An employer is not required to provide an accommodation that is primarily for personal use. Reasonable accommodation applies to modifications that specifically assist an individual in performing the duties of a particular job. Equipment or devices that assist a person in daily activities on and off the job are considered personal items that an employer is not required to provide. However, in some cases, equipment that otherwise would be considered "personal" may be required as an accommodation if it is specifically designed or required to meet job-related rather than personal needs.

> **For example**: An employer generally would not be required to provide personal items such as eyeglasses, a wheelchair, or an artificial limb. However, the employer might be required to provide a person who has a visual impairment with glasses that are specifically needed to use a computer monitor. Or, if deep pile carpeting in a work area makes it impossible for an individual to use a manual wheelchair, the employer may need to replace the carpet, place a usable surface over the carpet in areas used by the employee, or provide a motorized wheelchair.

The ADA's requirements for certain types of adjustments and modifications to meet the reasonable accommodation obligation do not prevent an employer from providing accommodations beyond those required by the ADA.

> **For example**: "Supported employment" programs may provide free job coaches and other assistance to enable certain individuals with severe disabilities to learn and/or to progress in jobs. These programs typically require a range of modifications and adjustments to customary employment practices. Some of these modifications may also be required by the ADA as reasonable accommodations. However, supported employment programs may require modifications beyond those **required** under the ADA, such as restructuring of essential job functions. Many employers have found that supported employment programs are an excellent source of reliable productive new employees. Participation in these programs advances the underlying goal of the ADA - - to increase employment opportunities for people with disabilities. Making modifications for supported employment beyond those required by the ADA in no way violates the ADA.

3.5 Some Examples of Reasonable Accommodation

The statute and EEOC's regulations provide examples of common types of reasonable accommodation that an employer may be required to provide, but many other accommodations may be appropriate for particular situations. Accommodations may include:

- **making facilities readily accessible to and usable by an individual with a disability;**
- **restructuring a job by reallocating or redistributing marginal job functions;**
- **altering when or how an essential job function is performed;**
- **part-time or modified work schedules;**
- **obtaining or modifying equipment or devices;**
- **modifying examinations, training materials or policies;**
- **providing qualified readers and interpreters;**
- **reassignment to a vacant position;**
- **permitting use of accrued paid leave or unpaid leave for necessary treatment;**
- **providing reserved parking for a person with a mobility impairment;**
- **allowing an employee to provide equipment or devices that an employer is not required to provide.**

These and other types of reasonable accommodation are discussed in the pages that follow. However, the examples in this Manual cannot cover the range of potential accommodations, because every reasonable accommodation must be determined on an individual basis. A reasonable accommodation always must take into consideration two unique factors:

- **the specific abilities and functional limitations of a particular applicant or employee with a disability; and**
- **the specific functional requirements of a particular job.**

In considering an accommodation, the focus should be on the abilities and limitations of the **individual**, not on the name of a disability or a particular physical or mental condition. This is necessary because people who have any particular disability may have very different abilities and limitations. Conversely, people with different kinds of disabilities may have similar functional limitations.

> **For example**: If it is an essential function of a job to press a foot pedal a certain number of times a minute and an individual with a disability applying for the job has some limitation that makes this difficult or impossible, the accommodation process should focus on ways that this person might be able to do the job function, not on the nature of her disability or on how persons with this kind of disability generally might be able to perform the job.

3.6 Who Is Entitled to a Reasonable Accommodation?

As detailed in Chapter II, an individual is entitled to a reasonable accommodation if s/he:

> **meets the ADA definition of "a qualified individual with a disability" (meets all prerequisites for performing the essential functions of a job [being considered for a job or enjoying equal benefits and privileges of a job] except any that cannot be met because of a disability).**

If there is a reasonable accommodation that will enable this person to perform the essential functions of a job (be considered, or receive equal benefits, etc.), the employer is obligated to provide it, unless it would impose an undue hardship on the operation of the business.

When is an Employer Obligated to Make a Reasonable Accommodation?

An employer is obligated to make an accommodation only to the known limitations of an otherwise qualified individual with a disability. In general, it is the responsibility of the applicant or employee with a disability to inform the employer that an accommodation is needed to participate in the application process, to perform essential job functions or to receive equal benefits and privileges of employment. An employer is not required to provide an accommodation if unaware of the need.

However, the employer is responsible for **notifying** job applicants and employees of its obligation to provide accommodations for otherwise qualified individuals with disabilities.

The ADA requires an employer to **post notices** containing the provisions of the ADA, including the reasonable accommodation obligation, in conspicuous places on its premises. Such notices should be posted in employment offices and other places where applicants and employees can readily see them. EEOC provides posters for this purpose. (See Chapter I for additional information on the required notice.)

Information about the reasonable accommodation obligation also can be included in job application forms, job vacancy notices, and in personnel manuals, and may be communicated orally.

An applicant or employee does not have to specifically request a "reasonable accommodation," but must only let the employer know that some adjustment or change is needed to do a job because of the limitations caused by a disability.

If a job applicant or employee has a "hidden" disability - - one that is not obvious - - it is up to that individual to make the need for an accommodation known. If an applicant has a known disability, such as a visible disability, that appears to limit, interfere with, or prevent the individual from performing job-related functions, the employer may ask the applicant to describe or demonstrate how s/he would perform the function with or without a reasonable accommodation. Chapter V provides guidance on how to make such an inquiry without violating the ADA prohibition against pre-employment inquiries in the application and interview process.

If an employee with a known disability is not performing well or is having difficulty in performing a job, the employer should assess whether this is due to a disability. The employer may inquire at any time whether the employee needs an accommodation.

Documentation of Need for Accommodation

If an applicant or employee requests an accommodation and the need for the accommodation is not obvious, or if the employer does not believe that the accommodation is needed, the employer may request documentation of the individual's functional limitations to support the request.

> **For example**: An employer may ask for written documentation from a doctor, psychologist, rehabilitation counselor, occupational or physical therapist, independent living specialist, or other professional with knowledge of the person's functional limitations. Such documentation might indicate, for example, that this person cannot lift more than 15 pounds without assistance.

3.7 How Does an Employer Determine What Is a Reasonable Accommodation?

When a qualified individual with a disability requests an accommodation, the employer must make a reasonable effort to provide an accommodation that is effective for the individual (gives the individual an equally effective opportunity to apply for a job, perform essential job functions, or enjoy equal benefits and privileges).

In many cases, an appropriate accommodation will be obvious and can be made without difficulty and at little or no cost. Frequently, the individual with a disability can suggest a simple change or adjustment, based on his or her life or work experience.

An employer should always consult the person with the disability as the first step in considering an accommodation. Often this person can suggest much simpler and less costly accommodations than the employer might have believed necessary.

> **For example**: A small employer believed it necessary to install a special lower drinking fountain for an employee using a wheelchair, but the employee indicated that he could use the existing fountain if paper cups were provided in a holder next to the fountain.

However, in some cases, the appropriate accommodation may not be so easy to identify. The individual requesting the accommodation may not know enough about the equipment being used or the exact nature of the worksite to suggest an accommodation, or the employer may not know enough about the individual's functional limitations in relation to specific job tasks.

In such cases, the employer and the individual with a disability should work together to identify the appropriate accommodation. EEOC regulations require, when necessary, an informal, interactive process to find an effective accommodation. The process is described below in relation to an accommodation that will enable an individual with a disability to perform the essential functions of a job. However, the same approach can be used to identify accommodations for job applicants and accommodations to provide equal benefits and privileges of employment.

3.8 A process for identifying a reasonable accommodation

1. **Look at the particular job involved. Determine its purpose and its essential functions.**

Chapter II recommended that the essential functions of the job be identified before advertising or interviewing for a job. However, it is useful to reexamine the specific job at this point to determine or confirm its essential functions and requirements.

2. **Consult with the individual with a disability to find out his or her specific physical or mental abilities and limitations** as they relate to the essential job functions. Identify the barriers to job performance and assess how these barriers could be overcome with an accommodation.

3. **In consultation with the individual, identify potential accommodations** and **assess how effective** each would be in enabling the individual to perform essential job functions. If this consultation does not identify an appropriate accommodation, technical assistance is available from a number of sources, many without cost. There are also financial resources to help with accommodation costs. (See Financial and Technical Assistance for Accommodations, **4.1** below).

4. If there are several effective accommodations that would provide an equal employment opportunity, consider **the preference of the individual** with a disability and **select the accommodation** that **best serves the needs of the individual and the employer.**

   If more than one accommodation would be effective for the individual with a disability, or if the individual would prefer to provide his or her own accommodation, the individual's preference should be given first consideration. However, the employer is free to choose among effective accommodations, and may choose one that is less expensive or easier to provide.

   The fact that an individual is willing to provide his or her own accommodation does not relieve the employer of the duty to provide this or another reasonable accommodation should this individual for any reason be unable or unwilling to continue to provide the accommodation.

Examples of the Reasonable Accommodation Process:

- A "sack-handler" position requires that the employee in this job pick up 50 pound sacks from a loading dock and carry them to the storage room. An employee who is disabled by a back impairment requests an accommodation. The employer analyzes the job and finds that its real purpose and essential function is to move the

sacks from the loading dock to the store room. The person in the job does not necessarily have to lift and carry the sacks. The employer consults with the employee to determine his exact physical abilities and limitations. With medical documentation, it is determined that this person can lift 50 pound sacks to waist level, but cannot carry them to the storage room. A number of potential accommodations are identified: use of a dolly, a hand-truck or a cart. The employee prefers the dolly. After considering the relative cost, efficiency, and availability of the alternative accommodations, and after considering the preference of the employee, the employer provides the dolly as an accommodation. In this case, the employer found the dolly to be the most cost-effective accommodation, as well as the one preferred by the employee. If the employer had found a hand-truck to be as efficient, it could have provided the hand-truck as a reasonable accommodation.

- A company has an opening for a warehouse foreman. Among other functions, the job requires checking stock for inventory, completing bills of lading and other reports, and using numbers. To perform these functions, the foreman must have good math skills. An individual with diabetes who has good experience performing similar warehouse supervisory functions applies for the job. Part of the application process is a computerized test for math skills, but the job itself does not require use of a computer. The applicant tells the employer that although he has no problem reading print, his disability causes some visual impairment which makes it difficult to read a computer screen. He says he can take the test if it is printed out by the computer. However, this accommodation won't work, because the computer test is interactive, and the questions change based on the applicant's replies to each previous question. Instead, the employer offers a reader as an accommodation; this provides an effective equivalent method to test the applicant's math skills.

An individual with a disability is not required to accept an accommodation if the individual has not requested an accommodation and does not believe that one is needed. However, if the individual refuses an accommodation necessary to perform essential job functions, and as a result cannot perform those functions, the individual may not be considered qualified.

For example: An individual with a visual impairment that restricts her field of vision but who is able to read would not be required to accept a reader as an accommodation. However, if this person could not read accurately unaided, and reading is an essential function of the job, she would not be qualified for the job

if she refused an accommodation that would enable her to read accurately.

3.9 The Undue Hardship Limitation

An employer is not required to make a reasonable accommodation if it would impose an undue hardship on the operation of the business. However, if a particular accommodation would impose an undue hardship, the employer must consider whether there are alternative accommodations that would not impose such hardship.

An undue hardship is an action that requires **"significant difficulty or expense"** in relation to the size of the employer, the resources available, and the nature of the operation.

Accordingly, whether a particular accommodation will impose an undue hardship must always be determined on a **case-by-case basis**. An accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer. The concept of undue hardship includes any action that is:

- **unduly costly;**
- **extensive;**
- **substantial;**
- **disruptive; or**
- **that would fundamentally alter the nature or operation of the business.**

The statute and regulations provide **factors to be considered** in determining whether an accommodation would impose an undue hardship on a particular business:

1. **The nature and net cost of the accommodation needed.** The cost of an accommodation that is considered in determining undue hardship will be the actual cost to the employer. Specific Federal tax credits and tax deductions are available to employers for making accommodations required by the ADA, and there are also sources of funding to help pay for some accommodations. If an employer can receive tax credits or tax deductions or partial

funding for an accommodation, only the net cost to the employer will be considered in a determination of undue hardship. (See Financial and Technical Assistance for Accommodations, 4.1 below);

2. **The financial resources of the facility making the accommodation, the number of employees at this facility, and the effect on expenses and resources of the facility.**

   If an employer has only one facility, the cost and impact of the accommodation will be considered in relation to the effect on expenses and resources of that facility. However, if the facility is part of a larger entity that is covered by the ADA, factors 3. and 4. below also will be considered in determinations of undue hardship.

3. **The overall financial resources, size, number of employees, and type and location of facilities of the entity covered by the ADA** (if the facility involved in the accommodation is part of a larger entity).

4. **The type of operation of the covered entity, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the larger entity.**

   Factor 4. may include consideration of special types of employment operations, on a case-by-case basis, where providing a particular accommodation might be an undue hardship.

   For example: It might "fundamentally alter" the nature of a temporary construction site or be unduly costly to make it physically accessible to an employee using a wheelchair, if the terrain and structures are constantly changing as construction progresses.

   Factor 4. will be considered, along with factors 2. and 3., where a covered entity operates more than one facility, in order to assess the financial resources actually available to the facility making the accommodation, in light of the interrelationship between the facility and the covered entity. In some cases, consideration of the resources of the larger covered entity may not be justified, because the particular facility making the accommodation may not have access to those resources.

For example: A local, independently owned fast food franchise of a national company that receives no funding from that company may assert that it would be an undue hardship to provide an interpreter to enable a deaf applicant for store manager to participate in weekly staff meetings, because its own resources are inadequate and it has no access to resources of the national company. If the financial relationship between the national company and the local company is limited to payment of an annual franchise fee, only the resources of the local franchise would be considered in determining whether this accommodation would be an undue hardship. However, if the facility was part of a national company with financial and administrative control over all of its facilities, the resources of the company as a whole would be considered in making this determination.

5. **The impact of the accommodation on the operation of the facility that is making the accommodation.**

This may include the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

An employer may be able to show that providing a particular accommodation would be unduly disruptive to its other employees or to its ability to conduct business.

For example: If an employee with a disability requested that the thermostat in the workplace be raised to a certain level to accommodate her disability, and this level would make it uncomfortably hot for other employees or customers, the employer would not have to provide this accommodation. However, if there was an alternative accommodation that would not be an undue hardship, such as providing a space heater or placing the employee in a room with a separate thermostat, the employer would have to provide that accommodation.

For example: A person with a visual impairment who requires bright light to see well applies for a waitress position at an expensive nightclub. The club maintains dim lighting to create an intimate setting, and lowers its lights further during the floor show. If the job applicant requested bright lighting as an accommodation so that she could see to take orders, the employer could assert that this would be an undue hardship, because it would seriously affect the nature of its operation.

In determining whether an accommodation would cause an undue hardship, an employer may consider the impact of an accommodation on the ability of other employees to do their jobs. However, an employer may not claim undue hardship solely because providing an accommodation has a negative impact on the **morale** of other employees. Nor can an employer claim undue hardship because of "disruption" due to employees' fears about, or prejudices toward, a person's disability.

For example: If restructuring a job to accommodate an individual with a disability creates a heavier workload for other employees, this may constitute an undue hardship. But if other employees complain because an individual with a disability is allowed to take additional unpaid leave or to have a special flexible work schedule as a reasonable accommodation, such complaints or other negative reactions would not constitute an undue hardship.

For example: If an employee objects to working with an individual who has a disability because the employee feels uncomfortable or dislikes being near this person, this would not constitute an undue hardship. In this case, the problem is caused by the employee's fear or prejudice toward the individual's disability, not by an accommodation.

Problems of employee morale and employee negative attitudes should be addressed by the employer through appropriate consultations with supervisors and, where relevant, with union representatives. Employers also may wish to provide supervisors, managers and employees with "awareness" training, to help overcome fears and misconceptions about disabilities, and to inform them of the employer's obligations under the ADA.

Other Cost Issues

An employer may not claim undue hardship simply because the cost of an accommodation is high in relation to an employee's wage or salary. When enacting the ADA "factors" for determining undue hardship, Congress rejected a proposed amendment that would have established an undue hardship if an accommodation exceeded 10% of an individual's salary. This approach was rejected because it would unjustifiably harm lower-paid workers who need accommodations. Instead, Congress clearly established that the focus for determining undue hardship should be the resources available to the employer.

If an employer finds that the cost of an accommodation would impose an undue hardship and no funding is available from another source, an applicant or employee with a disability should be offered the option of paying for the portion of the cost that constitutes an undue hardship, or of providing the accommodation.

For example: If the cost of an assistive device is $2000, and an employer believes that it can demonstrate that spending more than $1500 would be an undue hardship, the individual with a disability should be offered the option of paying the additional $500. Or, if it would be an undue hardship for an employer to purchase brailling equipment for a blind applicant, the applicant should be offered the option of providing his own equipment (if there is no other effective accommodation that would not impose an undue hardship).

The terms of a collective bargaining agreement may be relevant in determining whether an accommodation would impose an undue hardship.

For example: A worker who has a deteriorated disc condition and cannot perform the heavy labor functions of a machinist job, requests reassignment to a vacant clerk's job as a reasonable accommodation. If the collective bargaining agreement has specific seniority lists and requirements governing each craft, it might be an undue hardship to reassign this person if others had seniority for the clerk's job.

However, since both the employer and the union are covered by the ADA's requirements, including the duty to provide a reasonable accommodation, the employer should consult with the union and try to work out an acceptable accommodation.

To avoid continuing conflicts between a collective bargaining agreement and the duty to provide reasonable accommodation, employers may find it helpful to seek a provision in agreements negotiated after the effective date of the ADA permitting the employer to take all actions necessary to comply with this law. (See Chapter VII.)

3.10 Examples of Reasonable Accommodations

1. Making Facilities Accessible and Usable

The ADA establishes different requirements for accessibility under different sections of the Act. A **private employer's** obligation to

make its facilities accessible to its job applicants and employees under Title I of the ADA differs from the obligation of a place of **public accommodation** to provide access in existing facilities to its customers and clients, and from the obligations of public accommodations and **commercial facilities** to provide accessibility in renovated or newly constructed buildings under Title III of the Act. The obligation of a **state and local government** to provide access for applicants and employees under Title I also differs from its obligation to provide accessibility under Title II of the ADA.

The employer's obligation under Title I is to provide access for an individual applicant to participate in the job application process, and for an individual employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees. The employer must provide such access unless it would cause an undue hardship.

Under Title I, an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment related activities or benefits.

In contrast, Title III of the ADA requires that places of public accommodation (such as banks, retail stores, theaters, hotels and restaurants) make their goods and services accessible generally, to all people with disabilities. Under Title III, existing buildings and facilities of a public accommodation must be made accessible by removing architectural barriers or communications barriers that are structural in nature, if this is "readily achievable." If this is not "readily achievable," services must be provided to people with disabilities in some alternative manner if this is "readily achievable."

The obligation for state and local governments to provide "program accessibility" in existing facilities under Title II also differs from their obligation to provide access as employers under Title I. Title II requires that these governments operate each service, program or activity in existing facilities so that, when viewed in its entirety, it is readily accessible to and useable by persons with disabilities, unless this would cause a "fundamental alteration" in the nature of the program or service, or would result in "undue financial and administrative burdens."

In addition, private employers that occupy commercial facilities or operate places of public accommodation and state and local governments must conform to more extensive accessibility requirements under Title III and Title II when making alterations to existing facilities or undertaking new construction. (see Requirements for Renovation and New Construction below.)

The accessibility requirements under Title II and III are established in Department of Justice regulations. Employers may contact the Justice Department's **Office on the Americans with Disabilities Act** for information on these requirements and for copies of the regulations with applicable accessibility guidelines (see Resource Directory).

When making changes to meet an individual's needs under Title I, an employer will find it helpful to consult the applicable Department of Justice accessibility guidelines as a starting point. It is advisable to make changes that conform to these guidelines, if they meet the individual's needs and do not impose an undue hardship, since such changes will be useful in the future for accommodating others. However, even if a modification meets the standards required under Title II or III, further adaptations may be needed to meet the needs of a particular individual.

> **For example**: A restroom may be modified to meet standard accessibility requirements (including wider door and stalls, and grab bars in specified locations) but it may be necessary to install a lower grab bar for a very short person in a wheelchair so that this person can transfer from the chair to the toilet.

Although the requirement for accessibility in employment is triggered by the needs of a particular individual, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will apply for jobs in the future.

> **For example**: Employment offices and interview facilities should be accessible to people using wheelchairs and others with mobility impairments. Plans also should be in place for making job information accessible and for communicating with people who have visual or hearing impairments. (See Chapter V. for additional guidance on accommodation in the application process.)

Accessibility to Perform the Essential Functions of the Job

The obligation to provide accessibility for a qualified individual with a disability includes accessibility of the job site itself and all work-related facilities.

Examples of accommodations that may be needed to make facilities accessible and usable include:

- installing a ramp at the entrance to a building;
- removing raised thresholds;
- reserving parking spaces close to the work site that are wide enough to allow people using wheelchairs to get in and out of vehicles;
- making restrooms accessible, including toilet stalls, sinks, soap, and towels;
- rearranging office furniture and equipment;
- making a drinking fountain accessible (for example, by installing a paper cup dispenser);
- making accessible, and providing an accessible "path of travel" to, equipment and facilities used by an employee, such as copying machines, meeting and training rooms, lunchrooms and lounges;
- removing obstacles that might be potential hazards in the path of people without vision;
- adding flashing lights when alarm bells are normally used, to alert an employee with a hearing impairment to emergencies.

Requirements for Renovation or New Construction

While an employer's requirements for accessibility under Title I relate to accommodation of an individual, as described above, employers will have more extensive accessibility requirements under Title II or III of the ADA if they make renovations to their facilities or undertake new construction.

Title III of the ADA requires that any alterations to, or new construction of "**commercial facilities**," as well as places of **public accommodation**, made after January 26, 1992, must conform to the "ADA Accessibility Guidelines" (incorporated in Department of Justice Title III regulations). "Commercial facilities" are defined as any nonresidential facility whose operations affect commerce, including office buildings, factories and warehouses; therefore, the facilities of most employers will be subject to this requirement. An alteration is any change that affects the "usability" of a facility; it does not include normal maintenance, such as painting, roofing or changes to mechanical or electrical systems, unless the changes affect the "usability" of the facility.

> **For example**: If, during remodeling or renovation, a doorway is relocated, the new doorway must be wide enough to meet the requirements of the ADA Accessibility Guidelines.

Under Title III, all newly constructed public accommodations and commercial facilities for which the last building permit is certified after January 26, 1992, and which are occupied after January 26, 1993, must be accessible in accordance with the standards of the ADA Accessibility Guidelines. However, Title III does not require elevators in facilities under 3 stories or with less than 3000 square feet per floor, unless the building is a shopping center, mall, professional office of a health provider, or public transportation station.

Under Title II, any alterations to, or new construction of, State or local government facilities made after January 26, 1992, must conform either with the ADA Accessibility Guidelines (however, the exception regarding elevators does not apply to State or local governments) or with the Uniform Federal Accessibility Standards. Facilities under design on January 26, 1992 must comply with this requirement if bids were invited after that date.

Providing accessibility in remodeled and new buildings usually can be accomplished at minimal additional cost. Over time, fully accessible new and remodeled buildings will reduce the need for many types of individualized reasonable accommodations. Employers planning alterations to their facilities or new construction should contact the **Office on the Americans with Disabilities Act** in the **U.S. Department of Justice** for information on accessibility requirements, including the ADA Accessibility Guidelines and the Uniform Federal Accessibility Guidelines. Employers may get specific technical information and guidance on accessibility by calling, toll-free, the Architectural and

Transportation Barriers Compliance Board, at 1-800-USA-ABLE. (See Resource Directory.)

2. Job Restructuring

Job restructuring or job modification is a form of reasonable accommodation which enables many qualified individuals with disabilities to perform jobs effectively. Job restructuring as a reasonable accommodation may involve reallocating or redistributing the marginal functions of a job. However, an employer is not required to reallocate essential functions of a job as a reasonable accommodation. Essential functions, by definition, are those that a qualified individual must perform, with or without an accommodation.

> **For example**: Inspection of identification cards is generally an essential function of the job of a security job. If a person with a visual impairment could not verify the identification of an individual using the photo and other information on the card, the employer would not be required to transfer this function to another employee.

Job restructuring frequently is accomplished by exchanging marginal functions of a job that cannot be performed by a person with a disability for marginal job functions performed by one or more other employees.

> **For example**: An employer may have two jobs, each containing essential functions and a number of marginal functions. The employer may hire an individual with a disability who can perform the essential functions of one job and some, but not all, of the marginal functions of both jobs. As an accommodation, the employer may redistribute the marginal functions so that all of the functions that can be performed by the person with a disability are in this person's job and the remaining marginal functions are transferred to the other job.

Although an employer is not required to reallocate essential job functions, it may be a reasonable accommodation to modify the essential functions of a job by changing **when** or **how** they are done.

For example:

- An essential function that is usually performed in the early morning might be rescheduled to be performed later in the day, if an individual has a disability that makes it impossible to perform this function in the morning, and this would not cause an undue hardship.
- A person who has a disability that makes it difficult to write might be allowed to computerize records that have been maintained manually.
- A person with mental retardation who can perform job tasks but has difficulty remembering the order in which to do the tasks might be provided with a list to check off each task; the checklist could be reviewed by a supervisor at the end of the day.

Technical assistance in restructuring or modifying jobs for individuals with specific limitations can be obtained from state vocational rehabilitation agencies and other organizations with expertise in job analysis and job restructuring for people with various disabilities. (See Job Restructuring and Job Modification in Resource Directory Index.)

3. Modified Work Schedules

An employer should consider modification of a regular work schedule as a reasonable accommodation unless this would cause an undue hardship. Modified work schedules may include flexibility in work hours or the work week, or part-time work, where this will not be an undue hardship.

Many people with disabilities are fully qualified to perform jobs with the accommodation of a modified work schedule. Some people are unable to work a standard 9-5 work day, or a standard Monday to Friday work week; others need some adjustment to regular schedules.

Some examples of modified work schedules as a reasonable accommodation:

- An accountant with a mental disability required two hours off, twice weekly, for sessions with a psychiatrist. He was permitted to take longer lunch breaks and to make up the time by working later on those days.

- A machinist has diabetes and must follow a strict schedule to keep blood sugar levels stable. She must eat on a regular schedule and take insulin at set times each day. This means that she cannot work the normal shift rotations for machinists. As an accommodation, she is assigned to one shift on a permanent basis.

- An employee who needs kidney dialysis treatment is unable to work on two days because his treatment is only available during work hours on weekdays. Depending on the nature of his work and the nature of the employer's operation, it may be possible, without causing an undue hardship, for him to work Saturday and Sunday in place of the two weekdays, to perform work assignments at home on the weekend, or to work three days a week as part-time employee.

People whose disabilities may need modified work schedules include those who require special medical treatment for their disability (such as cancer patients, people who have AIDS, or people with mental illness); people who need rest periods (including some people who have multiple sclerosis, cancer, diabetes, respiratory conditions, or mental illness); people whose disabilities (such as diabetes) are affected by eating or sleeping schedules; and people with mobility and other impairments who find it difficult to use public transportation during peak hours, or who must depend upon special para-transit schedules.

4. Flexible Leave Policies

Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disability. An employer is not required to provide additional paid leave as an accommodation, but should consider allowing use of accrued leave, advanced leave, or leave without pay, where this will not cause an undue hardship.

People with disabilities may require special leave for a number of reasons related to their disability, such as:

- medical treatment related to the disability;
- repair of a prosthesis or equipment;

- temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing temperature above 85 degrees could seriously harm the condition of a person with multiple sclerosis);
- training in the use of an assistive device or a dog guide. (However, if an assistive device is used at work and provided as a reasonable accommodation, and if other employees receive training during work hours, the disabled employee should receive training on this device during work hours, without need to take leave.)

5. Reassignment to a Vacant Position

In general, the accommodation of reassignment should be considered only when an accommodation is not possible in an employee's present job, or when an accommodation in the employee's present job would cause an undue hardship. Reassignment also may be a reasonable accommodation if both employer and employee agree that this is more appropriate than accommodation in the present job.

Consideration of reassignment is only required for **employees**. An employer is not required to consider a different position for a job applicant if s/he is not able to perform the essential functions of the position s/he is applying for, with or without reasonable accommodation.

Reassignment may be an appropriate accommodation when an employee becomes disabled, when a disability becomes more severe, or when changes or technological developments in equipment affect the job performance of an employee with a disability. If there is no accommodation that will enable the person to perform the present job, or if it would be an undue hardship for the employer to provide such accommodation, reassignment should be considered.

Reassignment may not be used to limit, segregate, or otherwise discriminate against an employee with a disability. An employer may not reassign people with disabilities only to certain undesirable positions, or only to certain offices or facilities.

Reassignment should be made to a position equivalent to the one presently held in terms of pay and other job status, if the individual is qualified for the position and if such a position is vacant or will be vacant within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-

case basis, considering relevant factors such as the types of jobs for which the employee with a disability would be qualified; the frequency with which such jobs become available; the employer's general policies regarding reassignments of employees; and any specific policies regarding sick or injured employees.

> **For example**: If there is no vacant position available at the time that an individual with a disability requires a reassignment, but the employer knows that an equivalent position for which this person is qualified will become vacant within one or two weeks, the employer should reassign the individual to the position when it becomes available.

