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Legal Analysis of S. 2104 and H.R. 4000 The "Civil Rights Act of 1990"

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SUMMARY

On February 7, 1990, companion bills were introduced in the Senate and the House of Representatives which would address a range of issues posed by recent United Supreme Court rulings concerning enforcement of federal equal employment opportunity laws. The "Civil Rights Act of 1990" (S. 2104 and H.R. 4000) proposes an omnibus legislative response to judicial interpretations of Title VII of the 1964 Civil Rights Act with regard to burden of proof rules, finality of affirmative action consent decrees, statute of limitations as applied to seniority systems, and the scope of protection afforded racial minorities under §1981 of the 1866 Civil Rights Act. The bill would also expand Title VII remedies to include compensatory and punitive damages for victims of intentional employment discrimination and allow for jury trials under that law. Finally, several other aspects of civil rights law and practice are legislatively addressed, ranging from the recovery of attorney's fees from intervenors, and expert witness fees, to interest on judgments against the United States Government. This report analyzes the legal implications of the various amendments proposed by the Civil Rights Act of 1990 in relation to current law as developed by the statutes and relevant case law interpretations.

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LEGAL ANALYSIS OF S. 2104 AND H.R. 4000 THE "CIVIL RIGHTS ACT OF 1990"

On February 7, 1990, companion bills were introduced in the Senate and the House of Representatives which would address a range of issues posed by recent United States Supreme Court rulings concerning enforcement of federal equal employment opportunity laws. The "Civil Rights Act of 1990" (S. 2104 and H.R. 4000) proposes an omnibus legislative response to judicial interpretations of Title VII of the 1964 Civil Rights Act with regard to burden of proof rules, finality of affirmative action consent decrees, statute of limitations as applied to seniority systems, and the scope of protection afforded racial minorities under §1981 of the 1866 Civil Rights Act. The bill would also expand Title VII remedies to include compensatory and punitive damages for victims of intentional employment discrimination and allow for jury trials under that law. Finally, several other aspects of civil rights law and practice are legislatively addressed, ranging from the recovery of attorney's fees from intervenors, and expert witness fees, to interest on judgments against the United States Government. This report analyzes the legal implications of the various amendments proposed by the Civil Rights Act of 1990 in relation to current law as developed by the statutes and relevant case law interpretations.

Allocation of the Burden of Proof in Title VII Cases

Title VII of the 1964 Civil Rights Act prohibits employers from discriminating on the basis of race, color, religion sex, or national origin.[1] While Congress set forth the basic principles of employment discrimination, the Supreme Court has developed various methods by which claims of discrimination may be litigated and proven. The two principal models of Title VII proof are "disparate treatment," which focuses on an employer's intent, and "disparate impact," which is concerned with the adverse effects of an employer's practices on a protected class, regardless of intent. In its seminal 1971 ruling, *Griggs v. Duke Power Co.*[2] the Court held that Title VII prohibits employment practices that are "fair in form, but discriminatory in operation" and that any policy or practice which disqualifies blacks or other protected groups "at a substantially higher rate" than nonminorities must be demonstrably related to job performance or "business necessity." Since *Griggs*, judicial rules for allocating the burden of proof between parties to disparate impact litigation have continued to evolve from Title VII case law.

Last term, in its controversial ruling in *Wards Cove Packing Co. v. Atonio*,[3] the Supreme Court revisited the traditional Title VII theory of

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1 42 U.S.C. 2000e *et seq.*

2 401 U.S. 424 (1971).

3 109 S.Ct. 2115 (1989).

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discrimination based on "disparate impact" analysis. That case has since become the focus of a vigorous legal debate. On one side are those who argue that the decision significantly altered prior law by imposing new evidentiary demands on Title VII plaintiffs while easing employers' burden of justification for employment practices with discriminatory effects. Others view the decision as mainly an elaboration of prior law that did not change the respective burdens of the parties to Title VII litigation. Meanwhile, legislative efforts to override the effect of *Wards Cove* have led to introduction of S. 2014 and H.R. 4000, companion bills to amend Title VII by prescribing rules for proof and rebuttal of discrimination claims based on disparate impact analysis, which are the focus of recent House and Senate hearings. This section reviews the High Court ruling in *Wards Cove* and the congressional response proposed by the Civil Rights Act of 1990 from the standpoint of prior case law precedent on Title VII disparate impact analysis.

Disparate Impact Analysis After *Wards Cove* and the Proposed Act

Wards Cove involved salmon processing facilities in Alaska which operated during the summer months employing only seasonal labor. Most unskilled cannery jobs were held by minorities while the skilled, higher paying non-cannery positions in the plants were held predominantly by white workers, and the two groups were provided separate dormitory and mess facilities. Asserting both disparate treatment and disparate impact Title VII claims, a class of nonwhite cannery workers alleged that various employer policies--notably, nepotism, rehiring preferences, subjective hiring standards, separate hiring channels, and a practice of not promoting from within--resulted in a racially stratified workforce that denied them equal employment opportunity. After a trial and various appeals, the Ninth Circuit ultimately rejected the disparate treatment claims but held that the facts supported a *prima facie* case of disparate impact in hiring which could only be justified by the employer's showing of business necessity.

Justice White, writing for the five Justice majority, reversed. First, he ruled that the Circuit Court had "misapprehend[ed]" Title VII precedent by finding a disparate impact based upon an internal comparison between the racial composition of the company's cannery and noncannery workforces. Rather, the proper comparison in a disparate impact case is "between the racial composition of the qualified persons in the labor market and the persons holding at issue jobs." In this case, Justice White said, the cannery workforce "in no way" reflected the pool of qualified job applicants or the qualified population in the workforce. Therefore, "[a]s long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions," an employer is not accountable for a "racially imbalanced" workforce attributable to factors it did not cause. Otherwise, Justice White opined, employers might be tempted to adopt hiring quotas to achieve a racially balanced workforce, a result rejected by the Congress that enacted Title VII.

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The Court then considered two other issues which have since become focal points of the proposed Civil Rights Act of 1990: specific causation and the business necessity justification. First, the majority required employees asserting disparate impact claims to prove "specific causation" as part of their *prima facie* case. That is, statistical evidence of racial imbalance "at the bottom line," allegedly caused by the aggregate operation of multiple employer practices, as in *Wards Cove*, would not satisfy the plaintiffs' burden. Rather, the focus of disparate impact analysis is on "the impact of *particular* hiring practices on employment opportunities for minorities." Title VII plaintiffs, therefore, must prove "that the disparity they complain of is the result of one or more of the employment practices they are attacking" and "specifically show that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." The four dissenters in *Wards Cove* were particularly critical of this "apparent redefinition of the employees' burden in a disparate impact case" and would have instead permitted Title VII plaintiffs to build a *prima facie* case on proof of the cumulative effect of "numerous questionable employment practices."

Secondly, in a discussion of the employer's burden, the majority opinion recast the business necessity doctrine as applied by the Ninth Circuit in *Wards Cove* from an affirmative defense for which the employer carries the burden of persuasion to a "business justification" subject only to "reasoned review" and for which the latter must meet a "burden of production." Revealing may be the statement from the majority opinion that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business" since similar terminology had been used in the past to describe the business necessity defense. The result, as in the disparate treatment-intentional discrimination context, is that the "ultimate burden" remains "at all times" with the plaintiff employee. The majority further melds disparate treatment, for which the plaintiff must prove discriminatory intent, and disparate impact theory, traditionally thought not to require such proof, in the final stage of its analysis. Thus, the plaintiff may attack the employer's asserted business justification by showing that it is a "pretext" for discrimination. That is, the plaintiff must show that other "equally effective," less discriminatory alternatives are available to achieve the employer's legitimate objectives.

The proposed Civil Rights Act of 1990 would redefine the respective burdens placed on Title VII plaintiffs and employers in disparate impact cases by *Wards Cove* to override the specific causation and business justification aspects of that decision. Thus, §4 of the bill would define "unlawful employment practice" for purposes of §703(e) of Title VII so that plaintiffs would be required to "demonstrate" only that an employment practice or "group of employment practices" results in a disparate impact without any need to prove "which specific practice or practices within the group" caused the impact complained of. As a defense, the employer or respondent would then have the "burdens of production and persuasion" for showing "that such practices are required by business necessity," meaning that they are "essential to effective job performance." Alternatively, where a group of practices is

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challenged, the employer would not have to prove business necessity for any specific practice which he demonstrates "does not contribute to the disparate impact."[4] The bill, however, does not appear to directly address the statistical standards applied by *Wards Cove* for making out a *prima facie* case of disparate impact.

The remainder of this section examines pre-*Wards Cove* case law development of Title VII disparate impact analysis and burden of proof in relation to the requirement of specific causation and the business necessity doctrine.

Specific Causation

Until recently, Supreme Court decisions applying disparate impact analysis largely involved objective non-discretionary selection devices which were discrete and facially neutral.[5] Perhaps for this reason, the *Wards Cove* requirement that Title VII plaintiffs identify the specific employment practice resulting in disparate impact did not play a prominent role. The issue emerged, however, as the courts were confronted with disparate impact challenges to employment practices based on subjective hiring standards. These cases generally involve discretionary employment decisions predicated on an employer's perceptions of an applicant's ability rather than objectively defined hiring criteria.

Perhaps the first judicial elaboration of a specific causation requirement in disparate impact cases may be found in *Pouncy v. Prudential Insurance Co.*[6] The *Pouncy* plaintiff alleged that his employer discriminated against blacks based on evidence of their confinement to lower level positions. Several different employment practices were cited as the cause, among them, the employer's reliance on subjective performance evaluations and promotion decision by a predominantly white group of supervisors. The Fifth Circuit refused to apply disparate impact analysis to subjective employment decisions for two reasons. First, it held that disparate impact analysis was not "the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." In other words, it would "not permit a plaintiff to challenge an entire range of employment

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[4] 135 *Cong. Rec.* S 1019 (daily ed. 2-7-90).

[5] The types of selection devices first examined by the Court included standardized intelligence tests (*Griggs*; *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Connecticut v. Teal*, 457 U.S. 440 (1982)), minimum height and weight requirements (*Dothard v. Rawlinson*, 433 U.S. 321, 323-24(1977), and a rule against the employment of drug users (*New York Transit Authority v. Beazer*, 440 U.S. 568 (1979)).

[6] 668 F.2d 795, 800-01 (5th Cir. 1982).

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practices merely because the employer's workforce reflects a racial imbalance that might be causally related to any one or more of several practices. . ." Instead, the plaintiff was required to provide "proof that a specific practice results in a discriminatory impact. . .in order to allocate fairly the parties respective burdens of proof at trial." This added burden on the plaintiff was justified, in the court's view, because of the unfairness of placing on the defendant "the dual burden of articulating which of the employment practices cause the adverse impact at issue and proving the business necessity of the practice." The second reason for the Court's refusal to apply disparate impact analysis was that the challenged employment practices were not "facially neutral policies" for which the Title VII model was designed.

The Tenth Circuit appears to have rejected disparate impact analysis on similar reasoning. In *Mortensen v. Callaway*,[7] a federal employee challenged a promotion decision based on a supervisor's interview in which the two candidates were evaluated "according to forty-two attributes the supervisor believes were important." On each attribute the candidate was given a numerical rating from zero to four. The plaintiff contended that the government had to justify the "evaluative considerations as 'testing or measuring procedures'" under *Griggs*, but the Court disagreed.

> [Plaintiff] also claims she proved a prima facie case of disparate impact. To do so, she needed to show that the Army utilized employment practices that, while facially neutral in their treatment of different groups, had a discriminatory effect or impact on a particular group. [citations omitted]. But while [she] introduced statistics showing a lack of women supervisors in test operations at the [Army facility], she has not pointed to any employment practice that, neutral on its face, has caused women not to be promoted to supervisory positions.[8]

Several other decisions prior to *Wards Cove* were reluctant to extend disparate impact analysis to broad "cumulative effects" challenges to complex employee selection systems. Relying on *Pouncy*, the Fifth Circuit in *Carroll v. Sears Roebuck Co.*,[9] rejected a class action in which it was alleged that Sears engaged in "across the board" racial discrimination. The plaintiffs had attempted to prove statistically that Sears' hiring, job assignment, promotion, training, and termination decisions were discriminatory. While scored tests were part of the hiring and promotion process, other largely subjective criteria were also applied by the employer in the decisionmaking process. For this reason, the court concluded that "[t]he flaw in the plaintiffs' proof was its

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[7] 672 F.2d 822 (10th Cir. 1982).

[8] *Id.*, at 824.

[9] 708 F.2d 183 (5th Cir. 1983).

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failure to establish the required causal connection between the challenged employment practice (testing) and discrimination in the work force."[10] The Court went on to say ,"[t]he plaintiffs contend that this disparity results both from testing and the use of subjective hiring criteria, yet they offer no method from which this Court can ascertain whether a significant part of this disparity results from testing."[11] Similar concerns had prompted other courts, including the Ninth Circuit in *Wards Cove* itself, to require the plaintiffs to "identify specific employment practices or selection criteria" as part of the three elements constituting a *prima facie* case of disparate impact.[12]

Other pre-*Wards Cove* judicial decisions, however, appear to have taken the contrary position and permitted disparate impact challenges to multicomponent selection systems. In *Segar v. Smith*[13] the D.C. Circuit upheld a class action by black agents of the Drug Enforcement Agency alleging a pattern or practice of disparate treatment in the DEA employment system as a whole and several disparate impact claims against particular components of that system--grade and work assignments, supervisory evaluations, discipline, and promotion decisions, among others. The "systemic" effects of the "entirety" of an employer's practices could be subjected to both disparate treatment and disparate impact analysis, the decision suggests, without any further specification by the plaintiffs.

> [The] disparate impact concept may be relevant in two ways to a case involving allegations of class-wide discrimination. First, in addition to bringing a pattern or practice disparate treatment claim, plaintiffs may well challenge the disparate impact of specific employment practices and thus force the employer to prove the job-relatedness of those practices. [citations omitted]. Second, plaintiffs' pattern or practice disparate treatment challenge to the employment system as a whole may also implicate disparate impact analysis. A pattern or practice disparate treatment case shares with a typical disparate impact suit the allegation that an employer's practices have had a systemic adverse effect on the members of the plaintiff class.[14]

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[10] *Id.* at 189.

[11] *Id.*

[12] 810 F.2d at 1477. See, also, *Pope v. City of Hickory*, 679 F.2d 20, 22 (4th Cir. 1982) (holding claim of discrimination stemming from cumulative effects of employer's practices is not open to challenge under disparate impact theory); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014 (lst Cir. 1984).

[13] 738 F.2d 1249 (D.C.Cir. 1984).

[14] *Id.*, at 1266.

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In such a situation, the court held, "the defendant may appropriately be required to demonstrate the business necessity of the *practices* causing the disparity because the court will have before it all the traditional elements of a disparate impact claim."[15]

Similarly, *Griffin v. Carlin*[16] was a Title VII class action by black U.S. Postal employees and former employees asserting disparate impact discrimination claims against the Postal Service's multi-component promotional system and to several component parts of that process, including promotion advisory boards, awards, and discipline. In holding that disparate impact analysis could be used to challenge the end result of the multi-component promotions process, and the subjective elements of that process, the appeals court refused to follow the *Pouncy* line of precedent. To do so, it felt, would encourage subjective decision-making by employers and "completely exempt the situation in which an adverse impact is caused by the interaction of two or more components."[17]

The Supreme Court had itself confronted the specific causation issue of *Wards Cove* the previous term in *Watson v. Fort Worth Bank & Trust.*[18] It there resolved that disparate impact analysis is applicable in challenges to subjective or discretionary hiring and promotion standards. However, led by Justice O'Connor, a plurality of Justices held that when challenging subjective practices under disparate impact, a "plaintiff must begin by identifying the specific practice that is challenged."[19] She acknowledged that such identification may "sometimes be difficult" when subjective, rather than objective, selection criteria are at issue.[20] Once this task has been accomplished, the plaintiff must establish causation by offering "statistical evidence. . .sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[21] Furthermore, according to the plurality, because "[courts] are generally less competent than employers to restructure business

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[15] *Id.* (*emphasis added*).

[16] 755 F.2d 1516 (11th Cir. 1985).

[17] *Id.*, at 1525.

[18] 108 S. Ct. 2777 (1988).

[19] *Id.* at 2788.

[20] *Id.*

[21] *Id.*

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practices,"[22] the defendant need only produce some evidence that its practices "are based on legitimate business reasons" to rebut the plaintiff's statistical showing of disparate impact. With the ascendancy of Justice Kennedy to the High Court, the plurality view in *Watson* appears to have become the majority rule last term in *Wards Cove*.[23]

It therefore appears that the Court's ruling in *Wards Cove* was not the first assertion of a specific causation requirement within the context of a judicial definition of the plaintiff's burden for proving a *prima facie* case of disparate impact discrimination. Nonetheless, the requirement was not generally acknowledged by the courts in any explicit fashion until they were confronted with disparate impact challenges to subjective employment standards. Even then a division of judicial opinion prevailed on the issue until *Wards Cove* assembled a majority for the plurality view stated by Justice O'Connor in *Watson*. As noted, §4 of the Civil Rights Act of 1990 proposes to effectively override this specific causation requirement in Title VII by allowing proof of the aggregate impact of a "group of employment practices" to satisfy the plaintiff's burden without further isolating the effects of a "specific practice or practices within the group." Instead, to avoid liability, the burden would rest with the employer to demonstrate that any specific practice "does not contribute to the disparate impact."

The Business Necessity Doctrine

As noted, the Court has evolved a range of analytical models for distributing between plaintiffs and defendants the burden of proof and rebuttal in Title VII employment discrimination actions. To a large extent, Title VII theories of liability depend on legal "inferences" and "presumptions," common to the law of evidence generally, as applied to the facts presented by the parties and tailored to specific Title VII substantive rules developed by the Court. Thus, "while the most obvious evil Congress had in mind when it enacted Title VII" was "disparate treatment" or intentional workplace discrimination, in the Court's view,[24] the statute was also designed to eliminate the "adverse impact" or effects of practices and procedures that are "fair in form, but discriminatory in operation."[25] To implement this dual congressional purpose, different methods of proof were developed by the Court

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[22] *Id.* at 2791.

[23] *Supra* n. 3.

[24] *International Bhd of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

[25] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

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for "disparate treatment" (or intentional) and "adverse impact" (or unintentional) discrimination cases.[26]

Under prevailing disparate treatment analysis, *McDonnell Douglas Corp. v. Green*[27] established a tripartite order and allocation of proof for establishing whether or not an illicit discriminatory motive exists. That is, once the plaintiff establishes by direct or indirect evidence a *prima facie* case of differential treatment by an employer because of protected class status, the defendant has the burden of rebutting the inference of intentional discrimination. In a series of three post-*McDonnell Douglas Corp.* cases, however, the Court made clear that the burden of proof remains at all times with the plaintiff, and that the employer's sole obligation at the second stage is simply "to articulate a legitimate, nondiscriminatory reason" for the

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[26] A third method for proving discrimination combining elements of both disparate treatment and disparate impact is the "pattern or practice" model. In these cases, the plaintiff, often the federal government, challenges an employer's policies resulting in a broad pattern of discrimination to an entire class of protected persons. To establish the requisite pattern or practice, a plaintiff must show a pattern of differential treatment in the defendant's regular procedures. *Teamsters v. United States*, 433 U.S. 299 (1977)(asserting that government can allege pattern or practice discrimination when employer systematically failed to hire, transfer, or promote minority group members to higher paying, more desireable positions). Generally, a plaintiff creates an inference of classwide discrimination by presenting a statistical case similar to a disparate impact showing, supported when possible by "anecdotal" evidence of specific instances of intentional discrimination. If the plaintiff establishes a prima facie case, the defendant employer in rebuttal may show that plaintiff's statistics are either "inaccurate or insignificant." *Id.* at 360. In pattern or practice cases, courts issue injunctions to eliminate the discrimination. If, in addition, individual relief is sought, the case then proceeds to a second state where the plaintiff must demonstrate that he or she was qualified, applied for, and was refused employment as in the typical disparate treatment case. Here the defendant may also rebut the plaintiffs challenge by showing legal justificiation for not hiring the prospective employee. *Id.* at 361. See, also, *Hazelwood School District v. United States*, 433 U.S. 299, 303 (1977)(permitting government to bring action alleging school district had engaged in pattern of discriminatory hiring practices).

[27] 411 U.S. 792 (1973).

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employer's action.[28] In the third and final stage, the plaintiff must establish that the defendant's proffered reason for its actions is in fact a pretext.

Another line of decision provided the conceptual framework for Title VII disparate impact analysis. In *Griggs v. Duke Power Co.*[29] the Court held that the "touchstone" of Title VII's prohibition on employment practices that are "fair in form, but discriminatory in operation" is "business necessity." Thus, "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[30] Under *Griggs*, the plaintiff carries the initial burden of proving, usually in practice by way of statistics, the disparate impact of a given policy or practice on protected class members as compared to other employee or applicant groups.[31]

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[28] *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)(employer need only come forward and articulate its reason so as to create a triable issue of fact and need not prove by a preponderance of evidence that such reason constituted its true motivation nor that the selected candidate had superior qualifications); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978)(employer need only articulate a legitimate, nondiscriminatory reason and need not prove the absence of discriminatory motive); *Furnco Constr. Corp v. Waters*, 438 U.S. 567, 577 (1978)("[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race.").

[29] *Supra* n. 1.

[30] *Id.*, at 431.

[31] The courts have relied on several different statistical measures of discrimination in disparate impact cases. The EEOC Uniform Guidelines on Employee Selection Procedures endorses a four-fifths or eighty percent rule. 29 C.F.R. § 1607.4(D)(1989). Under the EEOC rule, disparate impact exists if the challenged procedure results in a selection rate for any minority group that is less than four-fifths or eighty percent of the rate of the nonprotected group. *E.g.*, *Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 225-26 (2d Cir. 1984)(finding that prima facie case of disparate impact was established by statistical showing that pass rate of minority candidates was fifty percent lower than pass rate of nonminority candidates), *cert. denied* 469 U.S. 1117 (1985). Other courts have relied on a standard deviation rule to find disparate impact when the selection rate for a minority group is several standard deviations away from the selection rate for the non-protected group. *See Hazelwood School Distr. v. United States*, *supra* n. 26, at 308-09 n. 14 (1977)(finding hiring procedures suspect where difference between observed and expected values were more than five or six standard deviations). Finally, some courts have used their discretion to determine whether the statistical disparity is significant. B. Schlei & P. Grossman, *Employment Discrimination Law* 98-99 (2d ed. 1983) (listing cases where courts have used own

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The "burden" of justifying the practice then shifts to the defendant. *Griggs*, however, did not settle on any single formulation of employer justification but spoke variously of "business necessity," "related to job performance," "meaningful study of their relationship to job performance ability,"and "manifest relationship to the employment in question."[32] Nor did *Griggs* explicitly decide whether employers carried a burden of "persuasion" or merely "production."[33]

In *Albermarle Paper Co. v. Moody*[34] the Court reviewed its holding in *Griggs* regarding allocation of the burdens of proof without definitively resolving the issue. A class of minority employees in *Albermarle* brought suit against the employer charging that the company's seniority policy, employment testing programs, and backpay policy had a discriminatory impact. The Court held that the employer had failed to refute the plaintiffs' *prima facie* case because the validation studies it had used to show job relatedness were materially defective. In describing the employer's evidentiary burden under *Griggs*, the Court stated:

> This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. [citing *McDonnell Douglas Corp v. Green*, *supra* n. 25] If an employer does meet the *burden of proving* that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a

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discretion).

[32] 401 U.S. at 431-32.

[33] Generally, the burden of proof in any case consists of both a burden of production and burden of persuasion. *See, e.g., C. McCormick, The Law of Evidence* § 336 (3d Ed. 1984). The burden of production, also referred to as the burden of going forward, is the first step in satisfying the burden of proof. To carry the burden of producing evidence on an issue, the evidence offered must be "such that a reasonable man could draw from it an inference of the existence of a particular fact to be proved," *Id.*, at § 338, but need not convince a factfinder of the truth of the allegation. The burden of persuasion becomes important only after the parties have satisfied their burdens of production. *Id.*, at § 336. The burden of persuasion refers to "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." *Id.*, at §339. Stated differently, the party with the burden of persuasion must convince the court or jury of the validity of his position by a preponderance of the evidence or lose on that issue. *Id.*

[34] *Supra* n. 4.

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> similarly undesireable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." [citation omitted] Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. [citation omitted][35]

While the reference to an employer's "burden of proving" job relatedness might encompass both the production and persuasion burdens, the *Albermarle* Court's reliance on *McDonnell Douglas*, and its adoption of a tripartite allocation of proof formula resembling the disparate impact model, left the matter in some doubt.

Dothard v. Rawlinson[36] involved a challenge to Alabama Board of Correction's height and weight requirements because of their disparate impact in excluding females from appointments as prison guards. The defendant failed to satisfy the *Griggs* job relatedness standard because it "*produced* no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance." Indeed, said the Court, defendant "failed to offer evidence of any kind in specific jusification of the statutory standards."[37] The Court also indicated that a requirement could not be considered "necessary" if there were alternative devices that served the employer's business purpose equally well but with less adverse effect on the protected class. In a separate concurrence, three Justices led by Chief Justice Rehnquist asserted that the defendant need only "articulate" a job related rationale for the employment decision to meet its rebuttal burden, an approach that parallels the disparate treatment model.

Further obscuring the nature of the employer's burden in disparate impact cases was *New York City Transit Authority v. Beazer*[38] which seemed to imply a less rigorous rationality standard for "business necessity." The Court there found that the plaintiff failed to establish a *prima facie* case that the Transit Authority's (TA's) refusal to hire a former addict participating in methadone maintenance programs had a disparate impact on minorities. Besides noting the "weak showing" made by the plaintiff's statistics, a footnote to the majority opinion indicated that the TA's "legitimate employment goals of safety and efficiency" were "significantly served by--even if they do not require--TA's rule."[39] Whether this apparent definition of job relatedness in terms of the employer's "legitimate employment goals" was the legal

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[35] *Id.* at 425 (emphasis added).

[36] 433 U.S. 321 (1977).

[37] *Id.*, at 331 (emphasis added).

[38] 440 U.S. 568 (1979).

[39] *Id.* at 587, n. 31.

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equivalent of the business necessity doctrine in *Griggs* was left for subsequent judicial speculation.

Supreme Court jurisprudence prior to *Wards Cove*, therefore, was not altogether free of ambiguity in regard to the nature and extent of the employer's rebuttal burden in disparate impact cases. The Court's use of a variety of terms, such as "articulate," "demonstrate," "produce," and "prove," to describe this burden, despite their differing implications, fostered considerable uncertainty as to whether a persuasion or mere production burden was intended. Nonetheless, an apparent majority of the lower federal courts during this period read the *Griggs* line of decision as imposing evidentiary standards in disparate impact cases that differed from the disparate treatment model and ruled that the employer had the burden of persuasion on the business necessity defense.[40] Just what employment policies and practices shown to have a disparate impact may be sufficiently related to job performance or the interests in workplace safety and efficiency to satisfy the business necessity defense depends largely on the facts and circumstances of the specific case.[41]

While most pre-*Wards Cove* lower courts required employers in disparate impact cases to carry the burden of persuasion on the business necessity defense, at least one circuit court appeared to impose only a production burden on disparate impact defendants. The Third Circuit Court of Appeals

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[40] *See, e.g., Lewis v. Bloomsburg Mills, Inc.,* 773 F.2d 561, 571-72 (4th Cir. 1985)(holding that the district court erred by equating defendant's burden of proving business necessity with less rigorous disparate treatment standard); *Maddox v. Claytor,* 764 F.2d 1539, 1548 (11th Cir. 1985)(asserting that the burden of persuasion shifts between the parties); *EEOC v. Kimbrough Inv. Co.,* 703 F.2d 98, 100 (asserting that burden shifts to employer to persuade court of legitimate business reason); *Johnson v. Uncle Ben's, Inc.* 657 F.2d 750, 753 (5th Cir. 1981)(requiring employer to prove job relationship by preponderance of evidence), *cert. denied,* 459 U.S. 967 (1984); *Williams v. Colorado Springs School District,* 641 F.2d 835, 842 (10th Cir. 1981)(holding district court erred by defining employer's burden as similar to burden in disparate treatment case); *Grant v. Bethlehem Steel Corp.,* 635 F.2d 1007, 1015 (2d Cir. 1980)(stating that employer's burden is much more than showing legitimate, nondiscriminatory reason), *cert. denied,* 452 U.S. 940 (1981); *Kaplan v. Alliance of Theatrical Stage Employees,* 525 F.2d 1354, 1358 (9th Cir. 1975)(burden of production and burden of persuasion shifts to the employer); and *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 425 (2d Cir. 1975)(requiring defendant to prove job relationship).

[41] *See*, Annotation, *What Constitutes "Business Necessity" Justifying Employment Practice Prima Facie Discriminatory Under Title VII of Civil Rights Act of 1964*, 36 ALR Fed 9 (1978).

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in *N.A.A.C.P v. Medical Center, Inc.*[42] rejected the argument that "in countering a prima facie case of discriminatory impact, the defendant is presenting something in the nature of an affirmative defense. . ."[43] In that case, plaintiffs sued under Title VI of the 1964 Civil Rights Act, which bars race discrimination in federally assisted programs,[44] to block relocation of an urban medical center to the suburbs because of the disparate impact such a move would have on blacks and other minorities. The Third Circuit held that the same standards, tests, and burdens of proof appropriate to Title VII disparate impact cases should be applied to Title VI impact claims. Seeking procedural symmetry between disparate treatment and disparate impact cases, and to avoid what the court viewed as the "illogic" of imposing a heavier burden on defendants claimed to have caused discriminatory effects than intentional discriminators, it ruled that the defendant bore only a burden of production on the business necessity issue. Subsequently, in *Crocker v. Boeing Co.*[45] the Third Circuit relied on its prior ruling in *N.A.A.C.P.* to hold that in a Title VII disparate impact case, the defendant's rebuttal burden is to "come forward with evidence to meet the inference of discrimination raised by the prima facie case."

This minority judicial view was in effect ratified by a four Justice plurality in *Watson v. Fort Worth Bank & Trust* which extended disparate impact theory to Title VII challenges involving subjective employment standards. As noted *supra*, the plurality there held that, as in disparate treatment cases, the employer has the less onerous burden of production on the legitimate business justification issue, and that "the ultimate burden of proving that discrimination against a protected class has been caused by a specific employment practice remains with the plaintiff at all times."[46] This in turn became the rule of law for a majority of the Court in *Wards Cove*. The proposed Civil Rights Act of 1990, on the other hand, would reinstate the rule prevailing in the lower courts before *Wards Cove* which required the employer to carry both the production and persuasion burdens for defending any practice or group of practices shown by the plaintiff to have a disparate impact on protected minorities. In addition, the bill would reformulate the employer's rebuttal burden from the seemingly more lenient "legitimate business justification" in *Wards Cove* to an affirmative defense based on business necessity as defined by the bill to mean "essential to effective job performance."

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[42] 657 F.2d 1322 (3d Cir. 1981).

[43] *Id.* at 1333.

[44] 42 U.S.C. 2000d *et. seq.*

[45] 662 F.2d 975 (3d Cir. 1981)(en banc).

[46] *Id.* at 2790.

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The bill's proposed statutory definition of "business necessity" as requiring proof of the "essential" relationship of a practice with disparate impact to "effective job performance" may connote a more rigorous approach to the job relatedness standard than applied by *Griggs* and its progeny. As noted, prior to *Wards Cove*, there was no uniform rule that a particular employment policy or practice was necessary or sufficiently "related to job performance" to withstand judicial scrutiny in all cases. Rather, the standard for "business necessity" was flexible. Thus, a higher level of job relateness may have been required of employment devices used to screen candidates for relatively unskilled jobs, where the risk of injury or economic loss from unsuccessful job performance was less than in situations involving highly skilled management or professional employees.[47] For example, an employer could require a college education for its airline flight engineers notwithstanding the impact of an education requirement on black applicants and the absence of a statistical correlation between education and performance in the cockpit.[48] Similarly, *Beazer* suggests that the weight of the business necessity burden may vary according to the level of disparate impact that a challenge practice has on a protected class. Before *Wards Cove*, therefore, the more dramatic the impact, the greater may have been the defendant's burden of proving necessity for the challenged practice. Under the bill, however, only "essential" practices would satisfy the employer's burden of persuasion on the business necessity defense. This may portend a more rigid approach than the law prior to *Wards Cove* and, therefore, permit the employer less latitude in considering *relative* rather than *minimum* qualifications of candidates for employment, particularly for highly skilled, technical, and professional job categories.

Mixed Motive

Allocation of the Title VII burden of proof in so-called "mixed motive" discrimination cases is the focal point of a ruling last term, *Price Waterhouse v. Hopkins*,[49] in which both illegitimate and legitimate factors affected an employment decision, and of §5 of the proposed Civil Rights Act of 1990.

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[47] Compare the rejection of educational requirements for lower level workers in *Griggs* and *McDonnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978), with the recognition that they are a "business necessity" when applied to mid-level supervisors.

[48] *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972). *Accord*, *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980)(*en banc*); *Walker v. Jefferson County Home*, 726 F.2d 1554 (llth Cir. 1984).

[49] 109 S.Ct. 1775 (1989).

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Resolving a conflict among the circuits,[50] *Price Waterhouse* held that once the plaintiff has established that a discriminatory motive was a significant factor in an employment decision, the burden of persuasion shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even in the absence of the illicit motivation. In effect, this "same decision" rule relieves the plaintiff in mixed motive cases of the burden of establishing the precise role that the employer's discriminatory motive played in the decisionmaking process, a particularly difficult task where subjective employment decisions are involved. However, while Justice O'Connor concurred that a burden-shifting principle was necessary to effectuate Title VII objectives, her opinion placed a heavier burden on the plaintiff than four other *Price Waterhouse* Justices who approved of the burden-shift where an impermissible factor was shown to play *any* role in the challenged decision. By contrast, Justice O'Connor, whose vote contributed to a majority on the issue, would require the plaintiff to show, by direct evidence, that an illegitimate factor played a "*substantial role*" in the employment decision.

Section 5 of the bill appears to adopt a "middle ground" approach to Title VII mixed motive cases. It would amend §703 to provide that a Title VII violation may be established by demonstrating that race, religion, sex, or national origin was "a motivating factor for any employment practice, even though such practice was also motivated by other factors." Thus, Title VII liability would lie where the plaintiff is able to prove that illicit motivation was one or a contributing factor, though not the sole or "but for" cause of the challenged employment practice. However, the bill would also amend the remedy provisions in §706(g) of Title VII to preclude equitable hiring or reinstatement, promotion, or backpay relief in cases where the employer "establishes that it would have taken the same action in the absence of any discrimination." In other words, unlike the Court in *Price Waterhouse*, which treats the same decision rule as an employer defense to avoid Title VII *liability*, the bill would permit the employer's proof that it would have made the same decision in the absence of discrimination only as a limitation on equitable *remedies*.

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[50] *E.g.*, *Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987)(where plaintiff shows discrimination was "a" motivating factor, burden shifts to employer to prove by "preponderance" of evidence that it was not determinative); *Knighton v. Laurens County School District 56*, 721 F.2d 976 (4th Cir. 1983)("direct evidence" of discrimination shifts burden to employer to prove "by clear and convincing evidence" that plaintiff was not victim of discrimination); *Walsdorf v. Board of Commissioners*, 857 F.2d 1047 (5th Cir. 1988)(proof that discriminatory motive was a "significant" factor established Title VII violation *per se*); *McQuillen v. Wisconsin Education Ass'n Council*, 830 F.2d 659 (7th Cir. 1987)(employee must show that discrimination the "determining" factor, not just a factor, in the challenged employment decision).

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The distinction may be important, particularly in view of the bill's §8 provision for damages in cases of intentional discrimination. For example, once the female plaintiff in *Price Waterhouse* had shown her employer's reliance upon sex role stereotypes in denying her a promotion to partner, she satisfied her burden of proving an impermissible motive, but the employer could still escape all Title VII liability by demonstrating that legitimate reasons alone would have led it to the same promotion decision. Likewise, under the bill, the employer presumably could not be required to promote the plaintiff, or make restitution for backpay, on the facts of *Price Waterhouse*, where the employer met the requirements of the same decision rule. However, because §5 recasts that principle as a limitation only on Title VII remedies and not liability, the employer may yet be found to have violated §703 and thereby be subject to a claim for Title VII damages pursuant to §8 of the bill. In this regard, the bill is consistent with certain pre-*Price Waterhouse* federal court decisions that drew a similar distinction between the liability and remedial phases of Title VII litigation.[51]

The bill, however, does not seem to address a controversy among the majority Justices in *Price Waterhouse* concerning the nature of evidence required to satisfy the employer's rebuttal burden in mixed motive cases. As framed by the plurality and a concurring opinion, the issue there was whether credible testimony and other "subjective" evidence is sufficient to satisfy the same decision rule, as urged by Justice White, or whether as per the plurality view only "objective" evidence would suffice.

Finality of Litigated or Consent Judgments

Section 6 of the bill would amend §703 of Title VII to preclude certain federal constitutional or civil rights challenges to any employment practice that "implements" a prior litigated or consent judgment by persons with notice and opportunity to be heard, or whose interests were otherwise adequately represented, in those earlier proceedings. Three specific types of challenges would be foreclosed by this section. First, are claims by persons who had "notice from any source" that their interests might be affected and "reasonable opportunity to present objections" to any such order or judgment. Second, persons whose interests "were adequately represented" in another challenge to the order or judgment could not complain of the practice in collateral proceedings. Finally, even in the absence of actual notice, legal challenge would be precluded if "reasonable efforts were made to provide notice to interested persons." Any collateral challenge not barred by §6 "shall be brought in the court, and if possible before the judge, that entered such judgment or order."

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[51] See, *e.g.*, *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1165-1166 (9th Cir. 1984); *Bibbs v. Block*, 778 F.2d 1318, 1320-1324 (8th Cir. 1985).

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Section 6 is an apparent legislative response to the Court's ruling in *Martin v. Wilks*. In *Wilks*, a Title VII suit between black firefighters and the City of Birmingham, Ala., was settled by two consent decrees that set forth long term and interim annual goals for hiring blacks as firefighters and also provided promotional goals for blacks within the department. An earlier union motion to intervene in the cases had been rejected as was an action to preliminarily enjoin the decrees filed by seven white firefighters. After various appeals, another group of white firefighters who claimed that they had been denied promotions in favor of less qualified blacks filed a separate suit. The city admitted that it had made race conscious personnel decisions but argued that its actions were unassailable because made pursuant to the consent decrees. Ruling against the city, the Eleventh Circuit declared that the consent decree was entitled to no more weight than a voluntary affirmative action plan which "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed."[52]

The Supreme Court majority relied on the premise that "a person cannot be deprived of his legal rights in a proceeding to which he is not a party" to reject the doctrine of "impermissible collateral attack." Under that doctrine, as adopted by the majority of federal circuits, actions taken pursuant to a consent decree are deemed largely immune from attack by parties who failed to intervene in the underlying lawsuit. Chief Justice Rehnquist's opinion was an interpretation of mandatory joinder and permissive intervention under Federal Civil Procedure Rules 19 and 24, respectively. The narrow issue as conceived by the majority was whether affected nonparties like the white firefighters had an obligation under Rule 24 to seek intervention at an earlier stage or whether the onus was instead on parties to the lawsuit to join them under Rule 19 as necessary parties. The majority concluded, "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to jurisdiction of the court and bound by a judgment or decree." Since the parties to a lawsuit know best who is likely to be affected by it, they have the burden under Rule 19 of joining all persons who they wish to be bound by the judgment. Knowledge of the lawsuit does not give rise to a duty under Rule 24 to intervene, Rehnquist said, and a non-party is thus not precluded from challenging actions taken under a consent decree.

Justice Stevens, in dissent, argued that although their interests may have been affected, the white firefighters were deprived of no "legal rights" by the consent decrees and were not "bound" by them in any legal sense. Moreover, to permit collateral attack in this situation "would destroy the integrity of litigated judgments, would lead to vexatious litigation, and would subvert the interest in comity between courts." Thus, unless a decree is

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[52] *In re Birmingham Discrimination Employment Litigation*, 833 F.2d 1492 (llth Cir. 1987).

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"collusive, fraudulent, transparently invalid, or entered without jurisdiction," he felt it "unconscionable" to hold the city to additional liability for adherence to it.

Martin settled an issue over which the Justices had been evenly divided before Justice Kennedy joined the Court[53] and on which a majority of federal circuit courts had ruled to the contrary.[54] The majority of the Court made clear that third party unions or individual plaintiffs can bring an action challenging the effects of an affirmative action consent decree. Nonetheless, numerous questions remained as to the nature of the injury that must be alleged and time limits within which the reverse discrimination action must be brought. The bill, on the other hand, would appear to erect a statutory bar to collateral attacks upon previously litigated orders or consent decrees in employment discrimination lawsuits under certain circumstances. Section 6 goes on to state, however, that this preclusion principle would not limit challenges by persons who become parties to an action and would not more broadly alter the standards for intervention FRCP Rule 24. Also unaffected by the bill would be the right of a nonparty to challenge an order or decree that was obtained by "collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction." Just what criteria are to govern the "transparent" invalidity standard in this latter exception are not further elaborated by the bill. Nor does the bill address the status of a person who fails to intervene in a lawsuit of which he had knowledge because of a mistaken belief that his interests are adequately represented by a party.

Statute of Limitations

The Equal Employment Opportunity Commission (EEOC) is responsible for administrative enforcement of Title VII and is empowered to investigate and conciliate formal charges of employment discrimination. Currently, a private aggrieved person must file an administrative charge with the Commission within one hundred and eighty days after the alleged unlawful employment practice occurred, a period which may be extended to three hundred days where proceedings are first instituted with a state or local fair employment practices agency.

The determination whether a charge is timely filed for purposes of present Title VII law requires first that it be determined when the alleged

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[53] See *Marino v. Ortiz*, 484 U.S. 301 (1988).

[54] Except for the Eleventh Circuit, the other federal appeals courts protected Title VII consent decrees from collateral attack. *Dennison v. City of Los Angeles Dept. of Water and Power*, 658 F.2d 694 (9th Cir. 1981); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982); *Striff v. Mason*, 47 FEP Cases 79 (6th Cir. 1988).

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discrimination occurred. This may pose some difficulty for Title VII plaintiffs in those situations where multiple events, occurring at different times, are involved in a single employment decision, or where the implications of a given decision are not known or felt by affected employees until some time after its occurrence. Nonetheless, since the mid-1970's, the Supreme Court has strictly adhered to Title VII timeliness requirements and repeatedly rejected claims of "continuing" violation predicated on a "course of conduct" by an employer or the alleged maintenance over time of a discriminatory policy or system. For example, in *Delaware State College v. Ricks*,[55] a tenure case, the Court upheld a judicial finding that the discriminatory "occurrence" was the college's denial of tenure to the plaintiff even though at the time the college offered a "terminal contract" for one further year of teaching. Neither expiration of that contract nor the final denial of Rick's grievance challenging the adverse tenure decision were critical determinants to the commencement of the 180 day Title VII limitation period.

Another aspect of the "continuing violation" theory arose in connection with claims alleging past discrimination, the effects of which were "perpetuated" by the operation of a *bona fide* seniority system protected by §703(h) of Title VII.[56] *Teamsters v. United States*[57] held that the use of a seniority which perpetuated the effects of pre-Act, and thus legal, segregation did not lack *bona fides* and was immunized by §703(h). *United Airlines v. Evans*[58] considered whether a seniority system that perpetuated the effects of illegal post-Act discrimination could be "bona fide" within the meaning of §703(h).

In *Evans*, an airline cabin attendant had been forced to resign in 1968 pursuant to United's no marriage rule which was later found to be illegal sex discrimination in another Title VII proceeding. She did not file a charge with the EEOC at the time of her original discharge and was subsequently rehired as a new employee in 1972. She was not given seniority credit for the earlier period of employment prior to her forced discharge, however, because of United's policy of crediting only continuing time in service for seniority purposes. A year later plaintiff sued, charging that United's use of the 1972 date of hire or rehire for determining seniority violated Title VII because it perpetuated into the present the effects of past discrimination that occurred in 1968. The Supreme Court rejected this argument, however. While

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[55] 449 U.S. 250 (1980).

[56] 42 U.S.C. 2000e-2(h). Basically, the section permits employers to differentiate in compensation and other employment terms, conditions, and benefits where such differences are "pursuant to a bona fide senority system" and "are not the result of an intention to discriminate."

[57] 431 U.S. 553 (1977).

[58] 431 U.S. 553 (1977).

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conceding that the seniority system gave "present effect to a past act of discrimination," the majority nonetheless held that the airline was entitled to treat the forced resignation of the plaintiff in 1968 as lawful when she failed to file a charge within the statutory limitations period.

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . .[I]t is merely an unfortunate event in history which has no present legal consequences.

Thus, *Evans* teaches that the Title VII 180 day limitation period commencing with the occurrence of an allegedly unlawful employment practice may not be extended by operation of the *bona fide* seniority system protected by §703(h).

In another ruling last term, *Lorance v. AT & T Technologies*,[59] the Court reviewed the plaintiff's burden for proving discrimination in the operation of employee seniority systems and the theory of Title VII liability based on "continuing violations." The precise issue there presented was whether the 180- or 300-day limitation period for filing Title VII charges runs from the date of adoption of an allegedly discriminatory seniority system or the date on which the individual is adversely affected by the system. Female AT & T employees there filed a charge with the EEOC in 1983 complaining that they had been demoted during a company reduction-in-force as the result of a change in seniority rules negotiated between labor unions and the employer and approved union's membership in 1979. The plaintiffs alleged that although neutral on its face, the change from plantwide to departmental seniority was adopted for the purpose of discriminating on the basis of sex, that the violations were continuing in nature, and that each action taken under the system was an act of discrimination actionable under Title VII.

In affirming dismissal of the suit as untimely, a 5 to 3 majority of the Court ruled that the Title VII limitation period commences when a discriminatory seniority system is imposed, not at some indefinite future time when the "concrete effects" of the system become obvious. The decision rested heavily on §703(h) and *Evans* which largely insulate seniority systems from challenge on a disparate impact theory unless discriminatory intent is proven.[60] Because of these special Title VII protections for seniority, Justice Scalia was unpersuaded that the continuing effects of the adoption of the system could serve as a predicate of successive charges of discrimination.

> In the context of the present case, a female [employee] could defeat the settled (and worked-for) expectations of her

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[59] *Supra* n. 12.

[60] *E.g.*, *Teamsters v. United States*, 431 U.S. 324 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

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> co-workers whenever she is demoted or not promoted under the new system, be that in 1983, 1993, 2003, or beyond. Indeed, a given plaintiff could in theory sue successively for not being promoted, for being demoted, for being laid off, and for not being awarded a sufficiently favorable pension, so long as these acts--even if nondiscriminatory in themselves--could be attributed to the 1979 change in seniority. Our past cases, to which we adhere today, have declined to follow an approach that has such disruptive implications.

