to hear and understand information in a quiet situation with the use of hearing aids or cochlear implants; however, as background noise increases and the distance between the source of the sound and the listener grows, and especially where there is distortion in the sound, an ALS becomes essential for basic comprehension and understanding. Commenters noted that among the 31 million Americans with hearing loss, and with a projected increase to over 78 million Americans with hearing loss by 2030, the benefit from ALS is huge and growing. Advocates for persons with disabilities and individuals commented that they appreciated the improvements in the 2004 ADAAG standards for ALS, including specifications for the ALS systems and performance standards. They noted that providing neckloops that translate the signal from the ALS transmitter to a frequency that can be heard on a hearing aid or cochlear implant are much more effective than separate ALS system headsets, which sometimes create feedback, often malfunction, and may create distractions for others seated nearby. Comments from advocates and users of ALS systems consistently noted that the Department's regulation should, at a minimum, be consistent with the 2004 ADAAG. Although there were requests for adjustments in the scoping requirements from advocates seeking increased scoping requirements, and from large venue operators seeking fewer requirements, there was no significant concern expressed by commenters about the technical specifications for ALS in the 2004 ADAAG.

Some commenters from trade associations and large venue owners criticized the scoping requirements as too onerous, and one commenter asked for a remand to the Access Board for new scoping rules. However, one State agency commented that the 2004 ADAAG largely duplicates the requirements in the 2006 IBC and the 2003 ANSI codes, which means that entities that comply with those standards would not incur additional costs associated with ADA compliance.

According to one State office of the courts, the costs to install either an infrared system or an FM system at average-sized facilities, including most courtrooms covered by title II, would be between $500 and $2,000, which the agency viewed as a small price in comparison to the benefits of inclusion. Advocacy organizations estimated wholesale costs of ALS systems at about $250 each, and individual neckloops to link the signal from the ALS transmitter to hearing aids or cochlear implants at less than $50 per unit. Many commenters pointed out that if a facility already is using induction neckloops, it would already be in compliance already and would not have any additional installation costs. One major city commented that annual maintenance is about $2,000 for the entire system of performance venues in the city. A trade association representing very large venues estimated annual maintenance and upkeep expenses, including labor and replacement parts, to be at most about $25,000 for a very large professional sports stadium.

One commenter suggested that the scoping requirements for ALS in the 2004 ADAAG were too stringent and that the Department should refer them back to the Access Board for further review and consideration. Others commented that the requirement for new ALS systems should mandate multichannel receivers capable of receiving audio description for persons who are blind, in addition to a channel for amplification for persons who are hard of hearing. Some commenters suggested that the Department should require a set schedule and protocol of mandatory maintenance. Department regulations already require maintenance of accessible features at § 36.211(a) of the title III regulation, which obligates a title III entity to maintain ALS in good working order. The Department recognizes that maintenance of ALS is key to its usability. Necessary maintenance will vary dramatically from venue to venue based upon a variety of factors including frequency of use, number of units, quality of equipment, and other items. Accordingly, the Department has determined that it is not appropriate to mandate details of maintenance, but notes that failure to maintain ALS would violate § 36.211(a) of this rule.

The NPRM asked whether the Department should return the issue of ALS requirements to the Access Board for further review. The Department has received substantial feedback on the technical and scoping requirements for ALS and is convinced that these requirements are reasonable—especially in light of the fact that the requirements largely duplicate those in the 2006 IBC and the 2003 ANSI codes already adopted in many States—and that the benefits justify the requirements. In addition, the Department believes that the new specifications will make ALS work more effectively for more persons with disabilities, which, together with a growing population of new users, will increase demand for ALS, thus mooting criticism from some large venue operators about insufficient demand. Thus, the Department has determined that it is unnecessary to refer this issue back to the Access Board for reconsideration.

Accessible teeing grounds, putting greens, and weather shelters. The Department's NPRM sought public input on the proposed requirements for accessible golf courses. These requirements specifically relate to accessible routes within the boundaries of the courses, as well as the accessibility of golfing elements (*e.g.,* teeing grounds, putting greens, weather shelters).

In the NPRM, the Department sought 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, and, if so, whether they intended to avail themselves of the proposed accessible route exception for golf car passages. 73 FR 34508, 34513 (June 17, 2008).

Most commenters expressed support for the adoption of an accessible route requirement that includes an exception permitting golf car passage as all or part of

an accessible route. Comments in favor of the proposed standard came from golf course owners and operators, individuals, organizations, and disability rights groups, while comments opposing adoption of the golf course requirements generally came from golf courses and organizations representing the golf course industry.

The majority of commenters expressed the general viewpoint that nearly all golf courses provide golf cars and have either well-defined paths or permit golf cars to drive on the course where paths are not present—and thus meet the accessible route requirement. Several commenters disagreed with the assumption in the Initial RIA that virtually every tee and putting green on an existing course would need to be regraded in order to provide compliant accessible routes. According to one commenter, many golf courses are relatively flat with little slope, especially those heavily used by recreational golfers. This commenter concurred with the Department that it is likely that most existing golf courses have a golf car passage to tees and greens, thereby substantially minimizing the cost of bringing an existing golf course into compliance with the proposed standards. One commenter reported that golf course access audits found that the vast majority of public golf courses would have little difficulty in meeting the proposed golf course requirements. In the view of some commenters, providing access to golf courses would increase golf participation by individuals with disabilities.

The Department also received many comments requesting clarification of the term "golf car passage." For example, one commenter requesting clarification of the term "golf car passage" argued that golf courses typically do not provide golf car paths or pedestrian paths onto the actual teeing grounds or greens, many of which are higher or lower than the car path. This commenter argued that if golf car passages were required to extend onto teeing grounds and greens in order to qualify for an exception, then some golf courses would have to substantially regrade teeing grounds and greens at a high cost.

After careful consideration of the comments, the Department has decided to adopt the 2010 Standards specific to golf facilities. The Department believes that in order for individuals with mobility disabilities to have an opportunity to play golf that is equal to golfers without disabilities, it is essential that golf courses provide an accessible route or accessible golf car passage to connect accessible elements and spaces within the boundary of the golf course, including teeing grounds, putting greens, and weather shelters.

Public Comments on Other NPRM Issues

Equipment and furniture. Equipment and furniture are covered under the Department's ADA regulations, including under the provision requiring modifications in policies, practices, and procedures and the provision requiring barrier removal. *See* 28 CFR 36.302, 36.304. The Department has not issued specific regulatory guidance on equipment and furniture, but proposed such regulations in 1991. The Department decided not to establish specific equipment requirements at that time because the requirements could be addressed under other sections of the regulation and because there were no appropriate accessibility standards applicable to many types of equipment at that time. *See* 28 CFR part 36, app. B (2009) ("Proposed Section 36.309 Purchase of Furniture and Equipment").

In the NPRM, the Department announced its intention not to regulate equipment, proposing instead to continue with the current approach. The Department received numerous comments objecting to this decision and urging the Department to issue equipment and furniture regulations. Based on these comments, the Department has decided that it needs to revisit the issuance of equipment and furniture regulations, and it intends to do so in future rulemaking.

Among the commenters' key concerns, many from the disability community objected to the Department's earlier decision not to issue equipment regulations, especially for medical equipment. These groups recommended that the Department list by name certain types of medical equipment that must be accessible, including exam tables (that lower to 15 inches above the floor or lower), scales, medical and dental chairs, and radiologic equipment (including mammography equipment). These commenters emphasized that the provision of medically-related equipment and furniture also should be specifically regulated since they are not included in the 2004 ADAAG (while depositories, change machines, fuel dispensers, and ATMs are) and because of their crucial role in the provision of healthcare. Commenters described how the lack of accessible medical equipment negatively affects the health of individuals with disabilities. For example, some individuals with mobility disabilities do not get thorough medical care because their health providers do not have accessible examination tables or scales.

Commenters also said that the Department's stated plan to assess the financial impact of free-standing equipment on businesses was not necessary, as any regulations could include a financial-balancing test. Other commenters representing persons who are blind or have low vision urged the Department to mandate accessibility for a wide range of equipment—including household appliances (stoves, washers, microwaves, and coffee makers), audiovisual equipment (stereos and DVD players), exercise machines, vending equipment, ATMs, computers at Internet cafes or hotel business centers, reservations kiosks at hotels, and point-of-sale devices—through speech output and tactile labels and controls. They argued that modern technology allows such equipment to be made accessible at minimal cost. According to these commenters, the lack of such accessibility in point-of-sale devices is particularly problematic because it forces blind individuals to provide personal or sensitive information (such as personal identification numbers) to third parties, which exposes them to identity fraud. Because the ADA does not apply directly to the manufacture of products, the Department lacks the authority to issue design requirements for equipment designed exclusively for use in private homes. *See* Department of Justice, Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities,* III–4.4200, available at *http://www.ada.gov/taman3.html.* To the extent that equipment intended for such use is used by a covered entity to facilitate a covered service or activity, that covered entity must make the equipment accessible to the extent that it can. *See id.:* 28 CFR part 36, app. B (2009) ("Proposed Section 36.309 Purchase of Furniture and Equipment").

Some commenters urged the Department to require swimming pool operators to provide aquatic wheelchairs for the use of persons with disabilities when the swimming pool has a sloped entry. If there is a sloped entry, a person who uses a wheelchair would require a wheelchair designed for use in the water in order to gain access to the pool since taking a personal wheelchair into water would rust and corrode the metal on the chair and damage any electrical components of a power wheelchair. Providing an aquatic wheelchair made of non-corrosive materials and designed for access into the water will protect the water from contamination and avoid damage to personal wheelchairs or other mobility aids.

Additionally, many commenters urged the Department to regulate the height of beds in accessible hotel guest rooms and to ensure that such beds have clearance at the floor to accommodate a mechanical lift. These commenters noted that in recent years, hotel beds have become higher as hotels use thicker mattresses, thereby making it difficult or impossible for many individuals who use wheelchairs to transfer onto hotel beds. In addition, many hotel beds use a solid-sided platform base with no clearance at the floor, which prevents the use of a portable lift to transfer an individual onto the bed. Consequently, individuals who bring their own lift to transfer onto the bed cannot independently get themselves onto the bed. Some commenters suggested various design options that might avoid these situations.

The Department intends to provide specific guidance relating to both hotel beds and aquatic wheelchairs in a future rulemaking. For the present, the Department reminds covered entities that they have the obligation to undertake reasonable modifications to their current policies and procedures and to undertake barrier removal or provide alternatives to barrier removal to make their facilities accessible to persons with disabilities. In many cases, providing aquatic wheelchairs or adjusting hotel bed heights may be necessary to comply with those requirements.

Commenters from the business community objected to the lack of clarity from the NPRM as to which equipment must be accessible and how to make it accessible. Several commenters urged the Department to clarify that equipment located in a public accommodation need not meet the technical specifications of ADAAG so long as the service provided by the equipment can be provided by alternative means, such as an

employee. For example, the commenters suggested that a self-service check-in kiosk in a hotel need not comply with the reach range requirement so long as a guest can check in at the front desk nearby. Several commenters argued that the Department should not require that point-of-sale devices be accessible to individuals who are blind or have low vision (although complying with accessible route and reach range was acceptable), especially until the Department adopts specific standards governing such access.

The Department has decided not to add specific scoping or technical requirements for equipment and furniture in this final rule. Other provisions of the regulation, including those requiring reasonable modifications of policies, practices, or procedures, readily achievable barrier removal, and effective communication will require the provision of accessible equipment in appropriate circumstances. Because it is clear that many commenters want the Department to provide additional specific requirements for accessible equipment, the Department plans to initiate a rulemaking to address these issues in the near future.

Accessible golf cars. An accessible golf car means a device that is designed and manufactured to be driven on all areas of a golf course, is independently usable by individuals with mobility disabilities, has a hand-operated brake and accelerator, carries golf clubs in an accessible location, and has a seat that both swivels and raises to put the golfer in a standing or semi-standing position. The 1991 regulation contained no language specifically referencing accessible golf cars. After considering the comments addressing the ANPRM's proposed requirement that golf courses make at least one specialized golf car available for the use of individuals with disabilities, and the safety of accessible golf cars and their use on golf course greens, the Department stated in the NPRM that it would not issue regulations specific to golf cars.

The Department received many comments in response to its decision to propose no new regulation specific to accessible golf cars. The majority of commenters urged the Department to require golf courses to provide accessible golf cars. These comments came from individuals, disability advocacy and recreation groups, a manufacturer of accessible golf cars, and representatives of local government. Comments supporting the Department's decision not to propose a new regulation came from golf course owners, associations, and individuals.

Many commenters argued that while the existing title III regulation covered the issue, the Department should nonetheless adopt specific regulatory language requiring golf courses to provide accessible golf cars. Some commenters noted that many local governments and park authorities that operate public golf courses have already provided accessible golf cars. Experience indicates that such golf cars may be used without damaging courses. Some argued that having accessible golf cars would increase golf course revenue by enabling more golfers with disabilities to play the game. Several commenters requested that the Department adopt a regulation specifically requiring each golf course to provide one or more accessible golf cars. Other commenters recommended allowing golf courses to make "pooling" arrangements to meet demands for such cars. A few commenters expressed support for using accessible golf cars to accommodate golfers with and without disabilities. Commenters also pointed out that the Departments of the Interior and Defense have already mandated that golf courses under their jurisdictional control must make accessible golf cars available unless it can be demonstrated that doing so would change the fundamental nature of the game.

While an industry association argued that at least two models of accessible golf cars meet the specifications recognized in the field, and that accessible golf cars cause no more damage to greens or other parts of golf courses than players standing or walking across the course, other commenters expressed concerns about the potential for damage associated with the use of accessible golf cars. Citing safety concerns, golf organizations recommended that an industry safety standard be developed.

Although the Department declines to add specific scoping or technical requirements for golf cars to this final rule, the Department expects to address requirements for accessible golf cars in future rulemaking. In the meantime, the Department believes that golfers with disabilities who need accessible golf cars are protected by other existing provisions in the title III regulation, including those requiring reasonable modifications of policies, practices, or procedures, and readily achievable barrier removal.

Web site accessibility. Many commenters expressed disappointment that the NPRM did not specifically require title III-covered entities to make their Web sites, through which they offer goods and services, accessible to individuals with disabilities. Commenters urged the Department to require specifically that entities that provide goods or services on the Internet make their Web sites accessible, regardless of whether or not these entities also have a "bricks and mortar" location. The commenters explained that such clarification was needed because of the current ambiguity caused by court decisions as to whether web-only businesses are covered under title III. Commenters argued that the cost of making Web sites accessible through Web site design is minimal, yet critical, to enabling individuals with disabilities to benefit from the goods and services an entity offers through its Web site. The Internet has become an essential tool for many Americans and, when accessible, provides individuals with disabilities great independence. Commenters recommended that, at a minimum, the Department require covered entities to meet the Electronic and Information Technology Accessibility Standards issued pursuant to section 508. Under section 508 of the Rehabilitation Act of 1973, Federal agencies are required to make their Web sites accessible. 29 U.S.C. 794(d); 36 CFR Part 1194.

The Department agrees that the ability to access the goods and services offered on the Internet through the Web sites of public accommodations is of great importance to individuals with disabilities, particularly those who are blind or who have low vision. When the ADA was enacted in 1990, the Internet was unknown to most of the public. Today, the Internet plays a critical role in daily life for personal, civic, commercial, and business purposes. In light of the growing importance of eBcommerce, ensuring nondiscriminatory access to the goods and services offered through the Web sites of covered entities can play a significant role in fulfilling the goals of the ADA.

Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility. *See Accessibility of State and Local Government Websites to People with Disabilities* (June 2003), available at *www.ada.gov/websites2.htm.* As the Department stated in that publication, an agency (and similarly a public accommodation) with an inaccessible Web site also may meet its legal obligations by providing an accessible alternative for individuals to enjoy its goods or services, such as a staffed telephone information line. However, such an alternative must provide an equal degree of access in terms of hours of operation and range of options and programs available. For example, if retail goods or bank services are posted on an inaccessible Web site that is available 24 hours a day, 7 days a week to individuals without disabilities, then the alternative accessible method must also be available 24 hours a day, 7 days a week. Additional guidance is available in the Web Content Accessibility Guidelines (WCAG), available at *http://www.w3.org/TR/WAI-WEBCONTENT* (last visited June 24, 2010), which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).

The Department did not issue proposed regulations as part of its NPRM, and thus is unable to issue specific regulatory language on Web site accessibility at this time. However, the Department expects to engage in rulemaking relating to Web site accessibility under the ADA in the near future.

Multiple chemical sensitivities. The Department received comments from a number of individuals asking the Department to add specific language to the final rule addressing the needs of individuals with chemical sensitivities. These commenters expressed concern that the presence of chemicals interferes with their ability to participate in a wide range of activities. These commenters also urged the Department to add multiple chemical sensitivities to the definition of a disability.

The Department has determined not to include specific provisions addressing multiple chemical sensitivities in the final rule. In order to be viewed as a disability under the ADA, an impairment must substantially limit one or more major life activities. An individual's major life

activities of respiratory or neurological functioning may be substantially limited by allergies or sensitivity to a degree that he or she is a person with a disability. When a person has this type of disability, a covered entity may have to make reasonable modifications in its policies and practices for that person. However, this determination is an individual assessment and must be made on a case-by-case basis.

■ 22. Redesignate Appendix B to part 36 as Appendix C to part 36 and add Appendix B to part 36 to read as follows:

Appendix B to Part 36—Analysis and Commentary on the 2010 ADA Standards for Accessible Design

Appendix B to Part 36

Analysis and Commentary on the 2010 ADA Standards for Accessible Design

The following is a discussion of substantive changes in the scoping and technical requirements for new construction and alterations resulting from the adoption of new ADA Standards for Accessible Design (2010 Standards) in the final rules for title II (28 CFR part 35) and title III (28 CFR part 36) of the Americans with Disabilities Act (ADA). The full text of the 2010 Standards is available for review at *http://www.ada.gov.*

In the Department's revised ADA title II regulation, 28 CFR 35.104 Definitions, the Department defines the term "2010 Standards" to mean the 2010 ADA Standards for Accessible Design. The 2010 Standards consist of the 2004 ADA Accessibility Guidelines (ADAAG) and the requirements contained in 28 CFR 35.151.

In the Department's revised ADA title III regulation, 28 CFR 36.104 Definitions, the Department defines the term "2010 Standards" to mean the 2010 ADA Standards for Accessible Design. The 2010 Standards consist of the 2004 ADA Accessibility Guidelines (ADAAG) and the requirements contained in 28 CFR part 36 subpart D.

This summary addresses selected substantive changes between the 1991 ADA Standards for Accessible Design (1991 Standards) codified at 28 CFR part 36, app. A (2009) and the 2010 Standards.

Editorial changes are not discussed. Scoping and technical requirements are discussed together, where appropriate, for ease of understanding the requirements. In addition, this document addresses selected public comments received by the Department in response to its September 2004 Advance Notice of Proposed Rulemaking (ANPRM) and its June 2008 Notice of Proposed Rulemaking (NPRM).

The ANPRM and NPRM issued by the Department concerning the proposed 2010 Standards stated that comments received by the Access Board in response to its development of the ADAAG upon which the 2010 Standards are based would be considered in the development of the final Standards. Therefore, the Department will not restate here all of the comments and responses to them issued by the Access Board. The Department is supplementing the Access Board's comments and responses with substantive comments and responses here. Comments and responses addressed by the Access Board that also were separately submitted to the Department will not be restated in their entirety here.

Section-by-Section Analysis With Public Comments

Application and Administration

102 Dimensions for Adults and Children

Section 2.1 of the 1991 Standards stated that the specifications were based upon adult dimensions and anthropometrics. The 1991 Standards did not provide specific requirements for children's elements or facilities.

Section 102 of the 2010 Standards states that the technical requirements are based on adult dimensions and anthropometrics. In addition, technical requirements are also provided based on children's dimensions and anthropometrics for drinking fountains, water closets and other elements located in toilet compartments, lavatories and sinks, dining surfaces, and work surfaces.

103 Equivalent Facilitation

This section acknowledges that nothing in these requirements prevents the use of designs, products, or technologies as alternatives to those prescribed, provided that the alternatives result in substantially equivalent or greater accessibility and usability.

A commenter encouraged the Department to include a procedure for determining equivalent facilitation. The Department believes that the responsibility for determining and demonstrating equivalent facilitation properly rests with the covered entity. The purpose of allowing for equivalent facilitation is to encourage flexibility and innovation while still ensuring access. The Department believes that establishing potentially cumbersome bureaucratic provisions for reviewing requests for equivalent facilitation is inappropriate.

104 Conventions

Dimensions. Section 104.1 of the 2010 Standards notes that dimensions not stated as a "maximum" or "minimum" are absolute. Section 104.1.1 of the 2010 Standards provides that all dimensions are subject to conventional industry tolerances except where the requirement is stated as a range with specific minimum and maximum end points. A commenter stated that the 2010 Standards restrict the application of construction tolerances only to those few requirements that are expressed as an absolute dimension.

This is an incorrect interpretation of sections 104.1 and 104.1.1 of the 2010 Standards. Construction and manufacturing tolerances apply to absolute dimensions as well as to dimensions expressed as a maximum or minimum. When the requirement states a specified range, such as in section 609.4 where grab bars must be installed between 33 inches and 36 inches above the finished floor, that range provides an adequate tolerance. Advisory 104.1.1 gives further guidance about tolerances.

Section 104.2 of the 2010 Standards provides that where the required number of elements or facilities to be provided is determined by calculations of ratios or percentages and remainders or fractions result, the next greater whole number of such elements or facilities shall be provided. Where the determination of the required size or dimension of an element or facility involves ratios or percentages, rounding down for values less than one-half is permissible.

A commenter stated that it is customary in the building code industry to round up rather than down for values less than one-half. As noted here, where the 2010 Standards provide for scoping, any resulting fractional calculations will be rounded to the next whole number. The Department is retaining the portion of section 104.2 that permits rounding down for values less than one-half where the determination of the required size or dimension of an element or facility involves ratios or percentages. Such practice is standard with the industry, and is in keeping with model building codes.

105 Referenced Standards

Section 105 lists the industry requirements that are referenced in the 2010 Standards. This section also clarifies that where there is a difference between a provision of the 2010 Standards and the referenced requirements, the provision of the 2010 Standards applies.

106 Definitions

Various definitions have been added to the 2010 Standards and some definitions have been deleted.

One commenter asked that the term public right-of-way be defined; others asked that various terms and words defined by the 1991 Standards, but which were eliminated from the 2010 Standards, plus other words and terms used in the 2010 Standards, be defined.

The Department believes that it is not necessary to add definitions to this text because section 106.3 of the 2010 Standards provides that the meanings of terms not specifically defined in the 2010 Standards, in the Department's ADA regulations, or in referenced standards are to be defined by collegiate dictionaries in the sense that the context implies. The Department believes that this provision adequately addresses these commenters' concerns.

Scoping and Technical Requirements

202 Existing Buildings and Facilities

Alterations. Under section 4.1.6(1)(c) of the 1991 Standards if alterations to single elements, when considered together, amount to an alteration of a room or space in a building or facility, the entire room or space would have to be made accessible. This requirement was interpreted to mean that if a covered entity chose to alter several elements in a room there would come a point when so much work had been done that it would be considered that the entire room or space would have to be made accessible. Under section 202.3 of the 2010 Standards entities can alter as many elements within a room or space as they like without triggering a requirement to make the entire room or space accessible based on the alteration of individual elements. This does not, however, change the requirement that if the intent was to alter the entire room or space, the entire

room or space must be made accessible and comply with the applicable requirements of Chapter 2 of the 2010 Standards.

Alterations to Primary Function Areas. Section 202.4 restates a current requirement under title III, and therefore represents no change for title III facilities or for those title II facilities that have elected to comply with the 1991 Standards. However, under the revised title II regulation, state and local government facilities that have previously elected to comply with the Uniform Federal Accessibility Standards (UFAS) instead of the 1991 Standards will no longer have that option, and thus will now be subject to the path of travel requirement. The path of travel requirement provides that when a primary function area of an existing facility is altered, the path of travel to that area (including restrooms, telephones, and drinking fountains serving the area) must also be made accessible, but only to the extent that the cost of doing so does not exceed twenty percent (20%) of the cost of the alterations to the primary function area. The UFAS requirements for a substantial alteration, though different, may have covered some of the items that will now be covered by the path of travel requirement.

Visible Alarms in Alterations to Existing Facilities. The 1991 Standards, at sections 4.1.3(14) and 4.1.6(1)(b), and sections 202.3 and 215.1 of the 2010 Standards require that when existing elements and spaces of a facility are altered, the alterations must comply with new construction requirements. Section 215.1 of the 2010 Standards adds a new exception to the scoping requirement for visible alarms in existing facilities so that visible alarms must be installed only when an existing fire alarm system is upgraded or replaced, or a new fire alarm system is installed.

Some commenters urged the Department not to include the exception and to make visible alarms a mandatory requirement for all spaces, both existing and new. Other commenters said that the exception will make the safety of individuals with disabilities dependent upon the varying age of existing fire alarm systems. Other commenters suggested that including this requirement, even with the exception, will result in significant cost to building owners and operators.

The Department believes that the language of the exception to section 215.1 of the 2010 Standards strikes a reasonable balance between the interests of individuals with disabilities and those of the business community. If undertaken at the time a system is installed, whether in a new facility or in a planned system upgrade, the cost of adding visible alarms is reasonable. Over time, existing facilities will become fully accessible to individuals who are deaf or hard of hearing, and will add minimal costs to owners and operators.

203 General Exceptions

Limited Access Spaces and Machinery Spaces. The 1991 Standards, at section 4.1.1, contain an exception that exempts "non-occupiable" spaces that have limited means of access, such as ladders or very narrow passageways, and that are visited only by service personnel for maintenance, repair, or occasional monitoring of equipment, from all accessibility requirements. Sections 203.4 and 203.5 of the 2010 Standards expand this exception by removing the condition that the exempt spaces be "non-occupiable," and by separating the other conditions into two independent exceptions: one for spaces with limited means of access, and the other for machinery spaces. More spaces are exempted by the exception in the 2010 Standards.

203, 206 and 215 Employee Work Areas

Common Use Circulation Paths in Employee Work Areas. The 1991 Standards at section 4.1.1(3), and the 2010 Standards at section 203.9, require employee work areas in new construction and alterations *only* to be designed and constructed so that individuals with disabilities can approach, enter, and exit the areas. Section 206.2.8 of the 2010 Standards requires accessible common use circulation paths within employee work areas unless they are subject to exceptions in sections 206.2.8, 403.5, 405.5, and 405.8. The ADA, 42 U.S.C. 12112 (b)(5)(A) and (B), requires employers to make reasonable accommodations in the workplace for individuals with disabilities, which may include modifications to work areas when needed. Providing increased access in the facility at the time of construction or alteration will simplify the process of providing reasonable accommodations when they are needed.

