DEPARTMENT OF TRANSPORTATION

49 CFR Part 37

[Docket OST–98–3648]

RIN 2105–ACOO

Transportation for Individuals With Disabilities

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; request for comments.

SUMMARY: The Department is amending its Americans with Disabilities Act (ADA) regulations to require the accessibility of new over-the-road buses (OTRBs) and to require accessible OTRB service. The new rule applies both to intercity and other fixed-route bus operators and to demand-responsive (i.e., charter and tour) operators. The rules require operators to ensure that passengers with disabilities can use OTRBs. In connection with the forthcoming Office of Management and Budget (OMB) review of information collection requirements, the Department is requesting comment on the information collection requirements section of the final rule.

DATES: This rule is effective October 28, 1998. Comments on the information collection provisions of § 37.213 are requested on or before [90 days from December 28, 1998], but late-filed comments will be considered to the extent practicable. Comments are not requested on any other portion of the rule.

ADDRESSES: Comments should be sent, preferably in triplicate, to Docket Clerk, Docket No., Department of Transportation, 400 7th Street, S.W., Room PL–401, Washington, D.C., 20590. Comments will be available for inspection at this address from 10:00 a.m. to 5:00 p.m., Monday through Friday. Commenters who wish the receipt of their comments to be acknowledged should include a stamped, self-addressed postcard with their comments. The Docket Clerk will date-stamp the postcard and mail it back to the commenter.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, S.W., Room 10424, Washington, D.C., 20590. (202) 366–9306 (voice); (202) 755–7687 (TDD), *bob.ashby@ost.dot.gov* (e-mail); or Donald Trilling, Director, Office of Environment, Energy, and Safety, same street address, Room 10305H, (202) 366–4220.

SUPPLEMENTARY INFORMATION: For purposes of the Americans with Disabilities Act (ADA), an OTRB is ''a bus characterized by an elevated passenger deck located over a baggage compartment'' (§ 301(5)). The Department's ADA regulation (49 CFR 37.3) repeats this definition without change. OTRBs are a familiar type of bus used by Greyhound and other fixed-route intercity bus carriers as well as charter and tour operators.

As provided by the ADA, the Department issued limited interim OTRB regulations with its 1991 final ADA rules. The statute originally provided for the Department to issue final regulations by mid-1994, which would go into effect in July 1996 for larger operators and July 1997 for smaller operators. The Department fell behind the statutory schedule. In recognition of this fact, Congress amended the ADA in 1995 to put the final rules into effect two years from the date of their issuance (three years for small entities). Secretary of Transportation Rodney Slater made issuance of OTRBs a Departmental priority, committing the Department to issuing a proposed rule in March 1998 and a final rule in September 1998. The Department issued its proposed rule on March 25, 1998 (63 FR 14560). With this September 1998 publication of the final rule, its provisions will begin to apply to large entities in October 2000 and to small entities in October 2001.

Previous Regulatory Activity

In October 1993, the Department issued an advance notice of proposed rulemaking (ANPRM) that asked a variety of questions about the scope of accessibility requirements, interim service requirements, operational and fleet composition issues, lavatories and rest stops, training, and economic issues concerning OTRBs. Also in the autumn of 1993, the Department convened a public meeting at which DOT staff discussed OTRB issues with representatives of the disability community and OTRB industry. On various occasions, former Secretary of Transportation Federico Peña, Secretary of Transportation Rodney Slater and other DOT officials have met with disability community and bus industry groups to discuss the issues involved.

It was clear from responses to the ANPRM, the public meeting, and written comments that the bus industry and disability community had quite different views of the course the Department should follow in these regulations. The disability community believed that all new OTRBs should be accessible. The bus industry advocated a so-called ''service-based'' approach, involving such elements as a small pool of accessible buses, alternate means of access (e.g., station-based lifts and scalamobils), and on-call service. In support of its position, the disability community cited the accessibility requirements of other transportation provisions of the ADA, which uniformly require new vehicles to be accessible, and gaps and inequalities in service that they believe the industry approach would create. In support of its position, the industry cited the higher costs of purchasing and operating accessible vehicles, their projections that demand for accessible service would be low, the economic problems of the intercity bus industry, assertions that bus companies would cut rural and other marginal routes in response to accessibility requirements, and their view that their approach is more cost-effective.

The Department's NPRM proposed that all new OTRBs used in fixed-route service had to be accessible. The NPRM did not propose to require retrofit of existing buses or the acquisition of accessible used buses. Large fixed-route OTRB operators would be required to have 50 percent of their fleets accessible within 6 years, and 100 percent of their fleets accessible within 12 years, of the date on which the rule began to apply to them. Small fixed-route operators could be excused from these fleet accessibility deadlines if they had not acquired enough new buses in 6 or 12 years to replace 50 or 100 percent of their fleets.

Under the NPRM, demand-responsive operators would have to have 10 percent of their fleets accessible within two years of the application date of the rules. All demand-responsive operators would have to make an accessible bus available to a passenger who requested it. They could ask for 48 hours' advance notice. When any operator using an accessible bus made a rest stop, it would have to permit individuals who need to use the lift to get on and off the bus to use the rest stop. Operators who were not using an accessible bus would have to provide boarding assistance for rest stop purposes if such assistance did not create an unreasonable delay.

A joint Access Board/DOT rulemaking proposed standards for accessible buses. Under this proposal, an accessible bus would have to have a lift and wheelchair securement locations, among other features. Only a bus that accommodated passengers riding in their own wheelchairs was viewed as accessible.

The Department received over 400 comments on the NPRM. In general, comments from the disability

community supported the NPRM, though commenters wanted to shorten the fleet accessibility timetable and to strengthen the requirements concerning rest stops. Comments from the bus industry generally opposed the NPRM, saying that it was too costly and insufficiently cost-effective.

Principal Issues: Comments and Responses

Transporting Passengers in Their Own Wheelchairs

The NPRM, and the DOT/Access Board proposal for accessible bus standard, proposed that wheelchair users should be able to ride in their own mobility aids. As the Department explained in the NPRM preamble:

> Approaches not permitting passengers to remain in their own wheelchairs involve a minimum of four transfers on each trip (not counting rest or intermediate stops)—from wheelchair to boarding chair or device, and from boarding chair or device to vehicle seat, at the start of the trip, with the process reversed at the end of the trip. This increases the probability of discomfort, indignity, and injury, compared to a trip that does not involve transfers. Moreover, wheelchairs used by disabled passengers are often quite different from one another, reflecting the individual needs of their users. Vehicle seats are uniform, and consequently do not provide the same comfort and support as the passenger's own wheelchair. This can have health and safety implications for mobility-impaired passengers. Many mobility-impaired passengers use electric wheelchairs. Many such chairs are large and heavy. Others are of the ''scooter'' type. It is likely that most electric wheelchairs will not fit into bus luggage compartments. Based on experience in the airline industry, the process of stowing and retrieving electric wheelchairs carries a significant risk of damage to the expensive devices. Bus service to passengers who use electric wheelchairs cannot be effective if transportation for the wheelchairs is unavailable.

Disability community commenters unanimously supported this proposed requirement, pointing to the inconvenience, indignity, and increased risk of injury resulting from transfers as reasons. Hand-carrying, even in boarding chairs, is unacceptable, many commenters said. Some comments mentioned instances where passengers had been dropped, or wheelchairs been damaged, in the course of manual boarding assistance efforts. Many commenters also noted the likely unavailability of other alternatives, such as station-based lifts or extra personnel needed for boarding chair assistance, at stops in small towns or rural areas. (It should be noted that no disability community commenters shared the view of a bus industry commenter who thought that a bus seat was a more comfortable place for a wheelchair user to ride than his or her own wheelchair.)

The response of the bus industry to this aspect of the proposal was ambivalent. On one hand, industry commenters stated firmly that operators could meet the transportation needs of individuals with disabilities through a ''service-based approach'' that would make accessible buses (i.e., lift-equipped buses in which passengers could ride in their own wheelchairs) available to passengers on a 48-hour advance notice basis. (Greyhound recently announced that, as it had previously proposed, it would provide 80 accessible buses on this basis.) Sharing agreements among operators (''pooling'') would ensure that such buses would be available, they said. Many operators also referred to service they had provided successfully to wheelchair users in accessible buses. Industry commenters also cited approvingly a Canadian program that would provide accessible buses to passengers on an advance-notice basis. It was clear from these comments that the industry is convinced that providing service to wheelchair users riding in their own wheelchairs is a viable option, as long as it is organized along the ''service-based'' lines they propose. The industry's comments to this effect said nothing about safety problems companies anticipated encountering in implementing their own proposals.

On the other hand, some industry commenters questioned the advisability of allowing passengers to ride in their own wheelchairs. First, commenters said, DOT failed to consider the safety implications of placing wheelchairs on OTRBs. The comments suggested that doing so could pose a safety risk to other passengers. Second, commenters said that it was unfair to require OTRBs to be accessible when less accessibility was allegedly required in other modes (e.g., airlines, where passengers transfer into aircraft seats) or when other modes where passengers are required to be able to travel in their own wheelchairs received government grants (e.g., mass transit, intercity rail). More detailed summaries of these two lines of argument follow.

a. Safety

Industry commenters raising the safety issue made several points. First, unlike accessible transit buses, which assumedly travel at lower city speeds, OTRBs operate at highway speeds, increasing the risks to wheelchair users and other passengers if wheelchairs are not adequately secured. Second, the OTA report suggested that further review of wheelchair transportation safety was needed. Third, DOT should study crash forces in OTRB crashes so that proper securement standards could be developed and should study the crashworthiness of the variety of wheelchair designs in use, before requiring OTRB accessibility. Fourth, for safety-related reasons, DOT does not permit airline passengers to travel in their own wheelchairs, which makes it unfair to assume that it is safe for passengers to travel in their own wheelchairs on OTRBs. Fifth, the ADA and the DOT act require the Department to resolve these safety issues before proceeding to a final rule. One industry association attached a statement from a former National Highway Traffic Safety Administration (NHTSA) official, Mr. William Boehly, elaborating on some of these arguments.

b. Intermodal Unfairness

Industry comments assert that no other transportation mode has to meet a standard requiring a wheelchair lift in every vehicle with only a minimal Federal subsidy. They cite Federal grants for Amtrak and mass transit, which help to pay for accessibility requirements. They also argue that airlines do not have to buy lifts and that DOT has exempted airports with less than 10,000 enplanements from accessibility requirements. Provisions of the DOT Act and the ADA, these commenters add, require greater equity among the relative burdens accessibility requirements impose on carriers in various modes.

DOT Response—Safety Issues

a. What is the ADA Standard for Considering Safety Issues?

Under the ADA, if an agency is to limit the accessibility of programs, facilities, or services to individuals with disabilities, it must have evidence of a ''direct threat'' to the safety of others. This standard is cited in bus industry comments (see Boehly statement, p.3). However, industry commenters appear not to understand fully this standard or its implications for this rulemaking. The concept of ''direct threat'' is the following, as explained in the regulations of the Department of Justice (28 CFR 36.208):

> (b) 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.
>
> (c) 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 will mitigate the risk.

This standard is designed to prevent the exclusion of persons with disabilities from services based on stereotype or speculation, as distinct from actual risk. It is meant to be a very strict standard. (See 56 FR 35560–35561; July 26, 1991). General concerns about the possibility of risk, however sincerely felt, do not provide a basis for a finding of direct threat.

This rulemaking is the fourth ADA rulemaking in which transportation providers have made safety-related arguments to support limits on the accessibility of vehicles or transportation service. The first concerned the transportation of individuals in scooter-type mobility devices. Transportation providers argued that since it was more difficult to secure these devices, and since these devices may be more likely to suffer damage in a crash than other types of wheelchairs, providers should be able to deny transportation to persons using them or require that the passengers transfer to a vehicle seat. The Department responded as follows:

The Department, consistent with the ADA's requirement for nondiscriminatory service and its legislative history, in view of the ATBCB's definition of a ''common wheelchair,'' and given the continued absence of information in the record that would support a finding that carrying non-traditional wheelchairs would constitute a ''direct threat'' to the safety of others, is retaining the basic requirement proposed in the NPRM. Under this requirement, any ''common wheelchair'' (i.e., one that will fit on a lift meeting Access Board guideline requirements) must be carried. The provider cannot deny service on the ground that the wheelchair is not secured to the provider's satisfaction. The transit authority may require that the wheelchair park in one of the securement locations (generally, the Access Board guidelines require two such locations in a vehicle) and that the user permit the device to be secured using the vehicle's securement system. If the vehicle (e.g., a currently-existing bus) does not have a securement system meeting standards, the entity must still use a securement system it has to ensure as best it can, that the mobility device remains within the securement area. (56 FR 45617; September 6, 1991).

Second, transportation providers sought change in the provision of the Department's ADA rule requiring providers to allow standees to use lifts. Again, the argument was that standees posed unacceptable safety risks. The Department responded as follows:

The key point in the comments, from the Department's point of view, is the absence of information documenting a safety problem resulting from standees' use of lifts. The ADA is a nondiscrimination statute, intended to ensure, among other things, that people with disabilities have access to transportation services. To permit a transportation provider to exclude a category of persons with disabilities from using a device that provides access to a vehicle on the basis of a perceived safety hazard, absent information in the rulemaking record that the hazard is real, would be inconsistent with the statute (c.f., the discussion of the transportation of three-wheeled mobility devices in the preamble to the Department's September 6, 1991, final ADA rule (56 FR 45617)). While we understand the concerns of transit agency commenters about the potential safety risks that may be involved, the Department does not have a basis in the rulemaking record for authorizing a restriction on lift use by standees. (58 FR 63096; November 30, 1993).

Third, a transit authority petitioned the Department for a rule that would permit it to deny use of bus lifts to wheelchair users at certain stops that it deemed too difficult or dangerous for wheelchair users to use. While this proposed rule change would deny wheelchair users the use of facilities used by all other passengers, the petitioner asserted that it was necessary on safety grounds. The Department denied the petition, stating the following basis:

* * * [T]he ADA imposes strong legal constraints on the use of classifications based on disability. Under the ADA, a proposed action which treats a disability-based class of persons differently from the rest of the public cannot be accepted merely because it may assuage a party's good faith concerns about safety. This is a position that the Department has taken consistently as it has developed and implemented its ADA regulations [citing 56 FR 45617, quoted above] * * *. Subsequently, transit community commenters raised the issue of the use of lifts by standees, which the original version of Part 37 required. The commenters expressed the concern that standees could fall off the lifts or hit their heads, resulting in injury to passengers and liability for providers * * *. [T]here was little information in the record demonstrating that a real safety problem, as distinct from speculation or fears concerning potential safety problems, existed. The Department rejected the proposal [citing (58 FR 63096, quoted above] * * *.

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

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

In thinking about situations in which safety reasons are advanced for using disability-based classifications, the Department finds it useful to consider the ''direct threat'' provisions that exist in other provisions of the ADA. ''Direct threat'' permits exceptions—specific to an individual—to be made to ADA nondiscrimination requirements on the basis of safety. The Department of Justice (DOJ) rule implementing Title III of the ADA in the context of public accommodations defines the concept as follows [citing 28 CFR 36.208, quoted above] * * *.

[T]he Department believes that it is appropriate, and in keeping with the language and intent of the statute, to determine that disability-based classifications in transportation having a safety rationale are supportable only on the basis of analysis that incorporates the essentials of the ''direct threat'' concept in a way consistent with the nature of transportation programs. The petition at issue in this rulemaking does not, in the Department's view, closely approach what is necessary to be adopted under such an analysis. (61 FR 25410–25411; May 21, 1996)

A common theme runs through each of these rulemaking decisions. Transportation providers sought to limit accessibility on the basis of safety. Transportation providers speculated that there might be safety risks, but were unable to provide any significant evidence that the risks were real. The Department, noting that there was not enough evidence to support a ''direct threat'' finding, rejected the attempts to limit accessibility. The direct threat concept itself, and the Department's well-established application of the concept to transportation rulemakings, place the burden of proof on the proponent of limiting accessibility to demonstrate that a direct threat exists. The Department is not required to prove a negative—to demonstrate that there is no possible safety risk, or conduct extensive studies to disprove the existence of a risk that commenters assert may exist—in order to implement

fully the nondiscrimination requirements of the ADA.

b. Is There Evidence of a Direct Threat in This Case?