By way of caveat, however, Justice Scalia cautioned that "a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time, and that even a facially neutral system, if it is adopted with unlawful discriminatory motive," can be challenged within the time limits prescribed by Title VII. Justices Marshall, Brennan, and Blackmun argued in dissent that the distinction between facially neutral and facially discriminatory seniority systems is a "specious" one and predicted that *Lorance* "will come as a surprise to Congress, whose goals in enacting Title VII surely never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days."

Section 7 of the Civil Rights Act of 1990 would respond to these Title VII timeliness issues in two ways. First, and perhaps most dramatic, §7(a) would extend the limitations period for filing an EEOC charge from 180 days to two years commencing on the later of either the date of occurrence or the date on which the challenged practice "has been applied to affect adversely the person aggrieved. . ." This provision could ameliorate the impact of the rulings in *Evans* and *Ricks* both by its extension of the appropriate Title VII time limits for filing charges and by defining the point of commencement of that limitations period in terms the effect of any challenged practice on the particular employee or applicant. Under §7(b) of the bill, any application of a collectively bargained seniority system that was adopted with discriminatory intent could be made the subject of an EEOC charge at any time during the effective life of the labor agreement and up to two years after its expiration. This provision appears more narrowly targeted at the result reached in *Lorance*.

Civil Damage Awards and Jury Trials

Under §706(g) of Title VII, the courts are granted broad equitable authority to enjoin unlawful employment practices and "make whole" the victims of past discrimination. [61] Thus, in addition to prohibitive injunctive relief, trial judges in Title VII cases may "order such affirmative action as may be appropriate, which may include. . . reinstatement or hiring of employees,

[61] *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976).

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with or without back pay. . ., or any other relief as the court deems appropriate."[62] Liability for Title VII backpay is limited to the period dating from two years prior to filing the complaint. While stated in discretionary terms, as a general rule a trial court may not limit or deny the remedies of hiring, reinstatement, backwages, interest on back wages, and seniority without fully stating its reasons, and the denial will be "permissible only for reasons which, applied generally, would not frustrate the central purposes of eradicating discrimination throughout the economy and making persons whole for the injuries suffered through past discrimination."[63] In practice, this standard rarely permits denial or hiring or reinstatement with restitution for lost compensation and seniority credit.

However, the award of backpay under Title VII is viewed as a remedy "equitable" rather than "legal" in nature, and the courts have generally concluded that there is no discretion to award consequential damages to compensate plaintiffs for actual losses such as credit and lost reputation suffered as a consequence of illegal action. Similarly, damages for nonmonetary losses, such as for pain, suffering, and humiliation, are not awarded under Title VII. Not only are such damages "legal," according to the courts, but they are not a part of "make whole" relief.[64] Similarly, punitive damages are viewed as legal and, furthermore, because the thrust of Title VII is remedial rather than "punitive," such exemplary damages to punish willful and wanton Title VII violations are held not to fall within the purview of the statute.[65] For the same reason, while the Supreme Court has not directly ruled on the subject,[66] jury trials are not generally available for enforcement of Title VII rights. The lone judicial departure from this rule may be the recent federal district court decision in *Beesley v. Hartford Fire Insurance Co.*[67] which held that Title VII provides for jury trials since the remedy of backpay is a form of compensatory or "legal" damages.

Section 8 of the bill would amend the remedial provisions of §706(g) of the 1964 Act to provide for compensatory and punitive damage awards in

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[62] 42 U.S.C. 2000e-5(g).

[63] *Franks*, *supra* n. 57.

[64] *See Shah v. Mount Zion Hospital & Medical Center*, 642 F.2d 268 (9th Cir. 1981); *Swanson v. Elmhurst Chrysler Plymouth*, 882 F.2d 1235 (7th Cir. 1989).

[65] *Id.*

[66] But *Lorillard v. Pons*, 434 U.S. 575 (1978), denying jury trials under the Age Discrimination in Employment Act, may suggest that the Court would not find a Title VII right to a jury trial.

[67] 723 F. Supp. 635 (N.D.Ala. 1989).

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Title VII cases subject to certain limitations. First, the proposed damage remedy would apparently be confined to cases of intentional discrimination involving disparate treatment and pattern or practice violations since actions based on the disparate impact model proposed by the bill's §4 are specifically exempted by §8. Second, while both private employers and governmental entities could be held liable for compensatory damages, punitive damages could not be awarded against governmental defendants, i.e. "a government, government agency or a political subdivision." In general accord with common law practice, punitive damages would be authorized only in cases where the intentional discrimination is committed "with malice, or with reckless disregard or callous indifference" to federally protected rights. Finally, where damages are requested as part of the relief, any party may demand a trial by jury, but backpay or any interest thereon would not considered compensatory damages.

Section 1981 of the 1866 Civil Rights Act

Section 12 of the bill would effectively overturn the Supreme Court ruling last term in *Patterson v. McLean Credit Union*[68] by amending the 1866 Act to make clear that the "same right" to "make and enforce contracts"[69] therein includes "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." In a widely awaited decision, the Court in *Patterson* placed new limits on the scope of the §1981 right to equality in contract relations as applied to employment. A series of High Court rulings over a two decade period had led to a revival of the long dormant 1866 Civil Rights Act as a remedy for private racial discrimination in a broad range of areas. This trend culminated in the 1976 decision in *Runyon v. McCrary*[70] which ruled that §1981 prohibited the racially based refusal of a private school to "contract" for admission of black students. Even before *Runyon*, however, the Court had ruled that §1981 afforded a federal remedy for racial discrimination in private employment, and while by no means limited thereto, employment has remained a principal focus of §1981 litigation. Specifically,

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68 *Supra* n. 9.

69 The full text of the statute reads as follows:

> All persons within the jurisdiction of the United States shall have the *same right* in every State and Territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains penalties, taxes, licenses, and exactions of every kind, and to no other. (emphasis added).

70 427 U.S. 160 (1976).

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§1981 had been used to challenge racial and ethnic discrimination in virtually all aspects of the employment relationship, including hiring,[71] job assignments,[72] termination,[73] and other terms, conditions, and privileges of employment. Thus, in terms of substantive coverage, §1981 had evolved into a remedy for race discrimination in private employment largely coextensive with Title VII of the 1964 Civil Rights Act.[74]

Patterson, a racial harassment in employment case,[75] was first heard by the Court during its 1987-88 Term but by a 5 to 4 vote was ordered held over for reargument last Term. Provoking controversy far beyond the narrow issues presented by the case, the order directed the parties to brief and argue the more fundamental question of whether the 1976 *Runyon* decision should be reconsidered. However, when it finally decided *Patterson*, the Court unanimously declined to overrule the earlier case.[76] Instead, by a 5 to 4

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[71] *E.g., Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975)("word of mouth" hiring policy violates §1981 because it may have tendency to perpetuate all-white workforce).

[72] *E.g., Williams v. DeKalb County*, 577 F.2d 248 (5th Cir. 1978)("irregularities" in job posting procedures that disadvantaged black applicants for promotion violated §1981 unless adequately explained).

[73] *E.g., Goff v, Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982)(retaliatory firing of employee for filing a racial discrimination claim with Equal Employment Opportunity Commission is actionable under §1981).

[74] Note, however, that employment discrimination because of sex and religion, covered by Title VII, is not actionable under §1981 which has been strictly limited by judicial interpretation to racial and ethnic bias cases.

[75] In *Patterson*, a black woman alleged that her employer had harassed and berated her, refused to promote her to an intermediate accounting clerk position, and then discharged her, all because of her race in violation of §1981. A federal district judge ruled that her harassment claim was beyond the reach of the statute and the Fourth Circuit affirmed that racial harassment standing alone does not abridge the right to "make" and "enforce" contracts. The appeals court also agreed that to prevail on her promotion claim, the plaintiff had to show that she was better qualified than the person promoted in order to demonstrate that her employer's justification was a pretext.

[76] Speaking for the entire Court, Justice Kennedy ruled that while "[s]ome Members of this Court believe that *Runyon* was decided incorrectly," none of the traditional exceptions to *stare decisis* or the principle of judicial adherence to precedent justified its reversal. That is, the *Runyon* holding had not been "undermined by subsequent changes or developments of the law," was not "unworkable or confusing" or a "positive detriment to coherence and consistency in the law," and was "entirely consistent with our society's deep

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margin, it held the statute did not apply to racial harassment related to the conditions of employment or any other conduct which does not interfere with the "formation" or "right to enforce" a contract.

The *Patterson* majority held that the scope of §1981 was limited "by its plain terms" to the right to "make" and "enforce" contracts and could not be construed "as a general proscription of racial discrimination in all aspects of contract relations." Thus, while the statute extends to discrimination in the "formation" of a contract, it does not reach "postformation" employer conduct affecting employment terms, conditions, or benefits which are governed by the more comprehensive provisions of Title VII. Similarly, the right to "enforce" contracts was limited strictly to impairment of an employee's "right of access to legal process" for resolution of contract disputes whether by public or private action. Thus, "harassment" claims as in *Patterson* are not covered by §1981 nor, Justice Kennedy's opinion suggests, would discriminatory discharge or conduct amounting to a "breach" of contract under state law since that "would federalize all state-law claims for breach of contract where racial animus is alleged." However, the majority did leave a window for §1981 claims of race discrimination in promotion but only "where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and employer."[77]

The case was thus remanded for consideration of whether the claimed denial of promotion in *Patterson* had entailed "the opportunity for a new contract with the employer." If so, §1981 would apply to the refusal to promote and Justice Kennedy states that the Title VII disparate treatment approach to proof of intentional discrimination must govern the lower courts' further deliberations. This meant, however, that plaintiff was not limited to proving that she was more qualified than the white candidate who got the job but that she could rely on other evidence of employer intent to discriminate or "pretext." And the employer's past treatment of her, including alleged racial harassment, could be relevant here, not as the basis for a separate claim, but as evidence of discrimination "at the time of the formation of the contract [or promotion]."

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commitment to eradication of [racial] discrimination."

[77] In dissent, Justice Brennan, joined by Justices Marshall, Blackmun, and in part by Stevens, argued that §1981 covers racial harassment or other postformation conduct that is so "severe or pervasive as to effectively belie that the contract was entered into in a racially neutral manner" and was concerned the majority's "cramped" construction would restrict the statute's availability in non-employment contexts. Justice Stevens argued that an at-will employee's contract is continually remade, so that harassment fits the statutory language.

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Accordingly, after *Patterson*, §1981 coverage of employment was largely limited to refusals to hire because of race and, in some situations, racial discrimination in promotions where a "new" contractual relation with the employer would result. Discriminatory discharges, layoffs, transfers, for example, or disparate treatment in the terms, conditions, or benefits of employment were possibly left outside the purview of the statute.[78] Instead, civil rights plaintiffs would probably have to pursue those claims under the broader coverage of Title VII. Indeed, the possibility of conflict with the "detailed" and more comprehensive coverage and procedures of the 1964 Act was one factor which persuaded the *Patterson* majority to confine the scope of §1981. "We should be reluctant. . .to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute."

Section 1981 is often viewed by civil rights proponents to have certain remedial and procedural advantages over Title VII that may be lost because of the ruling. As succinctly outlined by Justice Brennan's dissenting opinion:

> Perhaps most important, §1981 is not limited in scope to employment discrimination by businesses with 15 or more employees, [citation omitted], and hence may reach the nearly 15% of the workforce not covered by Title VII. [citation omitted]. A §1981 backpay award may also extend beyond the two-year limit of Title VII. [citation omitted]. Moreover, a §1981 plaintiff is not limited to recovering backpay: she may also obtain damages, including punitive damages in an appropriate case. Other differences between the two statutes include the right to a jury trial under §1981, but not Title VII; a different statute of limitations in §1981 cases, [citation omitted], and the availability under Title VII, but not §1981, of administrative machinery designed to provide assistance in investigation and conciliation, [citation omitted].

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[78] For example, since *Patterson*, a federal district court in Texas has ruled that a black salesman who alleged that he was evaluated under harsher standards than whites, denied equal opportunities for promotion, and ultimately laid off during a reduction in force because of his race could not proceed against his former employer under §1981 since none of his claims "concern[ed] discrimination in the making or enforcement of his contract. . .as those terms were defined in *Patterson*." While the trial judge found that a failure-to-promote charge may be pursued under §1981, he ruled against the plaintiff here too because the desired promotion to area supervisor would not have created a "new and distinct relationship" with the employer. *Greggs v. Hillman Distributing Co.*, 141 DLR A-2 (July 25, 1989)

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Note, however, that some of these perceived advantages, particularly the provision of civil damages and jury trials in Title VII cases, are addressed by other sections of the Civil Rights Act of 1990.

Since *Patterson* the courts have reached varying conclusions as to the applicability of §1981 to alleged racial discrimination in promotions, discharges, and other non-hiring related employment practices.[79] By addition of a new subsection to §1981, the bill would extend the coverage of the 1866 Act to racial discrimination in all aspects the employment relationship and thereby overcome the limiting implications of *Patterson*. Moreoever, because §1981 is not limited to equal employment opportunity, but applies to contractual relations in other civil rights contexts (for example, education and commercial dealing of various sorts) the bill would potentially affect application of the statute in nonemployment areas as well. It would not, however, extend the substantive scope of §1981 beyond racial or ethnic minorities to groups not now protected by the 1866 Act.

Witness and Attorney's Fees

Section 9 of the bill contains three relatively technical provisions related to recovery of witness and attorney's fees under Title VII. First, §9 would amend the current §706(k), which allows the prevailing party to a Title VII action "reasonable attorney's fees" as part of costs, to include "witness fees

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[79] For example, on remand from the Supreme Court ruling in *Patterson*, a federal district court earlier this year held that the plaintiff in that case has no remedy against her employer for being denied a promotion to another hourly job at the same pay rate, location, and working condition since that would result in no "new and distinct relation with her employer" as could be claimed, said the court, if a salaried position had been sought. *Patterson v. McLean Credit Union*, 729 F. Supp. 35 (M.D.N.C. 1990). Contrariwise, in *Hudgens v. Harper-Grace Hospitals*, 728 F. Supp 1321 (E.D.Mich 1990), a federal judge in Detroit ruled that a black hospital employee who was denied two promotions to higher level computer jobs involving changes "significant enough to give rise to a new and distinct relationship" with his employer could sue under §1981. *See, also, e.g., Malekian v. Pottery Club of Aurora, Inc.*, 724 F. Supp. 1299 (D.Colo. 1989)(*Patterson* requires dismissal of plaintiff's claim that she was terminated because of her race in violation of §1981); *Greggs v. Hillman Distributing Co.*, 719 F.Supp. 552 (E.D.Tex. 1989)(racial discrimination in promotions and layoffs does not violate §1981 where no "new and distinct relationship" created with the employer). According to a study released by the NAACP Legal Defense and Education Fund in November 1989, nearly one hundred §1981 employment discrimination cases were dismissed from federal court nationwide in the four and a half months following the *Patterson* decision. *See* 223 *DLR* D-1 (BNA 11-21-89).

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and other litigation expenses." In *Crawford Fitting Co. v. J.T. Gibbons Inc.*,[80] the Court held that trial courts lack authority under Rule 54(d) FRCP to award a successful defendant the fees of an expert witness that exceeded $30 per day unless that witness was appointed by the court pursuant to 28 U.S.C. §1920(6). The Court did not address whether such fees could be awarded as part of attorney's fees under such statutes as § 706(k), an issue the bill would resolve affirmatively. Under the proposed amendment, any prevailing party, whether Title VII plaintiff or defendant employer, would apparently be entitled to "reasonable" witness fees without regard to the monetary limits imposed by Federal Rule 54(d).

Another High Court ruling, *Evans v. Jeff D.*,[81] upheld the legality of negotiated waivers of attorney's fees in civil rights cases. *Evans* was a non-Title VII class action seeking injunctive relief on behalf of publicly institutionalized mentally and emotionally handicapped children in the State of Idaho. One week prior to trial, the defendant offered virtually all the injunctive relief sought by the class plaintiffs on the condition that they waive their claims to fees and costs under the Attorney's Fees Awards Act.[82] Plaintiff's lawyer "determined that his ethical obligation to his clients mandated acceptance of the proposal," but he later requested the district court to disapprove the costs and fees waiver of the negotiated settlement. The Supreme Court agreed with the trial judge who upheld the waiver, however, stating that "[t]he statute and its legislative history nowhere suggest that Congress intended to forbid *all* waivers of attorney's fees. . ." To overcome the potential conflict of interest dilemma posed by the *Evans*[83] result, the bill would add to § 706(k) a new subsection barring judicial approval of any Title VII settlement "unless the parties and their counsel attest that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement."

Finally, §9 of the bill would also alter the effect of the Supreme Court decision in *Independent Federation of Flight Attendants v. Zipes*[84] which ruled that attorney's fees cannot be awarded under Title VII against losing intervenors who have not been found to have violated the Act, unless the

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[80] 107 S.Ct. 2494 (1987).

[81] 475 U.S. 717 (1986).

[82] 42 U.S.C. §1988.

[83] The *Evans* majority noted that "it is argued that an attorney is required to evaluate a settlement offer on the basis of the client's interest, without considering his own interest in obtaining a fee; upon recommending settlement, he must abide by the client's decision whether or not to accept the offer." *Id.* at 728 n. 14.

[84] 109 S.Ct. 2372 (1989).

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intervenors' action is frivolous, unreasonable or without foundation.[85] Justice Scalia, reasoned for the *Zipes* majority that a fee award would further neither the general policy that wrongdoers make whole those whom they have injured nor Title VII's aim of deterring employers from engaging in discriminatory practices. As a general rule, he argued, the law has recognized a connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes. "[F]ee liability runs with merits liability." There is also a generally recognized distinction in law between wrongdoers and the blameless as pertains to a district court's discretion to fashion Title VII remedies. Justice Blackmun concurred in the judgment but refused to join the Court's opinion insofar as it might require the plaintiff to bear the cost of intervention related attorney's fees. Instead, he would require the losing defendant to defray these costs. In dissent, Justice Marshall, joined by Justice Brennan, objected that the majority ruling will tempt defendants to "rely on intervenors to raise many of their defenses, thereby minimizing the fee exposure of defendants and forcing prevailing plaintiffs to litigate many, if not most, of their claims against parties from whom they have no chance of recovering fees."

In effect, §9 of the bill appears to adopt the Blackmun view by amending §706(k) to permit recovery from the losing party to the original action any costs "reasonably" incurred by the prevailing party in defending a judgment or other order in its favor. Costs which may be recovered pursuant to the amendment include a reasonable attorney's fee, expert fees, and other litigation expenses. The prevailing party for purposes of this amendment could be a party, an intervenor, or "otherwise."

Actions Against the Federal Government

Section 10 of the bill proposes two changes to §717, a 1972 amendment to Title VII which broadened the Act's coverage to reach federal government employment. First, the limitations period for filing a federal civil action after notice of final agency action on a charge is extended from thirty to ninety days. Second, the bill would overturn the Supreme Court ruling in *Library of Congress v. Shaw*[86] which held that interest cannot be obtained from the United States for delays in the payment of attorney's fees without explicit legislative authorization. In *Shaw*, the plaintiff prevailed in his Title VII

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[85] The dispute in *Zipes* originated in a 1970 class action challenging as sex discrimination an airline's policy of dismissing flight attendants who became mothers. The settlement agreement, which credited class members with both company and union seniority, was unsuccessfully challenged by the union, which had intervened on behalf of employees who were not members of the plaintiff class. The district court awarded plaintiffs attorney's fees against the union but the Supreme Court reversed.

[86] 378 U.S. 310 (1986).

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action against the government but was not awarded attorney's fees until two years later. The district judge increased the award to reflect accrued interest, but the Supreme Court reversed. Justice Blackmun held that the Library of Congress, as a government agency, was protected by sovereign immunity unless Congress expressly indicated an intent to waive that immunity. Despite the fact that §706(k) made the United States liable for fees "the same as a private person," Justice Blackmun held that the evidence of congressional intent was not sufficiently strong to overcome the presumption of sovereign immunity. Section 10 would reverse the *Shaw* result, in conformity with the prevailing practice of awarding fee adjustments for interest against private parties. However, because §10 is drafted in general terms to authorize "interest to compensate for delay in payment," it may not be limited to attorney's fees but could also apply to backpay awards.

Rules of Construction

Section 11 of the bill would enact two general rules to guide judicial construction of the scope and effect of "all federal laws" protecting civil rights and not just Title VII. The first would declare Congress' intention that the federal civil rights laws "shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies." The second rule states that, except as expressly provided, no federal civil rights law "shall be construed to restrict or limit the rights, procedures, or remedies available under any other Federal law protecting such civil rights."

The bill summary submitted for the record by Senator Kennedy on introduction of S. 2014 describes these interpretative rules as "reaffirming the intention of Congress that civil rights laws must be construed generously, in order to provide effective remedies to eliminate discrimination."[87] While generally hortatory in nature, and possibly an aid to judicial interpretation of congressional intent, § 11 would not appear to directly mandate or limit the substantive judicial standards applied under any federal civil rights statute. Instead, the proposed rules of construction appear to codify in statute the established common law canon of statutory construction that remedial legislation, like the civil rights laws, are to be liberally construed "in order that their beneficent objectives may be realized to the fullest extent

[87] 136 *Cong. Rec.* 1021 (daily ed. 2-7-90).

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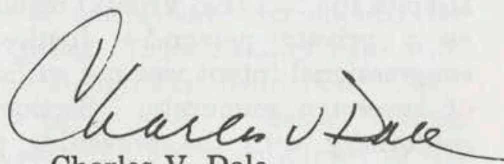
possible."[88] Consequently, it may be doubted whether the proposed rules would be a reliable predictor or outcome determinative in the Court's consideration of any future case.



Charles V. Dale
Legislative Attorney
March 21, 1990

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[88] Singer, *Sands Sutherland Statutory Construction*, §74.05 (4th Ed. 1986).

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FEDERAL PROTECTION OF EQUAL EMPLOYMENT OPPORTUNITY FOR RACIAL AND ETHNIC MINORITIES AND FOR WOMEN IN THE PRIVATE SECTOR

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February 17, 1983
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FEDERAL PROTECTION OF EQUAL EMPLOYMENT OPPORTUNITY FOR RACIAL AND ETHNIC MINORITIES AND FOR WOMEN IN THE PRIVATE SECTOR

WAYS IN WHICH THE FEDERAL GOVERNMENT SEEKS TO GUARANTEE EQUAL EMPLOYMENT OPPORTUNITY

Equal employment opportunity means that no individual is denied a job, or training, or the chance to be upgraded in an employer's workforce because that individual belongs to a certain racial or ethnic minority group or because she is a woman. To be denied such employment opportunity because of one's race, national origin, or sex is to suffer employment discrimination.

There are two ways in which the Federal Government seeks to ensure that individuals have equal employment opportunity.

The first way is by enforcing laws that prohibit discrimination by employers and by others who are in a position to discriminate. Such laws forbid not only overt discrimination, such as refusal to hire an applicant because he or she is, for example, black or Hispanic, or female, or segregation of the workforce so that minority individuals or women are channelled into lower paid, dead-end jobs while whites or males are placed on career ladders leading to training and upgrading. Equal employment opportunity laws also forbid subtle types of discrimination by means of practices that are neutral on their face but are meant to effect discrimination. An example of this type of discrimination would be a test for selecting applicants for hiring, or employees for training, that is given both to minority and non-minority applicants for the purpose, not of testing job-related abilities, but of screening out minority or female test-takers.

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The second way in which the Federal Government aims to promote equal employment opportunity is by requiring that many employers undertake special measures to recruit, hire, train and upgrade minority and women workers. Such special measures are called "affirmative action."

Affirmative action is undertaken for either or both of two reasons.

The first reason is to overcome the consequences of past discrimination. As a result of past discrimination, minority persons or women may be deprived of training and work experience and thereby rendered not competitive with others. Affirmative action programs must be designed to help them become so.

The second reason for affirmative action is to eliminate present employment practices that constitute barriers to equal opportunity. An example of such a practice would be seeking applicants only in places where white or male applicants are to be found. An affirmative action program would oblige an employers to make special efforts to seek minority applicants in places where they are to be found, for example, in schools and colleges with heavy black or Hispanic enrollments.

The Federal Government implements its policy or ensuring equal employment opportunity primarily through a statute, Title VII of the Civil Rights Act of 1964, and an executive order, Executive Order 11246.

Title VII is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), whose primary mission is dealing with complaints and obtaining remedies for individuals and classes of individuals who have suffered discrimination.

Executive Order 11246 is implemented by the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor, whose primary mission is to ensure that Federal contractors take affirmative action to promote equal employment opportunity.

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Equal employment opportunity is also required under other statutes mandating nondiscrimination in programs of Federal financial assistance. Title VI of the Civil Rights Act of 1964 prohibits discrimination by recipients of Federal funds, e.g., hospitals, public schools, State employment services, against the beneficiaries of programs operated with the assistance of such funds. Although Title VI is intended to protect program beneficiaries rather than employees or job applicants of recipients, Federal granting agencies oblige recipients to practice nondiscrimination with respect to their own workers as a means of ensuring that beneficiaries are granted equal access to program benefits. 1/

Nondiscrimination provisions similar to those of Title VI have been written into many specific programs of Federal assistance, including revenue sharing, and equal employment opportunity practices are obligatory for recipients under these programs both because of the program statute and because of Title VI.

Federal agencies that grant funds for programs are responsible for nondiscrimination in those programs, and they may enforce this obligation by withholding Federal funds. But they are authorized to refer any complaints of employment discrimination against an individual to EEOC. 2/

Finally, Congress, by the Civil Rights Act of 1957, created the U.S. Commission on Civil Rights to study and report on violations of the equal protection of the laws. One of the duties of the Commission is to study what the Federal Government is doing to eliminate discrimination because of race, color, religion, sex or national origin. In response to this mandate, the

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1/ 28 Code of Federal Regulations 42.402(f), 42.406(b)(3).

2/ 28 CFR 42.605(b).

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Commission has published reports on efforts by the Federal Government to enforce equal employment opportunity. One of its publications is its November 1981 report, Affirmative Action in the 1980s: Dismantling the Process of Discrimination.

The balance of this report will concentrate on implementation of what were noted above as the two primary, legal requirements for equal employment opportunity, Title VII and Executive Order 11246.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 as amended in 1972 forbids discrimination against any individual in employment decisions or practices because of that individual's race, color, religion, sex, or national origin. Title VII covers the entire range of employment practices: hiring, pay, opportunity for training, promotion. Most generally, it forbids any employment practice that

> . . . would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 3/

Title VII applies to employers with 15 or more employees, to labor unions, and to employment agencies. It also covers public employers, Federal, State, and local. This report, however, deals only with employment practices in the private sector.

Enforcement

Congress created the Equal Employment Opportunity Commission (EEOC) to enforce the provisions of Title VII. The mission of EEOC is to receive, investigate and resolve complaints of discrimination.

3/ Sec. 703(a)(2).

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All complaints of discrimination filed with the Commission must charge discrimination against an individual. Some complaints, however, may suggest that the discrimination cited is not limited in its effect to an individual, but extends to an entire class of individuals, for example, to blacks, or Hispanics, or women in a particular department of the employing company, or in the company's entire workforce. Early in the process of dealing with complaints, EEOC notes those with "class implications," that is, those that indicate that discrimination extends beyond the individual complainant, and later in the process it may expand an individual charge into a class complaint, or group together individual charges against the same employer into a class complaint. As a matter of terminology, however, a class complaint cannot become what is called a "class action" until the case reaches the stage of litigation in court. As the result of a class complaint or a class action, an employer may be compelled to do justice to an entire class of individuals, some of whom may not have filed a complaint, instead of only to particular individuals who did file complaints.

Title VII requires that EEOC defer complaints to State and local fair employment practice (FEP) agencies when the complaint comes from a jurisdication having an FEP agency. EEOC enters into deferral contracts with such FEP agencies only after it has made sure that the FEP agency is effective in combating discrimination. 4/

Most of the steps in EEOC's charge processing are mandated by its statute. 5/ The Commission itself, however, has introduced a new way of attempting swift resolution of charges, the Rapid Charge Processing System. 6/ Under this method,

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4/ 29 CFR 1601.70.

5/ Enforcement procedures are mandated in Sec. 706.

6/ 29 CFR 1601.20.

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EEOC asks the complainant and respondent (the employer or other entity charged with discrimination) shortly after a charge is received to sit down together with an EEOC staff member for a face-to-face, fact-finding conference. The aim of such a conference is to attempt to settle the charge by negotiation. Such a settlement involves no Commission judgment as to whether the complaint has merit. In fiscal year 1981, 43 percent of charges were settled in this way.

If there is no rapid settlement, EEOC will investigate the complaint and decide whether there is "reasonable cause to believe that the charge is true." 7/

If the Commission finds that there is not reasonable cause to believe that the charge is true, it will dismiss the complaint and notify the complainant that he has the right under Title VII to bring his case to the appropriate U.S. district court.

If EEOC determines that there is reasonable cause to believe that the charge is true, it will try to resolve it by "informal methods of conference, conciliation, persuasion." 8/ Through conciliation, the Commission tries to remedy the discrimination by eliciting from the respondent--the party against whom the complaint has been filed--an agreement to eliminate the discriminatory practice and to do justice to the complainant. Doing justice to the complainant could involve hiring or promoting him or her, and may involve payment to the complainant of back pay as compensation for pay lost as a result of discrimination. Title VII authorizes the award of back pay for up to two years prior to the date of filing a charge with the Commission.

If EEOC cannot obtain a conciliation agreement with the respondent acceptable to the Commission, it may bring suit against the respondent in a Federal district court. If the court finds that the employer, labor union, or employment agency

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7/ Sec. 706(b).

8/ Ibid.

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has discriminated against the complainant or class of complainants, it may order the respondent to cease discriminating, to hire, or to reinstate each complainant, or to grant each complainant whatever other opportunity he or she was wrongfully denied, and to compensate each complainant with back pay.

Pattern-or-Practice Cases

In addition to receiving and resolving complaints from individuals who have suffered discrimination, EEOC may itself--by one of its commissioners--file a charge against an employer or other entity subject to Title VII. It may do so if it believes that the employer has practiced discrimination not only against this or that individual but against all individuals of a class protected by Title VII by means of a "pattern or practice" of discrimination. A pattern or practice of discrimination means that, in some way, discrimination is built into the employer's personnel system, that such discrimination is "systemic." An example of systemic discrimination would be segregation by race or ethnic origin or sex of job classifications--having "black" or "Hispanic jobs," or "women's jobs."

EEOC charges of systemic discrimination are dealt with by the same procedures--including suit in court--as are other complaints received from complainants. 9/

EEOC and Affirmative Action

While Title VII prohibits employers and others subject to it from discriminating against individuals or classes of individuals, it does not require them to develop plans of affirmative action, unless they are obliged to do so under a conciliation agreement or court order. Nevertheless, EEOC urges employers

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9/ Systemic charges are authorized by Sec. 707.

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to elaborate and to carry out affirmative action plans as a means of promoting equal employment opportunity and thereby of precluding liability to suit under Title VII. In 1979, the Commission published its guidelines, "Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964, as Amended." 10/ EEOC defines affirmative action as follows: "Affirmative action . . . means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunitiy." 11/

In its guidelines on affirmative action and in other publications, EEOC advises employers about ways to increase minority participation in the workforce, such as special recruiting, redesign of jobs so that individuals can learn to do higher level work, and training programs. 12/

EXECUTIVE ORDER 11246

Executive Order 11246, promulgated in 1965, requires equal employment opportunity on the part of Federal contractors.

The Executive Order covers Federal construction and nonconstruction contractors and their subcontractors. It also covers federally assisted construction contractors and their subcontractors. A federally assisted construction contractor is a contractor who does construction work for an entity that is a recipient of Federal financial assistance and who pays for the construction work with the aid of Federal funds.

The Executive Order requires that all such contractors obligate themselves by contract not to discriminate in employment against job applicants or employees

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10/ 29 CFR 1608.

11/ Ibid.

12/ 29 CFR 1608.4(c)(1).

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because of their race, color, religion, sex or national origin, and to undertake affirmative action to promote equal employment opportunity.

The Secretary of Labor is responsible for enforcing the Executive Order; the Secretary has vested this responsibility in the Office of Federal Contract Compliance Programs (OFCCP), which is part of the Employment Standards Administration.

Affirmative Action Requirements for Nonconstruction Contractors

OFCCP requires nonconstruction contractors and subcontractors with a contract of $50,000 or more and with 50 or more employees to develop written affirmative action plans. The plan must cover all of their offices and plants, whether or not they are working on a Federal contract or subcontract. 13/ OFCCP defines an affirmative action plan as "a set of specific and result-oriented procedures" designed "to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his [the contractor's] workforce where deficiencies exist." 14/

The notion of "utilization" is the key to understanding the aim of affirmative action. OFCCP recognizes that there are in any area labor force, among people who are working or looking for work, minority and women workers either with developed knowledge, skills and abilities needed by industry, or with aptitude to acquire job qualifications through training, but whose qualifications remain unused, or underused, or whose potentialities remain latent as a result of past or present discrimination. The aim of affirmative action, according to OFCCP, is to search for these unused abilities and aptitudes and to hire, train and upgrade minority and women workers who possess them.

13/ 41 CFR 60-2.

14/ 41 CFR 60-2.10.

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Pursuant to this aim, OFCCP obliges contractors to perform a "utilization analysis." 15/ A utilization analysis compares two things. It compares the availability of qualified and qualifiable minority and women workers both in the labor area and in the contractor's workforce with the numbers of minority and women workers employed in each "job group" in the contractor's workforce. A "job group" is a group of jobs that are similar in types of work, in pay, and in opportunities for advancement. The purpose of the comparison is to discover "underutilization," which OFCCP defines as "having fewer minorities or women in a particular job group than would be expected by their availability." 16/

A contractor may find that there are higher proportions of qualified minority or women workers in the labor area than he employs in job groups corresponding to their specific skills. He may find that he has minority and women workers in his own workforce who are doing work that does not fully utilize their abilities.

For job groups in which there is such underutilization, the contractor is required to set employment "goals". A "goal" is the number of minority or women workers who would be in a job group, or the percentages of all workers in a job group who would be minorities or women, if available minority and women workers were fully utilized. And for each goal, the contractor is to set a timetable for its attainment. 17/

The goal for any job group in which minority workers are underutilized is to be a single goal for persons of all minority groups taken together, and for women. 18/ OFCCP designated as minority groups the following: blacks, Hispanics, American Indians and Alaskan Natives, and Asians and Pacific Islanders. 19/

15/ 41 CFR 60-2.11

16/ 41 CFR 60-2.11(b).

17/ 41 CFR 60-2.12.

18/ 41 CFR 60-2.12(h).

19/ 41 CFR 60-2.11(a).

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OFCCP, however, will not permit employment of members of one or some minority groups to the exclusion of members of other minority groups, and, if any minority group appears to be substantially underutilized, OFCCP may require a separate goal for that minority group. 20/

A goal is meant to be at once a target to aim at, and a measure of accomplishment. It is not to be attained by direct, quota hiring, but by means of carrying out all of the specific steps of an affirmative action program. 21/

OFCCP specifies many of the steps that must be included in the contractor's affirmative action program, and by means of which the contractor is to make good-faith efforts to attain his goals. 22/

Among the most important steps that a contractor is expected to take are: to elicit job applications through minority and women's organizations that refer applicants for employment; to recruit at schools and colleges with sizeable minority or female enrollments; to provide training, if possible; and to support vocational training programs in the community and in schools.

Affirmative Action Requirements for Construction Contractors

Federal and federally assisted construction contractors and their construction subcontractors with a contract of more than $10,000 must comply with OFCCP affirmative action requirements for the construction industry. Such requirements cover all of a contractor's construction projects, whether or not they are Federal or federaly assisted. 23/

20/ 41 CFR 60-2.12(k)(1).

21/ 41 CFR 2.12(a).

22/ 41 CFR 60-2.20-2.26.

23/ 41 CFR 60-4.1.

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Whereas nonconstruction contractors are obligated to perform their own utilization analyses and to set their own employment goals and timetables, OFCCP itself establishes goals for construction contractors. 24/ It does so in the following way.

OFCCP has divided the country into urban areas--standard metropolitan statistical areas (SMSA's) and nonurban areas--so-called "economic areas" (EA's), comprising a county or a group of counties.

For all construction projects within each SMSA or EA, OFCCP has set the same goal for minority participation in each construction trade. The single goal for every trade is a percentage equal to the percentage that minority workers comprise in the experienced civilian labor force (everyone 16 years old or over who is working or looking for work and who has ever worked before) in that SMSA or EA. 25/

For example, if black, Hispanic, American Indian and Asian-American workers comprise 10 percent of the civilian labor force in an SMSA, the minority goal for each construction trade--asbestos workers, carpenters, lathers, roofers, sheetmetal workers and other trades is 10 percent.

Some construction contractors have objected that setting goals for construction trades on the basis of the minority percentage in the civilian labor force is unrealistic, because people are counted in the civilian labor force regardless of their specific job qualifications, whereas construction trade work requires considerable training. These contractors pointed out that there may not be enough trained minority craftsmen available to meet such goals. 26/

24/ 41 CFR 60-4.6.

25/ 45 Federal Register 65983. Construction goals are percentages of total workforce hours worked by minority employees.

26/ Ibid.

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OFCCP's reply to this objection was that low minority representation in construction trades results from discriminatory exclusion of minorities from craft work, and that goals are meant to measure efforts by contractors to increase the supply of minority craftsmen. 27/

As indicated, construction goals are aggregate goals, comprising individuals in all minority groups taken together. However, OFCCP says that, on the basis of 1980 census data, it will issue separate goals for each minority group subdivided by sex. 28/

OFCCP has established a single, nationwide goal for women in construction. It arrived at this goal largely through estimating the percentage of women nationwide who do craft work similar to the work of construction trades, and by assuming that many women who do craft work would like to do it in the construction industry. The present goal for women is 6.9 percent. Unlike goals for minority workers, the goal for women is not applicable to each construction trade. Rather, it represents the percentage of on-site construction work hours worked by women. 29/

OFCCP enumerates "specific affirmative actions" 30/ that construction contractors are obligated to take as means of attaining their goals: recruiting outreach to sources of minority and female workers; measures to prevent discrimination in referral practices when contractors have agreed with unions to obtain their workers through hiring halls; on-the-job training or support of local training programs; and other steps to ensure full participation of minority and women workers in construction.

27/ Ibid.

28/ Ibid.

29/ 43 FR 14899-14900.

30/ 41 CFR 60-4.3(a).

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Some construction contractors are exempt from the requirements described above. These are contractors who are participants in so-called "hometown plans." Hometown plans are affirmative action plans in the construction industry agreed upon by contractors, unions, and minority groups in an area and approved by OFCCP. Contractors who have agreed to hometown plans must fulfill their obligations under those plans instead of complying with standardized OFCCP requirements. As of October 1980, there were 27 hometown plans in operation. 31/

Enforcement of Executive Order 11246

Executive Order 11246 authorizes administrative (as compared to judicial) enforcement of its requirements, although the Justice Department may also prosecute noncomplying contractors in court for violation of contract.

OFCCP monitors the compliance of contractors through several kinds of compliance reviews.

The initial compliance review is the preaward review. Prior to the award of any nonconstruction contract or subcontract amounting to $1 million or more, OFCCP makes a preliminary check of the contractor's commitment to equal employment opportunity. If OFCCP finds the contractor's commitment to be deficient, it may oblige the Federal agency awarding the contract to suspend the award of the contract until the contractor's commitment to nondiscrimination and affirmative action is assured. 32/

Other compliance reviews consist either of studying a contractor's equal employment opportunity records at OFCCP, or of going to the contractor's offices or plants and investigating the contractor's compliance on the spot.

31/ 45 FR 65979, 65983.

32/ 41 CFR 60-1.20(d), 1.29.

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The first kind of review is called a "desk audit," because it is an audit of records at an OFCCP desk. 33/ If a desk audit reveals any violation of the Executive Order or any failure to meet the obligations imposed by OFCCP regulations, OFCCP may perform an "on-site" review on the contractor's premises. 34/

If OFCCP discovers through an on-site review that the contractor is not in compliance, it may try to elicit from the contractor a conciliation agreement, whereby the contractor promises to take whatever actions are necessary to comply with the contractor's equal employment opportunity obligations. 35/

If a contractor refuses to conclude a conciliation agreement, or refuses to comply with such an agreement, OFCCP may then proceed to impose sanctions authorized by the Executive Order: cancellation or termination of the contract, and, after a hearing, debarment of the contractor from further Federal contracts, subcontracts, or federally assisted construction contracts. 36/

With respect to federally assisted construction contracts, the recipient who pays for such a contract with the aid of Federal funds must cooperate with OFCCP in enforcing such sanctions against any contractor upon whom such sanctions have been imposed. 37/

OFCCP also enforces the Executive Order through receiving, investigating and seeking to resolve complaints of discrimination from contractors' employees or job applicants. 38/ By agreement with EEOC, OFCCP refers complaints from

33/ 41 CFR 60-60.3(b).

34/ 41 CFR 60-60.3(c).

35/ 41 CFR 60-1.33(a).

36/ Executive Order 11246, Sec. 209(a)(5) and (6); Sec. 208(b).

37/ Ibid., Sec. 301.

38/ 41 CFR 60-1.21-1.24.

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individuals to EEOC, but itself deals with complaints involving practices of discrimination against whole clases of workers. 39/

Number of Contractors and Employees Covered by Executive Order 11246

In 1984, Executive Order 11246 required the following numbers of contractors and contractor establishments (separate plants or offices) to have written affirmative action plans:

Nonconstruction contractors: 15,420;
Nonconstruction contractor establishments: 115,000
Construction contractors: 42,000;
Construction contractor establishments: 100,000.

Both types of contractors together had contracts totalling about $166.8 billion and employed about 30 million workers.

39/ 41 CFR 60-1.24(a); U.S. Commission on Civil Rights. Promises and Perspectives; Federal Efforts to Eliminate Employment Discrimination Through Affirmative Action. October 1980. Washington, 1980. p. 11.

PMD/jcd

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SIDE—BY—SIDE COMPARISON BETWEEN THE SENATE BILL (S.933) AND THE HOUSE AMENDMENT TO THE AMERICANS WITH DISABILITIES ACT

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SENATE BILL

3 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

4 (a) SHORT TITLE.—This Act may be cited as the

5 "Americans with Disabilities Act of 1989".

6 (b) TABLE OF CONTENTS.—The table of contents is as

7 follows:

Sec. 1. Short title; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Definitions.

TITLE I—EMPLOYMENT

Sec. 101. Definitions.
Sec. 102. Discrimination.
Sec. 103. Defenses.
Sec. 104. Illegal drugs and alcohol.
Sec. 105. Posting notices.
Sec. 106. Regulations.
Sec. 107. Enforcement.
Sec. 108. Effective date.

TITLE II—PUBLIC SERVICES

Sec. 201. Definition.
Sec. 202. Discrimination.
Sec. 203. Actions applicable to public transportation provided by public entities considered discriminatory.
Sec. 204. Regulations.
Sec. 205. Enforcement.
Sec. 206. Effective date.

HOUSE AMENDMENT

1 *SECTION 1. SHORT TITLE; TABLE OF CONTENTS.*

2 *(a) SHORT TITLE.—This Act may be cited as the*

3 *"Americans with Disabilities Act of 1990".*

4 *(b) TABLE OF CONTENTS.—The table of contents is as*

5 *follows:*

Sec. 1. Short title; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Definitions.

TITLE I—EMPLOYMENT

Sec. 101. Definitions.
Sec. 102. Discrimination.
Sec. 103. Defenses.
Sec. 104. Illegal use of drugs and alcohol.
Sec. 105. Posting notices.
Sec. 106. Regulations.
Sec. 107. Enforcement.
Sec. 108. Effective date.

TITLE II—PUBLIC SERVICES

Subtitle A—Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 201. Definition.
Sec. 202. Discrimination.
Sec. 203. Enforcement.
Sec. 204. Regulations.
Sec. 205. Effective date.

Subtitle B—Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

Part I—Public Transportation Other Than by Aircraft or Certain Rail Operations

Sec. 221. Definitions.
Sec. 222. Public entities operating fixed route systems.
Sec. 223. Paratransit as a complement to fixed route service.
Sec. 224. Public entity operating a demand responsive system.
Sec. 225. Temporary relief where lifts are unavailable.
Sec. 226. New facilities.
Sec. 227. Alterations of existing facilities.
Sec. 228. Public transportation programs and activities in existing facilities and one car per train rule
Sec. 229. Regulations.
Sec. 230. Interim accessibility requirements.
Sec. 231. Effective date.

COMMENTS

1. Short title.

The Senate bill titles the Act the Americans with Disabilities Act of 1989. The House amendment changes the date to 1990.

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SENATE BILL

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Sec. 301. Definitions.
Sec. 302. Prohibition of discrimination by public accommodations.
Sec. 303. New construction in public accommodations and potential places of employment.
Sec. 304. Prohibition of discrimination in public transportation services provided by private entities.
Sec. 305. Study.
Sec. 306. Regulations.
Sec. 307. Exemptions for private clubs and religious organizations.
Sec. 308. Enforcement.
Sec. 309. Effective date.

TITLE IV—TELECOMMUNICATIONS RELAY SERVICES

Sec. 401. Telecommunication services for hearing-impaired and speech-impaired individuals.

TITLE V—MISCELLANEOUS PROVISIONS

Sec. 501. Construction.
Sec. 502. Prohibition against retaliation and coercion.
Sec. 503. State immunity.
Sec. 504. Regulations by the Architectural and Transportation Barriers Compliance Board.
Sec. 505. Attorney's fees.
Sec. 506. Technical assistance.
Sec. 507. Federal wilderness areas.
Sec. 508. Transvestites.
Sec. 509. Congressional inclusion.
Sec. 510. Illegal drug use.
Sec. 511. Definitions.
Sec. 512. Amendments to the Rehabilitation Act.
Sec. 513. Severability.

HOUSE AMENDMENT

Part II—Public Transportation by Intercity and Commuter Rail

Sec. 241. Definitions.
Sec. 242. Intercity and commuter rail actions considered discriminatory.
Sec. 243. Conformance of accessibility standards.
Sec. 244. Regulations.
Sec. 245. Interim accessibility requirements.
Sec. 246. Effective date.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Sec. 301. Definitions.
Sec. 302. Prohibition of discrimination by public accommodations.
Sec. 303. New construction and alterations in public accommodations and commercial facilities.
Sec. 304. Prohibition of discrimination in public transportation services provided by private entities.
Sec. 305. Study.
Sec. 306. Regulations.
Sec. 307. Exemptions for private clubs and religious organizations.
Sec. 308. Enforcement.
Sec. 309. Examinations and courses.
Sec. 310. Effective date.

TITLE IV—TELECOMMUNICATIONS RELAY SERVICES

Sec. 401. Telecommunication services for hearing-impaired and speech-impaired individuals.
Sec. 402. Closed-captioning of public service announcements.

TITLE V—MISCELLANEOUS PROVISIONS

Sec. 501. Construction.
Sec. 502. State immunity.
Sec. 503. Prohibition against retaliation and coercion.
Sec. 504. Regulations by the Architectural and Transportation Barriers Compliance Board.
Sec. 505. Attorney's fees.
Sec. 506. Technical assistance.
Sec. 507. Federal wilderness areas.
Sec. 508. Transvestites.
Sec. 509. Congressional inclusion.
Sec. 510. Illegal use of drugs.
Sec. 511. Definitions.
Sec. 512. Amendments to the Rehabilitation Act.
Sec. 513. Alternative means of dispute resolution.
Sec. 514. Severability.