The requirement for accessible common use circulation paths will not apply to existing facilities pursuant to the readily achievable barrier removal requirement. The Department has consistently taken the position that barrier removal requirements do not apply to areas used exclusively by employees because the purpose of title III is to ensure that access is provided to clients and customers. *See* Appendix B to the 1991 regulation implementing title III, 28 CFR part 36.

Several exceptions to section 206.2.8 of the 2010 Standards exempt common use circulation paths in employee work areas from the requirements of section 402 where it may be difficult to comply with the technical requirements for accessible routes due to the size or function of the area:

- Employee work areas, or portions of employee work areas, that are less than 300 square feet and are elevated 7 inches or more above the ground or finish floor, where elevation is essential to the function of the space, are exempt.
- Common use circulation paths within employee work areas that are less than 1,000 square feet and are defined by permanently installed partitions, counters, casework, or furnishings are exempt. Kitchens in quick service restaurants, cocktail bars, and the employee side of service counters are frequently covered by this exception.
- Common use circulation paths within exterior employee work areas that are fully exposed to the weather are exempt. Farms, ranches, and outdoor maintenance facilities are covered by this exception.

The 2010 Standards in sections 403.5 and 405.8 also contain exceptions to the technical requirements for accessible routes for circulation paths in employee work areas:

- Machinery and equipment are permitted to reduce the clear width of common use circulation paths where the reduction is essential to the function of the work performed. Machinery and equipment that must be placed a certain way to work properly, or for ergonomics or to prevent workplace injuries are covered by this exception.
- Handrails are not required on ramps, provided that they can be added in the future.

Commenters stated that the requirements set out in the 2010 Standards for accessible common use circulation paths in employee work areas are inappropriate, particularly in commercial kitchens, storerooms, and behind cocktail bars where wheelchairs would not be easily accommodated. These commenters further urged the Department not to adopt a requirement that circulation paths in employee work areas be at least 36 inches wide, including those at emergency exits.

These commenters misunderstand the scope of the provision. Nothing in the 2010 Standards requires all circulation paths in non-exempt areas to be accessible. The Department recognizes that building codes and fire and life safety codes, which are adopted by all of the states, require *primary* circulation paths in facilities, including employee work areas, to be at least 36 inches wide for purposes of emergency egress. Accessible routes also are at least 36 inches wide. Therefore, the Department anticipates that covered entities will be able to satisfy the requirement to provide accessible circulation paths by ensuring that their required *primary* circulation paths are accessible.

Individual employee work stations, such as a grocery checkout counter or an automobile service bay designed for use by one person, do not contain common use circulation paths and are not required to comply. Other work areas, such as stockrooms that typically have narrow pathways between shelves, would be required to design only one accessible circulation path into the stockroom. It would not be necessary to make each circulation path in the room accessible. In alterations it may be technically infeasible to provide accessible common use circulation paths in some employee work areas. For example, in a stock room of a department store significant existing physical constraints, such as having to move walls to avoid the loss of space to store inventory, may mean that it is technically infeasible (*see* section 106.5 "Defined Terms" of the 2010 Standards) to make even the primary common use circulation path in that stock room wide enough to be accessible. In addition, the 2010 Standards include exceptions for common use circulation paths in employee work areas where it may be difficult to comply with the technical requirements for accessible routes due to the size or function of the areas. The Department believes that these exceptions will provide the flexibility necessary to ensure that this requirement does not interfere with legitimate business operations.

Visible Alarms. Section 215.3 of the 2010 Standards provides that where employee work areas in newly constructed facilities have audible alarm coverage they are

required to have wiring systems that are capable of supporting visible alarms that comply with section 702 of the 2010 Standards. The 1991 Standards, at section 4.1.1(3), require visible alarms to be provided where audible fire alarm systems are provided, but do not require areas used only by employees as work areas to be equipped with accessibility features. As applied to office buildings, the 1991 Standards require visible alarms to be provided in public and common use areas such as hallways, conference rooms, break rooms, and restrooms, where audible fire alarm systems are provided.

Commenters asserted that the requirements of section 215.3 of the 2010 Standards would be burdensome to meet. These commenters also raised concerns that all employee work areas within existing buildings and facilities must be equipped with accessibility features.

The commenters' concerns about section 215.3 of the 2010 Standards represent a misunderstanding of the requirements applicable to employee work areas.

Newly constructed buildings and facilities merely are required to provide wiring so that visible alarm systems can be added as needed to accommodate employees who are deaf or hard of hearing. This is a minimal requirement without significant impact.

The other issue in the comments represents a misunderstanding of the Department's existing regulatory requirements. Employee common use areas in covered facilities (*e.g.,* locker rooms, break rooms, cafeterias, toilet rooms, corridors to exits, and other common use spaces) were required to be accessible under the 1991 Standards; areas in which employees actually perform their jobs are required to enable a person using a wheelchair or mobility device to approach, enter, and exit the area. The 2010 Standards require increased access through the accessible common use circulation path requirement, but neither the 1991 Standards nor the 2010 Standards require employee work stations to be accessible. Access to specific employee *work stations* is governed by title I of the ADA.

205 and 309 Operable Parts

Section 4.1.3, and more specifically sections 4.1.3(13), 4.27.3, and 4.27.4 of the 1991 Standards, require operable parts on accessible elements, along accessible routes, and in accessible rooms and spaces to comply with the technical requirements for operable parts, including height and operation. The 1991 Standards, at section 4.27.3, contain an exception, "* * * where the use of special equipment dictates otherwise or where electrical and communications systems receptacles are not normally intended for use by building occupants," from the technical requirement for the height of operable parts. Section 205.1 of the 2010 Standards divides this exception into three exceptions covering operable parts intended only for use by service or maintenance personnel, electrical or communication receptacles serving a dedicated use, and floor electrical receptacles. Operable parts covered by these new exceptions are exempt from all of the technical requirements for operable parts in section 309. The 2010 Standards also add exceptions that exempt certain outlets at kitchen counters; heating, ventilating and air conditioning diffusers; redundant controls provided for a single element, other than light switches; and exercise machines and equipment from all of the technical requirements for operable parts. Exception 7, in section 205.1 of the 2010 Standards, exempts cleats and other boat securement devices from the accessible height requirement. Similarly, section 309.4 of the 2010 Standards exempts gas pump nozzles, but only from the technical requirement for activating force.

Reach Ranges. The 1991 Standards set the maximum height for side reach at 54 inches above the floor. The 2010 Standards, at section 308.3, lower that maximum height to 48 inches above the finish floor or ground. The 2010 Standards also add exceptions, as discussed above, to the scoping requirement for operable parts for certain elements that, among other things, will exempt them from the reach range requirements in section 308.

The 1991 Standards, at sections 4.1.3, 4.27.3, and 4.2.6, and the 2010 Standards, at sections 205.1, 228.1, 228.2, 308.3, and 309.3, require operable parts of accessible elements, along accessible routes, and in accessible rooms and spaces to be placed within the forward or side-reach ranges specified in section 308. The 2010 Standards also require at least five percent (5%) of mailboxes provided in an interior location and at least one of each type of depository, vending machine, change machine, and gas pump to meet the technical requirements for a forward or a side reach.

Section 4.2.6 of the 1991 Standards specifies a maximum 54-inch high side reach and a minimum 9-inch low side reach for an unobstructed reach depth of 10 inches maximum. Section 308.3.1 of the 2010 Standards specifies a maximum 48-inch high side reach and a minimum 15-inch low side reach where the element being reached for is unobstructed. Section 308.3.1, Exception 1, permits an obstruction that is no deeper than 10 inches between the edge of the clear floor or ground space and the element that the individual with a disability is trying to reach. Changes in the side-reach range for new construction and alterations in the 2010 Standards will affect a variety of building elements such as light switches, electrical outlets, thermostats, fire alarm pull stations, card readers, and keypads.

Commenters were divided in their views about the changes to the unobstructed side-reach range. Disability advocacy groups and others, including individuals of short stature, supported the modifications to the proposed reach range requirements. Other commenters stated that the new reach range requirements will be burdensome for small businesses to comply with. These comments argued that the new reach range requirements restrict design options, especially in residential housing.

The Department continues to believe that data submitted by advocacy groups and others provides compelling evidence that lowered reach range requirements will better serve significantly greater numbers of individuals with disabilities, including individuals of short stature, persons with limited upper body strength, and others with limited use of their arms and fingers. The change to the side-reach range was developed by the Access Board over a prolonged period in which there was extensive public participation. This process did not produce any significant data to indicate that applying the new unobstructed side-reach range requirement in new construction or during alterations would impose a significant burden.

206 and Chapter 4 Accessible Routes

Slope. The 2010 Standards provide, at section 403.3, that the cross slope of walking surfaces not be steeper than 1:48. The 1991 Standards' cross slope requirement was that it not exceed 1:50. A commenter recommended increasing the cross slope requirement to allow a maximum of ½ inch per foot (1:24) to prevent imperfections in concrete surfaces from ponding water. The Department continues to believe that the requirement that a cross slope not be steeper than 1:48 adequately provides for water drainage in most situations. The suggested changes would double the allowable cross slope and create a significant impediment for many wheelchair users and others with a mobility disability.

Accessible Routes from Site Arrival Points and Within Sites. The 1991 Standards, at sections 4.1.2(1) and (2), and the 2010 Standards, at sections 206.2.1 and 206.2.2, require that at least one accessible route be provided within the site from site arrival points to an accessible building entrance and that at least one accessible route connect accessible facilities on the same site. The 2010 Standards also add two exceptions that exempt site arrival points and accessible facilities within a site from the accessible route requirements where the only means of access between them is a vehicular way that does not provide pedestrian access.

Commenters urged the Department to eliminate the exception that exempts site arrival points and accessible facilities from the accessible route requirements where the only means of access between them is a vehicular way not providing pedestrian access. The Department declines to accept this recommendation because the Department believes that its use will be limited. If it can be reasonably anticipated that the route between the site arrival point and the accessible facilities will be used by pedestrians, regardless of whether a pedestrian route is provided, then this exception will not apply. It will apply only in the relatively rare situations where the route between the site arrival point and the accessible facility dictates vehicular access—for example, an office complex on an isolated site that has a private access road, or a self-service storage facility where all users are expected to drive to their storage units.

Another commenter suggested that the language of section 406.1 of the 2010 Standards is confusing because it states that curb ramps on accessible routes shall comply with 406, 405.2 through 405.5, and 405.10. The 1991 Standards require that curb ramps be provided wherever an accessible route crosses a curb.

The Department declines to change this language because the change is purely

editorial, resulting from the overall changes in the format of the 2010 Standards. It does not change the substantive requirement. In the 2010 Standards all elements on a required accessible route must be accessible; therefore, if the accessible route crosses a curb, a curb ramp must be provided.

Areas of Sport Activity. Section 206.2.2 of the 2010 Standards requires at least one accessible route to connect accessible buildings, facilities, elements, and spaces on the same site. Advisory section 206.2.2 adds the explanation that an accessible route must connect the boundary of each area of sport activity (*e.g.,* courts and playing fields, whether indoor or outdoor). Section 206.2.12 of the 2010 Standards further requires that in court sports the accessible route must directly connect both sides of the court.

Limited-Use/Limited-Application Elevators, Destination-Oriented Elevators and Private Residence Elevators. The 1991 Standards, at section 4.1.3(5), and the 2010 Standards, at sections 206.2 and 206.6, include exceptions to the scoping requirement for accessible routes that exempt certain facilities from connecting each story with an elevator. If a facility is exempt from the scoping requirement, but nonetheless installs an elevator, the 1991 Standards require the elevator to comply with the technical requirements for elevators. The 2010 Standards add a new exception that allows a facility that is exempt from the scoping requirement to install a limited-use/limited-application (LULA) elevator. LULA elevators are also permitted in the 1991 Standards and the 2010 Standards as an alternative to platform lifts. The 2010 Standards also add a new exception that permits private residence elevators in multi-story dwelling and transient lodging units. The 2010 Standards contain technical requirements for LULA elevators at section 408 and private residence elevators at section 409.

Section 407.2.1.4 of the 2010 Standards includes an exception to the technical requirements for locating elevator call buttons for destination-oriented elevators. The advisory at section 407.2.1.4 describes lobby controls for destination-oriented elevator systems. Many elevator manufacturers have recently developed these new "buttonless" elevator control systems. These new, more efficient elevators are usually found in high-rise buildings that have several elevators. They require passengers to enter their destination floor on an entry device, usually a keypad, in the elevator lobby. The system then sends the most efficient car available to take all of the passengers going to the sixth floor, for example, only to the sixth floor, without making stops at the third, fourth, and fifth floors on the way to the sixth floor. The challenge for individuals who are blind or have low vision is how to know which elevator car to enter, after they have entered their destination floor into the keypad.

Commenters requested that the Department impose a moratorium on the installation of destination-oriented elevators arguing that this new technology presents wayfinding challenges for persons who are blind or have low vision.

Section 407.2.1.5 of the 2010 Standards allows destination-oriented elevators to not provide call buttons with visible signals to indicate when each call is registered and when each call is answered *provided* that visible and audible signals, compliant with 407.2.2 of the 2010 Standards, indicating which elevator car to enter, are provided. This will require the responding elevator car to automatically provide audible and visible communication so that the system will always verbally and visually indicate which elevator car to enter.

As with any new technology, all users must have time to become acquainted with how to use destination-oriented elevators. The Department will monitor the use of this new technology and work with the Access Board so that there is not a decrease in accessibility as a result of permitting this new technology to be installed.

Accessible Routes to Tiered Dining Areas in Sports Facilities. The 1991 Standards, at sections 4.1.3(1) and 5.4, and section 206.2.5 of the 2010 Standards require an accessible route to be provided to all dining areas in new construction, including raised or sunken dining areas. The 2010 Standards add a new exception for tiered dining areas in sports facilities. Dining areas in sports facilities are typically integrated into the seating bowl and are tiered to provide adequate lines of sight for individuals with disabilities. The new exception requires accessible routes to be provided to at least 25 percent (25%) of the tiered dining areas in sports facilities. Each tier must have the same services and the accessible routes must serve the accessible seating.

Accessible Routes to Press Boxes. The 1991 Standards, at sections 4.1.1(1) and 4.1.3(1), cover all areas of newly constructed facilities required to be accessible, and require an accessible route to connect accessible entrances with all accessible spaces and elements within the facility. Section 201.1 of the 2010 Standards requires that all areas of newly designed and constructed buildings and facilities and altered portions of existing buildings and facilities be accessible. Sections 206.2.7(1) and (2) of the 2010 Standards add two exceptions that exempt small press boxes that are located in bleachers with entrances on only one level, and small press boxes that are free-standing structures elevated 12 feet or more above grade, from the accessible route requirement when the aggregate area of all press boxes in a sports facility does not exceed 500 square feet. The Department anticipates that this change will significantly reduce the economic impact on smaller sports facilities, such as those associated with high schools or community colleges.

Public Entrances. The 1991 Standards, at sections 4.1.3(8) and 4.1.6(1)(h), require at least fifty percent (50%) of public entrances to be accessible. Additionally, the 1991 Standards require the number of accessible public entrances to be equivalent to the number of exits required by applicable building and fire codes. With very few exceptions, building and fire codes require at least two exits to be provided from spaces within a building and from the building itself. Therefore, under the 1991 Standards where two public entrances are planned in a newly constructed facility, both entrances are required to be accessible.

Instead of requiring accessible entrances based on the number of public entrances provided or the number of exits required (whichever is greater), section 206.4.1 of the 2010 Standards requires at least sixty percent (60%) of public entrances to be accessible. The revision is intended to achieve the same result as the 1991 Standards. Thus, under the 2010 Standards where two public entrances are planned in a newly constructed facility, both entrances must be accessible.

Where multiple public entrances are planned to serve different site arrival points, the 1991 Standards, at section 4.1.2(1), and section 206.2.1 of the 2010 Standards require at least one accessible route to be provided from each type of site arrival point provided, including accessible parking spaces, accessible passenger loading zones, public streets and sidewalks, and public transportation stops, to an accessible public entrance that serves the site arrival point.

Commenters representing small businesses recommended retaining the 1991 requirement for fifty percent (50%) of public entrances of covered entities to be accessible. These commenters also raised concerns about the impact upon existing facilities of the new sixty percent (60%) requirement.

The Department believes that these commenters misunderstand the 1991 Standards. As explained above, the requirements of the 1991 Standards generally require more than fifty percent (50%) of entrances in small facilities to be accessible. Model codes require that most buildings have more than one means of egress. Most buildings have more than one entrance, and the requirements of the 1991 Standards typically resulted in these buildings having more than one accessible entrance. Requiring at least sixty percent (60%) of public entrances to be accessible is not expected to result in a substantial increase in the number of accessible entrances compared to the requirements of the 1991 Standards. In some very large facilities this change may result in fewer accessible entrances being required by the 2010 Standards. However, the Department believes that the realities of good commercial design will result in more accessible entrances being provided for the convenience of all users.

The 1991 Standards and the 2010 Standards also contain exceptions that limit the number of accessible entrances required in alterations to existing facilities. When entrances to an existing facility are altered and the facility has an accessible entrance, the entrance being altered is not required to be accessible, unless a primary function area also is altered and then an accessible path of travel must be provided to the primary function area to the extent that the cost to do so is not disproportionate to the overall cost of the alteration.

Alterations to Existing Elevators. When a single space or element is altered, the 1991 Standards, at sections 4.1.6(1)(a) and (b), require the space or element to be made accessible. When an element in one elevator is altered, the 2010 Standards, at section 206.6.1, require the same element to be

altered in all elevators that are programmed to respond to the same call button as the altered elevator.

The 2010 Standards, at sections 407.2.1–407.4.7.1.2, also contain exceptions to the technical requirements for elevators when existing elevators are altered that minimize the impact of this change.

Commenters expressed concerns about the requirement that when an element in one elevator is altered, the 2010 Standards, at section 206.6.1, will require the same element to be altered in all elevators that are programmed to respond to the same call button as the altered elevator. Commenters noted that such a requirement is burdensome and will result in costly efforts without significant benefit to individuals with disabilities.

The Department believes that this requirement is necessary to ensure that when an individual with a disability presses a call button, an accessible elevator will arrive. Without this requirement, individuals with disabilities would have to wait unnecessarily for an accessible elevator to make its way to them arbitrarily. The Department also believes that the effort required to meet this provision is minimal in the majority of situations because it is typical to upgrade all of the elevators in a bank at the same time.

Accessible Routes in Dwelling Units with Mobility Features. Sections 4.34.1 and 4.34.2 of the UFAS require the living area, kitchen and dining area, bedroom, bathroom, and laundry area, where provided, in covered dwelling units with mobility features to be on an accessible route. Where covered dwelling units have two or more bedrooms, at least two bedrooms are required to be on an accessible route.

The 2010 Standards at sections 233.3.1.1, 809.1, 809.2, 809.2.1, and 809.4 will require all spaces and elements within dwelling units with mobility features to be on an accessible route. These changes exempt unfinished attics and unfinished basements from the accessible route requirement. Section 233.3.5 of the 2010 Standards also includes an exception to the dispersion requirement that permits accessible single-story dwelling units to be constructed, where multi-story dwelling units are one of the types of units provided.

Location of Accessible Routes. Section 4.3.2(1) of the 1991 Standards requires accessible routes connecting site arrival points and accessible building entrances to coincide with general circulation paths, to the maximum extent feasible. The 2010 Standards require all accessible routes to coincide with or be located in the same general area as general circulation paths. Additionally, a new provision specifies that where a circulation path is interior, the required accessible route must also be located in the interior of the facility. The change affects a limited number of buildings. Section 206.3 of the 2010 Standards requires all accessible routes to coincide with or be located in the same general area as general circulation paths. Designing newly constructed interior accessible routes to coincide with or to be located in the same area as general circulation paths will not typically present a difficult design challenge and is expected to impose limited design constraints. The change will have no impact on exterior accessible routes. The 1991 Standards and the 2010 Standards also require accessible routes to be located in the interior of the facility where general circulation paths are located in the interior of the facility. The revision affects a limited number of buildings.

Location of Accessible Routes to Stages. The 1991 Standards at section 4.33.5 require an accessible route to connect the accessible seating and the performing area. Section 206.2.6 of the 2010 Standards requires the accessible route to directly connect the seating area and the accessible seating, stage, and all areas of the stage, where a circulation path directly connects the seating area and the stage. Both the 1991 Standards and the 2010 Standards also require an accessible route to connect the stage and ancillary areas, such as dressing rooms, used by performers. The 2010 Standards do not require an additional accessible route to be provided to the stage. Rather, the changes specify where the accessible route to the stage, which is required by the 1991 Standards, must be located.

207 Accessible Means of Egress

General. The 1991 Standards at sections 4.1.3(9); 4.1.6(1)(g); and 4.3.10 establish scoping and technical requirements for accessible means of egress. Section 207.1 of the 2010 Standards reference the International Building Code (IBC) for scoping and technical requirements for accessible means of egress.

The 1991 Standards require the same number of accessible means of egress to be provided as the number of exits required by applicable building and fire codes. The IBC requires at least one accessible means of egress and at least two accessible means of egress where more than one means of egress is required by other sections of the building code. The changes in the 2010 Standards are expected to have minimal impact since the model fire and life safety codes, which are adopted by all of the states, contain equivalent requirements with respect to the number of accessible means of egress.

The 1991 Standards require areas of rescue assistance or horizontal exits in facilities with levels above or below the level of exit discharge. Areas of rescue assistance are spaces that have direct access to an exit, stair, or enclosure where individuals who are unable to use stairs can go to call for assistance and wait for evacuation. The 2010 Standards incorporate the requirements established by the IBC. The IBC requires an evacuation elevator designed with standby power and other safety features that can be used for emergency evacuation of individuals with disabilities in facilities with four or more stories above or below the exit discharge level, and allows exit stairways and evacuation elevators to be used as an accessible means of egress in conjunction with areas of refuge or horizontal exits. The change is expected to have minimal impact since the model fire and life safety codes, adopted by most states, already contain parallel requirements with respect to evacuation elevators.

The 1991 Standards exempt facilities equipped with a supervised automatic sprinkler system from providing areas of rescue assistance, and also exempt alterations to existing facilities from providing an accessible means of egress. The IBC exempts buildings equipped with a supervised automatic sprinkler system from certain technical requirements for areas of refuge, and also exempts alterations to existing facilities from providing an accessible means of egress.

The 1991 and 2010 Standards require signs that provide direction to or information about functional spaces to meet certain technical requirements. The 2010 Standards, at section 216.4, address exit signs. This section is consistent with the requirements of the IBC. Signs used for means of egress are covered by this scoping requirement. The requirements in the 2010 Standards require tactile signs complying with sections 703.1, 703.2 and 703.5 at doors at exit passageways, exit discharge, and at exit stairways. Directional exit signs and signs at areas of refuge required by section 216.4.3 must have visual characters and features complying with section 703.5.

Standby Power for Platform Lifts. The 2010 Standards at section 207.2 require standby power to be provided for platform lifts that are permitted to serve as part of an accessible means of egress by the IBC. The IBC permits platform lifts to serve as part of an accessible means of egress in a limited number of places where platform lifts are allowed in new construction. The 1991 Standards, at 4.1.3(5) Exception 4(a) through (d), and the 2010 Standards, at sections 206.7.1 through 206.7.10, similarly limit the places where platform lifts are allowed in new construction.

Commenters urged the Department to reconsider provisions that would require standby power to be provided for platform lifts. Concerns were raised that ensuring standby power would be too burdensome. The Department views this issue as a fundamental life safety issue. Lift users face the prospect of being trapped on the lift in the event of a power failure if standby power is not provided. The lack of standby power could be life-threatening in situations where the power failure is associated with a fire or other emergency. The use of a platform lift is generally only one of the options available to covered entities. Covered entities that are concerned about the costs associated with maintaining standby power for a lift may wish to explore design options that would incorporate the use of a ramp.

208 and 502 Parking Spaces

General. Where parking spaces are provided, the 1991 Standards, at sections 4.1.2(5)(a) and (7) and 7(a), and the 2010 Standards, at section 208.1, require a specified number of the parking spaces to be accessible. The 2010 Standards, at section 208, include an exception that exempts parking spaces used exclusively for buses, trucks, delivery vehicles, law enforcement vehicles, or for purposes of vehicular impound, from the scoping requirement for parking spaces, provided that when these lots are accessed by the public the lot has an accessible passenger loading zone.

The 2010 Standards require accessible parking spaces to be identified by signs that display the International Symbol of Accessibility. Section 216.5, Exceptions 1 and 2, of the 2010 Standards exempt certain accessible parking spaces from this signage requirement. The first exception exempts sites that have four or fewer parking spaces from the signage requirement. Residential facilities where parking spaces are assigned to specific dwelling units are also exempted from the signage requirement.

Commenters stated that the first exception, by allowing a small parking lot with four or fewer spaces not to post a sign at its one accessible space, is problematic because it could allow all drivers to park in accessible parking spaces. The Department believes that this exception provides necessary relief for small business entities that may otherwise face the prospect of having between twenty-five percent (25%) and one hundred percent (100%) of their limited parking area unavailable to their customers because they are reserved for the exclusive use of persons whose vehicles display accessible tags or parking placards. The 2010 Standards still require these businesses to ensure that at least one of their available parking spaces is designed to be accessible.

A commenter stated that accessible parking spaces must be clearly marked. The Department notes that section 502.6 of the 2010 Standards provides that accessible parking spaces must be identified by signs that include the International Symbol of Accessibility. Also, section 502.3.3 of the 2010 Standards requires that access aisles be marked so as to discourage parking in them.

Access Aisle. Section 502.3 of the 2010 Standards requires that an accessible route adjoin each access aisle serving accessible parking spaces. The accessible route connects each access aisle to accessible entrances.

Commenters questioned why the 2010 Standards would permit an accessible route used by individuals with disabilities to coincide with the path of moving vehicles. The Department believes that the 2010 Standards appropriately recognize that not all parking facilities provide separate pedestrian routes. Section 502.3 of the 2010 Standards provides the flexibility necessary to permit designers and others to determine the most appropriate location of the accessible route to the accessible entrances. If all pedestrians using the parking facility are expected to share the vehicular lanes, then the ADA permits covered entities to use the vehicular lanes as part of the accessible route. The advisory note in section 502.3 of the 2010 Standards, however, calls attention to the fact that this practice, while permitted, is not ideal. Accessible parking spaces must be located on the shortest accessible route of travel to an accessible entrance. Accessible parking spaces and the required accessible route should be located where individuals with disabilities do not have to cross vehicular lanes or pass behind parked vehicles to have access to an accessible entrance. If it is necessary to cross a vehicular lane because, for example, local fire engine access requirements prohibit parking immediately adjacent to a building, then a marked crossing running perpendicular to the vehicular route should be included as part of the accessible route to an accessible entrance.