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no positions vacant or soon to be vacant for which the employee is qualified (with or without an accommodation). In such a situation, the employer does not have to maintain the individual's salary at the level of the higher graded position, unless it does so for other employees who are reassigned to lower graded positions.

An employer is not required to create a new job or to bump another employee from a job in order to provide reassignment as a reasonable accommodation. Nor is an employer required to promote an individual with a disability to make such an accommodation.

6. Acquisition or Modification of Equipment and Devices

Purchase of equipment or modifications to existing equipment may be effective accommodations for people with many types of disabilities.

There are many devices that make it possible for people to overcome existing barriers to performing functions of a job. These devices range from very simple solutions, such as an elastic band that can enable a person with cerebral palsy to hold a pencil and write, to "high-tech" electronic equipment that can be operated with eye or head movements by people who cannot use their hands.

There are also many ways to modify standard equipment so as to enable people with different functional limitations to perform jobs effectively and safely.

Many of these assistive devices and modifications are inexpensive. Frequently, applicants and employees with disabilities can suggest effective low cost devices or equipment. They have had a great deal of experience in accommodating their disabilities, and many are informed about new and available equipment. Where the job requires special adaptations of equipment, the employer and the applicant or employee should use the process described earlier (see 3.8) to identify the exact functional abilities and limitations of the individual in relation to functional job needs, and to determine what type of assistance may be needed.

There are many sources of technical assistance to help identify and locate devices and equipment for specific job applications. An employer may be able to get information needed simply by telephoning the Job Accommodation Network, a free consulting service on accommodations, or other sources listed under "Accommodations" in the Resource Directory. Employers who need further assistance may use resources such as vocational rehabilitation specialists, occupational therapists and Independent Living Centers who will come on site to conduct a job analysis and recommend appropriate equipment or job modifications.

As indicated above (see 3.4), an employer is only obligated to provide equipment that is needed to perform a job; there is no obligation to provide equipment that the individual uses regularly in daily life, such as glasses, a hearing aid or a wheelchair. However, as previously stated, the employer may be obligated to provide items of this nature if special adaptations are required to perform a job.

> **For example**: It may be a reasonable accommodation to provide an employee with a motorized wheelchair if her job requires movement between buildings that are widely separated, and her disability prevents her operation of a wheelchair manually for that distance, or if heavy, deep-pile carpeting prevents operation of a manual wheelchair.

In some cases, it may be a reasonable accommodation to allow an applicant or employee to provide and use equipment that an employer would not be obligated to provide.

> **For example**: It would be a reasonable accommodation to allow an individual with a visual disability to provide his own guide dog.

Some examples of equipment and devices that may be reasonable accommodations:

- TDDs (Telecommunication Devices for the Deaf) make it possible for people with hearing and/or speech impairments to communicate over the telephone;
- telephone amplifiers are useful for people with hearing impairments;
- special software for standard computers and other equipment can enlarge print or convert print documents to spoken words for people with vision and/or reading disabilities;
- tactile markings on equipment in brailled or raised print are helpful to people with visual impairments;
- telephone headsets and adaptive light switches can be used by people with cerebral palsy or other manual disabilities;
- talking calculators can be used by people with visual or reading disabilities;
- speaker phones may be effective for people who are amputees or have other mobility impairments.

Some examples of effective low cost assistive devices as reported by the Job Accommodation Network and other sources:

- a timer with an indicator light allowed a medical technician who was deaf to perform laboratory tests. Cost $27.00;
- a clerk with limited use of her hands was provided a "lazy susan" file holder that enabled her to reach all materials needed for her job. Cost $85.00;
- A groundskeeper who had limited use of one arm was provided a detachable extension arm for a rake. This enabled him to grasp the handle on the extension with the impaired hand and control the rake with the functional arm. Cost $20.00;
- A desk layout was changed from the right to left side to enable a data entry operator who is visually impaired to perform her job. Cost $0;

- A telephone amplifier designed to work with a hearing aid allowed a plant worker to retain his job and avoid transfer to a lower paid job. Cost $24.00;

- A blind receptionist was provided a light probe which allowed her to determine which lines on the switchboard were ringing, on hold, or in use. (A light-probe gives an audible signal when held over an illuminated source.) Cost $50.00 to $100.00;

- A person who had use of only one hand, working in a food service position could perform all tasks except opening cans. She was provided with a one-handed can opener. Cost $35.00;

- Purchase of a light weight mop and a smaller broom enabled an employee with Downs syndrome and congenital heart problems to do his job with minimal strain. Cost under $40;

- A truck driver had carpal tunnel syndrome which limited his wrist movement and caused extreme discomfort in cold weather. A special wrist splint used with a glove designed for skin divers made it possible for him to drive even in extreme weather conditions. Cost $55.00;

- A phone headset allowed an insurance salesman with cerebral palsy to write while talking to clients. Rental cost $6.00 per month;

- A simple cardboard form, called a "jig" made it possible for a person with mental retardation to properly fold jeans as a stock clerk in a retail store. Cost $0.

Many recent technological innovations make it possible for people with severe disabilities to be very productive employees. Although some of this equipment is expensive, Federal tax credits, tax deductions, and other sources of financing are available to help pay for higher cost equipment.

For example: A company hired a person who was legally blind as a computer operator. The State Commission for the Blind paid half of the cost of a braille terminal. Since all programmers were provided with computers, the cost of the accommodation to this employer was only one-half of the difference in cost between the braille terminal and a regular computer. A smaller company also would be eligible for a

tax credit for such cost. (See Tax Credit for Small Business, **4.1a** below)

For sources of information and technical assistance to help employers develop or locate "assistive devices and equipment," see this listing in the Index to the Resource Directory.

7. Adjusting and Modifying Examinations, Training Materials, and Policies

An employer may be required to modify, adjust, or make other reasonable accommodations in the ways that tests and training are administered in order to provide equal employment opportunities for qualified individuals with disabilities. Revisions to other employment policies and practices also may be required as reasonable accommodations.

a. Tests and Examinations

Accommodations may be needed to assure that tests or examinations measure the actual **ability** of an individual to perform job functions, rather than reflecting limitations caused by the disability. The ADA requires that tests be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless that is the job-related skill the test is designed to measure.

> For example: An applicant who has dyslexia, which causes difficulty in reading, should be given an oral rather than a written test, unless reading is an essential function of the job. Or, an individual with a visual disability or a learning disability might be allowed more time to take a test, unless the test is designed to measure speed required on a job.

The employer is only required to provide a reasonable accommodation for a test if the individual with a disability requests such an accommodation. But the employer has an obligation to inform job applicants in advance that a test will be given, so that an individual who needs an accommodation can make such a request. (See Chapter V. for further guidance on accommodations in testing.)

b. Training

Reasonable accommodation should be provided, when needed, to give employees with disabilities equal opportunity for training to perform their jobs effectively and to progress in employment. Needed accommodations may include:

- providing accessible training sites;
- providing training materials in alternate formats to accommodate a disability.

  For example: An individual with a visual disability may need training materials on tape, in large print, or on a computer diskette. A person with mental retardation may need materials in simplified language or may need help in understanding test instructions;

- modifying the manner in which training is provided.

  For example: It may be a reasonable accommodation to allow more time for training or to provide extra assistance to people with learning disabilities or people with mental impairments.

Additional guidance on accommodations in training is provided in Chapter VII.

c. Other Policies

Adjustments to various existing policies may be necessary to provide reasonable accommodation. As discussed above (see 3.10.3 and 3.10.4), modifications to existing leave policies and regular work hours may be required as accommodations. Or, for example, a company may need to modify a policy prohibiting animals in the work place, so that a visually impaired person can use a guide dog. Policies on providing information to employees may need adjustment to assure that all information is available in accessible formats for employees with disabilities. Policies on emergency evacuations should be adjusted to provide effective accommodations for people with different disabilities. (See Chapter VII).

8. Providing Qualified Readers

It may be a reasonable accommodation to provide a reader for a qualified individual with a disability, if this would not impose an undue hardship.

> **For example**: A court has held under the Rehabilitation Act that it was not an undue hardship for a large state agency to provide full-time readers for three blind employees, in view of its very substantial budget. However, it may be an undue hardship for a smaller agency or business to provide such an accommodation.

In some job situations a reader may be the most effective and efficient accommodation, but in other situations alternative accommodations may enable an individual with a visual disability to perform job tasks just as effectively.

When an applicant or employee has a visual disability, the employer and the individual should use the "process" outlined in 3.8 above to identify specific limitations of the individual in relation to specific needs of the job and to assess possible accommodations.

> **For example**: People with visual impairments perform many jobs that do not require reading. Where reading is an essential job function, depending on the nature of a visual impairment and the nature of job tasks, print magnification equipment or a talking computer may be more effective for the individual and less costly for an employer than providing another employee as a reader. Where an individual has to read lengthy documents, a reader who transcribes documents onto tapes may be a more effective accommodation.

Providing a reader does not mean that it is necessary to hire a full-time employee for this service. Few jobs require an individual to spend all day reading. A reader may be a part-time employee or full-time employee who performs other duties. However, the person who reads to a visually impaired employee must read well enough to enable the individual to perform his or her job effectively. It would not be a reasonable accommodation to provide a reader whose poor skills hinder the job performance of the individual with a disability.

9. Providing Qualified Interpreters

Providing an interpreter on an "as-needed" basis may be a reasonable accommodation for a person who is deaf in some employment situations, if this does not impose an undue hardship.

If an individual with a disability is otherwise qualified to perform essential job functions, the employer's basic obligation is to provide an accommodation that will enable this person to perform the job effectively. A person who is deaf or hearing-impaired should be able to communicate effectively with others as required by the duties of the job. Identifying the needs of the individual in relation to specific job tasks will determine whether or when an interpreter may be needed. The resources available to the employer would be considered in determining whether it would be an undue hardship to provide such an accommodation.

> **For example**: It may be necessary to obtain a qualified interpreter for a job interview, because for many jobs the applicant and interviewer must communicate fully and effectively to evaluate whether the applicant is qualified to do the job. Once hired, however, if the individual is doing clerical work, research, computer applications, or other job tasks that do not require much verbal communication, an interpreter may only be needed occasionally. Interpretation may be necessary for training situations, staff meetings or an employee party, so that this person can fully participate in these functions. Communication on the job may be handled through different means, depending on the situation, such as written notes, "signing" by other employees who have received basic sign language training, or by typing on a computer or typewriter.

People with hearing impairments have different communication needs and use different modes of communication. Some use signing in American Sign Language, but others use sign language that has different manual codes. Some people rely on an oral interpreter who silently mouths words spoken by others to make them easier to lip read. Many hearing-impaired people use their voices to communicate, and some combine talking and signing. The

individual should be consulted to determine the most effective means of communication.

Communication between a person who is deaf and others through a supervisor and/or co-worker with basic sign language training may be sufficient in many job situations. However, where extensive discussions or complex subject matter is involved, a trained interpreter may be needed to provide effective communication. Experienced interpreters usually have received special training and may be certified by a professional interpreting organization or state or local Commission serving people who are deaf. (See Resource Directory Index listing of "Interpreters" for information about interpreters and how to obtain them).

10. Other Accommodations

There are many other accommodations that may be effective for people with different disabilities in different jobs. The examples of accommodations in EEOC regulations and the examples in this Manual are not the only types of accommodations that may be required. Some other accommodations that may be appropriate include:

- making transportation provided by the employer accessible;
- providing a personal assistant for certain job-related functions, such as a page turner for a person who has no hands, or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips.
- use of a job coach for people with mental retardation and other disabilities who benefit from individualized on-the job training and services provided at no cost by vocational rehabilitation agencies in "supported employment" programs. (See Resource Directory Index for "Supported Employment.")

3.11 Financial and Technical Assistance for Accommodations

a. Financial Assistance

There are several sources of financial assistance to help employers make accommodations and comply with ADA requirements.

1. **Tax Credit for Small Business** (Section 44 of the Internal Revenue Code)

In 1990, Congress established a special tax credit to help smaller employers make accommodations required by the ADA. An eligible small business may take a tax credit of up to $5000 per year for accommodations made to comply with the ADA. The credit is available for one-half the cost of "eligible access expenditures" that are more than $250 but less than $10,250.

For example: If an accommodation cost $10,250, an employer could get a tax credit of $5000 ($10,250 minus $250, divided by 2). If the accommodation cost $7000, a tax credit of $3375 would be available.

An **eligible small business** is one with gross receipts of $1 million or less for the taxable year, or 30 or fewer full time employees.

"**Eligible access expenditures**" for which the tax credit may be taken include the types of accommodations required under Title I of the ADA as well as accessibility requirements for commercial facilities and places of public accommodation under Title III. "Eligible access expenditures" include:

- removal of architectural, communication, physical, or transportation barriers to make the business accessible to, or usable by, people with disabilities.
- providing qualified interpreters or other methods to make communication accessible to people with hearing disabilities;
- providing qualified readers, taped texts, or other methods to make information accessible to people with visual disabilities; and/or

- acquiring or modifying equipment or devices for people with disabilities.

To be eligible for the tax credit, changes made to remove barriers or to provide services, materials or equipment must meet technical standards of the ADA Accessibility Guidelines, where applicable. (See p. above.)

2. **Tax Deduction for Architectural and Transportation Barrier Removal** (Section 190 of the Internal Revenue Code)

Any business may take a full tax deduction, up to $15,000 per year, for expenses of removing specified architectural or transportation barriers. Expenses covered include costs of removing barriers created by steps, narrow doors, inaccessible parking spaces, toilet facilities, and transportation vehicles. **Both** the tax credit and the tax deduction are available to eligible small businesses.

> **For example**: If a small business makes a qualified expenditure of $24,000, it may take the $5000 tax **credit** for the initial $10,250 and, if the remaining $13,750 qualifies under Section 190, may **deduct** that amount from its taxable income. However, a business may not receive a double benefit for the same expense: for example, it may not take both the tax credit and the tax deduction for $10,000 spent to renovate bathrooms.

Information on the Section 44 tax credit and the Section 190 tax deduction can be obtained from a local IRS office, or by contacting the Office of Chief Counsel, Internal Revenue Service. (See Resource Directory.)

3. **Targeted Jobs Tax Credit**

Tax credits also are available under the Targeted Jobs Tax Credit Program (TJTCP) for employers who hire individuals with disabilities referred by state or local vocational rehabilitation agencies, State Commissions on the Blind and the U.S. Department of Veterans Affairs and certified by a State Employment Service. This program promotes hiring of several "disadvantaged" groups, including people with disabilities.

Under the TJTCP, a tax credit may be taken for 40% of the first $6000 of an employee's first-year salary. This program must be reauthorized each year by Congress, and currently has been extended through June 30, 1992. Information about this program can be obtained from the State Employment Services or from State Governor's Committees on the Employment of People with Disabilities. (See State listings in Resource Directory.)

4. Other Funding Sources

State or local vocational rehabilitation agencies and State Commissions for the Blind can provide financial assistance for equipment and accommodations for their clients. The U.S. Department of Veterans Affairs also provides financial assistance to disabled veterans for equipment needed to help perform jobs. Some organizations that serve people with particular types of disabilities also provide financial assistance for needed accommodations. Other types of assistance may be available in the community. For example, some Independent Living Centers provide transportation service to the workplace for people with disabilities. For further information, see "Financial Assistance for Accommodations" in Resource Directory Index.

b. Technical Assistance

There are many sources of technical assistance to help employers make effective accommodations for people with different disabilities in various job situations. Many of these resources are available without cost. Major resources for information, assistance, and referral to local specialized resources are 10 new **ADA Regional Business and Disability Technical Assistance Centers** that have been funded by Congress specifically to help implement the ADA. These Centers have been established to provide information, training and technical assistance to employers and all other entities covered by the ADA and to people with disabilities. The Centers also can refer employers to local technical assistance sources. (See ADA Regional Business and Disability Technical Assistance Centers in Resource Directory.) Other resources include:

- **State and local vocational rehabilitation agencies**

- **Independent Living Centers** in some 400 communities around the country provide technical assistance to employers and people with disabilities on accessibility and other accommodations and make referrals to specialized sources of assistance.

- **The Job Accommodation Network** (JAN) a free national consultant service, available through a toll-free number, helps employers make individualized accommodations.

- **ABLEDATA**, a computerized database of disability-related products and services, conducts customized information searches on worksite modifications, assistive devices and other accommodations.

- **The President's Committee on Employment of People with Disabilities** provides technical information, including publications with practical guidance on job analysis and accommodations.

- **Governors' Committees on Employment of People with Disabilities** in each State, allied with the President's Committee, are local resources of information and technical assistance.

These and many other sources of specialized technical assistance are listed in the Resource Directory. The Index to the Directory will be helpful in locating specific types of assistance.

IV. ESTABLISHING NONDISCRIMINATORY QUALIFICATION STANDARDS AND SELECTION CRITERIA

4.1 Introduction

The ADA does not prohibit an employer from establishing job-related qualification standards, including education, skills, work experience, and physical and mental standards necessary for job performance, health and safety.

The Act does not interfere with an employer's authority to establish appropriate job qualifications to hire people who can perform jobs effectively and safely, and to hire the best qualified person for a job. ADA requirements are designed to assure that people with disabilities are not excluded from jobs that they can perform.

ADA requirements apply to all selection standards and procedures, including, but not limited to:

- **education and work experience requirements;**
- **physical and mental requirements;**
- **safety requirements;**
- **paper and pencil tests;**
- **physical or psychological tests;**
- **interview questions; and**
- **rating systems;**

4.2 Overview of Legal Obligations

- Qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability must be **job-related and consistent with business necessity.**

- Even if a standard is job-related and consistent with business necessity, if it screens out an individual with a disability on the basis of disability, the employer **must consider** if the individual could meet the standard with a **reasonable accommodation.**

- An employer is not required to lower existing production standards applicable to the quality or quantity of work for a given job in considering qualifications of an individual with a disability, if these standards are uniformly applied to all applicants and employees in that job.

- If an individual with a disability cannot perform a marginal function of a job because of a disability, an employer may base a hiring decision only on the individual's ability to perform the essential functions of the job, with or without a reasonable accommodation.

4.3 What is Meant by "Job-Related" and "Consistent with Business Necessity"?

1. Job-Related

If a qualification standard, test or other selection criterion operates to screen out an individual with a disability, or a class of such individuals on the basis of disability, it must be a legitimate measure or qualification for the specific job it is being used for. It is not enough that it measures qualifications for a general class of jobs.

> **For example**: A qualification standard for a secretarial job of "ability to take shorthand dictation" is not job-related if the person in the particular secretarial job actually transcribes taped dictation.

The ADA does not require that a qualification standard or selection criterion apply only to the "essential functions" of a job. A "job-related" standard or selection criterion may evaluate or measure all functions of a job and employers may continue to select and hire people who can perform all of these functions. It is only when an individual's disability prevents or impedes performance of marginal job functions that the ADA requires the employer to evaluate this individual's qualifications solely on his/her ability to perform the essential functions of the job, with or without an accommodation.

For example: An employer has a job opening for an administrative assistant. The essential functions of the job are administrative and organizational. Some occasional typing has been part of the job, but other clerical staff are available who can perform this marginal job function. There are two job applicants. One has a disability that makes typing very difficult, the other has no disability and can type. The employer may not refuse to hire the first applicant because of her inability to type, but must base a job decision on the relative ability of each applicant to perform the essential administrative and organizational job functions, with or without accommodation. The employer may not screen out the applicant with a disability because of the need to make an accommodation to perform the essential job functions. However, if the first applicant could not type for a reason not related to her disability (for example, if she had never learned to type) the employer would be free to select the applicant who could best perform all of the job functions.

2. Business Necessity

"Business necessity" will be interpreted under the ADA as it has been interpreted by the courts under Section 504 of the Rehabilitation Act.

Under the ADA, as under the Rehabilitation Act:

> **If a test or other selection criterion excludes an individual with a disability because of the disability and does not relate to the essential functions of a job, it is not consistent with business necessity.**

This standard is similar to the legal standard under Title VII of the Civil Rights Act which provides that a selection procedure which screens out a disproportionate number of persons of a particular race, sex or national origin "class" must be justified as a "business necessity." However, under the ADA the standard may be applied to an individual who is screened out by a selection procedure because of disability, as well as to a class of persons. It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability is screened out by a selection standard.

Disabilities vary so much that it is difficult, if not impossible, to make general determinations about the effect of various standards, criteria and procedures on "people with disabilities." Often, there may be little or no statistical data to measure the impact of a procedure on any "class" of people with a particular disability compared to people without disabilities. As with other determinations under the ADA, the exclusionary effect of a selection procedure usually must be looked at in relation to a particular individual who has particular limitations caused by a disability.

Because of these differences, the federal Uniform Guidelines on Employee Selection Procedures that apply to selection procedures on the basis of race, sex, and national origin under Title VII of the Civil Rights Act and other Federal authorities do not apply under the ADA to selection procedures affecting people with disabilities.

A standard may be job-related but not justified by business necessity, because it does not concern an essential function of a job.

> **For example**: An employer may ask candidates for a clerical job if they have a driver's license, because it would be desirable to have a person in the job who could occasionally run errands or take packages to the post office in an emergency. This requirement is "job-related," but it relates to an **incidental**, not an **essential**, job function. If it disqualifies a person who could not obtain a driver's license because of a disability, it would not be justified as a "business necessity" for purposes of the ADA.

Further, the ADA requires that even if a qualification standard or selection criterion is job-related and consistent with business necessity, it may not be used to exclude an individual with a disability if this individual could satisfy the legitimate standard or selection criterion with a reasonable accommodation.

> **For example**: It may be job-related and necessary for a business to require that a secretary produce letters and other documents on a word processor. But it would be discriminatory to reject a person whose disability prevented manual keyboard operation, but who could meet the qualification standard using a computer assistive device, if providing this device would not impose an undue hardship.

4.4 Establishing Job-Related Qualification Standards

The ADA does not restrict an employer's authority to establish needed job qualifications, including requirements related to:

- education;
- skills;
- work experience;
- licenses or certification;
- physical and mental abilities;
- health and safety; or
- other job-related requirements, such as judgment, ability to work under pressure or interpersonal skills.

Physical and Mental Qualification Standards

An employer may establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and fire fighter jobs; security guard jobs) or to protect health and safety.

However, as with other job qualification standards, if a physical or mental qualification standard screens out an individual with a disability or a class of individuals with disabilities, the employer must be prepared to show that the standard is:

- **job-related and**
- **consistent with business necessity.**

Even if a physical or mental qualification standard is job-related and necessary for a business, if it is applied to exclude an otherwise qualified individual with a disability, the employer must consider whether there is a reasonable accommodation that would enable this person to meet the standard. The employer does not have to consider such accommodations in establishing a standard, but only when an otherwise qualified person with a disability requests an accommodation.

For example: An employer has a forklift operator job. The essential function of the job is mechanical operation of the forklift machinery. The job has a physical requirement of ability to lift a

70 pound weight, because the operator must be able to remove and replace the 70 pound battery which powers the forklift. This standard is job-related. However, it would be a reasonable accommodation to eliminate this standard for an otherwise qualified forklift operator who could not lift a 70 pound weight because of a disability, if other operators or employees are available to help this person remove and replace the battery.

Evaluating Physical and Mental Qualification Standards Under the ADA

Employers generally have two kinds of physical or mental standards:

1. Standards that may exclude an entire class of individuals with disabilities.

   For example: No person who has epilepsy, diabetes, or a heart or back condition is eligible for a job.

2. Standards that measure a physical or mental ability needed to perform a job.

   For example: The person in the job must be able to lift x pounds for x hours daily, or run x miles in x minutes.

Standards that exclude an entire class of individuals with disabilities

"Blanket" exclusions of this kind usually have been established because employers believed them to be necessary for health or safety reasons. Such standards also may be used to screen out people who an employer fears, or assumes, may cause higher medical insurance or workers' compensation costs, or may have a higher rate of absenteeism.

Employers who have such standards should review them carefully. In most cases, they will not meet ADA requirements.

The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. An employer is not required to hire or retain an individual who would pose a "direct threat" to health or safety (see below). But the ADA requires an objective assessment of a particular individual's current ability to perform a job safely and effectively. Generalized "blanket" exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date

medical knowledge and technology, or that are based on fears about future medical or workers' compensation costs, are unlikely to survive a legal challenge under the ADA. (However, the ADA recognizes employers' obligations to comply with Federal laws that mandate such exclusions in certain occupations. [See Health and Safety Requirements of Other Federal or State Laws below.])

The ADA requires that:

- any determination of a direct threat to health or safety must be based on an individualized assessment of objective and specific evidence about a particular individual's present ability to perform essential job functions, not on general assumptions or speculations about a disability. (See Standards Necessary for Health and Safety: A "Direct Threat" below).

  For example: An employer who excludes all persons who have epilepsy from jobs that require use of dangerous machinery will be required to look at the life experience and work history of an individual who has epilepsy. The individual evaluation should take into account the type of job, the degree of seizure control, the type(s) of seizures (if any), whether the person has an "aura" (warning of seizure), the person's reliability in taking prescribed anti-convulsant medication, and any side effects of such medication. Individuals who have no seizures because they regularly take prescribed medication, or who have sufficient advance warning of a seizure so that they can stop hazardous activity, would not pose a "direct threat" to safety.

Standards that measure needed physical or mental ability to perform a job

Specific physical or mental abilities may be needed to perform certain types of jobs.

For example: Candidates for jobs such as airline pilots, policemen and firefighters may be required to meet certain physical and psychological qualifications.

In establishing physical or mental standards for such jobs, an employer does not have to show that these standards are "job related," justified by "business necessity" or that they relate only to "essential" functions of the job. However, if such a standard screens out an otherwise qualified individual with a disability, the employer must be prepared to show that the standard, as applied, is job-related and consistent with business

necessity under the ADA. And, even if this can be shown, the employer must consider whether this individual could meet the standard with a **reasonable accommodation**.

> **For example**: A police department that requires all its officers to be able to make forcible arrests and to perform all job functions in the department might be able to justify stringent physical requirements for all officers, if in fact they are all required to be available for any duty in an emergency.
>
> However, if a position in a mailroom required as a qualification standard that the person in the job be able to reach high enough to place and retrieve packages from 6-foot high shelves, an employer would have to consider whether there was an accommodation that would enable a person with a disability that prevented reaching that high to perform these essential functions. Possible accommodations might include lowering the shelf-height, providing a step stool or other assistive device.

Physical agility tests

An employer may give a physical agility test to determine physical qualifications necessary for certain jobs prior to making a job offer if it is simply an agility test and not a medical examination. Such a test would not be subject to the prohibition against pre-employment medical examinations if given to all similarly situated applicants or employees, regardless of disability. However, if an agility test screens out or tends to screen out an individual with a disability or a class of such individuals because of disability, the employer must be prepared to show that the test is job-related and consistent with business necessity and that the test or the job cannot be performed with a reasonable accommodation.

It is important to understand the distinction between physical agility tests and prohibited pre-employment medical inquiries and examinations. One difference is that agility tests do not involve medical examinations or diagnoses by a physician, while medical examinations may involve a doctor.

> **For example**: At the pre-offer stage, a police department may conduct an agility test to measure a candidate's ability to walk, run, jump, or lift in relation to specific job duties, but it cannot require the applicant to have a medical screening before taking the agility test. Nor can it administer a medical examination before making a conditional job offer to this person.

Some employers currently may require a medical screening before administering a physical agility test to assure that the test will not harm the applicant. There are two ways that an employer can handle this problem under the ADA:

- the employer can request the applicant's physician to respond to a very restricted inquiry which describes the specific agility test and asks: "Can this person safely perform this test?"

- the employer may administer the physical agility test after making a conditional job offer, and in this way may obtain any necessary medical information, as permitted under the ADA. (See Chapter VI.) The employer may find it more cost-efficient to administer such tests only to those candidates who have met other job qualifications.

4.5 Standards Necessary for Health and Safety: A "Direct Threat"

An employer may require as a qualification standard that an individual not pose a "direct threat" to the health or safety of the individual or others, if this standard is applied to all applicants for a particular job. However, an employer must meet very specific and stringent requirements under the ADA to establish that such a "direct threat" exists.

The employer must be prepared to show that there is:

- **significant risk of substantial harm;**
- **the specific risk must be identified;**
- **it must be a current risk, not one that is speculative or remote;**
- **the assessment of risk must be based on objective medical or other factual evidence regarding a particular individual; and**
- **even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.**

Looking at each of these requirements more closely:

1. Significant risk of substantial harm

An employer cannot deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The employer must be prepared to show that there is a **significant risk**, that is, **a high probability of substantial harm,** if the person were employed.

The assessment of risk cannot be based on mere speculation unrelated to the individual in question.

> **For example**: An employer cannot assume that a person with cerebral palsy who has restricted manual dexterity cannot work in a laboratory because s/he will pose a risk of breaking vessels with dangerous contents. The abilities or limitations of a particular individual with cerebral palsy must be evaluated.

2. The specific risk must be identified

If an individual has a disability, the employer must identify the aspect of the disability that would pose a direct threat, considering the following factors:

- the **duration** of the risk.

  > **For example**: An elementary school teacher who has tuberculosis may pose a risk to the health of children in her classroom. However, with proper medication, this person's disease would be contagious for only a two-week period. With an accommodation of two-weeks absence from the classroom, this teacher would not pose a "direct threat."