COMMENTS

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SENATE BILL	HOUSE AMENDMENT	COMMENTS
1 SEC. 2. FINDINGS AND PURPOSES. 2 (a) FINDINGS.—Congress finds that— 3 (1) some 43,000,000 Americans have one or more 4 physical or mental disabilities, and this number is in- 5 creasing as the population as a whole is growing older; 6 (2) historically, society has tended to isolate and 7 segregate individuals with disabilities, and, despite 8 some improvements, such forms of discrimination 9 against individuals with disabilities continue to be a se- 10 rious and pervasive social problem; 11 (3) discrimination against individuals with disabil- 12 ities persists in such critical areas as employment, 13 housing, public accommodations, education, transporta- 14 tion, communication, recreation, institutionalization, 15 health services, voting, and access to public services; 16 (4) unlike individuals who have experienced dis- 17 crimination on the basis of race, sex, national origin, 18 religion, or age, individuals who have experienced dis- 19 crimination on the basis of disability have often had no 20 legal recourse to redress such discrimination; 21 (5) individuals with disabilities continually encoun- 22 ter various forms of discrimination, including outright 23 intentional exclusion, the discriminatory effects of ar- 24 chitectural, transportation, and communication barriers, 25 overprotective rules and policies, failure to make mod 26 fications to existing facilities and practices, exclusion-	1 *SEC. 2. FINDINGS AND PURPOSES.* 2 *(a) FINDINGS.—The Congress finds that—* 3 *(1) some 43,000,000 Americans have one or more* 4 *physical or mental disabilities, and this number is in-* 5 *creasing as the population as a whole is growing older;* 6 *(2) historically, society has tended to isolate and* 7 *segregate individuals with disabilities, and, despite* 8 *some improvements, such forms of discrimination* 9 *against individuals with disabilities continue to be a* 10 *serious and pervasive social problem;* 11 *(3) discrimination against individuals with dis-* 12 *abilities persists in such critical areas as employment,* 13 *housing, public accommodations, education, transporta-* 14 *tion, communication, recreation, institutionalization,* 15 *health services, voting, and access to public services;* 16 *(4) unlike individuals who have experienced dis-* 17 *crimination on the basis of race, color, sex, national* 18 *origin, religion, or age, individuals who have experi-* 19 *enced discrimination on the basis of disability have* 1 *often had no legal recourse to redress such discrimina-* 2 *tion;* 3 *(5) individuals with disabilities continually en-* 4 *counter various forms of discrimination, including out-* 5 *right intentional exclusion, the discriminatory effects of* 6 *architectural, transportation, and communication bar-* 7 *riers, overprotective rules and policies, failure to make* 8 *modifications to existing facilities and practices, exclu-*	

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	SENATE BILL		HOUSE AMENDMENT	COMMENTS
1	ary qualification standards and criteria, segregation,	9	*sionary qualification standards and criteria, segrega-*	
2	and relegation to lesser services, programs, activities,	10	*tion, and relegation to lesser services, programs, activi-*	
3	benefits, jobs, or other opportunities;	11	*ties, benefits, jobs, or other opportunities;*	
4	(6) census data, national polls, and other studies	12	*(6) census data, national polls, and other studies*	
5	have documented that people with disabilities, as a	13	*have documented that people with disabilities, as a*	
6	group, occupy an inferior status in our society, and are	14	*group, occupy an inferior status in our society, and are*	
7	severely disadvantaged socially, vocationally, economi-	15	*severely disadvantaged socially, vocationally, economi-*	
8	cally, and educationally;	16	*cally, and educationally;*	
9	(7) individuals with disabilities are a discrete and	17	*(7) individuals with disabilities are a discrete and*	
10	insular minority who have been faced with restrictions	18	*insular minority who have been faced with restrictions*	
11	and limitations, subjected to a history of purposeful un-	19	*and limitations, subjected to a history of purposeful*	
12	equal treatment, and relegated to a position of political	20	*unequal treatment, and relegated to a position of politi-*	
13	powerlessness in our society, based on characteristics	21	*cal powerlessness in our society, based on characteris-*	
14	that are beyond the control of such individuals and re-	22	*tics that are beyond the control of such individuals and*	
15	sulting from stereotypic assumptions not truly indica-	23	*resulting from stereotypic assumptions not truly indic-*	
16	tive of the individual ability of such individuals to par-	24	*ative of the individual ability of such individuals to*	
17	ticipate in, and contribute to, society;	25	*participate in, and contribute to, society;*	
18	(8) the Nation's proper goals regarding individuals	1	*(8) the Nation's proper goals regarding individ-*	
19	with disabilities are to assure equality of opportunity,	2	*uals with disabilities are to assure equality of opportu-*	
20	full participation, independent living, and economic	3	*nity, full participation, independent living, and eco-*	
21	self-sufficiency for such individuals; and	4	*nomic self-sufficiency for such individuals; and*	
22	(9) the continuing existence of unfair and unneces-	5	*(9) the continuing existence of unfair and unnec-*	
23	sary discrimination and prejudice denies people with	6	*essary discrimination and prejudice denies people with*	
24	disabilities the opportunity to compete on an equal	7	*disabilities the opportunity to compete on an equal*	
25	basis and to pursue those opportunities for which our	8	*basis and to pursue those opportunities for which our*	
1	free society is justifiably famous, and costs the United	9	*free society is justifiably famous, and costs the United*	
2	States billions of dollars in unnecessary expenses re-	10	*States billions of dollars in unnecessary expenses re-*	
3	sulting from dependency and nonproductivity.	11	*sulting from dependency and nonproductivity.*	

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SENATE BILL		HOUSE AMENDMENT		COMMENTS
4	(b) PURPOSE.—It is the purpose of this Act—	12	*(b) PURPOSE.—It is the purpose of this Act—*	
5	(1) to provide a clear and comprehensive national	13	*(1) to provide a clear and comprehensive national*	
6	mandate for the elimination of discrimination against	14	*mandate for the elimination of discrimination against*	
7	individuals with disabilities;	15	*individuals with disabilities;*	
8	(2) to provide clear, strong, consistent, enforceable	16	*(2) to provide clear, strong, consistent, enforceable*	
9	standards addressing discrimination against individuals	17	*standards addressing discrimination against individ-*	
10	with disabilities;	18	*uals with disabilities;*	
11	(3) to ensure that the Federal Government plays a	19	*(3) to ensure that the Federal Government plays*	
12	central role in enforcing the standards established in	20	*a central role in enforcing the standards established in*	
13	this Act on behalf of individuals with disabilities; and	21	*this Act on behalf of individuals with disabilities; and*	
14	(4) to invoke the sweep of congressional authority,	22	*(4) to invoke the sweep of congressional authority,*	
15	including its power to enforce the fourteenth amend-	23	*including the power to enforce the fourteenth amend-*	
16	ment and to regulate commerce, in order to address	24	*ment and to regulate commerce, in order to address the*	
17	the major areas of discrimination faced day-to-day by	1	*major areas of discrimination faced day-to-day by*	
18	people with disabilities.	2	*people with disabilities.*	

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SENATE BILL	HOUSE AMENDMENT	COMMENTS
19 SEC. 3. DEFINITIONS. 20 As used in this Act: 21 (1) AUXILIARY AIDS AND SERVICES.—The term 22 "auxiliary aids and services" includes— 23 (A) qualified interpreters or other effective 24 methods of making aurally delivered materials 25 available to individuals with hearing impairments; 1 (B) qualified readers, taped texts, or other ef- 2 fective methods of making visually delivered ma- 3 terials available to individuals with visual impair- 4 ments; 5 (C) acquisition or modification of equipment 6 or devices; and 7 (D) other similar services and actions. 8 (2) DISABILITY.—The term "disability" means, 9 with respect to an individual— 10 (A) a physical or mental impairment that 11 substantially limits one or more of the major life 12 activities of such individual; 13 (B) a record of such an impairment; or 14 (C) being regarded as having such an impair- 15 ment. 16 (3) STATE.—The term "State" means each of the 17 several States, the District of Columbia, the Common- 18 wealth of Puerto Rico, Guam, American Samoa, the 19 Virgin Islands, the Trust Territory of the Pacific Is- 20 lands, and the Commonwealth of the Northern Mariana 21 Islands.	3 *SEC. 3. DEFINITIONS.* 4 *As used in this Act:* 5 *(1) AUXILIARY AIDS AND SERVICES.—The term* 6 *"auxiliary aids and services" includes—* 7 *(A) qualified interpreters or other effective* 8 *methods of making aurally delivered materials* 9 *available to individuals with hearing impair-* 10 *ments;* 11 *(B) qualified readers, taped texts, or other* 12 *effective methods of making visually delivered* 13 *materials available to individuals with visual* 14 *impairments;* 15 *(C) acquisition or modification of equipment* 16 *or devices; and* 17 *(D) other similar services and actions.* 18 *(2) DISABILITY.—The term "disability" means,* 19 *with respect to an individual—* 20 *(A) a physical or mental impairment that* 21 *substantially limits one or more of the major lif-* 22 *activities of such individual;* 23 *(B) a record of such an impairment; or* 24 *(C) being regarded as having such an* 25 *impairment.* 1 *(3) STATE.—The term "State" means each of the* 2 *several States, the District of Columbia, the Common-* 3 *wealth of Puerto Rico, Guam, American Samoa, the* 4 *Virgin Islands, the Trust Territory of the Pacific Is-* 5 *lands, and the Commonwealth of the Northern Mari-* 6 *ana Islands.*	

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SENATE BILL

22 TITLE I—EMPLOYMENT

23 SEC. 101. DEFINITIONS.

24 As used in this title:

1 (1) COMMISSION.—The term "Commission"
2 means the Equal Employment Opportunity Commis-
3 sion established by section 705 of the Civil Rights Act
4 of 1964 (42 U.S.C. 2000e-4).

5 (2) COVERED ENTITY.—The term "covered
6 entity" means an employer, employment agency, labor
7 organization, or joint labor-management committee.

8 (3) EMPLOYEE.—The term "employee" means an
9 individual employed by an employer.

10 (4) EMPLOYER.—

11 (A) The term "employer" means a person
12 engaged in an industry affecting commerce who
13 has 15 or more employees for each working day
14 in each of 20 or more calendar weeks in the cur-
15 rent or preceding calendar year, and any agent of
16 such person, except that, for two years following
17 the effective date of this title, an employer means
18 a person engaged in an industry affecting com-
19 merce who has 25 or more employees for each

HOUSE AMENDMENT

7 *TITLE I—EMPLOYMENT*

8 *SEC. 101. DEFINITIONS.*

9 *As used in this title:*

10 *(1) COMMISSION.—The term "Commission"*
11 *means the Equal Employment Opportunity Commis-*
12 *sion established by section 705 of the Civil Rights Act*
13 *of 1964 (42 U.S.C. 2000e-4).*

14 *(2) COVERED ENTITY.—The term "covered*
15 *entity" means an employer, employment agency, labor*
16 *organization, or joint labor-management committee.*

17 *(3) DIRECT THREAT.—The term "direct threat"*
18 *means a significant risk to the health or safety of*
19 *others that cannot be eliminated by reasonable accom-*
20 *modation.*

21 *(4) EMPLOYEE.—The term "employee" means an*
22 *individual employed by an employer.*

23 *(5) EMPLOYER.—*

24 *(A) IN GENERAL.—The term "employer"*
25 *means a person engaged in an industry affecting*
commerce who has 15 or more employees for each
working day in each of 20 or more calendar
weeks in the current or preceding calendar year,
and any agent of such person, except that, for two
years following the effective date of this title, an
employer means a person engaged in an industry
affecting commerce who has 25 or more employees

COMMENTS

2. Definition of the term "direct threat."

The House amendment, but not the Senate bill, defines the term "direct threat" to mean a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

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SENATE BILL

20 working day in each of 20 or more calendar
21 weeks in the current or preceding year, and any
22 agent of such person.
23 (B) EXCEPTIONS.—The term "employer"
24 does not include—
1 (i) the United States, a corporation
2 wholly owned by the government of the
3 United States, or an Indian tribe; or
4 (ii) a bona fide private membership club
5 (other than a labor organization) that is
6 exempt from taxation under section 501(c) of
7 the Internal Revenue Code of 1986.

8 (5) ILLEGAL DRUG.—The term "illegal drug"
9 means a controlled substance, as defined in schedules I
10 through V of section 202 of the Controlled Substances
11 Act (21 U.S.C. 812), the possession or distribution of
12 which is unlawful under such Act. The term "illegal
13 drug" does not mean the use of a controlled substance
14 pursuant to a valid prescription or other uses author-
15 ized by this Act.

HOUSE AMENDMENT

for each working day in each of 20 or more calen-
dar weeks in the current or preceding year, and
any agent of such person.
(B) EXCEPTIONS.—The term "employer"
does not include—
(i) the United States, a corporation
wholly owned by the government of the
United States, or an Indian tribe; or
(ii) a bona fide private membership club
(other than a labor organization) that is
exempt from taxation under section 501(c) of
the Internal Revenue Code of 1986.
(6) ILLEGAL USE OF DRUGS.—
(A) IN GENERAL.—The term "illegal use of
drugs" means the use of drugs, the possession or
distribution of which is unlawful under the Con-
trolled Substances Act (21 U.S.C. 812). Such
term does not include the use of a drug taken
1 *under supervision by a licensed health care pro-*
2 *fessional, or other uses authorized by the Con-*
3 *trolled Substances Act or other provisions of Fed-*
4 *eral law.*
5 *(B) DRUGS.—The term "drug" means a*
6 *controlled substance, as defined in schedules I*
7 *through V of section 202 of the Controlled Sub-*
8 *stances Act.*

COMMENTS

3. Definitions of terms "illegal use of drugs" and "drugs."

The Senate bill uses the phrase "illegal drug" and explains that the term means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act, the possession or distribution of which is unlawful under such Act and does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by the Controlled Substances Act.

The House amendment uses the phrase "illegal use of drugs" and defines the term to mean the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act and does not mean the use of controlled substances taken under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law. The House amendment defines the term "drugs" to mean a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

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SENATE BILL

16 (6) PERSON, ETC.—The terms "person", "labor
17 organization", "employment agency", "commerce",
18 and "industry affecting commerce", shall have the
19 same meaning given such terms in section 701 of the
20 Civil Rights Act of 1964 (42 U.S.C. 2000e).

21 (7) QUALIFIED INDIVIDUAL WITH A DISABIL-
22 ITY.—The term "qualified individual with a disability"
23 means an individual with a disability who, with or
24 without reasonable accommodation, can perform the
1 essential functions of the employment position that
2 such individual holds or desires.

3 (8) REASONABLE ACCOMMODATION.—The term
4 "reasonable accommodation" may include—
5 (A) making existing facilities used by em-
6 ployees readily accessible to and usable by indi-
7 viduals with disabilities; and
8 (B) job restructuring, part-time or modified
9 work schedules, reassignment to a vacant posi-
10 tion, acquisition or modification of equipment or
11 devices, appropriate adjustment or modifications of
12 examinations, training materials or policies, the

HOUSE AMENDMENT

9 *(7) PERSON, ETC.—The terms "person", "labor*
10 *organization", "employment agency", "commerce", and*
11 *"industry affecting commerce", shall have the same*
12 *meaning given such terms in section 701 of the Civil*
13 *Rights Act of 1964 (42 U.S.C. 2000e).*
14 *(8) QUALIFIED INDIVIDUAL WITH A DISABIL-*
15 *ITY.—The term "qualified individual with a disabil-*
16 *ity" means an individual with a disability who, with*
17 *or without reasonable accommodation, can perform the*
18 *essential functions of the employment position that*
19 *such individual holds or desires. For the purposes of*
20 *this title, consideration shall be given to the employer's*
21 *judgment as to what functions of a job are essential,*
22 *and if an employer has prepared a written description*
23 *before advertising or interviewing applicants for the*
24 *job, this description shall be considered evidence of the*
25 *essential functions of the job.*

1 *(9) REASONABLE ACCOMMODATION.—The term*
2 *"reasonable accommodation" may include—*
3 *(A) making existing facilities used by em-*
4 *ployees readily accessible to and usable by indi-*
5 *viduals with disabilities; and*
6 *(B) job restructuring, part-time or modified*
7 *work schedules, reassignment to a vacant position,*
8 *acquisition or modification of equipment or de-*
9 *vices, appropriate adjustment or modifications of*
10 *examinations, training materials or policies, the*

COMMENTS

4. **Essential** functions of the job.

The Senate bill defines a qualified individual with a disability as a person who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

The House amendment adds that consideration shall be given to the employer's judgment as to what functions of a job are essential and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

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SENATE BILL

13 provision of qualified readers or interpreters, and
14 other similar accommodations for individuals with
15 disabilities.
16 (9) UNDUE HARDSHIP.—
17 (A) IN GENERAL.—The term "undue hard-
18 ship" means an action requiring significant diffi-
19 culty or expense.
20 (B) DETERMINATION.—In determining
21 whether an accommodation would impose an
22 undue hardship on a covered entity, factors to be
23 considered include—
24 (i) the overall size of the business of a
25 covered entity with respect to the number of
1 employees, number and type of facilities, and
2 the size of the budget;
3 (ii) the type of operation maintained by
4 the covered entity, including the composition
5 and structure of the workforce of such entity;
6 and
7 (iii) the nature and cost of the accom-
8 modation needed under this Act.

HOUSE AMENDMENT

11 *provision of qualified readers or interpreters, and*
12 *other similar accommodations for individuals with*
13 *disabilities.*
14 *(10) UNDUE HARDSHIP.–*
15 *(A) IN GENERAL.—The term "undue hard-*
16 *ship" means an action requiring significant diffi-*
17 *culty or expense, when considered in light of the*
18 *factors set forth in subparagraph (B).*
19 *(B) FACTORS TO BE CONSIDERED.—In de-*
20 *termining whether an accommodation would*
21 *impose an undue hardship on a covered entity,*
22 *factors to be considered include—*
23 *(i) the nature and cost of the accommo-*
24 *dation needed under this Act;*
1 *(ii) the overall financial resources of the*
2 *facility or facilities involved in the provision*
3 *of the reasonable accommodation; the number*
4 *of persons employed at such facility; the*
5 *effect on expenses and resources, or the*
6 *impact otherwise of such accommodation*
7 *upon the operation of the facility;*
8 *(iii) the overall financial resources of*
9 *the covered entity; the overall size of the*
10 *business of a covered entity with respect to*
11 *the number of its employees; the number,*
12 *type, and location of its facilities; and*

COMMENTS

5. Definition of the term "undue hardship."

(a) The Senate bill defines an "undue hardship" to mean an action requiring significant difficulty or expense and then list the factors that must be considered in determining whether an accommodation would impose an undue hardship.

The House amendment specifies that the term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors listed in the statute.

(b) In determining whether accommodating a qualified applicant or employee with a disability imposes an "undue hardship," the Senate bill requires that the following factors be considered: (1) the overall size of the covered entity with respect to the number of employees, number and type of facilities, and size of the budget; (2) the type of operation of the covered entity, including the composition and structure of the entity; and (3) the nature and cost of the action needed.

The House amendment includes the following factors: (1) the nature and cost of the accommodation needed under the ADA; (2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

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11

SENATE BILL

9 SEC. 102. DISCRIMINATION.

10 (a) GENERAL RULE.—No covered entity shall discrimi-
11 nate against a qualified individual with a disability because of
12 the disability of such individual in regard to job application
13 procedures, the hiring or discharge of employees, employee
14 compensation, advancement, job training, and other terms,
15 conditions, and privileges of employment.

16 (b) CONSTRUCTION.—As used in subsection (a), the
17 term "discrimination" includes—

18 (1) limiting, segregating, or classifying a job appli-
19 cant or employee in a way that adversely affects the
20 opportunities or status of such applicant or employee
21 because of the disability of such applicant or employee;

22 (2) participating in a contractual or other arrange-
23 ment or relationship that has the effect of subjecting a
24 qualified applicant or employee with a disability to the
25 discrimination prohibited by this title (such relationship

HOUSE AMENDMENT

13 *(iv) the type of operation or operations*
14 *of the covered entity, including the composi-*
15 *tion, structure, and functions of the work-*
16 *force of such entity; the geographic separate-*
17 *ness, administrative, or fiscal relationship of*
18 *the facility or facilities in question to the*
19 *covered entity.*

20 ***SEC. 102. DISCRIMINATION.***

21 *(a) GENERAL RULE.—No covered entity shall dis-*
22 *criminate against a qualified individual with a disability be-*
23 *cause of the disability of such individual in regard to job*
24 *application procedures, the hiring, advancement, or discharge*
1 *of employees, employee compensation, job training, and other*
2 *terms, conditions, and privileges of employment.*

3 *(b) CONSTRUCTION.—As used in subsection (a), the*
4 *term "discriminate" includes—*

5 *(1) limiting, segregating, or classifying a job ap-*
6 *plicant or employee in a way that adversely affects the*
7 *opportunities or status of such applicant or employee*
8 *because of the disability of such applicant or employee;*

9 *(2) participating in a contractual or other ar-*
10 *rangement or relationship that has the effect of subject-*
11 *ing a covered entity's qualified applicant or employee*
12 *with a disability to the discrimination prohibited by*
13 *this title (such relationship includes a relationship with*

COMMENTS

6. Discrimination.

The Senate bill and the House amendment use the same terms but in a different order.

7. Contract liability.

The Senate bill specifies that covered entities cannot discriminate directly or indirectly through contracts with other parties.

The House amendment clarifies that a covered entity is only liable in contractual arrangements for discrimination against its own applicants or employees.

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1 includes a relationship with an employment or referral
2 agency, labor union, an organization providing fringe
3 benefits to an employee of the covered entity, or an or-
4 ganization providing training and apprenticeship pro-
5 grams);
6 (3) utilizing standards, criteria, or methods of
7 administration—
8 (A) that have the effect of discrimination on
9 the basis of disability; or
10 (B) that perpetuate the discrimination of
11 others who are subject to common administrative
12 control;
13 (4) excluding or otherwise denying equal jobs or
14 benefits to a qualified individual because of the known
15 disability of an individual with whom the qualified indi-
16 vidual is known to have a relationship or association;
17 (5) not making reasonable accommodations to the
18 known physical or mental limitations of a qualified in-
19 dividual who is an applicant or employee, unless such
20 covered entity can demonstrate that the accommoda-
21 tion would impose an undue hardship on the operation
22 of the business of such covered entity;
23 (6) denying employment opportunities to a job ap-
24 plicant or employee who is a qualified individual with a
25 disability, if such denial is based on the need of such
1 covered entity to make reasonable accommodation to
2 the physical or mental impairments of the employee or
3 applicant;

HOUSE AMENDMENT

14 *an employment or referral agency, labor union, an or-*
15 *ganization providing fringe benefits to an employee of*
16 *the covered entity, or an organization providing train-*
17 *ing and apprenticeship programs);*
18 *(3) utilizing standards, criteria, or methods of*
19 *administration—*
20 *(A) that have the effect of discrimination on*
21 *the basis of disability; or*
22 *(B) that perpetuate the discrimination of*
23 *others who are subject to common administrative*
24 *control;*
1 *(4) excluding or otherwise denying equal jobs or*
2 *benefits to a qualified individual because of the known*
3 *disability of an individual with whom the qualified in-*
4 *dividual is known to have a relationship or association;*
5 *(5)(A) not making reasonable accommodations to*
6 *the known physical or mental limitations of an other-*
7 *wise qualified individual with a disability who is an*
8 *applicant or employee, unless such covered entity can*
9 *demonstrate that the accommodation would impose an*
10 *undue hardship on the operation of the business of*
11 *such covered entity; or*
12 *(B) denying employment opportunities to a job*
13 *applicant or employee who is an otherwise qualified in-*
14 *dividual with a disability, if such denial is based on*
15 *the need of such covered entity to make reasonable ac-*
16 *commodation to the physical or mental impairments of*
17 *the employee or applicant;*

COMMENTS

8. Reasonable accommodation.

The Senate bill specifies that it is discriminatory for a covered entity to deny an employment opportunity to a qualified job applicant or employee with a disability if such denial is based on the need of the covered entity to make reasonable accommodations. In a separate section, the Senate bill specifies that reasonable accommodations need not be provided if they would result in an undue hardship.

The House amendment clarifies the relationship between the obligation not to deny a job to an individual with a disability who needs a reasonable accommodation and the undue hardship limitation governing the covered entity's obligation to provide the reasonable accommodation by including these provisions under the same paragraph.

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SENATE BILL

4 (7) using employment tests or other selection cri-
5 teria that screen out or tend to screen out an individual
6 with a disability or a class of individuals with disabil-
7 ities unless the test or other selection criteria, as used
8 by the covered entity, is shown to be job-related for
9 the position in question and is consistent with business
10 necessity; and

11 (8) failing to select and administer tests concern-
12 ing employment in the most effective manner to ensure
13 that, when such test is administered to a job applicant
14 or employee who has a disability that impairs sensory,
15 manual, or speaking skills, such test results accurately
16 reflect the skills, aptitude, or whatever other factor of
17 such applicant or employee that such test purports to
18 measure, rather than reflecting the impaired sensory,
19 manual, or speaking skills of such employee or appli-
20 cant (except where such skills are the factors that the
21 test purports to measure).

HOUSE AMENDMENT

18 *(6) using qualification standards, employment*
19 *tests or other selection criteria that screen out or tend*
20 *to screen out an individual with a disability or a class*
21 *of individuals with disabilities unless the standard, test*
22 *or other selection criteria, as used by the covered*
23 *entity, is shown to be job-related for the position in*
24 *question and is consistent with business necessity; and*

1 *(7) failing to select and administer tests concern-*
2 *ing employment in the most effective manner to ensure*
3 *that, when such test is administered to a job applicant*
4 *or employee who has a disability that impairs sensory,*
5 *manual, or speaking skills, such test results accurately*
6 *reflect the skills, aptitude, or whatever other factor of*
7 *such applicant or employee that such test purports to*
8 *measure, rather than reflecting the impaired sensory,*
9 *manual, or speaking skills of such employee or appli-*
10 *cant (except where such skills are the factors that the*
11 *test purports to measure).*

COMMENTS

9. Employment tests.

The House amendment adds the term "qualification standards" to the phrase "employment tests or other selection criteria."

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SENATE BILL

(c) MEDICAL EXAMINATIONS AND INQUIRIES.—

(1) IN GENERAL.—The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) PREEMPLOYMENT.—

(A) PROHIBITED EXAMINATION OR INQUIRY.—Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant or employee as to whether such applicant or employee is an individual with a disability or as to the nature or severity of such disability.

(B) ACCEPTABLE INQUIRY.—A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) EMPLOYMENT ENTRANCE EXAMINATION.—A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

HOUSE AMENDMENT

(c) MEDICAL EXAMINATIONS AND INQUIRIES.—

(1) IN GENERAL.—The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) PREEMPLOYMENT.—

(A) PROHIBITED EXAMINATION OR INQUIRY.—Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or a to the nature or severity of such disability.

(B) ACCEPTABLE INQUIRY.—A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) EMPLOYMENT ENTRANCE EXAMINATION.—A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

COMMENTS

10. Preemployment inquiries.

The House amendment deletes the word "employee" from the preemployment inquiry provision.

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22 (B) information obtained regarding the medi-
23 cal condition or history of the applicant is collect-
24 ed and maintained on separate forms and in sepa-
1 rate medical files and is treated as a confidential
2 medical record, except that—
3 (i) supervisors and managers may be in-
4 formed regarding necessary restrictions on
5 the work or duties of the employee and nec-
6 essary accommodations;
7 (ii) first aid and safety personnel may be
8 informed, when appropriate, if the disability
9 might require emergency treatment; and
10 (iii) government officials investigating
11 compliance with this Act shall be provided
12 relevant information on request; and
13 (C) the results of such physical examination
14 are used only in accordance with this title.
15 (4) EXAMINATION AND INQUIRY.—
16 (A) PROHIBITED EXAMINATIONS AND IN-
17 QUIRIES.—A covered entity shall not conduct or
18 require a medical examination and shall not make
19 inquiries of an employee as to whether such em-
20 ployee is an individual with a disability or as to
21 the nature or severity of the disability, unless
22 such examination or inquiry is shown to be job-
23 related and consistent with business necessity.

HOUSE AMENDMENT

11 *(B) information obtained regarding the medi-*
12 *cal condition or history of the applicant is collect-*
13 *ed and maintained on separate forms and in sepa-*
14 *rate medical files and is treated as a confidential*
15 *medical record, except that—*
16 *(i) supervisors and managers may be*
17 *informed regarding necessary restrictions on*
18 *the work or duties of the employee and neces-*
19 *sary accommodations;*
20 *(ii) first aid and safety personnel may*
21 *be informed, when appropriate, if the disabil-*
22 *ity might require emergency treatment; and*
23 *(iii) government officials investigating*
24 *compliance with this Act shall be provided*
25 *relevant information on request; and*
1 *(C) the results of such examination are used*
2 *only in accordance with this title.*
3 *(4) EXAMINATION AND INQUIRY.—*
4 *(A) PROHIBITED EXAMINATIONS AND IN-*
5 *QUIRIES.—A covered entity shall not require a*
6 *medical examination and shall not make inquiries*
7 *of an employee as to whether such employee is an*
8 *individual with a disability or as to the nature or*
9 *severity of the disability, unless such examination*
10 *or inquiry is shown to be job-related and consist-*
11 *ent with business necessity.*

COMMENTS

11. Postemployment medical examinations.

The Senate bill specifies that an employer shall not conduct or require a medical examination of an employer unless such examination or inquiry is shown to be job-related and consistent with business necessity.

The House amendment deletes the term "conduct" and adds that a covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site so long as the information obtained regarding the medical condition or history of any employee are kept confidential and are not used to discriminate against qualified individuals with disabilities.

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1 (B) ACCEPTABLE INQUIRIES.—A covered
2 entity may make inquiries into the ability of an
3 employee to perform job-related functions.

HOUSE AMENDMENT

12 (B) ACCEPTABLE EXAMINATIONS AND IN-
13 QUIRIES.—A covered entity may conduct volun-
14 tary medical examinations, including voluntary
15 medical histories, which are part of an em; 'oyee
16 health program available to employees at that
17 work site. A covered entity may make inquiries
18 into the ability of an employee to perform job-
19 related functions.
20 (C) REQUIREMENT.—Information obtained
21 under subparagraph (B) regarding the medical
22 condition or history of any employee are subject to
23 the requirements of subparagraphs (B) and (C) of
24 paragraph (3).

COMMENTS

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SENATE BILL

4 SEC. 103. DEFENSES.

5 (a) IN GENERAL.—It may be a defense to a charge of
6 discrimination under this Act that an alleged application of
7 qualification standards, tests, or selection criteria that screen
8 out or tend to screen out or otherwise deny a job or benefit to
9 an individual with a disability has been shown to be job-relat-
10 ed and consistent with business necessity, and such
11 performance cannot be accomplished by reasonable
12 accommodation.

13 (b) QUALIFICATION STANDARDS.—The term "qualifi-
14 cation standards" may include a requirement that an individ-
15 ual with a currently contagious disease or infection shall not
16 pose a direct threat to the health or safety of other individ-
17 uals in the workplace.

18 (c) RELIGIOUS ENTITIES.—

19 (1) IN GENERAL.—This title shall not prohibit a
20 religious corporation, association, educational institu-
21 tion, or society from giving preference in employment
22 to individuals of a particular religion to perform work
23 connected with the carrying on by such corporation,
24 association, educational institution, or society of its
25 activities.

1 (2) QUALIFICATION STANDARD.—Under this title,
2 a religious organization may require, as a qualification
3 standard to employment, that all applicants and em-
4 ployees conform to the religious tenets of such
5 organization.

HOUSE AMENDMENT

1 SEC. 103. DEFENSES.

2 (a) IN GENERAL.—It may be a defense to a charge of
3 discrimination under this Act that an alleged application of
4 qualification standards, tests, or selection criteria that screen
5 out or tend to screen out or otherwise deny a job or benefit to
6 an individual with a disability has been shown to be job-
7 related and consistent with business necessity, and such
8 performance cannot be accomplished by reasonable accommo-
9 dation, as required under this title.

10 (b) QUALIFICATION STANDARDS.—The term "qualifi-
11 cation standards" may include a requirement that an indi-
12 vidual shall not pose a direct threat to the health or safety of
13 other individuals in the workplace.

14 (c) RELIGIOUS ENTITIES.—

15 (1) IN GENERAL.—This title shall not prohibit a
16 religious corporation, association, educational institu-
17 tion, or society from giving preference in employment
18 to individuals of a particular religion to perform work
19 connected with the carrying on by such corporation,
20 association, educational institution, or society of its
21 activities.

22 (2) RELIGIOUS TENETS REQUIREMENT.—Under
23 this title, a religious organization may require that all
24 applicants and employees conform to the religious
25 tenets of such organization.

COMMENTS

12. Defenses, in general.

The Senate amendment includes a reference to "reasonable accommodations." The House adds the following phrase "as required under this title."

13. Health and safety.

The Senate bill includes as a defense that a covered entity may fire or refuse to hire a person with a contagious disease if the individual poses a direct threat to the health and safety of other individuals in the workplace.

The House amendment makes this specific defense applicable to all applicants and employees, not just to those with contagious diseases.

14. Religious tenet exemption.

The Senate bill specifies that a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of such organization.

The House amendment deletes the phrase "as a qualification standard to employment."

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SENATE BILL

6 SEC. 104. ILLEGAL DRUGS AND ALCOHOL.

7 (a) QUALIFIED INDIVIDUAL WITH A DISABILITY.—

8 For purposes of this title, the term "q :alified individual with

9 a disability" shall not include any employee or applicant who

10 is a current user of illegal drugs, except that an individual

11 who is otherwise handicapped shall not be excluded from the

12 protections of this Act if such individual also uses or is also

13 addicted to drugs.

HOUSE AMENDMENT

1 *(d) FOOD HANDLING JOBS.—It shall not be a violation*

2 *of this Act for an employer to refuse to assign or continue to*

3 *assign any employee with an infectious or communicable*

4 *disease of public health significance to a job involving food*

5 *handling, provided that the employer shall make reasonable*

6 *accommodation that would offer an alternative employment*

7 *opportunity for which the employee is qualified and for which*

8 ***the employee would sustain no economic damage.***

9 ***SEC. 104. ILLEGAL USE OF DRUGS AND ALCOHOL.***

10 *(a) QUALIFIED INDIVIDUAL WITH A DISABILITY.—*

11 *For purposes of this title, the term "qualified individual with*

12 *a disability" shall not include any employee or applicant*

13 *who is currently engaging in the illegal use of drugs, when*

14 *the covered entity acts on the basis of such use.*

15 *(b) RULES OF CONSTRUCTION.—Nothing in subsec-*

16 *tion (a) shall be construed to exclude as a qualified individ-*

17 *ual with a disability an individual who—*

18 *(1) has successfully completed a supervised drug*

19 *rehabilitation program and is no longer engaging in*

20 *the illegal use of drugs, or has otherwise been rehabili-*

21 *tated successfully and is no longer engaging in such*

22 *use;*

23 ***(2) is participating in a supervised rehabilitation***

24 ***program and is no longer engaging in such use; or***

COMMENTS

15. Food Handlers.

The House amendment, but not the Senate bill, specifies that it shall not be a violation of this Act for an employer to refuse to assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accommodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage.

16. Illegal use of drugs and use of alcohol.

(a) The Senate bill specifies that the term "qualified individual with a disability" does not include employees or applicants who are current users of illegal drugs, except that an individual who is otherwise handicapped shall not be excluded from the protections of the Act if such individual also uses or is addicted to drugs.

The House amendment specifies that "qualified person with a disability" does not include any applicant or employee who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use.

(b) The House amendment specifies that the following individuals are not excluded from the definition of the term "qualified individual with a disability": (1) an individual who has successfully completed a supervised rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in

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14 (b) AUTHORITY OF COVERED ENTITY.—A covered
15 entity—
16 (1) may prohibit the use of alcohol or illegal drugs
17 at the workplace by all employees;
18 (2) may require that employees shall not be under
19 the influence of alcohol or illegal drugs at the work-
20 place;
21 (3) may require that employees behave in con-
22 formance with the requirements established under the
23 Drug-Free Workplace of 1988 (41 U.S.C. 701 et seq.)
24 and that transportation employees meet requirements
1 established by the Secretary of Transportation with re-
2 spect to drugs and alcohol; and
3 (4) may hold an employee who is a drug user or
4 alcoholic to the same qualification standards for em-
5 ployment or job performance and behavior that such
6 entity holds other employees, even if any unsatisfactory
7 performance or behavior is related to the drug use or
8 alcoholism of such employee.

HOUSE AMENDMENT

1 *(3) is erroneously regarded as engaging in such*
2 *use, but is not engaging in such use;*
3 *except that it shall not be a violation of this Act for a covered*
4 *entity to adopt or administer reasonable policies or proce-*
5 *dures, including but not limited to drug testing, designed to*
6 *ensure that an individual described in paragraph (1) or (2) is*
7 *no longer engaging in the illegal use of drugs.*
8 *(c) AUTHORITY OF COVERED ENTITY.—A covered*
9 *entity—*
10 *(1) may prohibit the illegal use of drugs and the*
11 *use of alcohol at the workplace by all employees;*
12 *(2) may require that employees shall not be under*
13 *the influence of alcohol or be engaging in the illegal*
14 *use of drugs at the workplace;*
15 *(3) may require that employees behave in con-*
16 *formance with the requirements established under the*
17 *Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et*
18 *seq.);*
19 *(4) may hold an employee who engages in the ille-*
20 *gal use of drugs or who is an alcoholic to the same*
21 *qualification standards for employment or job perform-*
22 *ance and behavior that such entity holds other employ-*
23 *ees, even if any unsatisfactory performance or behavior*
24 *is related to the drug use or alcoholism of such*
25 *employee; and*

COMMENTS

such use; (2) an individual who is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) an individual who is erroneously regarded as engaging in such use but is not engaging in such use.

(c) The House amendment, but not the Senate bill, specifies that it is not a violation of title I of the Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual involved in rehabilitation programs is no longer engaging in the illegal use of drugs.

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SENATE BILL

HOUSE AMENDMENT

1 *(5) may, with respect to Federal regulations*
2 *regarding alcohol and the illegal use of drugs, require*
3 *that—*
4 *(A) employees comply with the standards*
5 *established in such regulations of the Department*
6 *of Defense, if the employees of the covered entity*
7 *are employed in an industry subject to such regu-*
8 *lations, including complying with regulations (if*
9 *any) that apply to employment in sensitive posi-*
10 *tions in such an industry, in the case of employ-*
11 *ees of the covered entity who are employed in such*
12 *positions (as defined in the regulations of the De-*
13 *partment of Defense);*
14 *(B) employees comply with the standards*
15 *established in such regulations of the Nuclear*
16 *Regulatory Commission, if the employees of the*
17 *covered entity are employed in an industry sub-*
18 *ject to such regulations, including complying with*
19 *regulations (if any) that apply to employment*
20 *in sensitive positions in such an industry, in the*
21 *case of employees of the covered entity who are*
22 *employed in such positions (as defined in the*
23 *regulations of the Nuclear Regulatory Commis-*
24 *sion); and*

COMMENTS

(d) The Senate bill specifies that the covered entity may require that employees behave in conformance with the requirements of the Drug-Free Workplace Act of 1988 and that transportation employees meet requirements established by the Secretary of Transportation with respect to drugs and alcohol.

The House amendment also includes reference to positions defined by the Department of Defense and the Nuclear Regulatory Commission.

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SENATE BILL

9 (c) DRUG TESTING.—

10 (1) IN GENERAL.—For purposes of this title, a
11 test to determine the use of illegal drugs shall not be
12 considered a medical examination.

13 (2) CONSTRUCTION.—Nothing in this title shall
14 be construed to encourage, prohibit, or authorize the
15 conducting of drug testing of job applicants or employ-
16 ees or making employment decisions based on such test
17 results.

HOUSE AMENDMENT

1 *(C) employees comply with the standards*
2 *established in such regulations of the Department*
3 *of Transportation, if the employees of the covered*
4 *entity are employed in a transportation industry*
5 *subject to such regulations, including complying*
6 *with such regulations (if any) that apply to*
7 *employment in sensitive positions in such an in-*
8 *dustry, in the case of employees of the covered*
9 *entity who are employed in such positions (as de-*
10 *fined in the regulations of the Department of*
11 *Transportation).*

12 *(d) DRUG TESTING.—*

13 *(1) IN GENERAL.—For purposes of this title, a*
14 *test to determine the illegal use of drugs shall not be*
15 *considered a medical examination.*

16 *(2) CONSTRUCTION.—Nothing in this title shall*
17 *be construed to encourage, prohibit, or authorize the*
18 *conducting of drug testing for the illegal use of drugs*
19 *by job applicants or employees or making employment*
20 *decisions based on such test results.*

21 *(e) RAIL EMPLOYEES.—Nothing in this title shall be*
22 *construed to encourage, prohibit, restrict, or authorize the oth-*
23 *erwise lawful exercise by railroads of authority to—*

24 *(1) test railroad employees in, and applicants for,*
25 *positions involving safety-sensitive duties, as deter-*

COMMENTS

(e) The House amendment adds that nothing in this title shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by railroads of authority to: (1) test railroad employees in, and applicants for, positions involving safety-sensitive duties, as determined by the Secretary of Transportation, for the illegal use of drugs and for on-duty impairment by alcohol; and (2) remove such persons who test positive from safety-sensitive duties.

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SENATE BILL	HOUSE AMENDMENT	COMMENTS
	1 *mined by the Secretary of Transportation, for the* 2 *illegal use of drugs and for on-duty impairment by* 3 *alcohol; and* 4 *(2) remove such persons who test positive pursu-* 5 *ant to paragraph (1) from safety-sensitive duties in* 6 *implementing subsection (c).*	
18 **SEC. 105. POSTING NOTICES.** 19 Every employer, employment agency, labor organiza- 20 tion, or joint labor-management committee covered under 21 this title shall post notices in an accessible format to appli- 22 cants, employees, and members describing the applicable pro- 23 visions of this Act, in the manner prescribed by section 711 24 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–10).	7 ***SEC. 105. POSTING NOTICES.*** 8 *Every employer, employment agency, labor organiza-* 9 *tion, or joint labor-management committee covered under this* 10 *title shall post notices in an accessible format to applicants,* 11 *employees, and members describing the applicable provisions* 12 *of this Act, in the manner prescribed by section 711 of the* 13 *Civil Rights Act of 1964 (42 U.S.C. 2000e–10).*	
1 **SEC. 106. REGULATIONS.** 2 Not later than 1 year after the date of enactment of this 3 Act, the Commission shall issue regulations in an accessible 4 format to carry out this title in accordance with subchapter II 5 of chapter 5 of title 5, United States Code.	14 ***SEC. 106. REGULATIONS.*** 15 *Not later than 1 year after the date of enactment of this* 16 *Act, the Commission shall issue regulations in an accessible* 17 *format to carry out this title in accordance with subchapter* 18 *II of chapter 5 of title 5, United States Code.*	

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SENATE BILL

6 SEC. 107. ENFORCEMENT.

7 The remedies and procedures set forth in sections 706,
8 707, 709, and 710 of the Civil Rights Act of 1964 (42
9 U.S.C. 2000e–5, 2000e–6, 2000e–8, and 2000e–9) shall be
10 available, with respect to the Commission or any individual
11 who believes that he or she is being subjected to discrimina-
12 tion on the basis of disability in violation of any provisions of
13 this Act, or regulations promulgated under section 106, con-
14 cerning employment.

15 SEC. 108. EFFECTIVE DATE.

16 This title shall become effective 24 months after the
17 date of enactment.

HOUSE AMENDMENT

19 *SEC. 107. ENFORCEMENT.*

20 *(a) POWERS, REMEDIES, AND PROCEDURES.—The*
21 *powers, remedies, and procedures set forth in sections 705,*
22 *706, 707, 709, and 710 of the Civil Rights Act of 1964 (42*
23 *U.S.C. 2000e-4, 2000e–5, 2000e–6, 2000e–8, and 2000e–*
24 *9) shall be the powers, remedies, and procedures this title*
25 *provides to the Commission, to the Attorney General, or to*
1 *any person alleging discrimination on the basis of disability*
2 *in violation of any provision of this Act, or regulations pro-*
3 *mulgated under section 106, concerning employment.*

4 *(b) COORDINATION.—The agencies with enforcement*
5 *authority for actions which allege employment discrimination*
6 *under this title and under the Rehabilitation Act of 1973*
7 *shall develop procedures to ensure that administrative com-*
8 *plaints filed under this title and under the Rehabilitation Act*
9 *of 1973 are dealt with in a manner that avoids duplication of*
10 *effort and prevents imposition of inconsistent or conflicting*
11 *standards for the same requirements under this title and the*
12 *Rehabilitation Act of 1973. Such agencies shall establish*
13 *such coordinating mechanisms in the regulations implement-*
14 *ing this title and the Rehabilitation Act of 1973.*

15 *SEC. 108. EFFECTIVE DATE.*

16 *This title shall become effective 24 months after the date*
17 *of enactment.*

COMMENTS

17. Enforcement.

(a) The House amendment adds "powers" to the phrase "remedies and procedures" to conform the ADA to title VII.

(b) The House amendment adds to the enforcement section a reference to section 705 of title VII of the Civil Rights Act of 1964 (authority of the Equal Employment Opportunity Commission).

(c) The House amendment adds a reference to "the Attorney General."

(d) The House amendment substitutes the term "person," which is used and defined in title VII of the Civil Rights Act of 1964 for the term "individual" included in the Senate bill.

(e) The Senate bill includes the phrase any individual "who believes he or she is being subjected to discrimination." The House amendment substitutes "any person alleging discrimination."

18. Relationship with the Rehabilitation Act of 1973.

The House amendment, but not the Senate bill, directs administrative agencies to develop procedures and coordinating mechanisms to ensure that ADA and Rehabilitation Act of 1973 administrative complaints are handled without duplication or inconsistent, conflicting standards. Further, agencies must establish the coordinating mechanisms in their regulations.

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SENATE BILL

18 TITLE II—PUBLIC SERVICES

19 SEC. 201. DEFINITION.

20 As used in this title, the term "qualified individual with
21 a disability" means an individual with a disability who, with
22 or without reasonable modifications to rules, policies, and
23 practices, the removal of architectural, communication, and
24 transportation barriers, or the provision of auxiliary aids and
25 services, meets the essential eligibility requirements for the
26 receipt of services or the participation in programs or activi-
1 ties provided by a department, agency, special purpose
2 district, or other instrumentality of a State or a local
3 government.