Van Accessible Parking Spaces. The 1991 Standards, at sections 4.1.2(5)(b), 4.6.3, 4.6.4, and 4.6.5, require one in every eight accessible parking spaces to be van accessible. Section 208.2.4 of the 2010 Standards requires one in every six accessible parking spaces to be van accessible.

A commenter asked whether automobiles other than vans may park in van accessible parking spaces. The 2010 Standards do not prohibit automobiles other than vans from using van accessible parking spaces. The Department does not distinguish between vehicles that are actual "vans" versus other vehicles such as trucks, station wagons, sport utility vehicles, etc. since many vehicles other than vans may be used by individuals with disabilities to transport mobility devices.

Commenters' opinions were divided on this point. Facility operators and others asked for a reduction in the number of required accessible parking spaces, especially the number of van accessible parking spaces, because they claimed these spaces often are not used. Individuals with disabilities, however, requested an increase in the scoping requirements for these parking spaces.

The Department is aware that a strong difference of opinion exists between those who use such spaces and those who must provide or maintain them. Therefore, the Department did not increase the total number of accessible spaces required. The only change was to increase the proportion of spaces that must be accessible to vans and other vehicles equipped to transport mobility devices.

Direct Access Entrances From Parking Structures. Where levels in a parking garage have direct connections for pedestrians to another facility, the 1991 Standards, at section 4.1.3(8)(b)(i), require at least one of the direct connections to be accessible. The 2010 Standards, at section 206.4.2, require all of these direct connections to be accessible.

209 and 503 Passenger Loading Zones and Bus Stops

Passenger Loading Zones at Medical Care and Long-Term Care Facilities. Sections 6.1 and 6.2 of the 1991 Standards and section 209.3 of the 2010 Standards require medical care and long-term care facilities, where the period of stay exceeds 24 hours, to provide at least one accessible passenger loading zone at an accessible entrance. The 1991 Standards also require a canopy or roof overhang at this passenger loading zone. The 2010 Standards do not require a canopy or roof overhang.

Commenters urged the Department to reinstate the requirement for a canopy or roof overhang at accessible passenger loading zones at medical care and long-term care facilities. While the Department recognizes that a canopy or roof overhang may afford useful protection from inclement weather conditions to everyone using a facility, it is not clear that the absence of such protection would impede access by individuals with disabilities. Therefore, the Department declined to reinstate that requirement.

Passenger Loading Zones. Where passenger loading zones are provided, the 1991 Standards, at sections 4.1.2(5) and 4.6.6, require at least one passenger loading zone to be accessible. Sections 209.2.1 and 503 of the 2010 Standards, require facilities such as airport passenger terminals that have long, continuous passenger loading zones to provide one accessible passenger loading zone in every continuous 100 linear feet of loading zone space. The 1991 Standards and the 2010 Standards both include technical requirements for the vehicle pull-up space (96 inches wide minimum and 20 feet long minimum). Accessible passenger loading zones must have an access aisle that is 60 inches wide minimum and extends the full length of the vehicle pull-up space. The 1991 Standards permit the access aisle to be on the same level as the vehicle pull-up space, or on the sidewalk. The 2010 Standards require the access aisle to be on the same level as the vehicle pull-up space and to be marked so as to discourage parking in the access aisle.

Commenters expressed concern that certain covered entities, particularly airports, cannot accommodate the requirements of the 2010 Standards to provide passenger loading zones, and urged a revision that would require one accessible passenger loading zone located in reasonable proximity to each building entrance served by the curb.

Commenters raised a variety of issues about the requirements at section 503 of the 2010 Standards stating that the requirements for an access aisle, width, length, and marking of passenger loading zones are not clear, do not fully meet the needs of individuals with disabilities, may run afoul of state or local requirements, or may not be needed because many passenger loading zones are typically staffed by doormen or valet parkers. The wide range of opinions expressed in these comments indicates that this provision is controversial. However, none of these comments provided sufficient data to enable the Department to determine that the requirement is not appropriate.

Valet Parking and Mechanical Access Parking Garages. The 1991 Standards, at sections 4.1.2(5)(a) and (e), and sections 208.2, 209.4, and 209.5 of the 2010 Standards require parking facilities that provide valet parking services to have an accessible passenger loading zone. The 2010 Standards extend this requirement to mechanical access parking garages. The 1991 Standards contained an exception that exempted valet parking facilities from providing accessible parking spaces. The 2010 Standards eliminate this exception. The reason for not retaining the provision is that valet parking is a service, not a facility type.

Commenters questioned why the exception for valet parking facilities from providing accessible parking spaces was eliminated. The provision was eliminated because valet parkers may not have the skills necessary to drive a vehicle that is equipped to be accessible, including use of hand controls, or when a seat is not present to accommodate a driver using a wheelchair. In that case, permitting the individual with a disability to self-park may be a required reasonable modification of policy by a covered entity.

210 and 504 Stairways

The 1991 Standards require stairs to be accessible only when they provide access to floor levels not otherwise connected by an accessible route (*e.g.,* where the accessible route is provided by an elevator, lift, or ramp). The 2010 Standards, at sections 210.1 and 504, require all newly constructed stairs that are part of a means of egress to comply with the requirements for accessible stairs, which include requirements for accessible treads, risers, and handrails. In existing facilities, where floor levels are connected by an accessible route, only the handrail requirement will apply when the stairs are altered. Exception 2 to section 210.1 of the 2010 Standards permits altered stairs to not comply with the requirements for accessible treads and risers where there is an accessible route between floors served by the stairs.

Most commenters were in favor of this requirement for handrails in alterations and stated that adding handrails to stairs during alterations would be feasible and not costly while providing important safety benefits. The Department believes that it strikes an appropriate balance by focusing the expanded requirements on new construction. The 2010 Standards apply to stairs which are part of a required means of egress. Few stairways are not part of a means of egress. The 2010 Standards are consistent with most building codes which do not exempt stairways when the route is also served by a ramp or elevator.

211 and 602 Drinking Fountains

Sections 4.1.3(10) and 4.15 of the 1991 Standards and sections 211 and 602 of the 2010 Standards require drinking fountains to be provided for persons who use wheelchairs and for others who stand. The 1991 Standards require wall and post-mounted cantilevered drinking fountains mounted at a height for wheelchair users to provide clear floor space for a forward approach with knee and toe clearance and free standing or built-in drinking fountains to provide clear floor space for a parallel approach. The 2010 Standards require drinking fountains mounted at a height for wheelchair users to provide clear floor space for a forward approach with knee and toe clearance, and include an exception for a parallel approach for drinking fountains installed at a height to accommodate very small children. The 2010 Standards also include a technical requirement for drinking fountains for standing persons.

212 and 606 Kitchens, Kitchenettes, Lavatories, and Sinks

The 1991 Standards, at sections 4.24, and 9.2.2(7), contain technical requirements for sinks and only have specific scoping requirements for sinks in transient lodging. Section 212.3 of the 2010 Standards requires at least five percent (5%) of sinks in each accessible space to comply with the technical requirements for sinks. The technical requirements address clear floor space, height, faucets, and exposed pipes and surfaces. The 1991 Standards, at section 4.24, and the 2010 Standards, at section 606, both require the clear floor space at sinks to be positioned for a forward approach and knee and toe clearance to be provided under the sink. The 1991 Standards, at section 9.2.2(7), allow the clear floor space at kitchen sinks and wet bars in transient lodging guest rooms with mobility features to be positioned for either a forward approach with knee and toe clearance or for a parallel approach.

The 2010 Standards include an exception that permits the clear floor space to be positioned for a parallel approach at kitchen sinks in any space where a cook top or conventional range is not provided, and at a wet bar.

A commenter stated that it is unclear what the difference is between a sink and a lavatory, and that this is complicated by requirements that apply to sinks (five percent (5%) accessible) and lavatories (at least one accessible). The term "lavatory" generally refers to the specific type of plumbing fixture required for hand washing in toilet and bathing facilities. The more generic term "sink" applies to all other types of sinks located in covered facilities.

A commenter recommended that the mounting height of sinks and lavatories should take into consideration the increased use of three-wheeled scooters and some larger wheelchairs. The Department is aware that the use of three-wheeled scooters and larger wheelchairs may be increasing and that some of these devices may require changes in space requirements in the future. The Access Board is funding research to obtain data that may be used to develop design guidelines that provide access to individuals using these mobility devices.

213, 603, 604, and 608 Toilet and Bathing Facilities, Rooms, and Compartments

General. Where toilet facilities and bathing facilities are provided, they must comply with section 213 of the 2010 Standards.

A commenter recommended that all accessible toilet facilities, toilet rooms, and compartments should be required to have signage indicating that such spaces are restricted solely for the use of individuals with disabilities. The Department believes that it is neither necessary nor appropriate to restrict the use of accessible toilet facilities. Like many other facilities designed to be accessible, accessible toilet facilities can and do serve a wide range of individuals with and without disabilities.

A commenter recommended that more than one wheelchair accessible compartment be provided in toilet rooms serving airports and train stations because these compartments are likely to be occupied by individuals with luggage and persons with disabilities often take longer to use them. The Access Board is examining airport terminal accessibility as part of an ongoing effort to facilitate accessibility and promote effective design. As part of these efforts, the Access Board will examine requirements for accessible toilet compartments in larger airport restrooms. The Department declines to change the scoping for accessible toilet compartments at this time.

Ambulatory Accessible Toilet Compartments. Section 213.3.1 of the 2010 Standards requires multi-user men's toilet rooms, where the total of toilet compartments and urinals is six or more, to contain at least one ambulatory accessible compartment. The 1991 Standards count only toilet stalls (compartments) for this purpose. The 2010 Standards establish parity between multi-user women's toilet rooms and multi-user men's toilet rooms with respect to ambulatory accessible toilet compartments.

Urinals. Men's toilet rooms with only one urinal will no longer be required to provide an accessible urinal under the 2010 Standards. Such toilet rooms will still be required to provide an accessible toilet compartment.

Commenters urged that the exception be eliminated. The Department believes that this change will provide flexibility to many small businesses and it does not alter the requirement that all common use restrooms must be accessible.

Multiple Single-User Toilet Rooms. Where multiple single-user toilet rooms are clustered in a single location, fifty percent (50%), rather than the one hundred percent (100%) required by the 1991 Standards, are required to be accessible by section 213.2, Exception 4 of the 2010 Standards. Section 216.8 of the 2010 Standards requires that accessible single-user toilet rooms must be identified by the International Symbol of Accessibility where all single-user toilet rooms are not accessible.

Hospital Patient Toilet Rooms. An exception was added in section 223.1 of the 2010 Standards to allow toilet rooms that are part of critical or intensive care patient sleeping rooms to no longer be required to provide mobility features.

Water Closet Location and Rear Grab Bar. Section 604.2 of the 2010 Standards allows greater flexibility for the placement of the centerline of wheelchair accessible and ambulatory accessible water closets. Section 604.5.2, Exception 1 permits a shorter grab bar on the rear wall where there is not enough wall space due to special circumstances (*e.g.,* when a lavatory or other recessed fixture is located next to the water closet and the wall behind the lavatory is recessed so that the lavatory does not overlap the required clear floor space at the water closet). The 1991 Standards contain no exception for grab bar length, and require the water closet centerline to be exactly 18 inches from the side wall, while the 2010 Standards requirement allows the centerline to be between 16 and 18 inches from the side wall in wheelchair accessible toilet compartments and 17 to 19 inches in ambulatory accessible toilet compartments.

Water Closet Clearance. Section 604.3 of the 2010 Standards represents a change in the accessibility requirements where a lavatory is installed adjacent to the water closet. The 1991 Standards allow the nearest side of a lavatory to be placed 18 inches minimum from the water closet centerline and 36 inches minimum from the side wall adjacent to the water closet. However, locating the lavatory so close to the water closet prohibits many individuals with disabilities from using a side transfer. To allow greater transfer options, including side transfers, the 2010 Standards prohibit lavatories from overlapping the clear floor space at water closets, except in covered residential dwelling units.

A majority of commenters, including persons who use wheelchairs, strongly

agreed with the requirement to provide enough space for a side transfer. These commenters believed that the requirement will increase the usability of accessible single-user toilet rooms by making side transfers possible for many individuals who use wheelchairs and would have been unable to transfer to a water closet using a side transfer even if the water closet complied with the 1991 Standards. In addition, many commenters noted that the additional clear floor space at the side of the water closet is also critical for those providing assistance with transfers and personal care for persons with disabilities. Numerous comments noted that this requirement is already included in other model accessibility standards and many state and local building codes and its adoption in the 2010 Standards is a important part of harmonization efforts. The Department agrees that the provision of enough clear floor space to permit side transfers at water closets is an important feature that must be provided to ensure access for persons with disabilities in toilet and bathing facilities. Furthermore, the adoption of this requirement closely harmonizes with the model codes and many state and local building codes.

Other commenters urged the Department not to adopt section 604.3 of the 2010 Standards claiming that it will require single-user toilet rooms to be two feet wider than the 1991 Standards require, and this additional requirement will be difficult to meet. Multiple commentators also expressed concern that the size of single-user toilet rooms would be increased but they did not specify how much larger such toilet rooms would have to be in their estimation. In response to these concerns, the Department developed a series of single-user toilet room floor plans demonstrating that the total square footage between representative layouts complying with the 1991 Standards and the 2010 Standards are comparable. The Department believes the floor plan comparisons clearly show that size differences between the two Standards are not substantial and several of the 2010 Standards-compliant plans do not require additional square footage compared to the 1991 Standards plans. These single-user toilet room floor plans are shown below.

Several commenters concluded that alterations of single-user toilet rooms should be exempt from the requirements of section 604.3 of the 2010 Standards because of the significant reconfiguration and reconstruction that would be required, such as moving plumbing fixtures, walls, and/or doors at significant additional expense. The Department disagrees with this conclusion since it fails to take into account several key points. The 2010 Standards contain provisions for in-swinging doors, 603.2.3, Exception 2, and recessed fixtures adjacent to water closets, 604.5.2, Exception 1. These provisions give flexibility to create more compact room designs and maintain required clearances around fixtures. As with the 1991 Standards, any alterations must comply to the extent that it is technically feasible to do so.

The requirements at section 604.3.2 of the 2010 Standards specify how required clearance around the water closet can overlap with specific elements and spaces. An exception that applies only to covered residential dwelling units permits a lavatory to be located no closer than 18 inches from the centerline of the water closet. The requirements at section 604.3.2 of the 2010 Standards increase accessibility for individuals with disabilities. One commenter expressed concern about other items that might overlap the clear floor space, such as dispensers, shelves, and coat hooks on the side of the water closet where a wheelchair would be positioned for a transfer. Section 604.3.2 of the 2010 Standards allows items such as associated grab bars, dispensers, sanitary napkin disposal units, coat hooks, and shelves to overlap the clear floor space. These are items that typically do not affect the usability of the clear floor space.

Toilet Room Doors. Sections 4.22.2 and 4.22.3 of the 1991 Standards and Section 603.2.3 of the 2010 Standards permit the doors of all toilet or bathing rooms with in-swinging doors to swing into the required turning space, but not into the clear floor space required at any fixture. In single-user toilet rooms or bathing rooms, Section 603.2.3 Exception 2 of the 2010 Standards permits the door to swing into the clear floor space of an accessible fixture if a clear floor space that measures at least 30 inches by 48 inches is provided outside of the door swing.

Several commenters expressed reservations about Exception 2 of Section 603.2.3. Concerns were raised that permitting doors of single-user toilet or bathing rooms with in-swinging doors to swing into the clearance around any fixture will result in inaccessibility to individuals using larger wheelchairs and scooters. Additionally, a commenter stated that the exception would require an unacceptable amount of precision maneuvering by individuals who use standard size wheelchairs. The Department believes that this provision achieves necessary flexibility while providing a minimum standard for maneuvering space. The standard does permit additional maneuvering space to be provided, if needed.

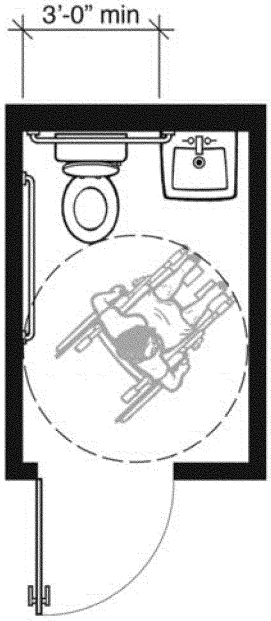
In the NPRM, the Department provided a series of plan drawings illustrating comparisons of the minimum size single-user toilet rooms. These floor plans showed typical examples that met the minimum requirements of the proposed ADA Standards. A commenter was of the opinion that the single-user toilet plans shown in the NPRM demonstrated that the new requirements will not result in a substantial increase in room size. Several other commenters representing industry offered criticisms of the single-user toilet floor plans to support their assertion that a 2010 Standards-compliant single-user toilet room will never be smaller and will likely be larger than such a toilet room required under the 1991 Standards. Commenters also asserted that the floor plans prepared by the Department were of a very basic design which could be accommodated in a minimal sized space whereas the types of facilities their customers demand would require additional space to be added to the rooms shown in the floor plans. The Department recognizes that there are many design choices that can affect the size of a room or space. Choices to install additional features may result in more space being needed to provide sufficient clear floor space for that additional feature to comply. However, many facilities that have these extra features also tend to have ample space to meet accessibility requirements. Other commenters asserted that public single-user toilet rooms always include a closer and a latch on the entry door, requiring a larger clear floor space than shown on the push side of the door shown in Plan 1B. The Department acknowledges that in instances where a latch is provided and a closer is required by other regulations or codes, the minimum size of a room with an out-swinging door may be slightly larger than as shown in Plan 1C.

Additional floor plans of single-user toilet rooms are now included in further response to the commentary received.

BILLING CODE 4410–13–P

Comparison of Single-User Toilet Room Layouts

1991 Standards

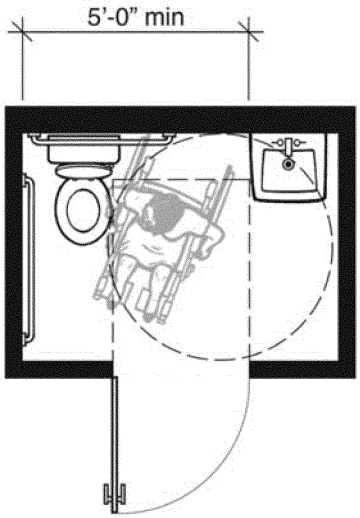


Plan-1A: 1991 Standards Minimum with Out-Swinging Door

5'-0" x 7'-3" • 36.25 Square Feet

This plan shows a typical example of a single-user toilet room that meets the minimum requirements of the 1991 Standards. The size of this space is determined by the minimum width required for the water closet and lavatory between the side walls, the minimum wheelchair turning space, and the space required for the out-swinging door. A lavatory with knee space can overlap the clear floor space required for the water closet provided that at least 36 inches of clearance is maintained between the side wall next to the water closet and the lavatory (see section 4.16.2 and Fig. 28 of the 1991 Standards). A wheelchair turning space meeting section 4.2.3 of the 1991 Standards must be provided. The size of this room requires that the entry door swing out. The room would be larger if the door were in-swinging.

2010 Standards



Plan-1B: 2010 Standards Minimum with Out-Swinging Door

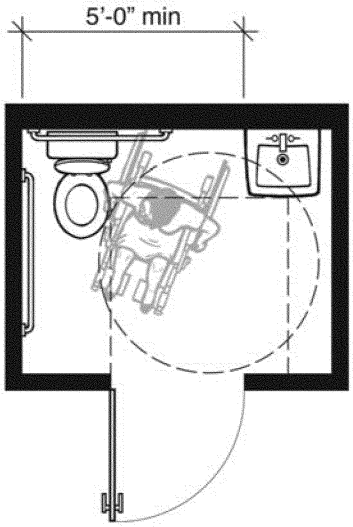
7'-0" x 5'-0" • 35.00 Square Feet

This plan shows a typical example of a single-user toilet room that meets the minimum requirements of the 2010 Standards. Features include: five-foot minimum width between the side wall of the water closet and the lavatory; 60-inch minimum circular wheelchair turning space; and 36-inch by 48-inch clear maneuvering space for the out-swinging entry door. Section 604.3.1 of the 2010 Standards requires a floor clearance at a water closet that is a minimum of 60 inches wide by 56 inches deep regardless of approach. Section 604.3.2 prohibits any other plumbing fixtures from being located in this clear space, except in residential dwelling units. The 2010 Standards, at section 304.3, allows the turning space to extend into toe and knee space provided beneath fixtures and other elements. Required maneuvering space for the entry door (inside the room) must be clear of all fixtures. If the door had both a closer and latch, section 404.2.4.1 and Figure 404.2.4.1(c) require additional space on the latch side.

This layout is three point five percent (3.5%) smaller than the accompanying Plan-1A: 1991 Standards Minimum with Out-Swinging Door example.

Comparison of Single-User Toilet Room Layouts

2010 Standards



Plan-1C: 2010 Standards Minimum with Out-Swinging Door

(entry door has both closer and latch)

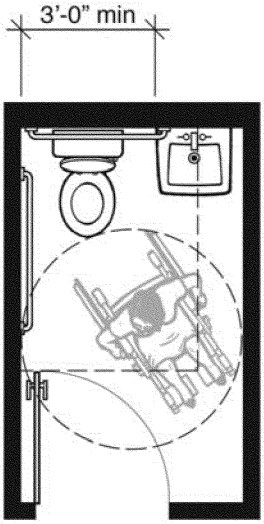
7'-0" x 5'-6" • 38.50 Square Feet

This plan shows the same typical features of a single-user toilet room that meets the minimum requirements of the 2010 Standards as Plan-1B does except the entry door has both a closer and latch. Because the door has both a closer and latch, a minimum additional foot of maneuvering space is required on the latch side (see section 404.2.4.1 and Figure 404.2.4.1(c) of the 2010 Standards).

This layout is six point two percent (6.2%) larger than the accompanying Plan-1A: 1991 Standards Minimum with Out-Swinging Door example.

Comparison of Single-User Toilet Room Layouts

1991 Standards

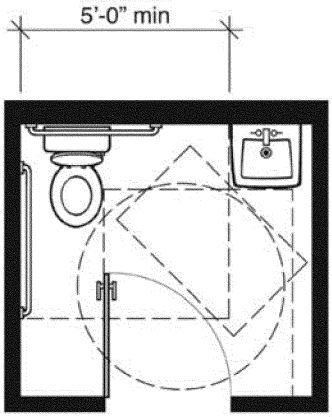


Plan-2A: 1991 Standards Minimum with In-Swinging Door

5'-0" x 8'-6" • 42.50 Square Feet

This plan shows a typical example of a single-user toilet room that meets the minimum requirements of the 1991 Standards. Depending on the width of the hallway and other circulation issues, it can be preferable to swing the entry door into the toilet room. Businesses and public entities typically prefer to have an in-swinging door. The in-swinging door increases overall room size because it cannot swing over the required clear floor space at any accessible fixture, (see section 4.22.2 of the 1991 Standards). This increases the room depth from Plan-1A. The door is permitted to swing over the required turning space shown as a 60-inch circle.

2010 Standards



Plan-2B: 2010 Standards Minimum with In-Swinging Door

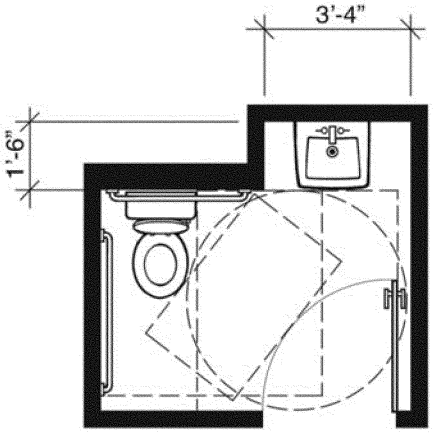
7'-0" x 6'-6" • 45.50 Square Feet

This plan shows a typical example of a single-user toilet room that meets the minimum requirements of the 2010 Standards when the entry door swings into the room. In the 2010 Standards an exception allows the entry door to swing over the clear floor spaces and clearances required at the fixtures if a clear floor space complying with section 305.3 (minimum 30 inches by 48 inches) is provided outside the arc of the door swing, section 603.3.3 exception 2. The required maneuvering space for the door, section 404.2.4.1 and Figure 404.2.4.1(a), also is a factor in room size. This clear space cannot be obstructed by the plumbing fixtures. Note that this layout provides more space for turning when the door is closed than Plan-1B.

This layout is seven percent (7%) larger than the accompanying Plan-2A: 1991 Standards Minimum with In-Swinging Door example.

Comparison of Single-User Toilet Room Layouts

2010 Standards



Plan-2C: 2010 Standards Minimum with In-Swinging Door

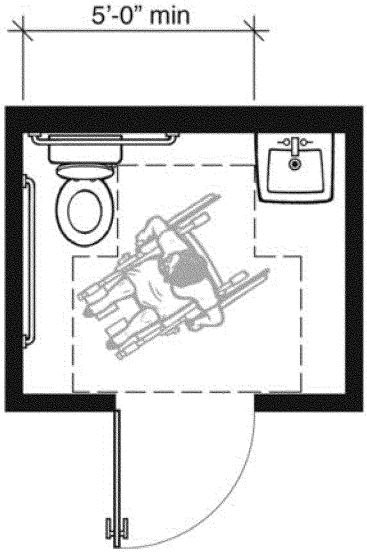
7'-0" x 6'-6" • 40.00 Square Feet
(plumbing chase not included)

This plan shows the same typical features of a single-user toilet room that meets the minimum requirements of the 2010 Standards as Plan-2B when the entry door swings into the room. Note that this layout also provides more space for turning when the door is closed than Plan-1B.

This layout is six point two five percent (6.25%) smaller than the accompanying Plan-2A: 1991 Standards Minimum with In-Swinging Door example.