- the **nature** and **severity** of the potential harm.

  > **For example**: A person with epilepsy, who has lost consciousness during seizures within the past year, might seriously endanger her own life and the lives of others if employed as a bus driver. But this person would not pose a severe threat of harm if employed in a clerical job.

- the **likelihood** that the potential harm will occur.

For example: An employer may believe that there is a risk of employing an individual with HIV disease as a teacher. However, it is medically established that this disease can only be transmitted through sexual contact, use of infected needles, or other entry into a person's blood stream. There is little or no likelihood that employing this person as a teacher would pose a risk of transmitting this disease.

and

- the **imminence** of the potential harm.

For example: A physician's evaluation of an applicant for a heavy labor job that indicated the individual had a disc condition that might worsen in 8 or 10 years would not be sufficient indication of imminent potential harm.

If the perceived risk to health or safety arises from the behavior of an individual with a mental or emotional disability, the employer must identify the specific behavior that would pose the "direct threat".

3. **The risk must be current, not one that is speculative or remote**

The employer must show that there is a current risk -- "a high probability of substantial harm" -- to health or safety based on the individual's present ability to perform the essential functions of the job. A determination that an individual would pose a "direct threat" cannot be based on speculation about future risk. This includes speculation that an individual's disability may become more severe. An assessment of risk cannot be based on speculation that the individual will become unable to perform a job in the future, or that this individual may cause increased health insurance or workers compensation costs, or will have excessive absenteeism. (See Insurance, Chapter VII., and Workers' Compensation, Chapter IX.)

4. **The assessment of risk must be based on objective medical or other evidence related to a particular individual**

The determination that an individual applicant or employee with a disability poses a "direct threat" to health or safety must be based

on objective, factual evidence related to that individual's present ability to safely perform the essential functions of a job. It cannot be based on unfounded assumptions, fears, or stereotypes about the nature or effect of a disability or of disability generally. Nor can such a determination be based on patronizing assumptions that an individual with a disability may endanger himself or herself by performing a particular job.

> **For example**: An employer may not exclude a person with a vision impairment from a job that requires a great deal of reading because of concern that the strain of heavy reading may further impair her sight.

The determination of a "direct threat" to health or safety must be based on a reasonable medical judgement that relies on the most current medical knowledge and/or the best available objective evidence. This may include:

- **input from the individual with a disability;**
- **the experience of this individual in previous jobs;**
- **documentation from medical doctors, psychologists, rehabilitation counselors, physical or occupational therapists, or others who have expertise in the disability involved and/or direct knowledge of the individual with a disability.**

Where the psychological behavior of an employee suggests a threat to safety, **factual evidence** of this behavior also may constitute evidence of a "direct threat." An employee's violent, aggressive, destructive or threatening behavior may provide such evidence.

Employers should be careful to assure that assessments of "direct threat" to health or safety are based on current medical knowledge and other kinds of evidence listed above, rather than relying on generalized and frequently out-of- date assumptions about risk associated with certain disabilities. They should be aware that Federal contractors who have had similar disability nondiscrimination requirements under the Rehabilitation Act have had to make substantial backpay and other financial payments because they excluded individuals with disabilities who were qualified to perform their jobs, based on generalized assumptions that were not supported by evidence about the individual concerned.

Examples of Contractor Cases:

- A highly qualified experienced worker was rejected for a sheet metal job because of a company's general medical policy excluding anyone with epilepsy from this job. The company asserted that this person posed a danger to himself and to others because of the possibility that he might have a seizure on the job. However, this individual had been seizure-free for 6 years and co-workers on a previous job testified that he carefully followed his prescribed medication schedule. The company was found to have discriminated against this individual and was required to hire him, incurring large back pay and other costs.

- An applicant who was deaf in one ear was rejected for an aircraft mechanic job because the company feared that his impairment might cause a future workers' compensation claim. His previous work record gave ample evidence of his ability to perform the aircraft mechanic job. The company was found to have discriminated because it provided no evidence that this person would have been a danger to himself or to others on the job.

- An experienced carpenter was not hired because a blood pressure reading by the company doctor at the end of a physical exam was above the company's general medical standard. However, his own doctor provided evidence of much lower readings, based on measurements of his blood pressure at several times during a physical exam. This doctor testified that the individual could safely perform the carpenter's job because he had only mild hypertension. Other expert medical evidence confirmed that a single blood pressure reading was not sufficient to determine if a person has hypertension, that such a reading clearly was not sufficient to determine if a person could perform a particular job, and that hypertension has very different effects on different people. In this case, it was found that there was merely a slightly elevated risk, and that a remote possibility of future injury was not sufficient to disqualify an otherwise qualified person. (Note that while it is possible that a person with mild hypertension does not have an impairment that "substantially limits a major life activity," in this case the person was excluded because he was "regarded as" having such an impairment. The employer was still required to show that this person posed a "direct threat" to safety.)

"Direct Threat" to Self

An employer may require that an individual not pose a direct threat of harm to his or her own safety or health, as well as to the health or safety of others. However, as emphasized above, such determinations must be strictly based on valid medical analyses or other objective evidence related to this individual, using the factors set out above. A determination that a person might cause harm to himself or herself cannot be based on stereotypes, patronizing assumptions about a person with a disability, or generalized fears about risks that might occur if an individual with a disability is placed in a certain job. Any such determination must be based on evidence of specific risk to a particular individual.

For example: An employer would not be required to hire an individual disabled by narcolepsy who frequently and unexpectedly loses consciousness to operate a power saw or other dangerous equipment, if there is no accommodation that would reduce or eliminate the risk of harm. But an advertising agency could not reject an applicant for a copywriter job who has a history of mental illness, based on a generalized fear that working in this high stress job might trigger a relapse of the individual's mental illness. Nor could an employer reject an applicant with a visual or mobility disability because of a generalized fear of risks to this person in the event of a fire or other emergency.

5. If there is a significant risk, reasonable accommodation must be considered

Where there is a significant risk of substantial harm to health or safety, an employer still must consider whether there is a reasonable accommodation that would eliminate this risk or reduce the risk so that it is below the level of a "direct threat."

For example: A deaf bus mechanic was denied employment because the transit authority feared that he had a high probability of being injured by buses moving in and out of the garage. It was not clear that there was, in fact, a "high probability" of harm in this case, but the mechanic suggested an effective accommodation that enabled him to perform his job with little or no risk. He worked in a corner of the garage, facing outward, so that he could see moving buses. A co-worker was designated to

alert him with a tap on the shoulder if any dangerous situation should arise.

"Direct Threat" and Accommodation in Food Handling Jobs

The ADA includes a specific application of the "direct threat" standard and the obligation for reasonable accommodation in regard to individuals who have infectious or communicable diseases that may be transmitted through the handling of food.

The law provides that the U.S. Department of Health and Human Services (HHS) must prepare and update annually a list of contagious diseases that are transmitted through the handling of food and the methods by which these diseases are transmitted.

When an individual who has one of the listed diseases applies for work or works in a job involving food handling, the employer must consider whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through handling of food. If there is such an accommodation, and it would not impose an undue hardship, the employer must provide the accommodation.

An employer would not be required to hire a job **applicant** in such a situation if no reasonable accommodation is possible. However, an employer would be required to consider accommodating an **employee** by reassignment to a position that does not require handling of food, if such a position is available, the employee is qualified for it, and it would not pose an undue hardship.

In August 1991, the Centers for Disease Control (CDC) of the Public Health Service in HHS issued a list of infectious and communicable diseases that are transmitted through handling of food, together with information about how these diseases are transmitted. The list of diseases is brief. In conformance with established medical opinion, it does not include AIDS or the HIV virus. In issuing the list, the CDC emphasized that the greatest danger of food-transmitted illness comes from contamination of infected food-producing animals and contamination in food processing, rather than from handling of food by persons with infectious or communicable diseases. The CDC also emphasized that proper personal hygiene and sanitation in food-handling jobs were the most important measures to prevent transmission of disease.

The CDC list of diseases that are transmitted through food handling and recommendations for preventing such transmission appears in Appendix C.

4.6 Health and Safety Requirements of Other Federal or State Laws

The ADA recognizes employers' obligations to comply with requirements of other laws that establish health and safety standards. However, the Act gives greater weight to Federal than to state or local law.

1. Federal Laws and Regulations

The ADA does not override health and safety requirements established under other Federal laws. If a standard is required by another Federal law, an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity.

> **For example**: An employee who is being hired to drive a vehicle in interstate commerce must meet safety requirements established by the U.S. Department of Transportation. Employers also must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration (OSHA).

However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other Federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws.

> **For example**: In hiring a person to drive a vehicle in interstate commerce, an employer must conform to existing Department of Transportation regulations that exclude any person with epilepsy, diabetes, and certain other conditions from such a job.
>
> But, for example, if DOT regulations require that a truck have 3 grab bars in specified places, and an otherwise qualified individual with a disability could perform essential job functions with the assistance of 2 additional grab bars, it would be a reasonable accommodation to add these bars, unless this would be an undue hardship.

The Department of Transportation, as directed by Congress, currently is reviewing several motor vehicle standards that require "blanket" exclusions of individuals with diabetes, epilepsy and certain other disabilities.

2. State and Local Laws

The ADA does not override state or local laws designed to protect public health and safety, except where such laws conflict with ADA requirements. This means that if there is a state or local law that would exclude an individual with a disability for a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If there is such a "direct threat," the employer also must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer may not rely on the existence of a state or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

> **For example**: A state law that required a schoolbus driver to have a high level of hearing in both ears without use of a hearing aid was found by a court to violate Section 504 of the Rehabilitation Act, and would violate the ADA. The court found that the driver could perform his job with a hearing aid without a risk to safety.

(See further guidance on Medical Examinations and Inquiries in Chapter VI.)

V. NONDISCRIMINATION IN THE HIRING PROCESS: RECRUITMENT; APPLICATIONS; PRE-EMPLOYMENT INQUIRIES; TESTING

This chapter discusses nondiscrimination requirements that apply to recruitment and the job application process, including pre-employment inquiries. Chapter VI. discusses these requirements more specifically in relation to medical inquiries and examinations.

5.1 Overview of Legal Obligations

- An employer must provide an equal opportunity for an individual with a disability to participate in the job application process and to be considered for a job.
- An employer may not make any **pre-employment** inquiries regarding disability, but may ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how s/he would perform these functions.
- An employer may not require pre-employment medical examinations or medical histories, but may condition a job offer on the results of a post-offer medical examination, if all entering employees in the same job category are required to take this examination.
- Tests for illegal drugs are not medical examinations under the ADA and may be given at any time.
- A test that screens out or tends to screen out a person with a disability on the basis of disability must be job-related and consistent with business necessity.
- Tests must reflect the skills and aptitudes of an individual rather than impaired sensory, manual, or speaking skills, unless those are job-related skills the test is designed to measure.

A careful review of all procedures used in recruiting and selecting employees is advisable to assure nondiscrimination in the hiring process. Reasonable accommodation must be provided as needed, to assure that individuals with disabilities have equal opportunities to participate in this process.

5.2 Job Advertisements and Notices

It is advisable that job announcements, advertisements, and other recruitment notices include information on the essential functions of the job. Specific information about essential functions will attract applicants, including individuals with disabilities, who have appropriate qualifications.

Employers may wish to indicate in job advertisements and notices that they do not discriminate on the basis of disability or other legally prohibited bases. An employer may wish to include a statement such as: "We are an Equal Opportunity Employer. We do not discriminate on the basis of race, religion, color, sex, age, national origin or disability."

Accessibility of Job Information

Information about job openings should be accessible to people with different disabilities. An employer is not obligated to provide written information in various formats in advance, but should make it available in an accessible format on request.

> **For example**: Job information should be available in a location that is accessible to people with mobility impairments. If a job advertisement provides only a telephone number to call for information, a TDD (telecommunication device for the deaf) number should be included, unless a telephone relay service has been established[1]. Printed job information in an employment office or on employee bulletin boards should be made available, as needed, to persons with visual or other reading impairments. Preparing information in large print will help make it available to some people with visual impairments. Information can be recorded on a cassette or read to applicants with more severe vision impairments and those who have other disabilities which limit reading ability.

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[1] Title IV of the ADA requires all telephone carriers to establish relay services by July 1993, that will enable people who use TDDs to speak directly to anyone through use of a relay operator. Many states already have such services. See Resource Directory for Telecommunications Relay Services.

5.3 Employment Agencies

Employment agencies are "covered entities" under the ADA, and must comply with all ADA requirements that are applicable to their activities.

The definition of an "employment agency" under the ADA is the same as that under Title VII of the Civil Rights Act. It includes private and public employment agencies and other organizations, such as college placement services, that regularly procure employees for an employer.

When an employer uses an employment agency to recruit, screen, and refer potential employees, both the employer and the employment agency may be liable if there is any violation of ADA requirements.

> **For example**: An employer uses an employment agency to recruit and the agency places a newspaper advertisement with a telephone number that all interested persons must call, because no address is given. However, there is no TDD number. If there is no telephone relay service, and a deaf person is unable to obtain information about a job for which she is qualified and files a discrimination charge, both the employer and the agency may be liable.

An employer should inform an employment agency used to recruit or screen applicants of the mutual obligation to comply with ADA requirements. In particular, these agencies should be informed about requirements regarding qualification standards, pre-employment inquiries, and reasonable accommodation.

If an employer has a contract with an employment agency, the employer may wish to include a provision stating that the agency will conduct its activities in compliance with ADA and other legal nondiscrimination requirements.

5.4 Recruitment

The ADA is a nondiscrimination law. It does not require employers to undertake special activities to recruit people with disabilities. However, it is consistent with the purpose of the ADA for employers to expand their "outreach" to sources of qualified candidates with disabilities. (See **Locating Qualified Individuals with Disabilities** below).

Recruitment activities that have the effect of screening out potential applicants with disabilities may violate the ADA.

For example: If an employer conducts recruitment activity at a college campus, job fair, or other location that is physically inaccessible, or does not make its recruitment activity accessible at such locations to people with visual, hearing or other disabilities, it may be liable if a charge of discrimination is filed.

Locating Qualified Individuals with Disabilities

There are many resources for locating individuals with disabilities who are qualified for different types of jobs. People with disabilities represent a large, underutilized human resource pool. Employers who have actively recruited and hired people with disabilities have found valuable sources of employees for jobs of every kind.

Many of the organizations listed in the Resource Directory are excellent sources for recruiting qualified individuals with disabilities as well as sources of technical assistance for any accommodations needed. For example, many colleges and universities have coordinators of services for students with disabilities who can be helpful in recruitment and in making accommodations. The Association on Handicapped Student Service Programs in Postsecondary Education can provide information on these resources. Local Independent Living Centers, state and local vocational rehabilitation agencies, organizations such as Goodwill Industries, and many organizations representing people who have specific disabilities are among other recruitment sources. (See "Recruitment Sources" in Resource Directory Index).

5.5 Pre-Employment Inquiries

The ADA Prohibits Any Pre-Employment Inquiries About a Disability.

This prohibition is necessary to assure that qualified candidates are not screened out because of their disability before their actual ability to do a job is evaluated. Such protection is particularly important for people with hidden disabilities who frequently are excluded, with no real opportunity to present their qualifications, because of information requested in application forms, medical history forms, job interviews, and pre-employment medical examinations.

The prohibition on pre-employment inquiries about disability does not prevent an employer from obtaining necessary information regarding an applicant's qualifications, including medical information necessary to assess qualifications and assure health and safety on the job.

The ADA requires only that such inquiries be made in two separate stages of the hiring process.

1. **Before making a job offer.**

   At this stage, an employer:

   - may ask questions about an applicant's ability to perform specific job functions;
   - may not make an inquiry about a disability;
   - may make a job offer that is conditioned on satisfactory results of a post-offer medical examination or inquiry.

2. **After making a conditional job offer and before an individual starts work**

   At this stage, an employer may conduct a medical examination or ask health-related questions, providing that all candidates who receive a conditional job offer in the same job category are required to take the same examination and/or respond to the same inquiries.

Inquiries that may and may not be made at the **pre-offer** stage are discussed in the section that follows. Guidance on obtaining and using information from **post-offer** medical and inquiries and examinations is provided in Chapter VI.

5.5(a) Basic Requirements Regarding Pre-Offer Inquiries

- An employer may not make any pre-employment inquiry about a disability, or about the nature or severity of a disability:
  - on application forms
  - in job interviews
  - in background or reference checks.
- An employer may not make any medical inquiry or conduct any medical examination prior to making a conditional offer of employment.

- An employer may ask a job applicant questions about ability to perform specific job functions, tasks, or duties, as long as these questions are not phrased in terms of a disability. Questions need not be limited to the "essential" functions of the job.

- An employer may ask all applicants to describe or demonstrate how they will perform a job, with or without an accommodation.

- If an individual has a known disability that might interfere with or prevent performance of job functions, s/he may be asked to describe or demonstrate how these functions will be performed, with or without an accommodation, even if other applicants are not asked to do so; **however**,

- If a known disability would not interfere with performance of job functions, an individual may only be required to describe or demonstrate how s/he will perform a job if this is required of all applicants for the position.

- An employer may condition a job offer on the results of a medical examination or on the responses to medical inquiries if such an examination or inquiry is required of all entering employees in the same job category, regardless of disability; information obtained from such inquiries or examinations must be handled according to the strict confidentiality requirements of the ADA. (See Chapter VI.)

5.5(b) The Job Application Form

A review of job application forms should be a priority before the ADA's effective date, to eliminate any questions related to disability.

Some Examples of Questions that May Not be Asked on Application Forms or in Job Interviews:

- Have you ever had or been treated for any of the following conditions or diseases? (Followed by a checklist of various conditions and diseases.)
- Please list any conditions or diseases for which you have been treated in the past 3 years.

- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
- Have you ever been treated for any mental condition?
- Is there any health-related reason you may not be able to perform the job for which you are applying?
- Have you had a major illness in the last 5 years?
- How many days were you absent from work because of illness last year?

(Pre-employment questions about illness may not be asked, because they may reveal the existence of a disability. However, an employer may provide information on its attendance requirements and ask if an applicant will be able to meet these requirements. [See also **The Job Interview** below.])

- Do you have any physical defects which preclude you from performing certain kinds of work? If yes, describe such defects and specific work limitations.
- Do you have any disabilities or impairments which may affect your performance in the position for which you are applying?

(This question should not be asked even if the applicant is requested in a follow-up question to identify accommodations that would enable job performance. Inquiries should not focus on an applicant's disabilities. The applicant may be asked about ability to perform specific job functions, with or without a reasonable accommodation. [See **Information That May be Asked**, below.])

- Are you taking any prescribed drugs?

(Questions about use of prescription drugs are not permitted before a conditional job offer, because the answers to such questions might reveal the existence of certain disabilities which require prescribed medication.)

- Have you ever been treated for drug addiction or alcoholism?

  (Information may not be requested regarding treatment for drug or alcohol addiction, because the ADA protects people addicted to drugs who have been successfully rehabilitated, or who are undergoing rehabilitation, from discrimination based on drug addiction. [See Chapter VI. for discussion of post-offer inquiries and Chapter VIII. for drug and alcohol issues.])

- Have you ever filed for workers' compensation insurance?

  (An employer may not ask about an applicant's workers' compensation history at the pre-offer stage, but may obtain such information after making a conditional job offer. Such questions are prohibited because they are likely to reveal the existence of a disability. In addition, it is discriminatory under the ADA not to hire an individual with a disability because of speculation that the individual will cause increased workers' compensation costs. (See Chapter IV, 4.5(3), and Chapter IX.)

Information about an applicant's ability to perform job tasks, with or without accommodation, can be obtained through the application form and job interview, as explained below. Other needed information may be obtained through medical inquiries or examinations conducted after a conditional offer of employment, as described in Chapter VI.

5.5(c) Exception for Federal Contractors Covered by Section 503 of the Rehabilitation Act and Other Federal Programs Requiring Identification of Disability.

Federal contractors and subcontractors who are covered by the affirmative action requirements of Section 503 of the Rehabilitation Act may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act. Employers who request such information must observe Section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such

information as a separate, confidential record, apart from regular personnel records. (For further information, see **Office of Federal Contract Compliance Programs** listing in Resource Directory.)

A pre-employment inquiry about a disability also is permissible if it is required or necessitated by another Federal law or regulation. **For example**, a number of programs administered or funded by the U.S. Department of Labor target benefits to individuals with disabilities, such as, disabled veterans, veterans of the Vietnam era, individuals eligible for Targeted Job Tax Credits, and individuals eligible for Job Training Partnership Act assistance. Pre-employment inquiries about disabilities may be necessary under these laws to identify disabled applicants or clients in order to provide the required special services for such persons. These inquiries would not violate the ADA.

5.5(d) Information that May Be Requested on Application Forms or in Interviews.

An employer may ask questions to determine whether an applicant can perform specific job functions. The questions should focus on the applicant's ability to perform the job, not on a disability.

For example: An employer could attach a job description to the application form with information about specific job functions. Or the employer may describe the functions. This will make it possible to ask whether the applicant can perform these functions. It also will give an applicant with a disability needed information to request any accommodation required to perform a task. The applicant could be asked:

- **Are you able to perform these tasks with or without an accommodation?**

  If the applicant indicates that s/he can perform the tasks with an accommodation, s/he may be asked:

- **How would you perform the tasks, and with what accommodation(s)?**

However, the employer must keep in mind that it cannot refuse to hire a qualified individual with a disability because of this person's need for an accommodation that would be required by the ADA.

An employer may inform applicants on an application form that they may request any needed accommodation to participate in the application process. **For example**: accommodation for a test, a job interview, or a job demonstration.

The employer may wish to provide information on the application form and in the employment office about specific aspects of the job application process, so that applicants may request any needed accommodation. The employer is not required to provide such information, but without it the applicant may have no advance notice of the need to request an accommodation. Since the individual with a disability has the responsibility to request an accommodation and the employer has the responsibility to provide the accommodation (unless it would cause an undue hardship), providing advance information on various application procedures may help avoid last minute problems in making necessary accommodations. This information can be communicated orally or on tape for people who are visually impaired. (See also Testing, **5.6** below)

5.5(e) Making Job Applications Accessible

Employers have an obligation to make reasonable accommodations to enable an applicant with a disability to apply for a job. Some of the kinds of accommodations that may be needed have been suggested in the section on Accessibility of Job Information, **5.2** above. Individuals with visual or learning disabilities or other mental disabilities also may require assistance in filling out application forms.

5.5(f) The Job Interview

The basic requirements regarding pre-employment inquiries and the types of questions that are prohibited on job application forms **apply to the job interview as well.** (See **5.5(a)** and **(b)** above.) An interviewer may not ask questions about a disability, but may obtain more specific information about the ability to perform job tasks and about any needed accommodation, as set out below.

To assure that an interview is conducted in a nondiscriminatory manner, interviewers should be well-informed about the ADA's requirements. The employer may wish to provide written guidelines to people who conduct job interviews.

Most employment discrimination against people with disabilities is not intentional. Discrimination most frequently occurs because interviewers and others involved in hiring lack knowledge about the differing capabilities of individuals with disabilities and make decisions based on stereotypes, misconceptions, or unfounded fears. To avoid discrimination in the hiring process, employers may wish to provide "awareness" training for interviewers and others involved in the hiring process. Such training provides factual information about disability and the qualifications of people with disabilities, emphasizes the importance of individualized assessments, and helps interviewers feel more at ease in talking with people who have different disabilities.

Sources that provide "awareness training," some at little or no cost, may be found under this heading in the Resource Directory Index.

The job interview should focus on the ability of an applicant to perform the job, not on disability.

> **For example**: If a person has only one arm and an essential function of a job is to drive a car, the interviewer should not ask if or how the disability would affect this person's driving. The person may be asked if s/he has a valid driver's license, and whether s/he can perform any special aspect of driving that is required, such as frequent long-distance trips, with or without an accommodation.
>
> The interviewer also could obtain needed information about an applicant's ability and experience in relation to specific job requirements through statements and questions such as: "Eighty-percent of the time of this sales job must be spent on the road covering a three-state territory. What is your outside selling experience? Do you have a valid driver's license? What is your accident record?"

Where an applicant has a visible disability (for example, uses a wheelchair or a guide dog, or has a missing limb) or has volunteered information about a disability, the interviewer may not ask questions about:

- the nature of the disability;
- the severity of the disability;
- the condition causing the disability;
- any prognosis or expectation regarding the condition or disability; or
- whether the individual will need treatment or special leave because of the disability.

The interviewer may describe or demonstrate the specific functions and tasks of the job and ask whether an applicant can perform these functions with or without a reasonable accommodation.

For example: An interviewer could say: "The person in this mailroom clerk position is responsible for receiving incoming mail and packages, sorting the mail, and taking it in a cart to many offices in two buildings, one block apart. The mailclerk also must receive incoming boxes of supplies up to 50 pounds in weight, and place them on storage shelves up to 6 feet in height. Can you perform these tasks? Can you perform them with or without a reasonable accommodation?"

As suggested above, (see **5.5(d)**), the interviewer also may give the applicant a copy of a detailed position description and ask whether s/he can perform the functions described in the position, with or without a reasonable accommodation.

Questions may be asked regarding ability to perform all job functions, not merely those that are essential to the job.

For example: A secretarial job may involve the following functions:

1. transcribing dictation and written drafts from the supervisor and other staff into final written documents;
2. proof-reading documents for accuracy;
3. developing and maintaining files;
4. scheduling and making arrangements for meetings and conferences;

5. logging documents and correspondence in and out;

6. placing, answering, and referring telephone calls;

7. distributing documents to appropriate staff members;

8. reproducing documents on copying machines; and

9. occasional travel to perform clerical tasks at out of town conferences.

Taking into account the specific activities of the particular office in which this secretary will work, and availability of other staff, the employer has identified functions 1-6 as essential, and functions 7-9 as marginal to this secretary's job. The interviewer may ask questions related to all 9 functions; however, an applicant with limited mobility should not be screened out because of inability to perform the last 3 functions due to her disability. S/he should be evaluated on ability to perform the first 6 functions, with or without accommodation.

Inquiries Related to Ability to Perform Job Functions and Accommodations

An interviewer may obtain information about an applicant's ability to perform essential job functions and about any need for accommodation in several ways, depending on the particular job applicant and the requirements of a particular job:

- The applicant may be asked to describe or demonstrate how s/he will perform specific job functions, **if this is required of everyone applying for a job in this job category, regardless of disability.**

  For example: An employer might require all applicants for a telemarketing job to demonstrate selling ability by taking a simulated telephone sales test, but could not require that a person using a wheelchair take this test if other applicants are not required to take it.

- If an applicant has a **known** disability that would appear to interfere with or prevent performance of a job-related function, s/he may be asked to describe or demonstrate how this function would be performed, even if other applicants do not have to do so.

  For example: If an applicant has one arm and the job requires placing bulky items on shelves up to six feet high, the interviewer could ask the applicant to demonstrate how s/he would perform this function, with or without an accommodation. If the applicant states that s/he can perform this function with a reasonable accommodation, for example, with a step stool fitted with a device to assist lifting, the employer either must provide this accommodation so that the applicant can show that s/he can shelve the items, or let the applicant describe how s/he would do this task.

- However, if an applicant has a known disability that would **not** interfere with or prevent performance of a job related function, the employer can only ask the applicant to demonstrate how s/he would perform the function if all applicants in the job category are required to do so, regardless of disability.

  For example: If an applicant with one leg applies for a job that involves sorting small parts while seated, s/he may not be required to demonstrate the ability to do this job unless all applicants are required to do so.

If an applicant indicates that s/he cannot perform an essential job function even with an accommodation, the applicant would not be qualified for the job in question.

Inquiries About Attendance

An interviewer may not ask whether an applicant will need or request leave for medical treatment or for other reasons related to a disability.

The interviewer may provide information on the employer's regular work hours, leave policies, and any special attendance needs of the job, and ask if the applicant can meet these requirements (provided that the requirements actually are applied to employees in a particular job).

For example: "Our regular work hours are 9 to 5, five days weekly, but we expect employees in this job to work overtime, evenings, and weekends for 6 weeks during the Christmas season and on certain other holidays. New employees get 1 week of vacation, 7 sick leave days and may take no more than 5 days of unpaid leave per year. Can you meet these requirements?"

Information about previous work attendance records may be obtained on the application form, in the interview or in reference checks, but the questions should not refer to illness or disability.

If an applicant has had a poor attendance record on a previous job, s/he may wish to provide an explanation that includes information related to a disability, but the employer should not ask whether a poor attendance record was due to illness, accident or disability. For example, an applicant might wish to disclose voluntarily that the previous absence record was due to surgery for a medical condition that is now corrected, treatment for cancer that is now in remission or to adjust medication for epilepsy, but that s/he is now fully able to meet all job requirements.

Accommodations for Interviews

The employer must provide an accommodation, if needed, to enable an applicant to have equal opportunity in the interview process. As suggested earlier, the employer may find it helpful to state in an initial job notice, and/or on the job application form, that applicants who need accommodation for an interview should request this in advance.

Needed accommodations for interviews may include:

- an accessible location for people with mobility impairments;
- a sign interpreter for a deaf person;
- a reader for a blind person.

Conducting an Interview

The purpose of a job interview is to obtain appropriate information about the background qualifications and other personal qualities of an applicant in relation to the requirements of a specific job.