HOUSE AMENDMENT

18 *TITLE II—PUBLIC SERVICES*

19 *Subtitle A—Prohibition Against Dis-*
20 *crimination and Other Generally Ap-*
21 *plicable Provisions*

22 *SEC. 201. DEFINITION.*

23 *As used in this title:*

24 *(1) PUBLIC ENTITY.—The term "public entity"*
25 *means—*

1 *(A) any State or local government;*

2 *(B) any department, agency, special purpose*
3 *district, or other instrumentality of a State or*
4 *States or local government; and*

5 *(C) the National Railroad Passenger Corpo-*
6 *ration, and any commuter authority (as defined*
7 *in section 103(8) of the Rail Passenger Service*
8 *Act).*

9 *(2) QUALIFIED INDIVIDUAL WITH A DISABIL-*
10 *ITY.—The term "qualified individual with a disabil-*
11 *ity" means an individual with a disability who, with*
12 *or without reasonable modifications to rules, policies,*
13 *or practices, the removal of architectural, communica-*
14 *tion, or transportation barriers, or the provision of aux-*
15 *iliary aids and services, meets the essential eligibility*
16 *requirements for the receipt of services or the participa-*
17 *tion in programs or activities provided by a public*
18 *entity.*

COMMENTS

19. Structure of title II.

The Senate bill includes one set of standards applicable to all public entities providing public services, including entities providing public transportation.

The House amendment includes subtitle A-Prohibition Against Discrimination and Other Generally Applicable Provisions and subtitle B--Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory. Two parts are included under subtitle B: part I covers public transportation other than by aircraft or certain rail operations (intercity and commuter rail) and part II covers public transportation by intercity and commuter rail.

20. Definition of public entities.

The Senate bill specifies that the public entities subject to the provisions of title II include: any state or local government or any department, agency, special purpose district, or other instrumentality of a State or local government. The accompanying report makes it clear that AMTRAK and commuter authorities are considered public entities.

The House amendment defines the term "public entity" to mean any state or local government or any department, agency, special purpose district, or other instrumentality of a state or states or local government; a commuter authority (as defined in section 103(8) of the Rail Passenger Service Act); and the National Railroad Passenger Corporation (AMTRAK).

21. Qualified individual with a disability.

The House amendment uses the term "public entity" in lieu of the list of entities covered by subtitle A.

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25

SENATE BILL

4 SEC. 202. DISCRIMINATION.

5 No qualified individual with a disability shall, by reason
6 of such disability, be excluded from the participation in, be
7 denied the benefits of, or be subjected to discrimination by a
8 department, agency, special purpose district, or other instru-
9 mentality of a State or a local government.

8 SEC. 205. ENFORCEMENT.

9 The remedies, procedures, and rights set forth in section
10 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall
11 be available with respect to any individual who believes that
12 he or she is being subjected to discrimination on the basis of
13 disability in violation of this Act, or regulations promulgated
14 under section 204, concerning public services.

4 SEC. 204. REGULATIONS.

5 (a) ATTORNEY GENERAL.—Not later than 1 year after
6 the date of enactment of this Act, the Attorney General shall
7 promulgate regulations in an accessible format that imple-
8 ment this title (other than section 203), and such regulations
9 shall be consistent with this title and with the coordination
10 regulations under part 41 of title 28, Code of Federal Regu-
11 lations (as promulgated by the Department of Health, Educa-
12 tion, and Welfare on January 13, 1978), applicable to recipi-
13 ents of Federal financial assistance under section 504 of the
14 Rehabilitation Act of 1973 (29 U.S.C. 794) except, with re-
15 spect to "program accessibility, existing facilities", and
16 "communications", such regulations shall be consistent with
17 regulations and analysis as in part 39 of title 28 of the Code

HOUSE AMENDMENT

19 *SEC. 202. DISCRIMINATION.*

20 *Subject to the provisions of this title, no qualified indi-*
21 *vidual with a disability shall, by reason of such disability, be*
22 *excluded from participation in or be denied the benefits of the*
23 *services, programs, or activities of a public entity, or be sub-*
24 *jected to discrimination by any such entity.*

1 *SEC. 203. ENFORCEMENT.*

2 *The remedies, procedures, and rights set forth in section*
3 *505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a)*
4 *shall be the remedies, procedures and rights this title provides*
5 *to any person alleging discrimination on the basis of disabil-*
6 *ity in violation of section 202.*

7 *SEC. 204. REGULATIONS.*

8 *(a) IN GENERAL.—Not later than 1 year after the date*
9 *of enactment of this Act, the Attorney General shall promul-*
10 *gate regulations in an accessible format that implement this*
11 *subtitle. Such regulations shall not include any matter*
12 *within the scope of the authority of the Secretary of Trans-*
13 *portation under section 223, 229, or 244.*

14 *(b) RELATIONSHIP TO OTHER REGULATIONS.—*
15 *Except for "program accessibility, existing facilities", and*
16 *"communications", regulations under subsection (a) shall be*
17 *consistent with this Act and with the coordination regulations*
18 *under part 41 of title 28, Code of Federal Regulations (as*
19 *promulgated by the Department of Health, Education, and*

COMMENTS

22. Discrimination, in general.

The Senate bill specifies the general and specific prohibitions against discrimination by public entities.

The House amendment retains the general prohibition and clarifies that this general prohibition is subject to the other more specific provisions in title II. The House amendment also includes grammatical changes.

23. Enforcement.

The Senate bill specifies that the remedies, procedures, and rights set out in section 505 of the Rehabilitation Act of 1973 shall be available with respect to any individual who believes that he or she is being subjected to discimination on the basis of disability in violation of this Act, or regulations promulgated under section 204 concerning public services.

The House amendment provides that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

24. Regulations and standards.

The Senate bill specifies that the Attorney General shall issue regulations implementing title II with the exception of section 203 pertaining to public transportation provided by public entities.

The House amendment, consistent with the revised structure used by the House, specifies that the Attorney General shall promulgate regulations that implement subtitle A. Such regulations shall not incude any matter within the scope of the authority of the Secretary of Transportation under

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18 of Federal Regulations, applicable to federally conducted ac-
19 tivities under section 504 of the Rehabilitation Act of 1973
20 (29 U.S.C. 794).

15 SEC. 206. EFFECTIVE DATE.
16 (a) IN GENERAL.—Except as provided in subsection (b),
17 this title shall become effective 18 months after the date of
18 enactment of this Act.
19 (b) FIXED ROUTE VEHICLES.—Section 203(b)(1), as
20 regarding new fixed route vehicles, shall become effective on
21 the date of enactment of this Act.

HOUSE AMENDMENT

20 *Welfare on January 13, 1978), applicable to recipients of*
21 *Federal financial assistance under section 504 of the Reha-*
22 *bilitation Act of 1973 (29 U.S.C. 794). With respect to*
23 *"program accessibility, existing facilities", and "communica-*
24 *tions", such regulations shall be consistent with regulations*
25 *and analysis as in part 39 of title 28 of the Code of Federal*

1 *Regulations, applicable to federally conducted activities*
2 *under such section 504.*
3 *(c) STANDARDS.—Regulations under subsection (a)*
4 *shall include standards applicable to facilities and vehicles*
5 *covered by this subtitle, other than facilities, stations, rail*
6 *passenger cars, and vehicles covered by subtitle B. Such*
7 *standards shall be consistent with the minimum guidelines*
8 *and requirements issued by the Architectural and Transpor-*
9 *tation Barriers Compliance Board in accordance with sec-*
10 *tion 504(a) of this Act.*
11 *SEC. 205. EFFECTIVE DATE.*
12 *(a) GENERAL RULE.—Except as provided in subsec-*
13 *tion (b), this subtitle shall become effective 18 months after*
14 *the date of enactment of this Act.*
15 *(b) EXCEPTION.—Section 204 shall become effective on*
16 *the date of enactment of this Act.*

COMMENTS

section 223 (paratransit), section 229 (regulations relating to part I of subtitle B), and section 244 (regulations relating to part II of subtitle B).

The House amendment also specifies that regulations shall include standards applicable to facilities and vehicles covered by subtitle A, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B.

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SENATE BILL

10 SEC. 203. ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION
11 PROVIDED BY PUBLIC ENTITIES CONSIDERED
12 DISCRIMINATORY.

13 (a) DEFINITION.—As used in this title, the term "public
14 transportation" means transportation by bus or rail, or by
15 any other conveyance (other than air travel) that provides the
16 general public with general or special service (including char-
17 ter service) on a regular and continuing basis.

HOUSE AMENDMENT

17 ***Subtitle B—Actions Applicable to***
18 ***Public Transportation Provided by***
19 ***Public Entities Considered Discrimi-***
20 ***natory***

21 *PART I—PUBLIC TRANSPORTATION OTHER THAN BY*
22 *AIRCRAFT OR CERTAIN RAIL OPERATIONS*

23 *SEC. 221. DEFINITIONS.*

24 *As used in this part:*

1 *(1) DEMAND RESPONSIVE SYSTEM.—The term*
2 *"demand responsive system" means any system of pro-*
3 *viding designated public transportation which is not a*
4 *fixed route system.*
5 *(2) DESIGNATED PUBLIC TRANSPORTATION.—*
6 *The term "designated public transportation" means*
7 *transportation (other than public school transportation)*
8 *by bus, rail, or any other conveyance (other than*
9 *transportation by aircraft or intercity or commuter rail*
10 *transportation (as defined in section 241)) that pro-*
11 *vides the general public with general or special service*
12 *(including charter service) on a regular and continuing*
13 *basis.*
14 *(3) FIXED ROUTE SYSTEM.—The term "fixed*
15 *route system" means a system of providing designated*
16 *public transportation on which a vehicle is operated*
17 *along a prescribed route according to a fixed schedule.*

COMMENTS

25. Definitions.

The Senate bill uses the following phrases: "demand responsive system," "fixed route system," "operates," and "public transportation."

The House amendment adds definitions for the terms "demand responsive system," "fixed route system" and "operates." The House amendment also substitutes the phrase "designated public transportation" for the phrase "public transportation" and includes the following definition: transportation (other than public school transportation) by bus, rail, or by other conveyance (other than transportation by aircraft, or intercity or commuter rail) that provides the general public with general or special service (including charter service) on a regular and continuing basis. The House amendment also includes a definition for the term "public school transportation.

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18 (b) VEHICLES.—

19 (1) NEW BUSES, RAIL VEHICLES, AND OTHER
20 FIXED ROUTE VEHICLES.—It shall be considered dis-
21 crimination for purposes of this Act and section 504 of
22 the Rehabilitation Act of 1973 (29 U.S.C. 794) for a
23 public entity to purchase or lease a new fixed route bus
24 of any size, a new intercity rail vehicle, a new com-
25 muter rail vehicle, a new rapid rail vehicle, a new light
1 rail vehicle to be used for public transportation, or any
2 other new fixed route vehicle to be used for public
3 transportation and for which a solicitation is made later
4 than 30 days after the date of enactment of this Act, if
5 such bus, rail, or other vehicle is not readily accessible
6 to and usable by individuals with disabilities, including
7 individuals who use wheelchairs.

HOUSE AMENDMENT

18 *(4) OPERATES.—The term "operates", as used*
19 *with respect to a fixed route system or demand respon-*
20 *sive system, includes operation of such system by a*
21 *person under a contractual or other arrangement or re-*
22 *lationship with a public entity.*
23 *(5) PUBLIC SCHOOL TRANSPORTATION.—The*
24 *term "public school transportation" means transporta-*
25 *tion by schoolbus vehicles of schoolchildren, personnel,*
1 *and equipment to and from a public elementary or sec-*
2 *ondary school and school-related activities.*
3 *(6) SECRETARY.—The term "Secretary" means*
4 *the Secretary of Transportation.*

5 *SEC. 222. PUBLIC ENTITIES OPERATING FIXED ROUTE SYSTEMS.*

6 *(a) PURCHASE AND LEASE OF NEW VEHICLES.—It*
7 *shall be considered discrimination for purposes of section 202*
8 *of this Act and section 504 of the Rehabilitation Act of 1973*
9 *(29 U.S.C. 794) for a public entity which operates a fixed*
10 *route system to purchase or lease a new bus, a new rapid rail*
11 *vehicle, a new light rail vehicle, or any other new vehicle to*
12 *be used on such system, if the solicitation for such purchase*
13 *or lease is made after the 30th day following the effective date*
14 *of this subsection and if such bus, rail vehicle, or other vehi-*
15 *cle is not readily accessible to and usable by individuals with*
16 *disabilities, including individuals who use wheelchairs.*

COMMENTS

26. Purchase or lease of new and used fixed route vehicles.

With slightly different wording, the Senate bill and the House amendment require that all new vehicles purchased or leased by a public entity which operates a fixed route system be accessible and require such public entity to make demonstrated good faith efforts to purchase or lease used vehicles that are accessible.

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(2) USED VEHICLES.—If a public entity purchases or leases a used vehicle to be used for public transportation after the date of enactment of this Act, such individual or entity shall make demonstrated good faith efforts to purchase or lease such a used vehicle that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(3) REMANUFACTURED VEHICLES.—If a public entity remanufactures a vehicle, or purchases or leases a remanufactured vehicle to be used for public transportation, so as to extend its usable life for 5 years or more, the vehicle shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

HOUSE AMENDMENT

(b) PURCHASE AND LEASE OF USED VEHICLES.—Subject to subsection (c)(1), it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system to purchase or lease, after the 30th day following the effective date of this subsection, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) REMANUFACTURED VEHICLES.—

(1) GENERAL RULE.—Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system—

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following the effective date of this subsection; or

COMMENTS

27. **Remanufactured and historic vehicles.**

The Senate bill specifies that if a public entity remanufactures a vehicle, or purchases or leases a remanufactured vehicle so as to extend its usable life for 5 years or more, the vehicle must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.

With slightly different phrasing, the House amendment includes the policy in the Senate version applicable to remanufactured vehicles and adds a specific provision in the legislation for historic vehicles. Under the provision, if making a vehicle of historic character (which is used solely on any segment of a fixed route system that is included on the National Register of Historic Places) readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle,

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SENATE BILL	HOUSE AMENDMENT	COMMENTS
	14 *(B) to purchase or lease for use on such* 15 *system a remanufactured vehicle which has been* 16 *remanufactured so as to extend its usable life for* 17 *5 years or more, which purchase or lease occurs* 18 *after such 30th day and during the period in* 19 *which the usable life is extended;* 20 *unless, after remanufacture, the vehicle is, to the maxi-* 21 *mum extent feasible, readily accessible to and usable* 22 *by individuals with disabilities, including individuals* 23 *who use wheelchairs.* 24 *(2) EXCEPTION FOR HISTORIC VEHICLES.—* 1 *(A) GENERAL RULE.—If a public entity op-* 2 *erates a fixed route system any segment of which* 3 *is included on the National Register of Historic* 4 *Places and if making a vehicle of historic charac-* 5 *ter to be used solely on such segment readily ac-* 6 *cessible to and usable by individuals with disabil-* 7 *ities would significantly alter the historic charac-* 8 *ter of such vehicle, the public entity only has to* 9 *make (or to purchase or lease a remanufactured* 10 *vehicle with) those modifications which are neces-* 11 *sary to meet the requirements of paragraph (1)* 12 *and which do not significantly alter the historic* 13 *character of such vehicle.*	the public entity only has to make (or purchase or lease a remanufactured vehicle with) those modifications which do not significantly alter the historic character of such vehicle.

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	14 *(B) VEHICLES OF HISTORIC CHARACTER* 15 *DEFINED BY REGULATIONS.—For purposes of* 16 *this paragraph and section 228(b), a vehicle of* 17 *historic character shall be defined by the regula-* 18 *tions issued by the Secretary to carry out this* 19 *subsection.*	
23 (c) PARATRANSIT AS A SUPPLEMENT TO FIXED 24 ROUTE PUBLIC TRANSPORTATION SYSTEM.— 1 (1) IN GENERAL.—If a public entity operates a 2 fixed route public transportation system to provide 3 public transportation, it shall be considered discrimina- 4 tion, for purposes of this Act and section 504 of the 5 Rehabilitation Act of 1973 (29 U.S.C. 794), for a 6 public transit entity that is responsible for providing 7 public transportation to fail to provide paratransit or 8 other special transportation services sufficient to pro- 9 vide a comparable level of services as is provided to 10 individuals using fixed route public transportation to in- 11 dividuals with disabilities, including individuals who use 12 wheelchairs, who cannot otherwise use fixed route 13 public transportation and to other individuals associated 14 with such individuals with disabilities in accordance	20 *SEC. 223. PARATRANSIT AS A COMPLEMENT TO FIXED ROUTE* 21 *SERVICE.* 22 *(a) GENERAL RULE.—It shall be considered discrimi-* 23 *nation for purposes of section 202 of this Act and section 504* 24 *of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a* 25 *public entity which operates a fixed route system (other than* 1 *a system which provides solely commuter bus service) to fail* 2 *to provide with respect to the operations of its fixed route* 3 *system, in accordance with this section, paratransit and other* 4 *special transportation services to individuals with disabil-* 5 *ities, including individuals who use wheelchairs, that are* 6 *sufficient to provide to such individuals a level of service (1)* 7 *which is comparable to the level of designated public trans-* 8 *portation services provided to individuals without disabilities* 9 *using such system; or (2) in the case of response time, which* 10 *is comparable, to the extent practicable, to the level of desig-* 11 *nated public transportation services provided to individuals* 12 *without disabilities using such system.*	28. Paratransit. The Senate bill specifies that if a public entity operates a fixed route system, it is discrimination for a public transit authority to fail to provide paratransit or other special transportation services sufficient to provide a comparable level of services as is provided to individuals using the fixed route transportation to individuals with disabilities who cannot otherwise use fixed route transportation and individuals associated with such individuals with disabilities unless the public transit authority can demonstrate that the provision of paratransit or other transportation services would impose an undue financial burden on the public transit entity. If the provision of comparable paratransit services would impose an undue financial burden on the public entity, such entity must provide such service to the extent that provision of such services would not impose an undue financial burden on such entity. The Senate version specifies that the definition of undue financial burden may include reference to a flexible numerical formula that incorporates appropriate local characteristics such as population.

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15 with service criteria established under regulations pro-
16 mulgated by the Secretary of Transportation unless the
17 public transit entity can demonstrate that the provision
18 of paratransit or other special transportation services
19 would impose an undue financial burden on the public
20 transit entity.

HOUSE AMENDMENT

13 *(b) ISSUANCE OF REGULATIONS.—Not later than 1*
14 *year after the effective date of this subsection, the Secretary*
15 *shall issue final regulations to carry out this section.*
16 *(c) REQUIRED CONTENTS OF REGULATIONS.—*
17 *(1) ELIGIBLE RECIPIENTS OF SERVICE.—The*
18 *regulations issued under this section shall require each*
19 *public entity which operates a fixed route system to*
20 *provide the paratransit and other special transportation*
21 *services required under this section—*
22 *(A)(i) to any individual with a disability*
23 *who is unable, as a result of a physical or mental*
24 *impairment (including a vision impairment) and*
25 *without the assistance of another individual*
1 *(except an operator of a wheelchair lift or other*
2 *boarding assistance device), to board, ride, or dis-*
3 *embark from any vehicle on the system which is*
4 *readily accessible to and usable by individuals*
5 *with disabilities;*
6 *(ii) to any individual with a disability who*
7 *needs the assistance of a wheelchair lift or other*
8 *boarding assistance device (and is able with such*
9 *assistance) to board, ride, and disembark from*
10 *any vehicle which is readily accessible to and*
11 *usable by individuals with disabilities if the indi-*
12 *vidual wants to travel on a route on the system*
13 *during the hours of operation of the system at a*
14 *time (or within a reasonable period of such time)*

COMMENTS

The House amendment includes the following changes.

(a) The House amendment clarifies that a public entity that only provides commuter bus service need not provide paratransit.

(b) The House amendment specifies that comparable level of service must be provided but in the case of response time, it must be comparable, to the extent practicable.

(c) Under the House amendment, paratransit and other special transportation services must be provided to three categories of individuals with disabilities:

-to any individual with a disability who is unable as a result of a physical or mental impairment (including a vision impairment) without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device) to board, ride, or disembark from any vehicle on the system which is accessible;

--to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is accessible if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such an accessible vehicle is <u>not</u> being used to provide designated public transportation on the route; and

--to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system.

For purposes of the first two categories of individuals with disabilities, boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

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15 *when such a vehicle is not being used to provide*
16 *designated public transportation on the route; and*
17 *(iii) to any individual with a disability who*
18 *has a specific impairment-related condition which*
19 *prevents such individual from traveling to a*
20 *boarding location or from a disembarking location*
21 *on such system; and*
22 *(B) to 1 other individual accompanying the*
23 *individual with the disability.*
24 *For purposes of clauses (i) and (ii) of subparagraph*
25 *(A), boarding or disembarking from a vehicle does not*

1 *include travel to the boarding location or from the dis-*
2 *embarking location.*
3 *(2) SERVICE AREA.—The regulations issued*
4 *under this section shall require the provision of para-*
5 *transit and special transportation services required*
6 *under this section in the service area of each public*
7 *entity which operates a fixed route system, other than*
8 *any portion of the service area in which the public*
9 *entity solely provides commuter bus service.*
10 *(3) SERVICE CRITERIA.—Subject to paragraphs*
11 *(1) and (2), the regulations issued under this section*
12 *shall establish minimum service criteria for determin-*
13 *ing the level of services to be required under this*
14 *section.*

(d) The House amendment clarifies that paratransit and special transportation services need only be provided in the service area of each public entity that operates a fixed route system and not in any portion of the service area in which the public entity solely provides commuter bus service.

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(2) UNDUE FINANCIAL BURDEN.—If the provision of comparable paratransit or other special transportation services would impose an undue financial burden on the public transit entity, such entity must provide paratransit and other special transportation services to the extent that providing such services would not impose an undue financial burden on such entity.

(3) REGULATIONS.—

(A) FORMULA.—Regulations promulgated by the Secretary of Transportation to determine what constitutes an undue financial burden, for purposes of this subsection, may include a flexible numerical formula that incorporates appropriate local characteristics such as population.

(B) ADDITIONAL PARATRANSIT SERVICES.—Notwithstanding paragraphs (1) and (2), the Secretary may require, at the discretion of the Secretary, a public transit authority to provide paratransit services beyond the amount determined by such formula.

HOUSE AMENDMENT

(4) UNDUE FINANCIAL BURDEN LIMITATION.—The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to provide such services to the extent that providing such services would not impose such a burden.

(5) ADDITIONAL SERVICES.—The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) PUBLIC PARTICIPATION.—The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

COMMENTS

(e) The House amendment deletes the permissive reference to flexible numerical formula.

(f) The House amendment requires that paratransit be available to one other person accompanying the individual with a disability.

(g) The House amendment specifies that each public entity must submit plans for operating paratransit services to the Secretary. The plan must include, among other things, the identity of any other public entity or person providing paratransit service and provide that the public entity does not have to provide directly under the plan the identified paratransit services being provided to others.

(h) The House amendment includes a statutory construction provision that makes it clear that nothing in the ADA should be construed as preventing a public entity from providing paratransit services at a level which is greater than the level required by the ADA, from providing paratransit services in addition to those services required by the ADA, or from providing such services to individuals in addition to those individuals to whom such services are required to be provided by the ADA.

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15 (7) PLANS.—The regulations issued under this
16 section shall require that each public entity which oper-
17 ates a fixed route system—
18 (A) within 18 months after the effective date
19 of this subsection, submit to the Secretary, and
20 commence implementation of, a plan for providing
21 paratransit and other special transportation serv-
22 ices which meets the requirements of this section;
23 and
1 (B) on an annual basis thereafter, submit to
2 the Secretary, and commence implementation of,
3 a plan for providing such services.
4 (8) PROVISION OF SERVICES BY OTHERS.—The
5 regulations issued under this section shall—
6 (A) require that a public entity submitting a
7 plan to the Secretary under this section identify
8 in the plan any person or other public entity
9 which is providing a paratransit or other special
10 transportation service for individuals with disabil-
11 ities in the service area to which the plan applies;
12 and
13 (B) provide that the public entity submitting
14 the plan does not have to provide under the plan
15 such service for individuals with disabilities.

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16 *(9) OTHER PROVISIONS.—The regulations issued*
17 *under this section shall include such other provisions*
18 *and requirements as the Secretary determines are nec-*
19 *essary to carry out the objectives of this section.*
20 *(d) REVIEW OF PLAN.—*
21 *(1) GENERAL RULE.—The Secretary shall*
22 *review a plan submitted under this section for the pur-*
23 *pose of determining whether or not such plan meets the*
24 *requirements of this section, including the regulations*
25 *issued under this section.*

1 *(2) DISAPPROVAL.—If the Secretary determines*
2 *that a plan reviewed under this subsection fails to meet*
3 *the requirements of this section, the Secretary shall*
4 *disapprove the plan and notify the public entity which*
5 *submitted the plan of such disapproval and the reasons*
6 *therefor.*
7 *(3) MODIFICATION OF DISAPPROVED PLAN.—*
8 *Not later than 90 days after the date of disapproval of*
9 *a plan under this subsection, the public entity which*
10 *submitted the plan shall modify the plan to meet the*
11 *requirements of this section and shall submit to the*
12 *Secretary, and commence implementation of, such*
13 *modified plan.*

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14 *(e) DISCRIMINATION DEFINED.—As used in subsec-*
15 *tion (a), the term "discrimination" includes—*
16 *(1) a failure of a public entity to which the regu-*
17 *lations issued under this section apply to submit, or*
18 *commence implementation of, a plan in accordance*
19 *with subsections (c)(6) and (c)(7);*
20 *(2) a failure of such entity to submit, or com-*
21 *mence implementation of, a modified plan in accord-*
22 *ance with subsection (d)(3);*
23 *(3) submission to the Secretary of a modified*
24 *plan under subsection (d)(3) which does not meet the*
25 *requirements of this section; or*
1 *(4) a failure of such entity to provide paratransit*
2 *or other special transportation services in accordance*
3 *with the plan or modified plan the public entity sub-*
4 *mitted to the Secretary under this section.*
5 *(f) STATUTORY CONSTRUCTION.—Nothing in this sec-*
6 *tion shall be construed as preventing a public entity—*
7 *(1) from providing paratransit or other special*
8 *transportation services at a level which is greater than*
9 *the level of such services which are required by this*
10 *section,*
11 *(2) from providing paratransit or other special*
12 *transportation services in addition to those paratransit*
13 *and special transportation services required by this*
14 *section, or*
15 *(3) from providing such services to individuals in*
16 *addition to those individuals to whom such services are*
17 *required to be provided by this section.*

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16 (d) COMMUNITY OPERATING DEMAND RESPONSIVE
17 SYSTEMS FOR THE GENERAL PUBLIC.—If a public entity
18 operates a demand responsive system that is used to provide
19 public transportation for the general public, it shall be consid-
20 ered discrimination, for purposes of this Act and section 504
21 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such
22 individual or entity to purchase or lease a new vehicle, for
23 which a solicitation is made later than 30 days after the date
24 of enactment of this Act, that is not readily accessible to and
25 usable by individuals with disabilities, including individuals
1 who use wheelchairs, unless the entity can demonstrate that
2 such system, when viewed in its entirety, provides a level of
3 service to individuals with disabilities equivalent to that pro-
4 vided to the general public.

5 (e) TEMPORARY RELIEF WHERE LIFTS ARE UN-
6 AVAILABLE.—With respect to the purchase of new buses, a
7 public entity may apply for, and the Secretary of Transporta-
8 tion may temporarily relieve such public entity from the obli-
9 gation to purchase new buses of any size that are readily
10 accessible to and usable by individuals with disabilities if such
11 public entity demonstrates—
12 (1) that the initial solicitation for new buses made
13 by the public entity specified that all new buses were
14 to be lift-equipped and were to be otherwise accessible
15 to and usable by individuals with disabilities;

HOUSE AMENDMENT

18 *SEC. 224. PUBLIC ENTITY OPERATING A DEMAND RESPONSIVE*
19 *SYSTEM.*
20 *If a public entity operates a demand responsive system,*
21 *it shall be considered discrimination, for purposes of section*
22 *202 of this Act and section 504 of the Rehabilitation Act of*
23 *1973 (29 U.S.C. 794), for such entity to purchase or lease a*
24 *new vehicle for use on such system, for which a solicitation is*
25 *made after the 30th day following the effective date of this*
1 *section, that is not readily accessible to and usable by indi-*
2 *viduals with disabilities, including individuals who use*
3 *wheelchairs, unless such system, when viewed in its entirety,*
4 *provides a level of service to such individuals equivalent to*
5 *the level of service such system provides to individuals with-*
6 *out disabilities.*
7 *SEC. 225. TEMPORARY RELIEF WHERE LIFTS ARE UNAVAIL-*
8 *ABLE.*
9 *(a) GRANTING.—With respect to the purchase of new*
10 *buses, a public entity may apply for, and the Secretary may*
11 *temporarily relieve such public entity from the obligation*
12 *under section 222(a) or 224 to purchase new buses that are*
13 *readily accessible to and usable by individuals with disabil-*
14 *ities if such public entity demonstrates to the satisfaction of*
15 *the Secretary—*
16 *(1) that the initial solicitation for new buses made*
17 *by the public entity specified that all new buses were to*
18 *be lift-equipped and were to be otherwise accessible to*
19 *and usable by individuals with disabilities;*

COMMENTS

29. Demand responsive systems operated by a public entity.

With slightly different wording, the Senate bill and the House amendment specify rules for public entities operating demand responsive systems.

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16 (2) the unavailability from any qualified manufacturer of hydraulic, electro-mechanical, or other lifts for such new buses;	20 *(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;*	39
19 (3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and	23 *(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and*	
24 (4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.	3 *(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.*	
3 (f) CONSTRUCTION.—		
4 (1) IN GENERAL.—Any relief granted under subsection (e) shall be limited in duration by a specified date and the appropriate committees of the Congress shall be notified of any such relief granted.	7 *(b) DURATION AND NOTICE TO CONGRESS.—Any relief granted under subsection (a) shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.*	
8 (2) FRAUDULENT APPLICATION.—If, at any time, the Secretary of Transportation has reasonable cause to believe that such relief was fraudulently applied for, the Secretary of Transportation shall—	11 *(c) FRAUDULENT APPLICATION.—If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) was fraudulently applied for, the Secretary shall—*	
12 (A) cancel such relief, if such relief is still in effect; and	15 *(1) cancel such relief if such relief is still in effect; and*	
14 (B) take other steps that the Secretary of Transportation considers appropriate.	17 *(2) take such other action as the Secretary considers appropriate.*	

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16 (g) NEW FACILITIES.—For purposes of this Act and
17 section 504 of the Rehabilitation Act of 1973 (29 U.S.C.
18 794), it shall be considered discrimination for a public entity
19 to build a new facility that will be used to provide public
20 transportation services, including bus service, intercity rail
21 service, rapid rail service, commuter rail service, light rail
22 service, and other service used for public transportation that
23 is not readily accessible to and usable by individuals with
24 disabilities, including individuals who use wheelchairs.

1 (h) ALTERATIONS OF EXISTING FACILITIES.—With
2 respect to a facility or any part thereof that is used for public
3 transportation and that is altered by, on behalf of, or for the
4 use of a public entity in a manner that affects or could affect
5 the usability of the facility or part thereof, it shall be consid-
6 ered discrimination, for purposes of this title and section 504
7 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such
8 individual or entity to fail to make the alterations in such a
9 manner that, to the maximum extent feasible, the altered
10 portions of the facility are readily accessible to and usable by
11 individuals with disabilities, including individuals who use
12 wheelchairs. If such public entity is undertaking major struc-
13 tural alterations that affect or could affect the usability of the
14 facility (as defined under criteria established by the Secretary
15 of Transportation), such public entity shall also make the al-

HOUSE AMENDMENT

19 *SEC. 226. NEW FACILITIES.*
20 *For purposes of section 202 of this Act and section 504*
21 *of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall*
22 *be considered discrimination for a public entity to construct a*
23 *new facility to be used in the provision of designated public*
24 *transportation services unless such facility is readily accessi-*
1 *ble to and usable by individuals with disabilities, including*
2 *individuals who use wheelchairs.*

3 *SEC. 227. ALTERATIONS OF EXISTING FACILITIES.*
4 *(a) GENERAL RULE.—With respect to alterations of an*
5 *existing facility or part thereof used in the provision of desig-*
6 *nated public transportation services that affect or could affect*
7 *the usability of the facility or part thereof, it shall be consid-*
8 *ered discrimination, for purposes of section 202 of this Act*
9 *and section 504 of the Rehabilitation Act of 1973 (29*
10 *U.S.C. 794), for a public entity to fail to make such alter-*
11 *ations (or to ensure that the alterations are made) in such a*
12 *manner that, to the maximum extent feasible, the altered por-*
13 *tions of the facility are readily accessible to and usable by*
14 *individuals with disabilities, including individuals who use*
15 *wheelchairs, upon the completion of such alterations. Where*
16 *the public entity is undertaking an alteration that affects or*
17 *could affect usability of or access to an area of the facility*
18 *containing a primary function, the entity shall also make the*
19 *alterations in such a manner that, to the maximum extent*

COMMENTS

30. **New facilities.**

The House amendment substitutes the phrase "designated public transportation services" for the phrase "public transportation services" used in the Senate bill.

31. **Alterations to existing facilities.**

(a) The House amendment adds a reference to "designated public transportation.

(b) The Senate bill requires that when major structural alterations are made, the alterations as well as the path of travel must be accessible to individuals with disabilities to the maximum extent feasible.

The House amendment substitutes the phrase "an alteration that affects or could affect usability or access to an area of the facility containing a primary function" for the Senate language "major structural alteration" and adds that the alterations to the path of travel and facilities serving the altered area should "not be disproportionate" to the overall alterations in terms of the cost and scope of the overall alterations as determined under criteria established by the Attorney General.

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16 terations in such a manner that, to the maximum extent fea-
17 sible, the path of travel to the altered area, and the bath-
18 rooms, telephones, and drinking fountains serving such area,
19 are readily accessible to and usable by individuals with dis-
20 abilities, including individuals who use wheelchairs.

(3) KEY STATIONS.—

(A) IN GENERAL.—For purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to make stations in intercity rail systems and key stations in rapid rail, commuter rail, and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

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20 *feasible, the path of travel to the altered area and the bath-*
21 *rooms, telephones, and drinking fountains serving the altered*
22 *area, are readily accessible to and usable by individuals with*
23 *disabilities, including individuals who use wheelchairs, upon*
24 *completion of such alterations, where such alterations to the*
25 *path of travel or the bathrooms, telephones, and drinking*
1 *fountains serving the altered area are not disproportionate to*
2 *the overall alterations in terms of cost and scope (as deter-*
3 *mined under criteria established by the Attorney General).*
4 *(b) SPECIAL RULE FOR STATIONS.—*
5 *(1) GENERAL RULE.—For purposes of section*
6 *202 of this Act and section 504 of the Rehabilitation*
7 *Act of 1973 (29 U.S.C. 794), it shall be considered*
8 *discrimination for a public entity that provides desig-*
9 *nated public transportation to fail, in accordance with*
10 *the provisions of this subsection, to make key stations*
11 *(as determined under criteria established by the Secre-*
12 *tary by regulation) in rapid rail and light rail systems*
13 *readily accessible to and usable by individuals with*
14 *disabilities, including individuals who use wheelchairs.*

COMMENTS

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32. Key stations in rapid and light rail systems.

(a) The Senate bill provides an extension of up to 20 years for making key stations in rapid rail or light rail systems accessible where extraordinary expensive structural changes are required.

The House amendment permits 30 years where extraordinary expensive structural changes are required except that by the last day of the 20th year at least two-thirds of such key stations must be readily accessible.

(b) With slightly different wording, both the Senate bill and the House amendment require the development of plans and milestones.

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(B) RAPID RAIL, COMMUTER RAIL, AND LIGHT RAIL SYSTEMS.—Key stations in rapid rail, commuter rail, and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after the date of enactment of this Act, except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinarily expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

HOUSE AMENDMENT

15 *(2) RAPID RAIL AND LIGHT RAIL KEY STA-*
16 *TIONS.—*
17 *(A) ACCESSIBILITY.—Except as otherwise*
18 *provided in this paragraph, all key stations (as*
19 *determined under criteria established by the Sec-*
20 *retary by regulation) in rapid rail and light rail*
21 *systems shall be made readily accessible to and*
22 *usable by individuals with disabilities, including*
23 *individuals who use wheelchairs, as soon as prac-*
24 *ticable but in no event later than the last day of*
1 *the 3-year period beginning on the effective date*
2 *of this paragraph.*
3 *(B) EXTENSION FOR EXTRAORDINARILY*
4 *EXPENSIVE STRUCTURAL CHANGES.—The Sec-*
5 *retary may extend the 3-year period under sub-*
6 *paragraph (A) up to a 30-year period for key sta-*
7 *tions in a rapid rail or light rail system which*
8 *stations need extraordinarily expensive structural*
9 *changes to, or replacement of, existing facilities;*
10 *except that by the last day of the 20th year fol-*
11 *lowing the date of the enactment of this Act at*
12 *least ⅔ of such key stations must be readily ac-*
13 *cessible to and usable by individuals with disabil-*
14 *ities.*

COMMENTS

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(D) PLANS AND MILESTONES.—The Secretary of Transportation shall require the appropriate public entity to develop a plan for compliance with this paragraph that reflects consultation with 1 individuals with disabilities affected by such plan 2 and that establishes milestones for achievement of 3 the requirements of this paragraph.	15 *(3) PLANS AND MILESTONES.—The Secretary* 16 *shall require the appropriate public entity to develop* 17 *and submit to the Secretary a plan for compliance with* 18 *this subsection—* 19 *(A) that reflects consultation with individ-* 20 *uals with disabilities affected by such plan and* 21 *the results of a public hearing and public com-* 22 *ments on such plan, and* 23 *(B) that establishes milestones for achieve-* 24 *ment of the requirements of this subsection.*	
21 (i) EXISTING FACILITIES, INTERCITY RAIL, RAPID 22 RAIL, LIGHT RAIL, AND COMMUTER RAIL SYSTEMS, AND 23 KEY STATIONS.— 24 (1) EXISTING FACILITIES.—Except as provided 25 in paragraph (3), with respect to existing facilities used 1 for public transportation, it shall be considered discrim- 2 ination, for purposes of this Act and section 504 of the 3 Rehabilitation Act of 1973 (29 U.S.C. 794), for a 4 public entity to fail to operate such public transporta- 5 tion program or activity conducted in such facilities so 6 that, when viewed in the entirety, it is readily accessi- 7 ble to and usable by individuals with disabilities, in- 8 cluding individuals who use wheelchairs.	1 *SEC. 228. PUBLIC TRANSPORTATION PROGRAMS AND ACTIVI-* 2 *TIES IN EXISTING FACILITIES AND ONE CAR PER* 3 *TRAIN RULE.* 4 *(a) PUBLIC TRANSPORTATION PROGRAMS AND AC-* 5 *TIVITIES IN EXISTING FACILITIES.—* 6 *(1) IN GENERAL.—With respect to existing facili-* 7 *ties used in the provision of designated public transpor-* 8 *tation services, it shall be considered discrimination,* 9 *for purposes of section 202 of this Act and section 504* 10 *of the Rehabilitation Act of 1973 (29 U.S.C. 794), for* 11 *a public entity to fail to operate a designated public* 12 *transportation program or activity conducted in such* 13 *facilities so that, when viewed in the entirety, the pro-* 14 *gram or activity is readily accessible to and usable by* 15 *individuals with disabilities.*	**33. Access to non-key stations.** With slightly different phrasing, the Senate bill and the House amendment specify rules governing non-key existing stations. The House recedes to the Senate and the Senate recedes to the House with an amendment.

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9 (2) INTERCITY, RAPID, LIGHT, AND COMMUTER
10 RAIL SYSTEMS.—With respect to vehicles operated by
11 intercity, light, rapid, and commuter rail systems, for
12 purposes of this title and section 504 of the Rehabilita-
13 tion Act of 1973 (29 U.S.C. 794), it shall be consid-
14 ered discrimination for a public entity to fail to have at
15 least one car per train that is accessible to individuals
16 with disabilities, including individuals who use wheel-
17 chairs, as soon as practicable but in any event in no
18 less than 5 years.

HOUSE AMENDMENT

16 *(2) KEY STATIONS.—Paragraph (1) shall not*
17 *apply to a key station if the portion of such station*
18 *providing access to the vehicle boarding or disembark-*
19 *ing location has not been made readily accessible to*
20 *and usable by individuals with disabilities who use*
21 *wheelchairs at that station.*
22 *(b) ONE CAR PER TRAIN RULE.—*
23 *(1) GENERAL RULE.—Subject to paragraph (2),*
24 *with respect to 2 or more vehicles operated as a train*
25 *by a light or rapid rail system, for purposes of section*
26 *202 of this Act and section 504 of the Rehabilitation*
1 *Act of 1973 (29 U.S.C. 794), it shall be considered*
2 *discrimination for a public entity to fail to have at*
3 *least 1 vehicle per train that is accessible to individ-*
4 *uals with disabilities, including individuals who use*
5 *wheelchairs, as soon as practicable but in no event*
6 *later than the last day of the 5-year period beginning*
7 *on the effective date of this section.*
8 *(2) HISTORIC TRAINS.—In order to comply with*
9 *paragraph (1) with respect to the remanufacture of a*
10 *vehicle of historic character which is to be used on a*
11 *segment of a light or rapid rail system which is includ-*
12 *ed on the National Register of Historic Places, if*
13 *making such vehicle readily accessible to and usable by*
14 *individuals with disabilities would significantly alter*
15 *the historic character of such vehicle, the public entity*

COMMENTS

34. One car per train rule applicable to rapid rail and light rail systems

The Senate bill provides that as soon as practicable, but in any event in no less than 5 years, rail systems must have at least one car per train that is accessible to individuals with disabilities.

The House amendment specifies that the one car per train rule only applies with respect to trains that have two or more vehicles and includes a special provision applicable to historic trains.

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SENATE BILL

21 (b) SECRETARY OF TRANSPORTATION.—

22 (1) IN GENERAL.—Not later than 1 year after the
23 date of enactment of this Act, the Secretary of Trans-
24 portation shall promulgate regulations in an accessible

1 format that include standards applicable to facilities
2 and vehicles covered under section 203 of this title.

3 (2) CONFORMANCE OF STANDARDS.—Such stand-
4 ards shall be consistent with the minimum guidelines
5 and requirements issued by the Architectural and
6 Transportation Barriers Compliance Board in accord-
7 ance with section 504.

HOUSE AMENDMENT

16 *which operates such system only has to make (or to*
17 *purchase or lease a remanufactured vehicle with) those*
18 *modifications which are necessary to meet the require-*
19 *ments of section 222(c)(1) and which do not signifi-*
20 *cantly alter the historic character of such vehicle.*

21 ***SEC. 229. REGULATIONS.***

22 *(a) IN GENERAL.—Not later than 1 year after the date*
23 *of enactment of this Act, the Secretary of Transportation*
24 *shall issue regulations, in an accessible format, necessary for*
25 *carrying out this part (other than section 223).*

1 *(b) STANDARDS.—The regulations issued under this*
2 *section and section 223 shall include standards applicable to*
3 *facilities and vehicles covered by this subtitle. The standards*
4 *shall be consistent with the minimum guidelines and require-*
5 *ments issued by the Architectural and Transportation Bar-*
6 *riers Compliance Board in accordance with section 504 of*
7 *this Act.*

COMMENTS

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SENATE BILL

HOUSE AMENDMENT

8 *SEC. 230. INTERIM ACCESSIBILITY REQUIREMENTS.*
9 *If final regulations have not been issued pursuant to*
10 *section 229, for new construction or alterations for which a*
11 *valid and appropriate State or local building permit is ob-*
12 *tained prior to the issuance of final regulations under such*
13 *section, and for which the construction or alteration author-*
14 *ized by such permit begins within one year of the receipt of*
15 *such permit and is completed under the terms of such permit,*
16 *compliance with the Uniform Federal Accessibility Stand-*
17 *ards in effect at the time the building permit is issued shall*
18 *suffice to satisfy the requirement that facilities be readily ac-*
19 *cessible to and usable by persons with disabilities as required*
20 *under sections 226 and 227, except that, if such final regula-*
21 *tions have not been issued one year after the Architectural*
22 *and Transportation Barriers Compliance Board has issued*
23 *the supplemental minimum guidelines required under section*
24 *504(a) of this Act, compliance with such supplemental mini-*
25 *mum guidelines shall be necessary to satisfy the requirement*
1 *that facilities be readily accessible to and usable by persons*
2 *with disabilities prior to issuance of the final regulations.*
3 *SEC. 231. EFFECTIVE DATE.*
4 *(a) GENERAL RULE.—Except as provided in subsec-*
5 *tion (b), this part shall become effective 18 months after the*
6 *date of enactment of this Act.*
7 *(b) EXCEPTION.—Sections 222, 223 (other than sub-*
8 *section (a)), 224, 225, 227(b), 228(b), and 229 shall become*
9 *effective on the date of enactment of this Act.*

COMMENTS

35. Interim accessibility.

The House amendment, but not the Senate bill, specifies that for new construction and alterations for which a valid and appropriate state or local building permit is obtained prior to the issuance of final regulations and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the accessiblity requirement except that if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines, compliance with such supplemental guidelines shall be necessary.

36. Effective date.

The Senate bill specifies that the section in title II pertaining to new fixed route vehicles shall become effective on the date of enactment.

The House amendment specifies that sections concerning fixed route vehicles, demand responsive, stations, one car per train and regulations become effective on the date of enactment.

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SENATE BILL	HOUSE AMENDMENT	COMMENTS
	10 *PART II—PUBLIC TRANSPORTATION BY INTERCITY* 11 *AND COMMUTER RAIL* 12 *SEC. 241. DEFINITIONS.* 13 *As used in this part:* 14 *(1) COMMUTER AUTHORITY.—The term "com-* 15 *muter authority" has the meaning given such term in* 16 *section 103(8) of the Rail Passenger Service Act (45* 17 *U.S.C. 502(8))* 18 *(2) COMMUTER RAIL TRANSPORTATION.—The* 19 *term "commuter rail transportation" has the meaning* 20 *given the term "commuter service" in section 103(9) of* 21 *the Rail Passenger Service Act (45 U.S.C. 502(9))* 22 *(3) INTERCITY RAIL TRANSPORTATION.—The* 23 *term "intercity rail transportation" means transporta-* 24 *tion provided by the National Railroad Passenger* 25 *Corporation* 1 *(4) RAIL PASSENGER CAR.—The term "rail pas-* 2 *senger car" means, with respect to intercity rail trans-* 3 *portation, single-level and bi-level coach cars, single-* 4 *level and bi-level dining cars, single-level and bi-level* 5 *sleeping cars, single-level and bi-level lounge cars, and* 6 *food service cars* 7	37. Definitions. The House amendment but not the Senate bill includes definitions of the following terms: "commuter authority," "commuter rail transportation," "intercity rail transportation," "rail passenger car," "responsible person," and "station."

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(5) Responsible person.—The term "respon-
8 *sible person" means—*
9 *(A) in the case of a station more than 50*
10 *percent of which is owned by a public entity, such*
11 *public entity;*
12 *(B) in the case of a station more than 50*
13 *percent of which is owned by a private party, the*
14 *persons providing intercity or commuter rail*
15 *transportation to such station, as allocated on an*
16 *equitable basis by regulation by the Secretary of*
17 *Transportation; and*
18 *(C) in a case where no party owns more*
19 *than 50 percent of a station, the persons providing*
20 *intercity or commuter rail transportation to such*
21 *station and the owners of the station, other than*
22 *private party owners, as allocated on an equitable*
23 *basis by regulation by the Secretary of Transpor-*
24 *tation*

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SENATE BILL

For the comparable provision in the Senate bill see page 44, column 1.