Bus industry comments speculated that there could be problems regarding such matters as the crashworthiness of wheelchairs, the adequacy of Access Board guidelines for the force to be restrained by securement devices, and assertedly greater risks because OTRBs travel at higher speeds than transit buses. The bus industry's argument is that the Department must study each of the issues it raised, and engage in lengthy safety rulemakings, before it may proceed with a requirement that passengers be able to travel in their own wheelchairs.

As noted above, the Department is not obliged to demonstrate that there are no safety risks before imposing an accessibility requirement. Instead, before it could impose a limitation on accessibility, the Department would have to conclude, based on evidence in the record, that there is a direct threat. There is no evidence in the record of this rulemaking demonstrating that any safety problem—let alone a problem significant enough to constitute a direct threat—exists with respect to the transportation of wheelchair users in their own mobility devices on board OTRBs.

The record is replete with representations by OTRB operators that they have successfully used accessible OTRBs for considerable periods of time. For example, the same industry association that included the Boehly statement also attached a summary of the accessible bus experience of many of its members. From all this experience of bus operators carrying actual wheelchair users in actual buses there is not a single study, not a single set of data, not a single summary of insurance claim information, not a single court decision imposing liability on a bus operator for a wheelchair-related injury, not a single accident report, not even a single anecdote demonstrating that carrying wheelchair users in their own mobility aids has ever had any actual adverse safety consequences. Notwithstanding the safety arguments in their comments, industry commenters repeatedly advocate using a percentage of accessible buses with lifts and securements to implement the ''service-based approach'' they support. The Department cannot limit the accessibility of wheelchair passengers without a basis in evidence sufficient to support a direct threat determination.

c. Bus Speeds

The industry argument concerning bus speeds is essentially that since OTRBs frequently travel at highway speeds (i.e., 55–70 miles per hour on Interstate highways), the securement standards applied to transit buses, which typically travel at slower city speeds, may not be adequate for OTRBs. It is fair to assume that, if an OTRB crashes at full highway speed, there are serious risks of death and injury to all persons aboard the vehicle, including those using vehicle seats. One need not look further than this year's multi-fatality crash of an intercity bus in Pennsylvania to prove the point. Fortunately for everyone concerned, OTRB service one of the safest modes of transportation (one industry web site declares that ''people are nearly twice as likely to die of dog bite than in a bus crash''), and high-speed crashes like the one in Pennsylvania appear to be rare.

The bus industry, individual companies, and their insurers are in the position to know a good deal about the industry's crash experience. For example, the industry would know what proportion of its crashes take place at highway speeds and what proportion take place at lower speeds in more congested urban areas. The comments do not include data of this kind. As with other types of vehicles, it appears likely that there is a higher probability of OTRBs having accidents in the midst of urban congestion, rather than on the safer ''open road'' of the Interstate system. In other words, while OTRBs travel more vehicle miles at highway speeds than do transit buses, it is reasonable to suppose that their principal exposure to crashes is likely to be in a similar environment to the one that transit buses inhabit.

It should also be noted that, in HOV lanes, busways, suburban express commuter routes, and off-peak travel on Interstate highways, transit buses often do travel at highway speeds. Transit buses, of course, must permit wheelchair users to travel in their own wheelchairs. No one has presented any evidence to the Department, in this rulemaking or otherwise, demonstrating the existence of a safety problem related to wheelchair users traveling in their own wheelchairs in this context. Nor is there such evidence in the record concerning intercity, commuter, or rapid rail systems, in none of which passengers are required to use securement systems for their wheelchairs and all of which involve travel at higher than highway speeds.

There appears to be more in common between the risk exposure of transit bus and OTRB passengers than the industry comments suggest. There is no evidence to suggest that wheelchair passengers traveling in their own mobility aids are a significant safety problem in either context. The Department does not have a basis concerning the relative speeds of transit buses and OTRBs for determining that there is a direct threat resulting from wheelchair passengers traveling in their own mobility devices.

d. Wheelchair Crashworthiness

This argument, developed at its greatest length in the Boehly statement, is that no one, including NHTSA, has established crashworthiness standards for wheelchairs that are used on board buses or other conveyances. Since there is a great variety of mobility aids, and little is known about how many models perform in crashes, industry comments say, there should be studies and a NHTSA rulemaking addressing wheelchair crashworthiness before an OTRB accessibility requirement is issued.

The Department agrees that accessible OTRBs, like other vehicles, must meet applicable NHTSA and FHWA safety requirements. We would not require OTRB operators to take action, or obtain equipment, that violate established safety requirements. The final rule includes language to this effect. In this regard, we take the same path as we did under the Air Carrier Access Act, where our regulations specify that carriers are not required to act contrary to FAA safety regulations.

It is quite another thing, however, to say that the Department should withhold accessibility requirements pending a rulemaking that NHTSA is not now pursuing and that NHTSA does not believe it has jurisdiction to pursue. The Department has no history of regulating wheelchairs and no explicit authority to regulate them. The Boehly statement asserts that NHTSA should pursue such a rulemaking. However, the absence of a rule that commenters believe NHTSA should issue in the future has no legal or practical effect on the issuance of an ADA rule by Department today.

e. Securement Device Standards.

Industry comments and the Boehly statement recommend detailed studies of the crash performance of OTRBs and wheelchairs, with the aim of establishing engineering standards for the design loads of securement devices. Once again, should NHTSA choose to conduct such studies, and should the studies result in the issuance of a final NHTSA rule, the rule would apply prospectively to accessible OTRBs.

Meanwhile, nothing in the record of this rulemaking demonstrates either that the proposed Access Board design loads for securement devices are inadequate or that present or future securement devices used on accessible OTRBs result in a direct threat. It bears reemphasis that speculation about potential hazaards is not a basis for a direct threat finding that would justify a limitation on accessibility.

Members of the bus industry who have accessible buses can be presumed to know what types of securements they currently use. If they, or their risk managers, have used or recommended securement systems that exceed the proposed Access Board guidelines, that information is available to them. No such information was provided in the record for this rulemaking, however. It should be pointed out, in any case, that the Access Board guidelines for accessible vehicle are minimums. If bus companies believe that securements exceeding these guidelines are advisable, they can install them. We also note that requirements to purchase accessible buses do not begin to apply to carriers until two years from the effective date of this rule. To the extent that bus companies are genuinely concerned about the adequacy of existing securement devices, this time should permit them to undertake additional development work toward improved securements that the bus industry could use.

f. OTA Recommendation

Industry comments cite statements in the OTA study discussing safety issues concerning transportation of wheelchairs in OTRBs and recommending further review of standards for carriage of wheelchairs in OTRBs. The OTA statements briefly mention potential risks to wheelchair users and other passengers. Like statements by industry commenters themselves about potential risks, the OTA statements do not provide a factual basis for a direct threat finding. Data, not speculation, is needed to establish a direct threat.

The OTA statements concerning potential safety issues were in context of a report that clearly recommended that all new buses be accessible and that wheelchair users ride in their own mobility aids. It is clear from the OTA report that OTA did not believe that its statements about potential safety issues precluded a requirement for accessible buses. Moreover, as the ADA itself provides, the Department is obliged to consider OTA's recommendations but is not required to adopt them. Bus industry comments clearly recognize this point when they urge the Department not to follow OTA recommendations to make all new buses accessible.

One other OTA statement cited in bus industry comments has to do with the ability of bus operators to secure wheelchairs properly if they do not do so frequently. The final rule requires bus companies to train their operators to proficiency in, among other things, wheelchair securements. In response to industry commenters' concern that their operators might forget how to carry out this or other functions, the rule also mandates refresher training, as needed, to maintain proficiency. The rule does not mandate any particular training time, curriculum, or inteval. These matters are best left to bus companies as they determine what is necessary to ensure that employees become and remain proficient as providing service to passengers with disabilities.

g. Buses and Airplanes

Industry comments argue that because wheelchair users must transfer to aircraft seats, it may be necessary for safety reasons to follow the same practice in OTRBs. As one comment put it, ''If onboard wheelchairs are deemed not safe for the airline industry, they cannot be assumed safe in the OTRB industry.'' This argument misses what should be a very obvious point: buses don't fly. Industry comments that make much of the differences between OTRBs and transit buses do not mention the far greater differences between OTRBs and commercial passenger aircraft.

OTRBs do not take off, cruise, and land at speeds in the hundreds of miles per hour. Even on the most potholed of city streets, OTRB passengers do not experience forces similar to those experienced by airline passengers during episodes of turbulence. In normal flight, airline passengers are likely to experience substantially higher g forces (e.g., takeoff acceleration), steeper angles (e.g., while ascending and descending) and bigger bumps (e.g., upon many landings) than bus passengers. DOT safety rules for seats and passenger restraints in buses (see for instance 49 CFR 571.207 and 571.222) and aircraft (see for instance 14 CFR 25.562 and 25.785) are very different from one another, as befits the different modes of transportation. For example, airline passengers are required to fasten their seat belts, which themselves have very specific requirements for the forces they must restrain. Buses are not even required to have seat belts.

The flawed analogy between aircraft and OTRBs fails to establish that, because aircraft passengers must transfer into airplane seats and fasten their seat belts, there is a direct threat to the safety of bus passengers if wheelchair users ride in their own wheelchairs.

h. Other Statutory Provisions

In addition to citing the direct threat language of the ADA, the Boehly statement refers to ADA language tasking OTA with studying ''the degree to which [OTRBs] and service are * * * readily accessible to and usable by individuals with disabilities'' (citing 42 U.S.C. 12185(2) [sic]. The statement asserts that this term means that buses be able to be entered ''safely and effectively.'' The latter words are not in the statutory provision.

In any case, this portion of the ADA is not a mandate that the Department must prove that there are no potential safety issues before issuing an accessibility rule. Neither the statute nor the courts have ever stated or implied such a requirement in any ADA context. The extent to which OTRBs are ''readily accessible'' was one of several matters into which OTA was to look as it made recommendations concerning OTRB accessibility. As noted above, OTA strongly recommended that all new buses in fixed-route be accessible. Of course, DOT is not obliged to adopt OTA's recommendations in any case. This language does not preclude the Department from issuing a requirement for accessible OTRBs, even if alleged safety issues are not resolved to the industry's satisfaction.

Commenters also cited a provision of the Department of Transportation Act that provides that the Secretary is to consider the needs for effectiveness and safety in transportation systems. This is part of the general statement of the Department's responsibilities. It is not a requirement that the Department proceed in any particular way on this or any other specific rulemaking.

DOT Response—Intermodal Unfairness

All modes of transportation have to meet significant accessibility requirements. These obligations are well known. Many are parallel to, or more stringent than, requirements for OTRB accessibility. New transit buses and intercity, commuter and rapid rail cars must be accessible, just like new fixed-route OTRBs. Other modes must make good faith efforts to obtain accessible used vehicles as well; there is no parallel requirement for OTRBs. OTRBs are excused from requirements to have accessible restrooms if doing so will result in a loss of seats; intercity rail cars are not. Fixed-route transit

authorities must provide expensive, operating cost-intensive paratransit services to passengers who cannot use fixed-route transit. There is no parallel to this requirement for OTRB companies. The ADA requires facility modifications for rail stations (e.g., key station retrofits for rapid and commuter rail; retrofits of all Amtrak stations). OTRB companies, whose existing stations are subject only to the general requirements of Title III of the ADA, have no parallel retrofit requirement.

Infrastructure-related costs also vary among the modes. New rapid rail systems have significant construction costs. All types of rail systems, directly or indirectly, pay to maintain their rights of way. Through airport landing fees, aviation fuel taxes, and passenger facility charges, airlines directly or indirectly contribute significantly to the costs of the construction and maintenance of the infrastructure they use. OTRB operators, on the other hand, have since 1984 been exempt from all but three cents of the Federal tax on diesel and other special fuels. The value of this exemption is currently 21.3 cents per gallon. This tax saving—in effect, an indirect Federal subsidy—allows the bus industry to use the nation's highway infrastructure at a considerably lower cost than other users.

The airline industry is governed, for accessibility purposes, by the Air Carrier Access Act, rather than the ADA. Like the OTRB industry, it consists of private companies who (except for some small carriers who receive financial assistance under the Essential Air Service program) do not receive public grants. Unlike the OTRB industry, airlines provide for level-entry boarding for all passengers in many situations, usually through expensive loading bridge equipment. Recently, the Department began requiring lifts for situations in which level-entry boarding does not exist for small commuter aircraft at most commercial service airports. We anticipate proposing to expand this requirement to other aircraft where level-entry boarding is not available. (The Department's rule provides for carriers and airports to work together to make lifts available.) It is not correct to say, as one industry comment suggested, that airports with fewer than 10,000 annual enplanements are not subject to accessibility requirements. As public entities, airports are subject to normal ADA Title II requirements for accessibility, without regard to the number of enplanements.

Industry comments also argue that most transportation providers in other categories receive significant Federal grants. Such programs do, of course, exist. We would point out that TEA–21 authorizes a subsidy for OTRB operators dedicated to accessibility costs. The overall grants to other surface modes are higher, in their absolute amounts, than the subsidy authorized by TEA–21 for OTRB accessibility. Of course, the other surface modes also have higher total costs and higher accessibility costs (especially for mass transit, with its paratransit mandate).

It should also be emphasized that in transit and intercity rail, Federal grants are not dedicated to the purpose of defraying accessibility costs. They are grants that apply to the overall capital and, to an extent, operating costs of the systems. (TEA–21 largely eliminated transit operating assistance, which was available to help pay for the costs of paratransit operations.) Accessibility programs must compete for these Federal grants with other system priorities. Unlike grants for mass transit and Amtrak, the subsidy authorized in TEA–21 for OTRB operators is dedicated to accessibility costs (the transit program does provide an additional 10 percent Federal share toward capital purchases of accessibility equipment). This subsidy addresses, precisely and in a significant way, the costs of compliance with this rule. In this important respect, it has no parallel in other modes. As with all TEA–21 funding for all programs, even those with guaranteed funding, the availability of funds is subject to the budget and appropriations processes.

It is true, as industry comments point out, that the TEA–21 OTRB subsidy is only authorized through the end of TEA–21. This is true of transit and Amtrak grants as well, all of which must be reauthorized in the next highway/transit authorization bill in order to continue. As noted below, other Federal funding sources are available to help defray OTRB costs.

Transportation modes differ significantly from one another. Accessibility requirements, and sources of funds to pay for them, are not the same in every mode. It is not fair to say, however, that accessibility requirements are more burdensome for OTRB operators than for anyone else. Nor is it fair to say that the OTRB industry is worse off than everyone else with respect to accessibility costs or Federal assistance in helping to meet the costs.

In any event, the Department is not required, as a legal or policy matter, to equalize the burdens on all modes or companies. There is no provision of the ADA that so requires. In the ADA, Congress specified the requirements for other surface modes, sometimes in great detail. Congress delegated the task of determining requirements for OTRBs to the Department, but nothing in the language or legislative history of the ADA requires OTRB costs to be the same as, or directly proportional to, costs in other types of transportation.

Nor do any provisions of the DOT Act or other statutes applying to the Department require an ''equalization'' of costs, burdens, or benefits among modes. Given the very real differences among modes, it is doubtful that such a result is attainable, and it is not required in other areas, such as safety regulation (e.g., where airlines are regulated in significantly greater detail than buses) or grant program provisions (e.g., where Federal financial assistance pays a greater portion of the costs of building a highway than operating a transit system). Accessibility requirements may likewise legitimately reflect differences among the modes.

DOT Response—Conclusion

The Department's final rule, and the DOT/Access Board provisions concerning accessible bus standards, will continue to provide for wheelchair users riding in their own mobility aids.

Accessible Buses and the ''Service-Based Approach''

One of the principal debates surrounding this rulemaking is that of the competing claims concerning the necessity for accessible buses in operators' fleets. Generally, disability community commenters said that accessible buses were essential, while operators said that a ''service-based approach'' centering on 48-hour advance notice service would provide just as good service on a much more cost-effective basis. While this debate touched on charter/tour service, it focused on fixed-route service.

Disability community comments unanimously said that service in accessible buses was essential, and that solutions short of this—use of station based-lifts, boarding chairs, etc.—were wholly inadequate. Risks of transfer were real (e.g., passengers who were dropped, passengers who had to crawl on board, wheelchairs that were damaged), they said, and station-based lifts and sufficient personnel to assist boarding would not exist at many stops. The lack of service in accessible buses denies needed and essential transportation opportunities to persons with disabilities, many of whom are low-income, transit-dependent persons, with few if any affordable transportation alternatives, particularly in rural areas. Advance-notice fixed-route service on a permanent basis is discriminatory, they said. All passengers must have the same

opportunity to travel when they wished, including on short notice.