Comparison of Single-User Toilet Room Layouts

1991 Standards and 2010 Standards



Plan-3: Meets Both 1991 Standards and 2010 Standards

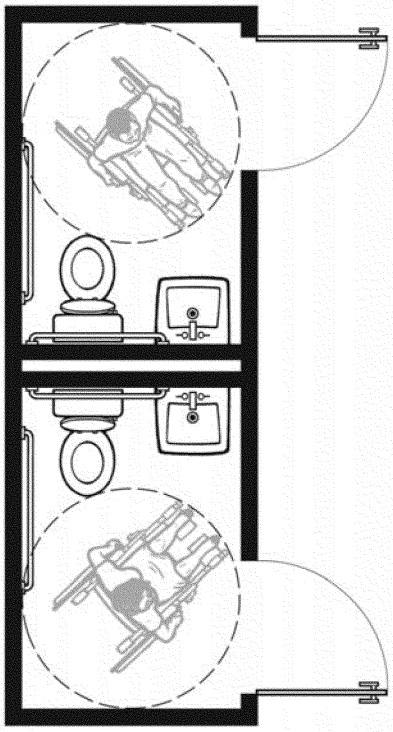
7'-0" x 5'-9" • 40.25 Square Feet

This plan shows an example of a single-user toilet room that meets the minimum requirements of both the 1991 Standards and 2010 Standards. A T-shaped turning space has been used (see Fig. 3(a) of the 1991 Standards and Figure 304.3.2 of the 2010 Standards) to maintain a compact room size. An out-swinging door also minimizes the overall layout depth and cannot swing over the required clear floor space or clearance at any accessible plumbing fixture.

This layout is eleven percent (11%) larger than the Plan-1A: 1991 Standards Minimum with Out-Swinging Door example shown at the beginning of these plan comparisons.

Comparison of Single-User Toilet Room "Pairs" With Fixtures Side-by-Side

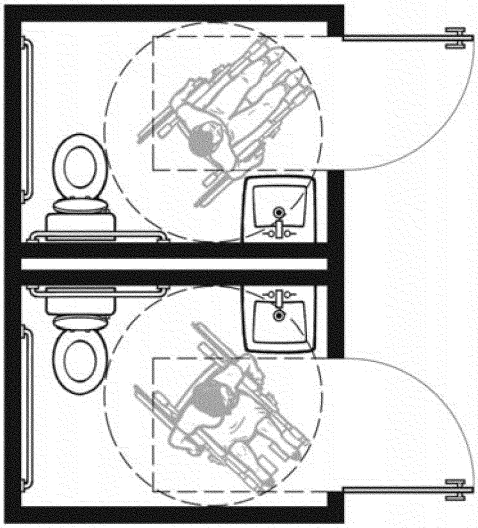
1991 Standards



Plan-1A Pair: 1991 Standards with Out-Swinging Doors

Two 5'-0" x 7'-3" Rooms – 72.50 Square Feet Total

2010 Standards



Plan-1B Pair: 2010 Standards with Out-Swinging Doors

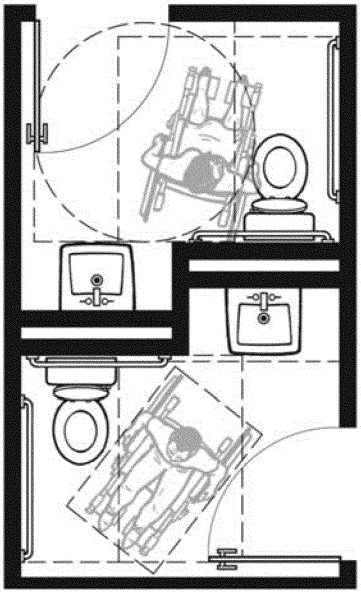
Two 7'-0" x 5'-0" Rooms – 70.00 Square Feet Total

These plans show men's/women's room configurations using Plans 1A and 1B.

BILLING CODE 4410–13–C

Comparison of Single-User Toilet Room "Pairs" With Fixtures Side-by-Side

2010 Standards



Plan-2C Pair: 2010 Standards with In-Swinging Doors

Two 7'-2" x 6'-6" Rooms - 82.00 Square Feet Total

This plan shows a men's/women's room configuration using Plan 2C.

BILLING CODE 4410–13–C

Toilet Paper Dispensers. The provisions for toilet paper dispensers at section 604.7 of the 2010 Standards require the dispenser to be located seven inches minimum and nine inches maximum in front of the water closet measured to the centerline of the dispenser. The paper outlet of the dispenser must be located 15 inches minimum and 48 inches maximum above the finish floor. In the 1991 Standards the location of the toilet paper dispenser is determined by the centerline and forward edge of the dispenser. In the 2010 Standards the mounting location of the toilet paper dispenser is determined by the centerline of the dispenser and the location of the outlet for the toilet paper.

One commenter discussed the difficulty of using large roll toilet paper dispensers and dispensers with two standard size rolls stacked on top of each other. The size of the large dispensers can block access to the grab bar and the outlet for the toilet paper can be too low or too high to be usable. Some dispensers also control the delivery of the toilet paper which can make it impossible to get the toilet paper. Toilet paper dispensers that control delivery or do not allow continuous paper flow are not permitted by the 1991 Standards or the 2010 Standards. Also, many of the large roll toilet paper dispensers do not comply with the 2010 Standards since their large size does not allow them to be mounted 12 inches above or 1½ inches below the side grab bar as required by section 609.3.

Shower Spray Controls. In accessible bathtubs and shower compartments, sections 607.6 and 608.6 of the 2010 Standards require shower spray controls to have an on/off control and to deliver water that is 120 °F (49 °C) maximum. Neither feature was required by the 1991 Standards, but may be required by plumbing codes. Delivering water that is no hotter than 120 °F (49 °C) will require controlling the maximum temperature at each accessible shower spray unit.

Shower Compartments. The 1991 Standards at sections 4.21 and 9.1.2 and the 2010 Standards at section 608 contain technical requirements for transfer-type and roll-in shower compartments. The 2010 Standards provide more flexibility than the 1991 Standards as follows:

- Transfer-type showers are exactly 36 inches wide by 36 inches long.
- The 1991 Standards and the 2010 Standards permit a ½-inch maximum curb in transfer-type showers. The 2010 Standards add a new exception that permits a 2-inch maximum curb in transfer-type showers in alterations to existing facilities, where recessing the compartment to achieve a ½-inch curb will disturb the structural reinforcement of the floor slab.
- Roll-in showers are 30 inches wide minimum by 60 inches long minimum. Alternate roll-in showers are 36 inches wide by 60 inches long minimum, and have a 36-inch minimum wide opening on the long side of the compartment. The 1991 Standards require alternate roll-in showers in a portion of accessible transient lodging guest rooms, but provision of this shower type in other facilities is generally permitted as an equivalent facilitation. The 1991 Standards require a seat to be provided adjacent to the opening; and require the controls to be located on the side adjacent to the seat. The 2010 Standards permit alternate roll-in showers to be used in any facility, only require a seat in transient lodging guest rooms, and allow location of controls on the back wall opposite the seat as an alternative.

Commenters raised concerns that adding a new exception that permits a 2-inch maximum curb in transfer-type showers in alterations to existing facilities, where recessing the compartment to achieve a ½-inch curb will disturb the structural reinforcement of the floor slab, will impair the ability of individuals with disabilities to use transfer-type showers.

The exception in section 608.7 of the 2010 Standards permitting a 2-inch maximum curb in transfer-type showers is allowed only in existing facilities where provision of a ½-inch high threshold would disturb the structural reinforcement of the floor slab. Whenever this exception is used the least high threshold that can be used should be provided, up to a maximum height of 2 inches. This exception is intended to provide some flexibility where the existing structure precludes full compliance.

Toilet and Bathing Rooms. Section 213 of the 2010 Standards sets out the scoping requirements for toilet and bathing rooms.

Commenters recommended that section 213, Toilet Facilities and Bathing Facilities, of the 2010 Standards include requirements that unisex toilet and bathing rooms be provided in certain facilities. These commenters suggested that unisex toilet and bathing rooms are most useful as companion care facilities.

Model plumbing and building codes require single-user (unisex or family) toilet facilities in certain occupancies, primarily assembly facilities, covered malls, and transportation facilities. These types of toilet rooms provide flexibility for persons needing privacy so that they can obtain assistance from family members or persons of the opposite sex. When these facilities are provided, both the 1991 Standards and 2010 Standards require that they be accessible. The 2010 Standards do not scope unisex toilet facilities because plumbing codes generally determine the number and type of plumbing fixtures to be provided in a particular occupancy and often determine whether an occupancy must provide separate sex facilities in addition to single-user facilities. However, the scoping at section 213.2.1 of the 2010 Standards coordinates with model plumbing and building code requirements which will permit a small toilet room with two water closets or one water closet and one urinal to be considered a single-user toilet room provided that the room has a privacy latch. In this way, a person needing assistance from a person of the opposite sex can lock the door to use the facility while temporarily inconveniencing only one other potential user. These provisions strike a reasonable balance and impose less impact on covered entities.

A commenter recommended that in shower compartments rectangular seats as provided in section 610.3.1 of the 2010 Standards should not be permitted as a substitute for L-shaped seats as provided in 610.3.2.

The 2010 Standards do not indicate a preference for either rectangular or L-shaped seats in shower compartments. L-shaped seats in transfer and certain roll-in showers have been used for many years to provide users with poor balance additional support because they can position themselves in the corner while showering.

214 and 611 Washing Machines and Clothes Dryers

Sections 214.2 (washing machines) and 214.3 (clothes dryers) of the 2010 Standards specify the number of each type of these machines required to be accessible (one to two depending upon the total number of machines provided) and section 611 specifies the technical requirements. An exception will permit the maximum height for the tops of these machines to be 2 inches higher than the general requirement for maximum high reach over an obstruction.

A commenter objected to the scoping provision for accessible washing machines and clothes dryers stating that the probability is low that more than one accessible machine would be needed at the same time in the laundry facility of a place of transient lodging.

The scoping in this provision is based on the relative size of the facility. The Department assumes that the size of the facility (and, therefore, the number of accessible machines provided) will be determined by the covered entity's assessment of the demand for laundry facilities. The Department declines to assume that persons with disabilities will have less use for accessible facilities in transient lodging than in other public accommodations.

216 and 703 Signs

The following types of signs, though they are not specifically subject to the 1991 Standards requirement for signs, will now be explicitly exempted by sections 216 and 703 of the 2010 Standards. These types of signs include: seat and row designations in assembly areas; occupant names, building addresses; company names and logos; signs in parking facilities (except those identifying accessible parking spaces and means of egress); and exterior signs identifying permanent rooms and spaces that are not located at the door to the space they serve. This requirement also clarifies that the exception for temporary signs applies to signs used for seven days or less.

The 2010 Standards retain the option to provide one sign where both visual and tactile characters are provided or two signs, one with visual, and one with tactile characters.

217 and 704 Telephones

Drive-up Public Telephones. Where public telephones are provided, the 1991 Standards, at section 4.1.3(17)(a), and section 217.2 of the 2010 Standards, require a certain number of telephones to be wheelchair accessible. The 2010 Standards add a new exception that exempts drive-up public telephones.

Text Telephones (TTY). Section 4.1.3(17) of the 1991 Standards requires a public TTY to be provided if there are four or more public pay telephones at a site and at least one is in an interior location. Section 217.4.2 of the 2010 Standards requires that a building or facility provide a public TTY on each floor that has four or more public telephones, and in each telephone bank that has four or more telephones. Additionally, section 217.4.4 of the 2010 Standards requires that at least one public TTY be installed where four or more public pay telephones are provided on an exterior site. Section 217.4.5 of the 2010 Standards also requires that a public TTY be provided where at least one public pay telephone is provided at a public rest stop, emergency roadside stop, or service plaza. Section 217.4.6 of the 2010 Standards also requires that a public TTY be provided at each location where at least one public pay

telephone is provided serving a hospital emergency room, a hospital recovery room, or a hospital waiting room. Section 217.4.7 of the 2010 Standards also requires that, in addition to the requirements for a public TTY to be provided at each location where at least four or more public pay telephones are provided at a bank of pay telephones and where at least one public pay telephone is provided on a floor or in a public building, where at least one public pay telephone serves a particular entrance to a bus or rail facility at least one public TTY must serve that entrance. In airports, in addition to the requirements for the provision of a public TTY at phone banks, on floors, and in public buildings with pay phones, where four or more public pay phones are located in a terminal outside the security areas, in a concourse within the security areas, or a baggage claim area in a terminal at least one public TTY must be provided. Section 217.4.8 of the 2010 Standards also requires that a TTY be provided in at least one secured area where at least one pay telephone is provided in a secured area used only by detainees or inmates and security personnel in detention and correctional facilities.

Wheelchair Accessible Telephones

Section 217.2 of the 2010 Standards requires that where public telephones are provided wheelchair accessible telephones complying with section 704.2 must be provided in accordance with Table 217.2.

A commenter stated that requiring installation of telephones within the proposed reach range requirements would adversely impact public and telephone owners and operators. According to the commenter, individuals without disabilities will not use telephones that are installed within the reach range requirements because they may be inconvenienced by having to stoop to operate these telephones, and, therefore, owners and operators will lose revenue due to less use of public telephones.

This comment misunderstands the scoping requirements for wheelchair accessible telephones. Section 217.2 of the 2010 Standards provides that where one or more single units are provided, only one unit per floor, level, or exterior site is required to be wheelchair accessible. However, where banks of telephones are provided, only one telephone in each bank is required to be wheelchair accessible. The Department believes these scoping requirements for wheelchair accessible telephones are reasonable and will not result in burdensome obligations or lost revenue for owners and operators.

218 and 810 Transportation Facilities

Detectable Warnings. Detectable warnings provide a distinctively textured surface of truncated domes. The 1991 Standards at sections 4.1.3(15), 4.7.7, 4.29.2, 4.29.5, 4.29.6, and 10.3.1(8) require detectable warnings at curb ramps, hazardous vehicular areas, reflecting pools, and transit platform edges. The 2010 Standards at sections 218, 810.5, 705.1, and 705.2 only require detectable warnings at transit platform edges. The technical specifications for the diameter and spacing of the truncated domes have also been changed. The 2010 Standards also delete the requirement for the material used to contrast in resiliency or sound-on-cane contact from adjoining walking surfaces at interior locations.

The 2010 Standards apply to detectable warnings on developed sites. They do not apply to the public right-of-way. Scoping for detectable warnings at all locations other than transit platform edges has been eliminated from the 2010 Standards. However, because detectable warnings have been shown to significantly benefit individuals with disabilities at transit platform edges, the 2010 Standards provide scoping and technical requirements for detectable warnings at transit platform edges.

219 and 706 Assistive Listening Systems

Signs. Section 216.10 of the 2010 Standards requires each covered assembly area to provide signs at each auditorium to inform patrons that assistive listening systems are available. However, an exception to this requirement permits assembly areas that have ticket offices or ticket windows to display the required signs at the ticket window.

A commenter recommended eliminating the exception at 216.10 because, for example, people who buy tickets through the mail, by subscription, or on-line may not need to stop at a ticket office or window upon arrival at the assembly area. The Department believes that an individual's decision to purchase tickets before arriving at a performance does not limit the discretion of the assembly operator to use the ticket window to provide other services to its patrons. The Department retained the exception at 216.10 to permit the venue operator some flexibility in determining how to meet the needs of its patrons.

Audible Communication. The 1991 Standards, at section 4.1.3(19)(b), require assembly areas, where audible communication is integral to the use of the space, to provide an assistive listening system if they have an audio amplification system or an occupant load of 50 or more people and have fixed seating. The 2010 Standards at section 219 require assistive listening systems in spaces where communication is integral to the space and audio amplification is provided and in courtrooms.

The 1991 Standards require receivers to be provided for at least four percent (4%) of the total number of fixed seats. The 2010 Standards, at section 219.3, revise the percentage of receivers required according to a table that correlates the required number of receivers to the seating capacity of the facility. Small facilities will continue to provide receivers for four percent (4%) of the seats. The required percentage declines as the size of the facility increases. The changes also require at least twenty-five percent (25%), but no fewer than two, of the receivers to be hearing-aid compatible. Assembly areas served by an induction loop assistive listening system will not have to provide hearing-aid compatible receivers.

Commenters were divided in their opinion of this change. The Department believes that the reduction in the required number of assistive listening systems for larger assembly areas will meet the needs of individuals with disabilities. The new requirement to provide hearing-aid compatible receivers should make assistive listening systems more usable for people who have been underserved until now.

Concerns were raised that the requirement to provide assistive listening systems may have an adverse impact on restaurants. This comment misunderstands the scope of coverage. The 2010 Standards define the term "assembly area" to include facilities used for entertainment, educational, or civic gatherings. A restaurant would fall within this category only if it is presenting programs to educate or entertain diners, and it provides an audio amplification system.

Same Management or Building. The 2010 Standards add a new exception that allows multiple assembly areas that are in the same building and under the same management, such as theaters in a multiplex cinema and lecture halls in a college building, to calculate the number of receivers required based on the total number of seats in all the assembly areas, instead of each assembly area separately, where the receivers are compatible with the assistive listening systems used in each of the assembly areas.

Mono Jacks, Sound Pressure, Etc. Section 4.33.7 of the 1991 Standards does not contain specific technical requirements for assistive listening systems. The 2010 Standards at section 706 require assistive listening systems to have standard mono jacks and will require hearing-aid compatible receivers to have neck loops to interface with telecoils in hearing aids. The 2010 Standards also specify sound pressure level, signal-to-noise ratio, and peak clipping level. Currently available assistive listening systems typically meet these technical requirements.

220 and 707 Automatic Teller Machines and Fare Machines

Section 707 of the 2010 Standards adds specific technical requirements for speech output, privacy, tactilely-discernible input controls, display screens, and Braille instructions to the general accessibility requirements set out in the 1991 Standards. Machines shall be speech enabled and exceptions are provided that cover when audible tones are permitted, when advertisements or similar information are provided, and where speech synthesis cannot be supported. The 1991 Standards require these machines to be accessible to and independently usable by persons with visual impairments, but do not contain any technical specifications.

221 Assembly Areas

Wheelchair Spaces/Companion Seats. Owners of large assembly areas have historically complained to the Department that the requirement for one percent (1%) of seating to be wheelchair seating is excessive and that wheelchair seats are not being sold. At the same time, advocates have traditionally argued that persons who use wheelchairs will increasingly participate in activities at assembly areas once they become accessible and that at least one percent (1%) of seats should be accessible.

The 1991 Standards, at sections 4.1.3(19)(a) and 4.33.3, require assembly areas to provide

wheelchair and companion seats. In assembly areas with a capacity of more than five hundred seats, accessible seating at a ratio of one percent (1%) (plus one seat) of the number of traditional fixed seats must be provided. The 2010 Standards, at section 221.2, require assembly areas with 501 to 5000 seats to provide at least six wheelchair spaces and companion seats plus one additional wheelchair space for each additional 150 seats (or fraction thereof) between 501 through 5000. In assembly areas with more than 5000 seats at least 36 wheelchair spaces and companion seats plus one additional wheelchair space for each 200 seats (or fraction thereof) more than 5000 are required. See sections 221.1 and 221.2 of the 2010 Standards.

Commenters questioned why scoping requirements for large assembly areas are being reduced. During the development of the 2004 ADAAG, industry providers, particularly those representing larger stadium-style assembly areas, supplied data to the Access Board demonstrating the current scoping requirements for large assembly areas often exceed the demand. Based on the data provided to the Access Board, the Department believes the reduced scoping requirements will adequately meet the needs of individuals with disabilities, while balancing concerns of the industry.

Commenters representing assembly areas supported the reduced scoping. One commenter asked that scoping requirements for larger assembly areas be reduced even further. Although the commenter referenced data demonstrating that wheelchair spaces in larger facilities with seating capacities of 70,000 or more may not be used by individuals with disabilities, the data was not based on actual results, but was calculated at least in part based on probability assumptions. The Department is not convinced that further reductions should be made based upon those projections and that further reductions would not substantially limit accessibility at assembly areas for persons who use wheelchairs.

Section 221.2.1.3 of the 2010 Standards clarifies that the scoping requirements for wheelchair spaces and companion seats are to be applied separately to general seating areas and to each luxury box, club box, and suite in arenas, stadiums, and grandstands. In assembly areas other than arenas, stadiums, and grandstands, the scoping requirements will not be applied separately. Thus, in performing arts facilities with tiered boxes designed for spatial and acoustical purposes, the scoping requirement is to be applied to the seats in the tiered boxes. The requisite number of wheelchair spaces and companion seats required in the tiered boxes are to be dispersed among at least twenty percent (20%) of the tiered boxes. For example, if a performing arts facility has 20 tiered boxes with 10 fixed seats in each box, for a total of 200 seats, at least five wheelchair spaces and companion seats must be provided in the boxes, and they must be dispersed among at least four of the 20 boxes.

Commenters raised concerns that the 2010 Standards should clarify requirements for scoping of seating areas and that requiring accessible seating in each luxury box, club box, and suite in arenas, stadiums and grandstands could result in no wheelchair and companion spaces available for individuals with disabilities in the general seating area(s). These comments appear to misunderstand the requirements. The 2010 Standards require each luxury box, club box, and suite in an arena, stadium or grandstand to be accessible and to contain wheelchair spaces and companion seats as required by sections 221.2.1.1, 221.2.1.2 and 221.3. In addition, the remaining seating areas not located in boxes must also contain the number of wheelchair and companion seating locations specified in the 2010 Standards based on the total number of seats in the entire facility excluding luxury boxes, club boxes and suites.

Wheelchair Space Overlap in Assembly Areas. Section 4.33.3 of the 1991 Standards and the 2010 Standards, at sections 402, 403.5.1, 802.1.4, and 802.1.5, require walkways that are part of an accessible route to have a 36-inch minimum clear width. Section 802.1.5 of the 2010 Standards specifically prohibits accessible routes from overlapping wheelchair spaces. This change is consistent with the technical requirements for accessible routes, since the clear width of accessible routes cannot be obstructed by any object. The 2010 Standards also specifically prohibit wheelchair spaces from overlapping circulation paths. An advisory note clarifies that this prohibition applies only to the circulation path width required by applicable building codes and fire and life safety codes since the codes prohibit obstructions in the required width of assembly aisles.

Section 802.1.5 of the 2010 Standards provides that where a main circulation path is located in front of a row of seats that contains a wheelchair space and the circulation path is wider than required by applicable building codes and fire and life safety codes, the wheelchair space may overlap the "extra" circulation path width. Where a main circulation path is located behind a row of seats that contains a wheelchair space and the wheelchair space is entered from the rear, the aisle in front of the row may need to be wider in order not to block the required circulation path to the other seats in the row, or a mid-row opening may need to be provided to access the required circulation path to the other seats.

Line of Sight and Dispersion of Wheelchair Spaces in Assembly Areas. Section 4.33.3 of the 1991 Standards requires wheelchair spaces and companion seats to be an integral part of any fixed seating plan in assembly areas and to provide individuals with disabilities a choice of admission prices and lines of sight comparable to those available to other spectators. Section 4.33.3 also requires wheelchair spaces and companion seats to be dispersed in assembly areas with more than 300 seats. Under the 1991 Standards, sports facilities typically located some wheelchair spaces and companion seats on each accessible level of the facility. In 1994, the Department issued official guidance interpreting the requirement for comparable lines of sight in the 1991 Standards to mean wheelchair spaces and companion seats in sports stadia and arenas must provide patrons with disabilities and their companions with lines of sight over standing spectators to the playing field or performance area, where spectators were expected to stand during events. See "Accessible Stadiums," www.ada.gov/stadium.pdf. The Department also interpreted the section 4.33.3 comparable lines of sight requirement to mean that wheelchair spaces and companion seats in stadium-style movie theaters must provide patrons with disabilities and their companions with viewing angles comparable to those provided to other spectators.

Sections 221.2.3 and 802.2 of the 2010 Standards add specific technical requirements for providing lines of sight over seated and standing spectators and also require wheelchair spaces and companion seats (per section 221.3) to provide individuals with disabilities choices of seating locations and viewing angles that are substantially equivalent to, or better than, the choices of seating locations and viewing angles available to other spectators. This applies to all types of assembly areas, including stadium-style movie theaters, sports arenas, and concert halls. These rules are expected to have minimal impact since they are consistent with the Department's longstanding interpretation of the 1991 Standards and technical assistance.

Commenters stated that the qualitative viewing angle language contained in section 221.2.3 is not appropriate for an enforceable regulatory standard unless the terms of such language are defined. Other commenters requested definitions for viewing angles, an explanation for precisely how viewing angles are measured, and an explanation for precisely how to evaluate whether one viewing angle is better than another viewing angle. The Department is convinced that the regulatory language in the 2010 Standards is sufficient to provide a performance-based standard for designers, architects, and other professionals to design facilities that provide comparable lines of sight for wheelchair seating in assembly areas, including viewing angles. The Department believes that as a general rule, the vast variety of sizes and configurations in assembly areas requires it to establish a performance standard for designers to adapt to the specific circumstances of the venue that is being designed. The Department has implemented more explicit requirements for stadium-style movie theaters in 28 CFR 36.406(f) and 35.151(g) of the final regulations based on experience and expertise gained after several major enforcement actions.

Another commenter inquired as to what determines whether a choice of seating locations or viewing angles is better than that available to all other spectators. The answer to this question varies according to each assembly area that is being designed, but designers and venue operators understand which seats are better and that understanding routinely drives design choices made to maximize profit and successful operation of the facility, among other things. For example, an "equivalent or better" line of sight in a major league football stadium would be different than for a 350-seat lecture hall. This performance standard is based upon the underlying principle of equal opportunity for

a good viewing experience for everyone, including persons with disabilities. The Department believes that for each specific facility that is designed, the owner, operator, and design professionals will be able to distinguish easily between seating locations and the quality of the associated lines of sight from those seating locations in order to decide which ones are better than others. The wheelchair locations do not have to be exclusively among the seats with the very best lines of sight nor may they be exclusively among the seats with the worst lines of sight. Rather, wheelchair seating locations should offer a choice of viewing experiences and be located among the seats where most of the audience chooses to sit.

Section 4.33.3 of the 1991 Standards requires wheelchair spaces and companion seating to be offered at a choice of admission prices, but section 221.2.3.2 of the 2010 Standards no longer requires wheelchair spaces and companion seats to be dispersed based on admission prices. Venue owners and operators commented during the 2004 ADAAG rulemaking process that pricing is not always established at the design phase and may vary from event to event within the same facility, making it difficult to determine where to place wheelchair seats during the design and construction phase. Their concern was that a failure by the venue owner or operator to provide a choice of ticket prices for wheelchair seating as required by the 1991 Standards governing new construction could somehow unfairly subject parties involved in the design and construction to liability unknowingly.

Sections 221.2.3.2 and 221.3 of the 2010 Standards require wheelchair spaces and companion seats to be vertically dispersed at varying distances from the screen, performance area, or playing field. The 2010 Standards, at section 221.2.3.2, also require wheelchair spaces and companion seats to be located in each balcony or mezzanine served by an accessible route. The final regulations at 28 CFR 35.151(g)(1) and 36.406(f)(1) also require assembly areas to locate wheelchair spaces and companion seats at all levels of the facility that include seating and that are served by an accessible route. The Department interprets that requirement to mean that wheelchair and companion seating must be provided in a particular area even if the accessible route may not be the same route that other individuals use to reach their seats. For example, if other patrons reach their seats on the field by an inaccessible route (e.g., by stairs), but there is an accessible route that complies with section 206.3 that could be connected to seats on the field, accessible seats must be placed on the field even if that route is not generally available to the public. The 2010 Standards, at section 221.2.3.2, provide an exception for vertical dispersion in assembly areas with 300 or fewer seats if the wheelchair spaces and companion seats provide viewing angles that are equivalent to, or better than, the average viewing angle provided in the facility.