HOUSE AMENDMENT

1 *(6) STATION.—The term "station" means the*
2 *portion of a property located appurtenant to a right-of-*
3 *way on which intercity or commuter rail transportation*
4 *is operated, where such portion is used by the general*
5 *public and is related to the provision of such transpor-*
6 *tation, including passenger platforms, designated wait-*
7 *ing areas, ticketing areas, restrooms, and, where a*
8 *public entity providing rail transportation owns the*
9 *property, concession areas, to the extent that such*
10 *public entity exercises control over the selection, design,*
11 *construction, or alteration of the property, but such*
12 *term does not include flag stops.*

13 ***SEC. 242. INTERCITY AND COMMUTER RAIL ACTIONS CONSID-***
14 ***ERED DISCRIMINATORY.***
15 *(a) INTERCITY RAIL TRANSPORTATION.—*
16 *(1) ONE CAR PER TRAIN RULE.—It shall be con-*
17 *sidered discrimination for purposes of section 202 of*
18 *this Act and section 504 of the Rehabilitation Act of*
19 *1973 (29 U.S.C. 794) for a person who provides inter-*
20 *city rail transportation to fail to have at least one pas-*
21 *senger car per train that is readily accessible to and*
22 *usable by individuals with disabilities, including indi-*
23 *viduals who use wheelchairs, in accordance with regu-*
24 *lations issued under section 244, as soon as practica-*
1 *ble, but in no event later than 5 years after the date of*
2 *enactment of this Act.*

COMMENTS

38. One car per train rule for intercity rail transportation.

With slightly different wording, the Senate bill and the House amendment specify a one car per train rule for intercity rail transportation.

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SENATE BILL

For the comparable provision in the Senate bill, see page 28, column 1.

HOUSE AMENDMENT

3 (2) NEW INTERCITY CARS.—
4 (A) GENERAL RULE.—Except as otherwise
5 provided in this subsection with respect to individ-
6 uals who use wheelchairs, it shall be considered
7 discrimination for purposes of section 202 of this
8 Act and section 504 of the Rehabilitation Act of
9 1973 (29 U.S.C. 794) for a person to purchase
10 or lease any new rail passenger cars for use in
11 intercity rail transportation, and for which a so-
12 licitation is made later than 30 days after the ef-
13 fective date of this section, unless all such rail
14 cars are readily accessible to and usable by indi-
15 viduals with disabilities, including individuals
16 who use wheelchairs, as prescribed by the Secre-
17 tary of Transportation in regulations issued under
18 section 244.
19 (B) SPECIAL RULE FOR SINGLE-LEVEL
20 PASSENGER COACHES FOR INDIVIDUALS WHO
21 USE WHEELCHAIRS.—Single-level passenger
22 coaches shall be required to—
23 (i) be able to be entered by an individ-
24 ual who uses a wheelchair;
1 (ii) have space to park and secure a
2 wheelchair;
3 (iii) have a seat to which a passenger in
4 a wheelchair can transfer, and a space to
5 fold and store such passenger's wheelchair;
6 and

COMMENTS

39. **New Intercity cars.**

The Senate bill provides that all new intercity vehicles must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The House amendment includes a general obligation to make new intercity cars accessible that is identical to the provision in the Senate bill but includes special rules of accessibility applicable to people who use wheelchairs for specific categories of passenger car.

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SENATE BILL	HOUSE AMENDMENT	COMMENTS

7 *(iv) have a restroom usable by an individual who uses a wheelchair,*
9 *only to the extent provided in paragraph (3).*
10 *(C) SPECIAL RULE FOR SINGLE-LEVEL DINING CARS FOR INDIVIDUALS WHO USE WHEELCHAIRS.—Single-level dining cars shall not be required to—*
14 *(i) be able to be entered from the station platform by an individual who uses a wheelchair; or*
17 *(ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.*
20 *(D) SPECIAL RULE FOR BI-LEVEL DINING CARS FOR INDIVIDUALS WHO USE WHEELCHAIRS.—Bi-level dining cars shall not be required to—*
24 *(i) be able to be entered by an individual who uses a wheelchair;*
1 *(ii) have space to park and secure a wheelchair;*
3 *(iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or*
6 *(iv) have a restroom usable by an individual who uses a wheelchair.*

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8 *(3) Accessibility of single-level coaches.—*
9
10 *(A) General rule.—It shall be considered*
11 *discrimination for purposes of section 202 of this*
12 *Act and section 504 of the Rehabilitation Act of*
13 *1973 (29 U.S.C. 794) for a person who provides*
14 *intercity rail transportation to fail to have on each*
15 *train which includes one or more single-level rail*
16 *passenger coaches—*
17 *(i) a number of spaces—*
18 *(I) to park and secure wheelchairs*
19 *(to accommodate individuals who wish*
20 *to remain in their wheelchairs) equal to*
21 *not less than one-half of the number of*
22 *single-level rail passenger coaches in*
23 *such train; and*
24 *(II) to fold and store wheelchairs*
25 *(to accommodate individuals who wish*
1 *to transfer to coach seats) equal to not*
2 *less than one-half of the number of*
3 *single-level rail passenger coaches in*
4 *such train,*
5 *as soon as practicable, but in no event later*
6 *than 5 years after the date of enactment of*
7 *this Act; and*

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8 *(ii) a number of spaces—*
9 *(I) to park and secure wheelchairs*
10 *(to accommodate individuals who wish*
11 *to remain in their wheelchairs) equal to*
12 *not less than the total number of single-*
13 *level rail passenger coaches in such*
14 *train; and*
15 *(II) to fold and store wheelchairs*
16 *(to accommodate individuals who wish*
17 *to transfer to coach seats) equal to not*
18 *less than the total number of single-level*
19 *rail passenger coaches in such train,*
20 *as soon as practicable, but in no event later*
21 *than 10 years after the date of enactment of*
22 *this Act.*
23 *(B) LOCATION.—Spaces required by sub-*
24 *paragraph (A) shall be located in single-level rail*
25 *passenger coaches or food service cars.*

1 *(C) LIMITATION.—Of the number of spaces*
2 *required on a train by subparagraph (A), not*
3 *more than two spaces to park and secure wheel-*
4 *chairs nor more than two spaces to fold and store*
5 *wheelchairs shall be located in any one coach or*
6 *food service car.*

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7 *(D) OTHER ACCESSIBILITY FEATURES.—*
8 *Single-level rail passenger coaches and food serv-*
9 *ice cars on which the spaces required by subpara-*
10 *graph (A) are located shall have a restroom usable*
11 *by an individual who uses a wheelchair and shall*
12 *be able to be entered from the station platform by*
13 *an individual who uses a wheelchair.*
14 *(4) FOOD SERVICE.—*
15 *(A) SINGLE-LEVEL DINING CARS.—On any*
16 *train in which a single-level dining car is used to*
17 *provide food service—*
18 *(i) if such single-level dining car was*
19 *purchased after the date of enactment of this*
20 *Act, table service in such car shall be provid-*
21 *ed to a passenger who uses a wheelchair if—*
22 *(I) the car adjacent to the end of*
23 *the dining car through which a wheel-*
24 *chair may enter is itself accessible to a*
25 *wheelchair;*

1 *(II) such passenger can exit to the*
2 *platform from the car such passenger*
3 *occupies, move down the platform, and*
4 *enter the adjacent accessible car de-*
5 *scribed in subclause (I) without the ne-*
6 *cessity of the train being moved within*
7 *the station; and*

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8 *(III) space to park and secure a*
9 *wheelchair is available in the dining*
10 *car at the time such passenger wishes to*
11 *eat (if such passenger wishes to remain*
12 *in a wheelchair), or space to store and*
13 *fold a wheelchair is available in the*
14 *dining car at the time such passenger*
15 *wishes to eat (if such passenger wishes*
16 *to transfer to a dining car seat); and*
17 *(ii) appropriate auxiliary aids and serv-*
18 *ices, including a hard surface on which to*
19 *eat, shall be provided to ensure that other*
20 *equivalent food service is available to indi-*
21 *viduals with disabilities, including individ-*
22 *uals who use wheelchairs, and to passengers*
23 *traveling with such individuals.*
24 *Unless not practicable, a person providing inte.-*
25 *city rail transportation shall place an accessible*
1 *car adjacent to the end of a dining car described*
2 *in clause (i) through which an individual who*
3 *uses a wheelchair may enter.*

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4 (B) BI-LEVEL DINING CARS.—On any
5 train in which a bi-level dining car is used to pro-
6 vide food service—
7 (i) if such train includes a bi-level
8 lounge car purchased after the date of enact-
9 ment of this Act, table service in such lounge
10 car shall be provided to individuals who use
11 wheelchairs and to other passengers; and
12 (ii) appropriate auxiliary aids and serv-
13 ices, including a hard surface on which to
14 eat, shall be provided to ensure that other
15 equivalent food service is available to indi-
16 viduals with disabilities, including individ-
17 uals who use wheelchairs, and to passengers
18 traveling with such individuals.

For the comparable provision in the Senate bill, see page 44, column 1.

19 (b) COMMUTER RAIL TRANSPORTATION.—
20 (1) ONE CAR PER TRAIN RULE.—It shall be con-
21 sidered discrimination for purposes of section 202 of
22 this Act and section 504 of the Rehabilitation Act of
23 1973 (29 U.S.C. 794) for a person who provides com-
24 muter rail transportation to fail to have at least one
25 passenger car per train that is readily accessible to and

40. One car per train rule and new commuter rail cars.

(a) With slightly different wording, the Senate bill and the House amendment specify the one car per train rule for persons providing commuter rail transportation.

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	1 *usable by individuals with disabilities, including indi-* 2 *viduals who use wheelchairs, in accordance with regu-* 3 *lations issued under section 244, as soon as practica-* 4 *ble, but in no event later than 5 years after the date of* 5 *enactment of this Act.*	
For the comparable provision in the Senate bill see page 28, column 1.	6 *(2) NEW COMMUTER RAIL CARS.—* 7 *(A) GENERAL RULE.—It shall be considered* 8 *discrimination for purposes of section 202 of this* 9 *Act and section 504 of the Rehabilitation Act of* 10 *1973 (29 U.S.C. 794) for a person to purchase* 11 *or lease any new rail passenger cars for use in* 12 *commuter rail transportation, and for which a so-* 13 *licitation is made later than 30 days after the ef-* 14 *fective date of this section, unless all such rail* 15 *cars are readily accessible to and usable by indi-* 16 *viduals with disabilities, including individuals* 17 *who use wheelchairs, as prescribed by the Secre-* 18 *tary of Transportation in regulations issued under* 19 *section 244.*	(b) The Senate bill provides that all new commuter rail cars must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. The House amendment adopts the same standard and specifies that the term "readily accessible to and usable by" shall not be construed to require: a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger; space to store and fold a wheelchair; or a seat to which a passenger who uses a wheelchair can transfer.
	20 *(B) ACCESSIBILITY.—For purposes of sec-* 21 *tion 202 of this Act and section 504 of the Reha-* 22 *bilitation Act of 1973 (29 U.S.C. 794), a re-* 23 *quirement that a rail passenger car used in com-* 24 *muter rail transportation be accessible to or read-* 25 *ily accessible to and usable by individuals with*	

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For the comparable provision in the Senate bill see page 29, column 1.

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1 *disabilities, including individuals who use wheel-*
2 *chairs, shall not be construed to require—*
3 *(i) a restroom usable by an individual*
4 *who uses a wheelchair if no restroom is pro-*
5 *vided in such car for any passenger;*
6 *(ii) space to fold and store a wheelchair;*
7 *or*
8 *(iii) a seat to which a passenger who*
9 *uses a wheelchair can transfer.*
10 *(c) USED RAIL CARS.—It shall be considered discrimi-*
11 *nation for purposes of section 202 of this Act and section 504*
12 *of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a*
13 *person to purchase or lease a used rail passenger car for use*
14 *in intercity or commuter rail transportation, unless such*
15 *person makes demonstrated good faith efforts to purchase or*
16 *lease a used rail car that is readily accessible to and usable*
17 *by individuals with disabilities, including individuals who*
18 *use wheelchairs, as prescribed by the Secretary of Transpor-*
19 *tation in regulations issued under section 244.*
20 *(d) REMANUFACTURED RAIL CARS.—*
21 *(1) REMANUFACTURING.—It shall be considered*
22 *discrimination for purposes of section 202 of this Act*
23 *and section 504 of the Rehabilitation Act of 1973 (29*
24 *U.S.C. 794) for a person to remanufacture a rail pas-*
25 *senger car for use in intercity or commuter rail trans-*

COMMENTS

41. Used and remanufactured rail cars.

The Senate bill includes special rules for the purchase of all types of used and remanufactured vehicles.

The House amendment includes special provisions applicable to the purchase of used rail cars and remanufactured rail cars similar to the provisions included in the Senate bill applicable to all vehicles (the time period for remanufacture is 10 years for rail cars instead of 5 years for other vehicles).

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For the comparable provision in the Senate bill see page 40, column 1.	1 *portation so as to extend its usable life for 10 years or* 2 *more, unless the rail car, to the maximum extent feasi-* 3 *ble, is made readily accessible to and usable by indi-* 4 *viduals with disabilities, including individuals who use* 5 *wheelchairs, as prescribed by the Secretary of Trans-* 6 *portation in regulations issued under section 244.* 7 *(2) PURCHASE OR LEASE.—It shall be consid-* 8 *ered discrimination for purposes of section 202 of this* 9 *Act and section 504 of the Rehabilitation Act of 1973* 10 *(29 U.S.C. 794) for a person to purchase or lease a* 11 *remanufactured rail passenger car for use in intercity* 12 *or commuter rail transportation unless such car was* 13 *remanufactured in accordance with paragraph (1).* 14 *(e) STATIONS.—* 15 *(1) NEW STATIONS.—It shall be considered dis-* 16 *crimination for purposes of section 202 of this Act and* 17 *section 504 of the Rehabilitation Act of 1973 (29* 18 *U.S.C. 794) for a person to build a new station for* 19 *use in intercity or commuter rail transportation that is* 20 *not readily accessible to and usable by individuals* 21 *with disabilities, including individuals who use wheel-* 22 *chairs, as prescribed by the Secretary of Transporta-* 23 *tion in regulations issued under section 244.*	

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For the comparable provision in the Senate bill see page 41, column 1.

(C) INTERCITY RAIL SYSTEMS.—All stations in intercity rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after the date of enactment of this Act.

HOUSE AMENDMENT

24 *(2) EXISTING STATIONS.—*

1 *(A) FAILURE TO MAKE READILY ACCESSI-*
2 *BLE.—*
3 *(i) GENERAL RULE.—It shall be con-*
4 *sidered discrimination for purposes of section*
5 *202 of this Act and section 504 of the Reha-*
6 *bilitation Act of 1973 (29 U.S.C. 794) for a*
7 *responsible person to fail to make existing*
8 *stations in the intercity rail transportation*
9 *system, and existing key stations in commut-*
10 *er rail transportation systems, readily acces-*
11 *sible to and usable by individuals with dis-*
12 *abilities, including individuals who use*
13 *wheelchairs, as prescribed by the Secretary*
14 *of Transportation in regulations issued*
15 *under section 244.*
16 *(ii) PERIOD FOR COMPLIANCE.—*
17 *(I) INTERCITY RAIL.—All stations*
18 *in the intercity rail transportation*
19 *system shall be made readily accessible*
20 *to and usable by individuals with dis-*
21 *abilities, including individuals who use*
22 *wheelchairs, as soon as practicable, but*
23 *in no event later than 20 years after the*
24 *date of enactment of this Act.*

COMMENTS

42. New and existing stations.

(a) With respect to commuter rail, the Senate bill specifies that existing key stations must be made accessible as soon as practicable but in no event later than 3 years after the effective date, except that the time limit may be extended to 20 years after the date of enactment in a case where extraordinarily expensive structural changes are necessary to attain accessibility.

The House amendment provides that the extension to 20 years applies where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

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For the comparable provision in the Senate bill see page 41-42, column 1.

HOUSE AMENDMENT

1 *(II) COMMUTER RAIL.—Key sta-*
2 *tions in commuter rail transportation*
3 *systems shall be made readily accessible*
4 *to and usable by individuals with dis-*
5 *abilities, including individuals who use*
6 *wheelchairs, as soon as practicable but*
7 *in no event later than 3 years after the*
8 *date of enactment of this Act, except*
9 *that the time limit may be extended by*
10 *the Secretary of Transportation up to*
11 *20 years after the date of enactment of*
12 *this Act in a case where the raising of*
13 *the entire passenger platform is the only*
14 *means available of attaining accessibil-*
15 *ity or where other extraordinarily ex-*
16 *pensive structural changes are necessary*
17 *to attain accessibility.*
18 *(iii) DESIGNATION OF KEY STA-*
19 *TIONS.—Each commuter authority shall des-*
20 *ignate the key stations in its commuter rail*
21 *transportation system, in consultation with*
22 *individuals with disabilities and organiza-*
23 *tions representing such individuals, taking*
24 *into consideration such factors as high rider-*
25 *ship and whether such station serves as a*

COMMENTS

(b) The Senate bill explains in the report the criteria used to determine which stations are considered "key." The House amendment places these criteria in the legislation. The factors that must be taken into consideration, after consultation with individuals with disabilities and organizations representing such individuals include: high ridership and whether such station serves as a transfer or feeder station.

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SENATE BILL

For the comparable provision in the Senate bill see page 43, column 1.

For the comparable provision in the Senate bill see page 40, column 1.

HOUSE AMENDMENT

1 *transfer or feeder station. Before the final*
2 *designation of key stations under this clause,*
3 *a commuter authority shall hold a public*
4 *hearing.*
5 *(iv) PLANS AND MILESTONES.—The*
6 *Secretary of Transportation shall require the*
7 *appropriate person to develop a plan for car-*
8 *rying out this subparagraph that reflects con-*
9 *sultation with individuals with disabilities*
10 *affected by such plan and that establishes*
11 *milestones for achievement of the require-*
12 *ments of this subparagraph.*
13 *(B) REQUIREMENT WHEN MAKING ALTER-*
14 *ATIONS.—*
15 *(i) GENERAL RULE.—It shall be con-*
16 *sidered discrimination, for purposes of sec-*
17 *tion 202 of this Act and section 504 of the*
18 *Rehabilitation Act of 1973 (29 U.S.C. 794),*
19 *with respect to alterations of an existing sta-*
20 *tion or part thereof in the intercity or com-*
21 *muter rail transportation systems that affect*
22 *or could affect the usability of the station or*
23 *part thereof, for the responsible person,*
24 *owner, or person in control of the station to*
25 *fail to make the alterations in such a*

COMMENTS

43. Alterations of existing facilities.

(a) The Senate bill specifies that a facility or any part thereof that is used for public transportation and that is altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility must be altered in such a way that it is readily accessible to and usable by individuals with disabilities.

The House amendment adopts the same standard but substitutes for the phrase "public entity" the phrase "responsible person, owner, or person in control of the station."

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SENATE BILL	HOUSE AMENDMENT	COMMENTS

1 *telephones, and drinking fountains serving*
2 *the altered area are not disproportionate to*
3 *the overall alterations in terms of cost and*
4 *scope (as determined under criteria estab-*
5 *lished by the Attorney General).*
6 *(C) Required cooperation.—It shall be*
7 *considered discrimination for purposes of section*
8 *202 of this Act and section 504 of the Rehabilita-*
9 *tion Act of 1973 (29 U.S.C. 794) for an owner,*
10 *or person in control, of a station governed by sub-*
11 *paragraph (A) or (B) to fail to provide reasonable*
12 *cooperation to a responsible person with respect to*
13 *such station in that responsible person's efforts to*
14 *comply with such subparagraph. An owner, or*
15 *person in control, of a station shall be liable to a*
16 *responsible person for any failure to provide rea-*
17 *sonable cooperation as required by this subpara-*
18 *graph. Failure to receive reasonable cooperation*
19 *required by this subparagraph shall not be a de-*
20 *fense to a claim of discrimination under this Act.*
21 *SEC. 243. CONFORMANCE OF ACCESSIBILITY STANDARDS.*
22 *Accessibility standards included in regulations issued*
23 *under this part shall be consistent with the minimum guide-*
24 *lines issued by the Architectural and Transportation Bar-*
25 *riers Compliance Board under section 504(a) of this Act.*

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SENATE BILL	HOUSE AMENDMENT	COMMENTS
	1 *SEC. 244. REGULATIONS.* 2 *Not later than 1 year after the date of enactment of this* 3 *Act, the Secretary of Transportation shall issue regulations,* 4 *in an accessible format, necessary for carrying out this part.* 5 *SEC. 245. INTERIM ACCESSIBILITY REQUIREMENTS.* 6 *(a) STATIONS.—If final regulations have not been* 7 *issued pursuant to section 244, for new construction or alter-* 8 *ations for which a valid and appropriate State or local build-* 9 *ing permit is obtained prior to the issuance of final regula-* 10 *tions under such section, and for which the construction or* 11 *alteration authorized by such permit begins within one year* 12 *of the receipt of such permit and is completed under the terms* 13 *of such permit, compliance with the Uniform Federal Acces-* 14 *sibility Standards in effect at the time the building permit is* 15 *issued shall suffice to satisfy the requirement that stations be* 16 *readily accessible to and usable by persons with disabilities* 17 *as required under section 242(e). except that, if such final* 18 *regulations have not been issued one year after the Architec-* 19 *tural and Transportation Barriers Compliance Board has* 20 *issued the supplemental minimum guidelines required under* 21 *section 504(a) of this Act, compliance with such supplemen-* 22 *tal minimum guidelines shall be necessary to satisfy the re-* 23 *quirement that stations be readily accessible to and usable by* 24 *persons with disabilities prior to issuance of the final* 25 *regulations.*	**44. Interim accessibility standards.** The House amendment, but not the Senate bill, specifies the standards that would apply to stations and rail passenger cars during an interim period between the effective date and the date regulations are issued in final form.

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SENATE BILL	HOUSE AMENDMENT	COMMENTS
	1 (b) RAIL PASSENGER CARS.—If final regulations 2 have not been issued pursuant to section 244, a person shall 3 be considered to have complied with the requirements of sec- 4 tion 242 (a) through (d) that a rail passenger car be readily 5 accessible to and usable by individuals with disabilities, if 6 the design for such car complies with the laws and regula- 7 tions (including the Minimum Guidelines and Requirements 8 for Accessible Design and such supplemental minimum 9 guidelines as are issued under section 504(a) of this Act) 10 governing accessibility of such cars, to the extent that such 11 laws and regulations are not inconsistent with this part and 12 are in effect at the time such design is substantially 13 completed.	
For the comparable provision in the Senate bill see page 26, column 1.	14 SEC. 246. EFFECTIVE DATE. 15 (a) GENERAL RULE.—Except as provided in subsec- 16 tion (b), this part shall become effective 18 months after the 17 date of enactment of this Act. 18 (b) EXCEPTION.—Sections 242 and 244 shall become 19 effective on the date of enactment of this Act.	

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SENATE BILL

1 TITLE III—PUBLIC ACCOMMODA-
2 TIONS AND SERVICES OPERAT-
3 ED BY PRIVATE ENTITIES

4 SEC. 301. DEFINITIONS.

5 As used in this title:

6 (1) COMMERCE.—The term "commerce" means
7 travel, trade, traffic, commerce, transportation, or com-
8 munication—
9 (A) among the several States;
10 (B) between any foreign country or any terri-
11 tory or possession and any State; or
12 (C) between points in the same State but
13 through another State or foreign country.
14 (2) POTENTIAL PLACES OF EMPLOYMENT.—The
15 term "potential places of employment" means facili-
16 ties—
17 (A) that are intended for nonresidential use;
18 and
19 (B) whose operations will affect commerce.
20 Such term shall not include facilities that are covered
21 or expressly exempted from coverage under the Fair
22 Housing Act of 1968 (42 U.S.C. 3601 et seq.).

HOUSE AMENDMENT

20 *TITLE III—PUBLIC ACCOMMODA-*
21 *TIONS AND SERVICES OPERAT-*
22 *ED BY PRIVATE ENTITIES*

23 *SEC. 301. DEFINITIONS.*

24 *As used in this title:*

1 *(1) COMMERCE.—The term "commerce" means*
2 *travel, trade, traffic, commerce, transportation, or com-*
3 *munication—*
4 *(A) among the several States;*
5 *(B) between any foreign country or any ter-*
6 *ritory or possession and any State; or*
7 *(C) between points in the same State but*
8 *through another State or foreign country.*
9 *(2) COMMERCIAL FACILITIES.—The term "com-*
10 *mercial facilities" means facilities—*
11 *(A) that are intended for nonresidential use;*
12 *and*
13 *(B) whose operations will affect commerce.*
14 *Such term shall not include railroad locomotives, rail-*
15 *road freight cars, railroad cabooses, railroad cars de-*
16 *scribed in section 242 or covered under this title, rail-*
17 *road rights-of-way, or facilities that are covered or ex-*
18 *pressly exempted from coverage under the Fair Hous-*
19 *ing Act of 1968 (42 U.S.C. 3601 et seq.).*

COMMENTS

45. Definitions.

(a) The Senate bill includes the term "potential places of employment" to describe facilities subject to the new construction requirements.

The House amendment substitutes the term "commerical facilities" for the phrase "potential places of employment." The House amendment also specifies that the term does not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 222 or covered under title III, or railroad rights-of-way.

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SENATE BILL

HOUSE AMENDMENT

20 (3) DEMAND RESPONSIVE SYSTEM.—*The term*
21 *"demand responsive system" means any system of pro-*
22 *viding transportation of individuals by a vehicle, other*
23 *than a system which is a fixed route system.*
24 (4) FIXED ROUTE SYSTEM.—*The term "fixed*
25 *route system" means a system of providing transporta-*

1 *tion of individuals (other than by aircraft) on which a*
2 *vehicle is operated along a prescribed route according*
3 *to a fixed schedule.*
4 (5) OVER-THE-ROAD BUS.—*The term "over-the-*
5 *road bus" means a bus characterized by an elevated*
6 *passenger deck located over a baggage compartment.*
7 (6) PRIVATE ENTITY.—*The term "private entity"*
8 *means any entity other than a public entity (as defined*
9 *in section 201(1)).*

COMMENTS

(b) The House amendment, but not the Senate bill, includes definitions for the following terms: "demand responsive system," "fixed route system," and "over-the-road bus."

(c) The House amendment, but not the Senate bill, defines the term "private entity" to mean any entity other than a public entity, as defined in title II.

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SENATE BILL

23 (3) PUBLIC ACCOMMODATION.—The following
24 privately operated entities are considered public accom-
1 modations for purposes of this title, if the operations of
2 such entities affect commerce—
3 (A) an inn, hotel, motel, or other similar
4 place of lodging, except for an establishment lo-
5 cated within a building that contains not more
6 than five rooms for rent or hire and that is actual-
7 ly occupied by the proprietor of such establish-
8 ment as the residence of such proprietor;
9 (B) a restaurant, bar, or other establishment
10 serving food or drink;
11 (C) a motion picture house, theater, concert
12 hall, stadium, or other place of exhibition or
13 entertainment;
14 (D) an auditorium, convention center, or lec-
15 ture hall;
16 (E) a bakery, grocery store, clothing store,
17 hardware store, shopping center, or other similar
18 retail sales establishment;
19 (F) a laundromat, dry-cleaners, bank, barber
20 shop, beauty shop, travel service, shoe repair
21 service, funeral parlor, gas station, office of an ac-
22 countant or lawyer, pharmacy, insurance office,
23 professional office of a health care provider, hospi-
24 tal, or other similar service establishment;
25 (G) a terminal used for public transportation;

HOUSE AMENDMENT

10 *(7) PUBLIC ACCOMMODATION.—The following*
11 *private entities are considered public accommodations*
12 *for purposes of this title, if the operations of such enti-*
13 *ties affect commerce—*
14 *(A) an inn, hotel, motel, or other place of*
15 *lodging, except for an establishment located within*
16 *a building that contains not more than five rooms*
17 *for rent or hire and that is actually occupied by*
18 *the proprietor of such establishment as the resi-*
19 *dence of such proprietor;*
20 *(B) a restaurant, bar, or other establishment*
21 *serving food or drink;*
22 *(C) a motion picture house, theater, concert*
23 *hall, stadium, or other place of exhibition or en-*
24 *tertainment;*
1 *(D) an auditorium, convention center, lecture*
2 *hall, or other place of public gathering;*
3 *(E) a bakery, grocery store, clothing store,*
4 *hardware store, shopping center, or other sales or*
5 *rental establishment;*
6 *(F) a laundromat, dry-cleaner, bank, barber*
7 *shop, beauty shop, travel service, shoe repair serv-*
8 *ice, funeral parlor, gas station, office of an ac-*
9 *countant or lawyer, pharmacy, insurance office,*
10 *professional office of a health care provider, hospi-*
11 *tal, or other service establishment;*
12 *(G) a terminal, depot, or other station used*
13 *for specified public transportation;*

COMMENTS

(d) The Senate bill lists a number of specific types of entities that are considered public accommodations and then includes the following catch-all phrase "and other similar places."

The House amendment deletes the term "similar." In addition, the House amendment makes several technical changes to the categories.

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SENATE BILL

1 (H) a museum, library, gallery, and other
2 similar place of public display or collection;
3 (I) a park or zoo;
4 (J) a nursery, elementary, secondary, under-
5 graduate, or postgraduate private school;
6 (K) a day care center, senior citizen center,
7 homeless shelter, food bank, adoption program, or
8 other similar social service center; and
9 (L) a gymnasium, health spa, bowling alley,
10 golf course, or other similar place of exercise or
11 recreation.

HOUSE AMENDMENT

14 *(H) a museum, library, gallery, or other*
15 *place of public display or collection;*
16 *(I) a park, zoo, amusement park, or other*
17 *place of recreation;*
18 *(J) a nursery, elementary, secondary, under-*
19 *graduate, or postgraduate private school, or other*
20 *place of education;*
21 *(K) a day care center, senior citizen center,*
22 *homeless shelter, food bank, adoption agency, or*
23 *other social service center establishment; and*
1 *(L) a gymnasium, health spa, bowling alley,*
2 *golf course, or other place of exercise or recrea-*
3 *tion.*
4 *(8) RAIL AND RAILROAD.—The terms "rail" and*
5 *"railroad" have the meaning given the term "railroad"*
6 *in section 202(e) of the Federal Railroad Safety Act of*
7 *1970 (45 U.S.C. 431(e)).*

COMMENTS

(e) The House amendment, but not the Senate bill, defines the term "rail" and "railroad."

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SENATE BILL

18 (5) READILY ACHIEVABLE.—
19 (A) IN GENERAL.—The term "readily
20 achievable" means easily accomplishable and able
21 to be carried out without much difficulty or
22 expense.
23 (B) DETERMINATION.—In determining
24 whether an action is readily achievable, factors to
25 be considered include—
1 (i) the overall size of the covered entity
2 with respect to number of employees,
3 number and type of facilities, and the size of
4 budget;
5 (ii) the type of operation of the covered
6 entity, including the composition and struc-
7 ture of the entity; and
8 (iii) the nature and cost of the action
9 needed.

HOUSE AMENDMENT

8 *(9) READILY ACHIEVABLE.—The term "readily*
9 *achievable" means easily accomplishable and able to be*
10 *carried out without much difficulty or expense. In de-*
11 *termining whether an action is readily achievable, fac-*
12 *tors to be considered include—*
13 *(A) the nature and cost of the action needed*
14 *under this Act;*
15 *(B) the overall financial resources of the fa-*
16 *cility or facilities involved in the action; the*
17 *number of persons employed at such facility; the*
18 *effect on expenses and resources, or the impact*
19 *otherwise of such action upon the operation of the*
20 *facility;*
21 *(C) the overall financial resources of the cov-*
22 *ered entity; the overall size of the business of a*
23 *covered entity with respect to the number of its*
24 *employees; the numl , type, and location of its*
25 *facilities; and*

1 *(D) the type of operation or operations of the*
2 *covered entity, including the composition, struc-*
3 *ture, and functions of the workforce of such*
4 *entity; the geographic separateness, administrative*
5 *or fiscal relationship of the facility or facilities in*
6 *question to the covered entity.*

COMMENTS

(f) In determining whether making changes to existing facilities are "readily achievable," the Senate bill requires that the following factors be considered: (1) the overall size of the covered entity with respect to the number of employees, number and type of facilities, and size of the budget; (2) the type of operation of the covered entity, including the composition and structure of the entity; and (3) the nature and cost of the action needed.

The House amendment includes the following factors: (1) the nature and cost of the action needed under the ADA; (2) the overall financial resources of the facility or facilities involved in the action, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

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SENATE BILL

12 (4) PUBLIC TRANSPORTATION.—The term
13 "public transportation" means transportation by bus or
14 rail, or by any other conveyance (other than by air
15 travel) that provides the general public with general or
16 special service (including charter service) on a regular
17 and continuing basis.

10 SEC. 302. PROHIBITION OF DISCRIMINATION BY PUBLIC AC-
11 COMMODATIONS.
12 (a) GENERAL RULE.—No individual shall be discrimi-
13 nated against on the basis of disability in the full and equal
14 enjoyment of the goods, services, facilities, privileges, advan-
15 tages, and accommodations of any place of public accommo-
16 dation.
17 (b) CONSTRUCTION.—

HOUSE AMENDMENT

7 *(10) SPECIFIED PUBLIC TRANSPORTATION.—*
8 *The term "specified public transportation" means*
9 *transportation by bus, rail, or any other conveyance*
10 *(other than by aircraft) that provides the general public*
11 *with general or special service (including charter serv-*
12 *ice) on a regular and continuing basis.*
13 *(11) VEHICLE.—The term "vehicle" does not in-*
14 *clude a rail passenger car, railroad locomotive, railroad*
15 *freight car, railroad caboose, or a railroad car de-*
16 *scribed in section 242 or covered under this title.*

17 *SEC. 302. PROHIBITION OF DISCRIMINATION BY PUBLIC ACCOM-*
18 *MODATIONS.*
19 *(a) GENERAL RULE.—No individual shall be discrimi-*
20 *nated against on the basis of disability in the full and equal*
21 *enjoyment of the goods, services, facilities, privileges, advan-*
22 *tages, or accommodations of any place of public accommoda-*
23 *tion by any person who owns, leases (or leases to), or operates*
24 *a place of public accommodation.*
25 *(b) CONSTRUCTION.—*

COMMENTS

(g) The House amendment substitutes the term "specified public transportation" for the term "public transportation" with no change in the definition.

(h) The House amendment, but not the Senate bill, defines the term "vehicle" as not including a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 242 or covered under title III.

46. Entities subject to the prohibitions against discrimination.

The Senate bill specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

The House amendment clarifies that this prohibition applies to any person who owns, leases (or leases to), or operates a place of public accommodation.

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SENATE BILL

18 (1) GENERAL PROHIBITION.—
19 (A) ACTIVITIES.—
20 (i) DENIAL OF PARTICIPATION.—It
21 shall be discriminatory to subject an individ-
22 ual or class of individuals on the basis of a
23 disability or disabilities of such individual or
24 class, directly, or through contractual, licens-
25 ing, or other arrangements, to a denial of the

1 opportunity of the individual or class to par-
2 ticipate in or benefit from the goods, serv-
3 ices, facilities, privileges, advantages, and ac-
4 commodations of an entity.
5 (ii) PARTICIPATION IN UNEQUAL BENE-
6 FIT.—It shall be discriminatory to afford an
7 individual or class of individuals, on the basis
8 of a disability or disabilities of such individ-
9 ual or class, directly, or through contractual,
10 licensing, or other arrangements with the op-
11 portunity to participate in or benefit from a
12 good, service, facility, privilege, advantage,
13 and accommodation that is not equal to that
14 afforded to other individuals.
15 (iii) SEPARATE BENEFIT.—It shall be
16 discriminatory to provide an individual or
17 class of individuals, on the basis of a disabil-

HOUSE AMENDMENT

1 *(1) GENERAL PROHIBITION.—*
2 *(A) ACTIVITIES.—*
3 *(i) DENIAL OF PARTICIPATION.—It*
4 *shall be discriminatory to subject an individ-*
5 *ual or class of individuals on the basis of a*
6 *disability or disabilities of such individual or*
7 *class, directly, or through contractual, licens-*
8 *ing, or other arrangements, to a denial of the*
9 *opportunity of the individual or class to par-*
10 *ticipate in or benefit from the goods, services,*
11 *facilities, privileges, advantages, or accommo-*
12 *dations of an entity.*
13 *(ii) PARTICIPATION IN UNEQUAL BEN-*
14 *EFIT.—It shall be discriminatory to afford*
15 *an individual or class of individuals, on the*
16 *basis of a disability or disabilities of such*
17 *individual or class, directly, or through con-*
18 *tractual, licensing, or other arrangements*
19 *with the opportunity to participate in or ben-*
20 *efit from a good, service, facility, privilege,*
21 *advantage, or accommodation that is not*
22 *equal to that afforded to other individuals.*
23 *(iii) SEPARATE BENEFIT.—It shall be*
24 *discriminatory to provide an individual or*
25 *class of individuals, on the basis of a disabil-*

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SENATE BILL

18 ity or disabilities of such individual or class,
19 directly, or through contractual, licensing, or
20 other arrangements with a good, service, fa-
21 cility, privilege, advantage, or accommoda-
22 tion that is different or separate from that
23 provided to other individuals, unless such
24 action is necessary to provide the individual
25 or class of individuals with a good, service,

1 facility, privilege, advantage, or accommoda-
2 tion, or other opportunity that is as effective
3 as that provided to others.

4 (B) INTEGRATED SETTINGS.—Goods, facili-
5 ties, privileges, advantages, accommodations, and
6 services shall be afforded to an individual with a
7 disability in the most integrated setting appropri-
8 ate to the needs of the individual.
9 (C) OPPORTUNITY TO PARTICIPATE.—Not-
10 withstanding the existence of separate or different

HOUSE AMENDMENT

1 *ity or disabilities of such individual or class,*
2 *directly, or through contractual, licensing, or*
3 *other arrangements with a good, service, fa-*
4 *cility, privilege, advantage, or accommoda-*
5 *tion that is different or separate from that*
6 *provided to other individuals, unless such*
7 *action is necessary to provide the individual*
8 *or class of individuals with a good, service,*
9 *facility, privilege, advantage, or accommoda-*
10 *tion, or other opportunity that is as effective*
11 *as that provided to others.*
12 *(iv) INDIVIDUAL OR CLASS OF INDI-*
13 *VIDUALS.— For purposes of clauses (i)*
14 *through (iii) of this subparagraph, the term*
15 *"individual or class of individuals" refers to*
16 *the clients or customers of the covered public*
17 *accommodation that enters into the contrac-*
18 *tual, licensing or other arrangement.*
19 *(B) INTEGRATED SETTINGS.—Goods, serv-*
20 *ices, facilities, privileges, advantages, and accom-*
21 *modations shall be afforded to an individual with*
22 *a disability in the most integrated setting appro-*
23 *priate to the needs of the individual.*
24 *(C) OPPORTUNITY TO PARTICIPATE.—Not-*
25 *withstanding the existence of separate or different*

COMMENTS

47. Contract liability.

The Senate bill specifies that covered entities cannot engage in discrimination indirectly through contracts with other parties.

The House amendment specifies that covered entities are only liable in contractual arrangements for discrimination against the entity's own customers and clients and not the contractor's customers and clients.

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SENATE BILL		HOUSE AMENDMENT	COMMENTS
11	programs or activities provided in accordance with	1 *programs or activities provided in accordance with*	
12	this section, an individual with a disability shall	2 *this section, an individual with a disability shall*	
13	not be denied the opportunity to participate in	3 *not be denied the opportunity to participate in*	
14	such programs or activities that are not separate	4 *such programs or activities that are not separate*	
15	or different.	5 *or different.*	
16	(D) ADMINISTRATIVE METHODS.—An indi-	6 *(D) ADMINISTRATIVE METHODS.—An indi-*	
17	vidual or entity shall not, directly or through con-	7 *vidual or entity shall not, directly or through con-*	
18	tractual or other arrangements, utilize standards	8 *tractual or other arrangements, utilize standards*	
19	or criteria or methods of administration—	9 *or criteria or methods of administration—*	
20	(i) that have the effect of discriminating	10 *(i) that have the effect of discriminating*	
21	on the basis of disability; or	11 *on the basis of disability; or*	
22	(ii) that perpetuate the discrimination of	12 *(ii) that perpetuate the discrimination of*	
23	others who are subject to common adminis-	13 *others who are subject to common adminis-*	
24	trative control.	14 *trative control.*	
1	(E) ASSOCIATION.—It shall be discriminato-	15 *(E) ASSOCIATION.—It shall be discrimina-*	
2	ry to exclude or otherwise deny equal goods,	16 *tory to exclude or otherwise deny equal goods,*	
3	services, facilities, privileges, advantages, and ac-	17 *services, facilities, privileges, advantages, accom-*	
4	commodations, or other opportunities to an indi-	18 *modations, or other opportunities to an individual*	
5	vidual or entity because of the known disability of	19 *or entity because of the known disability of an in-*	
6	an individual with whom the individual or entity	20 *dividual with whom the individual or entity is*	
7	is known to have a relationship or association.	21 *known to have a relationship or association.*	
8	(2) SPECIFIC PROHIBITIONS.—	22 *(2) SPECIFIC PROHIBITIONS.—*	
9	(A) DISCRIMINATION.—As used in subsec-	23 *(A) DISCRIMINATION.—For purposes of*	
10	tion (a), the term "discrimination" shall include—	24 *subsection (a), discrimination includes—*	

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SENATE BILL

11 (i) the imposition or application of eligi-
12 bility criteria that screen out or tend to
13 screen out an individual with a disability or
14 any class of individuals with disabilities from
15 fully and equally enjoying any goods, serv-
16 ices, facilities, privileges, advantages, and ac-
17 commodations, unless such criteria can be
18 shown to be necessary for the provision of
19 the goods, services, facilities, privileges, ad-
20 vantages, or accommodations being offered;
21 (ii) a failure to make reasonable modifi-
22 cations in policies, practices, procedures,
23 when such modifications are necessary to
24 afford such goods, services, facilities, privi-
25 leges, advantages, and accommodations to

1 individuals with disabilities, unless the entity
2 can demonstrate that making such modifica-
3 tions would fundamentally alter the nature of
4 such goods, services, facilities, privileges, ad-
5 vantages, and accommodations;
6 (iii) a failure to take such steps as may
7 be necessary to ensure that no individual
8 with a disability is excluded, denied services,
9 segregated or otherwise treated differently
10 than other individual because of the absence

HOUSE AMENDMENT

1 *(i) the imposition or application of eligi-*
2 *bility criteria that screen out or tend to*
3 *screen out an individual with a disability or*
4 *any class of individuals with disabilities*
5 *from fully and equally enjoying any goods,*
6 *services, facilities, privileges, advantages, or*
7 *accommodations, unless such criteria can be*
8 *shown to be necessary for the provision of the*
9 *goods, services, facilities, privileges, advan-*
10 *tages, or accommodations being offered;*
11 *(ii) a failure to make reasonable modifi-*
12 *cations in policies, practices, or procedures,*
13 *when such modifications are necessary to*
14 *afford such goods, services, facilities, privi-*
15 *leges, advantages, or accommodations to indi-*
16 *viduals with disabilities, unless the entity*
17 *can demonstrate that making such modifica-*
18 *tions would fundamentally alter the nature*
19 *of such goods, services, facilities, privileges,*
20 *advantages, or accommodations;*
21 *(iii) a failure to take such steps as may*
22 *be necessary to ensure that no individual*
23 *with a disability is excluded, denied services,*
24 *segregated or otherwise treated differently*
25 *than other individuals because of the absence*

COMMENTS

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11	of auxiliary aids and services, unless the	1	*of auxiliary aids and services, unless the*	
12	entity can demonstrate that taking such steps	2	*entity can demonstrate that taking such steps*	
13	would fundamentally alter the nature of the	3	*would fundamentally alter the nature of the*	
14	good, service, facility, privilege, advantage,	4	*good, service, facility, privilege, advantage,*	
15	or accommodation being offered or would	5	*or accommodation being offered or would*	
16	result in undue burden;	6	*result in an undue burden;*	**48. Readily achievable changes to existing barriers.**
17	(iv) a failure to remove architectural	7	*(iv) a failure to remove architectural*	The House amendment adds rail passenger cars used by an establishment for transporting individuals to the list of vehicles from which barriers must be removed.
18	barriers, and communication barriers that are	8	*barriers, and communication barriers that*	
19	structural in nature, in existing facilities, and	9	*are structural in nature, in existing facili-*	
20	transportation barriers in existing vehicles	10	*ties, and transportation barriers in existing*	
21	used by an establishment for transporting in-	11	*vehicles and rail passenger cars used by an*	
22	dividuals (not including barriers that can only	12	*establishment for transporting individuals*	
23	be removed through the retrofitting of vehi-	13	*(not including barriers that can only be re-*	
24	cles by the installation of a hydraulic or	14	*moved through the retrofitting of vehicles or*	
		15	*rail passenger cars by the installation of a*	
1	other lift), where such removal is readily	16	*hydraulic or other lift), where such removal*	
2	achievable;	17	*is readily achievable; and*	
3	(v) where an entity can demonstrate	18	*(v) where an entity can demonstrate*	
4	that the removal of a barrier under clause	19	*that the removal of a barrier under clause*	
5	(iv) is not readily achievable, a failure to	20	*(iv) is not readily achievable, a failure to*	
6	make such goods, services, facilities, privi-	21	*make such goods, services, facilities, privi-*	
7	leges, advantages, and accommodations	22	*leges, advantages, or accommodations avail-*	
8	available through alternative methods if such	23	*able through alternative methods if such*	
9	methods are readily achievable;	24	*methods are readily achievable.*	
16	(B) FIXED ROUTE SYSTEM.—	25	*(B) FIXED ROUTE SYSTEM.—*	

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SENATE BILL

17 (i) ACCESSIBILITY.—It shall be consid-
18 ered discrimination for an entity that uses a
19 vehicle for a fixed route system to transport
20 individuals not covered under section 203 or
21 304, to purchase or lease a bus or a vehicle
22 that is capable of carrying in excess of 16
23 passengers, for which solicitations are made
24 later than 30 days after the effective date of
25 this Act, that is not readily accessible to and

1 usable by individuals with disabilities (includ-
2 ing individuals who use wheelchairs), except
3 that over-the-road buses shall be subject to
4 section 304(b)(4) and section 305.
5 (ii) EQUIVALENT SERVICE.—If such
6 entity purchases or leases a vehicle carrying
7 16 or less passengers after the effective date
8 of this title that is not readily accessible to
9 or usable by individuals with disabilities, it
10 shall be discriminatory for such entity to fail
11 to operate a system that, when viewed in its
12 entirety, ensures a level of service to individ-
13 uals with disabilities, including individuals

HOUSE AMENDMENT

1 *(i) ACCESSIBILITY.—It shall be con-*
2 *sidered discrimination for a private entity*
3 *which operates a fixed route system and*
4 *which is not subject to section 304 to pur-*
5 *chase or lease a vehicle with a seating capac-*
6 *ity in excess of 16 passengers (including the*
7 *driver) for use on such system, for which a*
8 *solicitation is made after the 30th day fol-*
9 *lowing the effective date of this subpara-*
10 *graph, that is not readily accessible to and*
11 *usable by individuals with disabilities, in-*
12 *cluding individuals who use wheelchairs.*
13 *(ii) EQUIVALENT SERVICE.—If a pri-*
14 *vate entity which operates a fixed route*
15 *system and which is not subject to section*
16 *304 purchases or leases a vehicle with a*
17 *seating capacity of 16 passengers or less (in-*
18 *cluding the driver) for use on such system*
19 *after the effective date of this subparagraph*
20 *that is not readily accessible to or usable by*
21 *individuals with disabilities, it shall be con-*
22 *sidered discrimination for such entity to fail*
23 *to operate such system so that, when viewed*
24 *in its entirety, such system ensures a level of*
25 *service to individuals with disabilities, in-*

COMMENTS

49. Fixed route and demand responsive systems.

With slightly different wording, the Senate bill and the House amendment specify standards for fixed route and demand responsive systems operated by private entities.