Moreover, the ''pooling'' arrangements needed for the industry's approach would not work, they said. The logistics are complicated, and there is no information to suggest that they could be made to work successfully, particularly in the context of interlining or other service requiring well-timed transfers between buses. Commenters were concerned that passengers would be stranded at transfer points. One disability group did an informal survey of advance notice service by a large operator under present § 37.169 that it said revealed numerous failings in the service. If carriers can't make present interim service work, commenters argued, how can they make their ''service-based approach'' work? Other disability community comments also related anecdotes of failed advance notice service in the bus industry. Commenters also recalled what they viewed as significant logistical problems with ADA paratransit and advance notice service in the airlines, saying that it is very difficult for any organization or group of organizations to make such service work consistently well. Moreover, the industry has also underestimated the cost and difficulty (e.g., communications, computer services, planning, dispatching, deadheading) of operating good demand-responsive service.

From the industry's point of view, requiring all new buses to be accessible is unnecessary and cost-ineffective. Given the low usage of accessible buses that the industry expects, a small number of accessible buses (e.g., 80 for Greyhound) deployed in a 48-hour advance notice mode could meet all fixed-route demand, commenters said. Doing so would be far more cost-effective than acquiring a fleet of accessible buses, in the sense that the industry would spend fewer dollars per expected ride by persons who need accessible buses. Some unions for bus company employees supported this point of view.

Commenters assured the Department that the logistics of such a system could work, though they provided few details about how it would work. The carrier that was the subject of the disability group survey that alleged poor service commented that it had an extensive training program for its personnel and that it could either not verify most of the problems alleged or that the alleged problems were contrary to its policy. Operators also commented that the service-based approach would provide accessible service sooner than the NPRM's proposal, which they said would ''delay'' accessible service for 12 years, compared to the advance notice system they were prepared to inaugurate in the near future.

Industry commenters also disagreed with the disability groups' assertion that advance notice service in the fixed-route context was discriminatory. One operator commissioned a survey of a small number of selected passengers who, it said, preferred an advance-notice system to something like the Department's NPRM. Moreover, this operator said, most passengers—particularly most disabled passengers—call ahead of time to make arrangements for or inquiries about service. If passengers ordinarily call ahead of time anyhow, the carrier argued, it is not discriminatory to require them to do so in order to get an accessible bus.

DOT Response. Two good friends and traveling companions, Don and Mike, go to the bus station Monday morning. Don is ambulatory. Mike is a wheelchair user. They both approach the ticket window and pay $34 for a ticket. The ticket seller says to Don, ''Your bus is at Gate 5. It is leaving in 10 minutes. Get on it and proceed to your destination.'' The ticket seller says to Mike, ''Come back Wednesday. Then we'll have a bus you can use.'' The scenario works the same way over the telephone. In response to their Monday morning calls, the reservationist says to Don, ''Your reservation is confirmed. You bus leaves at noon today.'' To Mike, the reservationist says, ''Your reservation is confirmed, but you can't leave until noon Wednesday, because we won't have a bus you can use before that.''

In this scenario, two people seek the same service at the same time. One gets the service immediately, the other gets the service after a two-day delay. The only difference between them is that one is ambulatory and the other is a wheelchair user. In a very precise sense, the scenario is discriminatory: it provides more delayed, less convenient service to some passengers than to others, based solely on disability. Adopting industry proposals for fixed-route service across the board, particularly with respect to large-fixed route operators whose service constitutes the backbone of intercity bus service, permanently institutionalizes this scenario. This is very difficult to reconcile with the purposes of a nondiscrimination statute like the ADA.

In establishing a rule for large fixed-route carriers' obligations under the ADA, it is not appropriate for the Department to adopt a system institutionalizing disability-based distinctions in the quality of service. Doing so would mean that carriers who provide a large majority of all intercity trips would never need to provide fully accessible, everyday, nondiscriminatory service. While it makes policy sense to make some accommodations for small carriers on the margins of the fixed-route system (see discussion of small mixed-service operators below) the Department believes the backbone of intercity service must consist of fully accessible, nondiscriminatory everyday service if the purposes of the ADA are to be fulfilled.

It may be that many passengers, disabled and non-disabled alike, call fixed-route bus companies before they travel. Certainly, under present § 37.169, calling ahead to try to arrange boarding assistance is the *only* way passengers with disabilities can hope to travel on most fixed-route bus service, so it would be surprising if some passengers didn't call. We note that commenters, while saying that a lot of passengers called for information before traveling, did not assert that large percentages of passengers made advance reservations. Since carriers provide immediate service to passengers (unless they are disabled passengers requiring boarding assistance), it is not necessary for them to do so.

In any case, the fact that passengers may call for information does not negate the discriminatory impact of requiring a disabled passenger to make an advance reservation while other passengers can and do receive immediate service. Even if everyone called the bus company ahead of time, and even if everyone made a reservation, a system that allowed non-disabled passengers to make a reservation for today while requiring disabled passengers to make a reservation for two days from today would be discriminatory. It would single out passengers with disabilities as the only category of persons who were required to make reservations two days in advance.

Industry comments consistently assert that a service-based system will work in the fixed-route context. Unfortunately, industry comments included little, if any, factual or analytic information from which the Department can determine whether such a system really would work. Given the number of points served by fixed-route bus systems and the complexity of bus scheduling, particularly where transfers and interlining are involved (points made by bus industry commenters themselves in the context of their discussion of unscheduled rest stops), it is not self-evident that the logistics of 48-hour advance notice service could be made to work system-wide. Disability community comments raised reasonable

doubts about the likelihood of success, based on experience with the bus industry and other modes.

The Department reviewed the information in one industry comment concerning the brief consumer research paper prepared by a consultant. It involved telephone interviews with a small number of wheelchair users, many of whom were selected because of previous phone contacts with the carrier. The researcher then asked the respondents whether they would prefer a 48-hour advance reservation system or a system in which all buses were accessible, but all passengers would pay a fare increase (the information in the comment did not state what size fare increase the researchers suggested to respondents would be involved). The questions appeared to assume that the advance notice system would succeed logistically in producing the requested service. Most of the respondents said they preferred the advance notice system under these circumstances.

This consumer research paper is neither persuasive nor relevant. The small number of respondents, the bias in the selection method for many of the respondents, and the bias produced by the form of the questions and the assumptions underlying them, among other factors, undermine whatever value it might have as popularity poll for the point of view it was designed to support. It is best viewed as an illustration of the survey research truism that one can determine the outcome of a poll by the way one formulates the questions.

In any case, popularity polls for policy choices have limited relevance to the rulemaking process. Unlike some activities (e.g., TV network programming), rulemaking is not run by polling numbers. Compared to the substance of comments on the record from those individuals and organizations who chose to actually participate in the rulemaking process, such polls carry little weight. If the individuals polled believed that the Department should alter its proposed approach, they had the opportunity to comment and say why, but they apparently chose not to do so (since no comments from individuals who identified themselves as having disabilities took the position that the poll represents the respondents took.)

It is not accurate to say that the Department's decision to require the acquisition of new accessible buses will in any sense ''delay'' accessible service, compared to the industry's preferred approach. Under the interim service provisions, fixed-route operators will have to provide 48-hour advance notice service until their fleets are 100 percent accessible, just as the industry proposed. The difference between the industry proposal and the final rule is that, under the latter, most fixed-route fleets—particularly those of large carriers—will ultimately become 100 percent accessible, rather than advance notice service becoming the permanent approach.

The industry's economic arguments are discussed in more detail in subsequent sections of the preamble. At this point, we note that industry comments have repeatedly mischaracterized the provisions of the ADA relating to the OTA study as *requiring* the Department to adopt a ''cost-effective'' solution. The provisions of the ADA say no such thing. Rather, the provisions of the Act list cost-effectiveness as one of several matters that OTA was to study. DOT was to take OTA's study, its purposes, and its recommendations into account, which the Department has done. The statute does not mandate that the Department accept any of OTA's findings. It does not mandate that the outcome of the Department's rulemaking meet any particular substantive test. Congress could have written statutory language that said ''DOT shall issue a regulation adopting the approach to OTRB bus accessibility having the lowest cost per stimulated trip,'' or ''DOT shall not issue a regulation unless the approach satisfies industry cost-effectiveness criteria.'' Such language may have had the effect the industry seeks to read into the existing statutory language. But Congress did not do so.

We also note that it is difficult to argue that an approach is ''cost-effective'' unless it is *effective* in achieving its objective. The objective of OTRB service under the ADA is to provide service that works to passengers with disabilities in a nondiscriminatory manner. A system premised on a discriminatory mode of providing service that has not been demonstrated to be workable cannot be presumed to be effective.

Fleet Accessibility Deadlines

The NPRM proposed to require fixed-route operators to ensure that their fleets were 50 percent accessible 6 years into implementation of the final rule and 100 percent accessible 12 years into implementation. Small operators would be excused from these deadlines if they had not obtained enough new buses in those time periods to meet the required fleet accessibility percentages. These deadlines were intended to provide a time certain when passengers could count on regular, scheduled accessible service on all runs as well as to create a disincentive for companies to delay bus replacements to postpone accessibility. The 12-year target for 100 percent accessibility was based on information concerning the normal bus replacement cycle of large carriers. In addition, demand-responsive providers were to achieve 10 percent fleet accessibility within two years, again with a provision excepting small carriers who did not obtain enough new buses in that period to meet the deadline.

Disability community commenters generally supported the concept of fleet accessibility deadlines for fixed-route operators. Commenters believed that fleet accessibility schedules were important, among other reasons because, in their view, the bus industry was so opposed to accessibility that it could not be trusted to proceed toward accessibility in a measured way. It was necessary to hold the industry's feet to the fire, in this view. However, most of these commenters thought that the proposed deadlines were too far into the future. They would allow 20 years between the passage of the ADA and full accessibility, some pointed out. The bus industry should not be rewarded for its opposition to accessibility and the statutory and DOT-created delays in promulgating rules, others said. Suggestions for fleet accessibility timetables included 4 and 8 years, 4 and 10 years, 2 and 5 years, 3 and 6 years, etc. for 50 and 100 percent fixed-route fleet accessibility.

Even aside from its opposition to a requirement to obtain new accessible buses, the bus industry strongly opposed the proposal for fleet accessibility deadlines. Part of this opposition appears to be based on a concern about their effect on small fixed-route operators. Industry comments expressed concern that the deadlines would force small companies to accelerate the purchase of vehicles, purchase new instead of used vehicles, or take other uneconomic actions that would impose unreasonable costs and lead them to abandon fixed-route service. Commenters also expressed concern about the potential effect of the deadlines on the resale value of inaccessible buses.

Moreover, commenters said, the proposed deadlines were based on the replacement cycles typical of large carriers, which do not necessarily apply to smaller carriers. Even large carriers may not always be able to maintain a 12-year replacement cycle, commenters said, because of changes in economic conditions. The requirement placed them in an economic straitjacket that

hampered their ability to respond flexibly to market conditions, they said. It was unfair to impose on bus operators a timing requirement that other modes did not face under the ADA, they added.

With respect to charter/tour service, disability community commenters generally favored the 10 percent requirement, though some thought it was too low, believing that 20 or 25 percent would be a better figure to ensure the availability of accessible buses in the charter/tour segment of the industry. Bus industry commenters decried what some called a ''quota'' approach, saying that this imposed unnecessary costs and that it made more sense to eliminate a number-based requirement altogether and simply require that operators meet identified needs on a 48-hour advance notice basis, with an accountability mechanism.

DOT Response. It appears that some of the bus industry's concerns about the effect of the proposed deadlines on small operators were based on a misunderstanding of the NPRM. Used buses would not be required to be accessible. Retrofit would not be required. Under the NPRM, if a small fixed-route operator did not obtain enough new buses within the stated time frames to replace 50 or 100 percent of its buses (e.g., it kept its old buses a long time, or it purchased only used buses), it would not violate the proposed rule. Substantively, the NPRM formulation for small fixed-route operators—the fleet accessibility requirement plus the exception—is not very different from a requirement to obtain accessible new buses without any fleet accessibility requirement being stated.

In either case, all new fixed-route buses have to be accessible. In either case, the total fixed-route fleet becomes accessible only if and when all inaccessible buses are replaced with new buses. This being the case, we have decided it is simpler and more understandable to eliminate the fleet accessibility requirement for small fixed-route operators. There will be no retrofit or accessible used bus acquisition requirement. Small operators' fleets will become accessible when, and to the extent, that they replace existing inaccessible buses with new accessible buses. Operators must continue to provide interim service until and unless their fleets are 100 percent accessible, which, for some operators (e.g., operators who purchase primarily inaccessible used buses), could be indefinitely.

Large fixed-route operators provide the backbone of intercity bus service. For fully accessible, nondiscriminatory, everyday service to be a reality, those carriers must have accessible fleets within a reasonable period of time. These carriers typically purchase or lease new buses, and their comments do not deny that they do so on a 10–12 year replacement cycle. Consequently, the Department believes that it is consistent with the purpose and language of the ADA to require large fixed-route operators to meet a 6/12-year fleet accessibility schedule. Such a schedule is what they would meet via their normal replacement cycles, so it should not cause any economic distortions. This schedule will give assurance to consumers of the time frame in which they have a reasonable expectation of fully accessible service. Shortening these time frames, as disability community comments suggested, could force companies to disrupt bus replacement schedules or even retrofit existing buses, which we do not believe to be desirable.

The Department realizes that economic conditions can change, and companies can face unexpected problems. Bus replacements can fall behind historically typical cycles. To provide flexibility for unexpected situations, the Department has added a time extension provision for large fixed-route operators. If (1) such an operator has not obtained enough new buses in 6 or 12 years to meet the 50 and 100 percent fleet accessibility requirements; (2) it has not put itself in this position by, for example, stocking up on an unusually large number of inaccessible buses between October 1998 and October 2000; and (3) it has otherwise complied effectively with the requirements of the rule, the Secretary could grant a time extension beyond the 6 and 12-year dates. This provision avoids the potential ''straitjacket'' problem asserted by commenters, since it allows bus companies operating in good faith to obtain additional time to meet requirements in a way consistent with their actual bus replacement practices.

With respect to charter/tour operators, the Department has decided to eliminate the proposed 10 percent fleet accessibility requirement. Unlike the fixed-route sector, in which fleet accessibility is necessary for fully accessible, nondiscriminatory, everyday service, the charter/tour sector is better able to meet its ADA obligations through the industry's favored ''service-based'' approach. This is because of the advance-reservation nature of charter/tour service. If bus industry arrangements produce reliable charter/tour accessible bus service on an advance-notice basis, as industry comments assert that it can, ensuring that a particular percentage of buses in carriers' fleets are accessible becomes less important. The accountability mechanism described below is expected to help ensure that the promised service is provided.

Consequently, the final rule does not require charter/tour operators to acquire any particular number or percentage of accessible buses within any particular time frame. These companies will be responsible for providing 48-hour advance reservation service to passengers with disabilities in October 2001 or 2002, as applicable, rather than two years later as proposed in the NPRM. The two-year delay in the NPRM was premised on companies building up to a 10 percent accessible fleet in that period. In the absence of the 10 percent requirement, the rationale for a phase-in period of this length is considerably weakened. A shorter phase-in will be sufficient. Moreover, given the assurances of industry commenters concerning their readiness to meet advance notice requirements, and the fact that compliance is not required for two to three years from now, it is reasonable to believe it is feasible for operators to comply in October 2001–2002. In addition, retaining the two-year delay would mean that, for passengers of most of the operators who are small entities, it would be five years before they could count on receiving accessible service.

Small Mixed-service Operators

Bus industry commenters said that the NPRM's division of operators into fixed-route and demand-responsive components did not capture a frequent type of operation among small operators. Small operators, they said, often provided both kinds of service. Typically, such an operator is primarily a provider of charter/tour service. The typical operator uses most of its buses in, and makes most of its money from, charter/tour operations. Its fixed-route operations make up a much smaller portion of its overall activities, which may often be economically marginal. Often, the same buses are used for both fixed-route and demand-responsive purposes (e.g., a bus might be used for fixed-route service at one time during the week and demand-responsive service at another time of the week, or a bus might be used for charter/tour service initially and then moved into fixed-route service as it ages).