This chapter has discussed ways to obtain this information by focusing on the abilities rather than the disability of a disabled applicant. However, there are other aspects of an interview that may create barriers to an accurate and objective assessment of an applicant's job qualifications. The interviewer may not know how to communicate effectively with people who have particular disabilities, or may make negative, incorrect assumptions about the abilities of a person with a disability because s/he misinterprets some external manifestation of the disability.

For example. An interviewer may assume that a person who displays certain characteristics of cerebral palsy, such as indistinct speech, lisping, and involuntary or halting movements, is limited in intelligence. In fact, cerebral palsy does not affect intelligence at all.

If an applicant who is known to have a disability was referred by a rehabilitation agency or other source familiar with the person, it may be helpful to contact the agency to learn more about this individual's ability to perform specific job functions; however, questions should not be asked about the nature or extent of the person's disability. General information on different disabilities may be obtained from many organizations listed in the Resource Directory. See Index under the specific disability.

5.5(g) Background and Reference Checks

Before making a conditional job offer, an employer may not request any information about a job applicant from a previous employer, family member, or other source that it may not itself request of the job applicant.

If an employer uses an outside firm to conduct background checks, the employer should assure that this firm complies with the ADA's prohibitions on pre-employment inquiries. Such a firm is an agent of the employer. The employer is responsible for actions of its agents and may not do anything

through a contractual relationship that it may not itself do directly.

Before making a conditional offer of employment, an employer may not ask previous employers or other sources about an applicant's:

- disability;
- illness;
- workers' compensation history;
- or any other questions that the employer itself may not ask of the applicant.

A previous employer may be asked about:

- job functions and tasks performed by the applicant;
- the quality and quantity of work performed;
- how job functions were performed;
- attendance record;
- other job-related issues that do not relate to disability.

If an applicant has a known disability and has indicated that s/he could perform a job with a reasonable accommodation, a previous employer may be asked about accommodations made by that employer.

5.6 Testing

Employers may use any kind of test to determine job qualifications. The ADA has two major requirements in relation to tests:

1. **If a test screens out or tends to screen out an individual with a disability or a class of such individuals on the basis of disability, it must be job-related and consistent with business necessity.**

- This requirement applies to all kinds of tests, including, but not limited to: aptitude tests, tests of knowledge and skill, intelligence tests, agility tests, and job demonstrations.

A test will most likely be an accurate predictor of the job performance of a person with a disability when it most directly or closely measures actual skills and ability needed to do a job. **For example**: a typing test, a sales demonstration test, or other job performance test would indicate what the individual actually could do in performing a job, whereas a test that measured general qualities believed to be desirable in a job may screen out people on the basis of disability who could do the job. **For example**, a standardized test used for a job as a heavy equipment operator might screen out a person with dyslexia or other learning disability who was able to perform all functions of the job itself.

An employer is only required to show that a test is job-related and consistent with business necessity if it screens out a person with a disability because of the disability. If a person was screened out for a reason unrelated to disability, ADA requirements do not apply.

For example: If a person with paraplegia who uses a wheelchair is screened out because s/he does not have sufficient speed or accuracy on a typing test, this person probably was not screened out because of his or her disability. The employer has no obligation to consider this person for a job which requires fast, accurate typing.

Even if a test is job-related and justified by business necessity, the employer has an obligation to provide a specific reasonable accommodation, if needed. For example, upon request, test sites must be accessible to people who have mobility disabilities. The ADA also has a very specific requirement for accommodation in testing, described below.

2. Accommodation in testing

The ADA requires that tests be given to people who have impaired sensory, speaking or manual skills in a format and manner that does not require use of the impaired skill, unless the test is designed to measure that skill. (Sensory skills include the abilities to hear, see and to process information.)

The purpose of this requirement is to assure that tests accurately reflect a person's job skills, aptitudes, or whatever else the test is supposed to measure, rather than the person's impaired skills.

This requirement applies the reasonable accommodation obligation to testing. It protects people with disabilities from being excluded from jobs that they actually can do because a disability prevents them from taking a test or negatively influences a test result. However, an employer does not have to provide an alternative test format for a person with an impaired skill if the purpose of the test is to measure that skill.

For example:

- A person with dyslexia should be given an opportunity to take a written test orally, if the dyslexia seriously impairs the individual's ability to read. But if ability to read is a job-related function that the test is designed to measure, the employer could require that a person with dyslexia take the written test. However, even in this situation, reasonable accommodation should be considered. The person with dyslexia might be accommodated with a reader, unless the ability to read unaided is an essential job function, unless such an accommodation would not be possible on the job for which s/he is being tested, or would be an undue hardship. For example, the ability to read without help would be essential for a proofreader's job. Or, a dyslexic firefighter applicant might be disqualified if he could not quickly read necessary instructions for dealing with specific toxic substances at the site of a fire when no reader would be available.

- Providing extra time to take a test may be a reasonable accommodation for people with certain disabilities, such as visual impairments, learning disabilities, or mental retardation. On the other hand, an employer could require that an applicant complete a test within an established time frame if speed is one of the skills that the test is designed to measure. However, the results of a timed test should not be used to exclude a person with a disability, unless the test measures a particular speed necessary to perform an essential function of the job, and there is no reasonable accommodation that would enable this person to perform that function within prescribed time frames, or the accommodation would cause an undue hardship.

Generally, an employer is only required to provide such an accommodation if it knows, before administering a test, that an accommodation will be needed. Usually, it is the responsibility of the individual with a disability to request any required accommodation for a test. It has been suggested that the employer

inform applicants, in advance, of any tests that will be administered as part of the application process so that they may request an accommodation, if needed. (See **5.5(d)** above.) The employer may require that an individual with a disability request an accommodation within a specific time period before administration of the test. The employer also may require that documentation of the need for accommodation accompany such a request.

Occasionally, however, an individual with a disability may not realize in advance that s/he will need an accommodation to take a particular test.

> **For example**: A person with a visual impairment who knows that there will be a written test may not request an accommodation because she has her own specially designed lens that usually is effective for reading printed material. However, when the test is distributed, she finds that her lens is not sufficient, because of unusually low color contrast between the paper and the ink. Under these circumstances, she might request an accommodation and the employer would be obligated to provide one. The employer might provide the test in a higher contrast format at that time, reschedule the test, or make any other effective accommodation that would not impose an undue hardship.

An employer is not required to offer an applicant the specific accommodation requested. This request should be given primary consideration, but the employer is only obligated to provide an effective accommodation. (See Chapter III.) The employer is only required to provide, upon request, an "accessible" test format for individuals whose disabilities impair sensory, manual, or speaking skills needed to take the test, unless the test is designed to measure these skills.

Some Examples of Alternative Test Formats and Accommodations:

- Substituting a written test for an oral test (or written instructions for oral instructions) for people with impaired speaking or hearing skills;
- Administering a test in large print, in Braille, by a reader, or on a computer for people with visual or other reading disabilities;

- Allowing people with visual or learning disabilities or who have limited use of their hands to record test answers by tape recorder, dictation or computer;

- Providing extra time to complete a test for people with certain learning disabilities or impaired writing skills;

- Simplifying test language for people who have limited language skills because of a disability;

- Scheduling rest breaks for people with mental and other disabilities that require such relief;

- Assuring that a test site is accessible to a person with a mobility disability;

- Allowing a person with a mental disability who cannot perform well if there are distractions to take a test in a separate room, if a group test setting is not relevant to the job itself;

- Where it is not possible to test an individual with a disability in an alternative format, an employer may be required, as a reasonable accommodation, to evaluate the skill or ability being tested through some other means, such as an interview, education, work experience, licenses or certification, or a job demonstration for a trial period.

There are a number of technical assistance resources for effective alternative methods of testing people with different disabilities. (See "Alternative Testing Formats" in Resource Directory Index).

VI. MEDICAL EXAMINATIONS AND INQUIRIES

6.1 Overview of Legal Obligations

Pre-Employment, Pre-Offer

- An employer may not require a job applicant to take a medical examination, to respond to medical inquiries or to provide information about workers' compensation claims before the employer makes a job offer.

Pre-Employment, Post-Offer

- An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be "job-related" and "consistent with business necessity." Questions also may be asked about previous injuries and workers' compensation claims.

- If an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and necessary for the business. The employer also must show that no reasonable accommodation was available that would enable this individual to perform the essential job functions, or that accommodation would impose an undue hardship.

- A post-offer medical examination may disqualify an individual who would pose a "direct threat" to health or safety. Such a disqualification is job-related and consistent with business necessity.

- A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

Employee Medical Examinations and Inquiries

- After a person starts work, a medical examination or inquiry of an employee must be job related and necessary for the business.

- Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other Federal laws, examinations to determine current "fitness" to perform a particular job and voluntary examinations that are part of employee health programs.

Confidentiality

- Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions specified in the ADA. (See **6.5** below.)

Drug Testing

- Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions on such examinations. (See Chapter VIII.)

6.2 Basic Requirements

The ADA does not prevent employers from obtaining medical and related information necessary to evaluate the ability of applicants and employees to perform essential job functions, or to promote health and safety on the job. However, to protect individuals with disabilities from actions based on such information that are not job-related and consistent with business necessity, including protection of health and safety, the ADA imposes specific and differing obligations on the employer at three stages of the employment process:

1. **Before making a job offer**, an employer may not make any medical inquiry or conduct any medical examination.

2. **After making a conditional job offer,** before a person starts work, an employer may make unrestricted medical inquiries, but may not refuse to hire an individual with a disability based on results of such inquiries, unless the reason for rejection is job-related and justified by business necessity.

3. **After employment**, any medical examination or inquiry required of an employee must be job-related and justified by business necessity. Exceptions are voluntary examinations conducted as part of employee health programs and examinations required by other federal laws.

Under the ADA, "medical" documentation concerning the qualifications of an individual with a disability, or whether this individual constitutes a "direct threat" to health and safety, does not mean only information from medical doctors. It may be necessary to obtain information from other sources, such as rehabilitation experts, occupational or physical therapists, psychologists, and others knowledgeable about the individual and the disability concerned. It also may be more relevant to look at the individual's previous work history in making such determinations than to rely on an examination or tests by a physician.

The basic requirements regarding actions based on medical information and inquiries have been set out in Chapter IV. As emphasized there, such actions taken because of a disability **must be job-related** and **consistent with business necessity.** When an individual is rejected as a **"direct threat"** to health and safety:

- **the employer must be prepared to show a significant current risk of substantial harm (not a speculative or remote risk);**
- **the specific risk must be identified;**
- **the risk must be documented by objective medical or other factual evidence regarding the particular individual;**
- **even if a genuine significant risk of substantial harm exists, the employer must consider whether it can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.**

This chapter discusses in more detail the content and manner of medical examinations and inquiries that may be made, and the documentation that may be required (1) before employment and (2) after employment.

6.3 Examinations and Inquiries Before Employment

No Pre-Offer Medical Examination or Inquiry

The ADA prohibits medical inquiries or medical examinations before making a conditional job offer to an applicant. This prohibition is necessary because the results of such inquiries and examinations frequently are used to exclude people with disabilities from jobs they are able to perform.

Some employers have medical policies or rely on doctors' medical assessments that overestimate the impact of a particular condition on a particular individual, and/or underestimate the ability of an individual to cope with his or her condition. Medical policies that focus on **disability**, rather than the **ability** of a particular person, frequently will be discriminatory under the ADA.

> **For example**: A policy that prohibits employment of any individual who has epilepsy, diabetes or a heart condition from a certain type of job, and which does not consider the ability of a particular individual, in most cases would violate the ADA. (See Chapter IV.)

Many employers currently use a pre-employment medical questionnaire, a medical history, or a pre-employment medical examination as one step in a several-step selection process. Where this is so, an individual who has a "hidden" disability such as diabetes, epilepsy, heart disease, cancer, or mental illness, and who is rejected for a job, frequently does not know whether the reason for rejection was information revealed by the medical exam or inquiry (which may not have any relation to this person's ability to do the job), or whether the rejection was based on some other aspect of the selection process.

A history of such rejections has discouraged many people with disabilities from applying for jobs, because of fear that they will automatically be rejected when their disability is revealed by a medical examination. The ADA is designed to remove this barrier to employment.

6.4 Post-Offer Examinations and Inquiries Permitted

The ADA recognizes that employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. The ADA requires only that such examinations be conducted as a separate, second step of the selection process, after an individual has met all other job pre-requisites. The employer may make a job offer to such an individual, conditioned on the satisfactory outcome of a medical examination or inquiry, providing that the employer requires such examination or inquiry for all entering employees in a particular job category, not merely individuals with known disabilities, or those whom the employer believes may have a disability.

A post-offer medical examination does not have to be given to all entering employees in all jobs, only to those in the same job category.

For example: An examination might be given to all entering employees in physical labor jobs, but not to employees entering clerical jobs.

The ADA does not require an employer to justify its requirement of a post-offer medical examination. An employer may wish to conduct a post-offer medical exam or make post-offer medical inquiries for purposes such as:

To determine if an individual currently has the physical or mental qualifications necessary to perform certain jobs:

For example: If a job requires continuous heavy physical exertion, a medical examination may be useful to determine whether an applicant's physical condition will permit him/her to perform the job.

To determine that a person can perform a job without posing a "direct threat" to the health or safety of self or others.

For example:

- A medical examination and evaluation might be required to ensure that prospective construction crane operators do not have disabilities such as uncontrolled seizures that would pose a significant risk to other workers.

- Workers in certain health care jobs may need to be examined to assure that they do not have a current contagious disease or infection that would pose a significant risk of transmission to others, and that could not be accommodated (for example, by giving the individual a delayed starting date until the period of contagion is over).

Compliance with medical requirements of other Federal laws

Employers may comply with medical and safety requirements established under other Federal laws without violating the ADA.

For example: Federal Highway Administration regulations require medical examinations and evaluations of interstate truck drivers, and the Federal Aviation Administration

requires examinations for pilots and air controllers.

However, an employer still has an obligation to consider whether there is a reasonable accommodation, consistent with the requirements of other Federal laws, that would not exclude individuals who can perform jobs safely.

Employers also may conduct post-offer medical examinations that are required by state laws, but, as explained in Chapter IV, may not take actions based on such examinations if the state law is inconsistent with ADA requirements. (See Health and Safety Requirements of Other Federal or State Laws, 4.6.)

Information That May Be Requested in Post-Offer Examinations or Inquiries

After making a conditional job offer, an employer may make inquiries or conduct examinations to get any information that it believes to be relevant to a person's ability to perform a job. **For example**, the employer may require a full physical examination. An employer may ask questions that are prohibited as pre-employment inquiries about previous illnesses, diseases or medications. (See Chapter V.)

If a post-offer medical examination is given, it must be administered to all persons entering a job category. If a response to an initial medical **inquiry** (such as a medical history questionnaire) reveals that an applicant has had a previous injury, illness, or medical condition, the employer cannot require the applicant to undergo a medical **examination** unless all applicants in the job category are required to have such examination. However, the ADA does not require that the scope of medical examinations must be identical. An employer may give follow-up tests or examinations where an examination indicates that further information is needed.

For example: All potential employees in a job category must be given a blood test, but if a person's initial test indicates a problem that may affect job performance, further tests may be given to that person only, in order to get necessary information.

A **post-offer** medical examination or inquiry, made before an individual starts work, need not focus on ability to perform job functions. Such inquiries and examinations themselves, unlike examinations/inquiries of **employees,** do not have to be "job related" and "consistent with business necessity." However, if a conditional job offer is withdrawn because of the results of such examination or inquiry, an employer must be able to show that:

- the reasons for the exclusion are job-related and consistent with business necessity, or the person is being excluded to avoid a "direct threat" to health or safety; and that
- no reasonable accommodation was available that would enable this person to perform the essential job functions without a significant risk to health or safety, or that such an accommodation would cause undue hardship.

Some examples of post-offer decisions that might be job-related and justified by business necessity, and/or where no reasonable accommodation was possible:

- a medical history reveals that the individual has suffered serious multiple re-injuries to his back doing similar work, which have progressively worsened the back condition. Employing this person in this job would incur significant risk that he would further re-injure himself.

- a workers' compensation history indicates multiple claims in recent years which have been denied. An employer might have a legitimate business reason to believe that the person has submitted fraudulent claims. Withdrawing a job offer for this reason would not violate the ADA, because the decision is not based on disability.

- a medical examination reveals an impairment that would require the individual's frequent lengthy absence from work for medical treatment, and the job requires daily availability for the next 3 months. In this situation, the individual is not available to perform the essential functions of the job, and no accommodation is possible.

Examples of discriminatory use of examination results that are not job related and justified by business necessity:

- A landscape firm sent an applicant for a laborer's job (who had been doing this kind of work for 20 years) for a physical exam. An x-ray showed that he had a curvature of the spine. The doctor advised the firm not to hire him because there was a risk that he might injure his back at some time in the future. The doctor provided no specific medical documentation that this would happen or was likely to happen. The

company provided no description of the job to the doctor. The job actually involved riding a mechanical mower. This unlawful exclusion was based on speculation about future risk of injury, and was not job-related.

- An individual is rejected from a job because he cannot lift more than 50 pounds. The job requires lifting such a weight only occasionally. The employer has not considered possible accommodations, such as sharing the occasional heavy weight lifting with another employee or providing a device to assist lifting.

Risk Cannot be Speculative or Remote

The results of a medical examination may not disqualify persons **currently** able to perform essential job functions because of unsubstantiated **speculation** about future risk.

The results of a medical inquiry or examination may not be used to disqualify persons who are currently able to perform the essential functions of a job, either with or without an accommodation, because of **fear** or **speculation** that a disability may indicate a greater risk of future injury, or absenteeism, or may cause future workers' compensation or insurance costs. An employer may use such information to exclude an individual with a disability where there is specific medical documentation, reflecting current medical knowledge, that this individual would pose a significant, current risk of substantial harm to health or safety. (See Standards for Health and Safety: "Direct Threat" Chapter IV.)

For example:

- An individual who has an abnormal back X-ray may not be disqualified from a job that requires heavy lifting because of fear that she will be more likely to injure her back or cause higher workers' compensation or health insurance costs. However, where there is documentation that this individual has injured and re-injured her back in similar jobs, and the back condition has been aggravated further by injury, **and** if there is no reasonable accommodation that would eliminate the risk of reinjury or reduce it to an acceptable level, an employer would be justified in rejecting her for this position.

- If a medical examination reveals that an individual has epilepsy and is seizure-free or has adequate warning of a seizure, it would be unlawful to disqualify this person from a job operating a machine because of fear or speculation that he might pose a risk to himself or others. But if the examination and other medical inquiries reveal that an individual with epilepsy has seizures resulting in loss of consciousness, there could be evidence of significant risk in employing this person as a machine operator. However, even where the person might endanger himself by operating a machine, an accommodation, such as placing a shield over the machine to protect him, should be considered.

The Doctor's Role

A doctor who conducts medical examinations for an employer should not be responsible for making employment decisions or deciding whether or not it is possible to make a reasonable accommodation for a person with a disability. That responsibility lies with the employer.

The doctor's role should be limited to advising the employer about an individual's functional abilities and limitations in relation to job functions, and about whether the individual meets the employer's health and safety requirements.

Accordingly, employers should provide doctors who conduct such examinations with **specific** information about the job, including the type of information indicated in the discussions of "job descriptions" and "job analysis" in Chapter II. (See **2.3.**)

Often, particularly when an employer uses an outside doctor who is not familiar with actual demands of the job, a doctor may make incorrect assumptions about the nature of the job functions and specific tasks, or about the ability of an individual with a disability to perform these tasks with a reasonable accommodation. It may be useful for the doctor to visit the job site to see how the job is done.

The employer should inform the doctor that any recommendations or conclusions related to hiring or placement of an individual should focus on only two concerns:

1. **Whether this person currently is able to perform this specific job, with or without an accommodation.**

   This evaluation should look at the individual's specific abilities and limitations in regard to specific job demands.

For example: The evaluation may indicate that a person can lift up to 30 pounds and can reach only 2 feet above the shoulder; the job as usually performed (without accommodation) requires lifting 50 pound crates to shelves that are 6 feet high.

2. **Whether this person can perform this job without posing a "direct threat" to the health or safety of the person or others.**

The doctor should be informed that the employer must be able to show that an exclusion of an individual with a disability because of a risk to health or safety meets the "direct threat" standard of the ADA, based on "the most current medical knowledge and/or the best available objective evidence about this individual." (See Chapter IV., Standards Necessary for Health and Safety, and **6.2** above.)

For example: If a post-offer medical questionnaire indicates that a person has a history of repetitive motion injuries but has had successful surgery with no further problems indicated, and a doctor recommends that the employer reject this candidate because this medical history indicates that she would pose a higher risk of future injury, the employer would violate the ADA if it acted on the doctor's recommendation based only on the history of injuries. In this case, the doctor would not have considered this person's actual current condition as a result of surgery.

A doctor's evaluation of any future risk must be supported by valid medical analyses indicating a high probability of substantial harm if **this individual** performed the particular functions of the particular job in question. Conclusions of general medical studies about work restrictions for people with certain disabilities will not be sufficient evidence, because they do not relate to a particular individual and do not consider reasonable accommodation.

The employer should not rely only on a doctor's opinion, but on the **best available objective evidence**. This may include the experience of the individual with a disability in previous similar jobs, occupations, or non-work activities, the opinions of other doctors with expertise on the particular disability, and the advice of rehabilitation counselors, occupational or physical therapists, and others with direct knowledge of the disability and/or the individual concerned. Organizations such as Independent Living Centers, public and private rehabilitation agencies, and organizations

serving people with specific disabilities such as the Epilepsy Foundation, United Cerebral Palsy Associations, National Head Injury Foundation, and many others can provide such assistance. (See Resource Directory.)

Where the doctor's report indicates that an individual has a disability that may prevent performance of essential job functions, or that may pose a "direct threat" to health or safety, the employer also may seek his/her advice on possible accommodations that would overcome these disqualifications.

6.5 Confidentiality and Limitations on Use of Medical Information

Although the ADA does not limit the nature or extent of post-offer medical examinations and inquiries, it imposes very **strict limitations on the use of information** obtained from such examinations and inquiries. These limitations also apply to information obtained from examinations or inquiries of employees.

- All information obtained from post-offer medical examinations and inquiries must be collected and maintained on separate forms, in separate medical files and must be treated as a **confidential medical record.** Therefore, an employer should not place any medical-related material in an employee's personnel file. The employer should take steps to guarantee the security of the employee's medical information, including:
  - keeping the information in a medical file in a separate, locked cabinet, apart from the location of personnel files; and
  - designating a specific person or persons to have access to the medical file.
- All medical-related information must be kept confidential, with the following exceptions:
  - Supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations;
  - First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment or if any specific procedures are needed in the case of fire or other evacuations.

- Government officials investigating compliance with the ADA and other Federal and state laws prohibiting discrimination on the basis of disability or handicap should be provided relevant information on request. (Other Federal laws and regulations also may require disclosure of relevant medical information.)

- Relevant information may be provided to state workers' compensation offices or "second injury" funds, in accordance with state workers' compensation laws. (See Chapter IX., Workers' Compensation and Work-Related Injury.)

- Relevant information may be provided to insurance companies where the company requires a medical examination to provide health or life insurance for employees. (See Health Insurance and Other Benefit Plans, Chapter VII.)

6.6 Employee Medical Examinations and Inquiries

The ADA's requirements concerning medical examinations and inquiries of **employees** are more stringent than those affecting applicants who are being evaluated for employment after a conditional job offer. In order for a medical examination or inquiry to be made of an employee, it must be job related and consistent with business necessity. The need for the examination may be triggered by some evidence of problems related to job performance or safety, or an examination may be necessary to determine whether individuals in physically demanding jobs continue to be fit for duty. In either case, the scope of the examination also must be job-related.

For example:

- An attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related.

- An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his job or to his impairment.

Medical examinations or inquiries may be job related and necessary under several circumstances:

- **When an employee is having difficulty performing his or her job effectively.** In such cases, a medical examination may be necessary to determine if s/he can perform essential job functions with or without an accommodation.

  For example: If an employee falls asleep on the job, has excessive absenteeism, or exhibits other performance problems, an examination may be needed to determine if the problem is caused by an underlying medical condition, and whether medical treatment is needed. If the examination reveals an impairment that is a disability under the ADA, the employer must consider possible reasonable accommodations. If the impairment is not a disability, the employer is not required to make an accommodation.

  For example: An employee may complain of headaches caused by noise at the worksite. A medical examination may indicate that there is no medically discernible mental or physiological disorder causing the headaches. This employee would not be "an individual with a disability" under the ADA, and the employer would have no obligation to provide an accommodation. The employer may voluntarily take steps to improve the noise situation, particularly if other employees also suffer from noise, but would have no obligation to do so under the ADA.

- **When An Employee Becomes Disabled**

  An employee who is injured on or off the job, who becomes ill, or suffers any other condition that meets the ADA definition of "disability," is protected by the Act if s/he can perform the essential functions of the job with or without reasonable accommodation.

  Employers are accustomed to dealing with injured workers through the workers' compensation process and disability management programs, but they have different, although not necessarily conflicting obligations under the ADA. The relationship between ADA, workers' compensation requirements and medical examinations and inquiries is discussed in Chapter IX.

  Under the ADA, medical information or medical examinations may be required when an employee suffers an injury on the job. Such an examination or inquiry also may be required when an employee

wishes to return to work after an injury or illness, if it is job-related and consistent with business necessity:

- to determine if the individual meets the ADA definition of "individual with a disability," if an accommodation has been requested.

- to determine if the person can perform essential functions of the job currently held, (or held before the injury or illness), with or without reasonable accommodation, and without posing a "direct threat" to health or safety that cannot be reduced or eliminated by reasonable accommodation.

- to identify an effective accommodation that would enable the person to perform essential job functions in the current (previous) job, or in a vacant job for which the person is qualified (with or without accommodation). (See Chapter IX.)

- **Examination Necessary for Reasonable Accommodation**

A medical examination may be required if an employee requests an accommodation on the basis of disability. An accommodation may be needed in an employee's existing job, or if the employee is being transferred or promoted to a different job. Medical information may be needed to determine if the employee has a disability covered by the ADA and is entitled to an accommodation, and if so, to help identify an effective accommodation.

Medical inquiries related to an employee's disability and functional limitations may include consultations with knowledgeable professional sources, such as occupational and physical therapists, rehabilitation specialists, and organizations with expertise in adaptations for specific disabilities.

- **Medical examinations, screening and monitoring required by other laws.**

Employers may conduct periodic examinations and other medical screening and monitoring required by federal, state or local laws. As indicated in Chapter IV, the ADA recognizes that an action taken to comply with another Federal law is job-related and consistent with business necessity; however, requirements of state and local laws do not necessarily meet this standard unless they are consistent with the ADA.

For example: Employers may conduct medical examinations and medical monitoring required by:

- The U.S. Department of Transportation for interstate bus and truck drivers, railroad engineers, airline pilots and air controllers;
- The Occupational Safety and Health Act:
- The Federal Mine Health and Safety Act;
- Other statutes that require employees exposed to toxic or hazardous substances to be medically monitored at specific intervals.

However, if a state or local law required that employees in a particular job be periodically tested for AIDS or the HIV virus, the ADA would prohibit such an examination unless an employer can show that it is job-related and consistent with business necessity, or required to avoid a direct threat to health or safety. (See Chapter IV.)

- **Voluntary "Wellness" and Health Screening Programs**

An employer may conduct voluntary medical examinations and inquiries as part of an employee health program (such as medical screening for high blood pressure, weight control, and cancer detection), providing that:

- participation in the program is voluntary;
- information obtained is maintained according to the confidentiality requirements of the ADA (See 6.5); and
- this information is not used to discriminate against an employee.

Information from Medical Inquiries May Not be Used to Discriminate

An employer may not use information obtained from an employee medical examination or inquiry to discriminate against the employee in any employment practice. (See Chapter VII.)

Confidentiality

All information obtained from employee medical examinations and inquiries must be maintained and used in accordance with ADA confidentiality requirements. (See 6.5 above.)

VII. NONDISCRIMINATION IN OTHER EMPLOYMENT PRACTICES

7.1 Introduction

The nondiscrimination requirements of the ADA apply to all employment practices and activities. The preceding chapters have explained these requirements as they apply to job qualification and selection standards, the hiring process, and medical examinations and inquiries. This chapter discusses the application of nondiscrimination requirements to other employment practices and activities.

In most cases, an employer need only apply the basic nondiscrimination principles already emphasized; however, there are also some special requirements applicable to certain employment activities. This chapter discusses:

- the ADA's prohibition of discrimination on the basis of a **relationship or association with** an individual with a disability;
- nondiscrimination requirements affecting:
  - **promotion, assignment, training, evaluation, discipline, advancement opportunity and discharge;**
  - **compensation, insurance, leave, and other benefits and privileges of employment; and**
  - **contractual relationships.**

7.2 Overview of Legal Obligations

- An employer may not discriminate against a qualified individual with a disability because of the disability, in any employment practice, or any term, condition or benefit of employment.
- An employer may not deny an employment opportunity because an individual, with or without a disability, has a **relationship or association with** an individual who has a disability.
- An employer may not participate in a contractual or other arrangement that subjects the employer's qualified applicant or employee with a disability to discrimination.

- An employer may not discriminate or retaliate against any individual, whether or not the individual is disabled, because the individual has opposed a discriminatory practice, filed a discrimination charge, or participated in any way in enforcing the ADA.