Section 221.3 of the 2010 Standards requires wheelchair spaces and companion seats to be dispersed horizontally. In addition, 28 CFR 35.151(g)(2) and 36.406(f)(2) require assembly areas that have seating around the field of play or performance area to place wheelchair spaces and companion seating all around that field of play or performance area.

Stadium-Style Movie Theaters

Pursuant to 28 CFR 35.151(g) and 36.406(f), in addition to other obligations, stadium-style movie theaters must meet horizontal and vertical dispersion requirements set forth in sections 221.2.3.1 and 221.2.3.2 of the 2010 Standards; placement of wheelchair and companion seating must be on a riser or cross-aisle in the stadium section of the theater; and placement of such seating must satisfy at least one of the following criteria: (i) It is located within the rear sixty percent (60%) of the seats provided in the auditorium; or (ii) it is located within the area of the auditorium where the vertical viewing angles are between the 40th and 100th percentile of vertical viewing angles for all seats in that theater as ranked from the first row (1st percentile) to the back row (100th percentile). The line-of-sight requirements recognize the importance to the movie-going experience of viewing angles, and the final regulations ensure that movie patrons with disabilities are provided views of the movie screen comparable to other theater patrons. Some commenters supported regulatory language that would require stadium-style theaters to meet standards of accessibility equal to those of non-stadium-style theaters, with larger theaters being required to provide accessible seating locations and viewing angles equal to those offered to individuals without disabilities.

One commenter noted that stadium-style movie theaters, sports arenas, music venues, theaters, and concert halls each pose unique conditions that require separate and specific standards to accommodate patrons with disabilities, and recommended that the Department provide more specific requirements for sports arenas, music venues, theaters, and concert halls. The Department has concluded that the 2010 Standards will provide sufficient flexibility to adapt to the wide variety of assembly venues covered.

Companion Seats. Section 4.33.3 of the 1991 Standards required at least one fixed companion seat to be provided next to each wheelchair space. The 2010 Standards at sections 221.3 and 802.3 permit companion seats to be movable. Several commenters urged the Department to ensure that companion seats are positioned in a manner that places the user at the same shoulder height as their companions using mobility devices. The Department recognizes that some facilities have created problems by locating the wheelchair space and companion seat on different floor elevations (often a difference of one riser height). Section 802.3.1 of the 2010 Standards addresses this problem by requiring the wheelchair space and the companion seat to be on the same floor elevation. This solution should prevent any vertical discrepancies that are not the direct result of differences in the sizes and configurations of wheelchairs.

Designated Aisle Seats. Section 4.1.3(19)(a) of the 1991 Standards requires one percent (1%) of fixed seats in assembly areas to be designated aisle seats with either no armrests or folding or retractable armrests on the aisle side of the seat. The 2010 Standards, at sections 221.4 and 802.4, base the number of required designated aisle seats on the total number of aisle seats, instead of on all of the seats in an assembly area as the 1991 Standards require. At least five percent (5%) of the aisle seats are required to be designated aisle seats and to be located closest to accessible routes. This option will almost always result in fewer aisle seats being designated aisle seats compared to the 1991 Standards. The Department is aware that sports facilities typically locate designated aisle seats on, or as near to, accessible routes as permitted by the configuration of the facility.

One commenter recommended that section 221.4, Designated Aisle Seats, be changed to require that aisle seats be on an accessible route, and be integrated and dispersed throughout an assembly area. Aisle seats, by their nature, typically are located within the general seating area, and integration occurs almost automatically. The issue of dispersing aisle seats or locating them on accessible routes is much more challenging. During the separate rulemaking on the 2004 ADAAG the Access Board specifically requested public comment on the question of whether aisle seats should be required to be located on accessible routes. After reviewing the comments submitted during the 2004 Access Board rulemaking, the Access Board concluded that this could not be done without making significant and costly changes in the design of most assembly areas. However, section 221.4 of the 2004 ADAAG required that designated aisle seats be the aisle seats closest to accessible routes. The Department proposed the same provision and concurs in the Access Board's conclusion and declines to implement further changes.

Team or Player Seating Areas. Section 221.2.1.4 of the 2010 Standards requires that at least one wheelchair space compliant with section 802.1 be provided in each team or player seating area serving areas of sport activity. For bowling lanes, the requirement for a wheelchair space in player seating areas is limited to lanes required to be accessible.

Lawn Seating. The 1991 Standards, at section 4.1.1(1), require all areas of newly constructed facilities to be accessible, but do not contain a specific scoping requirement for lawn seating in assembly areas. The 2010 Standards, at section 221.5, specifically require lawn seating areas and exterior overflow seating areas without fixed seats to connect to an accessible route.

Aisle Stairs and Ramps in Assembly Areas. Sections 4.1.3 and 4.1.3(4) of the 1991 Standards require that interior and exterior stairs connecting levels that are not connected by an elevator, ramp, or other accessible means of vertical access must comply with the technical requirements for stairs set out in section 4.9 of the 1991 Standards. Section 210.1 of the 2010 Standards requires that stairs that are part of a means of egress shall comply with section 504's technical requirements for stairs. The 1991 Standards do not contain any exceptions for aisle stairs in assembly areas. Section 210.1, Exception 3 of the 2010 Standards adds a new exception that exempts

aisle stairs in assembly areas from section 504's technical requirements for stairs, including section 505's technical requirements for handrails.

Section 4.8.5 of the 1991 Standards exempts aisle ramps that are part of an accessible route from providing handrails on the side adjacent to seating. The 2010 Standards, at section 405.1, exempt aisle ramps adjacent to seating in assembly areas and not serving elements required to be on an accessible route, from complying with all of section 405's technical requirements for ramps. Where aisle ramps in assembly areas serve elements required to be on an accessible route, the 2010 Standards require that the aisle ramps comply with section 405's technical requirements for ramps. Sections 505.2 and 505.3 of the 2010 Standards provide exceptions for aisle ramp handrails. Section 505.2 states that in assembly areas, a handrail may be provided at either side or within the aisle width when handrails are not provided on both sides of aisle ramps. Section 505.3 states that, in assembly areas, handrails need not be continuous in aisles serving seating.

222 and 803 Dressing, Fitting, and Locker Rooms

Dressing rooms, fitting rooms, and locker rooms are required to comply with the accessibility requirements of sections 222 and 803 of the 2010 Standards. Where these types of rooms are provided in clusters, five percent (5%) but at least one room in each cluster must comply. Some commenters stated that clothing and retail stores would have to expand and reconfigure accessible dressing, fitting and locker rooms to meet the changed provision for clear floor space alongside the end of the bench. Commenters explained that meeting the new requirement would result in a loss of sales and inventory space. Other commenters also expressed opposition to the changed requirement in locker rooms for similar reasons.

The Department reminds the commenters that the requirements in the 2010 Standards for the clear floor space to be beside the short axis of the bench in an accessible dressing, fitting, or locker room apply only to new construction and alterations. The requirements for alterations in the 2010 Standards at section 202.3 do not include the requirement from the 1991 Standards at section 4.1.6(1)(c) that if alterations to single elements, when considered together, amount to an alteration of a room or space in a building or facility, the entire space shall be made accessible. Therefore, under the 2010 Standards, the alteration requirements only apply to specific elements or spaces that are being altered. So providing the clear floor space at the end of the bench as required by the 2010 Standards instead of in front of the bench as is allowed by the 1991 Standards would only be required when the bench in the accessible dressing room is altered or when the entire dressing room area is altered.

224 and 806 Transient Lodging Guest Rooms

Scoping. The minimum number of guest rooms required to be accessible in transient lodging facilities is covered by section 224 of the 2010 Standards. Scoping requirements for guest rooms with mobility features and guest rooms with communication features are addressed at section 224.2 and section 224.4, respectively. Under the 1991 Standards all newly constructed guest rooms with mobility features must provide communication features. Under the 2010 Standards, in section 224.5, at least one guest room with mobility features must also provide communication features. Additionally, not more than ten percent (10%) of the guest rooms required to provide mobility features and also equipped with communication features can be used to satisfy the minimum number of guest rooms required to provide communication features.

Some commenters opposed requirements for guest rooms accessible to individuals with mobility disabilities stating that statistics provided by the industry demonstrate that all types of accessible guest rooms are unused. They further claimed that the requirements of the 2010 Standards are too burdensome to meet in new construction, and that the requirements will result in a loss of living space in places of transient lodging. Other commenters urged the Department to increase the number of guest rooms required to be accessible. The number of guest rooms accessible to individuals with mobility disabilities and the number accessible to persons who are deaf or who are hard of hearing in the 2010 Standards are consistent with the 1991 Standards and with the IBC. The Department continues to receive complaints about the lack of accessible guest rooms throughout the country. Accessible guest rooms are used not only by individuals using mobility devices such as wheelchairs and scooters, but also by individuals with other mobility disabilities including persons who use walkers, crutches, or canes.

Data provided by the Disability Statistics Center at the University of California, San Francisco demonstrated that the number of adults who use wheelchairs has been increasing at the rate of six percent (6%) per year from 1969 to 1999; and by 2010, it was projected that two percent (2%) of the adult population would use wheelchairs. In addition to persons who use wheelchairs, three percent (3%) of adults used crutches, canes, walkers, and other mobility devices in 1999; and the number was projected to increase to four percent (4%) by 2010. Thus, in 2010, up to six percent (6%) of the population may need accessible guest rooms.

Dispersion. The 2010 Standards, in section 224.5, set scoping requirements for dispersion in facilities covered by the transient lodging provisions. This section covers guest rooms with mobility features and guest rooms with communication features and applies in new construction and alterations. The primary requirement is to provide choices of types of guest rooms, number of beds, and other amenities comparable to the choices provided to other guests. An advisory in section 224.5 provides guidance that "factors to be considered in providing an equivalent range of options may include, but are not limited to, room size, bed size, cost, view, bathroom fixtures such as hot tubs and spas, smoking and nonsmoking, and the number of rooms provided."

Commenters asked the Department to clarify what is meant by various terms used in section 224.5 such as "classes," "types," "options," and "amenities." Other commenters asked the Department to clarify and simplify the dispersion requirements set forth in section 224.5 of the 2010 Standards, in particular the scope of the term "amenities." One commenter expressed concern that views, if considered an amenity, would further complicate room categories and force owners and operators to make an educated guess. Other commenters stated that views should only be a dispersion criteria if view is a factor for pricing room rates.

These terms are not to be considered terms of art, but should be used as in their normal course. For example, "class" is defined by Webster's Dictionary as "a division by quality." "Type" is defined as "a group of * * * things that share common traits or characteristics distinguishing them as an identifiable group or class." Accordingly, these terms are not intended to convey different concepts, but are used as synonyms. In the 2010 Standards, section 224.5 and its advisory require dispersion in such a varied range of hotels and lodging facilities that the Department believes that the chosen terms are appropriate to convey what is intended. Dispersion required by this section is not "one size fits all" and it is imperative that each covered entity consider its individual circumstance as it applies this requirement. For example, a facility would consider view as an amenity if some rooms faced mountains, a beach, a lake, or other scenery that was considered to be a premium. A facility where view was not marketed or requested by guests would not factor the view as an amenity for purposes of meeting the dispersion requirement.

Section 224.5 of the 2010 Standards requires that guest rooms with mobility features and guest rooms with communication features "shall be dispersed among the various classes of guest rooms, and shall provide choices of types of guest rooms, number of beds, and other amenities comparable to the choices provided to other guests. When the minimum number of guest rooms required is not sufficient to allow for complete dispersion, guest rooms shall be dispersed in the following priority: guest room type, number of beds and amenities."

This general dispersion requirement is intended to effectuate Congress' directive that a percentage of each class of hotel rooms is to be fully accessible to persons with disabilities. See H.R. Rep. No. 101–485 (II) at 391. Accordingly, the promise of the ADA in this instance is that persons with disabilities will have an equal opportunity to benefit from the various options available to hotel guests without disabilities, from single occupancy guest rooms with limited features (and accompanying limited price tags) to luxury suites with lavish features and choices. The inclusion of section 224.5 of the 2010 Standards is not new. Substantially similar language is contained in section 9.1.4 of the 1991 Standards.

Commenters raised concerns that the factors included in the advisory to section 224.5 of the 2010 Standards have been expanded. The advisory provides: "[f]actors to be considered in providing an equivalent

range of options may include, but are not limited to, room size, bed size, cost, view, bathroom fixtures such as hot tubs and spas, smoking and nonsmoking, and the number of rooms provided."

As previously discussed, the advisory materials provided in the 2010 Standards are meant to be illustrative and do not set out specific requirements. In this particular instance, the advisory materials for section 224.5 set out some of the common types of amenities found at transient lodging facilities, and include common sense concepts such as view, bathroom fixtures, and smoking status. The intention of these factors is to indicate to the hospitality industry the sorts of considerations that the Department, in its enforcement efforts since the enactment of the ADA, has considered as amenities that should be made available to persons with disabilities, just as they are made available to guests without disabilities.

Commenters offered several suggestions for addressing dispersion. One option included the flexibility to use an equivalent facilitation option similar to that provided in section 9.1.4(2) of the 1991 Standards.

The 2010 Standards eliminated all specific references to equivalent facilitation. Since Congress made it clear that each class of hotel room is to be available to individuals with disabilities, the Department declines to adopt such a specific limitation in favor of the specific requirement for new construction and alterations found in section 224.5 of the 2010 Standards.

In considering the comments of the hospitality industry from the ANPRM and the Department's enforcement efforts in this area, the Department sought comment in the NPRM on whether the dispersion requirements should be applied proportionally, or whether the requirements of section 224.5 of the 2010 Standards would be complied with if access to at least one guest room of each type were to be provided.

One commenter expressed concern about requiring different guest room types to be proportionally represented in the accessible guest room pool as opposed to just having each type represented. Some commenters also expressed concern about accessible guest rooms created in pre-1993 facilities and they requested that such accessible guest rooms be safe harbored just as they are safe harbored under the 1991 Standards. In addition, one commenter requested that the proposed dispersion requirements in section 224.5 of the 2010 Standards not be applied to pre-1993 facilities even when they are altered. Some commenters also offered a suggestion for limitations to the dispersion requirements as an alternative to safe harboring pre-1993 facilities. The suggestion included: (1) Guest rooms' interior or exterior footprints may remain unchanged in order to meet the dispersion requirements; (2) Dispersion should only be required among the types of rooms affected by an alteration; and (3) Subject to (1) and (2) above and technical feasibility, a facility would need to provide only one guest room in each guest room type such as single, double and suites. One commenter requested an exception to the dispersion criteria that applies to both existing and new multi-story timeshare facilities. This requested exception waives dispersion based on views to the extent that up to eight units may be vertically stacked in a single location.

Section 224.1.1 of the 2010 Standards sets scoping requirements for alterations to transient lodging guest rooms. The advisory to section 224.1.1 further explains that compliance with 224.5 is more likely to be achieved if all of the accessible guest rooms are not provided in the same area of the facility, when accessible guest rooms are added as a result of subsequent alterations.

Some commenters requested a specific exemption for small hotels of 300 or fewer guest rooms from dispersion regarding smoking rooms. The ADA requires that individuals with disabilities be provided with the same range of options as persons without disabilities, and, therefore, the Department declines to add such an exemption. It is noted, however, that the existence of this language in the advisory does not require a place of transient lodging that does not offer smoking guest rooms at its facility to do so only for individuals with disabilities.

Guest Rooms with Mobility Features. Scoping provisions for guest rooms with mobility features are provided in section 224.2 of the 2010 Standards. Scoping requirements for alterations are included in 224.1.1. These scoping requirements in the 2010 Standards are consistent with the 1991 Standards.

One commenter expressed opposition to the new scoping provisions for altered guest rooms, which, according to the commenter, require greater numbers of accessible guest rooms with mobility features.

Section 224.1.1 of the 2010 Standards provides scoping requirements for alterations to guest rooms in existing facilities. Section 224.1.1 modifies the scoping requirements for new construction in section 224 by limiting the application of section 224 requirements only to those guest rooms being altered or added until the number of such accessible guest rooms complies with the minimum number required for new construction in section 224.2 of the 2010 Standards. The minimum required number of accessible guest rooms is based on the total number of guest rooms altered or added instead of the total number of guest rooms provided. These requirements are consistent with the requirements in the 1991 Standards. Language in the 2010 Standards clarifies the provision of section 104.2 of the 2010 Standards which requires rounding up values to the next whole number for calculations of percentages in scoping.

Guest Rooms with Communication Features. The revisions at section 224.4 of the 2010 Standards effect no substantive change from the 1991 Standards with respect to the number of guest rooms required to provide communication features. The scoping requirement is consolidated into a single table, instead of appearing in three sections as in the 1991 Standards. The revised provisions also limit the overlap between guest rooms required to provide mobility features and guest rooms required to provide communication features. Section 224.5 of the 2010 Standards requires that at least one guest room providing mobility features must also provide communications features. At least one, but not more than ten percent (10%), of the guest rooms required to provide mobility features can also satisfy the minimum number of guest rooms required to provide communication features.

Commenters suggested that the requirements for scoping and dispersion of guest rooms for persons with mobility impairments and guest rooms with communication features are too complex for the industry to effectively implement.

The Department believes the requirements for guest rooms with communications features in the 2010 Standards clarify the requirements necessary to provide equal opportunity for travelers with disabilities. Additional technical assistance will be made available to address questions before the rule goes into effect.

Visible Alarms in Guest Rooms with Communication Features. The 1991 Standards at sections 9.3.1 and 4.28.4 require transient lodging guest rooms with communication features to provide either permanently installed visible alarms that are connected to the building fire alarm system or portable visible alarms that are connected to a standard 110-volt electrical outlet and are both activated by the building fire alarm system and provide a visible alarm when the single station smoke detector is activated. Section 215.4 of the 2010 Standards no longer includes the portable visible alarm option and instead requires that transient lodging guest rooms with communication features be equipped with a fire alarm system which includes permanently installed audible and visible alarms in accordance with NFPA 72 National Fire Alarm Code (1999 or 2002 edition). Such guest rooms with communication features are also required by section 806.3.2 of the 2010 Standards to be equipped with visible notification devices that alert room occupants of incoming telephone calls and a door knock or bell.

The 2010 Standards add a new exception for alterations to existing facilities that exempts existing fire alarm systems from providing visible alarms, unless the fire alarm system itself is upgraded or replaced, or a new fire alarm system is installed. Transient lodging facilities that alter guest rooms are not required to provide permanently installed visible alarms complying with the NFPA 72 if the existing fire alarm system has not been upgraded or replaced, or a new fire alarm system has not been installed.

Commenters representing small providers of transient lodging raised concerns about the proposed changes to prohibit the use of portable visible alarms used in transient lodging guest rooms. These commenters recommended retaining requirements that allow the use of portable visible alarms.

Persons who are deaf or hard of hearing have reported that portable visible alarms used in transient lodging guest rooms are deficient because the alarms are not activated by the building fire alarm system, and the alarms do not work when the building power source goes out in emergencies. The 2010 Standards are consistent with the model

building, fire, and life safety codes as applied to newly constructed transient lodging facilities. One commenter sought confirmation of its understanding of visible alarm requirements from the Department. This commenter interpreted the exception to section 215.1 of the 2010 Standards and the Department's commentary to the NPRM to mean that if a transient lodging facility does not have permanently installed visible alarms in its communication accessible guest rooms, it will not be required to provide such alarms until such time that its fire alarm system is upgraded or replaced, or a new fire alarm system is installed. In addition, this commenter also understood that, if a hotel already has permanently installed visible alarms in all of its mobility accessible guest rooms, it would not have to relocate such visible alarms and other communication features in those rooms to other guest rooms to comply with the ten percent (10%) overlap requirement until the alarm system is upgraded or replaced.

This commenter's interpretation and understanding are consistent with the Department's position in this matter. Section 215.4 of the 2010 Standards requires that guest rooms required to have communication features be equipped with a fire alarm system complying with section 702. Communication accessible guest rooms are required to have all of the communication features described in section 806.3 of the 2010 Standards including a fire alarm system which provides both audible and visible alarms. The exception to section 215.1 of the 2010 Standards, which applies only to fire alarm requirements for guest rooms with communication features in existing facilities, exempts the visible alarm requirement until such time as the existing fire alarm system is upgraded or replaced, or a new fire alarm system is installed. If guest rooms in existing facilities are altered and they are required by section 224 of the 2010 Standards to have communication features, such guest rooms are required by section 806.3 to have all other communication features including notification devices.

Vanity Counter Space. Section 806.2.4.1 of the 2010 Standards requires that if vanity countertop space is provided in inaccessible transient lodging guest bathrooms, comparable vanity space must be provided in accessible transient lodging guest bathrooms.

A commenter questioned whether in existing facilities vanity countertop space may be provided through the addition of a shelf. Another commenter found the term "comparable" vague and expressed concern about confusion the new requirement would cause. This commenter suggested that the phrase "equal area in square inches" be used instead of comparable vanity space.

In some circumstances, the addition of a shelf in an existing facility may be a reasonable way to provide a space for travelers with disabilities to use their toiletries and other personal items. However, this is a determination that must be made on a case-by-case basis. Comparable vanity countertop space need not be one continuous surface and need not be exactly the same size as the countertops in comparable guest bathrooms. For example, accessible shelving within reach of the lavatory could be stacked to provide usable surfaces for toiletries and other personal items.

Shower and Sauna Doors in Transient Lodging Facilities. Section 9.4 of the 1991 Standards and section 206.5.3 of the 2010 Standards both require passage doors in transient lodging guest rooms that do not provide mobility features to provide at least 32 inches of clear width. Congress directed this requirement to be included so that individuals with disabilities could visit guests in other rooms. See H. Rept. 101–485, pt. 2, at 118 (1990); S. Rept. 101–116, at 70 (1989). Section 224.1.2 of the 2010 Standards adds a new exception to clarify that shower and sauna doors in such inaccessible guest rooms are exempt from the requirement for passage doors to provide at least 32 inches of clear width. Two commenters requested that saunas and steam rooms in existing facilities be exempt from the section 224.1.2 requirement and that the requirement be made applicable to new construction only.

The exemption to the section 224.1.2 requirement for a 32-inch wide clearance at doors to shower and saunas applies only to those showers and saunas in guest rooms which are not required to have mobility features. Showers and saunas in other locations, including those in common use areas and guest rooms with mobility features, are required to comply with the 32-inch clear width standard as well as other applicable accessibility standards. Saunas come in a variety of types: portable, pre-built, pre-cut, and custom-made. All saunas except for custom-made saunas are made to manufacturers' standard dimensions. The Department is aware that creating the required 32-inch clearance at existing narrower doorways may not always be technically feasible. However, the Department believes that owners and operators will have an opportunity to provide the required doorway clearance, unless doing so is technically infeasible, when an alteration to an existing sauna is undertaken. Therefore, the Department has retained these requirements.

Platform Lifts in Transient Lodging Guest Rooms and Dwelling Units. The 1991 Standards, at section 4.1.3(5), exception 4, and the 2010 Standards, at sections 206.7 and 206.7.6, both limit the locations where platform lifts are permitted to be used as part of an accessible route. The 2010 Standards add a new scoping requirement that permits platform lifts to be used to connect levels within transient lodging guest rooms and dwelling units with mobility features.

806 Transient Lodging Guest Rooms

In the NPRM, the Department included floor plans showing examples of accessible guest rooms and bathrooms designs with mobility features to illustrate how compliance with the 2010 Standards could be accomplished with little or no additional space compared to designs that comply with the 1991 Standards.

Commenters noted that the Department's plans showing accessible transient lodging guest rooms compliant with the 2010 Standards were not common in the transient lodging industry and also noted that the plans omitted doors at sleeping room closets.

The Department agrees that the configuration of the accessible bathrooms is somewhat different from past designs used by the industry, but this was done to meet the requirements of the 2010 Standards. The plans were provided to show that, with some redesign, the 2010 Standards do not normally increase the square footage of an accessible sleeping room or bathroom with mobility features in new construction. The Department has also modified several accessible guest room plans to show that doors can be installed on closets and comply with the 2010 Standards.

A commenter stated that the Department's drawings suggest that the fan coil units for heat and air conditioning are overhead, while the typical sleeping room usually has a vertical unit, or a packaged terminal air conditioning unit within the room. The Department's drawings are sample plans, showing the layout of the space, relationship of elements to each other, and required clear floor and turning spaces. It was not the intent of the Department to provide precise locations for all elements, including heating and air conditioning units.

Commenters noted that in guest rooms with two beds, each bed was positioned close to a wall, reducing access on one side. Another commenter stated that additional housekeeping time is needed to clean the room when beds are placed closer to walls. The 2010 Standards require that, when two beds are provided, there must be at least 36 inches of clear space between the beds. The plans provided in the NPRM showed two bed arrangements with adequate clear width complying with the 1991 Standards and the 2010 Standards. Additional space can be provided on the other side of the beds to facilitate housekeeping as long as the clear floor space between beds is at least 36 inches wide.

Commenters stated that chases in sleeping room bathrooms that route plumbing and other utilities can present challenges when modifying existing facilities. In multi-story facilities, relocating or re-routing these elements may not be possible, limiting options for providing access. The Department recognizes that relocating mechanical chases in multi-story facilities may be difficult or impossible to accomplish. While these issues do not exist in new facilities, altered existing facilities must comply with the 2010 Standards to the extent that it is technically feasible to do so. When an alteration cannot fully comply because it is technically infeasible to do so, the alteration must still be designed to comply to the greatest extent feasible.

Commenters noted that on some of the Department's plans where a vanity is located adjacent to a bathtub, the vanity may require more maintenance due to exposure to water. The Department agrees that it would be advisable that items placed next to a bathtub or shower be made of materials that are not susceptible to water damage.