Small operators in this category said that they would need few, if any, accessible buses of their own to meet the 48-hour advance notice

requirements for charter/tour service. They could rely on ''pooling'' or other bus-sharing arrangements to produce an accessible bus when needed. If they had to buy accessible buses when they bought new OTRBs that would be used in fixed-route service, their costs would increase to the point where they would have an incentive to eliminate their fixed-route service.

Disability community comments did not discuss this category of operator, which the NPRM did not specifically mention. From disability community comments on other types of operations, however, it is fair to infer that disability community commenters would advocate that all new buses used in fixed-route service would have to be accessible.

DOT Response: In working on the regulatory assessment, the Department conducted a brief, informal survey of small bus operators. Based on this survey and other information available to the Department, the regulatory assessment estimates that for about 5/8 of the carriers offering fixed-route service, not more than 25 percent of their fleets is allocated to fixed-route service. Survey responses from operators in this category indicated that an average of 77 percent of their fleets were assigned to charter service.

The Department believes that industry commenters have a plausible argument. If a significant majority of an operator's buses and service is devoted to charter/tour service, with a small amount of fixed-route service on the side, it is reasonable to believe that the costs of acquiring accessible new buses for (often part-time) use in fixed-route service would provide an incentive to limit or end fixed-route service. In order to avoid this effect, we are modifying the requirements for operators in this category, which the final rule defines as a small operator 25 percent or fewer of whose buses are used in fixed-route service.

The final rule gives operators in this category the option of providing all its service—fixed-route as well as demand-responsive—on a 48-hour advance notice basis. This approach would remove the incentive to eliminate fixed-route service discussed above. It would also permit these small operators to meet all requirements through only one set of procedures.

This approach admittedly has disadvantages from the point of view of passengers with disabilities. It encounters the discrimination and logistics issues discussed in connection with fixed-route service by large operators. As a policy matter, however, the situation of small mixed-service operators is quite different from that of large fixed-route operators. They are at the periphery, not the center, of the nationwide intercity bus system. They carry a much smaller percentage of fixed-route passengers. Treating these operators differently from large fixed-route operators, moreover, is consistent with Regulatory Flexibility Act policy. Consequently, the Department has concluded that, on balance, this approach is acceptable in this limited set of circumstances, particularly in view of the accountability mechanism discussed below.

Accountability Mechanism

A number of bus industry comments, in the course of providing assurances that 48-hour advance notice service will work, suggested the idea of an accountability mechanism for the provision of promised service. There were two principal ideas. One industry association suggested a ''complaint board,'' an administrative body that could act in a mediation role with respect to consumer complaints and could also sanction bus companies that fail to meet their obligations. Another industry association suggested a mechanism for the immediate compensation of passengers' failure to provide required accessible service, generally analogous to ''denied boarding compensation'' in the airline industry.

The Department believes that these industry suggestions have merit. The final rule includes a version of the second idea. When an operator is obligated to provide service on 48 hours' advance notice (whether in charter/tour, interim fixed-route service, or elsewhere) or is providing equivalent service (if a small fixed-route operator elects to do so), either the required accessible vehicle is provided in a timely manner or it isn't. Either the lift works or it doesn't. It is not necessary to conduct an administrative proceeding to determine these simple factual matters. It is not necessary to refer the question to a board sitting in Washington, D.C.

Instead, when there is a failure to provide required service, the operator would pay a predetermined amount of compensation to the passenger. This is not a fine or a civil penalty that is paid to the Department. It is paid to the passenger whose travel is prevented or disrupted by the operator's inability to provide accessible service. The amount of compensation is set by an increasing, graduated scale. The first time a given operator fails to provide required service, it pays the passenger $300. By the fifth such occurrence for any company, the amount becomes $700. Assuming that operators' comments that they can readily meet the 48-hour requirement are soundly based in reality, occasions for paying this compensation should be infrequent. Lest paying compensation to the occasional passenger simply be regarded as a cost of doing business, the rule states that paying compensation is not a defense in litigation brought to enforce compliance with the rule (e.g., a ''pattern or practice'' lawsuit filed by the Department of Justice under Title III of the ADA).

Stimulated Demand

There was considerable debate in the comments about the extent to which accessible OTRB service will increase passenger demand. This issue is important primarily for its effect on the projected net cost of compliance with the Department's rule. The greater the stimulated demand—new revenue trips generated by passengers with disabilities and persons accompanying them—the lower the net compliance cost of the rule.

Bus industry commenters asserted that the estimates of stimulated demand in the regulatory assessment accompanying the NPRM were greatly overstated. Many small bus companies related their own experience: in many years of providing service, they said, they had received few if any requests for service from passengers with disabilities. Even some companies that had purchased accessible buses and, in a few cases, promoted their use had received a miniscule number of requests for accessible service.

More generally, industry comments cited the so-called ''Nathan Study,'' a report prepared by a consultant for a large carrier for purposes of this rulemaking, for the proposition that, based on experience in a few situations in which limited fixed-route OTRB service had been provided, stimulated demand could be expected to be quite low (e.g., 13,600 trips annually for the largest intercity carrier). This experience, commenters said, was more likely to be representative of demand than transit or commuter bus experience, which, because it involved shorter, less discretionary, trips, was likely to produce higher ridership by passengers with disabilities.

Disability community comments said that there was a large untapped market among people with disabilities for service. This market should only grow larger with the aging of the ''baby boom'' generation, they said. Transportation is a matter of great concern to the elderly and disabled, and they will travel if they are assured that

the entire chain of a trip is accessible. Demand to date has been suppressed by the unavailability of accessible service. It is no wonder that many bus companies have few requests for service from disabled passengers: the passengers know that service isn't accessible, and they don't bother to seek service they know they can't readily use. Commenters also referred to the substantially higher ridership estimates of the OTA study. As has been the case in other modes, commenters said, demand will grow as service improves and becomes accecssible. This is likely to be true of the intercity bus industry because it offers a unique service, which is the only available mode of intercity service for many disabled passengers.

DOT Response: Experience has shown that once passengers with disabilities are assured that accessibility is widespread they will begin to take advantage of these services. Beyond this general point, however, there remains wide divergence in estimates of potential new ridership. The ''Nathan Study'' asserts that it anticipates 13,600 wheelchair passenger trips per year on accessible Greyhound service, based on the mid-point of the trip results of on-going operations using accessible OTRBs in Massachusetts and Colorado, and service demonstration projects in Canada. This report does indicate, however, that if made solely on the basis of the Denver Regional Transportation District (RTD) experience, an estimate of demand might be as high as 35,000 trips per year by wheelchair users.

At the other end of the spectrum is the OTA report, which essentially assumes that persons with disabilities would travel and generate trips at the same rate as all of the citizens in the population once OTRB fleets are fully accessible. The assumption would result in 180,000 trips being made annually by persons using wheelchairs over the whole intercity fixed-route service system. The report goes on to note (pg. 95) that estimating travel demand is notoriously difficult for services that have not been introduced. Further, the Massachusetts and Canadian programs were not representative of full-scale future accessible service because of limited connectivity to the broader national system and the continued existence of certain barriers to persons with disabilities. Further, one can only conjecture how many of the trips estimated by OTA for the cited populations are already being taken.

In preparing the Regulatory Assessment for the final rule, the Department relied on estimates from a variety of sources, which varied in their projections of stimulated traffic by a factor of seven. Given the uncertainties involved in estimating demand generated by a system that is not yet in existence, we have expressed our projections in terms of a range with a high and low estimates.

For the high-end estimate presented in the assessment, it is assumed that demand by wheelchair passengers and other mobility-impaired passengers will grow substantially once there is full access to a nationwide accessible OTRB system. The urban transit systems that will provide connectivity in the form of entrance and egress for many intercity OTRB trips will also be becoming more accessible as the ADA continues to take effect. Many barriers will remain, however, and for the future period with which this Regulatory Assessment is concerned it is not expected even for purposes of the high-end estimate that there will be achieved the universal accessibility assumed in the estimates by OTA.

When persons with disabilities can travel, they will often take along family members or personal assistants. Consistent with the data in the American Travel Survey, the high-end estimate assumes that approximately 17 percent of new patrons with disabilities will be accompanied by family members. On the other hand, transit data suggests little additional use of lift service by cane and crutch users, so this portion of the estimate was reduced, compared to the NPRM.

The high estimate implies that new patronage by wheelchair users of scheduled intercity OTRB service will be approximately 52,000 per year once the fleets of Class I and other intercity regular-route operators are fully equipped with lifts (i.e., 12 years into implementation of the rule). It assumes that total stimulated traffic will grow to a volume of trips of 182,000 annual trips, equivalent to 0.456 percent of total current passenger traffic of about 40 million trips per year. This percentage is made up of 0.15 persons in wheelchairs, 0.24 percent persons with other mobility impairments, and 0.066 percent family members or other persons accompanying these passengers. The Regulatory Assessment's low estimate of stimulated traffic differs from the high estimate in that the percentage of current traffic assumed to be accounted for by new patrons in wheelchairs is 0.10 percent rather than 0.15 percent, with patronage by other mobility-impaired persons and accompanying family members adjusted proportionately to 0.16 percent and 0.043 percent, respectively, or 0.303 percent altogether. It would result in a projection of approximately 121,000 total annual new trips when Class I fixed-route fleets are fully accessible. It is expected that wheelchair passengers and other mobility-impaired passengers and their families will ultimately take advantage of between 171 and 262 thousand additional trips per year on fixed-route services and between 397 and 595 thousand trips on charter/tour services. It should be pointed out that one of the sources of difference between the industry's figures and the Department's is that the former concerns demand at the beginning of a process leading to a fully accessible system, while the latter projects demand once a fully accessible system is in place, some years later.

While the high estimate of new patronage by wheelchair users reflects available experience with accessible OTRB commuter services offered by one transit operator, Denver RTD, this low estimate relies more on experience with longer-distance intercity service that would not have had any significant commuter-type patronage (in particular the programs by Canada Coach Lines) and the transit experience of Golden Gate Transit and the New York City Transit. Both estimates involve a modest reduction in projected demand, compared to the regulatory assessment prepared in connection with the NPRM.

Financial Burdens/Loss of Marginal Routes

A basic argument the bus industry made against the NPRM's approach was that it was too costly and imposed undue financial burdens on the industry, with negative effects not only on the companies themselves but on passengers who travel on marginal, especially rural, routes. Commenters emphasized the financial fragility of the industry generally and individual companies, noted that many companies typically have low profit margins and expressed the concern that the costs of accessibility proposed in the NPRM would drive some companies out of business. They mentioned the historical trend toward shrinking passenger volume and points served by intercity buses. They said that, in a number of respects, the NPRM's regulatory assessment understated the actual costs imposed on carriers. In this context, commenters argued that the actual costs imposed on carriers constituted an undue financial burden, because they would hamper the rebuilding of the capital investment of bus companies, endangering their attempts to revitalize the passenger bus business.

Bus industry commenters also provided lists of points that they

thought could well lose service if they were required to obtain accessible buses. The reasoning of the operators is that, in order to cover compliance costs, they would have to eliminate economically marginal routes, since they could not afford to raise fares across the board and remain competitive. Greyhound listed 144 points it said would face the loss of intercity service. Combining this projection with information from other carriers, an industry association projected that 278 points would lose all service, and another 378 would lose frequency of service or connections. The commenter projected that the loss of service to these points could result in an annual loss of 208,000 passenger trips, a considerably larger number of trips than the stimulated demand that the regulation would create. This commenter believed that the service would not disappear overnight, but rather incrementally as old equipment needed to be replaced by more expensive, accessible new equipment that companies would choose not to acquire.

Disability community commenters pointed to the TEA–21 subsidy as mitigating financial impacts on carriers. They also suggested that industry comments seriously underestimated the operating costs of an on-call system, which were continuing, in contrast to the discrete capital costs of accessible buses. They also criticized the objectivity and data in industry cost projections. Every business in America has to comply with ADA accessibility mandates, they said, generally without subsidy, and bus companies could do so as well.

DOT Response

a. Financial Situation of Fixed-Route Carriers

Throughout the early 1990s, most intercity carriers experienced financial difficulties, to a great extent as a result of Greyhound's 1990 drivers' strike and bankruptcy, plus two different Greyhound plans to restructure service. Many other OTRB carriers' earnings are very dependent on the state of Greyhound's service, over 30 percent of which involves interlining with other carriers. In 1996 and 1997, all but a few Class I intercity carriers began to creep into the black, or break even.

There is naturally some variation in the financial strength of different carriers. For example, the Class I financial reports (for the year 1997) filed with DOT's Bureau of Transportation Statistics show privately held Peter Pan Lines (Massachusetts), much smaller than Greyhound but the next-largest carrier in terms of regular-route intercity revenues and its effective competitor in certain heavy-density Northeastern markets, generating operating expenses (before interest and taxes) at a rate of 86 percent of revenues as contrasted with 97 percent for Greyhound Lines itself.

However, when viewed as a whole, the industry's financial position continues to center on Greyhound, the extensive debt financing of which generates an annual interest expense that is still substantial compared to operating earnings. Greyhound and its consolidated subsidiaries have incurred net losses in all but one year since the driver's strike, ranging from a high of $77.4 million (1994) down to $6.6 million (1996). Their loss for 1997 was $16.9 million although they would have reported $8.4 million in positive net income had it not been for an extraordinary expense charge taken that year in connection with a re-financing transaction that spread their required debt repayments further out into the future.

According to Greyhound, in 1995, 1996 and 1997, it posted revenue and ridership increases (the first since 1991) and has realized a dramatic turnaround by streamlining operations, lowering fares, hiring more drivers, and adding long-haul services. It is beginning to restore infrastructure, and reduce fleet failure rates and high maintenance costs, by replacing an aging fleet of 15–20-year-old buses. It has also increased its package-express business, in part because of the UPS strike in August 1997. In July, 1997 Greyhound bought Carolina Trailways for $25.3 million cash, debt assumption and stock, of which $20.4 million was cash, and in August of that year purchased Valley Transit for $19 million in cash. During 1996–97, Greyhound leased 384 new buses (without lifts) financed by seven institutions. It has also committed to acquire 80 new lift-equipped buses through 1999, of which 20 have already been ordered. Greyhound raised fares by four percent last year on selected routes (while increasing their overall revenues, according to filings the company made with the Securities and Exchange Commission), and also made selected fare reductions on other route segments.

Thus, Greyhound appears to be headed for recovery along with most of the other Class I intercity/regional carriers. Some small carriers continue to face financial hardships and cannot afford to replace aging fleets. The requirements of the final rule for small operators, however, should significantly mitigate regulatory impacts on them.

b. Reductions of Passenger Traffic and Points Served

Commercial intercity carriers are also concerned about their limited ability to ''pass on'' to current passengers the costs of accessibility improvements. This can be expressed in economic analysis terms as the elasticity of overall demand for their service with respect to average price charged. The Department is not assuming that fares could be raised by an amount sufficient to completely cover the costs of compliance with the final rule by current OTRB operations in all U.S. markets without any effect at all on existing patronage. By definition, this would demonstrate perfect inelasticity of demand over that range of price change, which industry representatives suggest is not the case.

The economic model used in the regulatory assessment focuses on an elasticity of demand of -1.0. If this theoretical assumption is correct, and Greyhound needed to add about 2.1 percent to its ticket prices to wholly recover compliance costs of the rule, it could lose 2.1 percent of its revenues, which could be approximated as 2.1 percent of passenger trips being lost. Subject to appropriations, the TEA–21 subsidy would cut these figures by about a third. For Greyhound, this (i.e., the subsidized price increase level of 1.33%) would amount to a potential loss of 233,000 passenger trips out of 17.5 million. Extrapolating to the 40 million carried by large intercity carriers in 1997, this would amount to a 532,000 passenger trip decline. The offsets for stimulated traffic would range from about 53,000 to 80,000 passenger trips for Greyhound, and 85,000–127,000 passenger trips for the fixed-route system as a whole.

To the best of the Department's knowledge, there are no stated preference or revealed preference studies of the actual impacts of price rises in intercity bus travel that would empirically confirm or disconfirm the hypothesis derived from this model that a 1.3 percent price increase would have these effects. There is some room for question given the low absolute price increases involved. For example, taking into account the TEA–21 subsidy, the compliance cost of the rule would add 46 cents to the cost of Greyhound's $34.00 average fixed-route ticket. In the real world, would a transit-dependent consumer of an average intercity bus trip decline to take the trip because the ticket cost $34.46 instead of $34.00? (We note that Greyhound recently raised fares by about four percent on selected routes.) There is a considerable

uncertainty surrounding this model which makes it difficult to say with confidence what the actual magnitude of the effects of a price increase would be, and a certain degree of caution in using these estimates is in order.