7.3 Nondiscrimination in all Employment Practices

The ADA prohibits discrimination against a qualified individual with a disability on the basis of disability in the following employment practices:

- Recruitment, advertising, and job application procedures;
- Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- Rates of pay or any other form of compensation, and changes in compensation;
- Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- Leaves of absence, sick leave, or any other leave;
- Fringe benefits available by virtue of employment, whether or not administered by the covered entity;
- Selection and financial support for training, including: apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
- Activities sponsored by a covered entity including social and recreational programs; and
- Any other term, condition, or privilege of employment.

Nondiscrimination, as applied to all employment practices, means that:

- an individual with a disability should have equal access to any employment opportunity available to a similarly situated individual who is not disabled;

- employment decisions concerning an employee or applicant should be based on objective factual evidence about the particular individual, not on assumptions or stereotypes about the individual's disability;
- the qualifications of an individual with a disability may be evaluated on ability to perform all job-related functions, with or without reasonable accommodation. However, an individual may not be excluded from a job because a disability prevents performance of marginal job functions;
- an employer must provide a reasonable accommodation that will enable an individual with a disability to have an equal opportunity in every aspect of employment, unless a particular accommodation would impose an undue hardship;
- an employer may not use an employment practice or policy that screens out or tends to screen out an individual with a disability or a class of individuals with disabilities, unless the practice or policy is job related and consistent with business necessity and the individual cannot be accommodated without undue hardship;
- an employer may not limit, segregate, or classify an individual with a disability in any way that negatively affects the individual in terms of job opportunity and advancement;
- an individual with a disability should not because of a disability be treated differently than a similarly situated individual in any aspect of employment, except when a reasonable accommodation is needed to provide an equal employment opportunity, or when another Federal law or regulation requires different treatment.

These requirements are discussed in this chapter as they apply to various employment practices. The prohibition against retaliation is discussed in Chapter X.

7.4 Nondiscrimination and Relationship or Association with an Individual with a Disability

The ADA specifically provides that an employer or other covered entity may not deny an employment opportunity or benefit to an individual, whether or not that individual is disabled, because that individual has a **known relationship or association** with an individual who has a disability. Nor may an employer discriminate in any other way against an individual, whether or not disabled, because that individual has such a relationship or association.

The term "relationship or association" refers to family relationships and any other social or business relationship or association. Therefore, this provision of the law prohibits employers from making employment decisions based on concerns about the disability of a family member of an applicant or employee, or anyone else with whom this person has a relationship or association.

For example: An employer may not:

- refuse to hire or fire an individual because the individual has a spouse, child, or other dependent who has a disability. The employer may not assume that the individual will be unreliable, have to use leave time, or be away from work in order to care for the family member with a disability;

- refuse to hire or fire an individual because s/he has a spouse, child or other dependent who has a disability that is either not covered by the employer's current health insurance plan or that may cause future increased health care costs;

- refuse to insure, or subject an individual to different terms or conditions of insurance, solely because the individual has a spouse, child, or other dependent who has a disability;

- refuse to hire or fire an individual because the individual has a relationship or association with a person or persons who have disabilities.

For example: an employer cannot fire an employee because s/he does volunteer work with people who have AIDS.

This provision of the law prohibits discrimination in employment decisions concerning an individual, whether the individual is or is not disabled, because of a known relationship or association with an individual with a disability. However, an employer is not obligated to provide a reasonable accommodation to a **nondisabled** individual, because this person has a relationship or association with a disabled individual. The obligation to make a reasonable accommodation applies only to qualified individuals with disabilities.

For example: The ADA does not require that an employer provide an employee who is not disabled with a modified work schedule as an accommodation, to enable the employee to care for a spouse or child with a disability.

7.5 Nondiscrimination and Opportunity for Advancement

The nondiscrimination requirements that apply to initial selection apply to all aspects of employment, including opportunities for advancement. For example, an employer may not discriminate in promotion, job classification, evaluation, disciplinary action, opportunities for training, or participation in meetings and conferences. In particular, an employer:

- should not assume that an individual is not interested in, or not qualified for, advancement because of disability;
- should not deny a promotion because of the need to make an accommodation, unless the accommodation would cause an undue hardship;
- should not place individuals with disabilities in separate lines of progression or in segregated units or locations that limit opportunity for advancement;
- should assure that supervisors and managers who make decisions regarding promotion and advancement are aware of ADA nondiscrimination requirements.

7.6 Training

Employees with disabilities must be provided equal opportunities to participate in training to improve job performance and provide opportunity for advancement. Training opportunities cannot be denied because of the need to make a reasonable accommodation, unless the accommodation would be an undue hardship. Accommodations that may be necessary, depending on the needs of particular individuals, may include:

- accessible locations and facilities for people with mobility disabilities;
- interpreters and note-takers for employees who are deaf;
- materials in accessible formats and/or readers for people who are visually impaired, for people with learning disabilities, and for people with mental retardation;
- if audiovisual materials are used, captions for people who are deaf, and voice-overs for people who are visually impaired;

- good lighting on an interpreter, and good general illumination for people with visual impairments and other disabilities;
- clarification of concepts presented in training for people who have reading or other disabilities;
- individualized instruction for people with mental retardation and certain other disabilities.

If an employer contracts for training with a training company, or contracts for training facilities such as hotels or conference centers, the employer is responsible for assuring accessibility and other needed accommodations.

It is advisable that any contract with a company or facility used for training include a provision requiring the other party to provide needed accommodations. However, if the contractor does not do so, the employer remains responsible for providing the accommodation, unless it would cause an undue hardship.

For example: Suppose a company with which an employer has contracted proposes to conduct training at an inaccessible location. The employer is responsible for providing an accommodation that would enable an employee who uses a wheelchair to obtain this training. The employer might do this by: requiring the training company to relocate the program to an accessible site; requiring the company to make the site (including all facilities used by trainees) accessible; making the site accessible or providing resources that enable the training company to do so; contracting with another training company that uses accessible sites; or providing any other accommodation (such as temporary ramps) that would not impose an undue hardship. If it is impossible to make an accommodation because the need is only discovered when an employee arrives at the training site, the employer may have to provide accessible training at a later date.

Or, for example: An employer contracts with a hotel to hold a conference for its employees. The employer must assure physical and communications accessibility for employees with disabilities, including accessibility of guest rooms and all meeting and other rooms used by attendees. The employer may assure accessibility by inspecting the site, or may ask a local disability group with accessibility expertise (such as an Independent Living Center) to do so. The employer remains responsible for assuring accessibility. However, if the hotel breaches a contract provision requiring accessibility, the hotel may be liable to the employer under regular (non-ADA) breach of contract law. The hotel also may be liable

under Title III of the ADA, which requires accessibility in public accommodations.

7.7 Evaluations, Discipline and Discharge

- An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions (with or without reasonable accommodation).
- An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal job functions, unless the disability affects the ability to perform these marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring (unless to do so would be an undue hardship).
- A disabled employee who needs an accommodation (that is not an undue hardship for an employer) in order to perform a job function should not be evaluated on his/her ability to perform the function without the accommodation, and should not be downgraded because such an accommodation is needed to perform the function.
- An employer should not give employees with disabilities "special treatment." They should not be evaluated on a lower standard or disciplined less severely than any other employee. This is not equal employment opportunity.
- An employer must provide an employee with a disability with reasonable accommodation necessary to enable the employee to participate in the evaluation process (for example, counseling or an interpreter).
- If an employee with a disability is not performing well, an employer may require medical and other professional inquiries that are job-related and consistent with business necessity to discover whether the disability is causing the poor performance, and whether any reasonable accommodation or additional accommodation is needed. (See Chapter VI.)
- An employer may take the same disciplinary action against employees with disabilities as it takes against other similarly situated employees, if the illegal use of drugs or alcohol use affects job performance and/or attendance. (See Chapter VIII.)

- An employer may not discipline or terminate an employee with a disability if the employer has refused to provide a requested reasonable accommodation that did not constitute an undue hardship, and the reason for unsatisfactory performance was the lack of accommodation.

7.8 Compensation

- An employer cannot reduce pay to an employee with a disability because of the elimination of a marginal job function or because it has provided a reasonable accommodation, such as specialized or modified equipment. The employer can give the employee with a disability other marginal functions that s/he can perform.

- An employee who is reassigned to a lower paying job or provided a part-time job as an accommodation may be paid the lower amount that would apply to such positions, consistent with the employer's regular compensation practices.

7.9 Health Insurance and Other Employee Benefit Plans

As discussed above, an employer or other covered entity may not limit, segregate or classify an individual with a disability, on the basis of disability, in a manner that adversely affects the individual's employment. This prohibition applies to the provision and administration of health insurance and other benefit plans, such as life insurance and pension plans.

This means that:

- If an employer provides insurance or other benefit plans to its employees, it must provide the same coverage to its employees with disabilities. Employees with disabilities must be given equal access to whatever insurance or benefit plans the employer provides.

- An employer cannot deny insurance to an individual with a disability or subject an individual with a disability to different terms or conditions of insurance, based on disability alone, if the disability does not pose increased insurance risks. Nor may the employer enter into any contract or agreement with an insurance company or other entity that has such effect.

- An employer cannot fire or refuse to hire an individual with a disability because the employer's current health insurance plan does not cover the individual's disability, or because the individual may increase the employer's future health care costs.

- An employer cannot fire or refuse to hire an individual (whether or not that individual has a disability) because the individual has a family member or dependent with a disability that is not covered by the employer's current health insurance plan, or that may increase the employer's future health care costs.

While establishing these protections for employees with disabilities, the ADA permits employers to provide insurance plans that comply with existing Federal and state insurance requirements, even if provisions of these plans have an adverse affect on people with disabilities, provided that the provisions are not used as a subterfuge to evade the purpose of the ADA.

Specifically, the ADA provides that:

- Where an employer provides health insurance through an insurance carrier that is regulated by state law, it may provide coverage in accordance with accepted principles of risk assessment and/or risk classification, as required or permitted by such law, even if this causes limitations in coverage for individuals with disabilities.

- Similarly, self-insured plans which are not subject to state law may provide coverage in a manner that is consistent with basic accepted principles of insurance risk classification, even if this results in limitations in coverage to individuals with disabilities.

In each case, such activity is permitted only if it is not being used as a subterfuge to evade the intent of the ADA. Whether or not an activity is being used as a subterfuge will be determined regardless of the date that the insurance plan or employee benefit plan was adopted.

This means that:

- An employer may continue to offer health insurance plans that contain pre-existing condition exclusions, even if this adversely affects individuals with disabilities, unless these exclusions are being used as a subterfuge to evade the purpose of the ADA.

- An employer may continue to offer health insurance plans that limit coverage for certain procedures, and/or limit particular treatments to a specified number per year, even if these restrictions adversely affect individuals with disabilities, as long as

the restrictions are uniformly applied to all insured individuals, regardless of the disability.

For example, an employer can offer a health insurance plan that limits coverage of blood transfusions to five transfusions per year for all employees, even though an employee with hemophilia may require more than five transfusions per year. However, the employer could not deny this employee coverage for another, otherwise covered procedure, because the plan will not pay for the additional blood transfusions that the procedure would require.

- An employer may continue to offer health insurance plans that limit reimbursements for certain types of drugs or procedures, even if these restrictions adversely affect individuals with disabilities, as long as the restrictions are uniformly applied without regard to disability.

  For example, an employer can offer a health insurance plan that does not cover experimental drugs or procedures, as long as this restriction is applied to all insured individuals.

7.10 Leave

- An employer may establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave.

- An employer may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave. (See Chapter III.)

- A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

  For example: If an employer has a policy providing 2 weeks paid leave for all employees, with no other provision for sick leave and a "no leave" policy for the first 6 months of employment, an employee with a disability who cannot get leave for needed medical treatment could not successfully

charge that the employer's policy is discriminatory on its face. However, this individual could request leave without pay or advance leave as a reasonable accommodation. Such leave should be provided, unless the employer can show undue hardship: For example, an employer might be able to show that it is necessary for the operation of the business that this employee be available for the time period when leave is requested.

- An employer is not required to give leave as a reasonable accommodation to an employee who has a relationship with an individual with a disability to enable the employee to care for that individual. (See p. 8 above.)

7.11 Contractual or Other Relationships

An employer may not do anything through a contractual relationship that it cannot do directly. This applies to any contracts, including contracts with:

- training organizations (see above);
- insurers (see above);
- employment agencies and agencies used for background checks (see Chapter V);
- labor unions (see below).

7.11(a) Collective Bargaining Agreements

Labor unions are covered by the ADA and have the same obligation as the employer to comply with its requirements. An employer also is prohibited by the ADA from taking any action through a labor union contract that it may not take itself.

For example: If a union contract contained physical requirements for a particular job that screened out people with disabilities who were qualified to perform the job, and these requirements are not job-related and consistent with business necessity, they could be challenged as discriminatory by a qualified individual with a disability.

The terms of a collective bargaining agreement may be relevant in determining whether a particular accommodation would cause an employer undue hardship.

For example: If the collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, this may be considered as a factor in determining whether it would be an undue hardship to reassign an individual with a disability who does not have seniority to a vacant job.

Where a collective bargaining agreement identifies functions that must be performed in a particular job, the agreement, like a job description, may be considered as evidence of what the employer and union consider to be a job's essential functions. However, just because a function is listed in a union agreement does not mean that it is an essential function. The agreement, like the job description, will be considered along with other types of evidence. (See Chapter II.)

The Congressional Committee Reports accompanying the ADA advised employers and unions that they could carry out their responsibilities under the Act, and avoid conflicts between the bargaining agreement and the employer's duty to provide reasonable accommodation, by adding a provision to agreements negotiated after the effective date of the ADA, permitting the employer to take all actions necessary to comply with the Act.

7.12 Nondiscrimination in Other Benefits and Privileges of Employment

Nondiscrimination requirements, including the obligation to make reasonable accommodation, apply to all social or recreational activities provided or conducted by an employer, to any transportation provided by an employer for its employees or applicants, and to all other benefits and privileges of employment.

This means that:

- Employees with disabilities must have an equal opportunity to attend and participate in any social functions conducted or sponsored by an employer. Functions such as parties, picnics, shows, and award ceremonies should be held in accessible

locations, and interpreters or other accommodation should be provided when necessary.

- Employees with disabilities must have equal access to break rooms, lounges, cafeterias, and any other non-work facilities that are provided by an employer for use by its employees.

- Employees with disabilities must have equal access to an exercise room, gymnasium, or health club provided by an employer for use by its employees. However, an employer would not have to eliminate facilities provided for employees because a disabled employee cannot use certain equipment or amenities because of his/her disability. **For example**, an employer would not have to remove certain exercise machines simply because an employee who is a paraplegic could not use them.

- Employees with disabilities must be given an equal opportunity to participate in employer-sponsored sports teams, leagues, or recreational activities such as hiking or biking clubs. However, the employer does not have to discontinue such activities because a disabled employee cannot fully participate due to his/her disability. **For example**, an employer would not have to discontinue the company biking club simply because a blind employee is unable to ride a bicycle.

- Any transportation provided by an employer for use by its employees must be accessible to employees with a disability. This includes transportation between employer facilities, transportation to or from mass transit and transportation provided on a occasional basis to employer-sponsored events.

VIII. DRUG AND ALCOHOL ABUSE

8.1 Introduction

The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other Federal laws and regulations regarding alcohol and drug use. At the same time, the ADA provides limited protection from discrimination for recovering drug addicts and for alcoholics.

8.2 Overview of Legal Obligations

- An individual who is currently engaging in the illegal use of drugs is not an "individual with a disability" when the employer acts on the basis of such use.
- An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.
- It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.
- An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- An employer may not discriminate against a drug addict who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction.
- A person who is an alcoholic is an "individual with a disability" under the ADA.
- An employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol impairs job performance or conduct to the extent that s/he is not a "qualified individual with a disability."
- Employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.
- Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by Federal agencies pertaining to drug and alcohol use in the workplace.

8.3 Illegal Use of Drugs

An employer may discharge or deny employment to current illegal users of drugs, on the basis of such drug use, without fear of being held liable for disability discrimination. Current illegal users of drugs are not "individuals with disabilities" under the ADA.

The illegal use of drugs includes the use, possession, or distribution of drugs which are unlawful under the Controlled Substances Act. It includes the use of illegal drugs and the illegal use of prescription drugs that are "controlled substances".

> **For example**: Amphetamines can be legally prescribed drugs. However, amphetamines, by law, are "controlled substances" because of their abuse and potential for abuse. If a person takes amphetamines without a prescription, that person is using drugs illegally, even though they could be prescribed by a physician.

The illegal use of drugs does not include drugs taken under supervision of a licensed health care professional, including experimental drugs for people with AIDS, epilepsy, or mental illness.

> **For example**: A person who takes morphine for the control of pain caused by cancer is not using a drug illegally if it is taken under the supervision of a licensed physician. Similarly, a participant in a methadone maintenance treatment program cannot be discriminated against by an employer based upon the individual's lawful use of methadone.

An individual who illegally uses drugs but also has a disability, such as epilepsy, is only protected by the ADA from discrimination on the basis of the disability (epilepsy). An employer can discharge or deny employment to such an individual on the basis of his/her illegal use of drugs.

What does "current" drug use mean?

If an individual tests positive on a test for the illegal use of drugs, the individual will be considered a current drug user under the ADA where the test correctly indicates that the individual is engaging in the illegal use of a controlled substance.

"Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem. It is not limited to the day of use, or

recent weeks or days, in terms of an employment action. It is determined on a case-by-case basis.

For example: An applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming that s/he now is in rehabilitation and is no longer using drugs illegally. A person who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation (see below).

8.4 Alcoholism

While a current illegal user of drugs has no protection under the ADA if the employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation, if s/he is qualified to perform the essential functions of a job. However, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not "qualified."

For example: If an individual who has alcoholism often is late to work or is unable to perform the responsibilities of his/her job, an employer can take disciplinary action on the basis of the poor job performance and conduct. However, an employer may not discipline an alcoholic employee more severely than it does other employees for the same performance or conduct.

8.5 Recovering Drug Addicts

Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of **past** drug addiction.

For example: An addict who is currently in a drug rehabilitation program and has not used drugs illegally for some time is not excluded from the protection of the ADA. This person will be protected by the ADA because s/he has a history of addiction, or if s/he is "regarded as" being addicted. Similarly, an addict who is rehabilitated or who has successfully completed a supervised rehabilitation program and is no longer illegally using drugs is not excluded from the ADA.

However, a person who casually used drugs illegally in the past, but did not become addicted is not an individual with a disability based on the past drug use. In order for a person to be "substantially limited" because of drug use, s/he must be addicted to the drug.

To ensure that drug use is not recurring, an employer may request evidence that an individual is participating in a drug rehabilitation program or may request the results of a drug test (see below).

A "rehabilitation program" may include in-patient, out-patient, or employee assistance programs, or recognized self-help programs such as Narcotics Anonymous.

8.6 Persons "Regarded As" Addicts and Illegal Drug Users

Individuals who are not illegally using drugs, but who are erroneously perceived as being addicts and as currently using drugs illegally, are protected by the ADA.

For example: If an employer perceived someone to be addicted to illegal drugs based upon rumor and the groggy appearance of the individual, but the rumor was false and the appearance was a side-effect of a lawfully prescribed medication, this individual would be "regarded as" an individual with a disability (a drug addict) and would be protected from discrimination based upon that false assumption. If an employer did not regard the individual as an addict, but simply as a social user of illegal drugs, the individual would not be "regarded as" an individual with a disability and would not be protected by the ADA.

As with other disabilities, an individual who claims that s/he was discriminated against because of past or perceived illegal drug addiction, may be asked to prove that s/he has a record of, or is regarded as having, an addiction to drugs.

8.7 Efforts to Prohibit Drug and Alcohol Use in the Workplace

The ADA does not prevent efforts to combat the use of drugs and alcohol in the workplace

The ADA does not interfere with employers' programs to combat the use of drugs and alcohol in the workplace. The Act specifically provides that an employer may:

- prohibit the use of drugs and alcohol in the workplace.
- require that employees not be under the influence of alcohol or drugs in the workplace.

  For example: An employer can require that employees not come to work or return from lunch under the influence of alcohol, or drugs used illegally.

- Require that employees who illegally use drugs or alcohol meet the same qualification and performance standards applied to other employees. Unsatisfactory behavior such as absenteeism, tardiness, poor job performance, or accidents caused by alcohol or illegal drug use need not be accepted nor accommodated.

  For example: If an employee is often late or does not show up for work because of alcoholism, an employer can take direct action based on the conduct. However, an employer would violate the ADA if it imposed greater sanctions on such an alcoholic employee than it did on other employees for the same misconduct.

While the ADA permits an employer to discipline or discharge an employee for illegal use of drugs or where alcoholism results in poor performance or misconduct, the Act does not require this. Many employers have established employee assistance programs for employees who abuse drugs or alcohol that are helpful to both employee and employer. However, the ADA does not **require** an employer to provide an opportunity for rehabilitation in place of discipline or discharge to such employees. The ADA may, however, require consideration of reasonable accommodation for a drug addict who is rehabilitated and not using drugs or an alcoholic who remains a "qualified individual with a disability." For example, a modified work schedule, to permit the individual to attend an ongoing self-help program, might be a reasonable accommodation for such an employee.

An employer can fire or refuse to hire a person with a past history of illegal drug use, even if the person no longer uses drugs, in specific occupations, such as law enforcement, when an employer can show that this policy is job-related and consistent with business necessity.

For example: A law enforcement agency might be able to show that excluding an individual with a history of illegal drug use from a police officer position was necessary, because such illegal conduct would undermine the credibility of the officer as a witness for the prosecution in a criminal case.

However, even in this case, exclusion of a person with a history of illegal drug use might not be justified automatically as a business necessity, if an applicant with such a history could demonstrate an extensive period of successful performance as a police officer since the time of drug use.

An employer also may fire or refuse to hire an individual with a history of alcoholism or illegal drug use if it can demonstrate that the individual poses a "direct threat" to health or safety because of the high probability that s/he would return to the illegal drug use or alcohol abuse. The employer must be able to demonstrate that such use would result in a high probability of substantial harm to the individual or others which could not be reduced or eliminated with a reasonable accommodation. Examples of accommodations in such cases might be to require periodic drug or alcohol tests, to modify job duties or to provide increased supervision.

An employer cannot prove a "high probability" of substantial harm simply by referring to statistics indicating the likelihood that addicts or alcoholics in general have a specific probability of suffering a relapse. A showing of "significant risk of substantial harm" must be based upon an assessment of the particular individual and his/her history of substance abuse and the specific nature of the job to be performed.

For example: An employer could justify excluding an individual who is an alcoholic with a history of returning to alcohol abuse from a job as a ship captain.

8.8 Pre-Employment Inquiries About Drug and Alcohol Use

An employer may make certain pre-employment, pre-offer inquiries regarding use of alcohol or the illegal use of drugs. An employer may ask whether an applicant drinks alcohol or whether he or she is currently using drugs illegally. However, an employer may not ask whether an applicant is a drug addict or alcoholic, nor inquire whether s/he has ever been in a drug or alcohol rehabilitation program. (See also Pre-Employment Inquiries, Chapter V.)

After a conditional offer of employment, an employer may ask any questions concerning past or present drug or alcohol use. However, the employer may not use such information to exclude an individual with a disability, on the basis of a disability, unless it can show that the reason for exclusion is job-related and consistent with business necessity, and that legitimate job criteria cannot be met with a reasonable

accommodation. (For more information on pre-employment medical inquiries, see Chapter VI.)

8.9 Drug Testing

An employer may conduct tests to detect illegal use of drugs. The ADA does not prohibit, require, or encourage drug tests. Drug tests are not considered medical examinations, and an applicant can be required to take a drug test before a conditional offer of employment has been made. An employee also can be required to take a drug test, whether or not such a test is job-related and necessary for the business. (On the other hand, a test to determine an individual's blood alcohol level would be a "medical examination" and only could be required by an employer in conformity with the ADA.)

An employer may refuse to hire an applicant or discharge or discipline an employee based upon a test result that indicates the illegal use of drugs. The employer may take these actions even if an applicant or employee claims that s/he recently stopped illegally using drugs.

Employers may comply with applicable Federal, State, or local laws regulating when and how drug tests may be used, what drug tests may be used, and confidentiality. Drug tests must be conducted to detect **illegal use of** drugs. However, tests for illegal use of drugs also may reveal the presence of lawfully-used drugs. If a person is excluded from a job because the employer erroneously "regarded" him/her to be an addict currently using drugs illegally when a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA. To avoid such potential liability, the employer would have to determine whether the individual was using a legally prescribed drug. Because the employer may not ask what prescription drugs an individual is taking before making a conditional job offer, one way to avoid liability is to conduct drug tests after making an offer, even though such tests may be given at anytime under the ADA. Since applicants who test positive for illegal drugs are not covered by the ADA, an employer can withdraw an offer of employment on the basis of illegal drug use.

If the results of a drug test indicate the presence of a lawfully prescribed drug, such information must be kept confidential, in the same way as any medical record. If the results reveal information about a disability in addition to information about drug use, the disability-related information is to be treated as a confidential medical record. (See confidentiality requirements regarding medical inquiries and examinations in Chapter VI.)

For example: If drug test results indicate that an individual is HIV positive, or that a person has epilepsy or diabetes because use of a related prescribed medicine is revealed, this information must remain confidential.

8.10 Laws and Regulations Concerning Drugs and Alcohol

An employer may comply with other Federal laws and regulations concerning the use of drugs and alcohol, including the Drug-Free Workplace Act of 1988; regulations applicable to particular types of employment, such as law enforcement positions; regulations of the Department of Transportation for airline employees, interstate motor carrier drivers and railroad engineers; and regulations for safety sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission. Employers may continue to require that their applicants and employees comply with such Federal laws and regulations.

For example: A trucking company can take appropriate action if an applicant or employee tests positive on a drug test required by Department of Transportation regulations or refuses to take such a drug test.

IX. WORKERS' COMPENSATION AND WORK-RELATED INJURY

9.1 Overview of Legal Obligations

- An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment.

- After making a conditional job offer, an employer may ask about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category.

- An employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire, or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation. (See Standards Necessary for Health and Safety: A "Direct Threat", Chapter IV.)

- An employer may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements.

- Only injured workers who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA.

9.2 Is a Worker Injured on the Job Protected by the ADA?

Whether an injured worker is protected by the ADA will depend on whether or not the person meets the ADA definitions of an "individual with a disability" and "qualified individual with a disability." (See Chapter II.) The person must have an impairment that "substantially

limits a major life activity," have a "record of" or be "regarded as" having such an impairment. S/he also must be able to perform the essential functions of a job currently held or desired, with or without an accommodation.

Clearly, not every employee injured on the job will meet the ADA definition. Work-related injuries do not always cause physical or mental impairments severe enough to "substantially limit" a major life activity. Also, many on-the-job injuries cause non-chronic impairments which heal within a short period of time with little or no long-term or permanent impact. Such injuries, in most circumstances, are not considered disabilities under the ADA.

The fact that an employee is awarded workers' compensation benefits, or is assigned a high workers' compensation disability rating, does not automatically establish that this person is protected by the ADA. In most cases, the definition of disability under state workers' compensation laws differs from that under the ADA, because the state laws serve a different purpose. Workers' compensation laws are designed to provide needed assistance to workers who suffer many kinds of injuries, whereas the ADA's purpose is to protect people from discrimination on the basis of disability.

Thus, many injured workers who qualify for benefits under workers' compensation or other disability benefits laws may not be protected by the ADA. An employer must consider work-related injuries on a case-by-case basis to know if a worker is protected by the ADA. Many job injuries are not "disabling" under the ADA, but it also is possible that an impairment which is not "substantially limiting" in one circumstance could result in, or lead to, disability in other circumstances.

> **For example**: Suppose a construction worker falls from a ladder and breaks a leg and the leg heals normally within a few months. Although this worker may be awarded workers' compensation benefits for the injury, he would not be considered a person with a disability under the ADA. The impairment suffered from the injury did not "substantially limit" a major life activity, since the injury healed within a short period and had little or no long-term impact. However, if the worker's leg took significantly longer to heal than the usual healing period for this type of injury, and during this period the worker could not walk, s/he would be considered to have a disability. Or, if the injury caused a permanent limp, the worker might be considered disabled under the ADA if the limp substantially limited his walking, as compared to the average person in the general population.

An employee who was seriously injured while working for a former employer, and was unable to work for a year because of the injury, would have a **"record of"** a substantially limiting impairment. If an employer refused to hire or promote this person on the basis of that record, even if s/he had recovered in whole or in part from the injury, this would be a violation of the ADA.

If an impairment or condition caused by an on-the-job injury does not substantially limit an employee's ability to work, but the employer regards the individual as having an impairment that makes him/her unable to perform a class of jobs, such as "heavy labor," this individual would be **"regarded"** by the employer as having a disability. An employer who refused to hire or discharged an individual because of this perception would violate the ADA.

Of course, in each of the examples above, the employer would only be liable for discrimination if the individual was qualified for the position held or desired, with or without an accommodation.

9.3 What Can an Employer Do to Avoid Increased Workers' Compensation Costs and Comply With the ADA?

The ADA allows an employer to take reasonable steps to avoid increased workers' compensation liability while protecting persons with disabilities against exclusion from jobs they can safely perform.