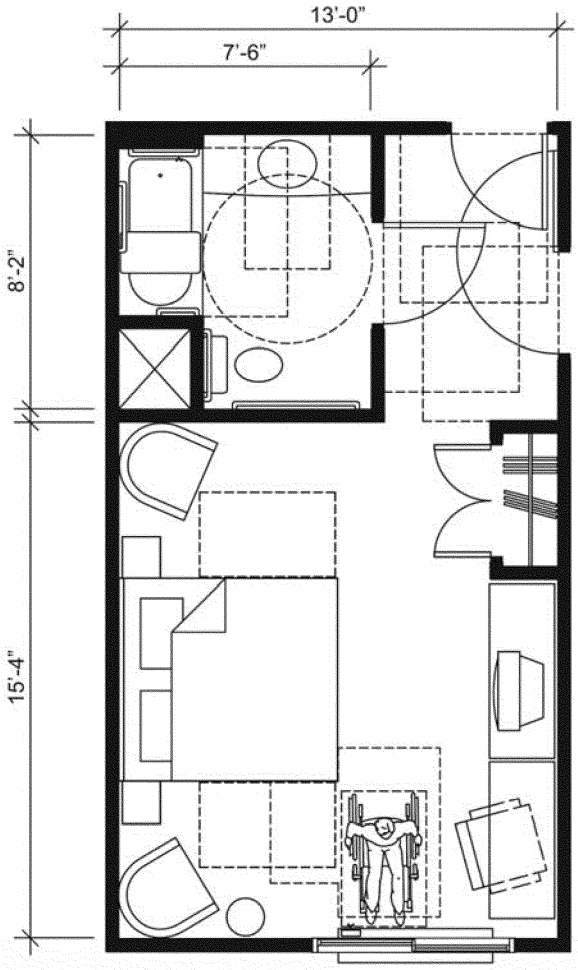
Transient Lodging Guest Room Floor Plans and Related Text. The Department has included the following floor plans showing application of the requirements of the 2010 Standards without significant loss of guest

room living space in transient lodging compared to the 1991 Standards.

BILLING CODE 4410–13–P

Plan 1A: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a standard bathtub with a seat, comparable vanity, clothes closet with swinging doors, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

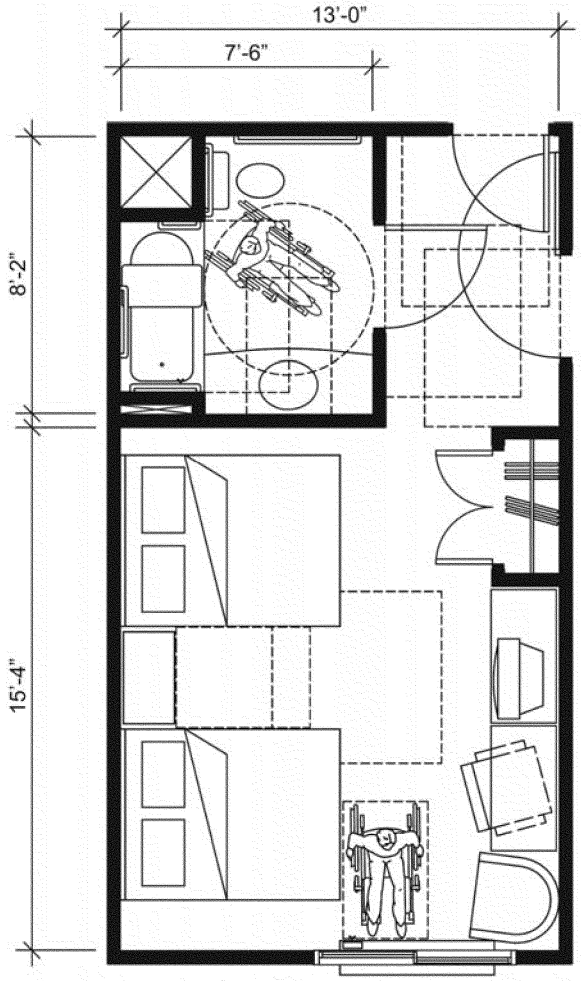
- Comparable vanity counter top space (section 806);
- Bathtub with a lavatory at the control end (section 607.2);
- Removable bathtub seat (section 607.3);
- Clearance in front of the bathtub extends its full length and is 30 inches wide min. (section 607.2);
- Recessed bathtub location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 1B: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a standard bathtub with a seat, comparable vanity, clothes closet with swinging doors, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

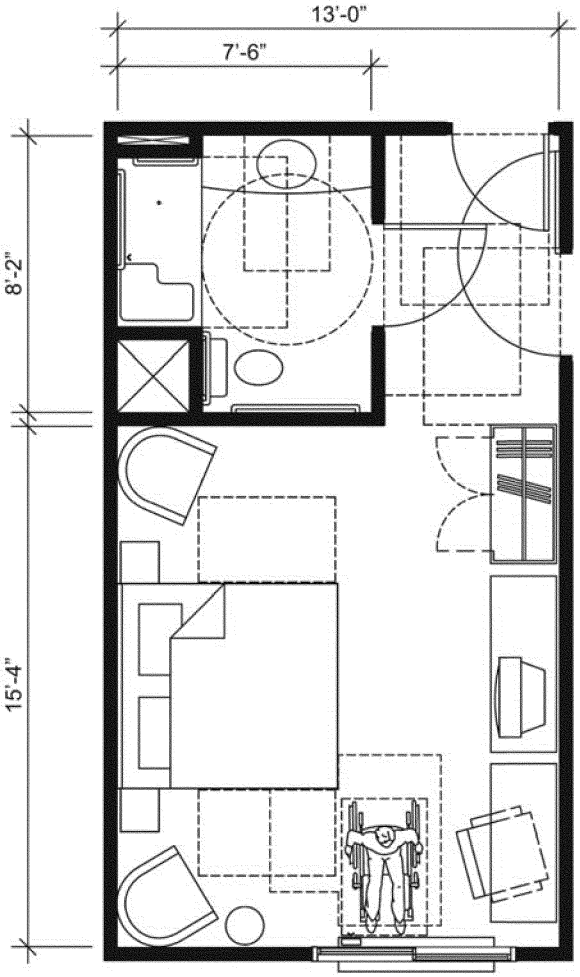
- Comparable vanity counter top space (section 806);
- Bathtub with a lavatory at the control end (section 607.2);
- Removable bathtub seat (section 607.3);
- Clearance in front of the bathtub extends its full length and is 30 inches wide min. (section 607.2);
- Recessed bathtub location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3);

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 2A: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a standard roll-in shower with a seat, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

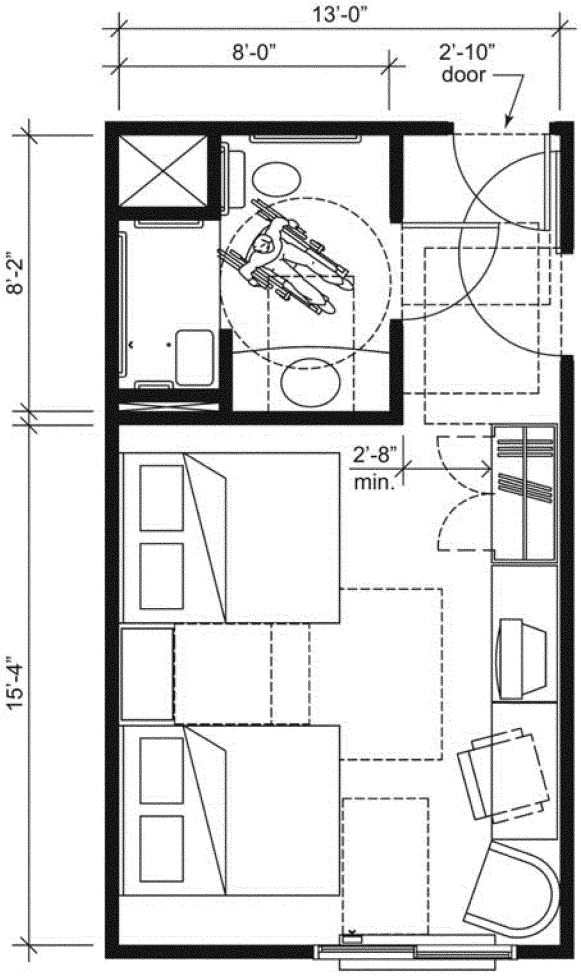
- Comparable vanity counter top space (section 806);
- Standard roll-in type shower with folding seat (section 608.2.2);
- Recessed roll-in shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Clear floor space adjacent to shower min. 30 inches wide by 60 inches long (section 608.2.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 2B: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include an alternate roll-in shower with a seat, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

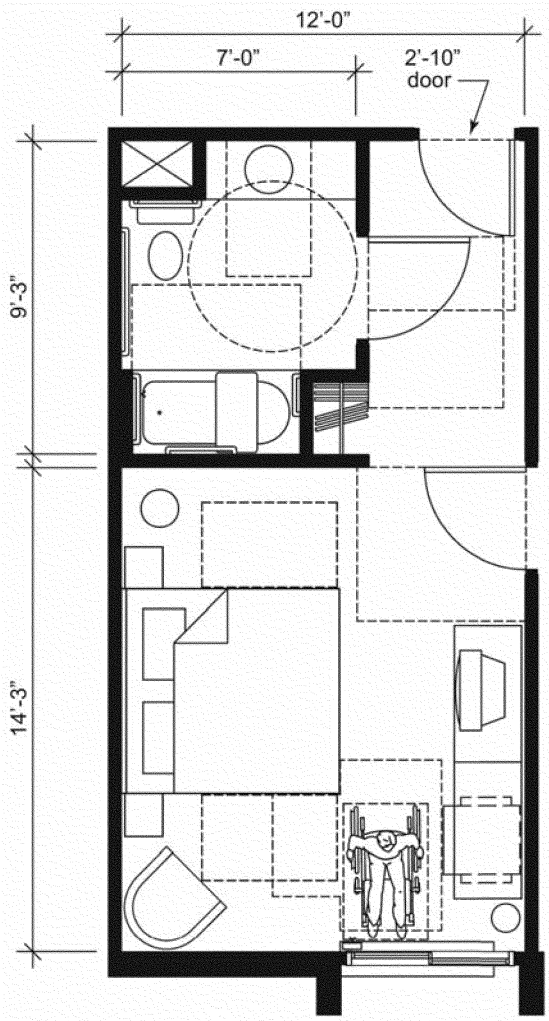
- Comparable vanity counter top space (section 806);
- Alternate roll-in type shower with folding seat is 36 inches deep and 60 inches wide (section 608.2.3);
- Alternate roll-in shower has a 36-inch wide entry at one end of the long side of the compartment (section 608.2.3);
- Recessed alternate roll-in shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 3A: 12-Foot Wide Accessible Guest Room

This drawing shows an accessible 12-foot wide guest room with features that comply with the 2010 Standards. Features include a bathtub with a seat, comparable vanity, open clothes closet, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

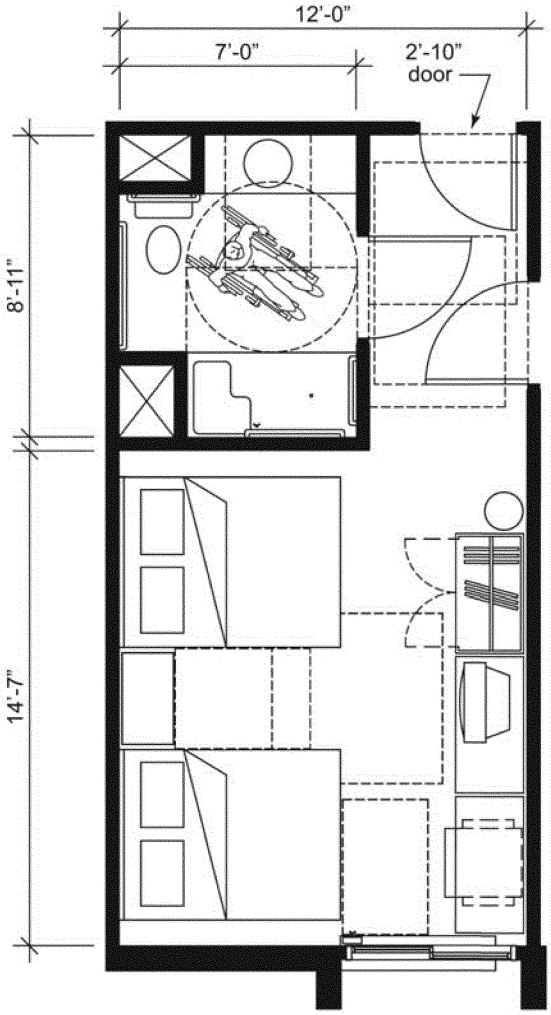
- Comparable vanity counter top space (section 806);
- Bathtub (section 607.2);
- Removable bathtub seat (section 607.3);
- Clearance in front of the bathtub extends its full length and is 30 inches wide min. (section 607.2);
- Recessed lavatory with vanity countertop permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 3B: 12-Foot Wide Accessible Guest Room

This drawing shows an accessible 12-foot wide guest room with features that comply with the 2010 Standards. Features include a standard roll-in shower with a seat, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

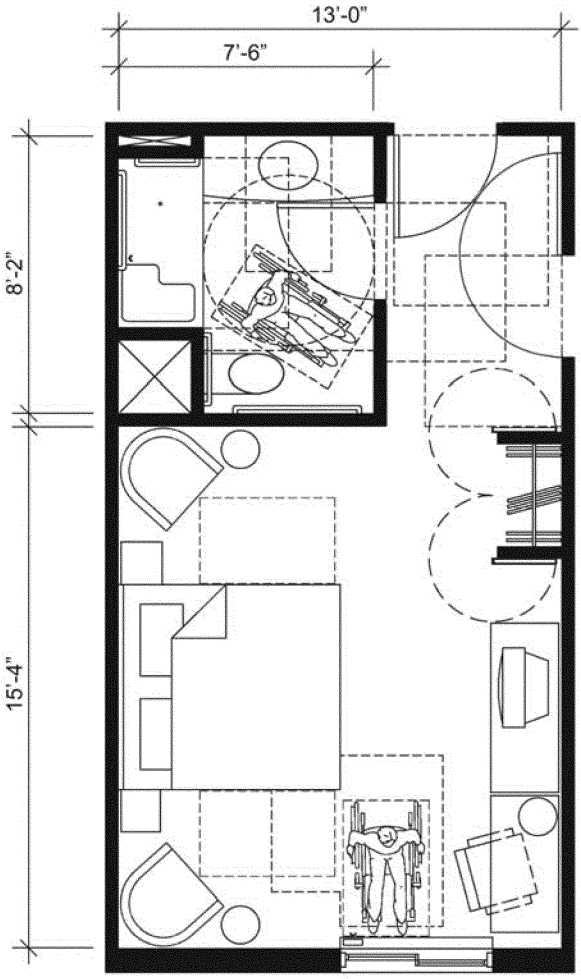
- Comparable vanity counter top space (section 806);
- Standard roll-in type shower with folding seat (section 608.2.2);
- Recessed lavatory with vanity counter top permits shorter rear grab bar at water closet (section 604.5.2);
- Clear floor space adjacent to shower min. 30 inches wide by 60 inches long (section 608.2.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 4A: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a standard roll-in shower with a seat, comparable vanity, clothes closet with swinging doors, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

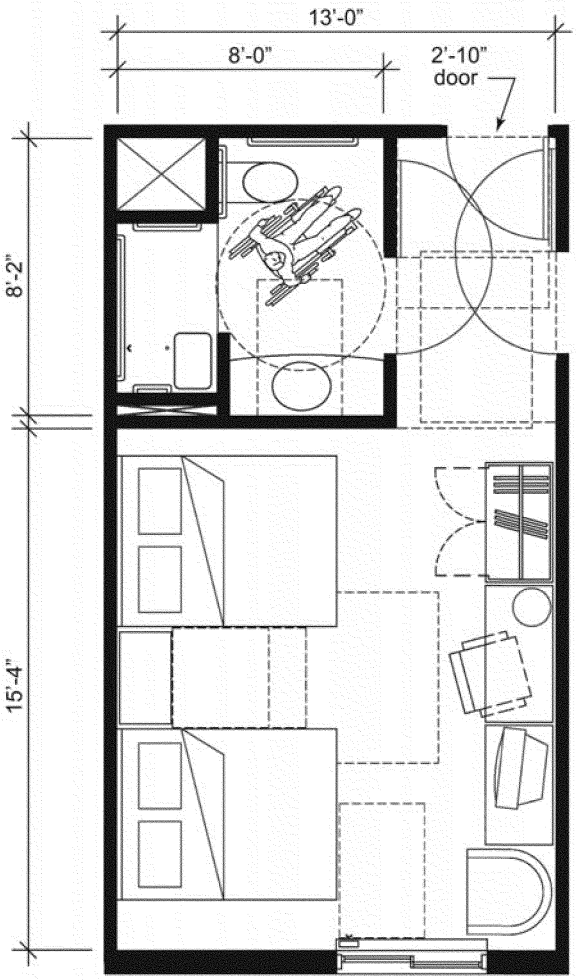
- Comparable vanity counter top space (section 806);
- Standard roll-in type shower with folding seat (section 608.2.2);
- Clear floor space adjacent to shower min. 30 inches wide by 60 inches long (section 608.2.2);
- Recessed roll-in shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).
- 30-inch wide by 48-inch long minimum clear floor space provided beyond the arc of the swing of the entry door (section 603.2.3 exception 2).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 4B: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include an alternate roll-in shower with a seat, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

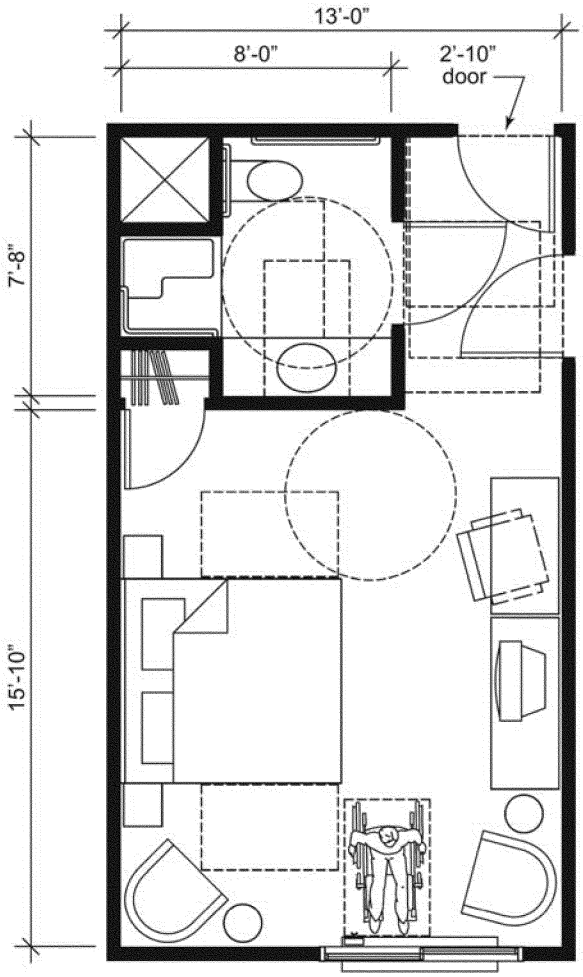
- Comparable vanity counter top space (section 806);
- Alternate roll-in type shower with folding seat is 36 inches deep and 60 inches wide (section 608.2.3);
- Alternate roll-in shower has a 36-inch wide entry at one end of the long end of the compartment (section 608.2.3);
- Recessed alternate roll-in shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 5A: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a transfer shower, comparable vanity, clothes closet with swinging door, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

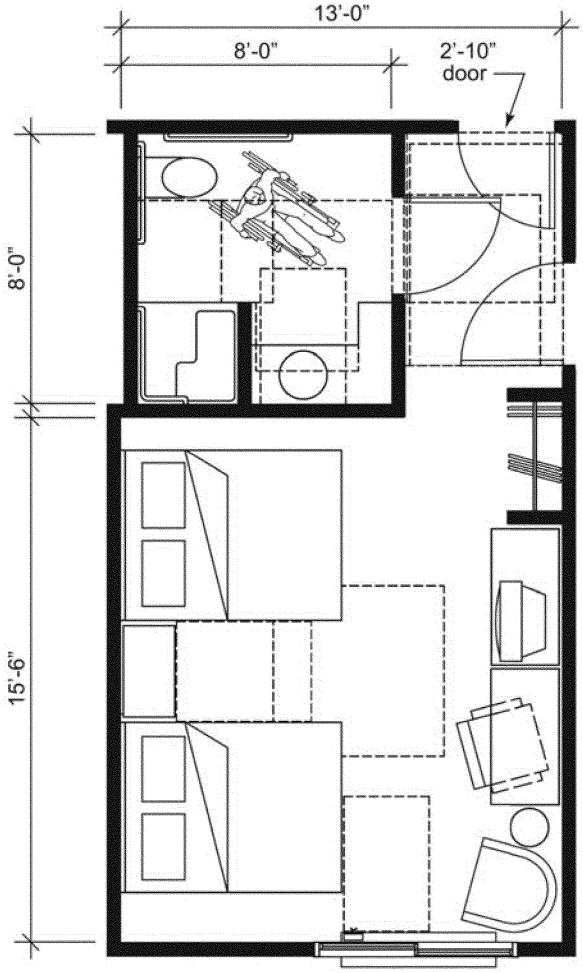
- Comparable vanity counter top space (section 806);
- Transfer shower (section 603.2);
- Shower seat (section 610.3);
- Clearance in front of the shower extends beyond the seat and is 36 inches wide min. (section 607.2);
- Recessed transfer shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- Circular turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 229); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 5B: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a transfer shower, comparable vanity, open clothes closet, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

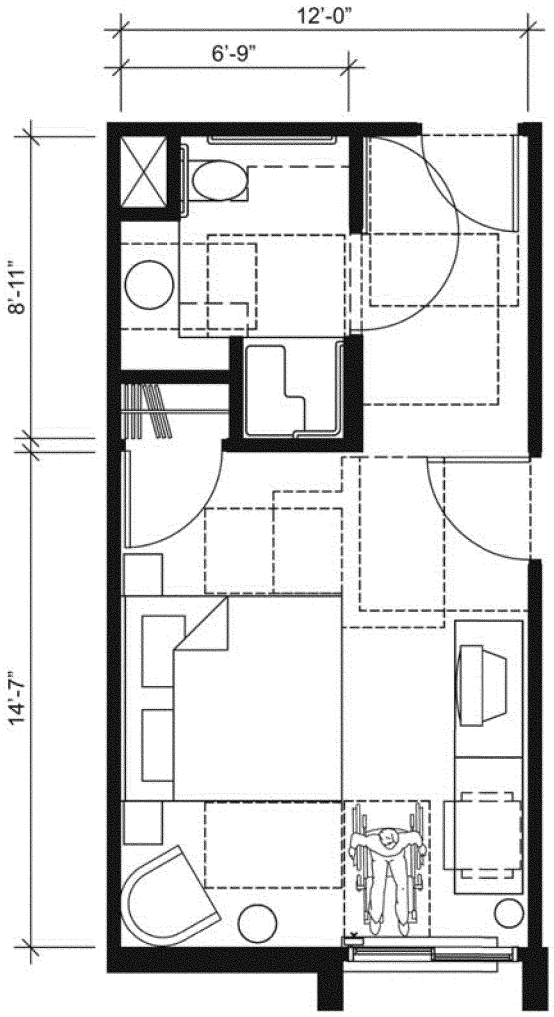
- Comparable vanity counter top space (section 806);
- Transfer shower (section 603.2);
- Shower seat (section 610.3);
- Clearance in front of the shower extends beyond the seat and is 36 inches wide min. (section 607.2);
- Lavatory with vanity counter top recessed to permit shorter rear grab bar at water closet (section 604.5.2);
- T-shaped turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 229); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 6A: 12-Foot Wide Accessible Guest Room

This drawing shows an accessible 12-foot wide guest room with features that comply with the 2010 Standards. Features include a transfer shower, water closet length (rim to rear wall) 24 inches maximum, comparable vanity, clothes closet with swinging door, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

- Comparable vanity counter top space (section 806);
- Transfer shower (section 603.2);
- Shower seat (section 610.3);
- Clearance in front of the shower extends beyond the seat and is 36 inches wide min. (section 607.2);
- Recessed lavatory with vanity counter top permits shorter rear grab bar at water closet (section 604.5.2);
- T-shaped turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 229); and
- Accessible controls for the heat and air conditioning (section 309).

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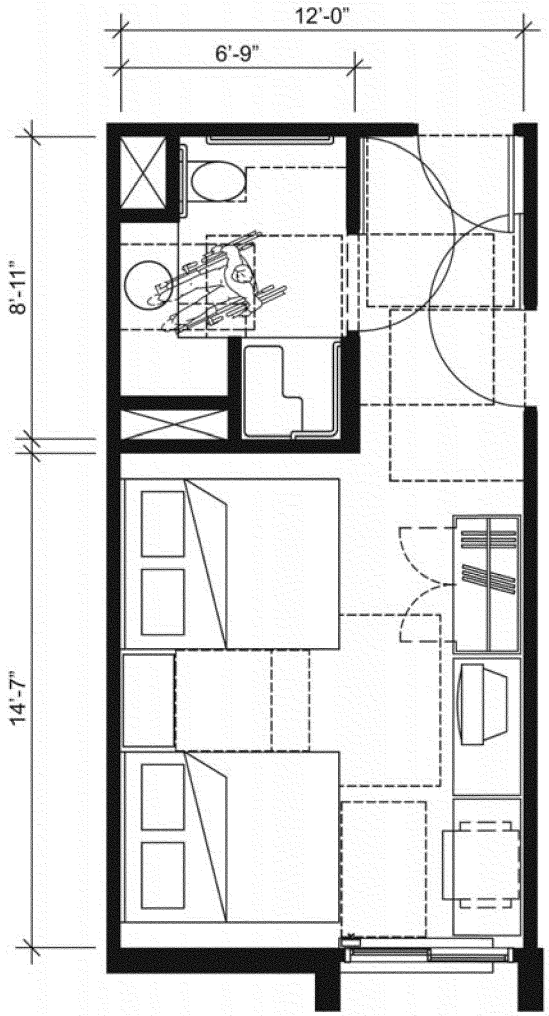
Plan 6B: 12-Foot Wide Accessible Guest Room

This drawing shows an accessible 12-foot wide guest room with features that comply with the 2010 Standards. Features include a transfer shower, water closet length (rim to rear wall) 24 inches maximum, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

- Comparable vanity counter top space (section 806);
- Transfer shower (section 603.2);
- Shower seat (section 610.3);
- Clearance in front of the shower extends beyond the seat and is 36 inches wide min. (section 607.2);
- Recessed lavatory with vanity counter top permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- Circular turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 229); and
- Accessible controls for the heat and air conditioning (section 309).

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225 and 811 Storage

Section 225 of the 2010 Standards provides that where storage is provided in accessible spaces, at least one of each type shall comply with the 2010 Standards. Self-service shelving is required to be on an accessible route, but is not required to comply with the reach range requirements. These requirements are consistent with the 1991 Standards.