With respect to cutting marginal routes, Greyhound cites a list of 19 marginal routes which could lose service. The Greyhound System Timetable for June 24, 1998, shows that the 144 points on these 19 routes represent 6 percent of the system's 2400 total points and 1.5 percent (on the basis of July operations) of their 1997 bus-miles. However, 45 of the 144 points were not listed in the timetable as having any agency service at all. Two routes, encompassing 27 points, are currently subsidized by the state of Pennsylvania.

An industry association comment enlarged the list of single-service points that might be abandoned to 287, but we have reason to question some them. Most of the routes cited by this comment are served by small carriers, which have the option of buying used buses instead of abandoning the routes. The ABA projection appears not to take this possibility into account. In addition, the small operator provisions of the final rule are likely to lower significantly the number of potential number of routes cut by small operators.

Moreover, as industry comments themselves pointed out, there has been marked shrinkage of the number of passengers and number of points served by the intercity bus industry in recent decades. This appears to have been caused by changes in the economy, passengers' travel preferences, and, to an extent, by management decisions of bus industry members. Certainly accessibility requirements had nothing to do with it. It is likely, in the future as in the past, that broader economic circumstances will have much more to do with the financial health and route structure of bus companies than any specific requirement of this or any other regulation.

c. Overall Costs.

The Department's estimates of overall compliance costs of the rule are set forth in the tables below. They are summarized from material in the Department's regulatory assessment. Net costs are calculated by subtracting the projected revenues from stimulated demand generated by service complying with the rule from the overall, or gross, costs. All costs are year 2000 present value discounted costs. The following tables do not include the effect of the TEA–21 subsidy or other financial assistance available to bus companies.

OVERALL GROSS AND NET COSTS

[Millions of Year 2000 dollars]

	Gross costs		Net costs	
	22-Year	Annual	22-Year	Annual
Fixed-route	205–254	19–23	152–219	14–20
Charter/tour	38–80	3–7	16–66	1–6
Total	242–334	22–30	168–285	15–26

COSTS EXPRESSED AS COSTS PER STIMULATED TRIP

[Year 2000 dollars]

	Gross costs basis	Net costs basis
Low Estimate of Stimulated Trips	67.91–93.47	54.23–79.71
High Estimate of Stimulated Trips	45.01–61.95	31.15–48.09

d. Conclusion

The conclusion the Department draws from its review of the economic issues in the rulemaking is that, while there are identifiable economic impacts on the bus industry, these impacts are not so great as to preclude the Department reasonably from requiring the accessibility requirements of the final rule. The ADA does not immunize private parties, including bus companies, from some of the burdens of ensuring nondiscrimination for people with disabilities. The economic impacts of the rule are not sufficient to constitute an ''undue burden'' on bus companies. Given the generally improving financial health of the fixed-route bus industry, the relatively modest net, and even gross, costs of the rule are very unlikely to have devastating effects on the industry, of a magnitude that could be fairly regarded as unduly burdensome. They are necessary, ''due'' burdens of achieving the objectives of the ADA by providing meaningful, nondiscriminatory service.

In the context of industry arguments about allegedly undue financial burdens and commenters' claims that the OTRB industry is unfairly impacted by Federal requirements, compared to other modes, we believe it is useful to review the sources of direct and indirect Federal financial assistance authorized for the OTRB industry. Some of this assistance is specifically directed at making OTRBs accessible, while other funding sources represent general public subsidies to the industry. The following table summarizes the financial assistance applicable to FY 1999 through FY 2003:

[Dollars in millions]

Program	Annual average	Total
Rural Transportation Accessibility Incentive Program (TEA–21, Sec. 3038)	*$4.86	*$24.3

[Dollars in millions]

Program	Annual average	Total
Non-Urbanized Area Formula Program, intercity bus 15% set-aside (49 U.S.C. § 5311)	*31.4	*157.0
Motor fuel tax exemption	*33.5	*167.5
Total	69.8	348.8

*—authorized funds.

The Rural Transportation Accessibility Initiative is the TEA–21 subsidy dedicated to OTRB accessibility. This program authorizes $24.3 million (including $17.5 million specifically for fixed-route operators) in guaranteed funds to subsidize up to 50 percent of capital and training costs of OTRB accessibility.

Since 1992, states have been required to make funds available for fixed-route intercity bus transportation. Each state is required to expend 15 percent of the funds received through FTA's Non-Urbanized Area Formula Program for this purpose. FTA guidance specifies that these funds may be used to purchase vehicles or vehicle-related equipment such as wheelchair lifts. The guaranteed TEA–21 funding available for the 15 percent set-aside will more than double between FY 1997 and FY 2003, from $17 to $36 millon per year. The 15 percent set-aside can be waived only if a state's governor certifies that the state's intercity bus service needs are being adequately met. This program provides states a means to respond to concerns that costs associated with accessibility could result in the termination of rural bus routes.

As noted above, OTRBs have a significant fuel tax break. OTRBs are exempt from all but three cents of the Federal Motor Fuels Tax on diesel and other special fuels. The value of this exemption is 21.3 cents per gallon,, amounting to an annual tax saving for the industry of $33.5 million (based on 1996 Federal fuel consumption statistics).

In addition to the sources of assistance shown in the table, there are two additional sources of Federal funding for OTRB services. While these funding sources do not provide dedicated funding for OTRB services, and other projects compete for funds, state and local officials who are concerned about the continuation or expansion of OTRB services (e.g., on rural or marginal routes) can take advantage of them.

First, a new provision in TEA–21 expands the highway Surface Transportation Program (STP) eligibility to fund private intercity bus capital expenses (TEA–21 section 1108). This amendment gives states two additional ways of using STP funds: directly, relying on the new TEA–21 language adding intercity bus terminals and equipment as eligible expenditures, or indirectly, through transfers of STP funds to the FTA Non-Urbanized Area Formula Grant Program, described above. The STP program averages $5.5 billion annually during the TEA–21 authorization period. Second, the Congestion Mitigation and Air Quality (CMAQ) program's funds are eligible for support of OTRB service. The CMAQ program averages $4.1 billion annually during the TEA–21 authorization period.

The Department emphasizes that these sources of Federal financial assistance are not essential to the Department's ability, as a matter of law or policy, to impose the nondiscrimination and accessibility requirements of the final rule. Requiring compliance with civil rights requirements like those of the ADA is not contingent on the availability of such assistance. However, in assessing the impact of this rule, it is fair to note the fact that such assistance is available. We note also that the amount of this assistance is well in excess of the total compliance costs of the rule.

Notwithstanding the modest total costs of the rule. and the considerable Federal financial assistance available, the Department is concerned about the overall economic impact of the regulation and its impact on particular companies. The Department is acting on this concern in several ways. These include the special provision for small mixed-service operators, the time extension mechanism for fleet accessibility deadlines for large fixed-route carriers, and the absence of a fleet accessibility requirement for small fixed-route operators and demand-responsive operators, discussed above.

In addition, with respect to small fixed-route operators, the Department is adding another provision designed to reduce potential economic impacts. Rather than obtaining accessible buses, a small fixed-route operator can commit to providing equivalent service to passengers with disabilities. This service, which has to meet existing part 37 criteria for equivalent service, must also provide service to a passenger in his or her own wheelchair. The Department is not prescribing the form of this equivalent service, but it could involve an alternative vehicle (e.g., an accessible van) that the operator would provide on short notice to carry a passenger where that passenger would have gone on the operator's bus.

The Department is also adding a regulatory review provision to the final rule. This review provision commits the Department to conduct reviews of the provisions of the rule for demand-responsive and fixed-route service, including data concerning accessible buses, advance notice service, costs and ridership in 2005–2007. This review will allow the Department to make appropriate changes in any provisions of the regulation, based on actual experience concerning costs, service and other matters. We note that comments from the bus industry supported data collection for this purpose and the idea of reviewing regulatory requirements after some time had passed (though bus industry commenters would have preferred to wait until after such a review before requiring fully accessible fixed-route service). Aside from this review provision, the Department will continue to evaluate relevant data about implementation of the rule, its costs and other effects, available funding, and the success of bus companies at providing accessible service as part of our ongoing oversight of ADA compliance.

Environmental Issues

Bus industry commenters made two related environmental arguments. The premise of both arguments is that bus companies will respond to the costs of compliance with the rule by reducing marginal, especially rural, routes. Significant numbers of points and passengers will lose intercity bus service as a result, the commenters assert.

Since intercity bus passengers are disproportionately low-income persons, including members of minority groups, the industry argued that Department should consider the ''environmental justice'' effects of the proposed rule under Executive Order 12898 and a DOT Order implementing it. In addition, industry comments asserted that reductions in bus routes would lead more people to drive their cars on trips, increasing air pollution. In addition, there would be increased fuel usage because of heavier equipment on buses, needing to keep buses running longer at stops to operate the lifts, etc. These factors should be the subject of an environmental impact statement, pending which the Department should withdraw the rulemaking.

DOT Response: As noted above, the premise of these arguments is that significant adverse environmental and environmental justice effects will flow from the Department's accessibility requirements, since companies will respond to these requirements by cutting routes. This premise is flawed in two important respects. First, the economic effects of the final rule, particularly but not only with respect to small entities, are greatly mitigated by the variety of steps the Department has taken in response to comments on the NPRM and the significant financial assistance available to operators. These provisions are likely to reduce significantly the extent to which many companies would choose to respond to the requirements of the rule by reducing service. Absent the route reductions, the environmental and environmental justice impacts alleged by industry comments effectively disappear.

Second, route reductions, and any consequent environmental or environmental justice effects, are not mandated by the final rule. To the extent they occur at all, route reductions are the result of free choice by the bus companies themselves. If a bus company's costs increase for any reason (e.g., higher capital costs, high debt service, increases in fuel prices, increases in labor costs, as well as regulatory compliance), the company must decide how to deal with the increased cost. There is wide variety of potential responses. Does the company raise fares? Does it reduce service? Does it accept a lower profit margin? Does it seek additional subsidies? When a company chooses one or a combination of responses to increased costs, its choice is likely to have consequences for its customers. These choices are the proximate causes of the consequences to customers.

One point that disability community comments made, and bus industry comments did not emphasize, is that people with disabilities are disproportionately poor. If they live in rural areas, they are likely to have even fewer transportation alternatives than other persons. This group, which has traditionally been underserved by the bus industry, would receive service they can use under this rule, often for the first time. It is appropriate, in an ADA rulemaking, to pay particular attention to the needs of people with disabilities in determining what policy to pursue.

The Department will place an environmental assessment (EA) in the docket for this rulemaking. It is our judgment that the environmental effects of the rulemaking are insufficient to call for the preparation of an environmental impact statement (EIS). The EA will address the industry's air quality arguments in more detail. We would note a few points here, however. The primary air quality argument made by the industry is that people who lose bus availability because of industry decisions to cut service will take trips by car. This forgets that people often ride buses precisely because they are transit dependent (e.g., according to information in the docket, 44 percent of intercity bus passengers do not own a car and 60 percent do not own a car capable of making a 500-mile trip). This substantially limits the extent to which ex-bus passengers are in a position to substitute car trips. In addition, the industry arguments with respect to running buses longer to operate lifts and therefore increase emissions appear to ignore industry commenters' assertion that, under the industry's favored approach, there would no fewer lift boardings than under the Department's requirements. Moreover, there would need to be some ''deadhead'' trips in order to meet 48-hour advance reservations. These additional trips would probably add to the total of bus emissions.

The Department finds that this rule has no significant environmental impacts that would warrant either the preparation of a full EIS or the withdrawal of the rulemaking.

Rest Stops

The NPRM proposed that operators of accessible buses would have to permit passengers with disabilities to use the lift to get off and back on the bus at rest stops. It proposed that operators of inaccessible buses would have to provide deboarding and reboarding assistance to passengers with disabilities at rest stops, as long as doing so would not unreasonably delay the trip.

Disability community commenters strongly opposed the proposal concerning inaccessible buses. They said the ''unreasonable delay'' language did not protect the rights of passengers to have nondiscriminatory access to rest stop facilities. Operators should not have the inhumane discretion to determine when, or for how long, a passenger with a disability can use a restroom, they said. Moreover, all or some rest stop facilities themselves should be required to be accessible, so that passengers did not get off buses only to confront an inaccessible restroom.

Commenters proposed two requirements beyond those discussed in the NPRM. First, while acknowledging that the ADA does not permit the Department to require the installation of accessible restrooms on buses if doing so will result in the loss of seats, some comments suggested that many operators now purchase buses with larger seating capacities than Congress contemplated in 1990 when it enacted the ADA. One could install an accessible restroom and have no fewer seats than Congress intended a bus to have at that time, they said, complying with the intent of the statute.

Second, with respect to buses with inaccessible restrooms traveling express routes with long intervals between rest stops, operators should be required to make unscheduled rest stops to accommodate passengers who cannot use the on-board restroom. This is the only way, commenters said, to provide necessary and nondiscriminatory service to passengers with disabilities, who otherwise would unfairly have to take uncomfortable steps (such as dehydrating themselves before a trip) to adjust to the denial of restroom facilities.

Bus industry commenters generally supported the NPRM proposal. They asked for additional guidance on how to determine whether a delay was unreasonable, suggesting that schedule disruption should be an important consideration. These commenters strongly opposed the disability community request for unscheduled rest stops (or more frequently scheduled rest stops) on express bus runs. They said it would fundamentally alter the nature of express service by creating delays that would make it very difficult to meet schedules, causing chaos with respect to interline connections, and reducing competitiveness with other modes of transportation. Industry comments also took the view that most rest stops were either accessible or becoming accessible,

and that bus operators should be able to make use of those that were not on the same basis as other persons or businesses.

DOT Response: When the final rule's requirements begin to apply to an operator, that operator will have to ensure that an accessible bus (or, in some cases, equivalent service) will be provided to passengers, either routinely or on 48 hours' advance notice. For this reason, the need to provide boarding assistance to paasengers at rest stops should occur only in rare cases (e.g., when there are more wheelchair users on a bus than there are securement locations). Situations involving transportation of wheelchair users on inaccessible vehicles should occur rarely if at all after 2000–2001.

The Department is persuaded by disability group comments that operators transporting disabled passengers have an obligation to assist passengers on and off buses at rest stops, even on such rare occasions. To stop at a restroom or a restaurant, allow everyone else to get off the bus and use the facilties, but refuse to assist wheelchair users or other persons requiring boarding assistance in leaving the bus, would treat the latter class of passengers differently from all others based on their disability. It is difficult to square such different treatment with the language and purposes of the ADA.

The Department is not persuaded by disability group comments that we have the discretion to require accessible lavatory units on OTRBs as long as it will not result in fewer seats than on a typical 1990 OTRB. It is better to read the statute to preclude a requirement for accessible restrooms in any situation in which installing such a unit would reduce the number of seats to less than it would otherwise be. If a 55-seat capacity bus would have space for only 51 seats after an accessible restroom is installed, we believe that this is a seat loss for the bus even though more seats remain available than on a 1990-model 47 passenger bus.

Rest stops themselves are Title III (or sometimes Title II) facilities for ADA purposes. Many, though not all, are or will become accessible. As a general matter, we do not believe it is fair to require organizations who bring people to these facilities to be responsible for the facilities' accessibility. It would be going too far, in our view, to mandate that bus companies stop only at facilities that are actually accessible. Nevertheless, there are some situations in which it is appropriate to impose obligations on bus operators. For example, if the bus company owns or controls a facility (e.g., a bus station) and uses the facility as the place where it makes rest stop services available to passengers, then use of the facility effectively becomes part of the bus company's package of transportation services. This is also true if the bus company contracts with a facility to provide rest stop services (e.g., a tour bus company contracts with a restaurant as a place where the bus will make a food and restroom stop). In these cases, it is reasonable to insist that the bus company, on its own or through a contractual relationship, ensure the compliance of the facilities with ADA requirements.

Unscheduled rest stops are a difficult issue. On one hand, if a bus takes three hours to go between Points A and B with no stops and there is an inaccessible restroom on board, non-disabled passengers have the chance to go to the bathroom over the three-hour period and disabled passengers do not. This facially different treatment raises a discrimination issue under the ADA. On the other hand, if a bus making such a trip is scheduled to interline with another company's bus at the next destination, and incurs an unscheduled 30-minute delay because of a rest stop request, the schedule and transportation for other passengers could be disrupted. Such disruptions, and other effects mentioned in industry comments, could be more than trivial.