Steps the Employer May Take

After making a conditional job offer, an employer may inquire about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, an employer may not require an applicant to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) discloses a previous on-the-job injury, unless all applicants in the same job category are required to have the examination. (See Chapter V.)

The employer may use information from medical inquiries and examinations for various purposes, such as:

- to verify employment history;
- to screen out applicants with a history of fraudulent workers' compensation claims;

- to provide information to state officials as required by state laws regulating workers' compensation and "second injury" funds;
- to screen out individuals who would pose a "direct threat" to health or safety of themselves or others, which could not be reduced to an acceptable level or eliminated by a reasonable accommodation. (See Chapter IV.)

9.4 What Can an Employer Do When a Worker is Injured on the Job?

Medical Examinations

An employer may only make medical examinations or inquiries of an employee regarding disability if such examinations are job-related and consistent with business necessity. If a worker has an on-the-job injury which appears to affect his/her ability to do essential job functions, a medical examination or inquiry is job-related and consistent with business necessity. A medical examination or inquiry also may be necessary to provide reasonable accommodation. (See Chapter VI.)

When a worker wishes to return to work after absence due to accident or illness, s/he can only be required to have a "job-related" medical examination, not a full physical exam, as a condition of returning to work.

The ADA prohibits an employer from discriminating against a person with a disability who is "qualified" for a desired job. The employer cannot refuse to let an individual with a disability return to work because the worker is not fully recovered from injury, unless s/he: (1) cannot perform the essential functions of the job s/he holds or desires with or without an accommodation; or (2) would pose a significant risk of substantial harm that could not be reduced to an acceptable level with reasonable accommodation. (See Chapter IV.) Since reasonable accommodation may include reassignment to a vacant position, an employer may be required to consider an employee's qualifications to perform other vacant jobs for which s/he is qualified, as well as the job held when injured.

"Light Duty" Jobs

Many employers have established "light duty" positions to respond to medical restrictions on workers recovering from job-related injuries, in order to reduce workers' compensation liability. Such positions usually place few physical demands on an employee and may include tasks such as answering the telephone and simple administrative work. An

employee's placement in such a position is often limited by the employer to a specific period of time.

The ADA does not require an employer to create a "light duty" position unless the "heavy duty" tasks an injured worker can no longer perform are **marginal** job functions which may be reallocated to co-workers as part of the reasonable accommodation of job-restructuring. In most cases however, "light duty" positions involve a totally different job from the job that a worker performed before the injury. Creating such positions by job restructuring is not required by the ADA. However, if an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position. If the position was created as a temporary job, a reassignment to that position need only be for a temporary period.

When an employer places an injured worker in a temporary "light duty" position, that worker is "otherwise qualified" for that position for the term of that position; a worker's qualifications must be gauged in relation to the position occupied, not in relation to the job held prior to the injury. It may be necessary to provide additional reasonable accommodation to enable an injured worker in a light duty position to perform the essential functions of that position.

> **For example**: Suppose a telephone line repair worker broke both legs and fractured her knee joints in a fall. The treating physician states that the worker will not be able to walk, even with crutches, for at least nine months. She therefore has a "disability." Currently using a wheelchair, and unable to do her previous job, she is placed in a "light duty" position to process paperwork associated with line repairs. However, the office to which she is assigned is not wheelchair accessible. It would be a reasonable accommodation to place the employee in an office that is accessible. Or, the office could be made accessible by widening the office door, if this would not be an undue hardship. The employer also might have to modify the employee's work schedule so that she could attend weekly physical therapy sessions.

Medical information may be very useful to an employer who must decide whether an injured worker can come back to work, in what job, and, if necessary, with what accommodations. A physician may provide an employer with relevant information about an employee's functional abilities, limitations, and work restrictions. This information will be useful in determining how to return the employee to productive work, but the employer bears the ultimate responsibility for deciding whether the individual is qualified, with or without a reasonable accommodation. Therefore, an employer cannot avoid liability if it relies on a physician's advice which is not consistent with ADA requirements.

9.5 Do the ADA's Pre-Employment Inquiry and Confidentiality Restrictions Prevent an Employer from Filing Second Injury Fund Claims?

Most states have established "second injury" funds designed to remove financial disincentives in hiring employees with a disability. Without a second injury fund, if a worker suffered increased disability from a work-related injury because of a pre-existing condition, the employer would have to pay the full cost. The second injury fund provisions limit the amount the employer must pay in these circumstances, and provide for the balance to be paid out of a common fund.

Many second injury funds require an employer to certify that it knew at the time of hire that the employee had a pre-existing injury. The ADA does not prohibit employers from obtaining information about pre-existing injuries and providing needed information to second injury funds. As discussed in Chapter VI., an employer may make such medical inquiries and require a medical examination after a conditional offer of employment, and before a person starts work, so long as the examination or inquiry is made of all applicants in the same job category. Although the ADA generally requires that medical information obtained from such examinations or inquiries be kept confidential, information may be submitted to second injury funds or state workers' compensation authorities as required by state workers' compensation laws.

9.6 Compliance with State and Federal Workers' Compensation Laws

a. Federal Laws

It may be a defense to a charge of discrimination under the ADA that a challenged action is required by another Federal law or regulation, or that another Federal law prohibits an action that otherwise would be required by the ADA. This defense is not valid, however, if the Federal standard does not require the discriminatory action, or if there is a way that an employer can comply with both legal requirements.

b. State Laws

ADA requirements supersede any conflicting state workers' compensation laws.

For example: Some state workers' compensation statutes make an employer liable for paying additional benefits if an injury occurs because the employer assigned a person to a position likely to jeopardize the person's health or safety, or exacerbate an earlier workers' compensation injury. Some of these laws may permit or require an employer to exclude a disabled individual from employment in cases where the ADA would not permit such exclusion. In these cases, the ADA takes precedence over the state law. An employer could not assert, as a valid defense to a charge of discrimination, that it failed to hire or return to work an individual with a disability because doing so would violate a state workers' compensation law that required exclusion of this individual.

9.7 Does Filing a Workers' Compensation Claim Prevent an Injured Worker from Filing a Charge Under the ADA?

Filing a workers' compensation claim does not prevent an injured worker from filing a charge under the ADA. "Exclusivity" clauses in state workers' compensation laws bar all other civil remedies related to an injury that has been compensated by a workers' compensation system. However, these clauses do not prohibit a qualified individual with a disability from filing a discrimination charge with EEOC, or filing a suit under the ADA, if issued a "right to sue" letter by EEOC. (See Chapter X.)

9.8 What if an Employee Provides False Information About his/her Health or Physical Condition?

An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or workers' compensation history.

Some state workers' compensation laws release an employer from its obligation to pay benefits if a worker falsely represents his/her health or physical condition at the time of hire and is later injured as a result. The ADA does not prevent use of this defense to a workers' compensation claim. The ADA requires only that information requests about health or workers compensation history are made as part of a post-offer medical examination or inquiry. (See Chapter VI.)

X. ENFORCEMENT PROVISIONS

10.1 Introduction

Title I of the ADA is enforced by the Equal Employment Opportunity Commission (EEOC) under the same procedures used to enforce Title VII of the Civil Rights Acts of 1964. The Commission receives and investigates charges of discrimination and seeks through conciliation to resolve any discrimination found and obtain full relief for the affected individual. If conciliation is not successful, the EEOC may file a suit or issue a "right to sue" letter to the person who filed the charge. Throughout the enforcement process, EEOC makes every effort to resolve issues through conciliation and to avoid litigation.

The Commission also recognizes that differences and disputes about the ADA requirements may arise between employers and people with disabilities as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process of the ADA. Accordingly, EEOC will encourage efforts to settle such differences through alternative dispute resolution, provided that such efforts do not deprive any individual of legal rights granted by the statute. (See "Alternative Dispute Resolution" in Resource Directory Index.)

10.2 Overview of Enforcement Provisions

- A job applicant or employee who believes s/he has been discriminated against on the basis of disability in employment by a private, state, or local government employer, labor union, employment agency, or joint labor management committee can file a charge with EEOC.

- An individual, whether disabled or not, also may file a charge if s/he believes that s/he has been discriminated against because of an association with a person with a known disability, or believes that s/he has suffered retaliation because of filing a charge or assisting in opposing a discriminatory practice. (See Retaliation below.) Another person or organization also may file a charge on behalf of such applicant or employee.

- The entity charged with violating the ADA should receive written notification of the charge within 10 days after it is filed.

- EEOC will investigate charges of discrimination. If EEOC believes that discrimination occurred, it will attempt to resolve the charge through conciliation and obtain full relief for the aggrieved individual consistent with EEOC's standards for remedies.

- If conciliation fails, EEOC will file suit or issue a "right to sue" letter to the person who filed the charge. (If the charge involves a state or local government agency, EEOC will refer the case to the Department of Justice for consideration of litigation or issuance of a "right to sue" letter.)

- Remedies for violations of Title I of the ADA include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees, and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.

- Employers may not retaliate against any applicant or employee who files a charge, participates in an EEOC investigation or opposes an unlawful employment practice.

10.3 Questions and Answers on the ADA Enforcement Process

When do the ADA's employment enforcement provisions become effective?

Charges of discrimination can be filed against employers with 25 or more employees and other covered entities beginning July 26, 1992. The alleged discriminatory act(s) must have occurred on or after July 26, 1992.

Charges can be filed against employers with 15 or more employees beginning July 26, 1994. The alleged discriminatory act(s) must have occurred on or after July 26, 1994, if the charge is against an employer with 15 to 24 employees.

Who can file charges of discrimination?

An applicant or employee who feels that s/he has been discriminated against in employment on the basis of disability can file a charge with EEOC. An individual, group or organization also can file a charge on behalf of another person. An individual, group or organization that files a charge is called the "charging party."

How are charges of discrimination filed?

A person who feels s/he has been discriminated against, or other potential "charging party" should contact the nearest EEOC office. (See Resource Directory listing.) If there is no EEOC office nearby, call, toll free 1-800-669-4000 (voice) or 1-800-800-3302 (TDD).

What are the time limits for filing charges of discrimination?

A charge of discrimination on the basis of disability must be filed with EEOC within **180 days** of the alleged discriminatory act.

If there is a state or local fair employment practices agency that enforces a law prohibiting the same alleged discriminatory practice, it is possible that charges may be filed with EEOC up to **300 days** after the alleged discriminatory act. However, to protect legal rights, it is recommended that EEOC be contacted promptly when discrimination is believed to have occurred.

How is a charge of discrimination filed?

A charge can be filed in person, by telephone, or by mail. If an individual does not live near an EEOC office, the charge can be filed by telephone and verified by mail. The type of information that will be requested from a charging party may include:

- the charging party's name, address, and telephone number (if a charge is filed on behalf of another individual, his/her identity may be kept confidential, unless required for a court action);
- the employer's name, address, telephone number, and number of employees;

- the basis or bases of the discrimination claimed by the individual (e.g., disability, race, color, religion, sex, national origin, age, retaliation);
- the issue or issues involved in the alleged discriminatory act(s) (e.g., hiring, promotion, wages, terms and conditions of employment, discharge);
- identification of the charging party's alleged disability (e.g., the physical or mental impairment and how it affects major life activities, the record of disability the employer relied upon, or how the employer regarded the individual as disabled);
- the date of the alleged discriminatory act(s);
- details of what allegedly happened; and
- identity of witnesses who have knowledge of the alleged discriminatory act(s).

Charging parties also may submit additional oral or written evidence on their behalf.

EEOC has work-sharing agreements with many state and local fair employment agencies. Depending on the agreement, some charges may be sent to a state or local agency for investigation; others may be investigated directly by EEOC. (See also Coordination Procedures to Avoid Duplicate Complaint Processing under the ADA and the Rehabilitation Act, below.)

Can a charging party file a charge on more than one basis?

EEOC also enforces other laws that bar employment discrimination based on race, color, religion, sex, national origin, and age (persons 40 years of age and older). An individual with a disability can file a charge of discrimination on more than one basis.

> **For example**: A cashier who is a paraplegic may claim that she was discriminated against by an employer based on both her sex and her disability. She can file a single charge claiming both disability and sex discrimination.

Can an individual file a lawsuit against an employer?

An individual can file a lawsuit against an employer, but s/he must first file the charge with EEOC. The charging party can request a "right to sue" letter from the EEOC 180 days after the charge was first filed with the Commission. A charging party will then have 90 days to file suit after receiving the notice of right to sue. If the charging party files suit, EEOC will ordinarily dismiss the original charges filed with the Commission. "Right to sue" letters also are issued when EEOC does not believe discrimination occurred or when conciliation attempts fail and EEOC decides not to sue on the charging party's behalf (see below).

Are charging parties protected from retaliation?

It is unlawful for an employer or other covered entity to retaliate against someone who files a charge of discrimination, participates in an investigation, or opposes discriminatory practices. Individuals who believe that they have been retaliated against should contact EEOC immediately. Even if an individual has already filed a charge of discrimination, s/he can file a new charge based on retaliation.

How does EEOC process charges of discrimination?

- A charge of employment discrimination may be filed with EEOC against a private employer, state or local government, employment agency, labor union or joint labor management committee. When a charge has been filed, EEOC calls these covered entities "respondents."

- Within 10 days after receipt of a charge, EEOC sends written notification of receipt to the respondent and the charging party.

- EEOC begins its investigation by reviewing information received from the charging party and requesting information from the respondent. Information requested from the respondent initially, and in the course of the investigation, may include:

  - specific information on the issues raised in the charge;
  - the identity of witnesses who can provide evidence about issues in the charge;

- information about the business operation, employment process, and workplace; and
- personnel and payroll records.

(Note: All or part of the data-gathering portion of an investigation may be conducted on-site, depending on the circumstances.)

- A respondent also may submit additional oral or written evidence on its own behalf.
- EEOC also will interview witnesses who have knowledge of the alleged discriminatory act(s).
- EEOC may dismiss a charge during the course of the investigation for various reasons. For example, it may find that the respondent is not covered by the ADA, or that the charge is not timely filed.
- EEOC may request additional information from the respondent and the charging party. They may be asked to participate in a fact-finding conference to review the allegations, obtain additional evidence, and, if appropriate, seek to resolve the charge through a negotiated settlement.
- The charging party and respondent will be informed of the preliminary findings of the investigation -- that is, whether there is cause to believe that discrimination has occurred and the type of relief that may be necessary. Both parties will be provided opportunity to submit further information.
- After reviewing all information, the Commission sends an official "Letter of Determination" to the charging party and the respondent, stating whether it has or has not found "reasonable cause" to believe that discrimination occurred.

What if the EEOC concludes that no discrimination occurred?

If the investigation finds no cause to believe discrimination occurred, EEOC will take no further action. EEOC will issue a "right to sue" letter to the charging party, who may initiate a private suit.

What if the EEOC concludes that discrimination occurred?

If the investigation shows that there is reasonable cause to believe that discrimination occurred, EEOC will attempt to resolve the issue through conciliation and to obtain full relief consistent with EEOC's standards for remedies for the charging party. (See Relief Available to Charging Party, below.) EEOC also can request an employer to post a notice in the workplace stating that the discrimination has been corrected and that it has stopped the discriminatory practice.

What happens if conciliation fails?

At all stages of the enforcement process, EEOC will try to resolve a charge without a costly lawsuit.

If EEOC has found cause to believe that discrimination occurred, but cannot resolve the issue through conciliation, the case will be considered for litigation. If EEOC decides to litigate, a lawsuit will be filed in federal district court. If the Commission decides not to litigate, it will send the charging party a "right-to-sue" letter. The charging party may then initiate a private civil suit within 90 days, if desired. If conciliation fails on a charge against a state or local government, EEOC will refer the case to the Department of Justice for consideration of litigation or issuance of a "right to sue" letter.

10.4 Coordination Procedures to Avoid Duplicative Complaint Processing Under the ADA and the Rehabilitation Act.

The ADA requires EEOC and the federal agencies responsible for Section 503 and Section 504 of the Rehabilitation Act of 1973 to establish coordination procedures to avoid duplication and to assure consistent standards in processing complaints that fall within the overlapping jurisdiction of both laws. EEOC and the Office of Federal Contract Compliance in the Department of Labor (OFCCP) have issued a joint regulation establishing such procedures for complaints against employers covered by the ADA who are also federal contractors or subcontractors. (Published in the Federal Register of January 24, 1992.) EEOC and the Department of Justice also will issue a joint regulation establishing procedures for complaints against employers covered by the ADA who are recipients of federal financial assistance.

The joint EEOC-OFCCP rule provides that a complaint of discrimination on the basis of disability filed with OFCCP under Section 503 will be considered a charge filed simultaneously under the ADA if the complaint

falls within the ADA's jurisdiction. This will ensure that an individual's ADA rights are preserved. OFCCP will process such complaints/charges for EEOC, with certain exceptions specified in the regulation, where OFCCP will refer the charge to EEOC. OFCCP also will refer to EEOC for litigation review any complaint/charge where a violation has been found, conciliation fails, and OFCCP decides not to pursue administrative enforcement.

EEOC will refer to OFCCP ADA charges that fall under Section 503 jurisdiction when the Commission finds cause to believe that discrimination has occurred but decides not to litigate, for any administrative action that OFCCP finds appropriate. Where a charge involves both allegations of discrimination and violation of OFCCP's affirmative action requirements, EEOC generally will refer the charge to OFCCP for processing and resolution.

(**Note:** Procedures established in an EEOC-Department of Justice joint rule on processing complaints that are within ADA and Section 504 jurisdiction will be summarized in a future supplement to this Manual, when a final regulation has been issued.)

10.5 Remedies

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include hiring, reinstatement, promotion, back pay, front pay, reasonable accommodation, or other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination). Remedies also may include payment of attorneys' fees, expert witness fees and court costs.

Compensatory and punitive damages also may be available where intentional discrimination is found. Damages may be available to compensate for actual monetary losses, for future monetary losses, for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference. The total amount of punitive damages and compensatory damages for future monetary loss and emotional injury for each individual is limited, based upon the size of the employer, using the following schedule:

Number of employees	Damages will not exceed
15-100	$ 50,000
101-200	100,000
201-500	200,000
500 and more	300,000

Punitive damages are not available against state or local governments.

In cases concerning reasonable accommodation, compensatory or punitive damages may not be awarded to the charging party if an employer can demonstrate that "good faith" efforts were made to provide reasonable accommodation.

What are EEOC's obligations to make the charge process accessible to and usable by individuals with disabilities?

EEOC is required by Section 504 of the Rehabilitation Act of 1973, as amended, to make all of its programs and activities accessible to and usable by individuals with disabilities. EEOC has an obligation to provide services or devices necessary to enable an individual with a disability to participate in the charge filing process. For example, upon request, EEOC will provide an interpreter when necessary for a charging party who is hearing impaired. People with visual or manual disabilities can request on-site assistance in filling out a "charge of discrimination" form and affidavits. EEOC will provide access to the charge process as needed by each individual with a disability, on a case-by-case basis.

Effective Communication and Accessibility Requirements in Public Accommodations and Public Services

Robert Mather

COMMUNICATION Fact Sheet

What is COMMUNICATION?

- Communication is the way we interact with others and the world around us: Receiving, processing, and sending information to exchange thoughts, feelings, wants, and ideas, and to monitor changes in our environment.
- Communication takes place constantly and is involved in our every activity. Even during sleep we communicate with our environment (e.g., our hearing alerts us to fire alarms, telephones ringing).
- We communicate in many different ways—through touch, sight, hearing, smell, speech, writing, gesturing, and reading. Speaking and listening are the most common ways we communicate.
- Language is the system and rules we use to process and code information for communication.

What are COMMUNICATION DISABILITIES?

- People experience communication disabilities when their ability to receive, send, or process information is reduced.
- Two major communication disabilities categories:
  - **Hearing impairments** affect between 21 to 28 million Americans (about 10% of U.S. population) of all ages. Hearing impairments are very common in older individuals, affecting up to 60% of those people over 65 years of age. Hearing losses range from mild (difficulty hearing soft sounds) to profound deafness (difficulty or inability to hear even loud sounds). The majority of people with hearing impairment are "hard-of-hearing" and rely in varying degrees on their hearing for communication. Many use amplification (e.g., hearing aids) to enhance their communication and listening functioning.
  - **Speech and language impairments** affect more than 3 million Americans of all ages. These impairments range from mild to severe difficulty in producing speech sounds; in fluency (stuttering); and producing or understanding language, reading, and writing due to learning disabilities, stroke, or head injury. Some people are unable to use speech or language at all. Many use assistive devices (e.g., speech output devices) to enhance their speaking and communication functioning.
- In many cases, people have multiple impairments (e.g., vision, mobility, and speech) that affect their communication ability.

What are the effects of COMMUNICATION DISABILITIES?

- **Different for each individual and communication activity**
- The amount of **difficulty varies with:**
  - type(s) and severity of impairment
  - ability to use other information sources or communication modalities, for example, the ability to speechread, ability to read
  - communication situation, such as, complexity of information, level of information, level of familiarity
  - differences or mismatches in primary communication mode, for example, manual sign language vs. spoken language
  - physical environment, for example, noise levels, lighting, distance between speaker/listener
  - ability to use and benefit from assistive devices or services.

...t are ...MUNICATION (SPEECH AND HEARING) BARRIERS?

- **Physical/environmental factors** include:
  - Noise
  - Rooms that echo or reverberate
  - Distance or barriers between the speaker/sound source and listener
  - Multiple speakers/sound sources
  - Low light levels/poor background that interfere with ability to speechread or see signing

COMMUNICATION BARRIERS *continued*

- Fast-paced or hurried situations
- Complex or lengthy information
- Aural (hearing)-only or visual-only information

- **Attitudinal and behavioral factors** (toward person with disability) include:
  - Impatience
  - Prejudice
  - Poor communication style (e.g., hand covering face, rapid speech)

What are WAYS TO IMPROVE COMMUNICATION?

- **Maximize information** in the impaired modality
  - Amplification devices (e.g., hearing aids, assistive listening devices)
  - Alternative and augmentative devices for speech and language impairments (e.g., manual or electronic communication boards, voice amplifier)
- **Supplement information** using other modalities (e.g., visual, tactile)
- **Simplify information** in the impaired modality (e.g., simplify and slowdown speech, rephrase)
- **Use a combination of modalities**
- **Remove physical barriers or change place of communication**

What types of COMMUNICATION AIDS AND SERVICES are available?

- Personally prescribed devices (e.g., hearing aids, electronic communication and speech output systems)
- Devices and services that can be used in addition to or instead of personally prescribed devices to:
  - **Enhance or amplify acoustic information**
    For example, assistive listening devices for groups, individuals; hearing aid compatible telephones; amplified telephone handsets/mouthpieces; amplified alerting, signaling, and warning systems.
  - **Provide visual and/or tactile information**
    For example, telecommunications device for the deaf (TDD) or text telephone; flashing or strobe alarm lights; vibrotactile (sense of touch) alerting, signaling, and warning devices; captioning (open and closed, real-time); computer-assisted note taking; written, graphic, or symbolic materials; facsimile machines that have visual signals.
  - **Translate or facilitate communication information**
    For example, interpreter services (cued speech, oral, sign language); TDD/telephone relay systems; augmentative communication devices (e.g., wordboards, speech output devices, writing aids); computers and electronic communications; hearing assistance dogs.

What are suggestions for EFFECTIVE COMMUNICATION?

- **Ask the person** with the disability about their needs
- **Consider the communication situation** (e.g., nature, length, and complexity)
- **Evaluate the accuracy** and rate of information transfer and emotional reactions
- **Select appropriate aids and services**, giving consideration to individual preferences
- **Use a combination of aids and services with appropriate communication techniques**, for example, speaking clearly in normal tone of voice, writing key words, using short sentences, gesturing, signing, looking directly at listener when speaking.

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AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION

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COMMUNICATION AND THE ADA
(Effective Communication and Accessibility)

What is EFFECTIVE COMMUNICATION under ADA?

- **Taking steps to ensure** that people with communication disabilities
  - Have **access to goods, services, and facilities**
  - Are **not excluded, denied services, segregated or otherwise treated differently** than other people
- **Making information accessible to and useable** by people with communication disabilities

What is required to achieve EFFECTIVE COMMUNICATION under ADA?

- **Providing any necessary auxiliary communication aids and services**
  - Unless an undue burden or a fundamental change in the nature of the goods, services, facilities, etc. would result
  - Without a surcharge to the individual
- **Making aurally (via hearing) delivered information available** to persons with hearing and speech impairments (including alarms, nonverbal speech, and computer-generated speech)
- Personally prescribed devices such as hearing aids are **not** required.

How do you determine NECESSARY AUXILIARY COMMUNICATION AIDS AND SERVICES?

- Consideration of:
  - **Expressed preference of the individual with disability**
  - **Level and type of the communication exchange** (complexity, length, and importance of material). For example, interpreter services might not be necessary for a simple business transaction such as buying groceries, but they might be appropriate in lengthy or major transactions such as purchasing a car or provision of legal or medical services.
- **Selection of appropriate aids and services** from available technologies and services (low-tech as well as high-tech) based on facility resources and communication needs (individual's and type of material)

What are STRATEGIES for achieving EFFECTIVE COMMUNICATION?

- **Establishing appropriate attitudes and behaviors:**
  - Assuming that persons with communication disabilities can express themselves if afforded the opportunity, respect, and the necessary assistance to do so
  - Consulting the person with the disability how best to communicate with him or her, and asking about the need for aids and services
  - Training staff to communicate more effectively
- **Modifying the communication setting**, for example, reducing noise levels. Improving the communication setting can also reduce the need for assistive devices in some cases.
- **Providing auxiliary aids and services**
- **Responding to auxiliary aids and services requests**
- **Providing materials in accessible formats** (e.g., written transcripts)
- **Keeping written materials simple and direct**
- **Providing visual as well as auditory information**
- **Providing a means for written exchange of information**
- **Informing public of available accommodations**
- **Maintaining devices in good working condition**
- **Consulting a professional** (audiologist, speech-language pathologist)

What are examples of COMMUNICATION (SPEECH AND HEARING) AIDS AND SERVICES?

- **In assembly areas, meetings, conversations:**
  - Assistive listening devices and systems (ALDs), communication boards (word, symbol), qualified interpreters (oral, cued speech, sign language), real-time captioning, written communication exchange and transcripts, computer-assisted note taking, lighting on speaker's face, preferential seating for good listening and viewing position, electrical outlet near accessible seating, videotext displays
- **In telecommunications:**
  - Hearing aid compatible telephones, volume control telephone handsets, amplified telephone mouthpieces (for person with weak voice) (to amplify speech for a hard-of-hearing listener), telecommunication device for the deaf (TDD) or text telephone, facsimile machines (that use visual symbols), computer/modem, interactive computer software with videotext
  - TDD/telephone relay systems
- **In buildings:**
  - Alerting, signaling, warning, and announcement systems using amplified auditory signals, visual signals (flashing, strobe), vibrotactile (touch) devices, videotext displays
- **In prepared (non-live) materials:**
  - Written materials in alternate formats (e.g., symbols, pictures)
  - Aurally-delivered materials in alternate formats (e.g., captioned videotapes, written transcript, sign interpreter)
  - Notification of accessibility options (e.g., alternative formats)

What are COMMUNICATION BARRIERS?

- **Factors that hinder or prevent information coming to and/or from a person**
- **Visually-related barriers**
  - Inadequate or poor lighting/poor background that interferes with ability to speechread or see signing
  - Unreadable signage (too small, not in line of vision of people in wheelchairs or of short stature)
  - Lack of visual information (For example, not showing speaker's face)
  - Lack of signage and accessibility symbols
- **Acoustically-related barriers**
  - High noise levels
  - High reverberation levels
  - Lack of aurally-delivered information to supplement visual information (For example, not using amplified auditory as well as visual signals in emergency alarms, partitions that block sound between speaker and listener)
- **Attitudinal and prejudicial barriers**
- **Information complexity** (such as difficult reading level)

What is required for COMMUNICATION ACCESSIBILITY under ADA?

- **Providing TDD and accessible telephone or alternative service**
  - When telephone service is regularly provided to customers/patients on more than just an incidental basis (e.g., hospitals, hotels)
  - When building entry requires aural or voice information exchange (e.g., closed circuit security telephone)

COMMUNICATION ACCESSIBILITY under ADA *continued*

- **Providing means for two-way communication in emergency situations** (e.g., elevator emergency notification system) that does not require hearing or speech for communication exchange
- **Providing closed caption decoders**, upon request, in hospitals that provide televisions, and in places of lodging with televisions in five or more guest rooms
- **Removing structural communication barriers** in existing buildings when readily achievable (inexpensively and easily removed)
- **Providing alternative service** when barriers are not easily removed (For example, preferential seating area)
- **Following accessibility standards** for new construction/alterations (ADA Accessibility Guidelines, Uniform Federal Accessibility Standard)

What are some READILY ACHIEVABLE ICTURAL BARRIER REMOVAL STRATEGIES?

- **Installing sound buffers** to reduce noise and reverberation
- **Installing flashing alarm lights** in restrooms, any general usage areas, hallways, lobbies, and any other common usage areas
- **Integrating visual alarms** into facility alarm systems
- **Removing physical partitions** that block sound or visual information between employees and customers
- **Providing directional signage** with symbols to indicate available services

What is needed for SIGNAGE AND SYMBOLS OF COMMUNICATION ACCESSIBILITY?