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14 who use wheelchairs, equivalent to the level
15 of service provided to the general public.
16 (C) DEMAND RESPONSIVE SYSTEM.—As
17 used in subsection (a), the term "discrimination"
18 shall include, in the case of a covered entity that
19 uses vehicles in a demand responsive system to
20 transport individuals not covered under section
21 203 or 304, an incident in which—
22 (i) such entity purchases or leases a ve-
23 hicle carrying 16 or less passengers after the
24 effective date of this title, a failure to operate
25 a system that, when viewed in its entirety,
1 ensures a level of service to individuals with
2 disabilities, including individuals who use
3 wheelchairs, equivalent to the level of serv-
4 ice provided to the general public; and
5 (ii) such entity purchases or leases a bus
6 or a vehicle that can carry in excess of 16
7 passengers for which solicitations are made
8 later than 30 days after the effective date of
9 this Act, that is not readily accessible to and
10 usable by individuals with disabilities (includ-
11 ing individuals who use wheelchairs) unless
12 such entity can demonstrate that such
13 system, when viewed in its entirety, already

HOUSE AMENDMENT

1 *cluding individuals who use wheelchairs,*
2 *equivalent to the level of service provided to*
3 *individuals without disabilities.*
4 *(C) DEMAND RESPONSIVE SYSTEM.—For*
5 *purposes of subsection (a), discrimination in-*
6 *cludes—*
7 *(i) a failure of a private entity which*
8 *operates a demand responsive system and*
9 *which is not subject to section 304 to operate*
10 *such system so that, when viewed in its en-*
11 *tirety, such system ensures a level of service*
12 *to individuals with disabilities, including in-*
13 *dividuals who use wheelchairs, equivalent to*
14 *the level of service provided to individuals*
15 *without disabilities; and*
16 *(ii) the purchase or lease by such entity*
17 *for use on such system of a vehicle with a*
18 *seating capacity in excess of 16 passengers*
19 *(including the driver), for which solicitations*
20 *are made after the 30th day following the ef-*
21 *fective date of this subparagraph, that is not*
22 *readily accessible to and usable by individ-*
23 *uals with disabilities (including individuals*
24 *who use wheelchairs) unless such entity can*
25 *demonstrate that such system, when viewed*

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14 provides a level of service to individuals with
15 disabilities equivalent to that provided to the
16 general public, except that over-the-road
17 buses shall be subject to section 304(b)(4)
18 and section 305.

HOUSE AMENDMENT

1 *in its entirety, provides a level of service to*
2 *individuals with disabilities equivalent to*
3 *that provided to individuals without*
4 *disabilities.*
5 *(D) OVER-THE-ROAD BUSES.—*
6 *(i) LIMITATION ON APPLICABILITY.—*
7 *Subparagraphs (B) and (C) do not apply to*
8 *over-the-road buses.*
9 *(ii) ACCESSIBILITY REQUIRE-*
10 *MENTS.—For purposes of subsection (a), dis-*
11 *crimination includes (I) the purchase or*
12 *lease of an over-the-road bus which does not*
13 *comply with the regulations issued under*
14 *section 306(a)(2) by a private entity which*
15 *provides transportation of individuals and*
16 *which is not primarily engaged in the busi-*
17 *ness of transporting people, and (II) any*
18 *other failure of such entity to comply with*
19 *such regulations.*
20 *(3) SPECIFIC CONSTRUCTION.—Nothing in this*
21 *title shall require an entity to permit an individual to*
22 *participate in or benefit from the goods, services, facili-*
23 *ties, privileges, advantages and accommodations of*
24 *such entity where such individual poses a direct threat*
25 *to the health or safety of others. The term "direct*

COMMENTS

For the applicable comments, see page 87, column 3.

50. Health and safety.

The House amendment, but not the Senate bill, specifies that nothing in title III requires an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "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 and services.

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19 SEC. 303. NEW CONSTRUCTION IN PUBLIC ACCOMMODATIONS
20 AND POTENTIAL PLACES OF EMPLOYMENT.
21 (a) APPLICATION OF TERM.—Except as provided in
22 subsection (b), as applied to a—
23 (1) public accommodation; and
24 (2) potential place of employment;
1 the term "discrimination" as used in section 302(a) shall
2 mean a failure to design and construct facilities for first occu-
3 pancy later than 30 months after the date of enactment of
4 this Act that are readily accessible to and usable by individ-
5 uals with disabilities, except where an entity can demonstrate
6 that it is structurally impracticable to meet the requirements
7 of such subsection in accordance with standards set forth or
8 incorporated by reference in regulations issued under this
9 title.

10 (vi) with respect to a facility or part
11 thereof that is altered by, on behalf of, or for
12 the use of an establishment in a manner that
13 affects or could affect the usability of the fa-
14 cility or part thereof, a failure to make alter-
15 ations in such a manner that, to the maxi-
16 mum extent feasible, the altered portions of
17 the facility are readily accessible to and
18 usable by individuals with disabilities, includ-
19 ing individuals who use wheelchairs, and
20 where the entity is undertaking major struc-
21 tural alterations that affect or could affect
22 the usability of the facility (as defined under

HOUSE AMENDMENT

1 *threat" means a significant risk to the health or safety*
2 *of others that cannot be eliminated by a modification of*
3 *policies, practices, or procedures or by the provision of*
4 *auxiliary aids or services.*
5 *SEC. 303. NEW CONSTRUCTION AND ALTERATIONS IN PUBLIC*
6 *ACCOMMODATIONS AND COMMERCIAL*
7 *FACILITIES.*
8 *(a) APPLICATION OF TERM.—Except as provided in*
9 *subsection (b), as applied to public accommodations and com-*
10 *mercial facilities, discrimination for purposes of section*
11 *302(a) includes—*
12 *(1) a failure to design and construct facilities for*
13 *first occupancy later than 30 months after the date of*
14 *enactment of this Act that are readily accessible to and*
15 *usable by individuals with disabilities, except where an*
16 *entity can demonstrate that it is structurally impracti-*
17 *cable to meet the requirements of such subsection in ac-*
18 *cordance with standards set forth or incorporated by*
19 *reference in regulations issued under this title; and*
20 *(2) with respect to a facility or part thereof that is*
21 *altered by, on behalf of, or for the use of an establish-*
22 *ment in a manner that affects or could affect the*
23 *usability of the facility or part thereof, a failure to*
24 *make alterations in such a manner that, to the maxi-*
25 *mum extent feasible, the altered portions of the facility*

COMMENTS

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51. New construction and alterations to existing facilities.

(a) The Senate bill includes in separate sections the requirements that alterations and new construction be readily accessible to and usable by individuals with disabilities.

The House amendment places these two requirements in the same section.

(b) The Senate bill specifies that when major structural alterations are made to public accommodations operated by private entities, the alterations as well as the path of travel and facilities must be accessible to individuals with disabilities to the maximum extent feasible.

The House amendment substitutes the phrase "an alteration that affects or could affect usability or access to an area of the facility containing a primary function," for the Senate language, "major structural alteration," and adds that the alterations to the path of travel and facilities serving the altered area should "not be disproportionate" to the cost overall alterations in terms of the cost and scope of the overall alterations.

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23 criteria established by the Attorney General),
24 the entity shall also make the alterations in
25 such a manner that, to the maximum extent
1 feasible, the path of travel to the altered
2 area and the bathrooms, telephones, and
3 drinking fountains serving the remodeled
4 area, are readily accessible to and usable by
5 individuals with disabilities, except that this
6 paragraph shall not be construed to require
7 the installation of an elevator for facilities
8 that are less than three stories or that have
9 less than 3,000 square feet per story unless
10 the building is a shopping center, a shopping
11 mall, or the professional office of a health
12 care provider or unless the Attorney General
13 determines that a particular category of such
14 facilities requires the installation of elevators
15 based on the usage of such facilities.

10 (b) ELEVATOR.—Subsection (a) shall not be construed
11 to require the installation of an elevator for facilities that are
12 less than three stories or have less than 3,000 square feet per
13 story unless the building is a shopping center, a shopping
14 mall, or the professional office of a health care provider or
15 unless the Attorney General determines that a particular cat-
16 egory of such facilities requires the installation of elevators
17 based on the usage of such facilities.

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1 are readily accessible to and usable by individuals
2 with disabilities, including individuals who use wheel-
3 chairs. Where the entity is undertaking an alteration
4 that affects or could affect usability of or access to an
5 area of the facility containing a primary function, the
6 entity shall also make the alterations in such a manner
7 that, to the maximum extent feasible, the path of travel
8 to the altered area and the bathrooms, telephones, and
9 drinking fountains serving the altered area, are readily
10 accessible to and usable by individuals with disabilities
11 where such alterations to the path of travel or the bath-
12 rooms, telephones, and drinking fountains serving the
13 altered area are not disproportionate to the overall al-
14 terations in terms of cost and scope (as determined
15 under criteria established by the Attorney General).

16 (b) ELEVATOR.—Subsection (a) shall not be construed
17 to require the installation of an elevator for facilities that are
18 less than three stories or have less than 3,000 square feet per
19 story unless the building is a shopping center, a shopping
20 mall, or the professional office of a health care provider or
21 unless the Attorney General determines that a particular cat-
22 egory of such facilities requires the installation of elevators
23 based on the usage of such facilities.

COMMENTS

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18 SEC. 304. PROHIBITION OF DISCRIMINATION IN PUBLIC
19 TRANSPORTATION SERVICES PROVIDED BY
20 PRIVATE ENTITIES.
21 (a) GENERAL RULE.—No individual shall be discrimi-
22 nated against on the basis of disability in the full and equal
23 enjoyment of public transportation services provided by a pri-
24 vately operated entity that is primarily engaged in the busi-
25 ness of transporting people, but is not in the principal busi-
1 ness of providing air transportation, and whose operations
2 affect commerce.
3 (b) CONSTRUCTION.—As used in subsection (a), the
4 term "discrimination against" includes—
5 (1) the imposition or application by an entity of
6 eligibility criteria that screen out or tend to screen out
7 an individual with a disability or any class of individ-
8 uals with disabilities from fully enjoying the public
9 transportation services provided by the entity;
10 (2) the failure of an entity to—
11 (A) make reasonable modifications consistent
12 with those required under section 302(b)(2)(A)(ii);
13 (B) provide auxiliary aids and services con-
14 sistent with the requirements of section
15 302(b)(2)(A)(iii); and

HOUSE AMENDMENT

1 *SEC. 304. PROHIBITION OF DISCRIMINATION IN SPECIFIED*
2 *PUBLIC TRANSPORTATION SERVICES PROVIDED*
3 *BY PRIVATE ENTITIES.*
4 *(a) GENERAL RULE.—No individual shall be discrimi-*
5 *nated against on the basis of disability in the full and equal*
6 *enjoyment of specified public transportation services provided*
7 *by a private entity that is primarily engaged in the business*
8 *of transporting people and whose operations affect commerce.*
9 *(b) CONSTRUCTION.—For purposes of subsection (a),*
10 *discrimination includes—*
11 *(1) the imposition or application by a entity de-*
12 *scribed in subsection (a) of eligibility criteria that*
13 *screen out or tend to screen out an individual with a*
14 *disability or any class of individuals with disabilities*
15 *from fully enjoying the specified public transportation*
16 *services provided by the entity, unless such criteria can*
17 *be shown to be necessary for the provision of the serv-*
18 *ices being offered;*
19 *(2) the failure of such entity to—*
20 *(A) make reasonable modifications consistent*
21 *with those required under section 302(b)(2)(A)(ii);*
22 *(B) provide auxiliary aids and services con-*
23 *sistent with the requirements of section*
24 *302(b)(2)(A)(iii); and*

COMMENTS

52. Discrimination and construction.

With slightly different wording, the Senate bill and the House amendment specify the general prohibition of discrimination and specific constructions of such discrimination.

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16 (C) remove barriers consistent with the re-
17 quirements of section 302(b)(2)(A) (iv), (v), and
18 (vi);
19 (3) the purchase or lease of a new vehicle (other
20 than an automobile or an over-the-road bus) that is to
21 be used to provide public transportation services, and
22 for which a solicitation is made later than 30 days
23 after the date of enactment of this Act, that is not
24 readily accessible to and usable by individuals with dis-
25 abilities, including individuals who use wheelchairs

1 (except in the case of a vehicle used in a demand re-
2 sponse system, in which case the new vehicle need not
3 be readily accessible to and usable by individuals with
4 disabilities if the entity can demonstrate that such
5 system, when viewed in its entirety, provides a level of
6 service to individuals with disabilities equivalent to the
7 level of service provided to the general public); and
8 (4) the purchase or lease of a new over-the-road
9 bus that is used to provide public transportation serv-
10 ices and for which a solicitation is made later than 7
11 years after the date of enactment of this Act for small
12 providers (as defined by the Secretary of Transporta-
13 tion) and 6 years for other providers, except as provid-
14 ed in section 305(d), that is not readily accessible to
15 and usable by individuals with disabilities, including in-
16 dividuals who use wheelchairs.

HOUSE AMENDMENT

1 *(C) remove barriers consistent with the re-*
2 *quirements of section 302(b)(2)(A) and with the*
3 *requirements of section 303(a)(2);*
4 *(3) the purchase or lease by such entity of a new*
5 *vehicle (other than an automobile, a van with a seating*
6 *capacity of less than 8 passengers, including the*
7 *driver, or an over-the-road bus) which is to be used to*
8 *provide specified public transportation and for which a*
9 *solicitation is made after the 30th day following the ef-*
10 *fective date of this section, that is not readily accessible*
11 *to and usable by individuals with disabilities, includ-*
12 *ing individuals who use wheelchairs; except that the*
13 *new vehicle need not be readily accessible to and*
14 *usable by such individuals if the new vehicle is to be*
15 *used solely in a demand responsive system and if the*
16 *entity can demonstrate that such system, when viewed*
17 *in its entirety, provides a level of service to such indi-*
18 *viduals equivalent to the level of service provided to the*
19 *general public;*
20 *(4)(A) the purchase or lease by such entity of an*
21 *over-the-road bus which does not comply with the regu-*
22 *lations issued under section 306(a)(2); and*
23 *(B) any other failure of such entity to comply*
24 *with such regulations; and*

COMMENTS

53. New vehicles other than new rail, passenger cars.

The Senate bill specifies that new vehicles other than automobiles purchased by a private entity in the principal business of transporting people must be readily accessible to and usable by individuals with disabilities.

The House amendment includes a special rule for vans with a seating capacity of less than 8 passengers. Such vans need not be accessible if the van is to be used solely in a demand responsive system and if the private entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the level of service provided to the general public.

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1 *(5) the purchase or lease by such entity of a new*
2 *van with a seating capacity of less than 8 passengers,*
3 *including the driver, which is to be used to provide*
4 *specified public transportation and for which a solicita-*
5 *tion is made after the 30th day following the effective*
6 *date of this section that is not readily accessible to or*
7 *usable by individuals with disabilities, including indi-*
8 *viduals who use wheelchairs; except that the new van*
9 *need not be readily accessible to and usable by such*
10 *individuals if the entity can demonstrate that the*
11 *system for which the van is being purchased or leased,*
12 *when viewed in its entirety, provides a level of service*
13 *to such individuals equivalent to the level of service*
14 *provided to the general public;*
15 *(6) the purchase or lease by such entity of a new*
16 *rail passenger car that is to be used to provide specified*
17 *public transportation, and for which a solicitation is*
18 *made later than 30 days after the effective date of this*
19 *paragraph, that is not readily accessible to and usable*
20 *by individuals with disabilities, including individuals*
21 *who use wheelchairs; and*
22 *(7) the remanufacture by such entity of a rail*
23 *passenger car that is to be used to provide specified*
24 *public transportation so as to extend its usable life for*
25 *10 years or more, or the purchase or lease by such*

COMMENTS

54. New rail passenger cars.

The Senate bill specifies that all new vehicles purchased by a private entity in the principal business of transporting people must be readily accessible.

The House amendment includes a separate provision applicable to new rail passenger cars purchased by such entities and includes the same standard set out in the Senate bill.

55. Remanufactured rail passenger cars.

The House amendment, but not the Senate bill, specifies that the remanufacture of a rail passenger car so as to extend its usable life for 10 years or more must be remanufactured in a manner to make it readily accessible "to the maximum extent feasible."

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1 *entity of such a rail car, unless the rail car, to the*
2 *maximum extent feasible, is made readily accessible to*
3 *and usable by individuals with disabilities, including*
4 *individuals who use wheelchairs.*
5 *(c) HISTORICAL OR ANTIQUATED CARS.—*
6 *(1) EXCEPTION.—To the extent that compliance*
7 *with subsection (b)(2)(C) or (b)(7) would significantly*
8 *alter the historic or antiquated character of a historical*
9 *or antiquated rail passenger car, or a rail station*
10 *served exclusively by such cars, or would result in vio-*
11 *lation of any rule, regulation, standard, or order issued*
12 *by the Secretary of Transportation under the Federal*
13 *Railroad Safety Act of 1970, such compliance shall*
14 *not be required.*
15 *(2) DEFINITION.—As used in this subsection, the*
16 *term "historical or antiquated rail passenger car"*
17 *means a rail passenger car—*
18 *(A) which is not less than 30 years old at*
19 *the time of its use for transporting individuals;*
20 *(B) the manufacturer of which is no longer*
21 *in the business of manufacturing rail passenger*
22 *cars; and*
23 *(C) which—*
24 *(i) has a consequential association with*
25 *events or persons significant to the past; or*

56. Historical or antiquated rail passenger cars and stations serving such cars.

The House amendment, but not the Senate bill, specifies that historical or antiquated vehicles that are currently in use or are remanufactured by private entities need not be made accessible to the extent that compliance would significantly alter the historic or antiquated character of such a car or rail station served exclusively by such cars or would result in a violation of safety rules issued by the Secretary of Transportation.

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8 (3) the cost of providing accessibility to over-the-
9 road buses to individuals with disabilities, including
10 recent technological and cost saving developments in
11 equipment and devices providing such accessibility;
12 (4) possible design changes in over-the-road buses
13 that could enhance such accessibility; and
14 (5) the impact of accessibility requirements on the
15 continuation of inter-city bus service by over-the-road
16 buses, with particular consideration of impact on rural
17 service.
18 (c) ADVISORY COMMITTEE.—In conducting the study
19 required by subsection (a), the Office of Technology Assess-
20 ment shall establish an advisory committee, which shall con-
21 sist of—
22 (1) members selected from among private opera-
23 tors using over-the-road buses, bus manufacturers, and
24 lift manufacturers;

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1 *(3) The effectiveness of various methods of provid-*
2 *ing accessibility to such buses and service to individ-*
3 *uals with disabilities.*
4 *(4) The cost of providing accessible over-the-road*
5 *buses and bus service to individuals with disabilities,*
6 *including consideration of recent technological and cost*
7 *saving developments in equipment and devices.*
8 *(5) Possible design changes in over-the-road buses*
9 *that could enhance accessibility, including the installa-*
10 *tion of accessible restrooms which do not result in a*
11 *loss of seating capacity.*
12 *(6) The impact of accessibility requirements on*
13 *the continuation of over-the-road bus service, with par-*
14 *ticular consideration of the impact of such require-*
15 *ments on such service to rural communities.*
16 *(c) ADVISORY COMMITTEE.—In conducting the study*
17 *required by subsection (a), the Office of Technology Assess-*
18 *ment shall establish an advisory committee, which shall*
19 *consist of—*
20 *(1) members selected from among private opera-*
21 *tors and manufacturers of over-the-road buses;*
22 *(2) members selected from among individuals with*
23 *disabilities, particularly individuals who use wheel-*
24 *chairs, who are potential riders of such buses; and*

COMMENTS

In the interim, regulations issued by the Secretary may not require any structural changes to over-the-road buses in order to provide access to individuals who use wheelchairs and may not require the purchase of boarding assistance devices to provide access.

With respect to the study, the purpose of the study is revised to include a determination of the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service and the most cost effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options. The study must analyze, among other things, the effectiveness of various methods of providing acessibility to such buses and service to individuals with disabilities.

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1 (2) members selected from among individuals with
2 disabilities, particularly individuals who use wheel-
3 chairs, who are potential riders of such buses; and
4 (3) members selected for their technical expertise
5 on issues included in the study.
6 The number of members selected under each of paragraphs
7 (1) and (2) shall be equal, and the total number of members
8 selected under paragraphs (1) and (2) shall exceed the
9 number of members selected under paragraph (3).
10 (d) DEADLINE.—The study required by subsection (a),
11 along with recommendations by the Office of Technology As-
12 sessment, including any policy options for legislative action,
13 shall be submitted to the President and the Congress within
14 36 months after the date of enactment of this Act. If the
15 President, after reviewing the study, determines that compli-
16 ance with the requirements of section 304(a) on or before the
17 applicable deadlines specified in section 304(b)(4) will result
18 in a significant reduction in intercity bus service, each such
19 deadline shall be extended by one additional year.
20 (e) REVIEW.—In developing the study required by sub-
21 section (a), the Office of Technology Assessment shall pro-
22 vide a preliminary draft of such study to the Architectural
23 and Transportation Barriers Compliance Board established
24 under section 502 of the Rehabilitation Act of 1973 (29
25 U.S.C. 792). The Board shall have an opportunity to com-

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1 *(3) members selected for their technical expertise*
2 *on issues included in the study, including manufactur-*
3 *ers of boarding assistance equipment and devices.*
4 *The number of members selected under each of paragraphs*
5 *(1) and (2) shall be equal, and the total number of members*
6 *selected under paragraphs (1) and (2) shall exceed the*
7 *number of members selected under paragraph (3).*
8 *(d) DEADLINE.—The study required by subsection (a),*
9 *along with recommendations by the Office of Technology As-*
10 *sessment, including any policy options for legislative action,*
11 *shall be submitted to the President and Congress within 36*
12 *months after the date of the enactment of this Act. If the*
13 *President determines that compliance with the regulations*
14 *issued pursuant to section 306(a)(2)(B) on or before the ap-*
15 *plicable deadlines specified in section 306(a)(2)(B) will*
16 *result in a significant reduction in intercity over-the-road bus*
17 *service, the President shall extend each such deadline by 1*
18 *year.*
19 *(e) REVIEW.—In developing the study required by sub-*
20 *section (a), the Office of Technology Assessment shall provide*
21 *a preliminary draft of such study to the Architectural and*
22 *Transportation Barriers Compliance Board established*
23 *under section 502 of the Rehabilitation Act of 1973 (29*
24 *U.S.C. 792). The Board shall have an opportunity to com-*
25 *ment on such draft study, and any such comments by the*

COMMENTS

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1 ment on such draft study, and any such comments by the
2 Board made in writing within 120 days after the Board's
3 receipt of the draft study shall be incorporated as part of the
4 final study required to be submitted under subsection (d).
5 SEC. 306. REGULATIONS.
6 (a) ACCESSIBILITY STANDARDS.—Not later than 1
7 year after the date of enactment of this Act, the Secretary of
8 Transportation shall issue regulations in an accessible format
9 that shall include standards applicable to facilities and vehi-
10 cles covered under section 302(b)(2) (B) and (C) and section
11 304.
12 (b) OTHER PROVISIONS.—Not later than 1 year after
13 the date of enactment of this Act, the Attorney General shall
14 issue regulations in an accessible format to carry out the re-
15 maining provisions of this title not referred to in subsection
16 (a) that include standards applicable to facilities and vehicles
17 covered under section 302.
18 (c) STANDARDS.—Standards included in regulations
19 issued under subsections (a) and (b) shall be consistent with
20 the minimum guidelines and requirements issued by the Ar-
21 chitectural and Transportation Barriers Compliance Board in
22 accordance with section 504.

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1 *Board made in writing within 120 days after the Board's*
2 *receipt of the draft study shall be incorporated as part of the*
3 *final study required to be submitted under subsection (d).*
4 *SEC. 306. REGULATIONS.*
5 *(a) TRANSPORTATION PROVISIONS.—*
6 *(1) GENERAL RULE.—Not later than 1 year after*
7 *the date of the enactment of this Act, the Secretary of*
8 *Transportation shall issue regulations in an accessible*
9 *format to carry out sections 302(b)(2) (B) and (C) and*
10 *to carry out section 304 (other than subsection (b)(4)).*
11 *(2) SPECIAL RULES FOR PROVIDING ACCESS TO*
12 *OVER-THE-ROAD BUSES.—*
13 *(A) INTERIM REQUIREMENTS—*
14 *(i) ISSUANCE.—Not later than 1 year*
15 *after the date of the enactment of this Act,*
16 *the Secretary of Transportation shall issue*
17 *regulations in an accessible format to carry*
18 *out sections 304(b)(4) and 302(b)(2)(D)(ii)*
19 *that require each private entity which uses*
20 *an over-the-road bus to provide transporta-*
21 *tion of individuals to provide accessibility to*
22 *such bus; except that such regulations shall*
23 *not require any structural changes in over-*
24 *the-road buses in order to provide access to*
25 *individuals who use wheelchairs during the*

COMMENTS

For the applicable comments, see page 87, column 3.

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1 *effective period of such regulations and shall*
2 *not require the purchase of boarding assist-*
3 *ance devices to provide access to such*
4 *individuals.*
5 *(ii) EFFECTIVE PERIOD.—The regula-*
6 *tions issued pursuant to this subparagraph*
7 *shall be effective until the effective date of*
8 *the regulations issued under subparagraph*
9 *(B).*
10 *(B) FINAL REQUIREMENT.—*
11 *(i) REVIEW OF STUDY AND INTERIM*
12 *REQUIREMENTS.—The Secretary shall*
13 *review the study submitted under section 305*
14 *and the regulations issued pursuant to sub-*
15 *paragraph (A).*
16 *(ii) ISSUANCE.—Not later than 1 year*
17 *after the date of the submission of the study*
18 *under section 305, the Secretary shall issue*
19 *in an accessible format new regulations to*
20 *carry out sections 304(b)(4) and*
21 *302(b)(2)(D)(ii) that require, taking into ac-*
22 *count the purposes of the study under section*
23 *305 and any recommendations resulting*
24 *from such study, each private entity which*
25 *uses an over-the-road bus to provide trans-*

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1 *portation to individuals to provide accessibil-*
2 *ity to such bus to individuals with disabil-*
3 *ities, including individuals who use wheel-*
4 *chairs.*
5 *(iii) EFFECTIVE PERIOD.—Subject to*
6 *section 305(d), the regulations issued pursu-*
7 *ant to this subparagraph shall take effect—*
8 *(I) with respect to small providers*
9 *of transportation (as defined by the Sec-*
10 *retary), 7 years after the date of the en-*
11 *actment of this Act; and*
12 *(II) with respect to other providers*
13 *of transportation, 6 years after such*
14 *date of enactment.*
15 *(C) LIMITATION ON REQUIRING INSTALLA-*
16 *TION OF ACCESSIBLE RESTROOMS.—The regula-*
17 *tions issued pursuant to this paragraph shall not*
18 *require the installation of accessible restrooms in*
19 *over-the-road buses if such installation would*
20 *result in a loss of seating capacity.*
21 *(3) STANDARDS.—The regulations issued pursu-*
22 *ant to this subsection shall include standards applica-*
23 *ble to facilities and vehicles covered by sections*
24 *302(b)(2) and 304.*

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1 *(b) OTHER PROVISIONS.—Not later than 1 year after*
2 *the date of the enactment of this Act, the Attorney General*
3 *shall issue regulations in an accessible format to carry out*
4 *the provisions of this title not referred to in subsection (a)*
5 *that include standards applicable to facilities and vehicles*
6 *covered under section 302.*
7 *(c) CONSISTENCY WITH ATBCB GUIDELINES.—*
8 *Standards included in regulations issued under subsections*
9 *(a) and (b) shall be consistent with the minimum guidelines*
10 *and requirements issued by the Architectural and Transpor-*
11 *tation Barriers Compliance Board in accordance with sec-*
12 *tion 504 of this Act.*
13 *(d) INTERIM ACCESSIBILITY STANDARDS.—*
14 *(1) FACILITIES.—If final regulations have not*
15 *been issued pursuant to this section, for new construc-*
16 *tion or alterations for which a valid and appropriate*
17 *State or local building permit is obtained prior to the*
18 *issuance of final regulations under this section, and for*
19 *which the construction or alteration authorized by such*
20 *permit begins within one year of the receipt of such*
21 *permit and is completed under the terms of such*
22 *permit, compliance with the Uniform Federal Accessi-*
23 *bility Standards in effect at the time the building*
24 *permit is issued shall suffice to satisfy the requirement*
25 *that facilities be readily accessible to and usable by*

COMMENTS

58. Interim accessibility.

The House amendment, but not the Senate bill, specifies that for new construction and alterations for which a valid and appropriate state or local building permit is obtained prior to the issuance of final regulations and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the accessiblity requirement except that if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines, compliance with such supplemental guidelines shall be necessary. The House amendment also includes interim policies applicable to vehicles and rail passenger cars.

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1 *persons with disabilities as required under section 303,*
2 *except that, if such final regulations have not been*
3 *issued one year after the Architectural and Transporta-*
4 *tion Barriers Compliance Board has issued the supple-*
5 *mental minimum guidelines required under section*
6 *504(a) of this Act, compliance with such supplemental*
7 *minimum guidelines shall be necessary to satisfy the*
8 *requirement that facilities be readily accessible to and*
9 *usable by persons with disabilities prior to issuance of*
10 *the final regulations.*
11 *(2) VEHICLES AND RAIL PASSENGER CARS.—If*
12 *final regulations have not been issued pursuant to this*
13 *section, a private entity shall be considered to have*
14 *complied with the requirements of this title, if any, that*
15 *a vehicle or rail passenger car be readily accessible to*
16 *and usable by individuals with disabilities, if the*
17 *design for such vehicle or car complies with the laws*
18 *and regulations (including the Minimum Guidelines*
19 *and Requirements for Accessible Design and such sup-*
20 *plemental minimum guidelines as are issued under*
21 *section 504(a) of this Act) governing accessibility of*
22 *such vehicles or cars, to the extent that such laws and*
23 *regulations are not inconsistent with this title and*
24 *are in effect at the time such design is substantially*
25 *completed.*

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1 SEC. 307. EXEMPTIONS FOR PRIVATE CLUBS AND RELIGIOUS
2 ORGANIZATIONS.
3 The provisions of this title shall not apply to private
4 clubs or establishments exempted from coverage under title
5 II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or
6 to religious organizations or entities controlled by religious
7 organizations, including places of worship.
8 SEC. 308. ENFORCEMENT.
9 (a) IN GENERAL.—
10 (1) AVAILABILITY OF REMEDIES AND PROCE-
11 DURES.—The remedies and procedures set forth in sec-
12 tion 204 of the Civil Rights Act of 1964 (42 U.S.C.
13 sec. 2000a-3(a)) shall be available to any individual
14 who is being or is about to be subjected to discrimina-
15 tion on the basis of disability in violation of this title.
16 (2) INJUNCTIVE RELIEF.—In the case of viola-
17 tions of section 302(b)(2)(A)(iv) and (vi) and section
18 303(a), injunctive relief shall include an order to alter
19 facilities to make such facilities readily accessible to

HOUSE AMENDMENT

1 SEC. 307. EXEMPTIONS FOR PRIVATE CLUBS AND RELIGIOUS
2 ORGANIZATIONS.
3 The provisions of this title shall not apply to private
4 clubs or establishments exempted from coverage under title II
5 of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to
6 religious organizations or entities controlled by religious or-
7 ganizations, including places of worship.
8 SEC. 308. ENFORCEMENT.
9 (a) IN GENERAL.—
10 (1) AVAILABILITY OF REMEDIES AND PROCE-
11 DURES.—The remedies and procedures set forth in sec-
12 tion 204(a) of the Civil Rights Act of 1964 (42
13 U.S.C. 2000a-3(a)) are the remedies and procedures
14 this title provides to any person who is being subjected
15 to discrimination on the basis of disability in violation
16 of this title or who has reasonable grounds for believing
17 that such person is about to be subjected to discrimina-
18 tion in violation of section 303. Nothing in this section
19 shall require a person with a disability to engage in a
20 futile gesture if such person has actual notice that a
21 person or organization covered by this title does not
22 intend to comply with its provisions.
23 (2) INJUNCTIVE RELIEF.—In the case of viola-
24 tions of sections 302(b)(2)(A)(iv) and section 303(a),
25 injunctive relief shall include an order to alter facili-
26 ties to make such facilities readily accessible to and

COMMENTS

59. **Enforcement in general.**

(a) The Senate bill makes reference to the remedies available to an "individual" under title II of the Civil Rights Act of 1964.

The House amendment substitutes the term "person" for the term "individual" since "person" is used in title II.

(b) The Senate bill specifies that remedies and procedures of the 1964 Civil Rights Act will be available to any individual who is or is about to be subjected to discrimination on the basis of disability.

The House amendment specifies that the remedies and procedures of title II of the 1964 Civil Rights Act shall be the powers, remedies, and procedures title III provides to any person who is being subject to discrimination on the basis of disability in violation of title III or any person who has "reasonable grounds" for believing that he or she is about to be subjected to discrimination with respect to the construction of new or the alteration of existing facilities in an inaccessible manner.

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20 and usable by individuals with disabilities to the extent
21 required by this title. Where appropriate, injunctive
22 relief shall also include requiring the provision of an
23 auxiliary aid or service, modification of a policy, or
24 provision of alternative methods, to the extent required
25 by this title.
26 (b) ENFORCEMENT BY THE ATTORNEY GENERAL.—
1 (1) DENIAL OF RIGHTS.—
2 (A) DUTY TO INVESTIGATE.—The Attorney
3 General shall investigate alleged violations of this
4 title, which shall include undertaking periodic re-
5 views of compliance of covered entities under this
6 title.

HOUSE AMENDMENT

1 *usable by individuals with disabilities to the extent re-*
2 *quired by this title. Where appropriate, injunctive*
3 *relief shall also include requiring the provision of an*
4 *auxiliary aid or service, modification of a policy, or*
5 *provision of alternative methods, to the extent required*
6 *by this title.*
7 *(b) ENFORCEMENT BY THE ATTORNEY GENERAL.—*
8 *(1) DENIAL OF RIGHTS.—*
9 *(A) DUTY TO INVESTIGATE.—*
10 *(i) IN GENERAL.—The Attorney Gen-*
11 *eral shall investigate alleged violations of*
12 *this title, and shall undertake periodic re-*
13 *views of compliance of covered entities under*
14 *this title.*
15 *(ii) ATTORNEY GENERAL CERTIFICA-*
16 *TION.—On the application of a State or*
17 *local government, the Attorney General may,*
18 *in consultation with the Architectural and*
19 *Transportation Barriers Compliance Board,*
20 *and after prior notice and a public hearing*
21 *at which persons, including individuals with*
22 *disabilities, are provided an opportunity to*
23 *testify against such certification, certify that*
24 *a State law or local building code or similar*
25 *ordinance that establishes accessibility re-*

COMMENTS

(c) The House amendment, but not the Senate bill, includes in the legislation the following policy set out in the Senate report: nothing in the enforcement section shall require an individual with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

(d) The House amendment, but not the Senate bill, specifies that state and local governments can apply to the Attorney General to certify that state or local building codes meet or exceed the minimum accessibility requirements of the ADA. In ruling on such applications from state or local governments, the Attorney General will consult with the Architectural and Transportation Barriers Compliance Board and consider the testimony of individuals with disabilities at public hearings about the state or local building code application.

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7 (B) POTENTIAL VIOLATION.—If the Attor-
8 ney General has reasonable cause to believe that
9 any person or group of persons is engaged in a
10 pattern or practice of resistance to the full enjoy-
11 ment of any of the rights granted by this title or
12 that any person or group of persons has been
13 denied any of the rights granted by such title, and
14 such denial raises an issue of general public im-
15 portance, the Attorney General may commence a
16 civil action in any appropriate United States dis-
17 trict court.

18 (2) AUTHORITY OF COURT.—In a civil action
19 under paragraph (1), the court—

HOUSE AMENDMENT

1 *quirements meets or exceeds the minimum*
2 *requirements of this Act for the accessibility*
3 *and usability of covered facilities under this*
4 *title. At any enforcement proceeding under*
5 *this section, such certification by the Attor-*
6 *ney General shall be rebuttable evidence that*
7 *such State law or local ordinance does meet*
8 *or exceed the minimum requirements of this*
9 *Act.*
10 *(B) POTENTIAL VIOLATION.—If the Attor-*
11 *ney General has reasonable cause to believe*
12 *that—*
13 *(i) any person or group of persons is*
14 *engaged in a pattern or practice of discrimi-*
15 *nation under this title; or*
16 *(ii) any person or group of persons has*
17 *been discriminated against under this title*
18 *and such discrimination raises an issue of*
19 *general public importance,*
20 *the Attorney General may commence a civil*
21 *action in any appropriate United States district*
22 *court.*
23 *(2) AUTHORITY OF COURT.—In a civil action*
24 *under paragraph (1)(B), the court—*

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20 (A) may grant any equitable relief that such
21 court considers to be appropriate, including grant-
22 ing temporary, preliminary, or permanent relief,
23 providing an auxiliary aid or service, modification
24 of policy or alternative method, or making facili-
25 ties readily accessible to and usable by individuals

1 with disabilities, to the extent required by this
2 title;
3 (B) may award such other relief as the court
4 considers to be appropriate, including monetary
5 damages to persons aggrieved when requested by
6 the Attorney General; and
7 (C) may, to vindicate the public interest,
8 assess a civil penalty against the entity in an
9 amount—
10 (i) not exceeding $50,000 for a first vio-
11 lation; and
12 (ii) not exceeding $100,000 for any sub-
13 sequent violation.

HOUSE AMENDMENT

1 *(A) may grant any equitable relief that such*
2 *court considers to be appropriate, including, to the*
3 *extent required by this title—*
4 *(i) granting temporary, preliminary, or*
5 *permanent relief;*
6 *(ii) providing an auxiliary aid or serv-*
7 *ice, modification of policy, practice, or proce-*
8 *dure, or alternative method; and*
9 *(iii) making facilities readily accessible*
10 *to and usable by individuals with disabil-*
11 *ities;*
12 *(B) may award such other relief as the court*
13 *considers to be appropriate, including monetary*
14 *damages to persons aggrieved when requested by*
15 *the Attorney General; and*
16 *(C) may, to vindicate the public interest,*
17 *assess a civil penalty against the entity in an*
18 *amount—*
19 *(i) not exceeding $50,000 for a first*
20 *violation; and*
21 *(ii) not exceeding $100,000 for any*
22 *subsequent violation.*
23 *(3) SINGLE VIOLATION.—For purposes of para-*
24 *graph (2)(C), in determining whether a first or subse-*
25 *quent violation has occurred, a determination in a*

COMMENTS

(●) The Senate bill specifies that the courts may assess civil penalties against an entity not to exceed $50,000 for the first violation and $100,000 for any subsequent public accommodation discrimination violation.
The House amendment specifies that when there are multiple violations that make up a pattern or practice suit

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14 (3) JUDICIAL CONSIDERATION.—In a civil action
15 under paragraph (1), the court, when considering what
16 amount of civil penalty, if any, is appropriate, shall
17 give consideration to any good faith effort or attempt
18 to comply with this Act by the entity.

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1 *single action, by judgment or settlement, that the cov-*
2 *ered entity has engaged in more than one discriminato-*
3 *ry act shall be counted as a single violation.*
4 *(4) PUNITIVE DAMAGES.—For purposes of sub-*
5 *section (b)(2)(B), the term "monetary damages" and*
6 *"such other relief" does not include punitive damages.*
7 *(5) JUDICIAL CONSIDERATION.—In a civil*
8 *action under paragraph (1)(B), the court, when consid-*
9 *ering what amount of civil penalty, if any, is appropri-*
10 *ate, shall give consideration to any good faith effort or*
11 *attempt to comply with this Act by the entity. In eval-*
12 *uating good faith, the court shall consider, among other*
13 *factors it deems relevant, whether the entity could have*
14 *reasonably anticipated the need for an appropriate type*
15 *of auxiliary aid needed to accommodate the unique*
16 *needs of a particular individual with a disability.*
17 *SEC. 309. EXAMINATIONS AND COURSES.*
18 *Any person that offers examinations or courses related*
19 *to applications, licensing, certification, or credentialing for*
20 *secondary or postsecondary education, professional, or trade*
21 *purposes shall offer such examinations or courses in a place*
22 *and manner accessible to persons with disabilities or offer*
23 *alternative accessible arrangements for such individuals.*

COMMENTS

brought by the Attorney General, all violations count as a first violation for the purpose of assessing the maximum civil penalty of $50,000. The maximum penalty of $100,000 for a subsequent violation can be applied only in a subsequent case.

(f) The Senate bill specifies that the Attorney General may seek "monetary damages" on behalf of an aggrieved party in Title III public accommodation civil actions.

The House amendment clarifies that "monetary damages" and other relief available to aggrieved persons under Title III public accommodation suits brought by the Attorney General do not include punitive damages.

(g) The Senate bill specifies that the courts may give consideration to an entity's "good faith" efforts to comply with the ADA in considering the amount of civil penalty.

The House version elaborates on the issue of good faith by requiring that the court consider whether an entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the particular needs of an individual with a disability.

60. **Examinations and Courses.**

The House amendment, but not the Senate bill, specifies that any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

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19 SEC. 309. EFFECTIVE DATE.

20 This title shall become effective 18 months after the

21 date of enactment of this Act.

HOUSE AMENDMENT

1 *SEC. 310. EFFECTIVE DATE.*

2 *(a) GENERAL RULE.—Except as provided in subsec-*

3 *tions (b) and (c), this title shall become effective 18 months*

4 *after the date of the enactment of this Act.*

5 *(b) CIVIL ACTIONS.—Except for any civil action*

6 *brought for a violation of section 303, no civil action shall be*

7 *brought—*

8 *(1) during the first 6 months after the effective*

9 *date, against businesses that employ 25 or fewer em-*

10 *ployees and have gross receipts of $1,000,000 or less;*

11 *and*

12 *(2) during the first year after the effective date,*

13 *against businesses that employ 10 or fewer employees*

14 *and have gross receipts of $500,000 or less.*

15 *(c) EXCEPTION.—Sections 302(a) for purposes of sec-*

16 *tion 302(b)(2)(B) and (C) only, 304(a) for purposes of sec-*

17 *tion 304(b)(3) only, 304(b)(3), 305, and 306 shall take effect*

18 *on the date of the enactment of this Act.*

COMMENTS

61. Effective Date.

(a) The House amendment, but not the Senate bill, precludes suits against small businesses for 6 months or 12 months (depending on the size of the business and its gross receipts) after the effective date of title III of the Act (18 months after date of enactment) for all violations except those relating to new construction and alterations.

(b) With slightly different wording, the Senate bill and the House amendment provide that certain provisions of title III go into effect on the date of enactment.

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1 TITLE IV—
2 TELECOMMUNICATIONS
3 RELAY SERVICES

4 SEC. 401. TELECOMMUNICATIONS SERVICES FOR HEARING-
5 IMPAIRED AND SPEECH-IMPAIRED INDIVID-
6 UALS.

7 (a) TELECOMMUNICATIONS.—Title II of the Communi-
8 cations Act of 1934 (47 U.S.C. 201 et seq.) is amended by
9 adding at the end thereof the following new section:

10 "SEC. 225. TELECOMMUNICATIONS SERVICES FOR HEARING-
11 IMPAIRED AND SPEECH-IMPAIRED INDIVID-
12 UALS.

13 "(a) DEFINITIONS.—As used in this section—
14 "(1) COMMON CARRIER OR CARRIER.—The term
15 'common carrier' or 'carrier' includes any common car-
16 rier engaged in interstate communication by wire or
17 radio as defined in section 3(h), any common carrier
18 engaged in intrastate communication by wire or radio,
19 and any common carrier engaged in both interstate and
20 intrastate communication, notwithstanding sections 2(b)
21 and 221(b).
22 "(2) TDD.—The term 'TDD' means a Telecom-
23 munications Device for the Deaf, which is a machine
24 that employs graphic communication in the transmis-
1 sion of coded signals through a wire or radio communi-
2 cation system.
3 "(3) TELECOMMUNICATIONS RELAY SERVICES.—
4 The term 'telecommunications relay services' means

HOUSE AMENDMENT

19 *TITLE IV—TELECOMMUNICATIONS*

20 *SEC. 401. TELECOMMUNICATIONS RELAY SERVICES FOR*
21 *HEARING-IMPAIRED AND SPEECH-IMPAIRED IN-*
22 *DIVIDUALS.*

23 *(a) TELECOMMUNICATIONS.—Title II of the Commu-*
24 *nications Act of 1934 (47 U.S.C. 201 et seq.) is amended by*
25 *adding at the end thereof the following new section:*

1 *"SEC. 225. TELECOMMUNICATIONS SERVICES FOR HEARING-IM-*
2 *PAIRED AND SPEECH-IMPAIRED INDIVIDUALS.*

3 *"(a) DEFINITIONS.—As used in this section—*
4 *"(1) COMMON CARRIER OR CARRIER.—The term*
5 *'common carrier' or 'carrier' includes any common car-*
6 *rier engaged in interstate communication by wire or*
7 *radio as defined in section 3(h) and any common car-*
8 *rier engaged in intrastate communication by wire or*
9 *radio, notwithstanding sections 2(b) and 221(b).*
10 *"(2) TDD.—The term 'TDD' means a Telecom-*
11 *munications Device for the Deaf, which is a machine*
12 *that employs graphic communication in the transmis-*
13 *sion of coded signals through a wire or radio communi-*
14 *cation system.*
15 *"(3) TELECOMMUNICATIONS RELAY SERV-*
16 *ICES.—The term 'telecommunications relay services'*
17 *means telephone transmission services that provide the*
18 *ability for an individual who has a hearing impair-*
19 *ment or speech impairment to engage in communica-*
20 *tion by wire or radio with a hearing individual in a*

COMMENTS

62. Definition of "Common Carrier" or "Carrier."

The House amendment deletes the phrase "and any common carrier engaged in both interstate and intrastate communication."