The Department believes that, since both sides of this issue have merit, it is reasonable to find a middle-ground solution. The final rule will require bus companies to make a good faith effort to accommodate the requests of passengers with disabilities for an unscheduled rest stop, but will not require the bus company to accede to such a request when doing so would unreasonably delay the trip or disrupt service for other passengers. The bus company would retain discretion with respect to making the unscheduled stop, but would owe the passenger an explanation for a decision not to make the stop.

Other Issues

a. Interlining

Disability community commenters raised the issue of interlining. When a passenger buys a ticket or makes a reservation through one carrier for service that involves transfer to another carrier's bus, commenters said, the carrier should have to ensure that accessible transportation is provided for the entire trip, so no one is stranded at a transfer point. While not speaking of this issue directly, some bus industry comments did allude to their ''service-based approach'' being able to handle this matter.

To provide clarity concerning interlining, the Department has added a section giving the carrier making the arrangements for the interline trip the responsibility for communicating to other carriers involved about the need for accessible service. Each carrier would be responsible for actually providing the service for which it is responsible, however.

b. Interim Service

There were few comments concerning the interim service provisions of the NPRM. Bus companies said they could comply, since the interim provisions were similar to the service-based approach they support. Disability community commenters said that the provisions were acceptable on an interim basis, since full fixed-route accessibility would be required later. While there were few comments that directly pertained to the time frames for providing interim service, carrier comments emphasized the readiness of the carriers to provide ''service-based'' transportation in the near future. Given that there are two or three years between now and the application dates of the rule it is reasonable to conclude that an additional two years is not necessary for carriers to provide interim service in accessible buses. In addition, retaining the two-year delay would mean that, for passengers of most of the operators who are small entities, it would be five years before they could count on receiving accessible service. Consequently, the final rule reduces the proposed phase-in period in half and calls on fixed-route carriers to begin 48-hour advance notice interim service in October 2001 or 2002.

c. Training and Maintenance

Disability community comments emphasized the importance of training of personnel and maintenance of accessible features. There were few comments on these subjects from bus industry commenters. Training and maintenance requirements were proposed in the NPRM. The final rule clarifies the content of the training requirements and specifies the lift maintenance requirement, which is similar to that for other modes.

d. Discriminatory Actions

Disability community commenters suggested that certain alleged practices of the bus industry under the current interim regulations should be proscribed (e.g., using traveling companions or paramedics to assist passengers' boarding, without the passengers' consent; unjustified denials

of service). We have added a provision enumerating several prohibited practices. We would note that most of the occasions for the problems to which this section refers should be much reduced when the interim service and ultimate accessibility requirements of the new rule are implemented, since accessible vehicles will be used for virtually all trips for passengers with disabilities beginning October 2001/2002.

e. Additional Passengers Using Wheelchairs

In addition, in response to some comments from both disability community and bus industry parties, we have specified that, if there are more wheelchair user passengers than securement locations on a given bus, ''extra'' passengers would be given the opportunity to receive boarding assistance with a transfer to a vehicle seat. If the passenger declined this offer, the bus company would not have to provide transportation to the passenger on that run.

f. Technical Accessibility Standards

Bus manufacturers and some industry commenters provided technical comments on the proposed bus accessibility standards proposed jointly by DOT and the Access Board. The Department is in agreement with the responses to the Access Board to these comments in its rulemaking document (e.g., with respect to door height and lighting issues), also published today, and we are adopting the Access Board's guidelines as an amendment to 49 CFR part 38. These standards determine what an accessible OTRB looks like for purposes of subpart H of part 37.

g. Definition of an OTRB

A few bus industry commenters expressed the concern that companies might seek to avoid requirements by acquiring buses that did not fit the statutory and regulatory definition of an OTRB. If any company actually contemplates such a tactic as a means of avoiding ADA accessibility requirements, it would not achieve its objective. A bus that does not fit the definition of an OTRB is simply a vehicle subject to the normal accessibility requirements of Title III of the ADA and part 37. Such a bus would not benefit from the special provisions applicable to OTRBs. For example, a fixed-route provider buying a new non-OTRB would have to buy an accessible bus. A demand-responsive provider buying a new non-OTRB would have to buy an accessible bus or provide equivalent service.

Section-by-Section Analysis

Section 37.3—Small Operator Definition

This section defines a Class I operator as a large operator. (Class I carriers are defined as carriers with $5 million more in gross annual operating revenues, adjusted by the current Producer Price Index of Finished Goods, compared to 1986 as a base. The current figure is $5.3 million.) Anyone else is a small operator. If companies are affiliated, in the sense of Small Business Administration size regulations (see 13 CFR Part 121), their revenues are added together for purposes of determining size. For example, a group of small companies owned or controlled in common by a holding company or conglomerate would be viewed as affiliates, whose revenues would be added together to determine whether they were treated as a small or large operator for purposes of the rule.

Section 37.181 Application Dates

This rule will become effective in October 1998. It will begin applying to large entities in October 2000 and to small entities in October 2001.

Section 37.183 Purchase or Lease of New OTRBs by Operators of Fixed-Route Systems

Beginning October 2000, buses purchased or leased by large fixed-route providers must be accessible. An accessible bus is one that meets Access Board/DOT standards (i.e., in 49 CFR Part 38). This requirement applies to buses *delivered* after that date, even if they were ordered earlier. Small fixed-route providers must comply with the same requirement beginning October 2001. However, instead of complying with this requirement, a small fixed-route operator can choose to provide equivalent service to passengers with disabilities, in a vehicle (it may be an alternative vehicle) that permits a wheelchair user to ride in his or her own mobility aid. Equivalent service is defined by § 37.105. Essentially, equivalent service is service that in terms of time, destination, cost, service availability etc. is parallel to that provided non-disabled passengers. Fixed-route operators are not required to purchase accessible used buses. Retrofitting existing buses for accessibility is not required.

Section 37.185 Fleet Accessibility Requirement for OTRB Fixed-Route Systems of Large Operators

Large fixed-route operators must ensure that 50 percent of the buses used for fixed-route service are accessible by October 2006. They must ensure that 100 percent of the buses in these fleets are accessible by October 2012. However, operators can ask for a time extension past these dates. The Department will consider such requests based on the three factors listed in the rule. A bus company that had disproportionately ''stocked up'' on inaccessible buses between October 1998 and October 2000 or that had demonstrated poor compliance with the rule would not be in a position to make a strong case for a time extension.

Section 37.187 Interline Service

This section requires communication among different bus companies involved in an interline trip. The first responsibility falls on the carrier with whom the passenger initially makes a reservation or buys a ticket for an interline trip. It must communicate with the other companies involved with the trip, who have a responsibility to maintain open channels of communication and pay attention to communications they receive. The other companies retain full responsibility for actually providing service to the customer on their legs of the trip.

Section 37.189 Service Requirement for OTRB Demand-Responsive Systems

Beginning October 2001 for large entities, and October 2002 for small entities, demand-responsive operators must provide an accessible bus to any passenger who requests it 48 hours in advance. There is no requirement on demand-responsive operators to acquire their own accessible buses and no fleet accessibility requirement. Rather, when a timely request is made, the operator must find a bus and get it to the location where it is needed. Even if the request is made closer to the time of travel than 48 hours, the operator must make a reasonable effort to locate an accessible bus and provide it to the passenger.

The rule notes that an operator need not fundamentally alter its reservation policies or displace other passengers to comply with this requirement. The examples in the rule text illustrate how this principle works.

Section 37.191 Special Provision for Small Mixed-Service Operators

This provision applies only to a subset of small operators. If a small operator uses 25 percent or less of its buses for fixed-route service, with the rest being used in demand-responsive service, it can provide 48-hour advance reservation service for everything it does, fixed-route as well as demand-responsive. It would not have to obtain accessible buses of its own, beyond the extent necessary to successfully provide

advance notice service. This exception to the normal rule that advance notice service is not permitted for fixed-route service is placed in the rule in recognition of the special situation of such small mixed-service operators. Use of this provision by small mixed-service operators is optional. Their fixed-route service can also comply with this subpart by acquiring accessible buses or providing equivalent service, as provided in § 37.183(b).

Section 37.193 Interim Service Requirements

Beginning October 2001 or 2002, as applicable, a fixed-route operator must provide 48-hour advance reservation service. The operator must keep providing this service until and unless its fixed-route fleet consists entirely of accessible buses. For example, if a small operator never has a 100 percent accessible fleet, because it continues to purchase only used buses, then it must meet this interim requirement indefinitely, at least for that part of its service that is not fully accessible. For example, if a small operator has two routes, and one uses accessible buses for all trips and the other does not, interim service would be maintained only for the latter route.

Section 37.195 Purchase or Lease of OTRBs by Private Entities Not Primarily in the Business of Transporting People

This section states, for clarity, the ''private not-primariles'' are subject to the same rules as ''private primarilies'' for OTRB accessibility purposes. The NPRM stated somewhat different requirements for the two categories, and there were no comments on the subject, but for the final rule it made more sense to make the requirements parallel.

Section 37.197 Remanufactured OTRBs

There were no comments on this section of the NPRM, which is retained without change. It is drawn from remanufactured bus requirements elsewhere in part 37. We did add a note that remanufacturing an OTRB as an accessible bus would be required only in situations where a new OTRB would have to be accessible.

Section 37.199 Compensation for Failure to Provide Required Vehicles or Service

This is an accountability mechanism for advance notice and equivalent service. If an operator fails to provide the required service, then the operator must pay compensation to the passenger. This is not a civil penalty paid to the Department, but a sum sent directly to the passenger whose travel plans were disrupted. No administrative procedure is needed. For example, a passenger requests an accessible bus on Monday for a trip taking place Thursday. On Thursday, is the accessible bus at the appointed place and does its accessibility equipment operate to allow the passenger to complete his or her trip successfully? If yes, then there is no problem. If no, then the operator pays the compensation to the passenger within seven days.

The reason for the failure doesn't matter. If the operator forgot to obtain an accessible bus, or if the operator made a good faith effort and couldn't find one, or if the operator found a bus but the lift is broken, the result is the same. Compensation must be paid. Only in rare situations in which no one receives transportation, for reasons beyond the operator's control (e.g., a blizzard shuts down the East Coast, and nothing moves for two days; an accessible bus is on the way to make a timely pickup of passengers, is involved in a crash, and never makes it to the pickup point), would the operator be excused from paying compensation.

The compensation scheme is graduated. The amount of compensation increases with each failure to provide transportation. For occasion 1 with passenger A, the company pays $300. For occasion 2 with passenger B, the company pays $400, on up to $700 for the fifth and subsequent such incidents in the company's history. To help prevent the payment of compensation being regarded as simply a cost of doing business in lieu of compliance, the rule notes that payment of compensation does not immunize operators from ADA enforcement actions (e.g., litigation by the Department of Justice).

We also note that refunds of fares paid by passengers with disabilities for trips not taken as a result of an occurrence triggering the compensation requirement do not reduce the compensation requirement for carriers. For example, suppose a passenger has paid $50 in advance for a ticket, cannot travel because the operator fails to provide an accessible bus in a timely manner, and receives a $50 refund from the operator. If the operator was responsible for paying $300 compensation in this situation, the amount of compensation would still be $300, not $250.

Section 37.201 Intermediate and Rest Stops

Whenever any OTRB makes an intermediate or rest stop, at which passengers have the opportunity to get off the bus and use the facilities that are available, passengers with disabilities must have the opportunity to use the rest stop facilities. In the case of an accessible bus, this means operating the lift mechanism to allow a wheelchair user to get off and back on the bus. Under the final rule, there should be few if any situations in which a passenger is traveling in an inaccecssible bus, such that other means of boarding assistance are necessary. (There could be situations in which boarding assistance is needed for a passenger who has transferred to a vehicle seat because securement locations are filled with other passengers.) In any case, the bus company is responsible for providing whatever equipment and personnel are needed to complete these tasks and taking the time necessary to do so.

When a bus is making a lengthy express run (i.e., three hours or more without a stop) and is equipped with an inaccessible restroom, ambulatory passengers can go to the bathroom but many passengers with disabilities cannot. In this situation, if such a passenger with a disability makes a request for an unscheduled rest stop (whether at the beginning of the trip or during the trip), the bus operator must make a good faith effort to accommodate the request. Because an unscheduled rest stop can potentially disrupt schedules and connections, however, the rule does not require the bus company to make the unscheduled rest stop. This decision is discretionary with the bus company. In a situation where making the unscheduled rest stop would not unduly disrupt schedules or connections, it would fair to expect the stop to be made, however.

Bus companies sometimes, but not always, have a direct connection with the facilities at which rest stops are made. When the bus company owns, leases, controls, or has a contractual relationship with the facility for rest stop purposes, then provision of the rest stop facility is part of the service which a ticket buyer purchases. In these situations, the bus company has an obligation to ensure that the facilities meet ADA requirements.

Section 37.203 Lift Maintenance

This provision is not substantively changed from the NPRM. It requires regular and frequent maintenance checks of lifts on OTRBs. The section does not require daily tests of lifts. However, it is intended to require frequent enough checks to ensure that any problems with lift operation are caught in a timely fashion. It is also intended to ensure that, when a lift is used to help a passenger board the bus,

it is not the first time all day the lift has been operated. The section provides that a vehicle with an inoperable lift may be kept in service for up to five days from the discovery of the problem, if there is no substitute vehicle to be had. In such a situation, however, the company operating the bus with the broken lift is not excused from paying compensation under § 37.199.

Section 37.205 Additional Passengers Who Use Wheelchairs

This section concerns a situation in which there are more wheelchair users seeking to travel on a bus than there are securement locations. Passengers would be assigned to the securement locations on a first-come, first-served basis. Additional passengers would be offered an opportunity to transfer to a vehicle seat. They would board via the lift but would then have to be assisted to a vehicle seat (e.g., through use of an aisle chair). The passenger's wheelchair would be stowed in the baggage compartment, in the same way provided for in § 37.169.

If the passenger did not accept this offer, the passenger would not have to be provided transportation on the bus. Assuming an accessible bus had been provided for the trip, the bus company would not owe the passenger compensation in this case.

Section 37.207 Discriminatory Practices

This section lists several prohibited practices, reflecting concerns from disability community commenters about problems they had encountered in bus service under § 37.169. Given the provisions of the final rule, it is likely that the situations involved with service in inaccessible buses would occur very rarely, particularly after October 2001/2002 when all advance notice service will be required to take place in accessible buses.

Section 37.209 Training and Other Requirements

This section lists several sections of the Department's ADA rule that are particularly relevant to OTRB service. This is not an exclusive list. Bus operators must comply with all applicable portions of the rule. With respect to training, the section lists a number of tasks which bus company personnel must be trained to carry out properly.

Section 37.211 Effect of NHTSA and FHWA Safety Rules

This section simply recites that OTRB operators are not required to violate applicable NHTSA and FHWA safety rules. This section does not mean that bus operators can decline to provide equipment and services to passengers with disabilities because the operators believe there may be safety risks or believe that NHTSA or FHWA should issue a rulemaking on a particular subject.

Section 37.213 Information Collection Requirements

This section requires four different recordkeeping/reporting requirements. The first has to do with 48-hour advance notice and compensation. The second has to do with equivalent service and compensation. In both cases, the section requires bus operators to fill out a form when compensation has to be provided. The former section requires part of a form to be filled out and provided to the passenger when a request for advance-notice service is made.

The third has to do with reporting information on ridership on accessible fixed-route buses. Fixed-route operators would separate out data for lift boardings on 48-hour service and other service. The fourth has to do with reporting information on the purchase and lease of accessible and inaccessible new and used buses, as well as the total numbers of buses in operators' fleets.

The purposes of these information collection requirements are to provide data that the Department can use in its regulatory review (see § 37.215) and to assist in our oversight of compliance by bus companies. Comments from both bus industry and disability community commenters suggested that recordkeeping and reporting of this kind would be useful for these purposes.

These information collection requirements are subject to Office of Management and Budget (OMB) review under the Paperwork Reduction Act (PRA). The Department will subsequently submit to OMB a PRA approval request, including our estimate of the information collection burden associated with these requirements. Because the Department has not yet provided this package to OMB, we are keeping our docket open for 90 days, to ensure that interested persons have the opportunity to comment on it to the Department as well as to OMB. The Department emphasizes that this comment period concerns *only* the information collection requirements of this section. Comments on other provisions of the final rule will not be considered.