- **Symbols** for:
  - **Telephone** accessibility:
    - blue grommet between cord and handset—"hearing aid compatible"
    - telephone handset with radiating soundwaves—"volume control"
  - **TDDs** or text telephones—the international TDD symbol
- **Signage:**
  - **Directional signage** indicating nearest TDD or accessible telephone
  - **Messages for availability of Assistive Listening Devices** (ALDs) in announcements, in key building areas
  - **Messages for communication aids and services** (e.g., interpreters)

International Symbol of Accessibility

International TDD Symbol

Telephone Handset Amplification Symbol

What types of POLICIES AND PRACTICES NEED TO BE MODIFIED?

- Discriminatory policies such as prohibiting hearing assistance dogs
- Discriminatory eligibility criteria such as restricting access to goods and services unless necessary for the provision of goods and services

What is the best way to ensure COST-EFFECTIVE ADA COMPLIANCE?

- **Perform a facility accessibility audit** that includes identification of communication barriers
- **Determine auxiliary aids and services needs**
- **Develop a plan to remove barriers and acquire assistive devices**
- **Perform ongoing audit and maintenance of accessibility features**
- **Modify discriminatory policies, practices, and procedures**
- **Obtain technical assistance and consult** with rehabilitation professionals, disability organizations, consumers, federal agencies as appropriate

The BOTTOM LINE

- **Ask people about their needs, show respect and sensitivity, use what works (not necessarily what is most expensive), use your resources creatively and effectively.**

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Title II - Nondiscrimination on the Basis of Disability in State and Local Government Services

1. Summary

This rule implements subtitle A of title II of the Americans with Disabilities Act, Pub. L. 101-336, which prohibits discrimination on the basis of disability by public entities. Subtitle A protects qualified individuals with disabilities from discrimination on the basis of disability in the services, programs, or activities of all State and local governments. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance, and incorporates specific prohibitions of discrimination on the basis of disability from titles I, III, and V of the Americans with Disabilities Act. This rule, therefore, adopts the general prohibitions of discrimination established under section 504, as well as the requirements for making programs accessible to individuals with disabilities and for providing equally effective communications. It also sets forth standards for what constitutes discrimination on the basis of mental or physical disability, provides a definition of disability and qualified individual with a disability, and establishes a complaint mechanism for resolving allegations of discrimination.

The effective date of this rule is January 26, 1992.

For further information about this rule contact the Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530. (202) 514-0301 (Voice), (202) 514-0381 (TDD). These telephone numbers are not toll-free numbers.

2. Background

The landmark Americans with Disabilities Act ("ADA" or "the Act"), enacted on July 26, 1990, provides comprehensive civil rights protections to individuals with disabilities in the areas of employment, public accommodations, State and local government services, and telecommunications.

This regulation implements subtitle A of title II of the ADA, which applies to State and local governments. Most programs and activities of State and local governments are recipients of Federal financial assistance from one or more Federal funding agencies and, therefore, are already covered by section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) ("section 504"), which prohibits discrimination on the basis of handicap in federally assisted programs and activities. Because title II of the ADA essentially extends the nondiscrimination mandate of section 504 to those State and local governments that do not receive Federal financial assistance, this rule hews closely to the provisions of existing section 504 regulations. This approach is also based on section 204 of the ADA, which provides that the regulations issued by the Attorney General to implement title II shall be consistent with the ADA and with the Department of Health, Education, and Welfare's coordination regulation, now codified at 28 CFR Part 41, and, with respect to "program accessibility, existing facilities," and "communications," with the Department of Justice's regulation for its federally conducted programs and activities, codified at 28 CFR Part 39.

The first regulation implementing section 504 was issued in 1977 by the Department of Health, Education, and Welfare (HEW) for the programs and activities to which it provided Federal financial assistance. The following year, pursuant to Executive Order 11914, HEW issued its coordination regulation for federally assisted programs, which served as the model for regulations issued by the other Federal agencies that administer grant programs. HEW's coordination authority, and the coordination regulation issued under that authority, were transferred to the Department of Justice by Executive Order 12250 in 1980.

In 1978, Congress extended application of section 504 to programs and activities conducted by Federal Executive agencies and the United States Postal Service. Pursuant to Executive Order 12250, the Department of Justice developed a prototype regulation to implement the 1978 amendment for federally conducted programs and activities. More than 80 Federal agencies have now issued final regulations based on that prototype, prohibiting discrimination based on handicap in the programs and activities they conduct.

Despite the large number of regulations implementing section 504 for federally assisted and federally conducted programs and activities, there is very little variation in their substantive requirements, or even in their language. Major portions of this regulation, therefore, are taken directly from the existing regulations.

In addition, section 204(b) of the ADA requires that the Department's regulation implementing subtitle A of title II be consistent with the ADA. Thus, the Department's final regulation includes provisions and concepts from titles I and III of the ADA.

3. Rulemaking History

On February 22, 1991, the Department of Justice published a notice of proposed rulemaking (NPRM) implementing title III of the ADA in the Federal Register. 56 FR 7452. On February 28, 1991, the Department published a notice of proposed rulemaking implementing subtitle A of title II of the ADA in the Federal Register. 56 FR 8538. Each NPRM solicited comments on the definitions, standards, and procedures of the proposed rules. By the April 29, 1991, close of the comment period of the NPRM for title II, the Department had received 2,718 comments. Following the close of the comment period, the Department received an additional 222 comments.

In order to encourage public participation in the development of the Department's rules under the ADA, the Department held four public hearings. Hearings were held in Dallas, Texas on March 4-5, 1991, in Washington, D.C. on March 13-15, 1991, in San Francisco, California on March 18-19, 1991, and in Chicago, Illinois on March 27-28, 1991. At these hearings, 329 persons testified and 1,567 pages of testimony were compiled. Transcripts of the hearings were included in the Department's rulemaking docket.

The comments that the Department received occupy almost six feet of shelf space and contain over 10,000 pages. The Department received comments from individuals from all fifty States and the District of Columbia. Nearly 75% of the comments that the Department received came from individuals and from organizations representing the interests of persons with disabilities. The Department received 292 comments from entities covered by the ADA and trade associations repre-

Subpart C addresses employment by public entities, which is also covered by title I of the Act. Subpart D, which is also based on the section 504 regulations, sets out the requirements for program accessibility in existing facilities and for new construction and alterations. Subpart E contains specific requirements relating to communications.

Subpart F establishes administrative procedures for enforcement of title II. As provided by section 203 of the Act, these are based on the procedures for enforcement of section 504, which, in turn, are based on the enforcement procedures for title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d to 2000d-4a). Subpart F also restates the provisions of title V of the ADA on attorneys fees, alternative means of dispute resolution, the effect of unavailability of technical assistance, and State immunity.

Subpart G designates the Federal agencies responsible for investigation of complaints under this part. It assigns enforcement responsibility for particular public entities, on the basis of their major functions, to eight Federal agencies that currently have substantial responsibilities for enforcing section 504. It provides that the Department of Justice would have enforcement responsibility for all State and local government entities not specifically assigned to other designated agencies, but that the Department may further assign specific functions to other agencies. The part would not, however, displace the existing enforcement authorities of the Federal funding agencies under section 504.

5. Regulatory Process Matters

This final rule has been reviewed by the Office of Management and Budget under Executive Order 12291. The Department is preparing a final regulatory impact analysis (RIA) of this rule and the Architectural and Transportation Barriers Compliance Board is preparing an RIA for its Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) that are incorporated in Appendix A of the Department's final rule implementing title III of the ADA. Draft copies of both preliminary RIAs are available for comment; the Department will provide copies of these documents to the public upon request. Commenters are urged to provide additional information as to the costs and benefits associated with this rule. This will facilitate the development of a final RIA by January 1, 1992.

The Department's RIA will evaluate the economic impact of the final rule. Included among those title II provisions that are likely to result in significant economic impact are the requirements for auxiliary aids, barrier removal in existing facilities, and readily accessible new construction and alterations. An analysis of these costs will be included in the RIA.

The Preliminary RIA prepared for the notice of proposed rulemaking contained all of the available information that would have been included in a preliminary regulatory flexibility analysis, had one been prepared under the Regulatory Flexibility Act, concerning the rule's impact on small entities. The final RIA will contain all of the information that is required in a final regulatory flexibility analysis and will serve as such an analysis. Moreover, the extensive notice and comment procedure followed by the Department in the promulgation of this rule, which included public hearings, dissemination of materials, and provision of speakers to affected groups, clearly provided any interested small entities with the notice and opportunity for comment provided for under the Regulatory Flexibility Act procedures.

Subpart C addresses employment by public entities, which is also covered by title I of the Act. Subpart D, which is also based on the section 504 regulations, sets out the requirements for program accessibility in existing facilities and for new construction and alterations. Subpart E contains specific requirements relating to communications.

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The Department is preparing a statement of the federalism impact of the rule under Executive Order 12612 and will provide copies of this statement on request.

The reporting and recordkeeping requirements described in the rule are considered to be information collection requirements as that term is defined by the Office of Management and Budget in 5 CFR Part 1320. Accordingly, those information collection requirements have been submitted to OMB for review pursuant to the Paperwork Reduction Act.

Part 35 - NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

Subpart A -- General

Sec.

Subpart B -- General Requirements

Subpart C -- Employment

Subpart D -- Program Accessibility

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; Title II, Pub. L. 101-336 (42 U.S.C. 12134).

REGULATION

Subpart A -- General

§35.101 Purpose.

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990, (42 U.S.C. 12131) which prohibits discrimination on the basis of disability by public entities.

ANALYSIS

Subpart A -- General

§35.101 Purpose.

Section 35.101 states the purpose of the rule, which is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to matters within the scope of the authority of the Secretary of Transportation under subtitle B of title II of the Act.

REGULATION

§35.102 Application.

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

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

ANALYSIS

§35.102 Application.

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in §35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in §35.134, this part does not apply to private entities.

The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that title II applies to anything a public entity does. Title II coverage, however, is not limited to "Executive" agencies, but includes activities of the legislative and judicial branches of State and local governments. All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations at 28 CFR Part 36.

Aside from employment, which is also covered by title I of the Act, there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the entity's facilities. Activities in the second category include programs that provide State or local government services or benefits.

REGULATION

ANALYSIS

Paragraph (b) of §35.102 explains that to the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the Act, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR Part 37, and are not covered by this part. The Department of Transportation's ADA regulation establishes specific requirements for construction of transportation facilities and acquisition of vehicles. Matters not covered by subtitle B, such as the provision of auxiliary aids, are covered by this rule. For example, activities that are covered by the Department of Transportation's regulation implementing subtitle B are not required to be included in the self-evaluation required by §35.105. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted programs and activities at 49 CFR Part 27. Like other programs of public entities that are also recipients of Federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Although airports operated by public entities are not subject to DOT's ADA regulation, they are subject to subpart A of title II and to this rule.

Some commenters asked for clarification about the responsibilities of public school systems under section 504 and the ADA with respect to programs, services, and activities that are not covered by the Individuals with Disabilities Education Act (IDEA), including, for example, programs open to parents or to the public, graduation ceremonies, parent-teacher organization meetings, plays and other events open to the public, and adult education classes. Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or to the public. For instance, public school systems must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services, and appropriate auxiliary aids and services whenever necessary to ensure effective communication, as long as the provision of the auxiliary aids results neither in an undue burden or in a fundamental alteration of the program.

REGULATION

§35.103 Relationship to other laws.

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

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

ANALYSIS

§35.103 Relationship to other laws.

Section 35.103 is derived from sections 501(a) and (b) of the ADA. Paragraph (a) of this section provides that, except as otherwise specifically provided by this part, title II of the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790-94), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than title V. Because title II of the ADA essentially extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under section 504 for federally assisted programs. Title II, however, also incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504. Judiciary Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt.3, at 51 (1990) [hereinafter "Judiciary report"]; Education and Labor Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990) [hereinafter "Education and Labor report"]. Therefore, this part also includes appropriate provisions derived from the regulations implementing those titles. The inclusion of specific language in this part, however, should not be interpreted as an indication that a requirement is not included under a regulation implementing section 504.

Paragraph (b) makes clear that Congress did not intend to displace any of the rights or remedies provided by other Federal laws (including section 504) or other State laws (including State common law) that provide greater or equal protection to individuals with disabilities. As discussed above, the standards adopted by title II of the ADA for State and local government services are generally the same as those required under section 504 for federally assisted programs and activities. Subpart F of the regulation establishes compliance procedures for processing complaints covered by both this part and section 504.

With respect to State law, a plaintiff may choose to pursue claims under a State law that does not confer greater substantive rights, or even confers fewer substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, a person with a physical disability could seek damages under a State law that

REGULATION

ANALYSIS

allows compensatory and punitive damages for discrimination on the basis of physical disability, but not on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not pre-empted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

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§35.104 Definitions.

For purposes of this part, the term --

Act means the Americans with Disabilities Act (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services includes--

(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to

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§35.104 Definitions.

"Act." The word "Act" is used in this part to refer to the Americans with Disabilities Act of 1990, Pub. L. 101-336, which is also referred to as the "ADA."

"Assistant Attorney General." The term "Assistant Attorney General" refers to the Assistant Attorney General of the Civil Rights Division of the Department of Justice.

"Auxiliary aids and services." Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. The proposed definition in §35.104 provided a list of examples of auxiliary aids and services that was taken from the definition of auxiliary aids and services in section 3(1) of the ADA and was supplemented by examples from regulations implementing section 504 in federally conducted programs (see 28 CFR 39.103).

A substantial number of commenters suggested that additional examples be added to this list. The Department has added several items to this list but wishes to clarify that the list is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology.

Subparagraph (1) lists several examples, which would be considered auxiliary aids and services to make aurally delivered materials available to individuals with hearing impairments. The Department has changed the phrase used in the proposed rules, "orally delivered materials," to the statutory phrase, "aurally delivered materials," to track section 3 of the ADA and to include non-verbal sounds and alarms, and computer generated speech.

The Department has added videotext displays, transcrip-

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individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

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tion services, and closed and open captioning to the list of examples. Videotext displays have become an important means of accessing auditory communications through a public address system. Transcription services are used to relay aurally delivered material almost simultaneously in written form to persons who are deaf or hearing-impaired. This technology is often used at conferences, conventions, and hearings. While the proposed rule expressly included television decoder equipment as an auxiliary aid or service, it did not mention captioning itself. The final rule rectifies this omission by mentioning both closed and open captioning.

Several persons and organizations requested that the Department replace the term "telecommunications devices for deaf persons" or "TDD's" with the term "text telephone." The Department has declined to do so. The Department is aware that the Architectural and Transportation Barriers Compliance Board (ATBCB) has used the phrase "text telephone" in lieu of the statutory term "TDD" in its final accessibility guidelines. Title IV of the ADA, however, uses the term "Telecommunications Device for the Deaf" and the Department believes it would be inappropriate to abandon this statutory term at this time.

Several commenters urged the Department to include in the definition of "auxiliary aids and services" devices that are now available or that may become available with emerging technology. The Department declines to do so in the rule. The Department, however, emphasizes that, although the definition would include "state of the art" devices, public entities are not required to use the newest or most advanced technologies as long as the auxiliary aid or service that is selected affords effective communication.

Subparagraph (2) lists examples of aids and services for making visually delivered materials accessible to persons with visual impairments. Many commenters proposed additional examples, such as signage or mapping, audio description services, secondary auditory programs, telebraillers, and reading machines. While the Department declines to add these items to the list, they are auxiliary aids and services and may be appropriate depending on the circumstances.

Subparagraph (3) refers to acquisition or modification of equipment or devices. Several commenters suggested the addition of current technological innovations in microelec-

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tronics and computerized control systems (e.g., voice recognition systems, automatic dialing telephones, and infrared elevator and light control systems) to the list of auxiliary aids. The Department interprets auxiliary aids and services as those aids and services designed to provide effective communications, i.e., making aurally and visually delivered information available to persons with hearing, speech, and vision impairments. Methods of making services, programs, or activities accessible to, or usable by, individuals with mobility or manual dexterity impairments are addressed by other sections of this part, including the provision for modifications in policies, practices, or procedures (§35.130(b)(7)).

Paragraph (b)(4) deals with other similar services and actions. Several commenters asked for clarification that "similar services and actions" include retrieving items from shelves, assistance in reaching a marginally accessible seat, pushing a barrier aside in order to provide an accessible route, or assistance in removing a sweater or coat. While retrieving an item from a shelf might be an "auxiliary aid or service" for a blind person who could not locate the item without assistance, it might be a method of providing program access for a person using a wheelchair who could not reach the shelf, or a reasonable modification to a self-service policy for an individual who lacked the ability to grasp the item. As explained above, auxiliary aids and services are those aids and services required to provide effective communications. Other forms of assistance are more appropriately addressed by other provisions of the final rule.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the Federal agency designated under subpart G as responsible for investigation of a complaint to initiate its investigation.

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shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

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"Current illegal use of drugs." The phrase "current illegal use of drugs" is used in §35.131. Its meaning is discussed in the preamble for that section.

"Designated agency." The term "designated agency" is used to refer to the Federal agency designated under subpart G of this rule as responsible for carrying out the administrative enforcement responsibilities established by subpart F of the rule.

"Disability." The definition of the term "disability" is the same as the definition in the title III regulation codified at 28 CFR Part 36. It is comparable to the definition of the term "individual with handicaps" in section 7(8) of the Rehabilitation Act and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare (HEW) in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban Development in its regulation implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply fully to the term "disability" (Education and Labor report at 50).

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by Congress to make use of up-to-date, currently accepted terminology. As with racial and ethnic epithets, the choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations repre-

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senting such individuals, object to the use of such terms as "handicapped person" or "the handicapped." In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability (Pub. L. 100-630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should one be attributed to this change in phraseology.

The term "disability" means, with respect to an individual -

(A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) A record of such an impairment; or

(C) Being regarded as having such an impairment.

If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. First, it has worked well since it was adopted in 1974. Second, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

(1)(i) The phrase physical or mental impairment means --

(A) Any physiological disorder or condition, cos-

Test A -- A physical or mental impairment that substantially limits one or more of the major life activities of such individual

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As

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metic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means func-

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explained in paragraph (1)(i) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, e.g., 45 CFR 84.3(j)(2)(i)).

Many commenters asked that "traumatic brain injury" be added to the list in paragraph (1)(i). Traumatic brain injury is already included because it is a physiological condition affecting one of the listed body systems, i.e., "neurological." Therefore, it was unnecessary to add the term to the regulation, which only provides representative examples of physiological disorders.

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future. However, the list of examples in paragraph (1)(ii) of the definition includes: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. The phrase "symptomatic or asymptomatic" was inserted in the final rule after "HIV disease" in response to commenters who suggested the clarification was necessary.

The examples of "physical or mental impairments" in paragraph (1)(ii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease (symptomatic or asymptomatic)" and "tuberculosis" to the list of examples. These additions are based on the com-

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tions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

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mittee reports, caselaw, and official legal opinions interpreting section 504. In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the Arline decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st. Cong., 1st Sess. 346 (1989).

Paragraph (1)(iii) states that the phrase "physical or mental impairment" does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

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Substantial Limitation of a Major Life Activity. Under Test A, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

The Department received many comments on the proposed rule's inclusion of the word "temporary" in the definition of "disability." The preamble indicated that impairments are not necessarily excluded from the definition of "disability" simply because they are temporary, but that the duration, or expected duration, of an impairment is one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. The preamble recognized, however, that temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial. Nevertheless, many commenters objected to inclusion of the word "temporary" both because it is not in the statute and because it is not contained in the definition of "disability" set forth in the title I regulations of the Equal Employment Opportunity Commission (EEOC). The word "temporary" has been deleted from the final rule to conform with the statutory language.

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The question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect).

Sometimes respiratory or neurological functioning is so severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all of the protections afforded by the Act and this part. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life activity of breathing may be somewhat, but not substantially, impaired. In such circumstances, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents.

In sum, the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized by the commenters as environmental illness are disabilities covered by the regulation must be made using the same case-

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(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase is regarded as having an impairment means-

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life

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by-case analysis that is applied to all other physical or mental impairments. Moreover, the addition of specific regulatory provisions relating to environmental illness in the final rule would be inappropriate at this time pending future consideration of the issue by the Architectural and Transportation Barriers Compliance Board, the Environmental Protection Agency, and the Occupational Safety and Health Administration of the Department of Labor.

Test B -- A record of such an impairment

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

Test C -- Being regarded as having such an impairment

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a public entity as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

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activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term disability does not include --

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

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(iv) "Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The perception of the covered entity is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test.

A person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in Arline, 480 U.S. 273 (1987). The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." Id. at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." Id. at 284.

Thus, a person who is denied services or benefits by a public entity because of myths, fears, and stereotypes associ-

ated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public entity can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public entity's perception is inaccurate (e.g., that he will be accepted by others) in order to receive benefits from the public entity.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of "disability." The excluded conditions are: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either section 504 or the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)), the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments under section 504. (Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Amendments Act of 1988, Pub. L. 100-430, section 6(b)).

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

"Drug." The definition of the term "drug" is taken from section 510(d)(2) of the ADA.

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads,

"Facility." "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. It

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walks, passageways, parking ots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Historic preservation programs means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

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includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

Commenters raised questions about the applicability of this part to activities operated in mobile facilities, such as bookmobiles or mobile health screening units. Such activities would be covered by the requirement for program accessibility in §35.150, and would be included in the definition of "facility" as "other real or personal property," although standards for new construction and alterations of such facilities are not yet included in the accessibility standards adopted by §35.151. Sections 35.150 and 35.151 specifically address the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

"Historic preservation programs" and "Historic properties" are defined in order to aid in the interpretation of §§35.150(a)(2) and (b)(2), which relate to accessibility of historic preservation programs, and §35.151(d), which relates to the alteration of historic properties.

"Illegal use of drugs." The definition of "illegal use of drugs" is taken from section 510(d)(1) of the Act and clarifies that the term includes the illegal use of one or more drugs.

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Individual with a disability means a person who has a disability. The term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Public entity means —

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

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"Individual with a disability" means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public entity acts on the basis of such use. The phrase "current illegal use of drugs" is explained in §35.131.

"Public entity." The term "public entity" is defined in accordance with section 201(1) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; or the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

"Qualified individual with a disability." The definition of "qualified individual with a disability" is taken from section 201(2) of the Act, which is derived from the definition of "qualified handicapped person" in the Department of Health and Human Services' regulation implementing section 504 (45 CFR §84.3(k)). It combines the definition at 45 CFR 84.3(k)(1) for employment ("a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question") with the definition for other services at 45 CFR 84.3(k)(4) ("a handicapped person who meets the essential eligibility requirements for the receipt of such services").

Some commenters requested clarification of the term "essential eligibility requirements." Because of the variety of situations in which an individual's qualifications will be at issue, it is not possible to include more specific criteria in the definition. The "essential eligibility requirements" for partici-

pation in some activities covered under this part may be minimal. For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it. Where such information is provided by telephone, even the ability to use a voice telephone is not an "essential eligibility requirement," because §35.161 requires a public entity to provide equally effective telecommunication systems for individuals with impaired hearing or speech.

For other activities, identification of the "essential eligibility requirements" may be more complex. Where questions of safety are involved, the principles established in §36.208 of the Department's regulation implementing title III of the ADA, to be codified at 28 CFR Part 36, will be applicable. That section implements section 302(b)(3) of the Act, which provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others.

A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established

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by the Supreme Court in Arline. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.

"Qualified interpreter." The Department received substantial comment regarding the lack of a definition of "qualified interpreter." The proposed rule defined auxiliary aids and services to include the statutory term, "qualified interpreters" (§35.104), but did not define it. Section 35.160 requires the use of auxiliary aids including qualified interpreters and commenters stated that a lack of guidance on what the term means would create confusion among those trying to secure interpreting services and often result in less than effective communication.

Many commenters were concerned that, without clear guidance on the issue of "qualified" interpreter, the rule would be interpreted to mean "available, rather than qualified" interpreters. Some claimed that few public entities would understand the difference between a qualified interpreter and a person who simply knows a few signs or how to fingerspell.

In order to clarify what is meant by "qualified interpreter" the Department has added a definition of the term to the final rule. A qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. This definition focuses on the actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public entity and the individual with disabilities.

Public comment also revealed that public entities have at times asked persons who are deaf to provide family members or friends to interpret. In certain circumstances, notwithstanding that the family member of friend is able to interpret or is a certified interpreter, the family member or friend may not be

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qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret "effectively, accurately, and impartially."

The definition of "qualified interpreter" in this rule does not invalidate or limit standards for interpreting services of any State or local law that are equal to or more stringent than those imposed by this definition. For instance, the definition would not supersede any requirement of State law for use of a certified interpreter in court proceedings.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

"Section 504." The Department added a definition of "section 504" because the term is used extensively in subpart F of this part.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

"State." The definition of "State" is identical to the statutory definition in section 3(3) of the ADA.

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§35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the

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§35.105 Self-evaluation.

Section 35.105 establishes a requirement, based on the section 504 regulations for federally assisted and federally conducted programs, that a public entity evaluate its current policies and practices to identify and correct any that are not consistent with the requirements of this part. As noted in the discussion of §35.102, activities covered by the Department of Transportation's regulation implementing subtitle B of title II are not required to be included in the self-evaluation required by this section.

Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with disabilities, which has promoted both effective and efficient implementation of section 504. The Department expects that it will likewise be useful to public entities newly covered by the ADA.

All public entities are required to do a self-evaluation. However, only those that employ 50 or more persons are required to maintain the self-evaluation on file and make it available for public inspection for three years. The number 50 was derived from the Department of Justice's section 504 regulations for federally assisted programs, 28 CFR 42.505(c). The Department received comments critical of this limitation, some suggesting the requirement apply to all public entities and others suggesting that the number be changed from 50 to 15. The final rule has not been changed. Although many regulations implementing section 504 for federally assisted programs do use 15 employees as the cut-off for this record-keeping requirement, the Department believes that it would be inappropriate to extend it to those smaller public entities covered by this regulation that do not receive Federal financial assistance. This approach has the benefit of minimizing paperwork burdens on small entities.

Paragraph (d) provides that the self-evaluation required by this section shall apply only to programs not subject to section 504 or those policies and practices, such as those involving communications access, that have not already been included in a self-evaluation required under an existing regulation implementing section 504. Because most self-evaluations were done from five to twelve years ago, however, the Department expects that a great many public entities will be reexamining all of their policies and programs. Programs and functions may have changed, and actions that were supposed

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self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

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to have been taken to comply with section 504 may not have been fully implemented or may no longer be effective. In addition, there have been statutory amendments to section 504 which have changed the coverage of section 504, particularly the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), which broadened the definition of a covered "program or activity."

Several commenters suggested that the Department clarify public entities' liability during the one-year period for compliance with the self-evaluation requirement. The self-evaluation requirement does not stay the effective date of the statute nor of this part. Public entities are, therefore, not shielded from discrimination claims during that time.

Other commenters suggested that the rule require that every self-evaluation include an examination of training efforts to assure that individuals with disabilities are not subjected to discrimination because of insensitivity, particularly in the law enforcement area. Although the Department has not added such a specific requirement to the rule, it would be appropriate for public entities to evaluate training efforts because, in many cases, lack of training leads to discriminatory practices, even when the policies in place are nondiscriminatory.

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§35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

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§35.106 Notice.

Section 35.106 requires a public entity to disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections afforded by the ADA and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio. In providing the notice, a public entity must comply with the requirements for effective communication in §35.160. The preamble to that section gives guidance on how to effectively communicate with individuals with disabilities.

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§35.107 Designation of responsible employee and adoption of grievance procedures.

(a) Designation of responsible employee. A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) Complaint procedure. A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

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§35.107 Designation of responsible employee and adoption of grievance procedures.

Consistent with §35.105, Self-evaluation, the final rule requires that public entities with 50 or more employees designate a responsible employee and adopt grievance procedures. Most of the commenters who suggested that the requirement that self-evaluation be maintained on file for three years not be limited to those employing 50 or more persons made a similar suggestion concerning §35.107. Commenters recommended either that all public entities be subject to section 35.107, or that "50 or more persons" be changed to "15 or more persons." As explained in the discussion of §35.105, the Department has not adopted this suggestion.

The requirement for designation of an employee responsible for coordination of efforts to carry out responsibilities under this part is derived from the HEW regulation implementing section 504 in federally assisted programs. The requirement for designation of a particular employee and dissemination of information about how to locate that employee helps to ensure that individuals dealing with large agencies are able to easily find a responsible person who is familiar with the requirements of the Act and this part and can communicate those requirements to other individuals in the agency who may be unaware of their responsibilities. This paragraph in no way limits a public entity's obligation to ensure that all of its employees comply with the requirements of this part, but it ensures that any failure by individual employees can be promptly corrected by the designated employee.

Section 35.107(b) requires public entities with 50 or more employees to establish grievance procedures for resolving complaints of violations of this part. Similar requirements are found in the section 504 regulations for federally assisted programs (see, e.g., 45 CFR 84.7(b)). The rule, like the regulations for federally assisted programs, provides for investigation and resolution of complaints by a Federal enforcement agency. It is the view of the Department that public entities subject to this part should be required to establish a mechanism for resolution of complaints at the local level without requiring the complainant to resort to the Federal complaint procedures established under subpart F. Complainants would not, however, be required to exhaust the public entity's grievance procedures before filing a com-

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plaint under subpart F. Delay in filing the complaint at the Federal level caused by pursuit of the remedies available under the grievance procedure would generally be considered good cause for extending the time allowed for filing under §35.170(b).