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5 telephone transmission services that provide the ability
6 for an individual who has a hearing impairment or
7 speech impairment to engage in communication by
8 wire or radio with a hearing individual in a manner
9 that is functionally equivalent to the ability of an indi-
10 vidual who does not have a hearing impairment or
11 speech impairment to communicate using voice commu-
12 nication services by wire or radio. Such term includes
13 services that enable two-way communication between
14 an individual who uses a TDD or other nonvoice ter-
15 minal device and an individual who does not use such
16 a device.
17 "(b) AVAILABILITY OF TELECOMMUNICATIONS RELAY
18 SERVICES.—
19 "(1) IN GENERAL.—In order to carry out the pur-
20 poses established under section 1, to make available to
21 all individuals in the United States a rapid, efficient
22 nationwide communication service, and to increase the
23 utility of the telephone system of the Nation, the Com-
24 mission shall ensure that interstate and intrastate tele-
25 communications relay services are available, to the
1 extent possible and in the most efficient manner, to
2 hearing-impaired and speech-impaired individuals in the
3 United States.
4 "(2) REMEDIES.—For purposes of this section,
5 the same remedies, procedures, rights, and obligations
6 under this Act that are applicable to common carriers

HOUSE AMENDMENT

21 *manner that is functionally equivalent to the ability of*
22 *an individual who does not have a hearing impairment*
23 *or speech impairment to communicate using voice com-*
24 *munication services by wire or radio. Such term in-*
25 *cludes services that enable two-way communication be-*
26 *tween an individual who uses a TDD or other non-*
1 *voice terminal device and an individual who does not*
2 *use such a device.*
3 *"(b) AVAILABILITY OF TELECOMMUNICATIONS*
4 *RELAY SERVICES.—*
5 *"(1) IN GENERAL.—In order to carry out the*
6 *purposes established under section 1, to make available*
7 *to all individuals in the United States a rapid, effi-*
8 *cient nationwide communication service, and to in-*
9 *crease the utility of the telephone system of the Nation,*
10 *the Commission shall ensure that interstate and intra-*
11 *state telecommunications relay services are available,*
12 *to the extent possible and in the most efficient manner,*
13 *to hearing-impaired and speech-impaired individuals*
14 *in the United States.*
15 *"(2) USE OF GENERAL AUTHORITY AND REME-*
16 *DIES.—For the purposes of administering and enforc-*
17 *ing the provisions of this section and the regulations*
18 *prescribed thereunder, the Commission shall have the*
19 *same authority, power, and functions with respect to*
20 *common carriers engaged in intrastate communication*
21 *as the Commission has in administering and enforcing*
22 *the provisions of this title with respect to any common*

COMMENTS

63. **General authority and remedies.**

The Senate bill specifies that the same remedies, procedures, rights, and obligations applicable to common carriers engaged in interstate communication by wire or radio are also applicable to common carriers engaged in intrastate communication.

The House amendment clarifies, without changing the meaning or intent of the Senate language.

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7 engaged in interstate communication by wire or radio
8 are also applicable to common carriers engaged in
9 intrastate communication by wire or radio and common
10 carriers engaged in both interstate and intrastate com-
11 munication by wire or radio.
12 "(c) PROVISION OF SERVICES.—Each common carrier
13 providing telephone voice transmission services shall provide
14 telecommunications relay services individually, through des-
15 ignees, or in concert with other carriers not later than 3
16 years after the date of enactment of this section.

HOUSE AMENDMENT

23 *carrier engaged in interstate communication. Any vio-*
24 *lation of this section by any common carrier engaged*
25 *in intrastate communication shall be subject to the*
1 *same remedies, penalties, and procedures as are appli-*
2 *cable to a violation of this Act by a common carrier*
3 *engaged in interstate communication.*
4 *"(c) PROVISION OF SERVICES.—Each common carri-*
5 *er providing telephone voice transmission services shall, not*
6 *later than 3 years after the date of enactment of this section,*
7 *provide in compliance with the regulations prescribed under*
8 *this section, within the area in which it offers service, tele-*
9 *communications relay services, individually, through desig-*
10 *nees, through a competitively selected vendor, or in concert*
11 *with other carriers. A common carrier shall be considered to*
12 *be in compliance with such regulations—*
13 *"(1) with respect to intrastate telecommunications*
14 *relay services in any State that does not have a certi-*
15 *fied program under subsection (f) and with respect to*
16 *interstate telecommunications relay services, if such*
17 *common carrier (or other entity through which the car-*
18 *rier is providing such relay services) is in compliance*
19 *with the Commission's regulations under subsection*
20 *(d); or*
21 *"(2) with respect to intrastate telecommunications*
22 *relay services in any State that has a certified pro-*
23 *gram under subsection (f) for such State, if such*
24 *common carrier (or other entity through which the car-*
25 *rier is providing such relay services) is in compliance*

COMMENTS

64. Provision of telecommunication services.

The Senate bill specifies that each common carrier providing telephone voice transmission services shall provide telecommunication relay services individually, through designees, or in concert with other carriers not later than 3 years after the date of enactment.

The House amendment makes several clarifying changes.

(a) The House amendment specifies that a common carrier must only provide relay services "within the area in which it offers service" to ensure that a common carrier on one side of the country is not held responsible to provide services for consumers in a state on the other side of the country.

(b) The House amendment specifies that common carriers may provide relay services "through a competitively selected vendor" in addition to providing such services through designees or in concert with other carriers.

(c) The House amendment specifies that a common carrier is considered in compliance wtih FCC regulations if the common carrier is either in direct compliance itself with those regulations, or if the "entity through which [it] is providing such relay services" is in compliance with the Commission's regulations. Further, the common carrier is considered in compliance with the FCC's regulations with respect to intrastate relay services when they or their designees are in compliance with a state certified program.

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17 "(d) REGULATIONS.—
18 "(1) IN GENERAL.—The Commission shall, not
19 later than 1 year after the date of enactment of this
20 section, prescribe regulations to implement this section,
21 including regulations that—
22 "(A) establish functional requirements, guide-
23 lines, and operations procedures for telecommuni-
24 cations relay services;

1 "(B) establish minimum standards that shall
2 be met by common carriers in carrying out sub-
3 section (c);
4 "(C) require that telecommunications relay
5 services operate every day for 24 hours per day;
6 "(D) require that users of telecommunica-
7 tions relay services pay rates no greater than the
8 rates paid for functionally equivalent voice com-
9 munication services with respect to such factors
10 as the duration of the call, the time of day, and
11 the distance from point of origination to point of
12 termination;
13 "(E) prohibit relay operators from refusing
14 calls or limiting the length of calls that use tele-
15 communications relay services;

HOUSE AMENDMENT

1 *with the program certified under subsection (f) for such*
2 *State.*
3 *"(d) REGULATIONS.—*
4 *"(1) IN GENERAL.—The Commission shall, not*
5 *later than 1 year after the date of enactment of this*
6 *section, prescribe regulations to implement this section,*
7 *including regulations that—*
8 *"(A) establish functional requirements,*
9 *guidelines, and operations procedures for telecom-*
10 *munications relay services;*
11 *"(B) establish minimum standards that shall*
12 *be met in carrying out subsection (c);*
13 *"(C) require that telecommunications relay*
14 *services operate every day for 24 hours per day;*
15 *"(D) require that users of telecommunica-*
16 *tions relay services pay rates no greater than the*
17 *rates paid for functionally equivalent voice com-*
18 *munication services with respect to such factors as*
19 *the duration of the call, the time of day, and*
20 *the distance from point of origination to point of*
21 *termination;*
22 *"(E) prohibit relay operators from failing to*
23 *fulfill the obligations of common carriers by refus-*
24 *ing calls or limiting the length of calls that use*
25 *telecommunications relay services;*

COMMENTS

65. **Regulations.**

The Senate bill directs the FCC to issue regulations covering, among other things, minimum standards for the relay systems, conduct by relay operators, separation of costs, and delay in the implementation date.

The House amendment includes two clarifying changes.

(a) The Senate bill requires the FCC to establish minimum standards that would be met "by common carriers" in providing relay services. The House amendment deletes the language in quotes.

(b) With respect to the conduct of relay operators, the House amendment specifies that a relay operator is subject to the same standards of conduct that other operators are subject to under the Communications Act of 1934.

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16 "(F) prohibit relay operators from disclosing
17 the content of any relayed conversation and from
18 keeping records of the content of any such con-
19 versation beyond the duration of the call; and
20 "(G) prohibit relay operators from intention-
21 ally altering a relayed conversation.
22 "(2) TECHNOLOGY.—The Commission shall
23 ensure that regulations prescribed to implement this
24 section encourage the use of existing technology and
1 do not discourage or impair the development of im-
2 proved technology.
3 "(3) JURISDICTIONAL SEPARATION OF COSTS.—
4 "(A) IN GENERAL.—The Commission shall
5 prescribe regulations governing the jurisdictional
6 separation of costs for the services provided pur-
7 suant to this section.
8 "(B) RECOVERING COSTS.—Such regulations
9 shall generally provide that costs caused by inter-
10 state telecommunications relay services shall be
11 recovered from the interstate jurisdiction and
12 costs caused by intrastate telecommunications
13 relay services shall be recovered from the intra-
14 state jurisdiction.

HOUSE AMENDMENT

1 *"(F) prohibit relay operators from disclosing*
2 *the content of any relayed conversation and from*
3 *keeping records of the content of any such conver-*
4 *sation beyond the duration of the call; and*
5 *"(G) prohibit relay operators from intention-*
6 *ally altering a relayed conversation.*
7 *"(2) TECHNOLOGY.—The Commission shall*
8 *ensure that regulations prescribed to implement this*
9 *section encourage, consistent with section 7(a) of this*
10 *Act, the use of existing technology and do not discour-*
11 *age or impair the development of improved technology.*
12 *"(3) JURISDICTIONAL SEPARATION OF COSTS.—*
13 *"(A) IN GENERAL.—Consistent with the*
14 *provisions of section 410 of this Act, the Commis-*
15 *sion shall prescribe regulations governing the ju-*
16 *risdictional separation of costs for the services*
17 *provided pursuant to this section.*
18 *"(B) RECOVERING COSTS.—Such regula-*
19 *tions shall generally provide that costs caused by*
20 *interstate telecommunications relay services shall*
21 *be recovered from all subscribers for every inter-*
22 *state service and costs caused by intrastate tele-*
23 *communications relay services shall be recovered*
24 *from the intrastate jurisdiction. In a State that*
25 *has a certified program under subsection (f), a*

COMMENTS

66. Technology.

The House amendment adds a reference to section 7(a) of the Communications Act of 1934.

67. Recovery of costs.

The House amendment includes the following changes applicable to recovery of costs.

(a) The House amendment specifies that costs caused by interstate relay services will be recovered from all subscribers for every interstate service, thereby ensuring that even those businesses that have private telecommunications systems will contribute to the cost of providing interstate relay services.

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15 "(C) JOINT PROVISION OF SERVICES.—To
16 the extent interstate and intrastate common carri-
17 ers jointly provide telecommunications relay serv-
18 ices, the procedures established in section 410
19 shall be followed, as applicable.
20 "(4) FIXED MONTHLY CHARGE.—The Commis-
21 sion shall not permit carriers to impose a fixed monthly
22 charge on residential customers to recover the costs of
23 providing interstate telecommunication relay services.
24 "(5) UNDUE BURDEN.—If the Commission finds
25 that full compliance with the requirements of this sec-
1 tion would unduly burden one or more common carri-
2 ers, the Commission may extend the date for full com-
3 pliance by such carrier for a period not to exceed 1 ad-
4 ditional year.
5 "(e) ENFORCEMENT.—
6 "(1) IN GENERAL.—Subject to subsections (f) and
7 (g), the Commission shall enforce this section.
8 "(2) COMPLAINT.—The Commission shall re-
9 solve, by final order, a complaint alleging a violation of
10 this section within 180 days after the date such com-
11 plaint is filed.
12 "(f) CERTIFICATION.—
13 "(1) STATE DOCUMENTATION.—Each State may
14 submit documentation to the Commission that describes
15 the program of such State for implementing intrastate
16 telecommunications relay services.

HOUSE AMENDMENT

1 *State commission shall permit a common carrier*
2 *to recover the costs incurred in providing intra-*
3 *state telecommunications relay services by a*
4 *method consistent with the requirements of this*
5 *section.*

6 *"(e) ENFORCEMENT.—*
7 *"(1) IN GENERAL.—Subject to subsections (f)*
8 *and (g), the Commission shall enforce this section.*
9 *"(2) COMPLAINT.—The Commission shall re-*
10 *solve, by final order, a complaint alleging a violation*
11 *of this section within 180 days after the date such*
12 *complaint is filed.*
13 *"(f) CERTIFICATION.—*
14 *"(1) STATE DOCUMENTATION.—Any State desir-*
15 *ing to establish a State program under this section*
16 *shall submit documentation to the Commission that de-*
17 *scribes the program of such State for implementing*
18 *intrastate telecommunications relay services and the*
19 *procedures and remedies available for enforcing any re-*
20 *quirements imposed by the State program.*

COMMENTS

(b) The House amendment authorizes State commissions to permit recovery by common carriers of costs incurred in providing intrastate relay services in states that are certified.

(c) The Senate bill prohibits the imposition of a fixed monthly charge on residential customers to recover the costs of providing interstate relay services.

The House amendment deletes this provision.

(d) The Senate bill extends the implementation period to three years for all common carriers and includes authority to extend it one additional year if a common carrier can demonstrate undue burden. The House amendment deletes the undue burden provision.

68. Requirements for state certification.

The Senate bill specifies that each State may submit documentation to the FCC that describes the program of such state for implementing intrastate relay services.

The House amendment specifies that such documentation must also include the procedures and remedies available for enforcing any requirements imposed by the State program. The House amendment also provides that in certifying the program the FCC must determine that the program makes available adequate procedures and remedies for enforcing the requirements of the State program. The House amendment also specifies that in a State whose program has been suspended or revoked, the Commission must take such steps as may be necessary to ensure continuity of telecommunications relay services.

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SENATE BILL

17 "(2) REQUIREMENTS FOR CERTIFICATION.—
18 After review of such documentation, the Commission
19 shall certify the State program if the Commission de-
20 termines that the program makes available to hearing-
21 impaired and speech-impaired individuals either direct-
22 ly, through designees, or through regulation of intra-
23 state common carriers, intrastate telecommunications
24 relay services in such State in a manner that meets the
1 requirements of regulations prescribed by the Commis-
2 sion under subsection (d).

3 "(3) METHOD OF FUNDING.—Except as provided
4 in subsection (d), the Commission shall not refuse to
5 certify a State program based solely on the method
6 such State will implement for funding intrastate tele-
7 communication relay services.
8 "(4) SUSPENSION OR REVOCATION OF CERTIFI-
9 CATION.—The Commission may suspend or revoke
10 such certification if, after notice and opportunity for
11 hearing, the Commission determines that such certifica-
12 tion is no longer warranted.

HOUSE AMENDMENT

21 *"(2) REQUIREMENTS FOR CERTIFICATION.—*
22 *After review of such documentation, the Commission*
23 *shall certify the State program if the Commission de-*
24 *termines that—*
1 *"(A) the program makes available to hear-*
2 *ing-impaired and speech-impaired individuals,*
3 *either directly, through designees, through a com-*
4 *petitively selected vendor, or through regulation of*
5 *intrastate common carriers, intrastate telecom-*
6 *munications relay services in such State in a*
7 *manner that meets or exceeds the requirements of*
8 *regulations prescribed by the Commission under*
9 *subsection (d); and*
10 *"(B) the program makes available adequate*
11 *procedures and remedies for enforcing the require-*
12 *ments of the State program.*
13 *"(3) METHOD OF FUNDING.—Except as provided*
14 *in subsection (d), the Commission shall not refuse to*
15 *certify a State program based solely on the method*
16 *such State will implement for funding intrastate tele-*
17 *communication relay services.*
18 *"(4) SUSPENSION OR REVOCATION OF CERTIFI-*
19 *CATION.—The Commission may suspend or revoke*
20 *such certification if, after notice and opportunity for*
21 *hearing, the Commission determines that such certifi-*
22 *cation is no longer warranted. In a State whose pro-*
23 *gram has been suspended or revoked, the Commission*
24 *shall take such steps as may be necessary, consistent*

COMMENTS

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13 "(g) COMPLAINT.—
14 "(1) REFERRAL OF COMPLAINT.—If a complaint
15 to the Commission alleges a violation of this section
16 with respect to intrastate telecommunications relay
17 services within a State and certification of the program
18 of such State under subsection (f) is in effect, the Com-
19 mission shall refer such complaint to such State.
20 "(2) JURISDICTION OF COMMISSION.—After re-
21 ferring a complaint to a State under paragraph (1), the
22 Commission shall exercise jurisdiction over such com-
23 plaint only if—
1 "(A) final action under such State program
2 has not been taken on such complaint by such
3 State—
4 "(i) within 180 days after the complaint
5 is filed with such State; or
6 "(ii) within a shorter period as pre-
7 scribed by the regulations of such State; or
8 "(B) the Commission determines that such
9 State program is no longer qualified for certifica-
10 tion under subsection (f).".
11 (b) CONFORMING AMENDMENTS.—The Communica-
12 tions Act of 1934 (47 U.S.C. 151 et seq.) is amended—

HOUSE AMENDMENT

1 *with this section, to ensure continuity of telecommuni-*
2 *cations relay services.*
3 *"(g) COMPLAINT.—*
4 *"(1) REFERRAL OF COMPLAINT.—If a complaint*
5 *to the Commission alleges a violation of this section*
6 *with respect to intrastate telecommunications relay*
7 *services within a State and certification of the program*
8 *of such State under subsection (f) is in effect, the*
9 *Commission shall refer such complaint to such State.*
10 *"(2) JURISDICTION OF COMMISSION.—After re-*
11 *ferring a complaint to a State under paragraph (1), the*
12 *Commission shall exercise jurisdiction over such com-*
13 *plaint only if—*
14 *"(A) final action under such State program*
15 *has not been taken on such complaint by such*
16 *State—*
17 *"(i) within 180 days after the com-*
18 *plaint is filed with such State; or*
19 *"(ii) within a shorter period as pre-*
20 *scribed by the regulations of such State; or*
21 *"(B) the Commission determines that such*
22 *State program is no longer qualified for certifica-*
23 *tion under subsection (f).".*
24 *(b) CONFORMING AMENDMENTS.—The Communica-*
25 *tions Act of 1934 (47 U.S.C. 151 et seq.) is amended—*

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13 (1) in section 2(b) (47 U.S.C. 152(b)), by striking
14 "section 224" and inserting "sections 224 and 225";
15 and
16 (2) in section 221(b) (47 U.S.C. 221(b)), by strik-
17 ing "section 301" and inserting "sections 225 and
18 301".

HOUSE AMENDMENT

1 *(1) in section 2(b) (47 U.S.C. 152(b)), by strik-*
2 *ing "section 224" and inserting "sections 224 and*
3 *225"; and*
4 *(2) in section 221(b) (47 U.S.C. 221(b)), by*
5 *striking "section 301" and inserting "sections 225 and*
6 *301".*
7 *SEC. 402. CLOSED-CAPTIONING OF PUBLIC SERVICE ANNOUNCE-*
8 *MENTS.*
9 *Section 711 of the Communications Act of 1934 is*
10 *amended to read as follows:*
11 *"SEC. 711. CLOSED-CAPTIONING OF PUBLIC SERVICE AN-*
12 *NOUNCEMENTS.*
13 *"Any television public service announcement that is*
14 *produced or funded in whole or in part by any agency or*
15 *instrumentality of Federal government shall include closed*
16 *captioning of the verbal content of such announcement. A tel-*
17 *evision broadcast station licensee—*
18 *"(1) shall not be required to supply closed cap-*
19 *tioning for any such announcement that fails to in-*
20 *clude it; and*
21 *"(2) shall not be liable for broadcasting any such*
22 *announcement without transmitting a closed caption*
23 *unless the licensee intentionally fails to transmit the*
24 *closed caption that was included with the announce-*
25 *ment.".*

COMMENTS

69. Closed-captioning of public service announcements.

The House amendment, but not the Senate bill, adds a provision requiring the closed-captioning of all television public service announcements produced or funded by the Federal government.

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SENATE BILL

19 TITLE V—MISCELLANEOUS
20 PROVISIONS

21 SEC. 501. CONSTRUCTION.

22 (a) REHABILITATION ACT OF 1973.—Nothing in this
23 Act shall be construed to reduce the scope of coverage or
24 apply a lesser standard than the coverage required or the
25 standards applied under title V of the Rehabilitation Act of
1 1973 (29 U.S.C. 790 et seq.) or the regulations issued by
2 Federal agencies pursuant to such title.

3 (b) OTHER LAWS.—Nothing in this Act shall be con-
4 strued to invalidate or limit any other Federal law or law of
5 any State or political subdivision of any State or jurisdiction
6 that provides greater or equal protection for the rights of
7 individuals with disabilities than are afforded by this Act.

8 (c) INSURANCE.—Titles I through IV of this Act shall
9 not be construed to prohibit or restrict—
10 (1) an insurer, hospital or medical service compa-
11 ny, health maintenance organization, or any agent, or
12 entity that administers benefit plans, or similar organi-
13 zations from underwriting risks, classifying risks, or ad-

HOUSE AMENDMENT

1 *TITLE V—MISCELLANEOUS*
2 *PROVISIONS*

3 *SEC. 501. CONSTRUCTION.*

4 *(a) IN GENERAL.—Except as otherwise provided in*
5 *this Act, nothing in this Act shall be construed to apply a*
6 *lesser standard than the standards applied under title V of*
7 *the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the*
8 *regulations issued by Federal agencies pursuant to such title.*

9 *(b) RELATIONSHIP TO OTHER LAWS.—Nothing in*
10 *this Act shall be construed to invalidate or limit the remedies,*
11 *rights, and procedures of any Federal law or law of any*
12 *State or political subdivision of any State or jurisdiction that*
13 *provides greater or equal protection for the rights of individ-*
14 *uals with disabilities than are afforded by this Act. Nothing*
15 *in this Act shall be construed to preclude the prohibition of,*
16 *or the imposition of restrictions on, smoking in places of em-*
17 *ployment covered by title I, in transportation covered by title*
18 *II or III, or in places of public accommodation covered by*
19 *title III.*

20 *(c) INSURANCE.—Titles I through IV of this Act shall*
21 *not be construed to prohibit or restrict—*
22 *(1) an insurer, hospital or medical service compa-*
23 *ny, health maintenance organization, or any agent, or*
24 *entity that administers benefit plans, or similar organi-*
25 *zations from underwriting risks, classifying risks, or*

COMMENTS

70. Construction.

(a) The House amendment adds the phrase "except as otherwise provided in this Act" as a qualification to the provision construing the interpretation of the ADA.

(b) With slightly different wording, the Senate bill and the House amendment specify the relationship between the ADA and other Federal laws (including the Rehabilitation Act) and state laws. The House amendment also specifies that nothing in the ADA shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment, in transportation provided by public and private entities, and places of public accommodations.

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14 ministering such risks that are based on or not incon-
15 sistent with State law; or
16 (2) a person or organization covered by this Act
17 from establishing, sponsoring, observing or administer-
18 ing the terms of a bona fide benefit plan that are based
19 on underwriting risks, classifying risks, or administer-
20 ing such risks that are based on or not inconsistent
21 with State law;
22 (3) a person or organization covered by this Act
23 from establishing, sponsoring, observing or administer-
24 ing the terms of a bona fide benefit plan that is not
25 subject to State laws that regulate insurance:
1 *Provided*, That paragraphs (1), (2), and (3) are not used as a
2 subterfuge to evade the purposes of title I and III.

22 SEC. 503. STATE IMMUNITY.
23 A State shall not be immune under the eleventh amend-
24 ment to the Constitution of the United States from an action
25 in Federal court for a violation of this Act. In any action
1 against a State for a violation of the requirements of this Act,
2 remedies (including remedies both at law and in equity) are
3 available for such a violation to the same extent as such rem-
4 edies are available for such a violation in an action against
5 any public or private entity other than a State.

HOUSE AMENDMENT

1 *administering such risks that are based on or not in-*
2 *consistent with State law; or*
3 *(2) a person or organization covered by this Act*
4 *from establishing, sponsoring, observing or administer-*
5 *ing the terms of a bona fide benefit plan that are based*
6 *on underwriting risks, classifying risks, or administer-*
7 *ing such risks that are based on or not inconsistent*
8 *with State law; or*
9 *(3) a person or organization covered by this Act*
10 *from establishing, sponsoring, observing or administer-*
11 *ing the terms of a bona fide benefit plan that is not*
12 *subject to State laws that regulate insurance.*
13 *Paragraphs (1), (2), and (3) shall not be used as a subterfuge*
14 *to evade the purposes of title I and III.*
15 *(d) ACCOMMODATIONS AND SERVICES.—Nothing in*
16 *this Act shall be construed to require an individual with a*
17 *disability to accept an accommodation, aid, service, opportu-*
18 *nity, or benefit which such individual chooses not to accept.*
19 *SEC. 502. STATE IMMUNITY.*
20 *A State shall not be immune under the eleventh amend-*
21 *ment to the Constitution of the United States from an action*
22 *in Federal or State court of competent jurisdiction for a vio-*
23 *lation of this Act. In any action against a State for a viola-*
24 *tion of the requirements of this Act, remedies (including rem-*
25 *edies both at law and in equity) are available for such a*

COMMENTS

(c) The section in the Senate bill concerning insurance includes the proviso "Provided, That paragraphs (1), (2), and (3) are not lused as a subterfuge to evade the purposes of title I and III." The House amendment includes the following phrase "Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III."

(d) The House amendment, but not the Senate bill, specifies that nothing in the Act shall be construed to require an individual with a disability

71. State immunity.

The House amendment adds states courts of competent jurisdiction to the reference to federal courts included in the Senate bill.

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SENATE BILL

3 SEC. 502. PROHIBITION AGAINST RETALIATION AND COER-
4 CION.
5 (a) RETALIATION.—No individual shall discriminate
6 against any other individual because such other individual
7 has opposed any act or practice made unlawful by this Act or
8 because such other individual made a charge, testified, assist-
9 ed, or participated in any manner in an investigation, pro-
10 ceeding, or hearing under this Act.
11 (b) INTERFERENCE, COERCION, OR INTIMIDATION.—It
12 shall be unlawful to coerce, intimidate, threaten, or interfere
13 with any person in the exercise or enjoyment of, or on ac-
14 count of his or her having exercised or enjoyed, or on account
15 of his or her having aided or encouraged any other person in
16 the exercise or enjoyment of, any right granted or protected
17 by this Act.
18 (c) REMEDIES AND PROCEDURES.—The remedies and
19 procedures available under sections 107, 205, and 308 of this
20 Act shall be available to aggrieved persons for violations of
21 subsections (a) and (b).

HOUSE AMENDMENT

1 violation to the same extent as such remedies are available
2 for such a violation in an action against any public or pri-
3 vate entity other than a State.
4 SEC. 503. PROHIBITION AGAINST RETALIATION AND COERCION.
5 (a) RETALIATION.—No person shall discriminate
6 against any individual because such individual has opposed
7 any act or practice made unlawful by this Act or because
8 such individual made a charge, testified, assisted, or partici-
9 pated in any manner in an investigation, proceeding, or
10 hearing under this Act.
11 (b) INTERFERENCE, COERCION, OR INTIMIDATION.—
12 It shall be unlawful to coerce, intimidate, threaten, or inter-
13 fere with any individual in the exercise or enjoyment of, or
14 on account of his or her having exercised or enjoyed, or on
15 account of his or her having aided or encouraged any other
16 individual in the exercise or enjoyment of, any right granted
17 or protected by this Act.
18 (c) REMEDIES AND PROCEDURES.—The remedies and
19 procedures available under sections 107, 203, and 308 of this
20 Act shall be available to aggrieved persons for violations of
21 subsections (a) and (b), with respect to title I, title II and
22 title III, respectively.

COMMENTS

72. Prohibition Against Retaliation and Coercion.

With slightly different wording, the Senate bill and the House amendment include prohibitions against retaliation and coercion.

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SENATE BILL

6 SEC. 504. REGULATIONS BY THE ARCHITECTURAL AND TRANS-
7 PORTATION BARRIERS COMPLIANCE BOARD.
8 (a) ISSUANCE OF GUIDELINES.—Not later than 6
9 months after the date of enactment of this Act, the Architec-
10 tural and Transportation Barriers Compliance Board shall
11 issue minimum guidelines that shall supplement the existing
12 Minimum Guidelines and Requirements for Accessible Design
13 for purposes of titles II and III.
14 (b) CONTENTS OF GUIDELINES.—The guidelines issued
15 under subsection (a) shall establish additional requirements,
16 consistent with this Act, to ensure that buildings, facilities,
17 and vehicles are accessible, in terms of architecture and
18 design, transportation, and communication, to individuals
19 with disabilities.

HOUSE AMENDMENT

1 *SEC. 504. REGULATIONS BY THE ARCHITECTURAL AND TRANS-*
2 *PORTATION BARRIERS COMPLIANCE BOARD.*
3 *(a) ISSUANCE OF GUIDELINES.—Not later than 9*
4 *months after the date of enactment of this Act, the Architec-*
5 *tural and Transportation Barriers Compliance Board shall*
6 *issue minimum guidelines that shall supplement the existing*
7 *Minimum Guidelines and Requirements for Accessible*
8 *Design for purposes of titles II and III of this Act.*
9 *(b) CONTENTS OF GUIDELINES.—The supplemental*
10 *guidelines issued under subsection (a) shall establish addi-*
11 *tional requirements, consistent with this Act, to ensure that*
12 *buildings, facilities, rail passenger cars, and vehicles are ac-*
13 *cessible, in terms of architecture and design, transportation,*
14 *and communication, to individuals with disabilities.*
15 *(c) QUALIFIED HISTORIC PROPERTIES.—*
16 *(1) IN GENERAL.—The supplemental guidelines*
17 *issued under subsection (a) shall include procedures*
18 *and requirements for alterations that will threaten or*
19 *destroy the historic significance of qualified historic*
20 *buildings and facilities as defined in 4.1.7(1)(a) of the*
21 *Uniform Federal Accessibility Standards.*
22 *(2) SITES ELIGIBLE FOR LISTING IN NATIONAL*
23 *REGISTER.—With respect to alterations of buildings or*
24 *facilities that are eligible for listing in the National*
25 *Register of Historic Places under the National Histor-*
26 *ic Preservation Act (16 U.S.C. 470 et seq.), the guide-*

COMMENTS

73. Guidelines by the ATBCB.

The Senate bill provides 6 months for the issuance of guidelines. The House amendment provides 9 months.

74. Historic buildings.

The House amendment, but not the Senate bill, includes specific provisions applicable to historic building.

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SENATE BILL

20 SEC. 505. ATTORNEY'S FEES.

21 In any action or administrative proceeding commenced
22 pursuant to this Act, the court or agency, in its discretion,
23 may allow the prevailing party, other than the United States,
24 a reasonable attorney's fee, including litigation expenses, and
1 costs, and the United States shall be liable for the foregoing
2 the same as a private individual.

3 SEC. 506. TECHNICAL ASSISTANCE.

4 (a) PLAN FOR ASSISTANCE.—
5 (1) IN GENERAL.—Not later than 180 days after
6 the date of enactment of this Act, the Attorney Gener-
7 al, in consultation with the Chairman of the Equal
8 Employment Opportunity Commission, the Secretary of

HOUSE AMENDMENT

1 *lines described in paragraph (1) shall, at a minimum,*
2 *maintain the procedures and requirements established*
3 *in 4.1.7 (1) and (2) of the Uniform Federal Accessibil-*
4 *ity Standards.*
5 *(3) OTHER SITES.—With respect to alterations of*
6 *buildings or facilities designated as historic under*
7 *State or local law, the guidelines described in para-*
8 *graph (1) shall establish procedures equivalent to those*
9 *established by 4.1.7(1) (b) and (c) of the Uniform Fed-*
10 *eral Accessibility Standards, and shall require, at a*
11 *minimum, compliance with the requirements estab-*
12 *lished in 4.1.7(2) of such standards.*

13 *SEC. 505. ATTORNEY'S FEES.*

14 *In any action or administrative proceeding commenced*
15 *pursuant to this Act, the court or agency, in its discretion,*
16 *may allow the prevailing party, other than the United States,*
17 *a reasonable attorney's fee, including litigation expenses, and*
18 *costs, and the United States shall be liable for the foregoing*
19 *the same as a private individual.*

20 *SEC. 506. TECHNICAL ASSISTANCE.*

21 *(a) PLAN FOR ASSISTANCE.—*
22 *(1) IN GENERAL.—Not later than 180 days after*
23 *the date of enactment of this Act, the Attorney Gener-*
24 *al, in consultation with the Chair of the Equal Em-*
25 *ployment Opportunity Commission, the Secretary of*

COMMENTS

75. Technical assistance

(a) The Senate bill, but not the House amendment, includes, among others, the National Council on Disability, as an agency responsible for the development of a technical assistance plan.

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SENATE BILL

9 Transportation, the National Council on Disability, the
10 Chairperson of the Architectural and Transportation
11 Barriers Compliance Board, and the Chairman of Fed-
12 eral Communications Commission, shall develop a plan
13 to assist entities covered under this Act, along with
14 other executive agencies and commissions, in under-
15 standing the responsibility of such entities, agencies,
16 and commissions under this Act.
17 (2) PUBLICATION OF PLAN.—The Attorney Gen-
18 eral shall publish the plan referred to in paragraph (1)
19 for public comment in accordance with the Administra-
20 tive Procedure Act (5 U.S.C. 551 et seq.).
21 (b) AGENCY AND PUBLIC ASSISTANCE.—The Attorney
22 General is authorized to obtain the assistance of other Feder-
23 al agencies in carrying out subsection (a), including the Na-
24 tional Council on Disability, the President's Committee on
1 Employment of People with Disabilities, the Small Business
2 Administration, and the Department of Commerce.
3 (c) IMPLEMENTATION.—
4 (1) AUTHORITY TO CONTRACT.—Each depart-
5 ment or agency that has responsibility for implement-
6 ing this Act may render technical assistance to individ-
7 uals and institutions that have rights or responsibilities
8 under this Act.

HOUSE AMENDMENT

1 *Transportation, the Chair of the Architectural and*
2 *Transportation Barriers Compliance Board, and the*
3 *Chairman of the Federal Communications Commis-*
4 *sion, shall develop a plan to assist entities covered*
5 *under this Act, and other Federal agencies, in under-*
6 *standing the responsibility of such entities and agen-*
7 *cies under this Act.*
8 *(2) PUBLICATION OF PLAN.—The Attorney Gen-*
9 *eral shall publish the plan referred to in paragraph (1)*
10 *for public comment in accordance with subchapter II*
11 *of chapter 5 of title 5, United States Code (commonly*
12 *known as the Administrative Procedure Act).*
13 *(b) AGENCY AND PUBLIC ASSISTANCE.—The Attor-*
14 *ney General may obtain the assistance of other Federal agen-*
15 *cies in carrying out subsection (a), including the National*
16 *Council on Disability, the President's Committee on Em-*
17 *ployment of People with Disabilities, the Small Business*
18 *Administration, and the Department of Commerce.*
19 *(c) IMPLEMENTATION.—*
20 *(1) RENDERING ASSISTANCE.—Each Federal*
21 *agency that has responsibility under paragraph (2) for*
22 *implementing this Act may render technical assistance*
23 *to individuals and institutions that have rights or*
24 *duties under the respective title or titles for which such*
25 *agency has responsibility.*

COMMENTS

(b) With slightly different wording, the Senate bill and the House amendment provide for the implementation of the technical assistance plan.

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SENATE BILL

9 (2) IMPLEMENTATION OF TITLES.—
10 (A) TITLE I.—The Equal Employment Op-
11 portunity Commission and the Attorney General
12 shall implement the plan for assistance, as de-
13 scribed in subsection (a), for title I.
14 (B) TITLE II.—
15 (i) IN GENERAL.—Except as provided
16 for in clause (ii), the Attorney General shall
17 implement such plan for assistance for title
18 II.
19 (ii) EXCEPTION.—The Secretary of
20 Transportation shall implement such plan for
21 assistance for section 203.
22 (C) TITLE III.—The Attorney General, in
23 coordination with the Secretary of Transportation
24 and the Chairperson of the Architectural Trans-
1 portation Barriers Compliance Board, shall imple-
2 ment such plan for assistance for title III.
3 (D) TITLE IV.—The Chairman of the Feder-
4 al Communications Commission, in coordination
5 with the Attorney General, shall implement such
6 plan for assistance for title IV.

HOUSE AMENDMENT

1 *(2) IMPLEMENTATION OF TITLES.—*
2 *(A) TITLE I.—The Equal Employment Op-*
3 *portunity Commission and the Attorney General*
4 *shall implement the plan for assistance developed*
5 *under subsection (a), for title I.*
6 *(B) TITLE II.—*
7 *(i) SUBTITLE A.—The Attorney Gener-*
8 *al shall implement such plan for assistance*
9 *for subtitle A of title II.*
10 *(ii) SUBTITLE B.—The Secretary of*
11 *Transportation shall implement such plan for*
12 *assistance for subtitle B of title II.*
13 *(C) TITLE III.—The Attorney General, in*
14 *coordination with the Secretary of Transportation*
15 *and the Chair of the Architectural Transportation*
16 *Barriers Compliance Board, shall implement such*
17 *plan for assistance for title III, except for section*
18 *304, the plan for assistance for which shall be im-*
19 *plemented by the Secretary of Transportation.*
20 *(D) TITLE IV.—The Chairman of the Fed-*
21 *eral Communications Commission, in coordina-*
22 *tion with the Attorney General, shall implement*
23 *such plan for assistance for title IV.*
24 *(3) TECHNICAL ASSISTANCE MANUALS.—Each*
25 *Federal agency that has responsibility under para-*

COMMENTS

(c) The Senate bill includes a section requiring agencies to provide

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SENATE BILL

7 (d) GRANTS AND CONTRACTS.—

8 (1) IN GENERAL.—Each department and agency
9 having responsibility for implementing this Act may
10 make grants or enter into contracts with individuals,
11 profit institutions, and nonprofit institutions, including
12 educational institutions and groups or associations rep-
13 resenting individuals who have rights or duties under
14 this Act, to effectuate the purposes of this Act.

15 (2) DISSEMINATION OF INFORMATION.—Such
16 grants and contracts, among other uses, may be de-
17 signed to ensure wide dissemination of information
18 about the rights and duties established by this Act and
19 to provide information and technical assistance about
20 techniques for effective compliance with this Act.

HOUSE AMENDMENT

1 *graph (2) for implementing this Act shall, as part of its*
2 *implementation responsibilities, ensure the availability*
3 *and provision of appropriate technical assistance*
4 *manuals to individuals or entities with rights or duties*
5 *under this Act no later than six months after applica-*
6 *ble final regulations are published under titles I, II,*
7 *III, and IV.*

8 *(d) GRANTS AND CONTRACTS.—*

9 *(1) IN GENERAL.—Each Federal agency that has*
10 *responsibility under subsection (c)(2) for implementing*
11 *this Act may make grants or award contracts to effec-*
12 *tuate the purposes of this section. Such grants and con-*
13 *tracts may be awarded to individuals, institutions not*
14 *organized for profit and no part of the net earnings of*
15 *which inures to the benefit of any private shareholder*
16 *or individual (including educational institutions), and*
17 *associations representing individuals who have rights*
18 *or duties under this Act. Contracts may be awarded to*
19 *entities organized for profit, but such entities may not*
20 *be the recipients or grants described in this paragraph.*

21 *(2) DISSEMINATION OF INFORMATION.—Such*
22 *grants and contracts, among other uses, may be de-*
23 *signed to ensure wide dissemination of information*
24 *about the rights and duties established by this Act and*

COMMENTS

technical assistance to covered individuals and entities.

The House amendment makes several technical and conforming changes and adds a requirement that appropriate departments and agencies develop and disseminate technical assistance manuals to those who have rights and responsibilities under the ADA no later than six months after ADA regulations are published. However, a covered entity is not excused from complying with the ADA because of any failure to receive technical assistance, including any failure in the development or dissemination of a technical assistance manual.

(d) With slightly different wording, the Senate bill and the House amendment authorize the entering into of grants and contracts.

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SENATE BILL

21 (e) FAILURE TO RECEIVE ASSISTANCE.—An employ-
22 er, public accommodation, or other entity covered under this
23 Act shall not be excused from meeting the requirements of
24 this Act because of any failure to receive technical assistance
25 under this section.

1 **SEC. 507. FEDERAL WILDERNESS AREAS.**
2 (a) STUDY.—The National Council on Disability shall
3 conduct a study and report on the effect that wilderness des-
4 ignations and wilderness land management practices have on
5 the ability of individuals with disabilities to use and enjoy the
6 National Wilderness Preservation System as established
7 under the Wilderness Act (16 U.S.C. 1131 et seq.).
8 (b) SUBMISSION OF REPORT.—Not later than 1 year
9 after the enactment of this Act, the National Council on Dis-
10 ability shall submit the report required under subsection (a) to
11 Congress.

HOUSE AMENDMENT

1 *to provide information and technical assistance about*
2 *techniques for effective compliance with this Act.*
3 *(e) FAILURE TO RECEIVE ASSISTANCE.—An employ-*
4 *er, public accommodation, or other entity covered under this*
5 *Act shall not be excused from compliance with the require-*
6 *ments of this Act because of any failure to receive technical*
7 *assistance under this section, including any failure in the*
8 *development or dissemination of any technical assistance*
9 *manual authorized by this section.*
10 ***SEC. 507. FEDERAL WILDERNESS AREAS.***
11 *(a) STUDY.—The National Council on Disability shall*
12 *conduct a study and report on the effect that wilderness desig-*
13 *nations and wilderness land management practices have on*
14 *the ability of individuals with disabilities to use and enjoy*
15 *the National Wilderness Preservation System as established*
16 *under the Wilderness Act (16 U.S.C. 1131 et seq.).*
17 *(b) SUBMISSION OF REPORT.—Not later than 1 year*
18 *after the enactment of this Act, the National Council on Dis-*
19 *ability shall submit the report required under subsection (a)*
20 *to Congress.*
21 *(c) SPECIFIC WILDERNESS ACCESS.—Congress reaf-*
22 *firms that nothing in the Wilderness Act is to be construed as*
23 *prohibiting use of a wheelchair in a wilderness area by an*
24 *individual whose disability requires use of a wheelchair, but*
25 *no agency is required to provide any form of special treat-*

COMMENTS

76. Wilderness areas.

The Senate bill specifies that the National Council on Disability shall conduct a study regarding the effect of wildnerness designations on access for people with disabilities.

The House amendment adds that the Wilderness Act is not to be construed as prohibiting use of a wheelchair in a wilderness area by an individual whose disability requires the use of a wheelchair but no modifications of land are required.

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SENATE BILL

12 SEC. 508. TRANSVESTITES.

13 For the purposes of this Act, the term "disabled" or
14 "disability" shall not apply to an individual solely because
15 that individual is a transvestite.

16 SEC. 509. CONGRESSIONAL INCLUSION.

17 Notwithstanding any other provision of this Act or of
18 law, the provisions of this Act shall apply in their entirety to
19 the Senate, the House of Representatives, and all the instru-
20 mentalities of the Congress, or either House thereof.

HOUSE AMENDMENT

1 *ment or accommodation, or to construct any facilities or*
2 *modify any conditions of lands within a wilderness area in*
3 *order to facilitate such use.*

4 *SEC. 508. TRANSVESTITES.*

5 *For the purposes of this Act, the term "disabled" or*
6 *"disability" shall not apply to an individual solely because*
7 *that individual is a transvestite.*

8 *SEC. 509. CONGRESSIONAL INCLUSION.*

9 *(a) IN GENERAL.—Notwithstanding any other provi-*
10 *sion of this Act or of law, the purposes of this Act shall,*
11 *subject to subsections (b) through (d), apply in their entirety*
12 *to the Senate, the House of Representatives, and all the in-*
13 *strumentalities of the Congress, or either House thereof.*

14 *(b) EMPLOYMENT IN THE HOUSE OF REPRESENTA-*
15 *TIVES.—*

16 *(1) IN GENERAL.—The rights and protections*
17 *under this Act shall, subject to paragraph (2), apply*
18 *with respect to any employee in an employment posi-*
19 *tion in the House of Representatives and any employ-*
20 *ing authority of the House of Representatives.*

21 *(2) ADMINISTRATION.—*

22 *(A) In the administration of this subsection,*
23 *the remedies and procedures made applicable pur-*
24 *suant to the resolution described in subparagraph*
25 *(B) shall apply exclusively.*

COMMENTS

77. Congressional coverage.

The Senate bill makes the provisions of the legislation applicable to Congress and the instrumentalities of Congress.

The House amendment, also covers Congress and the instrumentalities of Congress but delegates to the House and the instrumentalities of Congress the responsibility to develop applicable remedies and procedures.

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1 *(B) The resolution referred to in subpara-*
2 *graph (A) is House Resolution 15 of the One*
3 *Hundredth First Congress, as agreed to January*
4 *3, 1989, or any other provision that continues in*
5 *effect the provisions of, or is a successor to, the*
6 *Fair Employment Practices Resolution (House*
7 *Resolution 558 of the One Hundredth Congress,*
8 *as agreed to October 4, 1988).*
9 *(3) EXERCISE OF RULEMAKING POWER.—The*
10 *provisions of paragraph (2) of this subsection are en-*
11 *acted by the Congress as an exercise of the rulemaking*
12 *power of the House of Representatives, with full recog-*
13 *nition of the right of the House to change its rules, in*
14 *the same manner, and to the same extent as in the case*
15 *of any other rule of the House.*
16 *(c) CONGRESSIONAL MATTERS OTHER THAN EM-*
17 *PLOYMENT.—*
18 *(1) IN GENERAL.—The rights and protections*
19 *under this Act shall, subject to paragraph (2), apply*
20 *with respect to the conduct of the Congress regarding*
21 *matters other than employment.*
22 *(2) ESTABLISHMENT OF REMEDIES AND PRO-*
23 *CEDURES BY ARCHITECT OF THE CAPITOL.—The Ar-*
24 *chitect of the Capitol shall establish remedies and pro-*
25 *cedures to be utilized with respect to the rights and pro-*

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SENATE BILL	HOUSE AMENDMENT	COMMENTS

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1 *tections provided pursuant to paragraph (1). Such rem-*
2 *edies and procedures shall apply exclusively, after ap-*
3 *proval in accordance with paragraph (3).*
4 *(3) APPROVAL BY CONGRESSIONAL LEADER-*
5 *SHIP.—For purposes of paragraph (2), the Architect of*
6 *the Capitol shall submit proposed remedies and proce-*
7 *dures to the Speaker of the House of Representatives*
8 *and to an appropriate officer of the Senate, as desig-*
9 *nated by the Senate. The remedies and procedures*
10 *shall be effective upon the approval of the Speaker,*
11 *after consultation with the House Office Building*
12 *Commission, and the approval of the appropriate offi-*
13 *cer of the Senate.*
14 *(d) INSTRUMENTALITIES OF CONGRESS.—*
15 *(1) IN GENERAL.—The rights and protections*
16 *under this Act shall, subject to paragraph (2), apply*
17 *with respect to the conduct of each instrumentality of*
18 *the Congress.*
19 *(2) ESTABLISHMENT OF REMEDIES AND PRO-*
20 *CEDURES BY INSTRUMENTALITIES.—The chief offi-*
21 *cial of each instrumentality of the Congress shall es-*
22 *tablish remedies and procedures to be utilized with re-*
23 *spect to the rights and protections provided pursuant to*
24 *paragraph (1). Such remedies and procedures shall*
25 *apply exclusively.*

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SENATE BILL

21 SEC. 510. ILLEGAL DRUG USE.

22 (a) For purposes of this Act, an individual with a "dis-
23 ability" shall not include any individual who uses illegal
24 drugs, but may include an individual who has successfully
25 completed a supervised drug rehabilitation program, or has
1 otherwise been rehabilitated successfully, and no longer uses
2 illegal drugs.