Section 225.3 adds a new scoping requirement for self-storage facilities. Facilities with 200 or fewer storage spaces will be required to make at least five percent (5%) of the storage spaces accessible. Facilities with more than 200 storage spaces will be required to provide ten accessible storage spaces, plus two percent (2%) of the total storage spaces over 200.

Sections 225.2.1 and 811 of the 2010 Standards require lockers to meet accessibility requirements. Where lockers are provided in clusters, five percent (5%) but at least one locker in each cluster will have to comply. Under the 1991 Standards, only one locker of each type provided must be accessible.

Commenters recommended that the Department adopt language requiring public accommodations to provide access to all self-service shelves and display areas available to customers. Other commenters opposed this requirement as too burdensome to retail and other entities and claimed that significant revenue would be lost if this requirement were to be implemented.

Other commenters raised concerns that section 225.2.2 of the 2010 Standards scopes only self-service shelving whereas section 4.1.3(12)(b) of the 1991 Standards applies to both “shelves or display units.”

Although “display units” were not included in the 2010 Standards under the belief that displays are not to be touched and

therefore by definition cannot be "self-service," both the 2010 Standards and the 1991 Standards should be read broadly to apply to all types of shelves, racks, hooks, and similar self-service merchandising fittings, including self-service display units. Such fixtures are permitted to be installed above or below the reach ranges possible for many persons with disabilities so that space available for merchandising is used as efficiently as possible.

226 and 902 Dining Surfaces and Work Surfaces

Section 226.1 of the 2010 Standards require that where dining surfaces are provided for the consumption of food or drink, at least five percent (5%) of the seating spaces and standing spaces at the dining surfaces comply with section 902. Section 902.2 requires the provision of accessible knee and toe clearance.

Commenters stated that basing accessible seating on seating spaces and standing spaces potentially represents a significant increase in scoping, particularly given the ambiguity in what represents a "standing space" and urged a return to the 1991 Standard of requiring accessible seating based on fixed dining tables. The scoping change merely takes into account that tables may vary in size so that basing the calculation on the number of tables rather than on the number of individuals that may be accommodated by the tables could unnecessarily restrict opportunities for persons with disabilities. The revised scoping permits greater flexibility by allowing designers to disperse accessible seating and standing spaces throughout the dining area. Human factors data, which is readily available to designers, provides information about the amount of space required for both eating and drinking while seated or standing.

227 and 904 Sales and Service

Check-Out Aisles and Sales and Service Counters. The 1991 Standards, at section 7.2, and the 2010 Standards, at section 904.4, contain technical requirements for sales and service counters. The 1991 Standards generally require sales and service counters to provide an accessible portion at least 36 inches long and no higher than 36 inches above the finish floor. The nondiscrimination requirements of the ADA regulations require the level of service provided at the accessible portion of any sales and service counter to be the same as the level of service provided at the inaccessible portions of the counter.

The 2010 Standards specify different lengths for the accessible portion of sales and service counters based on the type of approach provided. Where a forward approach is provided, the accessible portion of the counter must be at least 30 inches long and no higher than 36 inches, and knee and toe space must be provided under the counter. The requirement that knee and toe space be provided where only clear floor space for a forward approach to a sales and service counter is provided is not a new requirement. It is a clarification of the ongoing requirement that part of the sales and service counter be accessible. This requirement applies to the entire accessible part of sales and service counters and requires that the accessible clear floor or ground space adjacent to those counters be kept clear of merchandise, equipment, and other items so that the accessible part of the counter is readily accessible to and usable by individuals with disabilities. The accessible part of the counter must also be staffed and provide an equivalent level of service as that provided to all customers.

Where clear floor space for a parallel approach is provided, the accessible portion of the counter must be at least 36 inches long and no higher than 36 inches above the finish floor. A clear floor or ground space that is at least 48 inches long x 30 inches wide must be provided positioned for a parallel approach adjacent to the 36-inch minimum length of counter.

Section 904.4 of the 2010 Standards includes an exception for alterations to sales and service counters in existing facilities. It permits the accessible portion of the counter to be at least 24 inches long, where providing a longer accessible counter will result in a reduction in the number of existing counters at work stations or existing mailboxes, provided that the required clear floor or ground space is centered on the accessible length of the counter.

Section 904.4 of the 2010 Standards also clarifies that the accessible portion of the counter must extend the same depth as the sales or service counter top. Where the counter is a single-height counter, this requirement applies across the entire depth of the counter top. Where the counter is a split-height counter, this requirement applies only to the customer side of the counter top. The employee-side of the counter top may be higher or lower than the customer-side of the counter top.

Commenters recommended that the Department consider a regulatory alternative exempting small retailers from the new knee and toe clearance requirement and retaining existing wheelchair accessibility standards for sales and service counters. These commenters believed that the knee and toe clearance requirements will cause a reduction in the sales and inventory space at check-out aisles and other sales and service counters.

Both the 1991 and the 2010 Standards permit covered entities to determine whether they will provide a forward or a parallel approach to sales and service counters. So any facility that does not wish to provide the knee or toe clearance required for a front approach to such a counter may avoid that option. However, the Department believes that permitting a forward approach without requiring knee and toe clearance is not adequate to provide accessibility because the person using a wheelchair will be prevented from coming close enough to the counter to see the merchandise or to transact business with a degree of convenience that is comparable to that provided to other customers.

A parallel approach to sales and service counters also can provide the accessibility required by the 2010 Standards. Individuals using wheelchairs can approach sales and service counters from the side, and, assuming the necessary elements, features, or merchandise necessary to complete a business transaction are within the reach range requirements for a side approach, the needs of individuals with disabilities can be met effectively.

Section 227 of the 2010 Standards clarifies the requirements for food service lines. Queues and waiting lines serving counters or check-out aisles, including those for food service, must be accessible to individuals with disabilities.

229 Windows

A new requirement at section 229.1 of the 2010 Standards provides that if operable windows are provided for building users, then at least one window in an accessible space must be equipped with controls that comply with section 309.

Commenters generally supported this provision but some commenters asked whether the maximum five-pounds (5 lbs.) of force requirement of section 309 applies to the window latch itself or only to the force required to open the window. Section 309 applies to all controls and operating mechanisms, so the latch must comply with the requirement to operate with no more than five pounds of force (5 lbf).

230 and 708 Two-Way Communication Systems

New provisions of the 2010 Standards at sections 230.1 and 708 require two-way communications systems to be equipped with visible as well as audible signals.

231 and 808 Judicial Facilities and Courtrooms

Section 231 of the 2010 Standards adds requirements for accessible courtrooms, holding cells, and visiting areas.

Accessible Courtroom Stations. Sections 231.2, 808, 304, 305, and 902 of the 2010 Standards provide increased accessibility at courtroom stations. Clear floor space for a forward approach is required for all courtroom stations (judges' benches, clerks' stations, bailiffs' stations, deputy clerks' stations, court reporters' stations, and litigants' and counsel stations). Other applicable specifications include accessible work surface heights and toe and knee clearance.

Accessible Jury Boxes, Attorney Areas, and Witness Stands. Section 206.2.4 of the 2010 Standards requires, in new construction and alterations, at least one accessible route to connect accessible building or facility entrances with all accessible spaces and elements within the building or facility that are connected by a circulation path unless they are exempted by Exceptions 1–7 of section 206.2.3. Advisory 206.2.4 Spaces and Elements Exception 1 explains that the exception allowing raised courtroom stations to be used by court employees, such as judge's benches, to be adaptable does not apply to areas of the courtroom likely to be used by members of the public such as jury areas, attorney areas, or witness stands. These areas must be on an accessible route at the time of initial construction or alteration.

Raised Courtroom Stations Not for Members of the Public. Section 206.2.4, Exception 1 of the 2010 Standards provides that raised courtroom stations that are used

by judges, clerks, bailiffs, and court reporters will not have to provide full vertical access when first constructed or altered if they are constructed to be easily adaptable to provide vertical accessibility.

One commenter suggested that a sufficient number of accessible benches for judges with disabilities, in addition to requiring accessible witness stands and attorney areas, be required. The Department believes that the requirements regarding raised benches for judges are easily adaptable to provide vertical access in the event a judge requires an accessible bench. Section 206.2.4 of the 2010 Standards provides that raised courtroom stations used by judges and other judicial staff do not have to provide full vertical access when first constructed or altered as long as the required clear floor space, maneuvering space, and electrical service, where appropriate, is provided at the time of new construction or can be achieved without substantial reconstruction during alterations.

A commenter asserted that there is nothing inherent in clerks' stations, jury boxes, and witness stands that require them to be raised. While it would, of course, be easiest to provide access by eliminating height differences among courtroom elements, the Department recognizes that accessibility is only one factor that must be considered in the design process of a functioning courtroom. The need to ensure the ability of the judge to maintain order, the need to ensure sight lines among the judge, the witness, the jury, and other participants, and the need to maintain the security of the participants all affect the design of the space. The Department believes that the 2010 Standards have been drafted in a way that will achieve accessibility without unduly constraining the ability of a designer to address the other considerations that are unique to courtrooms.

Commenters argued that permitting courtroom stations to be adaptable rather than fully accessible at the time of new construction likely will lead to discrimination in hiring of clerks, court reporters, and other court staff. The Department believes that the provisions will facilitate, not hinder, the hiring of court personnel who have disabilities. All courtroom work stations will be on accessible routes and will be required to have all fixed elements designed in compliance with the 2010 Standards. Elevated work stations for court employees may be designed to add vertical access as needed. Since the original design must provide the proper space and electrical wiring to install vertical access, the change should be easily accomplished.

232 Detention Facilities and Correctional Facilities

Section 232 of the 2010 Standards establishes requirements for the design and construction of cells, medical care facilities, and visiting areas in detention facilities and in correctional facilities. Section 35.151(k) of the Department's title II rule provides scoping for newly constructed general holding cells and general housing cells requiring mobility features compliant with section 807.2 of the 2010 Standards in a minimum of three percent (3%) of cells, but no fewer than one cell. Section 232.2 of the 2010 Standards provides scoping for newly constructed cells with communications features requiring a minimum of two percent (2%) of cells, but at least one cell, to have communication features.

The Department's title II rule at § 35.151(k) also specifies scoping for alterations to detention and correctional facilities. Generally a minimum of three percent (3%), but no fewer than one, of the total number of altered cells must comply with section 807.2 of the 2010 Standards and be provided within each facility. Altered cells with mobility features must be provided in each classification level, including administrative and disciplinary segregation, each use and service area, and special program. The Department notes that the three percent (3%), but no fewer than one, requirement is a minimum. As corrections systems plan for new facilities or alterations, the Department urges planners to include in their population estimates a projection of the numbers of inmates with disabilities so as to have sufficient numbers of accessible cells to meet inmate needs.

233 Residential Facilities

Homeless Shelters, Group Homes, and Similar Social Service Establishments. Section 233 of the 2010 Standards includes specific scoping and technical provisions that apply to new construction and alteration of residential facilities. In the 1991 Standards scoping and technical requirements for homeless shelters, group homes, and similar social service establishments were included in section 9 Transient Lodging. These types of facilities will be covered by section 233 of the 2010 Standards and by 28 CFR 35.151(e) and 36.406(d) and will be subject to requirements for residential facilities rather than the requirements for transient lodging. This approach will harmonize federal accessibility obligations under both the ADA and section 504 of the Rehabilitation Act of 1973, as amended. In sleeping rooms with more than 25 beds that are covered by § 36.406(d) a minimum of five percent (5%) of the beds must have clear floor space compliant with section 806.2.3 of the 2010 Standards. In large facilities with more than 50 beds, at least one roll-in shower compliant with section 608.2.2 or section 608.2.3 of the 2010 Standards must be provided. Where separate shower facilities are provided for men and for women, at least one roll-in shower must be provided for each gender.

Housing Operated By or On Behalf of Places of Education. Housing at a place of education includes: Residence halls, dormitories, suites, apartments, or other places of residence operated by or on behalf of places of education. Residence halls or dormitories operated by or on behalf of places of education are covered by the provisions in sections 224 and 806 of the 2010 Standards. The Department has included in the title III rule at § 36.406(e) requirements that apply to housing at places of education that clarify requirements for residence halls and dormitories and other types of student housing. Requirements for housing at a place of education covered by the title II rule are included at § 35.151(f).

Kitchens and Kitchenettes. Section 4.34.2 of the UFAS requires a clear turning space at least 60 inches in diameter or an equivalent T-shaped turning space in kitchens. Section 4.34.6 requires a clearance between opposing base cabinets, counters, appliances, or walls of at least 40 inches except in a U-shaped kitchen where the minimum clearance is 60 inches.

Section 804 of the 2010 Standards provides technical requirements for kitchens and kitchenettes. Section 804.2.1 requires that pass through kitchens, which have two entries and counters, appliances, or cabinets on two opposite sides or opposite a parallel wall, provide at least 40 inches minimum clearance. Section 804.2.2 requires that U-shaped kitchens, which are enclosed on three continuous sides, provide at least 60 inches minimum clearance between all opposing base cabinets, countertops, appliances, or walls within kitchen work areas. Kitchens that do not have a cooktop or conventional range are exempt from the clearance requirements but still must provide an accessible route.

If a kitchen does not have two entries, the 2010 Standards require the kitchen to have 60 inches minimum clearance between the opposing base cabinets, counters, appliances, or walls.

One commenter supported the provisions of section 804 of the 2010 Standards but sought clarification whether this section applies to residential units only, or to lodging and office buildings as well. Section 212 makes section 804 applicable to all kitchens and kitchenettes in covered buildings.

Residential Facilities. Section 4.1.4(11) of the UFAS contains scoping requirements for the new construction of housing. Under the 1991 title II regulation, state and local governments had the option of complying with the UFAS or the 1991 Standards. After the compliance date for the 2010 Standards, state and local governments will no longer have the option of complying with the UFAS, but will have to use the 2010 Standards for new construction and alterations.

Sections 233.1, 233.2, 233.3, 233.3.1, and 233.3.2 of the 2010 Standards differentiate between entities subject to the United States Department of Housing and Urban Development (HUD) regulations implementing section 504 of the Rehabilitation Act of 1973 and entities not subject to the HUD regulations. The HUD regulations apply to recipients of federal financial assistance through HUD, and require at least five percent (5%) of dwelling units in multi-family projects of five or more dwelling units to provide mobility features and at least two percent (2%) of the dwelling units to provide communication features. The HUD regulations define a project unique to its programs as "one or more residential structures which are covered by a single contract for federal financial assistance or application for assistance, or are treated as a whole for processing purposes, whether or not located on a common site." To avoid any potential conflicts with the HUD regulations, the 2010 Standards require residential dwelling units subject to the HUD regulations to comply with the scoping requirements in the HUD regulations, instead of the scoping requirements in the 2010 Standards.

For entities not subject to the HUD regulations, the 2010 Standards require at

least five percent (5%) of the dwelling units in residential facilities to provide mobility features, and at least two percent (2%) of the dwelling units to provide communication features. The 2010 Standards define facilities in terms of buildings located on a site. The 2010 Standards permit facilities that contain 15 or fewer dwelling units to apply the scoping requirements to all the dwelling units that are constructed under a single contract, or are developed as whole, whether or not located on a common site.

Alterations to Residential Facilities. Section 4.1.6 of the UFAS requires federal, state, and local government housing to comply with the general requirements for alterations to facilities. Applying the general requirements for alterations to housing can result in partially accessible dwelling units where single elements or spaces in dwelling units are altered.

The 2010 Standards, at sections 202.3 Exception 3, 202.4, and 233.3, contain specific scoping requirements for alterations to dwelling units. Dwelling units that are not required to be accessible are exempt from the general requirements for alterations to elements and spaces and for alterations to primary function areas.

The scoping requirements for alterations to dwelling units generally are based on the requirements in the UFAS:

- Where a building is vacated for purposes of alterations and has more than 15 dwelling units, at least five percent (5%) of the altered dwelling units are required to provide mobility features and at least two percent (2%) of the dwelling units are required to provide communication features.
- Where a bathroom or a kitchen is substantially altered in an individual dwelling unit and at least one other room is also altered, the dwelling unit is required to comply with the scoping requirements for new construction until the total number of dwelling units in the facility required to provide mobility features and communication features is met.

As with new construction, the 2010 Standards permit facilities that contain 15 or fewer dwelling units to apply the scoping requirements to all the dwelling units that are altered under a single contract, or are developed as a whole, whether or not located on a common site. The 2010 Standards also permit a comparable dwelling unit to provide mobility features where it is not technically feasible for the altered dwelling unit to comply with the technical requirements.

234 and 1002 Amusement Rides

New and Altered Permanently Installed Amusement Rides. Section 234 of the 2010 Standards sets out scoping requirements and section 1002 sets out the technical requirements for the accessibility of permanently installed amusement rides. These requirements apply to newly designed and constructed amusement rides and used rides when certain alterations are made.

A commenter raised concerns that smaller amusement parks tend to purchase used rides more frequently than new rides, and that the conversion of a used ride to provide the required accessibility may be difficult to ensure because of the possible complications in modifying equipment to provide accessibility.

The Department agrees with this commenter. The Department notes, however, that the 2010 Standards will require modifications to existing amusement rides when a ride's structural and operational characteristics are altered to the extent that the ride's performance differs from that specified by the manufacturer or the original design. Such an extensive alteration to an amusement ride may well require that new load and unload areas be designed and constructed. When load and unload areas serving existing amusement rides are newly designed and constructed they must be level, provide wheelchair turning space, and be on an accessible route compliant with Chapter 4 of the 2010 Standards except as modified by section 1002.2 of the 2010 Standards.

Mobile or Portable Amusement Rides. The exception in section 234.1 of the 2010 Standards exempts mobile or portable amusement rides, such as those set up for short periods of time at carnivals, fairs or festivals, from having to comply with the 2010 Standards. However, even though the mobile/portable ride itself is not subject to the Standards, these facilities are still subject to the ADA's general requirement to ensure that individuals with disabilities have an equal opportunity to enjoy the services and amenities of these facilities.

Subject to these general requirements, mobile or portable amusement rides should be located on an accessible route and the load and unload areas serving a ride should provide a level wheelchair turning space to provide equal opportunity for individuals with disabilities to be able to participate on the amusement ride to the extent feasible.

One commenter noted that the exception in Section 234.1 of the 2010 Standards for mobile or portable amusement rides limits the opportunities of persons with disabilities to participate on amusement rides because traveling or temporary amusement rides by their nature come to their customers' town or a nearby town rather than the customer having to go to them and so are less expensive than permanent amusement parks. While the Department understands the commenter's concerns, the Department notes that most amusement rides are too complex to be reasonably modified or re-engineered to accommodate the majority of individuals with disabilities and that additional complexities and safety concerns are added when the rides are mobile or portable.

A commenter asked that section 234 of the 2010 Standards make clear that the requirements for accessible routes include the routes leading up to and including the loading and unloading areas of amusement rides. Sections 206.2.9 and 1002.2 of the 2010 Standards clarify that the requirements for accessible routes include the routes leading up to and including the loading and unloading areas of amusement rides.

A commenter requested that the final rule specifically allow for wheelchair access through the exit or other routes, or alternate means of wheelchair access routes to amusement rides. The commenter stated that the concept of wheelchair access through the exit or alternate routes was a base assumption for the 2010 Standards. The commenter noted that the concept is apparent in the signage and load/unload area provisions in Section 216.12 (" * * * where accessible unload areas also serve as accessible load areas, signs indicating the location of the accessible load and unload areas shall be provided at entries to queues and waiting lines"). The Department agrees with the commenter that accessible load and unload areas may be the same where signs that comply with section 216.12 are provided.

Wheelchair Space or Transfer Seat or Transfer Device. Sections 234.3 and 1002.4–1002.6 of the 2010 Standards provide that each new and altered amusement ride, except for mobile/portable rides and a few additional excepted rides, will be required to provide at least one type of access by means of one wheelchair space or one transfer seat or one transfer device (the design of the transfer device is not specified).

Commenters urged the Department to revise the requirements for wheelchair spaces and transfer seats and devices because most amusement rides are too complex to be reasonably modified or re-engineered to accommodate the majority of individuals with disabilities. They argued that the experience of amusement rides will be significantly reduced if the proposed requirements are implemented.

The 2004 ADAAG, which the Department adopted as part of the 2010 Standards, was developed with the assistance of an advisory committee that included representation from the design staffs of major amusement venues and from persons with disabilities. The Department believes that the resulting 2004 ADAAG reflected sensitivity to the complex problems posed in adapting existing rides by focusing on new rides that can be designed from the outset to be accessible.

To permit maximum design flexibility, the 2010 Standards permit designers to determine whether it is more appropriate to permit individuals who use wheelchairs to remain in their chairs on the ride, or to provide for transfer access.

Maneuvering Space in Load and Unload Areas. Sections 234.2 and 1002.3 of the 2010 Standards require that a level wheelchair turning space be provided at the load and unload areas of each amusement ride. The turning space must comply with sections 304.2 and 304.3.

Signs Required at Waiting Lines to Amusement Rides. Section 216.12 of the 2010 Standards requires signs at entries to queues and waiting lines identifying type and location of access for the amusement ride.

235 and 1003 Recreational Boating Facilities

These sections require that accessible boat slips and boarding piers be provided. Most commenters approved of the requirements for recreational boating facility accessibility and urged the Department to keep regulatory language consistent with those provisions. They commented that the requirements appropriately reflect industry conditions. Individual commenters and disability organizations agreed that the 2010 Standards

achieve acceptable goals for recreational boating facility access.

Accessible Route. Sections 206.2.10 and 1003.2 of the 2010 Standards require an accessible route to all accessible boating facilities, including boat slips and boarding piers at boat launch ramps. Section 1003.2.1 provides a list of exceptions applicable to structures such as gangways, transition plates, floating piers, and structures containing combinations of these elements that are affected by water level changes. The list of exceptions specifies alternate design requirements applicable to these structures which, because of water level variables, cannot comply with the slope, cross slope, and handrail requirements for fixed ramps contained in sections 403.3, 405.2, 405.3, 405.6, and 405.7 of the 2010 Standards. Exceptions 3 and 4 in Section 1003.2.1, which permit a slope greater than that specified in Section 405.2, are available for structures that meet specified length requirements. Section 206.7.10 permits the use of platform lifts as an alternative to gangways that are part of accessible routes.

Commenters raised concerns that because of water level fluctuations it may be difficult to provide accessible routes to all accessible boating facilities, including boat slips and boarding piers at boat launch ramps. One of the specific concerns expressed by several commenters relates to the limits for running slope permitted on gangways that are part of an accessible route as gangways may periodically have a steeper slope than is permitted for a fixed ramp. The exceptions contained in section 1003.2 of the 2010 Standards modify the requirements of Chapter 4. For example, where the total length of a gangway or series of gangways serving as an accessible route is 80 feet or more an exception permits the slope on gangways to exceed the maximum slope in section 405.2.

Some commenters suggested that permissible slope variations could be reduced further by introducing a formula that ties required gangway length to anticipated water level fluctuations. Such a formula would incorporate predictions of tidal level changes such as those issued by the National Oceanographic and Atmospheric Administration (NOAA) and the United States Geologic Survey (USGS). This suggested approach would be an alternative to the gangway length exceptions and limits in section 1003.2.1 of the 2010 Standards. These commenters noted that contemporary building materials and techniques make gangways of longer length and alternative configurations achievable. These commenters provided at least one example of a regional regulatory authority using this type of formula. While this approach may be successfully implemented and consistent with the goals of the ADA, the example provided was applied in a highly developed area containing larger facilities. The Department has considered that many facilities do not have sufficient resources available to take advantage of the latest construction materials and design innovations. Other commenters supported compliance exceptions for facilities that are subject to extreme tidal conditions. One commenter noted that if a facility is located in an area with limited space and extreme tidal variations, a disproportionately long gangway might intrude into water travel routes. The Department has considered a wide range of boating facility characteristics including size, water surface areas, tidal fluctuations, water conditions, variable resources, whether the facility is in a highly developed or remote location, and other factors. The Department has determined that the 2010 Standards provide sufficient flexibility for such broad application. Additionally, the length requirement for accessible routes in section 1003.2.1 provides an easily determinable compliance standard.

Accessible Boarding Piers. Where boarding piers are provided at boat launch ramps, sections 235.3 and 1003.3.2 of the 2010 Standards require that at least five percent (5%) of boarding piers, but at least one, must be accessible.

Accessible Boat Slips. Sections 235.2 and 1003.3.1 of the 2010 Standards require that a specified number of boat slips in each recreational boating facility meet specified accessibility standards. The number of accessible boat slips required by the 2010 Standards is set out in a chart in section 235.2. One accessible boat slip is required for facilities containing 25 or fewer total slips. The number of required accessible boat slips increases with the total number of slips at the facility. Facilities containing more than one thousand (1000) boat slips are required to provide twelve (12) accessible boat slips plus one for each additional one hundred slips at the facility.

One commenter asserted the need for specificity in the requirement for dispersion of accessible slips. Section 235.2.1 of the 2010 Standards addresses dispersion and requires that boat slips "shall be dispersed throughout the various types of boat slips provided." The commenter was concerned that if a marina could not put accessible slips all on one pier, it would have to reconstruct the entire facility to accommodate accessible piers, gangways, docks and walkways. The provision permits required accessible boat slips to be grouped together. The Department recognizes that economical and structural feasibility may produce this result. The 2010 Standards do not require the dispersion of the physical location of accessible boat slips. Rather, the dispersion must be among the various types of boat slips offered by the facility. Section 235.2.1 of the 2010 Standards specifies that if the required number has been met, no further dispersion is required. For example, if a facility offers five different 'types' of boat slips but is only required to provide three according to the table in Section 235.2, that facility is not required to provide more than three accessible boat slips, but the three must be varied among the five 'types' of boat slips available at the facility.

236 and 1004 Exercise Machines and Equipment

Accessible Route to Exercise Machines and Equipment. Section 206.2.13 of the 2010 Standards requires an accessible route to serve accessible exercise machines and equipment.

Commenters raised concerns that the requirement to provide accessible routes to serve accessible exercise machines and equipment will be difficult for some facilities to provide, especially some transient lodging facilities that typically locate exercise machines and equipment in a single room. The Department believes that this requirement is a reasonable one in new construction and alterations because accessible exercise machines and equipment can be located so that an accessible route can serve more than one piece of equipment.

Exercise Machines and Equipment. Section 236 of the 2010 Standards requires at least one of each type of exercise machine to meet clear floor space requirements of section 1004.1. Types of machines are generally defined according to the muscular groups exercised or the kind of cardiovascular exercise provided.

Several commenters were concerned that existing facilities would have to reduce the number of available exercise equipment and machines in order to comply with the 2010 Standards. One commenter submitted prototype drawings showing equipment and machine layouts with and without the required clearance specified in the 2010 Standards. The accessible alternatives all resulted in a loss of equipment and machines. However, because these prototype layouts included certain possibly erroneous assumptions about the 2010 Standards, the Department wishes to clarify the requirements.