Section 37.215 Review of Requirements

This provision commits the Department to regulatory reviews of subpart H. The review would take place in 2005–2006 for rules affecting demand-responsive operators and 2006–2007 for rules affecting fixed-route operators. The review would be based in part on the information provided to the Department in the 37.213 reports. The purpose of the review would be to determine whether a mid-course correction in the provisions of the rules is appropriate (e.g., whether it would be desirable to eliminate, modify, or make more stringent certain provisions of the rule).

Chart Summarizing Final Rule, as Compared to NPRM

The following chart summarizes the provisions of the final rule, compared to the NPRM:

NPRM	Final rule
Applies to private OTRB operators beginning October 2000 (large companies) or October 2001 (small companies).	Same.
A small company is one that is not a Class I carrier (currently, a Class I carrier is one with gross operating revenues of $5.3 million or more).	Same.
Large and small companies providing fixed-route service, if purchasing or leasing a new OTRB, must acquire an accessible OTRB.	Same for large companies; small companies have the alternative of providing equivalent service.
Large and small companies providing fixed-route service must meet fleet accessibility deadlines. Deadlines are for 50% fleet accessibility by October 2006/2007 and 100% fleet accessibility by October 2012/2013. A small company does not have to meet these requirements if it does not obtain enough new buses by those dates to replace 50 or 100% of its fleet.	Same deadlines for large companies. Large companies may apply to the Secretary for a time extension if they have not obtained enough new buses by those dates to replace 50 or 100% of its fleet and meet other conditions. No fleet accessibility deadlines for small companies.

NPRM	Final rule
Large and small companies providing demand-responsive service, if purchasing or leasing new OTRBs, must obtain accessible buses unless they meet service requirements. Companies must meet 10% fleet accessibility requirement by October 2004/2005. A small operator does not have to meet this requirement if it does not obtain enough new buses by this date to replace 10% of its fleet.	Demand-responsive providers are required only to meet the service requirement.
Companies providing demand-responsive service must provide an accessible OTRB on 48 hours' advance notice. This requirement begins to apply in October 2002/2003.	Same requirement, but begins to apply in October 2001/2002.
No equivalent provision	Small mixed-service operators (75% or more of whose fleets are devoted to demand-responsive service) can meet requirements for both fixed-route and demand-responsive service through 48-hour advance notice service.
No equivalent provision	Fixed-route carriers who interline are required to send and receive information to one another to ensure that all accessible service needed for a trip is provided.
Until October 2002/2003, all companies must provide at least the interim service required by § 37.169. After those dates, fixed-route carriers with less than a 100% accessible fleet must provide at least 48-hour advance notice service as interim service.	Advance notice interim service with accessible buses begins October 2001/2002.
No equivalent provision	A bus company that fails to provide 48-hour advance notice service (e.g., demand-responsive service, interim service) or equivalent service, where required by the rule, must compensate the passenger with a disability who requested the service. Compensation amounts range from $300 to $700, depending on the number of times the bus company has failed to provide required service.
Private entities not primarily in the business of transporting people must obtain new accessible buses (fixed-route) or choose between obtaining new accessible buses and providing equivalent service (demand-responsive).	These entities must meet the same requirements as ''private primarily'' fixed-route or demand-responsive operators.
If an entity remanufactures an OTRB to extend its useful life 5 years or more, the remanufacturing must make the bus accessible, unless not technically feasible.	The requirement to remanufacture a bus to be accessible applies only in situations where a new bus would have to be accessible.
At rest stops, operator of an accessible bus would operate lift to permit passenger with a disability to get on and off the bus to use facilities. Operator of an inaccessible bus would provide boarding assistance for the same purpose, but need not unreasonably delay bus to provide this service.	At rest stops, the bus operator would have to provide needed assistance to allow passenger to use facilities. ''Unreasonable delay'' language deleted. Bus companies have obligation to ensure ADA compliance by facilities they own, lease, control or contract with. On express runs of 3 hours or more, if bus has inaccessible rest room, operator is required to make good faith effort to meet request of passenger with disability for unscheduled rest stop. The operator is not required to comply with the request, but must explain to the passenger the reason for any denial.
Bus companies must comply with §§ 37.161, 37.165–37.167, and 37.173 (concerning maintenance of other accessible features, lift and securement use, other service requirements, and training). Lift maintenance also required.	Same, but training requirements are more specific.
No equivalent provision	If there are more wheelchair users on a given bus than securement locations, bus company must offer to provide boarding assistance and transfer to a vehicle seat. If passenger declines the offer, bus operator is not required to transport the passenger on that bus.
No equivalent provision	Prohibited discriminatory actions listed (e.g., denials of service, use without passenger's consent of non-employees to provide boarding assistance).
No equivalent provision	Statement that NHTSA and FHWA safety rules apply to OTRBs.
No equivalent provision	Information collection required concerning provision of advance-notice and equivalent service and compensation, lift boardings, and bus acquisitions. The Department is seeking further comment on this provision, in connection with the Paperwork Reduction Act review process.
No equivalent provision	Department will conduct review of rule's provisions in 2005–2007.

Regulatory Analyses and Notices

This is a significant regulation under Executive Order 12866 and the Department's Regulatory Policies and Procedures, both because of its cost impacts on the industry and the strong public interest in accessibility matters. The Department has prepared a Final Regulatory Assessment to accompany the rule, which we have placed in the docket for the rulemaking. The Office of Management and Budget (OMB) has reviewed this final rule and the regulatory assessment.

Under the Regulatory Flexibility Act, this proposal is likely to have a significant economic impact on a substantial number of small entities. Indeed, all but 21 of the approximately 3500 bus companies covered by this rule are small entities. We have incorporated a Regulatory Flexibility Analysis into the regulatory assessment.

The Small Business Administration Office of Advocacy commented on the NPRM, recommending a service-based approach for small entities coupled with an accountability mechanism. The final rule includes a number of provisions

that are largely consistent with SBA recommendations:

- Small fixed-route carriers have the alternative of providing equivalent service, in lieu of obtaining accessible buses.
- Small fixed-route carriers are not subject to fleet accessibility deadlines.
- Until their fleets are 100 percent accessible, small fixed-route carriers would provide interim accessible bus service on a 48-hour advance notice basis.
- Small charter/tour carriers do not have a fleet accessibility percentage to meet and are not required to purchase accessible buses beyond what they need to meet the requirement for 48-hour advance notice service.
- Small mixed-service operators (who devote 25 percent or less of their fleets to fixed-route service) can meet all requirements through providing 48-hour advance notice service
- Small carriers do not have to obtain accessible used buses or retrofit existing buses.
- There is an accountability mechanism, of a type suggested by an association representing small carriers, for failure to meet service standards.
- The regulatory review provisions can benefit small carriers.

The Department has also placed an environmental assessment into the rulemaking docket. This rule does not have Federalism impacts under Executive Order 12612 sufficient to warrant a Federalism statement.

List of Subjects in 49 CFR Part 37

Buildings and facilities, buses, civil rights, individuals with disabilities, mass transportation, railroads, transportation.

Issued this 17th day of September, 1998, at Washington, D.C.

Rodney E. Slater,

Secretary of Transporation.

For the reasons set forth in the preamble, 49 CFR Part 37 is amended as follows:

PART 37—TRANSPORTATION SERVICES FOR INDIVIDUALS WITH DISABILITIES (ADA)

1. The authority for part 37 is revised to read as follows:

Authority: 42 U.S.C. 12101–12213; 49 U.S.C. 322.

2. Section 37.3 of part 37 is amended by adding the following definition, placed in alphabetical order with the existing definitions, to read as follows:

§ 37.3 Definitions.

* * * * *

Small operator means, in the context of over-the-road buses (OTRBs), a private entity primarily in the business of transporting people that is not a Class I motor carrier. To determine whether an operator has sufficient average annual gross transportation operating revenues to be a Class I motor carrier, its revenues are combined with those of any other OTRB operator with which it is affiliated.

* * * * *

4. A new Subpart H, consisting of §§ 37.181 through 37.215, is added to part 37, to read as follows:

Subpart H—Over-the-road Buses (OTRBs)

Sec.
37.181 Applicability dates.
37.183 Purchase or lease of new OTRBs by operators of fixed-route systems.
37.185 Fleet accessibility requirement for OTRB fixed-route systems of large operators.
37.187 Interline service.
37.189 Service requirement for OTRB demand-responsive systems.
37.191 Special provision for small mixed-service operators.
37.193 Interim service requirements.
37.195 Purchase or lease of OTRBs by private entities not primarily in the business of transporting people.
37.197 Remanufactured OTRBs.
37.199 Compensation for failure to provide required vehicles or service.
37.201 Intermediate and rest stops.
37.203 Lift maintenance.
37.205 Additional passengers who use wheelchairs.
37.207 Discriminatory practices.
37.209 Training and other requirements.
37.211 Effect of NHTSA and FHWA safety rules.
37.213 Information collection requirements.
37.215 Review of requirements.

Appendix A to Subpart H of Part 37—Forms for Advance Notice Requests and Provision of Equivalent Service

Subpart H—Over-the-Road Buses (OTRBs)

§ 37.181 Applicability dates.

This subpart applies to all private entities that operate OTRBs. The requirements of the subpart begin to apply to large operators beginning October 30, 2000 and to small operators beginning October 29, 2001.

§ 37.183 Purchase or lease of new OTRBs by operators of fixed-route systems.

The following requirements apply to private entities that are primarily in the business of transporting people, whose operations affect commerce, and that operate a fixed-route system, with respect to OTRBs delivered to them on or after the date on which this subpart applies to them:

(a) *Large operators.* If a large entity operates a fixed-route system, and purchases or leases a new OTRB for or in contemplation of use in that system, it shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) *Small operators.* If a small entity operates a fixed-route system, and purchases or leases a new OTRB for or in contemplation of use in that system, it must do one of the following two things:

(1) Ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; or

(2) Ensure that equivalent service, as defined in § 37.105, is provided to individuals with disabilities, including individuals who use wheelchairs. To meet this equivalent service standard, the service provided by the operator must permit a wheelchair user to travel in his or her own mobility aid.

§ 37.185 Fleet accessibility requirement for OTRB fixed-route systems of large operators.

Each large operator subject to the requirements of § 37.183 shall ensure that—

(a) By October 30, 2006 no less than 50 percent of the buses in its fleet with which it provides fixed-route service are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) By October 29, 2012, 100 percent of the buses in its fleet with which it provides fixed-route service are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) *Request for time extension.* An operator may apply to the Secretary for a time extension of the fleet accessibility deadlines of this section. If he or she grants the request, the Secretary sets a specific date by which the operator must meet the fleet accessibility requirement. In determining whether to grant such a request, the Secretary considers the following factors:

(1) Whether the operator has purchased or leased, since October 30, 2000, enough new OTRBs to replace 50 percent of the OTRBs with which it provides fixed-route service by October 30, 2006 or 100 percent of such OTRBs by October 29, 2012;

(2) Whether the operator has purchased or leased, between October 28, 1998 and October 30, 2000, a number of new inaccessible OTRBs significantly exceeding the number of buses it would normally obtain in such a period;

(3) The compliance with all requirements of this part by the operator

over the period between October 28, 1998 and the request for time extension.

§ 37.187 Interline service.

(a) When the general public can purchase a ticket or make a reservation with one operator for a fixed-route trip of two or more stages in which another operator provides service, the first operator must arrange for an accessible bus, or equivalent service, as applicable, to be provided for each stage of the trip to a passenger with a disability. The following examples illustrate the provisions of this paragraph (a):

Example 1. By going to Operator X's ticket office or calling X for a reservation, a passenger can buy or reserve a ticket from Point A through to Point C, transferring at intermediate Point B to a bus operated by Operator Y. Operator X is responsible for communicating immediately with Operator Y to ensure that Y knows that a passenger needing accessible transportation or equivalent service, as applicable, is traveling from Point B to Point C. By immediate communication, we mean that the ticket or reservation agent for Operator X, by phone, fax, computer, or other instantaneous means, contacts Operator Y the minute the reservation or ticketing transaction with the passenger, as applicable, has been completed. It is the responsibility of each carrier to know how to contact carriers with which it interlines (e.g., Operator X must know Operator Y's phone number).

Example 2. Operator X fails to provide the required information in a timely manner to Operator Y. Operator X is responsible for compensating the passenger for the consequent unavailability of an accessible bus or equivalent service, as applicable, on the B–C leg of the interline trip.

(b) Each operator retains the responsibility for providing the transportation required by this subpart to the passenger for its portion of an interline trip. The following examples illustrate the provisions of this paragraph (b):

Example 1. In Example 1 to paragraph (a) of this section, Operator X provides the required information to Operator Y in a timely fashion. However, Operator Y fails to provide an accessible bus or equivalent service to the passenger at Point B as the rules require. Operator Y is responsible for compensating the passenger as provided in § 37. 199.

Example 2. Operator X provides the required information to Operator Y in a timely fashion. However, the rules require Operator Y to provide an accessible bus on 48 hours' advance notice (i.e., as a matter of interim service under § 37.193(a) or service by a small mixed-service operator under § 37.191), and the passenger has purchased the ticket or made the reservation for the interline trip only 8 hours before Operator Y's bus leaves from Point B to go to Point C. In this situation, Operator Y is not responsible for providing an accessible bus to the passenger at Point B, any more than that it would be had the passenger directly contacted Operator Y to travel from Point B to Point C.

(c) All fixed-route operators involved in interline service shall ensure that they have the capacity to receive communications at all times concerning interline service for passengers with disabilities. The following examples illustrate the provisions of this paragraph (c):

Example 1. Operator Y's office is staffed only during normal weekday business hours. Operator Y must have a means of receiving communications from carriers with which it interlines (e.g., telephone answering machine, fax, computer) when no one is in the office.

Example 2. Operator Y has the responsibility to monitor its communications devices at reasonable intervals to ensure that it can act promptly on the basis of messages received. If Operator Y receives a message from Operator X on its answering machine on Friday night, notifying Y of the need for an accessible bus on Monday morning, it has the responsibility of making sure that the accessible bus is there on Monday morning. Operator Y is not excused from its obligation because no one checked the answering machine over the weekend.

§ 37.189 Service requirement for OTRB demand-responsive systems.

(a) This section applies to private entities primarily in the business of transporting people, whose operations affect commerce, and that provide demand-responsive OTRB service. Except as needed to meet the other requirements of this section, these entities are not required to purchase or lease accessible buses in connection with providing demand-responsive service.

(b) Demand-responsive operators shall ensure that, beginning one year from the date on which the requirements of this subpart begin to apply to the entity, any individual with a disability who requests service in an accessible OTRB receives such service. This requirement applies to both large and small operators.

(c) The operator may require up to 48 hours' advance notice to provide this service.

(d) If the individual with a disability does not provide the advance notice the operator requires under paragraph (a) of this section, the operator shall nevertheless provide the service if it can do so by making a reasonable effort.

(e) To meet this requirement, an operator is not required to fundamentally alter its normal reservation policies or to displace another passenger who has reserved a seat on the bus. The following examples illustrate the provisions of this paragraph (e):

Example 1. A tour bus operator requires all passengers to reserve space on the bus three months before the trip date. This requirement applies to passengers with disabilities on the same basis as other passengers. Consequently, an individual passenger who is a wheelchair user would have to request an accessible bus at the time he or she made his reservation, at least three months before the trip date. If the individual passenger with a disability makes a request for space on the trip and an accessible OTRB 48 hours before the trip date, the operator could refuse the request because all passengers were required to make reservations three months before the trip date.

Example 2. A group makes a reservation to charter a bus for a trip four weeks in advance. A week before the trip date, the group discovers that someone who signed up for the trip is a wheelchair user who needs an accessible bus, or someone who later buys a seat in the block of seats the group has reserved needs an accessible bus. A group representative or the passenger with a disability informs the bus company of this need more than 48 hours before the trip date. The bus company must provide an accessible bus.

Example 3. While the operator's normal deadline for reserving space on a charter or tour trip has passed, a number of seats for a trip are unfilled. The operator permits members of the public to make late reservations for the unfilled seats. If a passenger with a disability calls 48 hours before the trip is scheduled to leave and requests a seat and the provision of an accessible OTRB, the operator must meet this request, as long as it does not displace another passenger with a reservation.