3 (b) However, for purposes of covered entities providing
4 medical services, an individual who uses illegal drugs shall
5 not be denied the benefits of such services on the basis of his
6 or her use of illegal drugs, if he or she is otherwise entitled to
7 such services.

HOUSE AMENDMENT

1 *(3) REPORT TO CONGRESS.—The chief official of*
2 *each instrumentality of the Congress shall, after estab-*
3 *lishing remedies and procedures for purposes of para-*
4 *graph (2), submit to the Congress a report describing*
5 *the remedies and procedures.*

6 *SEC. 510. ILLEGAL USE OF DRUGS.*

7 *(a) IN GENERAL.—For purposes of this Act, the term*
8 *"individual with a disability" does not include an individual*
9 *who is currently engaging in the illegal use of drugs, when*
10 *the covered entity acts on the basis of such use.*

11 *(b) RULES OF CONSTRUCTION.—Nothing in subsec-*
12 *tion (a) shall be construed to exclude as an individual with a*
13 *disability an individual who—*

14 *(1) has successfully completed a supervised drug*
15 *rehabilitation program and is no longer engaging in*
16 *the illegal use of drugs, or has otherwise been rehabili-*
17 *tated successfully and is no longer engaging in such*
18 *use;*

19 *(2) is participating in a supervised rehabilitation*
20 *program and is no longer engaging in such use; or*

21 *(3) is erroneously regarded as engaging in such*
22 *use, but is not engaging in such use;*

23 *except that it shall not be a violation of this Act for a covered*
24 *entity to adopt or administer reasonable policies or proce-*
25 *dures, including but not limited to drug testing, designed to*

COMMENTS

78. Illegal use of drugs.

The Senate bill specifies that an individual with a disability does not include any individual who uses illegal drugs, but may include an individual who has successfully completed a supervised drug rehabilitation program, or has otherwise been rehabilitated successfully, and no longer uses illegal drugs. The Senate bill also makes it clear that an individual who uses illegal drugs may not be denied the benefits of medical services on the basis of his or her use of illegal drugs, if he or she is otherwise entitled to such services.

The House amendment includes clarifying and conforming changes to make this provision consistent with other provisions in the legislation concerning the treatment of users of illegal drugs:

(a) The House amendment specifies that an individual with a disability does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use.

(b) The House amendment specifies that the following individuals are not excluded from the term "individual with a disability"--an individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use; an individual who is participating in a supervised rehabilitation program and is no longer engaged in such use; or a person who is erroneously regarded as engaging in such use, but is not engaging in such use.

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HOUSE AMENDMENT

1 *ensure that an individual described in paragraph (1) or (2) is*
2 *no longer engaging in the illegal use of drugs; however, noth-*
3 *ing in this section shall be construed to encourage, prohibit,*
4 *restrict, or authorize the conducting of testing for the illegal*
5 *use of drugs.*
6 *(c) HEALTH AND OTHER SERVICES.—Notwithstand-*
7 *ing subsection (a) and section 511(b)(3), an individual shall*
8 *not be denied health services, or services provided in connec-*
9 *tion with drug rehabilitation, on the basis of the current ille-*
10 *gal use of drugs if the individual is oth. rwise entitled to such*
11 *services.*
12 *(d) DEFINITION OF ILLEGAL USE OF DRUGS.—*
13 *(1) IN GENERAL.—The term "illegal use of*
14 *drugs" means the use of drugs, the possession or distri-*
15 *bution of which is unlawful under the Controlled Sub-*
16 *stances Act (21 U.S.C. 812). Such term does not in-*
17 *clude the use of a drug taken under supervision by a*
18 *licensed health care professional, or other uses author-*
19 *ized by the Controlled Substances Act or other provi-*
20 *sions of Federal law.*
21 *(2) DRUGS.—The term "drug" means a con-*
22 *trolled substance, as defined in schedules I through V*
23 *of section 202 of the Controlled Substances Act.*

COMMENTS

(c) The House amendment specifies that it shall not be a violation for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual is no longer illegally using drugs; however nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(d) The House amendment specifies that an individual shall not be denied health services or other services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(e) The House amendment includes the same definition of "illegal use of drugs" and "drugs" set out in title I of the Act.

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SENATE BILL

8 SEC. 511. DEFINITIONS.

9 Under this Act the term "disability" does not include
10 "homosexuality", "bisexuality", "transvestism", "pedophi-
11 lia", "transsexualism", "exhibitionism", "voyeurism", "com-
12 pulsive gambling", "kleptomania", or "pyromania", "gender
13 identity disorders", "current psychoactive substance use dis-
14 orders", "current psychoactive substance-induced organic
15 mental disorders", as defined by DSM-III-R which are not
16 the result of medical treatment, or other sexual behavior dis-
17 orders.

18 SEC. 512. AMENDMENTS TO THE REHABILITATION ACT.

19 (a) HANDICAPPED INDIVIDUAL.—Section 7(7)(B) of the
20 Rehabilitation Act of 1973 (29 U.S.C. 706(8)(B)) is
21 amended—

22 (1) in the first sentence, by striking out "Subject
23 to the second sentence of this subparagraph, the" and
24 inserting in lieu thereof "The"; and

HOUSE AMENDMENT

1 *SEC. 511. DEFINITIONS.*

2 *(a) HOMOSEXUALITY AND BISEXUALITY.—For pur-*
3 *poses of the definition of "disability" in section 3(2), homo-*
4 *sexuality and bisexuality are not impairments and as such*
5 *are not disabilities under this Act.*

6 *(b) CERTAIN CONDITIONS.—Under this Act, the term*
7 *"disability" shall not include—*

8 *(1) transvestism, transsexualism, pedophilia, exhi-*
9 *bitionism, voyeurism, gender identity disorders not*
10 *resulting from physical impairments, or other sexual*
11 *behavior disorders;*

12 *(2) compulsive gambling, kleptomania, or pyroma-*
13 *nia; or*

14 *(3) psychoactive substance use disorders resulting*
15 *from current illegal use of drugs.*

16 *SEC. 512. AMENDMENTS TO THE REHABILITATION ACT.*

17 *(a) DEFINITION OF HANDICAPPED INDIVIDUAL.—*
18 *Section 7(8) of the Rehabilitation Act of 1973 (29 U.S.C.*
19 *706(8)) is amended by redesignating subparagraph (C) as*
20 *subparagraph (D), and by inserting after subparagraph (B)*
21 *the following subparagraph:*

22 *"(C)(i) For purposes of title V, the term 'individual*
23 *with handicaps' does not include an individual who is cur-*
24 *rently engaging in the illegal use of drugs, when a covered*
25 *entity acts on the basis of such use.*

COMMENTS

79. Exclusions from the term "disability."

The Senate bill restates current policy under section 504 of the Rehabilitation Act of 1973 that the term "disability" does not include homosexuality and bisexuality. The Senate bill also excludes from the term "disability" the following mental impairments: transvestism, pedophilia, transsexualism, exhibitionism, voyeurism, compulsive gambling, kleptomania, or pyromania, gender identity disorders, current psychoactive substance-induced organic mental disorders (as defined by DSM-III-R which are not the result of medical treatment), or other sexual behavior disorders.

The House amendment lists the various exclusions by category. The first category specifies that homosexuality and bisexuality are not impairments and as such are not disabilities under the ADA. The second category includes transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders. The third category includes compulsive gambling, kleptomania, or pyromania. The final category includes psychoactive substance use disorders resulting from current use of illegal drugs.

80. Amendments to the definition of the term "handicapped individual" under the Rehabilitation Act of 1973.

(a) The Senate bill includes amendments to the definition of the term "handicapped individual" used in the Rehabilitation Act of 1973 to exclude current users of illegal drugs which are consistent with the changes made to the definition of the term "individual with a disability" used in the ADA. The Senate bill also specifies that the exlusion does not apply to medical services for which the individual is otherwise entitled. The Senate bill also states

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SENATE BILL

1 (2) by striking out the second sentence and insert-
2 ing in lieu thereof the following:
3 "Notwithstanding any other provision of law, but subject to
4 subsection (C) with respect to programs and activities provid-
5 ing education and the last sentence of this paragraph, the
6 term 'individual with a handicap' does not include any indi-
7 vidual who currently uses illegal drugs, except that an indi-
8 vidual who is otherwise handicapped shall not be excluded
9 from the protections of this Act if such individual also uses or
10 is also addicted to drugs. For purposes of programs and ac-
11 tivities providing medical services, an individual who current-
12 ly uses illegal drugs shall not be denied the benefits of such
13 programs or activities on the basis of his or her current use of
14 illegal drugs if he or she is otherwise entitled to such
15 services.
16 "(C) For purposes of programs and activities providing
17 educational services, local educational agencies may take dis-
18 ciplinary action pertaining to the use or possession of illegal
19 drugs or alcohol against any handicapped student who cur-
20 rently uses drugs or alcohol to the same extent that such
21 disciplinary action is taken against nonhandicapped students.
22 Furthermore, the due process procedures at 34 CFR 104.36
23 shall not apply to such disciplinary actions.
24 "(D) For purposes of sections 503 and 504 of this Act
25 as such sections relate to employment, the term 'individual

HOUSE AMENDMENT

1 *"(ii) Nothing in clause (i) shall be construed to exclude*
2 *as an individual with handicaps an individual who—*
3 *"(I) has successfully completed a supervised drug*
4 *rehabilitation program and is no longer engaging in*
5 *the illegal use of drugs, or has otherwise been rehabili-*
6 *tated successfully and is no longer engaging in such*
7 *use;*
8 *"(II) is participating in a supervised rehabilita-*
9 *tion program and is no longer engaging in such use; or*
10 *"(III) is erroneously regarded as engaging in*
11 *such use, but is not engaging in such use;*
12 *except that it shall not be a violation of this Act for a covered*
13 *entity to adopt or administer reasonable policies or proce-*
14 *dures, including but not limited to drug testing, designed to*
15 *ensure that an individual described in subclause (I) or (II)*
16 *is no longer engaging in the illegal use of drugs.*
17 *"(iii) Notwithstanding clause (i), for purposes of pro-*
18 *grams and activities providing health services and services*
19 *provided under title I, II and III, an individual shall not be*
20 *excluded from the benefits of such programs or activities on*
21 *the basis of his or her current illegal use of drugs if he or she*
22 *is otherwise entitled to such services.*
23 *"(iv) For purposes of programs and activities providing*
24 *educational services, local educational agencies may take dis-*
25 *ciplinary action pertaining to the use or possession of illegal*

COMMENTS

that the term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by the controlled Substances Act or other provisions of Federal law.

The House amendment includes the same type of conforming changes to the Rehabilitation Act which are made to the ADA (see above). However, with respect to the provision that specifies that an individual shall not be excluded from medical services on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services, the category is limited to health services and services provided under titles I, II, and III of the Rehabilitation Act of 1973.

(b) The House amendment specifies that the term "drugs" and the phrase "current illegal use of drugs" have the same meanings as such terms have under the ADA.

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SENATE BILL	HOUSE AMENDMENT	COMMENTS
1 with handicaps' does not include any individual who is an 2 alcoholic whose current use of alcohol prevents such individ- 3 ual from performing the duties of the job in question or whose 4 employment, by reason of such current alcohol abuse, would 5 constitute a direct threat to property or the safety of 6 others.". 7 (b) Section 7 of such Act (29 U.S.C. 706) is further 8 amended by adding at the end thereof the following new 9 paragraph: 10 "(22) The term 'illegal drugs' means controlled sub- 11 stances, as defined in schedules I through V of section 202 of 12 the Controlled Substances Act (21 U.S.C. 812), the posses- 13 sion or distribution of which is unlawful under such Act. The 14 term 'illegal drugs' does not mean the use of a controlled 15 substance pursuant to a valid prescription or other uses au- 16 thorized by the Controlled Substances Act or other provisions 17 of Federal law.".	1 *drugs or alcohol against any handicapped student who cur-* 2 *rently is engaging in the illegal use of drugs or in the use of* 3 *alcohol to the same extent that such disciplinary action is* 4 *taken against nonhandicapped students. Furthermore, the* 5 *due process procedures at 34 CFR 104.36 shall not apply to* 6 *such disciplinary actions.* 7 *"(v) For purposes of sections 503 and 504 as such sec-* 8 *tions relate to employment, the term 'individual with handi-* 9 *caps" does not include any individual who is an alcoholic* 10 *whose current use of alcohol prevents such individual from* 11 *performing the duties of the job in question or whose employ-* 12 *ment, by reason of such current alcohol abuse, would consti-* 13 *tute a direct threat to property or the safety of others.".* 14 *(b) DEFINITION OF ILLEGAL DRUGS.—Section 7 of* 15 *the Rehabilitation Act of 1973 (29 U.S.C. 706) is amended* 16 *by adding at the end the following new paragraph:* 17 *"(22)(A) The term 'drug' means a controlled substance,* 18 *as defined in schedules I through V of section 202 of the* 19 *Controlled Substances Act (21 U.S.C. 812).* 20 *"(B) The term 'illegal use of drugs' means the use of* 21 *drugs, the possession or distribution of which is unlawful* 22 *under the Controlled Substances Act. Such term does not* 23 *include the use of a drug taken under supervision by a* 24 *licensed health care professional, or other uses authorized by*	

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SENATE BILL

18 SEC. 513. SEVERABILITY.

19 Should any provision in this Act be found to be uncon-
20 stitutional by a court of law, such provision shall be severed
21 from the remainder of the Act, and such action shall not

1 affect the enforceability of the remaining provisions of the
2 Act.

HOUSE AMENDMENT

1 *the Controlled Substances Act or other provisions of Federal*
2 *law.".*
3 *(c) CONFORMING AMENDMENTS.—Section 7(8)(B) of*
4 *the Rehabilitation Act of 1973 (29 U.S.C. 706(8)(B)) is*
5 *amended—*
6 *(1) in the first sentence, by striking "Subject to*
7 *the second sentence of this subparagraph," and insert-*
8 *ing "Subject to subparagraphs (C) and (D),"; and*
9 *(2) by striking the second sentence.*
10 ***SEC. 513. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.***
11 *Where appropriate and to the extent authorized by law,*
12 *the use of alternative means of dispute resolution, including*
13 *settlement negotiations, conciliation, facilitation, mediation,*
14 *factfinding, minitrials, and arbitration, is encouraged to*
15 *resolve disputes arising under this Act.*
16 ***SEC. 514. SEVERABILITY.***
17 *Should any provision in this Act be found to be uncon-*
18 *stitutional by a court of law, such provision shall be severed*
19 *from the remainder of the Act, and such action shall not*
20 *affect the enforceability of the remaining provisions of the*
21 *Act.*

COMMENTS

81. Alternative means of dispute resolutions.

The House amendment, but not the Senate bill, provides that where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the ADA.

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HOUSE-SENATE COMPARISON OF THE AMERICANS WITH DISABILITIES ACT

1. Short title.

The Senate bill titles the Act the Americans with Disabilities Act of 1989. The House amendment changes the date to 1990.

2. Definition of the term "direct threat."

The House amendment, but not the Senate bill, defines the term "direct threat" to mean a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

3. Definitions of terms "illegal use of drugs" and "drugs."

The Senate bill uses the phrase "illegal drug" and explains that the term means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act, the possession or distribution of which is unlawful under such Act and does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by the Controlled Substances Act.

The House amendment uses the phrase "illegal use of drugs" and defines the term to mean the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act and does not mean the use of controlled substances taken under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law. The House amendment defines the term "drugs" to mean a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

4. Essential functions of the job.

The Senate bill defines a qualified individual with a disability as a person who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

The House amendment adds that consideration shall be given to the employer's judgment as to what functions of a job are essential and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

5. Definition of the term "undue hardship."

(a) The Senate bill defines an "undue hardship" to mean an action requiring significant difficulty or expense and then list the factors that must be considered in determining whether an accommodation would impose an undue hardship.

The House amendment specifies that the term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors listed in the statute.

(b) In determining whether accommodating a qualified applicant or employee with a disability imposes an "undue hardship," the Senate bill requires that the following factors be considered: (1) the overall size of the covered entity with respect to the number of employees, number and type of facilities, and size of the budget; (2) the type of operation of the covered entity, including the composition and structure of the entity; and (3) the nature and cost of the action needed.

The House amendment includes the following factors: (1) the nature and cost of the accommodation needed under the ADA; (2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

6. Discrimination.

The Senate bill and the House amendment use the same terms but in a different order.

7. Contract liability.

The Senate bill specifies that covered entities cannot discriminate directly or indirectly through contracts with other parties.

The House amendment clarifies that a covered entity is only liable in contractual arrangements for discrimination against its own applicants or employees.

8. Reasonable accommodation.

The Senate bill specifies that it is discriminatory for a covered entity to deny an employment opportunity to a qualified job applicant or employee with a disability if such denial is based on the need of the covered entity to make reasonable accommodations. In a separate section, the Senate bill specifies that reasonable accommodations need not be provided if they would result in an undue hardship.

The House amendment clarifies the relationship between the obligation not to deny a job to an individual with a disability who needs a reasonable accommodation and the undue hardship limitation governing the covered entity's obligation to provide the reasonable accommodation by including these provisions under the same paragraph.

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9. Employment tests.

The House amendment adds the term "qualification standards" to the phrase "employment tests or other selection criteria."

10. Preemployment inquiries.

The House amendment deletes the word "employee" from the preemployment inquiry provision.

11. Postemployment medical examinations.

The Senate bill specifies that an employer shall not conduct or require a medical examination of an employer unless such examination or inquiry is shown to be job-related and consistent with business necessity.

The House amendment deletes the term "conduct" and adds that a covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site so long as the information obtained regarding the medical condition or history of any employee are kept confidential and are not used to discriminate against qualified individuals with disabilities.

12. Defenses, in general.

The Senate amendment includes a reference to "reasonable accommodations." The House adds the following phrase "as required under this title."

13. Health and safety.

The Senate bill includes as a defense that a covered entity may fire or refuse to hire a person with a contagious disease if the individual poses a direct threat to the health and safety of other individuals in the workplace.

The House amendment makes this specific defense applicable to all applicants and employees, not just to those with contagious diseases.

14. Religious tenet exemption.

The Senate bill specifies that a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of such organization.

The House amendment deletes the phrase "as a qualification standard to employment."

15. Food Handlers.

The House amendment, but not the Senate bill, specifies that it shall not be a violation of this Act for an employer to refuse to assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accommodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage.

16. Illegal use of drugs and use of alcohol.

(a) The Senate bill specifies that the term "qualified individual with a disability" does not include employees or applicants who are current users of illegal drugs, except that an individual who is otherwise handicapped shall not be excluded from the protections of the Act if such individual also uses or is addicted to drugs.

The House amendment specifies that "qualified person with a disability" does not include any applicant or employee who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use.

(b) The House amendment specifies that the following individuals are not excluded from the definition of the term "qualified individual with a disability": (1) an individual who has successfully completed a supervised rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) an individual who is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) an individual who is erroneously regarded as engaging in such use but is not engaging in such use.

(c) The House amendment, but not the Senate bill, specifies that it is not a violation of title I of the Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual involved in rehabilitation programs is no longer engaging in the illegal use of drugs.

(d) The Senate bill specifies that the covered entity may require that employees behave in conformance with the requirements of the Drug-Free Workplace Act of 1988 and that transportation employees meet requirements established by the Secretary of Transportation with respect to drugs and alcohol.

The House amendment also includes reference to positions defined by the Department of Defense and the Nuclear Regulatory Commission.

(e) The House amendment adds that nothing in this title shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by railroads of authority to: (1) test railroad employees in, and applicants for, positions involving safety-sensitive duties, as determined by the Secretary of Transportation, for the illegal use of drugs and for on-duty impairment by alcohol; and (2) remove such persons who test positive from safety-sensitive duties.

17. Enforcement.

(a) The House amendment adds "powers" to the phrase "remedies and procedures" to conform the ADA to title VII.

(b) The House amendment adds to the enforcement section a reference to section 705 of title VII of the Civil Rights Act of 1964 (authority of the Equal Employment Opportunity Commission).

(c) The House amendment adds a reference to "the Attorney General."

(d) The House amendment substitutes the term "person," which is used and defined in title VII of the Civil Rights Act of 1964 for the term "individual" included in the Senate bill.

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17 (e) The Senate bill includes the phrase any individual "who believes he or she is being subjected to discrimination." The House amendment substitutes "any person alleging discrimination."

18. Relationship with the Rehabilitation Act of 1973.

The House amendment, but not the Senate bill, directs administrative agencies to develop procedures and coordinating mechanisms to ensure that ADA and Rehabilitation Act of 1973 administrative complaints are handled without duplication or inconsistent, conflicting standards. Further, agencies must establish the coordinating mechanisms in their regulations.

19. Structure of title II.

The Senate bill includes one set of standards applicable to all public entities providing public services, including entities providing public transportation.

The House amendment includes subtitle A-Prohibition Against Discrimination and Other Generally Applicable Provisions and subtitle B--Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory. Two parts are included under subtitle B: part I covers public transportation other than by aircraft or certain rail operations (intercity and commuter rail) and part II covers public transportation by intercity and commuter rail.

20. Definition of public entities.

The Senate bill specifies that the public entities subject to the provisions of title II include: any state or local government or any department, agency, special purpose district, or other instrumentality of a State or local government. The accompanying report makes it clear that AMTRAK and commuter authorities are considered public entities.

The House amendment defines the term "public entity" to mean any state or local government or any department, agency, special purpose district, or other instrumentality of a state or states or local government; a commuter authority (as defined in section 103(8) of the Rail Passenger Service Act); and the National Railroad Passenger Corporation (AMTRAK).

21. Qualified individual with a disability.

The House amendment uses the term "public entity" in lieu of the list of entities covered by subtitle A.

22. Discrimination, in general.

The Senate bill specifies the general and specific prohibitions against discrimination by public entities.

The House amendment retains the general prohibition and clarifies that this general prohibition is subject to the other more specific provisions in title II. The House amendment also includes grammatical changes.

23. Enforcement.

The Senate bill specifies that the remedies, procedures, and rights set out in section 505 of the Rehabilitation Act of 1973 shall be available with respect to any individual who believes that he or she is being subjected to discimination on the basis of disability in violation of this Act, or regulations promulgated under section 204 concerning public services.

The House amendment provides that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

24. Regulations and standards.

The Senate bill specifies that the Attorney General shall issue regulations implementing title II with the exception of section 203 pertaining to public transportation provided by public entities.

The House amendment, consistent with the revised structure used by the House, specifies that the Attorney General shall promulgate regulations that implement subtitle A. Such regulations shall not incude any matter within the scope of the authority of the Secretary of Transportation under section 223 (paratransit), section 229 (regulations relating to part I of subtitle B), and section 244 (regulations relating to part II of subtitle B).

The House amendment also specifies that regulations shall include standards applicable to facilities and vehicles covered by subtitle A, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B.

25. Definitions.

The Senate bill uses the following phrases: "demand responsive system," "fixed route system," "operates," and "public transportation."

The House amendment adds definitions for the terms "demand responsive system," "fixed route system" and "operates." The House amendment also substitutes the phrase "designated public transportation" for the phrase "public transportation" and includes the following definition: transportation (other than public school transportation) by bus, rail, or by other conveyance (other than transportation by aircraft, or intercity or commuter rail) that provides the general public with general or special service (including charter service) on a regular and continuing basis. The House amendment also includes a definition for the term "public school transportation.

26. Purchase or lease of new and used fixed route vehicles.

With slightly different wording, the Senate bill and the House amendment require that all new vehicles purchased or leased by a public entity which operates a fixed route system be accessible and require such public entity to make demonstrated good faith efforts to purchase or lease used vehicles that are accessible.

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27. Remanufactured and historic vehicles.

The Senate bill specifies that if a public entity remanufactures a vehicle, or purchases or leases a remanufactured vehicle so as to extend its usable life for 5 years or more, the vehicle must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.

With slightly different phrasing, the House amendment includes the policy in the Senate version applicable to remanufactured vehicles and adds a specific provision in the legislation for historic vehicles. Under the provision, if making a vehicle of historic character (which is used solely on any segment of a fixed route system that is included on the National Register of Historic Places) readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or purchase or lease a remanufactured vehicle with) those modifications which do not significantly alter the historic character of such vehicle.

28. Paratransit.

The Senate bill specifies that if a public entity operates a fixed route system, it is discrimination for a public transit authority to fail to provide paratransit or other special transportation services sufficient to provide a comparable level of services as is provided to individuals using the fixed route transportation to individuals with disabilities who cannot otherwise use fixed route transportation and individuals associated with such individuals with disabilities unless the public transit authority can demonstrate that the provision of paratransit or other transportation services would impose an undue financial burden on the public transit entity. If the provision of comparable paratransit services would impose an undue financial burden on the public entity, such entity must provide such service to the extent that provision of such services would not impose an undue financial burden on such entity. The Senate version specifies that the definition of undue financial burden may include reference to a flexible numerical formula that incorporates appropriate local characteristics such as population.

The House amendment includes the following changes.

(a) The House amendment clarifies that a public entity that only provides commuter bus service need not provide paratransit.

(b) The House amendment specifies that comparable level of service must be provided but in the case of response time, it must be comparable, to the extent practicable.

(c) Under the House amendment, paratransit and other special transportation services must be provided to three categories of individuals with disabilities:

-to any individual with a disability who is unable as a result of a physical or mental impairment (including a vision impairment) without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device) to board, ride, or disembark from any vehicle on the system which is accessible;

--to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is accessible if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such an accessible vehicle is not being used to provide designated public transportation on the route; and

--to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system.

For purposes of the first two categories of individuals with disabilities, boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(d) The House amendment clarifies that paratransit and special transportation services need only be provided in the service area of each public entity that operates a fixed route system and not in any portion of the service area in which the public entity solely provides commuter bus service.

(e) The House amendment deletes the permissive reference to flexible numerical formula.

(f) The House amendment requires that paratransit be available to one other person accompanying the individual with a disability.

(g) The House amendment specifies that each public entity must submit plans for operating paratransit services to the Secretary. The plan must include, among other things, the identity of any other public entity or person providing paratransit service and provide that the public entity does not have to provide directly under the plan the identified paratransit services being provided to others.

(h) The House amendment includes a statutory construction provision that makes it clear that nothing in the ADA should be construed as preventing a public entity from providing paratransit services at a level which is greater than the level required by the ADA, from providing paratransit services in addition to those services required by the ADA, or from providing such services to individuals in addition to those individuals to whom such services are required to be provided by the ADA.

29. Demand responsive systems operated by a public entity.

With slightly different wording, the Senate bill and the House amendment specify rules for public entities operating demand responsive systems.

30. New facilities.

The House amendment substitutes the phrase "designated public transportation services" for the phrase "public transportation services" used in the Senate bill.

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31. Alterations to existing facilities.

(a) The House amendment adds a reference to "designated public transportation.

(b) The Senate bill requires that when major structural alterations are made, the alterations as well as the path of travel must be accessible to individuals with disabilities to the maximum extent feasible.

The House amendment substitutes the phrase "an alteration that affects or could affect usability or access to an area of the facility containing a primary function" for the Senate language "major structural alteration" and adds that the alterations to the path of travel and facilities serving the altered area should "not be disproportionate" to the overall alterations in terms of the cost and scope of the overall alterations as determined under criteria established by the Attorney General.

32. Key stations in rapid and light rail systems.

(a)The Senate bill provides an extension of up to 20 years for making key stations in rapid rail or light rail systems accessible where extraordinary expensive structural changes are required.

The House amendment permits 30 years where extraordinary expensive structural changes are required except that by the last day of the 20th year at least two-thirds of such key stations must be readily accessible.

(b) With slightly different wording, both the Senate bill and the House amendment require the development of plans and milestones.

33. Access to non-key stations.

With slightly different phrasing, the Senate bill and the House amendment specify rules governing non-key existing stations.

The House recedes to the Senate and the Senate recedes to the House with an amendment.

34. One car per train rule applicable to rapid rail and light rail systems

The Senate bill provides that as soon as practicable, but in any event in no less than 5 years, rail systems must have at least one car per train that is accessible to individuals with disabilities.

The House amendment specifies that the one car per train rule only applies with respect to trains that have two or more vehicles and includes a special provision applicable to historic trains.

35. Interim accessibility.

The House amendment, but not the Senate bill, specifies that for new construction and alterations for which a valid and appropriate state or local building permit is obtained prior to the issuance of final regulations and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the accessiblity requirement except that if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines, compliance with such supplemental guidelines shall be necessary.

36. Effective date.

The Senate bill specifies that the section in title II pertaining to new fixed route vehicles shall become effective on the date of enactment.

The House amendment specifies that sections concerning fixed route vehicles, demand responsive, stations, one car per train and regulations become effective on the date of enactment.

37. Definitions.

The House amendment but not the Senate bill includes definitions of the following terms: "commuter authority," "commuter rail transportation," "intercity rail transportation," "rail passenger car," "responsible person," and "station."

38. One car per train rule for intercity rail transportation.

With slightly different wording, the Senate bill and the House amendment specify a one car per train rule for intercity rail transportation.

39. New Intercity cars.

The Senate bill provides that all new intercity vehicles must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The House amendment includes a general obligation to make new intercity cars accessible that is identical to the provision in the Senate bill but includes special rules of accessibility applicable to people who use wheelchairs for specific categories of passenger car.

40. One car per train rule and new commuter rail cars.

(a) With slightly different wording, the Senate bill and the House amendment specify the one car per train rule for persons providing commuter rail transportation.

(b) The Senate bill provides that all new commuter rail cars must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The House amendment adopts the same standard and specifies that the term "readily accessible to and usable by" shall not be construed to require: a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger; space to store and fold a wheelchair; or a seat to which a passenger who uses a wheelchair can transfer.

41. Used and remanufactured rail cars.

The Senate bill includes special rules for the purchase of all types of used and remanufactured vehicles.

The House amendment includes special provisions applicable to the purchase of used rail cars and remanufactured rail cars similar to the provisions included in the Senate bill applicable to all vehicles (the time period for remanufacture is 10 years for rail cars instead of 5 years for other vehicles).

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42. New and existing stations.

(a) With respect to commuter rail, the Senate bill specifies that existing key stations must be made accessible as soon as practicable but in no event later than 3 years after the effective date, except that the time limit may be extended to 20 years after the date of enactment in a case where extraordinarily expensive structural changes are necessary to attain accessibility.

The House amendment provides that the extension to 20 years applies where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(b) The Senate bill explains in the report the criteria used to determine which stations are considered "key." The House amendment places these criteria in the legislation. The factors that must be taken into consideration, after consultation with individuals with disabilities and organizations representing such individuals include: high ridership and whether such station serves as a transfer or feeder station.

43. Alterations of existing facilities.

(a) The Senate bill specifies that a facility or any part thereof that is used for public transportation and that is altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility must be altered in such a way that it is readily accessible to and usable by individuals with disabilities.

The House amendment adopts the same standard but substitutes for the phrase "public entity" the phrase "responsible person, owner, or person in control of the station."

(b) The Senate bill requires that when major structural alterations are made, the alterations as well as the path of travel must be accessible to individuals with disabilities to the maximum extent feasible.

The House amendment substitutes the phrase "an alteration that affects or could affect usability or access to an area of the facility containing a primary function" for the Senate language "major structural alteration" and adds that the alterations to the path of travel and facilities serving the altered area should "not be disproportionate" to the overall alterations in terms of the cost and scope of the overall alterations.

(c) The House amendment also specifies that it is considered discrimination for an owner or person in control of a station to fail to provide reasonable cooperation to a responsible person with respect to such station in the responsible person's efforts to provide accessibility. An owner, or person in control of a station is liable to a responsible person for any failure to provide reasonable cooperation. The House amendment also makes it clear, however, that failure to receive reasonable cooperation shall not be a defense to a claim of discrimination by an individual with a disability.

44. Interim accessibility standards.

The House amendment, but not the Senate bill, specifies the standards that would apply to stations and rail passenger cars during an interim period between the effective date and the date regulations are issued in final form.

45. Definitions.

(a) The Senate bill includes the term "potential places of employment" to describe facilities subject to the new construction requirements.

The House amendment substitutes the term "commerical facilities" for the phrase "potential places of employment." The House amendment also specifies that the term does not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 222 or covered under title III, or railroad rights-of-way.

(b) The House amendment, but not the Senate bill, includes definitions for the following terms: "demand responsive system," "fixed route system," and "over-the-road bus."

(c) The House amendment, but not the Senate bill, defines the term "private entity" to mean any entity other than a public entity, as defined in title II.

(d) The Senate bill lists a number of specific types of entities that are considered public accommodations and then includes the following catch-all phrase "and other similar places."

The House amendment deletes the term "similar." In addition, the House amendment makes several technical changes to the categories.

(e) The House amendment, but not the Senate bill, defines the term "rail" and "railroad."

(f) In determining whether making changes to existing facilities are "readily achievable," the Senate bill requires that the following factors be considered: (1) the overall size of the covered entity with respect to the number of employees, number and type of facilities, and size of the budget; (2) the type of operation of the covered entity, including the composition and structure of the entity; and (3) the nature and cost of the action needed.

The House amendment includes the following factors: (1) the nature and cost of the action needed under the ADA; (2) the overall financial resources of the facility or facilities involved in the action, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

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56. Historical or antiquated rail passenger cars and stations serving such cars.

The House amendment, but not the Senate bill, specifies that historical or antiquated vehicles that are currently in use or are remanufactured by private entities need not be made accessible to the extent that compliance would significantly alter the historic or antiquated character of such a car or rail station served exclusively by such cars or would result in a violation of safety rules issued by the Secretary of Transportation.

57. Over-the-road buses.

The Senate bill specifies that over-the-road buses must be readily accessible to and usable by individuals with disabilities within 7 years for small providers and 6 years for other providers. Further, the Senate bill specifies that the Office of Technology Assessment must conduct a study to determine the access needs of individuals with disabilities and the most cost effective methods of making such buses readily accessible to and usable by individuals with disabilities.

The House amendment deletes the specific obligation to make each bus "readily accessible to and usable by" individuals with disabilities at the end of the 6 or 7 year period, whichever is applicable. Instead, the House amendment specifies that the purchase of new over-the-road buses must be made in accordance with regulations issued by the Secretary of Transportation. In issuing final regulations, the Secretary must take into account the purposes of the study and any recommendations resulting from the study. The obligations set out in the final regulations go into effect in 7 years for small providers and 6 years for others. The final regulations may not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

In the interim, regulations issued by the Secretary may not require any structural changes to over-the-road buses in order to provide access to individuals who use wheelchairs and may not require the purchase of boarding assistance devices to provide access.

With respect to the study, the purpose of the study is revised to include a determination of the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service and the most cost effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options. The study must analyze, among other things, the effectiveness of various methods of providing acessibility to such buses and service to individuals with disabilities.

58. Interim accessibility.

The House amendment, but not the Senate bill, specifies that for new construction and alterations for which a valid and appropriate state or local building permit is obtained prior to the issuance of final regulations and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the accessiblity requirement except that if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines, compliance with such supplemental guidelines shall be necessary. The House amendment also includes interim policies applicable to vehicles and rail passenger cars.

59. Enforcement in general.

(a) The Senate bill makes reference to the remedies available to an "individual" under title II of the Civil Rights Act of 1964.

The House amendment substitutes the term "person" for the term "individual" since "person" is used in title II.

(b) The Senate bill specifies that remedies and procedures of the 1964 Civil Rights Act will be available to any individual who is or is about to be subjected to discrimination on the basis of disability.

The House amendment specifies that the remedies and procedures of title II of the 1964 Civil Rights Act shall be the powers, remedies, and procedures title III provides to any person who is being subject to discrimination on the basis of disability in violation of title III or any person who has "reasonable grounds" for believing that he or she is about to be subjected to discrimination with respect to the construction of new or the alteration of existing facilities in an inaccessible manner.

(c) The House amendment, but not the Senate bill, includes in the legislation the following policy set out in the Senate report: nothing in the enforcement section shall require an individual with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

(d) The House amendment, but not the Senate bill, specifies that state and local governments can apply to the Attorney General to certify that state or local building codes meet or exceed the minimum accessibility requirements of the ADA. In ruling on such applications from state or local governments, the Attorney General will consult with the Architectural and Transportation Barriers Compliance Board and consider the testimony of individuals with disabilities at public hearings about the state or local building code application.

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(e) The Senate bill specifies that the courts may assess civil penalties against an entity not to exceed $50,000 for the first violation and $100,000 for any subsequent public accommodation discrimination violation.

The House amendment specifies that when there are multiple violations that make up a pattern or practice suit brought by the Attorney General, all violations count as a first violation for the purpose of assessing the maximum civil penalty of $50,000. The maximum penalty of $100,000 for a subsequent violation can be applied only in a subsequent case.

(f) The Senate bill specifies that the Attorney General may seek "monetary damages" on behalf of an aggrieved party in Title III public accommodation civil actions.

The House amendment clarifies that "monetary damages" and other relief available to aggrieved persons under Title III public accommodation suits brought by the Attorney General do not include punitive damages.

(g) The Senate bill specifies that the courts may give consideration to an entity's "good faith" efforts to comply with the ADA in considering the amount of civil penalty.

The House version elaborates on the issue of good faith by requiring that the court consider whether an entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the particular needs of an individual with a disability.

60. Examinations and Courses.

The House amendment, but not the Senate bill, specifies that any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

61. Effective Date.

(a) The House amendment, but not the Senate bill, precludes suits against small businesses for 6 months or 12 months (depending on the size of the business and its gross receipts) after the effective date of title III of the Act (18 months after date of enactment) for all violations except those relating to new construction and alterations.

(b) With slightly different wording, the Senate bill and the House amendment provide that certain provisions of title III go into effect on the date of enactment.

62. Definition of "Common Carrier" or "Carrier."

The House amendment deletes the phrase "and any common carrier engaged in both interstate and intrastate communication."

63. General authority and remedies.

The Senate bill specifies that the same remedies, procedures, rights, and obligations applicable to common carriers engaged in interstate communication by wire or radio are also applicable to common carriers engaged in intrastate communication.

The House amendment clarifies, without changing the meaning or intent of the Senate language.

64. Provision of telecommunication services.

The Senate bill specifies that each common carrier providing telephone voice transmission services shall provide telecommunication relay services individually, through designees, or in concert with other carriers not later than 3 years after the date of enactment.

The House amendment makes several clarifying changes.

(a) The House amendment specifies that a common carrier must only provide relay services "within the area in which it offers service" to ensure that a common carrier on one side of the country is not held responsible to provide services for consumers in a state on the other side of the country.

(b) The House amendment specifies that common carriers may provide relay services "through a competitively selected vendor" in addition to providing such services through designees or in concert with other carriers.

(c) The House amendment specifies that a common carrier is considered in compliance wtih FCC regulations if the common carrier is either in direct compliance itself with those regulations, or if the "entity through which [it] is providing such relay services" is in compliance with the Commission's regulations. Further, the common carrier is considered in compliance with the FCC's regulations with respect to intrastate relay services when they or their designees are in compliance with a state certified program.

65. Regulations.

The Senate bill directs the FCC to issue regulations covering, among other things, minimum standards for the relay systems, conduct by relay operators, separation of costs, and delay in the implementation date.

The House amendment includes two clarifying changes.

(a) The Senate bill requires the FCC to establish minimum standards that would be met "by common carriers" in providing relay services. The House amendment deletes the language in quotes.

(b) With respect to the conduct of relay operators, the House amendment specifies that a relay operator is subject to the same standards of conduct that other operators are subject to under the Communications Act of 1934.

66. Technology.

The House amendment adds a reference to section 7(a) of the Communications Act of 1934.

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67. Recovery of costs.

The House amendment includes the following changes applicable to recovery of costs.

(a) The House amendment specifies that costs caused by interstate relay services will be recovered from all subscribers for every interstate service, thereby ensuring that even those

businesses that have private telecommunications systems will contribute to the cost of providing interstate relay services.

(b) The House amendment authorizes State commissions to permit recovery by common carriers of costs incurred in providing intrastate relay services in states that are certified.

(c) The Senate bill prohibits the imposition of a fixed monthly charge on residential customers to recover the costs of providing interstate relay services.
The House amendment deletes this provision.

(d) The Senate bill extends the implementation period to three years for all common carriers and includes authority to extend it one additional year if a common carrier can demonstrate undue burden. The House amendment deletes the undue burden provision.

68. Requirements for state certification.

The Senate bill specifies that each State may submit documentation to the FCC that describes the program of such state for implementing intrastate relay services.
The House amendment specifies that such documentation must also include the procedures and remedies available for enforcing any requirements imposed by the State program. The House amendment also provides that in certifying the program the FCC must determine that the program makes available adequate procedures and remedies for enforcing the requirements of the State program. The House amendment also specifies that in a State whose program has been suspended or revoked, the Commission must take such steps as may be necessary to ensure continuity of telecommunications relay services.

69. Closed-captioning of public service announcements.

The House amendment, but not the Senate bill, adds a provision requiring the closed-captioning of all television public service announcements produced or funded by the Federal government.

70. Construction.

(a) The House amendment adds the phrase "except as otherwise provided in this Act" as a qualification to the provision construing the interpretation of the ADA.

(b) With slightly different wording, the Senate bill and the House amendment specify the relationship between the ADA and other Federal laws (including the Rehabilitation Act) and state laws. The House amendment also specifies that nothing in the ADA shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment, in transportation provided by public and private entities, and places of public accommodations.

(c) The section in the Senate bill concerning insurance includes the proviso "Provided, That paragraphs (1), (2), and (3) are not lused as a subterfuge to evade the purposes of title I and III." The House amendment includes the following phrase "Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III."

(d) The House amendment, but not the Senate bill, specifies that nothing in the Act shall be construed to require an individual with a disability

71. State immunity.

The House amendment adds states courts of competent jurisdiction to the reference to federal courts included in the Senate bill.

72. Prohibition Against Retaliation and Coercion.

With slightly different wording, the Senate bill and the House amendment include prohibitions against retaliation and coercion.

73. Guidelines by the ATBCB.

The Senate bill provides 6 months for the issuance of guidelines. The House amendment provides 9 months.

74. Historic buildings.

The House amendment, but not the Senate bill, includes specific provisions applicable to historic building.

75. Technical assistance

(a) The Senate bill, but not the House amendment, includes, among others, the National Council on Disability, as an agency responsible for the development of a technical assistance plan.

(b) With slightly different wording, the Senate bill and the House amendment provide for the implementation of the technical assistance plan.

technical assistance to covered individuals and entities.
The House amendment makes several technical and conforming changes and adds a requirement that appropriate departments and agencies develop and disseminate technical assistance manuals to those who have rights and responsibilities under the ADA no later than six months after ADA regulations are published. However, a covered entity is not excused from complying with the ADA because of any failure to receive technical assistance, including any failure in the development or dissemination of a technical assistance manual.

(d) With slightly different wording, the Senate bill and the House amendment authorize the entering into of grants and contracts.

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76. Wilderness areas.

The Senate bill specifies that the National Council on Disability shall conduct a study regarding the effect of wildnerness designations on access for people with disabilities.

The House amendment adds that the Wilderness Act is not to be construed as prohibiting use of a wheelchair in a wilderness area by an individual whose disability requires the use of a wheelchair but no modifications of land are required.

77. Congressional coverage.

The Senate bill makes the provisions of the legislation applicable to Congress and the instrumentalities of Congress.

The House amendment, also covers Congress and the instrumentalities of Congress but delegates to the House and the instrumentalities of Congress the responsibility to develop applicable remedies and procedures.

78. Illegal use of drugs.

The Senate bill specifies that an individual with a disability does not include any individual who uses illegal drugs, but may include an individual who has successfully completed a supervised drug rehabilitation program, or has otherwise been rehabilitated successfully, and no longer uses illegal drugs. The Senate bill also makes it clear that an individual who uses illegal drugs may not be denied the benefits of medical services on the basis of his or her use of illegal drugs, if he or she is otherwise entitled to such services.

The House amendment includes clarifying and conforming changes to make this provision consistent with other provisions in the legislation concerning the treatment of users of illegal drugs:

(a) The House amendment specifies that an individual with a disability does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use.

(b) The House amendment specifies that the following individuals are not excluded from the term "individual with a disability"--an individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use; an individual who is participating in a supervised rehabilitation program and is no longer engaged in such use; or a person who is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) The House amendment specifies that it shall not be a violation for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual is no longer illegally using drugs; however nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(d) The House amendment specifies that an individual shall not be denied health services or other services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(e) The House amendment includes the same definition of "illegal use of drugs" and "drugs" set out in title I of the Act.

79. Exclusions from the term "disability."

The Senate bill restates current policy under section 504 of the Rehabilitation Act of 1973 that the term "disability" does not include homosexuality and bisexuality. The Senate bill also excludes from the term "disability" the following mental impairments: transvestism, pedophilia, transsexualism, exhibitionism, voyeurism, compulsive gambling, kleptomania, or pyromania, gender identity disorders, current psychoactive substance-induced organic mental disorders (as defined by DSM-III-R which are not the result of medical treatment), or other sexual behavior disorders.

The House amendment lists the various exclusions by category. The first category specifies that homosexuality and bisexuality are not impairments and as such are not disabilities under the ADA. The second category includes transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders. The third category includes compulsive gambling, kleptomania, or pyromania. The final category includes psychoactive substance use disorders resulting from current use of illegal drugs.

80. Amendments to the definition of the term "handicapped individual" under the Rehabilitation Act of 1973.

(a) The Senate bill includes amendments to the definition of the term "handicapped individual" used in the Rehabilitation Act of 1973 to exclude current users of illegal drugs which are consistent with the changes made to the definition of the term "individual with a disability" used in the ADA. The Senate bill also specifies that the exlusion does not apply to medical services for which the individual is otherwise entitled. The Senate bill also states that the term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by the controlled Substances Act or other provisions of Federal law.

The House amendment includes the same type of conforming changes to the Rehabilitation Act which are made to the ADA (see above). However, with respect to the provision that specifies that an individual shall not be excluded from medical services on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services, the category is limited to health services and services provided under titles I, II, and III of the Rehabilitation Act of 1973.

(b) The House amendment specifies that the term "drugs" and the phrase "current illegal use of drugs" have the same meanings as such terms have under the ADA.

81. Alternative means of dispute resolutions.

The House amendment, but not the Senate bill, provides that where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the ADA.