Section 1004.1 of the 2010 Standards requires a clear floor space "positioned for transfer or for use by an individual seated in a wheelchair" to serve at least one of each type of exercise machine and equipment. This requirement provides the designer greater flexibility regarding the location of the clear floor space than was employed by the commenter who submitted prototype layouts. The 2010 Standards do not require changes to exercise machines or equipment in order to make them more accessible to persons with disabilities. Even where machines or equipment do not have seats and typically are used by individuals in a standing position, at least one of each type of machine or equipment must have a clear floor space. Therefore, it is reasonable to assume that persons with disabilities wishing to use this type of machine or equipment can stand or walk, even if they use wheelchairs much of the time. As indicated in Advisory 1004.1, "the position of the clear floor space may vary greatly depending on the use of the equipment or machine." Where exercise equipment or machines require users to stand on them, the clear floor space need not be located parallel to the length of the machine or equipment in order to provide a lateral seat-to-platform transfer. It is permissible to locate the clear floor space for such machines or equipment in the aisle behind the device and to overlap the clear floor space and the accessible route.

Commenters were divided in response to the requirement for accessible exercise machines and equipment. Some supported requirements for accessible machines and equipment; others urged the Department not to require accessible machines and

equipment because of the costs involved. The Department believes that the requirement strikes an appropriate balance in ensuring that persons with disabilities, particularly those who use wheelchairs, will have the opportunity to use the exercise equipment. Providing access to exercise machines and equipment recognizes the need and desires of individuals with disabilities to have the same opportunity as other patrons to enjoy the advantages of exercise and maintaining health.

237 and 1005 Fishing Piers and Platforms

Accessible Route. Sections 206.2.14 and 1005.1 of the 2010 Standards require an accessible route to each accessible fishing pier and platform. The exceptions described under Recreational Boating above also apply to gangways and floating piers. All commenters supported the requirements for accessible routes to fishing piers and platforms.

Accessible Fishing Piers and Platforms. Sections 237 and 1005 of the 2010 Standards require at least twenty-five percent (25%) of railings, guards, or handrails (if provided) to be at a 34-inch maximum height (so that a person seated in a wheelchair can cast a fishing line over the railing) and to be located in a variety of locations on the fishing pier or platform to give people a variety of locations to fish. An exception allows a guard required to comply with the IBC to have a height greater than 34 inches. If railings, guards, or handrails are provided, accessible edge protection and clear floor or ground space at accessible railings are required. Additionally, at least one turning space complying with section 304.3 of the 2010 Standards is required to be provided on fishing piers and platforms.

Commenters expressed concerns about the provision for fishing piers and platforms at the exception in section 1005.2.1 of the 2010 Standards that allows a maximum height of 42 inches for a guard when the pier or platform is covered by the IBC. Two commenters stated that allowing a 42-inch guard or railing height for facilities covered by another building code would be difficult to enforce. They also thought that this would hinder access for persons with disabilities because the railing height would be too high for a person seated in a wheelchair to reach over with their fishing pole in order to fish. The Department understands these concerns but believes that the railing height exception is necessary in order to avoid confusion resulting from conflicting accessibility requirements, and therefore has retained this exception.

238 and 1006 Golf Facilities

Accessible Route. Sections 206.2.15, 1006.2, and 1006.3 of the 2010 Standards require an accessible route to connect all accessible elements within the boundary of the golf course and, in addition, to connect golf car rental areas, bag drop areas, teeing grounds, putting greens, and weather shelters. An accessible route also is required to connect any practice putting greens, practice teeing grounds, and teeing stations at driving ranges that are required to be accessible. An exception permits the accessible route requirements to be met, within the boundaries of the golf course, by providing a "golf car passage" (the path typically used by golf cars) if specifications for width and curb cuts are met.

Most commenters expressed the general viewpoint that nearly all golf courses provide golf cars and have either well-defined paths or permit the cars to drive on the course where paths are not present, and thus meet the accessible route requirement.

The Department received many comments requesting clarification of the term "golf car passage." Some commenters recommended additional regulatory language specifying that an exception from a pedestrian route requirement should be allowed only when a golf car passage provides unobstructed access onto the teeing ground, putting green, or other accessible element of the course so that an accessible golf car can have full access to those elements. These commenters cautioned that full and equal access would not be provided if a golfer were required to navigate a steep slope up or down a hill or a flight of stairs in order to get to the teeing ground, putting green, or other accessible element of the course.

Conversely, another commenter requesting clarification of the term "golf car passage" argued that golf courses typically do not provide golf car paths or pedestrian paths up to actual tee grounds or greens, many of which are higher or lower than the car path. This commenter argued that if golf car passages were required to extend onto teeing grounds and greens in order to qualify for an exception, then some golf courses would have to substantially regrade teeing grounds and greens at a high cost.

Some commenters argued that older golf courses, small nine-hole courses, and executive courses that do not have golf car paths would be unable to comply with the accessible route requirements because of the excessive cost involved. A commenter noted that, for those older courses that have not yet created an accessible pedestrian route or golf car passage, the costs and impacts to do so should be considered.

A commenter argued that an accessible route should not be required where natural terrain makes it infeasible to create an accessible route. Some commenters cautioned that the 2010 Standards would jeopardize the integrity of golf course designs that utilize natural terrain elements and elevation changes to set up shots and create challenging golf holes.

The Department has given careful consideration to the comments and has decided to adopt the 2010 Standards requiring that at least one accessible route connect accessible elements and spaces within the boundary of the golf course including teeing grounds, putting greens, and weather shelters, with an exception provided that golf car passages shall be permitted to be used for all or part of required accessible routes. In response to requests for clarification of the term "golf car passage," the Department points out that golf car passage is merely a pathway on which a motorized golf car can operate and includes identified or paved paths, teeing grounds, fairways, putting greens, and other areas of the course. Golf cars cannot traverse steps and exceedingly steep slopes. A nine-hole golf course or an executive golf course that lacks an identified golf car path but provides golf car passage to teeing grounds, putting greens, and other elements throughout the course may utilize the exception for all or part of the accessible pedestrian route. The exception in section 206.2.15 of the 2010 Standards does not exempt golf courses from their obligation to provide access to necessary elements of the golf course; rather, the exception allows a golf course to use a golf car passage for part or all of the accessible pedestrian route to ensure that persons with mobility disabilities can fully and equally participate in the recreational activity of playing golf.

Accessible Teeing Grounds, Putting Greens, and Weather Shelters. Sections 238.2 and 1006.4 of the 2010 Standards require that golf cars be able to enter and exit each putting green and weather shelter. Where two teeing grounds are provided, the forward teeing ground is required to be accessible (golf car can enter and exit). Where three or more teeing grounds are provided, at least two, including the forward teeing ground, must be accessible.

A commenter supported requirements for teeing grounds, particularly requirements for accessible teeing grounds, noting that accessible teeing grounds are essential to the full and equal enjoyment of the golfing experience.

A commenter recommended that existing golf courses be required to provide access to only one teeing ground per hole. The majority of commenters reported that most public and private golf courses already provide golf car passage to teeing grounds and greens. The Department has decided that it is reasonable to maintain the requirement. The 2010 Standards provide an exception for existing golf courses with three or more teeing grounds not to provide golf car passage to the forward teeing ground where terrain makes such passage infeasible.

Section 1006.3.2 of the 2010 Standards requires that where curbs or other constructed barriers prevent golf cars from entering a fairway, openings 60 inches wide minimum shall be provided at intervals not to exceed 75 yards.

A commenter disagreed with the requirement that openings 60 inches wide minimum be installed at least every 75 yards, arguing that a maximum spacing of 75 yards may not allow enough flexibility for terrain and hazard placements. To resolve this problem, the commenter recommended that the standards be modified to require that each golf car passage include one 60-inch wide opening for an accessible golf car to reach the tee, and that one opening be provided where necessary for an accessible golf car to reach a green. The requirement for openings where curbs or other constructed barriers may otherwise prevent golf cars from entering a fairway allows the distance between openings to be less than every 75 yards. Therefore, the Department believes that the language in section 1006.3.2 of the 2010 Standards allows appropriate flexibility. Where a paved path with curbs or other constructed barrier exists, the Department believes that it is essential that

openings be provided to enable golf car passages to access teeing grounds, fairways and putting greens, and other required elements. Golf car passage is not restricted to a paved path with curbs. Golf car passage also includes fairways, teeing grounds, putting greens, and other areas on which golf cars operate.

Accessible Practice Putting Greens, Practice Teeing Grounds, and Teeing Stations at Driving Ranges. Section 238.3 of the 2010 Standards requires that five percent (5%) but at least one of each of practice putting greens, practice teeing grounds, and teeing stations at driving ranges must permit golf cars to enter and exit.

239 and 1007 Miniature Golf Facilities

Accessible Route to Miniature Golf Course Holes. Sections 206.2.16, 239.3, and 1007.2 of the 2010 Standards require an accessible route to connect accessible miniature golf course holes and the last accessible hole on the course directly to the course entrance or exit. Accessible holes are required to be consecutive with an exception permitting one break in the sequence of consecutive holes provided that the last hole on the miniature golf course is the last hole in the sequence.

Many commenters supported expanding the exception from one to multiple breaks in the sequence of accessible holes. One commenter noted that permitting accessible holes with breaks in sequence would enable customers with disabilities to enjoy the landscaping, water and theme elements of the miniature golf course. Another commenter wrote in favor of allowing multiple breaks in accessible holes with a connecting accessible route.

Other commenters objected to allowing multiple breaks in the sequence of miniature golf holes. Commenters opposed to this change argued that allowing any breaks in the sequence of accessible holes at a miniature golf course would disrupt the flow of play for persons with disabilities and create a less socially integrated experience. A commenter noted that multiple breaks in sequence would not necessarily guarantee the provision of access to holes that are most representative of those with landscaping, water elements, or a fantasy-like experience.

The Department has decided to retain the exception without change. Comments did not provide a sufficient basis on which to conclude that allowing multiple breaks in the sequence of accessible holes would necessarily increase integration of accessible holes with unique features of miniature golf courses. Some designs of accessible holes with multiple breaks in the sequence might provide equivalent facilitation where persons with disabilities gain access to landscaping, water or theme elements not otherwise represented in a consecutive configuration of accessible holes. A factor that might contribute to equivalent facilitation would be an accessible route designed to bring persons with disabilities to a unique feature, such as a waterfall, that would otherwise not be served by an accessible route connecting consecutive accessible holes.

Specified exceptions are permitted for accessible route requirements when located on the playing surfaces near holes.

Accessible Miniature Golf Course Holes. Sections 239.2 and 1007.3 of the 2010 Standards require at least fifty percent (50%) of golf holes on miniature golf courses to be accessible, including providing a clear floor or ground space that is 48 inches minimum by 60 inches minimum with slopes not steeper than 1:48 at the start of play.

240 and 1008 Play Areas

Section 240 of the 2010 Standards provides scoping for play areas and section 1008 provides technical requirements for play areas. Section 240.1 of the 2010 Standards sets requirements for play areas for children ages 2 and over and covers separate play areas within a site for specific age groups. Section 240.1 also provides four exceptions to the requirements that apply to family child care facilities, relocation of existing play components in existing play areas, amusement attractions, and alterations to play components where the ground surface is not altered.

Ground Surfaces. Section 1008.2.6 of the 2010 Standards provides technical requirements for accessible ground surfaces for play areas on accessible routes, clear floor or ground spaces, and turning spaces. These ground surfaces must follow special rules, incorporated by reference from nationally recognized standards for accessibility and safety in play areas, including those issued by the American Society for Testing and Materials (ASTM).

A commenter recommended that the Department closely examine the requirements for ground surfaces at play areas. The Department is aware that there is an ongoing controversy about play area ground surfaces arising from a concern that some surfaces that meet the ASTM requirements at the time of installation will become inaccessible if they do not receive constant maintenance. The Access Board is also aware of this issue and is working to develop a portable field test that will provide more relevant information on installed play surfaces. The Department would caution covered entities selecting among the ground surfacing materials that comply with the ASTM requirements that they must anticipate the maintenance costs that will be associated with some of the products. Permitting a surface to deteriorate so that it does not meet the 2010 Standards would be an independent violation of the Department's ADA regulations.

Accessible Route to Play Components. Section 206.2.17 of the 2010 Standards provides scoping requirements for accessible routes to ground level and elevated play components and to soft contained play structures. Sections 240.2 and 1008 of the 2010 Standards require that accessible routes be provided for play components. The accessible route must connect to at least one ground level play component of each different type provided (e.g., for different experiences such as rocking, swinging, climbing, spinning, and sliding). Table 240.2.1.2 sets requirements for the number and types of ground level play components required to be on accessible routes. When elevated play components are provided, an accessible route must connect at least fifty percent (50%) of the elevated play components. Section 240.2.1.2, provides an exception to the requirements for ground level play components if at least fifty percent (50%) of the elevated play components are connected by a ramp and at least three of the elevated play components connected by the ramp are different types of play components.

The technical requirements at section 1008 include provisions where if three or fewer entry points are provided to a soft contained play structure, then at least one entry point must be on an accessible route. In addition, where four or more entry points are provided to a soft contained play structure, then at least two entry points must be served by an accessible route.

If elevated play components are provided, fifty percent (50%) of the elevated components are required to be accessible. Where 20 or more elevated play components are provided, at least twenty five percent (25%) will have to be connected by a ramp. The remaining play components are permitted to be connected by a transfer system. Where less than 20 elevated play components are provided, a transfer system is permitted in lieu of a ramp.

A commenter noted that the 2010 Standards allow for the provision of transfer steps to elevated play structures based on the number of elevated play activities, but asserted that transfer steps have not been documented as an effective means of access.

The 2010 Standards recognize that play structures are designed to provide unique experiences and opportunities for children. The 2010 Standards provide for play components that are accessible to children who cannot transfer from their wheelchair, but they also provide opportunities for children who are able to transfer. Children often interact with their environment in ways that would be considered inappropriate for adults. Crawling and climbing, for example, are integral parts of the play experience for young children. Permitting the use of transfer platforms in play structures provides some flexibility for creative playground design.

Accessible Play Components. Accessible play components are required to be on accessible routes, including elevated play components that are required to be connected by ramps. These play components must also comply with other accessibility requirements, including specifications for clear floor space and seat heights (where provided).

A commenter expressed concerns that the general requirements of section 240.2.1 of the 2010 Standards and the advisory accompanying section 240.2.1 conflict. The comment asserts that section 240.2.1 of the 2010 Standards provides that the only requirement for integration of equipment is where there are two or more required ground level play components, while the advisory appears to suggest that all accessible components must be integrated.

The commenter misinterprets the requirement. The ADA mandates that persons with disabilities be able to participate in programs or activities in the most integrated setting appropriate to their needs. Therefore, all accessible play components must be integrated into the general playground setting. Section 240.2.1 of

the 2010 Standards specifies that where there is more than one accessible ground level play component, the components must be both dispersed and integrated.

241 and 612 Saunas and Steam Rooms

Section 241 of the 2010 Standards sets scoping for saunas and steam rooms and section 612 sets technical requirements including providing accessible turning space and an accessible bench. Doors are not permitted to swing into the clear floor or ground space for the accessible bench. The exception in section 612.2 of the 2010 Standards permits a readily removable bench to obstruct the required wheelchair turning space and the required clear floor or ground space. Where they are provided in clusters, five percent (5%) but at least one sauna or steam room in each cluster must be accessible.

Commenters raised concerns that the safety of individuals with disabilities outweighs the usefulness in providing accessible saunas and steam rooms. The Department believes that there is an element of risk in many activities available to the general public. One of the major tenets of the ADA is that individuals with disabilities should have the same opportunities as other persons to decide what risks to take. It is not appropriate for covered entities to prejudge the abilities of persons with disabilities.

242 and 1009 Swimming Pools, Wading Pools, and Spas

Accessible Means of Entry to Pools. Section 242 of the 2010 Standards requires at least two accessible means of entry for larger pools (300 or more linear feet) and at least one accessible entry for smaller pools. This section requires that at least one entry will have to be a sloped entry or a pool lift; the other could be a sloped entry, pool lift, a transfer wall, or a transfer system (technical specifications for each entry type are included at section 1009).

Many commenters supported the scoping and technical requirements for swimming pools. Other commenters stated that the cost of requiring facilities to immediately purchase a pool lift for each indoor and outdoor swimming pool would be very significant especially considering the large number of swimming pools at lodging facilities. One commenter requested that the Department clarify what would be an "alteration" to a swimming pool that would trigger the obligation to comply with the accessible means of entry in the 2010 Standards.

Alterations are covered by section 202.3 of the 2010 Standards and the definition of "alteration" is provided at section 106.5. A physical change to a swimming pool which affects or could affect the usability of the pool is considered to be an alteration. Changes to the mechanical and electrical systems, such as filtration and chlorination systems, are not alterations. Exception 2 to section 202.3 permits an altered swimming pool to comply with applicable requirements to the maximum extent feasible if full compliance is technically infeasible. "Technically infeasible" is also defined in section 106.5 of the 2010 Standards.

The Department also received comments suggesting that it is not appropriate to require two accessible means of entry to wave pools, lazy rivers, sand bottom pools, and other water amusements where there is only one point of entry. Exception 2 of Section 242.2 of the 2010 Standards exempts pools of this type from having to provide more than one accessible means of entry provided that the one accessible means of entry is a swimming pool lift compliant with section 1009.2, a sloped entry compliant with section 1009.3, or a transfer system compliant with section 1009.5 of the 2010 Standards.

Accessible Means of Entry to Wading Pools. Sections 242.3 and 1009.3 of the 2010 Standards require that at least one sloped means of entry is required into the deepest part of each wading pool.

Accessible Means of Entry to Spas. Sections 242.4 and 1009.2, 1009.4, and 1009.5 of the 2010 Standards require spas to meet accessibility requirements, including an accessible means of entry. Where spas are provided in clusters, five percent (5%) but at least one spa in each cluster must be accessible. A pool lift, a transfer wall, or a transfer system will be permitted to provide the required accessible means of entry.

243 Shooting Facilities with Firing Positions

Sections 243 and 1010 of the 2010 Standards require an accessible turning space for each different type of firing position at a shooting facility if designed and constructed on a site. Where firing positions are provided in clusters, five percent (5%), but at least one position of each type in each cluster must be accessible.

Additional Technical Requirements

302.1 Floor or Ground Surfaces

Both section 4.5.1 of the 1991 Standards and section 302.2 of the 2010 Standards require that floor or ground surfaces along accessible routes and in accessible rooms and spaces be stable, firm, slip-resistant, and comply with either section 4.5 in the case of the 1991 Standards or section 302 in the case of the 2010 Standards.

Commenters recommended that the Department apply an ASTM Standard (with modifications) to assess whether a floor surface is "slip resistant" as required by section 302.1 of the 2010 Standards. The Department declines to accept this recommendation since, currently, there is no generally accepted test method for the slip-resistance of all walking surfaces under all conditions.

304 Turning Space

Section 4.2.3 of the 1991 Standards and Section 304.3 of the 2010 Standards allow turning space to be either a circular space or a T-shaped space. Section 304.3 permits turning space to include knee and toe clearance complying with section 306. Section 4.2.3 of the 1991 Standards did not specifically permit turning space to include knee and toe clearance. Commenters urged the Department to retain the turning space requirement, but exclude knee and toe clearance from being permitted as part of this space. They argued that wheelchairs and other mobility devices are becoming larger and that more individuals with disabilities are using electric three and four-wheeled scooters which cannot utilize knee clearance.

The Department recognizes that the technical specifications for T-shaped and circular turning spaces in the 1991 and 2010 Standards, which are based on manual wheelchair dimensions, may not adequately meet the needs of individuals using larger electric scooters. However, there is no consensus about the appropriate dimension on which to base revised requirements. The Access Board is conducting research to study this issue in order to determine if new requirements are warranted. For more information, see the Access Board's Web site at *http://www.access-board.gov/research/current-projects.htm#suny.* The Department plans to wait for the results of this study and action by the Access Board before considering any changes to the Department's rules. Covered entities may wish to consider providing more than the minimum amount of turning space in confined spaces where a turn will be required. Appendix section A4.2.3 and Fig. A2 of the 1991 Standards provide guidance on additional space for making a smooth turn without bumping into surrounding objects.

404 Doors, Doorways, and Gates

Automatic Door Break Out Openings. The 1991 Standards do not contain any technical requirement for automatic door break out openings. The 2010 Standards at sections 404.1, 404.3, 404.3.1, and 404.3.6 require automatic doors that are part of a means of egress and that do not have standby power to have a 32-inch minimum clear break out opening when operated in emergency mode. The minimum clear opening width for automatic doors is measured with all leaves in the open position. Automatic bi-parting doors or pairs of swinging doors that provide a 32-inch minimum clear break out opening in emergency mode when both leaves are opened manually meet the technical requirement. Section 404.3.6 of the 2010 Standards includes an exception that exempts automatic doors from the technical requirement for break out openings when accessible manual swinging doors serve the same means of egress.

Maneuvering Clearance or Standby Power for Automatic Doors. Section 4.13.6 of the 1991 Standards does not require maneuvering clearance at automatic doors. Section 404.3.2 of the 2010 Standards requires automatic doors that serve as an accessible means of egress to either provide maneuvering clearance or to have standby power to operate the door in emergencies. This provision has limited application and will affect, among others, in-swinging automatic doors that serve small spaces.

Commenters urged the Department to reconsider provisions that would require maneuvering clearance or standby power for automatic doors. They assert that these requirements would impose unreasonable financial and administrative burdens on all covered entities, particularly smaller entities. The Department declines to change these provisions because they are fundamental life-safety issues. The requirement applies only to doors that are part of a means of egress that must be accessible in an emergency. If an emergency-related power failure prevents the

operation of the automatic door, a person with a disability could be trapped unless there is either adequate maneuvering room to open the door manually or a back-up power source.

Thresholds at Doorways. The 1991 Standards, at section 4.13.8, require the height of thresholds at doorways not to exceed ½ inch and thresholds at exterior sliding doors not to exceed ¾ inch. Sections 404.1 and 404.2.5 of the 2010 Standards require the height of thresholds at all doorways that are part of an accessible route not to exceed ½ inch. The 1991 Standards and the 2010 Standards require raised thresholds that exceed ¼ inch in height to be beveled on each side with a slope not steeper than 1:2. The 2010 Standards include an exception that exempts existing and altered thresholds that do not exceed ¾ inch in height and are beveled on each side from the requirement.

505 Handrails

The 2010 Standards add a new technical requirement at section 406.3 for handrails along walking surfaces.

The 1991 Standards, at sections 4.8.5, 4.9.4, and 4.26, and the 2010 Standards, at section 505, contain technical requirements for handrails. The 2010 Standards provide more flexibility than the 1991 Standards as follows:

- Section 4.26.4 of the 1991 Standards requires handrail gripping surfaces to have edges with a minimum radius of ⅛ inch. Section 505.8 of the 2010 Standards requires handrail gripping surfaces to have rounded edges.
- Section 4.26.2 of the 1991 Standards requires handrail gripping surfaces to have a diameter of 1¼ inches to 1½ inches, or to provide an equivalent gripping surface. Section 505.7 of the 2010 Standards requires handrail gripping surfaces with a circular cross section to have an outside diameter of 1¼ inches to 2 inches. Handrail gripping surfaces with a non-circular cross section must have a perimeter dimension of 4 inches to 6¼ inches, and a cross section dimension of 2¼ inches maximum.
- Sections 4.8.5 and 4.9.4 of the 1991 Standards require handrail gripping surfaces to be continuous, and to be uninterrupted by newel posts, other construction elements, or obstructions. Section 505.3 of the 2010 Standards sets technical requirements for continuity of gripping surfaces. Section 505.6 requires handrail gripping surfaces to be continuous along their length and not to be obstructed along their tops or sides. The bottoms of handrail gripping surfaces must not be obstructed for more than twenty percent (20%) of their length. Where provided, horizontal projections must occur at least 1½ inches below the bottom of the handrail gripping surface. An exception permits the distance between the horizontal projections and the bottom of the gripping surface to be reduced by ⅛ inch for each ½ inch of additional handrail perimeter dimension that exceeds 4 inches.
- Section 4.9.4 of the 1991 Standards requires handrails at the bottom of stairs to continue to slope for a distance of the width of one tread beyond the bottom riser nosing and to further extend horizontally at least 12 inches. Section 505.10 of the 2010 Standards requires handrails at the bottom of stairs to extend at the slope of the stair flight for a horizontal distance at least equal to one tread depth beyond the last riser nosing. Section 4.1.6(3) of the 1991 Standards has a special technical provision for alterations to existing facilities that exempts handrails at the top and bottom of ramps and stairs from providing full extensions where it will be hazardous due to plan configuration. Section 505.10 of the 2010 Standards has a similar exception that applies in alterations.

A commenter noted that handrail extensions are currently required at the top and bottom of stairs, but the proposed regulations do not include this requirement, and urged the Department to retain the current requirement. Other commenters questioned the need for the extension at the bottom of stairs.

Sections 505.10.2 and 505.10.3 of the 2010 Standards require handrail extensions at both the top and bottom of a flight of stairs. The requirement in the 1991 Standards that handrails extend horizontally at least 12 inches beyond the width of one tread at the bottom of a stair was changed in the 2004 ADAAG by the Access Board in response to public comments. Existing horizontal handrail extensions that comply with 4.9.4(2) of the 1991 Standards should meet or exceed the requirements of the 2010 Standards.

Commenters noted that the 2010 Standards will require handrail gripping surfaces with a circular cross section to have an outside diameter of 2 inches, and that this requirement would impose a physical barrier to individuals with disabilities who need the handrail for stability and support while accessing stairs.

The requirement permits an outside diameter of 1¼ inches to 2 inches. This range allows flexibility in meeting the needs of individuals with disabilities and designers and architects. The Department is not aware of any data indicating that an outside diameter of 2 inches would pose any adverse impairment to use by individuals with disabilities.

Handrails Along Walkways. The 1991 Standards do not contain any technical requirement for handrails provided along walkways that are not ramps. Section 403.6 of the 2010 Standards specifies that where handrails are provided along walkways that are not ramps, they shall comply with certain technical requirements. The change is expected to have minimal impact.

■ 23. Revise the heading to Appendix C to read as follows:

Appendix C to Part 36—Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities originally published on July 26, 1991.

■ 24. Revise the heading to Appendix D to read as follows:

Appendix D to Part 36—1991 Standards for Accessible Design as Originally Published on July 26, 1991.

Dated: July 23, 2010.

Eric H. Holder, Jr.,

Attorney General.

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