Example 4. A tour bus trip is nearly sold out three weeks in advance of the trip date. A passenger with a disability calls 48 hours before the trip is scheduled to leave and requests a seat and the provision of an accessible OTRB. The operator need not meet this request if it will have the effect of displacing a passenger with an existing reservation. If other passengers would not be displaced, the operator must meet this request.

§ 37.191 Special provision for small mixed-service operators.

(a) For purposes of this section, a small mixed-service operator is a small operator that provides both fixed-route and demand-responsive service and does not use more than 25 percent of its buses for fixed-route service.

(b) An operator meeting the criteria of paragraph (a) of this section may conduct all its trips, including fixed-route trips, on an advance-reservation basis as provided for demand-responsive trips in § 37.189. Such an operator is not required to comply with the accessible bus acquisition/equivalent service obligations of § 37.183(b).

§ 37.193 Interim service requirements.

(a) Until 100 percent of the fleet of a large or small operator uses to provide

fixed-route service is composed of accessible OTRBs, the operator shall meet the following interim service requirements:

(1) Beginning one year from the date on which the requirements of this subpart begin to apply to the operator, it shall ensure that any individual with a disability that requests service in an accessible OTRB receives such service.

(i) The operator may require up to 48 hours' advance notice to provide this service.

(ii) If the individual with a disability does not provide the advance notice the operator requires, the operator shall nevertheless provide the service if it can do so by making a reasonable effort.

(iii) If the trip on which the person with a disability wishes to travel is already provided by an accessible bus, the operator has met this requirement.

(2) Before a date one year from the date on which this subpart applies to the operator, an operator which is unable to provide the service specified in paragraph (a) of this section shall comply with the requirements of § 37.169.

(3) Interim service under this paragraph (a) is not required to be provided by a small operator who is providing equivalent service to its fixed-route service as provided in § 37.183(b)(2).

(b) Some small fixed-route operators may never have a fleet 100 percent of which consists of accessible buses (e.g., a small fixed-route operator who exclusively or primarily purchases or leases used buses). Such an operator must continue to comply with the requirements of this section with respect to any service that is not provided entirely with accessible buses.

(c) Before a date one year from the date on which this subpart applies to an operator providing demand-responsive service, an operator which is unable to provide the service described in § 37.189 shall comply with the requirements of § 37.169.

§ 37.195 Purchase or lease of OTRBs by private entities not primarily in the business of transporting people.

This section applies to all purchases or leases of new vehicles by private entities which are not primarily engaged in the business of transporting people, with respect to buses delivered to them on or after the date on which this subpart begins to apply to them.

(a) *Fixed-route systems.* If the entity operates a fixed-route system and purchases or leases an OTRB for or in contemplation of use on the system, it shall meet the requirements of § 37.183 (a) or (b), as applicable.

(b) *Demand-responsive systems.* The requirements of § 37.189 apply to demand-responsive systems operated by private entities not primarily in the business of transporting people. If such an entity operates a demand-responsive system, and purchases or leases an OTRB for or in contemplation of use on the system, it is not required to purchase or lease an accessible bus except as needed to meet the requirements of § 37.189.

§ 37.197 Remanufactured OTRBs.

(a) This section applies to any private entity operating OTRBs that takes one of the following actions:

(1) On or after the date on which this subpart applies to the entity, it remanufactures an OTRB so as to extend its useful life for five years or more or makes a solicitation for such remanufacturing; or

(2) Purchases or leases an OTRB which has been remanufactured so as to extend its useful life for five years or more, where the purchase or lease occurs after the date on which this subpart applies to the entity and during the period in which the useful life of the vehicle is extended.

(b) In any situation in which this subpart requires an entity purchasing or leasing a new OTRB to purchase or lease an accessible OTRB, OTRBs acquired through the actions listed in paragraph (a) of this section shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) For purposes of this section, it shall be considered feasible to remanufacture an OTRB so as to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis demonstrates that including accessibility features required by this part would have a significant adverse effect on the structural integrity of the vehicle.

§ 37.199 Compensation for failure to provide required vehicles or service.

(a) Operators shall pay compensation to passengers with disabilities as provided in this section in the following situations:

(1) If a demand-responsive operator under § 37.189 or a small mixed-service operator under § 37.191 fails to provide in a timely manner an accessible OTRB to a passenger with a disability who has made a timely request for such a bus;

(2) If a fixed-route operator providing interim service under § 37.193(a)(1) fails to provide in a timely manner an accessible OTRB to a passenger with a disability who has made a timely request for such a bus;

(3) If a small fixed-route operator who chooses to provide equivalent service under § 37.183(b)(2) fails to provide equivalent service to a passenger;

(4) If required service is not provided to a passenger with a disability because accessibility equipment does not function or operator personnel do not perform essential tasks;

(5) If, for a trip involving an interline connection (see § 37.187), the operator with whom the passenger purchases the ticket or makes a reservation for the trip fails to communicate immediately with other operators providing a portion of the trip to inform them of the need for an accessible bus or equivalent service, as applicable, with the result that other operators do not provide the service required by this subpart; or

(6) If an operator required to provide interim service under § 37.169, after the date on which this subpart begins to apply to the operator, fails to provide this service.

(b) When one of the events in paragraph (a) of this section calling for compensation occurs, the operator shall pay compensation regardless of the reason for the failure to provide the required service. The only exception to this requirement is a situation in which, for reasons beyond the control of the operator, no transportation is provided to any passenger.

(c) The amount of the compensation shall be the following:

(1) On the first occasion on which the operator fails to provide the required service as provided in paragraph (a) of this section to any passenger, $300;

(2) On the second such occasion, $400;

(3) On the third such occasion, $500;

(4) On the fourth such occasion, $600;

(5) On the fifth and subsequent such occasions, $700.

(d) The operator shall provide this compensation to the passenger within seven working days of the date on which the operator failed to provide the accessible OTRB or provide equivalent service, as applicable.

(e) Payment of compensation under this section is not a defense to legal action brought against the operator to enforce the Americans with Disabilities Act or this part.

§ 37.201 Intemediate and rest stops.

(a) Whenever an OTRB makes an intermediate or rest stop, a passenger with a disability, including an individual using a wheelchair, shall be permitted to leave and return to the bus on the same basis as other passengers.

The operator shall ensure that assistance is provided to passengers with disabilities as needed to enable the passenger to get on and off the bus at the stop (e.g., operate the lift and provide assistance with securement; provide other boarding assistance if needed, as in the case of a wheelchair user who has transferred to a vehicle seat because other wheelchair users occupied all securement locations).

(b) If an OTRB operator owns, leases, or controls the facility at which a rest or intermediate stop is made, or if an OTRB operator contracts with the person who owns, leases, or controls such a facility to provide rest stop services, the OTRB operator shall ensure the facility complies fully with applicable requirements of the Americans with Disabilities Act.

(c) If an OTRB equipped with an inaccessible restroom is making an express run of three hours or more without a rest stop, and a passenger with a disability who is unable to use the inaccessible restroom requests an unscheduled rest stop, the operator shall make a good faith effort to accommodate the request. The operator is not required to make the stop. However, if the operator does not make the stop, the operator shall explain to the passenger making the request the reason for its decision not to do so.

§ 37.203 Lift maintenance.

(a) The entity shall establish a system of regular and frequent maintenance checks of lifts sufficient to determine if they are operative.

(b) The entity shall ensure that vehicle operators report to the entity, by the most immediate means available, any failure of a lift to operate in service.

(c) Except as provided in paragraph (d) of this section, when a lift is discovered to be inoperative, the entity shall take the vehicle out of service before the beginning of the vehicle's next trip and ensure that the lift is repaired before the vehicle returns to service.

(d) If there is no other vehicle available to take the place of an OTRB with an inoperable lift, such that taking the vehicle out of service before its next trip will reduce the transportation service the entity is able to provide, the entity may keep the vehicle in service with an inoperable lift for no more than five days from the day on which the lift is discovered to be inoperative.

§ 37.205 Additional passengers who use wheelchairs.

If a number of wheelchair users exceeding the number of securement locations on the bus seek to travel on a trip, the operator shall assign the securement locations on a first come-first served basis. The operator shall offer boarding assistance and the opportunity to sit in a vehicle seat to passengers who are not assigned a securement location. If the passengers who are not assigned securement locations are unable or unwilling to accept this offer, the operator is not required to provide transportation to them on the bus.

§ 37.207 Discriminatory practices.

It shall be considered discrimination for any operator to—

(a) Deny transportation to passengers with disabilities, except as provided in § 37.5(h);

(b) Use or request the use of persons other than the operator's employees (e.g., family members or traveling companions of a passenger with a disability, medical or public safety personnel) for routine boarding or other assistance to passengers with disabilities, unless the passenger requests or consents to assistance from such persons;

(c) Require or request a passenger with a disability to reschedule his or her trip, or travel at a time other than the time the passenger has requested, in order to receive transportation as required by this subpart;

(d) Fail to provide reservation services to passengers with disabilities equivalent to those provided other passengers; or

(e) Fail or refuse to comply with any applicable provision of this part.

§ 37.209 Training and other requirements.

OTRB operators shall comply with the requirements of §§ 37.161, 37.165–37.167, and 37.173. For purposes of § 37.173, ''training to proficiency'' is deemed to include, as appropriate to the duties of particular employees, training in proper operation and maintenance of accessibility features and equipment, boarding assistance, securement of mobility aids, sensitive and appropriate interaction with passengers with disabilities, handling and storage of mobility devices, and familiarity with the requirements of this subpart. OTRB operators shall provide refresher training to personnel as needed to maintain proficiency.

§ 37.211 Effect of NHTSA and FHWA safety rules.

OTRB operators are not required to take any action under this subpart that would violate an applicable National Highway Traffic Safety Administration or Federal Highway Administration safety rule.

§ 37.213 Information collection requirements.

(a) This paragraph (a) applies to demand-responsive operators under § 37.189 and fixed-route operators under § 37.193(a)(1) that are required to, and small mixed-service operators under § 37.191 that choose to, provide accessible OTRB service on 48 hours' advance notice.

(1) When the operator receives a request for accessible bus service, the operator shall complete lines 1–8 of the Form A in Appendix A to this subpart. The operator shall immediately provide a copy of the form to the passenger.

(2) On the scheduled date of the trip, the operator shall complete lines 9–11 of the form. In any case in which the requested accessible bus was not provided, the operator shall immediately provide a copy of the form to the passenger.

(3) The operator shall retain its copy of the completed form for five years. The operator shall make these forms available to Department of Transportation or Department of Justice officials at their request.

(4) Beginning October 29, 2001 for large operators, and October 28, 2002 for small operators, and on that date in each year thereafter, each operator shall submit a summary of its forms to the Department of Transportation. The summary shall state the number of requests for accessible bus service, the number of times these requests were met, and the number of times compensation was paid. It shall also include the name, address, telephone number, and contact person name for the operator.

(b) This paragraph (b) applies to small fixed-route operators who choose to provide equivalent service to passengers with disabilities under § 37.183(b)(2).

(1) The operator shall complete Form B in Appendix A to this subpart on every occasion on which a passenger with a disability needs equivalent service in order to be provided transportation.

(2) The operator shall provide one copy of the form to the passenger and retain another copy of the completed form for five years. The operator shall make these forms available to Department of Transportation or Department of Justice officials at their request.

(3) Beginning October 28, 2002, and on that date in each year thereafter, each operator shall submit a summary of its forms to the Department of Transportation. The summary shall state the number of situations in which equivalent service was needed, the number of times such service was

provided, and the number of times compensation was paid. It shall also include the name, address, telephone number, and contact person name for the operator.

(c) Beginning October 30, 2000 for large operators, and October 29, 2001 for small operators, and on that date in each year thereafter, each fixed-route operator shall submit to the Department a report on how many passengers with disabilities used the lift to board accessible buses. For fixed-route operators, the report shall reflect separately the data pertaining to 48-hour advance reservation service and other service.

(d) Each operator shall submit to the Department, October 28, 1999 and each year thereafter on that date, a summary report listing the number of new buses and used buses it has purchased or leased during the preceding year, and how many of the buses in each category are accessible. It shall also include the total number of buses in the operator's fleet and the name, address, telephone number, and contact person name for the operator.

(e) The information required to be submitted to the Department shall be sent to the following address: Bureau of Transportation Statistics, 400 7th Street, SW., Washington, DC 20590.

§ 37.215 Review of requirements.

(a) Beginning October 28, 2005, the Department will review the requirements of § 37.189 and their implementation. The Department will complete this review by October 30, 2006.

(1) As part of this review, the Department will consider factors including, but not necessarily limited to, the following:

(i) The percentage of accessible buses in the demand-responsive fleets of large and small demand-responsive operators.

(ii) The success of small and large demand-responsive operators' service at meeting the requests of passengers with disabilities for accessible buses in a timely manner.

(iii) The ridership of small and large operators' demand-responsive service by passengers with disabilities.

(iv) The volume of complaints by passengers with disabilities.

(v) Cost and service impacts of implementation of the requirements of § 37.189.

(2) The Department will make one of the following decisions on the basis of the review:

(i) Retain § 37.189 without change; or

(ii) Modify the requirements of § 37.189 for large and/or small demand-responsive operators.

(b) Beginning October 30, 2006, the Department will review the requirements of §§ 37.183, 37.185, 37.187, 37.191 and 37.193(a) and their implementation. The Department will complete this review by October 29, 2007.

(1) As part of this review, the Department will consider factors including, but not necessarily limited to, the following:

(i) The percentage of accessible buses in the fixed-route fleets of large and small fixed-route operators.

(ii) The success of small and large fixed-route operators' interim or equivalent service at meeting the requests of passengers with disabilities for accessible buses in a timely manner.

(iii) The ridership of small and large operators' fixed-route service by passengers with disabilities.

(iv) The volume of complaints by passengers with disabilities.

(v) Cost and service impacts of implementation of the requirements of these sections.

(2) The Department will make one of the following decisions on the basis of the review:

(i) Retain §§ 37.183, 37.185, 37.187, 37.191, 37.193(a) without change; or

(ii) Modify the requirements of §§ 37.183, 37.185, 37.187, 37.191, 37.193(a) for large and/or small fixed-route operators.

Appendix A to Subpart H of Part 37—Forms for Advance Notice Requests and Provision of Equivalent Service

Form A—For Use by Providers of Advance Notice Service

1. Operator's name _____
2. Address _____
_____
3. Phone number: _____
4. Passenger's name: _____
5. Address: _____
_____
6. Phone number: _____
7. Scheduled date and time of trip: _____
8. Date and time of request: _____
9. Was accessible bus provided for trip? Yes____ no____
10. Was there a basis recognized by U.S. Department of transportation regulations for not providing an accessible bus for the trip? Yes____ no____

If yes, explain _____
_____

11. If the answers to items 9 and 10 were both no, attach documentation that compensation required by department of transportation regulations was paid.

Form B—For Use by Providers of Equivalent Service

1. Operator's name _____
2. Address _____
_____
3. Phone number: _____
4. Passenger's name: _____
5. Address: _____
_____
6. Phone number: _____
7. Date and time of trip: _____
8. Location of need for equivalent service:
_____
9. Was equivalent service provided for trip? Yes____ no____
10. If the answer to items 9 and 10 is no, attach documentation that compensation required by Department of Transportation regulations was paid.

[FR Doc. 98–25421 Filed 9–24–98; 2:15 pm]

BILLING CODE 4910–62–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1192

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 38

RIN 2105–AC00

Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles; Over-the-Road Buses

AGENCIES: Architectural and Transportation Barriers Compliance Board and Department of Transportation.

ACTION: Joint final rule.

SUMMARY: The Architectural and Transportation Barriers Compliance Board and the Department of Transportation amend the accessibility guidelines and standards under the Americans with Disabilities Act for over-the-road buses (OTRBs) to include scoping and technical provisions for lifts, ramps, wheelchair securement devices, and moveable aisle armrests. Revisions to the specifications for doors and lighting are also adopted. The specifications describe the design features that an OTRB must have to be readily accessible to and usable by persons who use wheelchairs or other mobility aids. The Department of Transportation has published a separate rule elsewhere in today's **Federal Register** which addresses when OTRB operators are required to comply with the specifications.

EFFECTIVE DATE: October 28, 1998.

FOR FURTHER INFORMATION CONTACT: *Access Board:* Dennis Cannon, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW., suite 1000, Washington, DC 20004–1111. Telephone number (202)