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Subpart B -- General Requirements

§35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability --

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

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Subpart B -- General Requirements

§35.130 General prohibitions against discrimination.

The general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar to State and local entities covered by section 504. In addition, §35.130 includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504.

Several commenters suggested that this part should include the section of the proposed title III regulation that implemented section 309 of the Act, which requires that courses and examinations related to applications, licensing, certification, or credentialing be provided in an accessible place and manner or that alternative accessible arrangements be made. The Department has not adopted this suggestion. The requirements of this part, including the general prohibitions of discrimination in this section, the program access requirements of subpart D, and the communications requirements of subpart E, apply to courses and examinations provided by public entities. The Department considers these requirements to be sufficient to ensure that courses and examinations administered by public entities meet the requirements of section 309. For example, a public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate. The analysis of §35.130(d) is relevant to this determination.

A number of commenters asked that the regulation be amended to require training of law enforcement personnel to recognize the difference between criminal activity and the effects of seizures or other disabilities such as mental retardation, cerebral palsy, traumatic brain injury, mental illness, or deafness. Several disabled commenters gave personal statements about the abuse they had received at the hands of law enforcement personnel. Two organizations that commented

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(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the

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cited the Judiciary report at 50 as authority to require law enforcement training.

The Department has not added such a training requirement to the regulation. Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities. Under this section law enforcement personnel would be required to make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability. The Department notes that a number of States have attempted to address the problem of arresting disabled persons for noncriminal conduct resulting from their disability through adoption of the Uniform Duties to Disabled Persons Act, and encourages other jurisdictions to consider that approach.

Paragraph (a) restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in §35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(1)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. Paragraph (b)(1)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and paragraph (b)(1)(iii) requires that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and simply restate principles long established under section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary

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existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections --

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the pur-

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to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

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pose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamen-

Analysis

Many commenters objected to proposed paragraphs (b)(1)(iv) and (d) as allowing continued segregation of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in 35.130(b)(1)(iv), and section 302(b)(1)(B) includes the same requirement for "the most integrated setting appropriate" as in §35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public entity's obligations within the integrated program when

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tally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the

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it offers a separate program but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

Paragraph (b)(1)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity, if both public entities are subject to common administrative control or are agencies of the same State. The phrase "criteria or methods of administration"

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representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

Analysis

refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985). The Court in Choate explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." Id. at 297 (footnote omitted).

Paragraph (b)(4) specifically applies the prohibition enunciated in §35.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the public entity. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the public entity, in the selection of procurement contractors, from using criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see §35.104).

A number of commenters were troubled by the phrase "essential eligibility requirements" as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of "qualified individual with a disability" applies, it is not possible to use more specific language in the definition. The phrase "essential eligibility requirements," however, is taken from the definitions in the regulations implementing section 504, so caselaw under section 504 will

be applicable to its interpretation. In Southeastern Community College v. Davis, 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate a handicapped person," 442 U.S. at 413, and that the school had established that the plaintiff was not "qualified" because she was not able to "serve the nursing profession in all customary ways," id. Whether a particular requirement is "essential" will, of course, depend on the facts of the particular case.

In addition, the public entity may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. For example, the public entity must comply with this requirement when establishing safety standards for the operations of licensees. In that case the public entity must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with disabilities in an impermissible manner.

Paragraph (b)(6) does not extend the requirements of the Act or this part directly to the programs or activities of licensees or certified entities themselves. The programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. Judiciary report at 52.

Paragraph (b)(8), a new paragraph not contained in the proposed rule, prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service,

program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. This prohibition is also a specific application of the general prohibitions of discrimination and is based on section 302(b)(2)(A)(i) of the ADA. It prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

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Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those individuals with disabilities. Section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, i.e., in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

Some commenters expressed concern that §35.130(e), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 35.130(e) has been revised to make it clear that paragraph (e) is inapplicable to the concern of the commenters. A new paragraph (e)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (e)

clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, e.g., Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C. 794); the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 35.130(e)(1) and (2) are based on section 501(d) of the ADA. Section 501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them:

> The Committee added this section [501(d)] to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

Judiciary report at 71-72. The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual can participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Paragraph (f) provides that a public entity may not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover any costs of

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measures required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part. Such measures may include the provision of auxiliary aids or of modifications required to provide program accessibility.

Several commenters asked for clarification that the costs of interpreter services may not be assessed as an element of "court costs." The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. The preamble to the Department's section 504 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, "it has the corresponding responsibility to pay for the services of the interpreters." (45 FR 37630 (June 3, 1980)). Accordingly, recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.

Paragraph (g), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) and 302(b)(1)(E) of the ADA. This paragraph was not contained in the proposed rule. The individuals covered under this paragraph are any individuals who are discriminated against because of their known association with an individual with a disability. For example, it.would be a violation of this paragraph for a local government to refuse to allow a theater company to use a school auditorium on the grounds that the company had recently performed for an audience of individuals with HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(l)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure

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that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

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§35.131 Illegal use of drugs.

(a) General. (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who-

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) Health and drug rehabilitation services. (1) A public entity shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may

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§35.131 Illegal use of drugs.

Section 35.131 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Section 35.131 does not affect use of controlled substances pursuant to a valid prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by §35.131 (although alcoholics are individuals with disabilities, subject to the protections of the statute).

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in §35.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 64 (1990) [hereinafter "Conference report"], is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

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deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) Drug testing. (1) This part does not prohibit a public entity from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

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Paragraph (a)(2)(i) specifies that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. A health care facility, such as a hospital or clinic, may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat a individual's burns on the grounds that the individual is illegally using drugs.

Some commenters pointed out that abstention from the use of drugs is an essential condition of participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings. The Department believes that this comment is well-founded. Congress clearly intended to prohibit exclusion from drug treatment programs of the very individuals who need such programs because of their use of drugs, but, once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or treatment program may prohibit illegal use of drugs by individuals while they are participating in the program.

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to testing for illegal use of drugs. This paragraph implements the provision in section 510(b) of the Act that allows entities "to adopt or administer reasonable policies or procedures, including but not limited to drug

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testing," that ensure that an individual who is participating in a supervised rehabilitation program, or who has completed such a program or otherwise been rehabilitated successfully is no longer engaging in the illegal use of drugs. The section is not to be "construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs."

Paragraph 35.131(c) clarifies that it is not a violation of this part to adopt or administer reasonable policies or procedures to ensure that an individual who formerly engaged in the illegal use of drugs is not currently engaging in illegal use of drugs. Any such policies or procedures must, of course, be reasonable, and must be designed to identify accurately the illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of "illegal use of drugs." A commenter argued that the rule should permit testing for lawful use of prescription drugs, but most commenters preferred that tests must be limited to unlawful use in order to avoid revealing the lawful use of prescription medicine used to treat disabilities.

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§35.132 Smoking.

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in transportation covered by this part.

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§35.132 Smoking.

Section 35.132 restates the clarification in section 501(b) of the Act that the Act does not preclude the prohibition of, or imposition of restrictions on, smoking in transportation covered by title II. Some commenters argued that this section is too limited in scope, and that the regulation should prohibit smoking in all facilities used by public entities. The reference to smoking in section 501, however, merely clarifies that the Act does not require public entities to accommodate smokers by permitting them to smoke in transportation facilities.

REGULATION

§35.133 Maintenance of accessible features.

(a) A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

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§35.133 Maintenance of accessible features.

Section 35.133 provides that a public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by, individuals with disabilities. This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or "accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

Some commenters objected that this section appeared to establish an absolute requirement and suggested that language from the preamble be included in the text of the regulation. It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Paragraph (b) of the final regulation provides that this section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the Act or this part. However, allowing obstructions or "out of service" equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance. Failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

Other commenters requested that this section be expanded to include specific requirements for inspection and maintenance of equipment, for training staff in the proper operation of equipment, and for maintenance of specific items. The Department believes that this section properly establishes the general requirement for maintaining access and that further details are not necessary.

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§35.134 Retaliation or coercion.

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

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§35.134 Retaliation or coercion.

Section 35.134 implements section 503 of the ADA, which prohibits retaliation against any individual who exercises his or her rights under the Act. This section is unchanged from the proposed rule. Paragraph (a) of §35.134 provides that no private or public entity shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

This section protects not only individuals who allege a violation of the Act or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under the Act or this part without regard to the ultimate resolution of the underlying allegations. Because this section prohibits any act of retaliation or coercion in response to an individual's effort to exercise rights established by the Act and this part (or to support the efforts of another individual), the section applies not only to public entities subject to this part, but also to persons acting in an individual capacity or to private entities. For example, it would be a violation of the Act and this part for a private individual to harass or intimidate an individual with a disability in an effort to prevent that individual from attending a concert in a State-owned park. It would, likewise, be a violation of the Act and this part for a private entity to take adverse action against an employee who appeared as a witness on behalf of an individual who sought to enforce the Act.

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§35.135 Personal devices and services.

This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

§§35.136-35.139 [Reserved]

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§35.135 Personal devices and services.

The final rule includes a new §35.135, entitles "Personal devices and services," which states that the provision of personal devices and services is not required by title II. This new section, which serves as a limitation on all of the requirements of the regulation, replaces §35.160(b)(2) of the proposed rule, which addressed the issue of personal devices and services explicitly only in the context of communications. The personal devices and services limitation was intended to have general application in the proposed rule in all contexts where it was relevant. The final rule, therefore, clarifies this point by including a general provision that will explicitly apply not only to auxiliary aids and services but across-the-board to include other relevant areas such as, for example, modifications in policies, practices, and procedures (§35.130(b)(7)). The language of §35.135 parallels an analogous provision in the Department's title III regulations (28 CFR §36.306) but preserves the explicit reference to "readers for personal use or study" in §35.160(b)(2) of the proposed rule. This section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

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Subpart C -- Employment

§35.140 Employment discrimination prohibited.

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

(b)(1) For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.

(2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to em-

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Subpart C -- Employment

§35.140 Employment discrimination prohibited.

Title II of the ADA applies to all activities of public entities, including their employment practices. The proposed rule cross-referenced the definitions, requirements, and procedures of title I of the ADA, as established by the Equal Employment Opportunity Commission in 29 CFR Part 1630. This proposal would have resulted in use, under §35.140, of the title I definition of "employer," so that a public entity with 25 or more employees would have become subject to the requirements of §35.140 on July 26, 1992, one with 15 to 24 employees on July 26, 1994, and one with fewer than 15 employees would have been excluded completely.

The Department received comments objecting to this approach. The commenters asserted that Congress intended to establish nondiscrimination requirements for employment by all public entities, including those that employ fewer than 15 employees; and that Congress intended the employment requirements of title II to become effective at the same time that the other requirements of this regulation become effective, January 26, 1992. The Department has reexamined the statutory language and legislative history of the ADA on this issue and has concluded that Congress intended to cover the employment practices of all public entities and that the applicable effective date is that of title II.

The statutory language of section 204(b) of the ADA requires the Department to issue a regulation that is consistent with the ADA and the Department's coordination regulation under section 504, 28 CFR part 41. The coordination regulation specifically requires nondiscrimination in employment, 28 CFR §§41.52-41.55, and does not limit coverage based on size of employer. Moreover, under all section 504 implementing regulations issued in accordance with the Department's coordination regulation, employment coverage under section 504 extends to all employers with federally assisted programs or activities, regardless of size, and the effective date for those employment requirements has always been the same as the effective date for nonemployment requirements established in the same regulations. The Department therefore concludes that §35.140 must apply to all public entities upon the effective date of this regulation.

In the proposed regulation the Department cross-refer-

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ployment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

§§35.141-35.148 [Reserved]

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enced the regulations implementing title I of the ADA, issued by the Equal Employment Opportunity Commission at 29 CFR part 1630, as a compliance standard for §35.140 because, as proposed, the scope of coverage and effective date of coverage under title II would have been coextensive with title I. In the final regulation this language is modified slightly. Subparagraph (1) of new paragraph (b) makes it clear that the standards established by the Equal Employment Opportunity Commission in 29 CFR part 1630 will be the applicable compliance standards if the public entity is subject to title I. If the public entity is not covered by title I, or until it is covered by title I, subparagraph (b)(2) cross-references section 504 standards for what constitutes employment discrimination, as established by the Department of Justice in 28 CFR part 41. Standards for title I of the ADA and section 504 of the Rehabilitation Act are for the most part identical because title I of the ADA was based on requirements set forth in regulations implementing section 504.

The Department, together with the other Federal agencies responsible for the enforcement of Federal laws prohibiting employment discrimination on the basis of disability, recognizes the potential for jurisdictional overlap that exists with respect to coverage of public entities and the need to avoid problems related to overlapping coverage. The other Federal agencies include the Equal Employment Opportunity Commission, which is the agency primarily responsible for enforcement of title I of the ADA, the Department of Labor, which is the agency responsible for enforcement of section 503 of the Rehabilitation Act of 1973, and 26 Federal agencies with programs of Federal financial assistance, which are responsible for enforcing section 504 in those programs. Section 107 of the ADA requires that coordination mechanisms be developed in connection with the administrative enforcement of complaints alleging discrimination under title I and complaints alleging discrimination in employment in violation of the Rehabilitation Act. Although the ADA does not specifically require inclusion of employment complaints under title II in the coordinating mechanisms required by title I, Federal investigations of title II employment complaints will be coordinated on a government-wide basis also. The Department is currently working with the EEOC and other affected Federal agencies to develop effective coordinating mechanisms, and final regulations on this issue will be issued on or before January 26, 1992.

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Subpart D -- Program Accessibility

§35.149 Discrimination prohibited.

Except as otherwise provided in §35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

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Subpart D -- Program Accessibility

§35.149 Discrimination prohibited.

Section 35.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§35.150 and 35.151.

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§35.150 Existing facilities.

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not --

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with §35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens

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§35.150 Existing facilities.

Consistent with section 204(b) of the Act, this regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities (e.g., 28 CFR Part 39). The concept of "program accessibility" was first used in the section 504 regulation adopted by the Department of Health, Education, and Welfare for its federally assisted programs and activities in 1977. It allowed recipients to make their federally assisted programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities, by offering those programs through alternative methods. Program accessibility has proven to be a useful approach and was adopted in the regulations issued for programs and activities conducted by Federal Executive agencies. The Act provides that the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.

Section 35.150 requires that each service, program, or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. The regulation makes clear, however, that a public entity is not required to make each of its existing facilities accessible (§35.150(a)(1)). Unlike title III of the Act, which requires public accommodations to remove architectural barriers where such removal is "readily achievable," or to provide goods and services through alternative methods, where those methods are "readily achievable," title II requires a public entity to make its programs accessible in all cases, except where to do so would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens. Congress intended the "undue burden" standard in title II to be significantly higher than the "readily achievable" standard in title III. Thus, although title II may not require removal of barriers in some cases where removal would be required under title III, the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.

Paragraph (a)(2), which establishes a special limitation on the obligation to ensure program accessibility in historic preservation programs, is discussed below in connection with paragraph (b).

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must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) Methods. (1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other meth-

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Paragraph (a)(3), which is taken from the section 504 regulations for federally conducted programs, generally codifies case law that defines the scope of the public entity's obligation to ensure program accessibility. This paragraph provides that, in meeting the program accessibility requirement, a public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens. A similar limitation is provided in §35.164.

This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

It is the Department's view that compliance with §35.150(a), like compliance with the corresponding provisions of the section 504 regulations for federally conducted programs, would in most cases not result in undue financial and administrative burdens on a public entity. In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with paragraph (a) of §35.150 would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity.

The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The Department recognizes the difficulty of identifying the official responsible for this determination, given the variety of organizational forms that may be taken by public entities and their components. The intention of this paragraph is that the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.

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ods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of §35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of §35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include --

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic proper-

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Any person who believes that he or she or any specific class of persons has been injured by the public entity head's decision or failure to make a decision may file a complaint under the compliance procedures established in subpart F.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides.

The Department wishes to clarify that, consistent with longstanding interpretation of section 504, carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. Department of Health, Education, and Welfare, Office of Civil Rights, Policy Interpretation No. 4, 43 Fed. Reg. 36035 (August 14, 1978). Carrying will be permitted only in manifestly exceptional cases, and only if all personnel who are permitted to participate in carrying an individual with a disability are formally instructed on the safest and least humiliating means of carrying. "Manifestly exceptional" cases in which carrying would be permitted might include, for example, programs conducted in unique facilities, such as an oceanographic vessel, for which structural changes and devices necessary to adapt the facility for use by individuals with mobility impairments are unavailable or prohibitively expensive. Carrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.

In choosing among methods, the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities. Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.) The requirements of §35.151 for alterations apply to structural changes undertaken to comply with this section. The public entity may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

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ties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) Transition plan. (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall

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Historic preservation programs. In order to avoid possible conflict between the congressional mandates to preserve historic properties, on the one hand, and to eliminate discrimination against individuals with disabilities on the other, paragraph (a)(2) provides that a public entity is not required to take any action that would threaten or destroy the historic significance of an historic property. The special limitation on program accessibility set forth in paragraph (a)(2) is applicable only to historic preservation programs, as defined in §35.104, that is, programs that have preservation of historic properties as a primary purpose. Narrow application of the special limitation is justified because of the inherent flexibility of the program accessibility requirement. Where historic preservation is not a primary purpose of the program, the public entity is not required to use a particular facility. It can relocate all or part of its program to an accessible facility, make home visits, or use other standard methods of achieving program accessibility without making structural alterations that might threaten or destroy significant historic features of the historic property. Thus, government programs located in historic properties, such as an historic State capitol, are not excused from the requirement for program access.

Paragraph (a)(2), therefore, will apply only to those programs that uniquely concern the preservation and experience of the historic property itself. Because the primary benefit of an historic preservation program is the experience of the historic property, paragraph (b)(2) requires the public entity to give priority to methods of providing program accessibility that permit individuals with disabilities to have physical access to the historic property. This priority on physical access may also be viewed as a specific application of the general requirement that the public entity administer programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities (§35.130(d)). Only when providing physical access would threaten or destroy the historic significance of an historic property, or would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens, may the public entity adopt alternative methods for providing program accessibility that do not ensure physical access. Examples of some alternative methods are provided in paragraph (b)(2).

Time periods. Paragraphs (c) and (d) establish time periods for complying with the program accessibility require-

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include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum --

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement

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ment. Like the regulations for federally assisted programs (e.g., 28 CFR 41.57(b)), paragraph (c) requires the public entity to make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation.

The proposed rule provided that, aside from structural changes, all other necessary steps to achieve compliance with this part must be taken within sixty days. The sixty day period was taken from regulations implementing section 504, which generally were effective no more than thirty days after publication. Because this regulation will not be effective until January 26, 1992, the Department has concluded that no additional transition period for non-structural changes is necessary, so the sixty day period has been omitted in the final rule. Of course, this section does not reduce or eliminate any obligations that are already applicable to a public entity under section 504.

Where structural modifications are required, paragraph (d) requires that a transition plan be developed by an entity that employs 50 or more persons, within six months of the effective date of this regulation. The legislative history of title II of the ADA makes it clear that, under title II, "local and state governments are required to provide curb cuts on public streets." Education and Labor report at 84. As the rationale for the provision of curb cuts, the House report explains, "The employment, transportation, and public accommodation sections of . . . [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." Id. Section 35.151(e), which establishes accessibility requirements for new construction and alterations, requires that all newly constructed or altered streets, roads, or highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, and all newly constructed or altered street level pedestrian walkways must have curb ramps or other sloped areas at intersections to streets, roads, or highways. A new paragraph (d)(2) has been added to the final rule to clarify the application of the general requirement for program accessibility to the provision of curb cuts at existing crosswalks. This paragraph requires that the transition plan include a schedule for providing curb ramps or other sloped areas at existing pedestrian walkways, giving priority to walkways serving entities covered by the Act, including

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of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

Analysis

State and local government offices and facilities, transportation, public accommodations, and employers, followed by walkways serving other areas. Pedestrian "walkways" include locations where access is required for use of public transportation, such as bus stops that are not located at intersections or crosswalks.

Similarly, a public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction.

Paragraph (d)(3) provides that, if a public entity has already completed a transition plan required by a regulation implementing section 504, the transition plan required by this part will apply only to those policies and practices that were not covered by the previous transition plan. Some commenters suggested that the transition plan should include all aspects of the public entity's operations, including those that may have been covered by a previous transition plan under section 504. The Department believes that such a duplicative requirement would be inappropriate. Many public entities may find, however, that it will be simpler to include all of their operations in the transition plan than to attempt to identify and exclude specifically those that were addressed in a previous plan. Of course, entities covered under section 504 are not shielded from their obligations under that statute merely because they are included under the transition plan developed under this section.

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deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at §4.1.3(5) and §4.1.6(1)(j) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) Alterations: Historic properties. (1) Alterations to historic properties shall comply, to the maximum extent feasible, with §4.1.7 of UFAS or §4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of §35.150.

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

(2) Newly constructed or altered street level pedes-

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ment has determined that a public entity should be entitled to choose to comply either with ADAAG or UFAS.

Public entities who choose to follow ADAAG, however, are not entitled to the elevator exemption contained in title III of the Act and implemented in the title III regulation at §36.401(d) for new construction and §36.404 for alterations. Section 303(b) of title III states that, with some exceptions, elevators are not required in facilities that are less than three stories or have less than 3000 square feet per story. The section 504 standard, UFAS, contains no such exemption. Section 501 of the ADA makes clear that nothing in the Act may be construed to apply a lesser standard to public entities than the standards applied under section 504. Because permitting the elevator exemption would clearly result in application of a lesser standard than that applied under section 504, paragraph (c) states that the elevator exemption does not apply when public entities choose to follow ADAAG. Thus, a two-story courthouse, whether built according to UFAS or ADAAG, must be constructed with an elevator. It should be noted that Congress did not include an elevator exemption for public transit facilities covered by subtitle B of title II, which covers public transportation provided by public entities, providing further evidence that Congress intended that public buildings have elevators.

Section 504 of the ADA requires the ATBCB to issue supplemental Minimum Guidelines and Requirements for Accessible Design of buildings and facilities subject to the Act, including title II. Section 204(c) of the ADA provides that the Attorney General shall promulgate regulations implementing title II that are consistent with the ATBCB's ADA guidelines. The ATBCB has announced its intention to issue title II guidelines in the future. The Department anticipates that, after the ATBCB's title II guidelines have been published, this rule will be amended to adopt new accessibility standards consistent with the ATBCB's rulemaking. Until that time, however, public entities will have a choice of following UFAS or ADAAG, without the elevator exemption.

Existing buildings leased by the public entity after the effective date of this part are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in §35.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of §35.151.

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§35.151 New construction and alterations.

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

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

(c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (Appendix A to 28 CFR part 36 shall be

ANALYSIS

§35.151 New construction and alterations.

Section 35.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities if the construction was commenced after the effective date of this part. Facilities under design on that date will be governed by this section if the date that bids were invited falls after the effective date. This interpretation is consistent with Federal practice under section 504.

Section 35.151(c) establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (hereinafter ADAAG) shall be deemed to comply with the requirements of this section with respect to those facilities except that, if ADAAG is chosen, the elevator exemption contained at §§36.401(d) and 36.404 does not apply. ADAAG is the standard for private buildings and was issued as guidelines by the Architectural and Transportation Barriers Compliance Board (ATBCB) under title III of the ADA. It has been adopted by the Department of Justice and is published as Appendix A to the Department's title III rule in today's Federal Register. Departures from particular requirements of these standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. Use of two standards is a departure from the proposed rule.

The proposed rule adopted UFAS as the only interim accessibility standard because that standard was referenced by the regulations implementing section 504 of the Rehabilitation Act promulgated by most Federal funding agencies. It is, therefore, familiar to many State and local government entities subject to this rule. The Department, however, received many comments objecting to the adoption of UFAS. Commenters pointed out that, except for the elevator exemption, UFAS is not as stringent as ADAAG. Others suggested that the standard should be the same to lessen confusion.

Section 204(b) of the Act states that title II regulations must be consistent not only with section 504 regulations but also with "this Act." Based on this provision, the Depart-

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trian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

§§35.152-35.159 [Reserved]

ANALYSIS

The Department received many comments urging that the Department require that public entities lease only accessible buildings. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Section 204(b) of the Act states that, in the area of "program accessibility, existing facilities," the title II regulations must be consistent with section 504 regulations. Thus, the Department has adopted the section 504 principles for these types of leased buildings. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the same program accessibility standard should apply to both owned and leased existing buildings. Similarly, requiring that public entities only lease accessible space would significantly restrict the options of State and local governments in seeking leased space, which would be particularly burdensome in rural or sparsely populated areas.

On the other hand, the more accessible the leased space is, the fewer structural modifications will be required in the future for particular employees whose disabilities may necessitate barrier removal as a reasonable accommodation. Pursuant to the requirements for leased buildings contained in the Minimum Guidelines and Requirements for Accessible Design published under the Architectural Barriers Act by the ATBCB, 36 CFR 1190.34, the Federal Government may not lease a building unless it contains (1) one accessible route from an accessible entrance to those areas in which the principal activities for which the building is leased are conducted, (2) accessible toilet facilities, and (3) accessible parking facilities, if a parking area is included within the lease (36 CFR 1190.34). Although these requirements are not applicable to buildings leased by public entities covered by this regulation, such entities are encouraged to look for the most accessible space available to lease and to attempt to find space complying at least with these minimum Federal requirements.

Section 35.151(d) gives effect to the intent of Congress, expressed in section 504(c) of the Act, that this part recognize the national interest in preserving significant historic structures. Commenters criticized the Department's use of descriptive terms in the proposed rule that are different from those used in the ADA to describe eligible historic properties.

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In addition, some commenters criticized the Department's decision to use the concept of "substantially impairing" the historic features of a property, which is a concept employed in regulations implementing section 504 of the Rehabilitation Act of 1973. Those commenters recommended that the Department adopt the criteria of "adverse effect" published by the Advisory Council on Historic Preservation under the National Historic Preservation Act, 36 CFR 800.9, as the standard for determining whether an historic property may be altered.

The Department agrees with these comments to the extent that they suggest that the language of the rule should conform to the language employed by Congress in the ADA. A definition of "historic property," drawn from section 504 of the ADA, has been added to §35.104 to clarify that the term applies to those properties listed or eligible for listing in the National Register of Historic Places, or properties designated as historic under State or local law.

The Department intends that the exception created by this section be applied only in those very rare situations in which it is not possible to provide access to an historic property using the special access provisions established by UFAS and ADAAG. Therefore, paragraph (d)(1) of §35.151 has been revised to clearly state that alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG. Paragraph (d)(2) has been revised to provide that, if it has been determined under the procedures established in UFAS and ADAAG that it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the property, alternative methods of access shall be provided pursuant to the requirements of §35.150.

In response to comments, the Department has added to the final rule a new paragraph (e) setting out the requirements of §36.151 as applied to curb ramps. Paragraph (e) is taken from the statement contained in the preamble to the proposed rule that all newly constructed or altered streets, roads, and highways must contain curb ramps at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, and that all newly constructed or altered street level pedestrian walkways must have curb ramps at intersections to streets, roads, or highways.

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Subpart E -- Communications

§35.160 General.

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

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

ANALYSIS

Subpart E -- Communications

§35.160 General.

Section 35.160 requires the public entity to take such steps as may be necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

Paragraph (b)(1) requires the public entity to furnish appropriate auxiliary aids and services when necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, the public entity's service, program, or activity. The public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This expressed choice shall be given primary consideration by the public entity (§35.160(b)(2)). The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under §35.164.

Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication. For instance, some courtrooms are now equipped for "computer-assisted transcripts," which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays. Such a system might be an effective auxiliary aid or service for a person who is deaf or has a hearing loss who uses speech to communicate, but may be useless for someone who uses sign language.

Although in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

Several commenters asked that the rule clarify that the

provision of readers is sometimes necessary to ensure access to a public entity's services, programs, or activities. Reading devices or readers should be provided when necessary for equal participation and opportunity to benefit from any governmental service, program, or activity, such as reviewing public documents, examining demonstrative evidence, and filling out voter registration forms or forms needed to receive public benefits. The importance of providing qualified readers for examinations administered by public entities is discussed under §35.130. Reading devices and readers are appropriate auxiliary aids and services where necessary to permit an individual with a disability to participate in or benefit from a service, program, or activity.

Section 35.160(b)(2) of the proposed rule, which provided that a public entity need not furnish individually prescribed devices, readers for personal use or study, or other devices of a personal nature, has been deleted in favor of a new section in the final rule on personal devices and services (see §35.135).

In response to comments, the term "auxiliary aids and services" is used in place of "auxiliary aids" in the final rule. This phrase better reflects the range of aids and services that may be required under this section.

A number of comments raised questions about the extent of a public entity's obligation to provide access to television programming for persons with hearing impairments. Television and videotape programming produced by public entities are covered by this section. Access to audio portions of such programming may be provided by closed captioning.

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§35.161 Telecommunication devices for the deaf (TDD's).

Where a public entity communicates by telephone with applicants and beneficiaries, TDD's or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech.

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§ 35.161 Telecommunication devices for the deaf (TDD's).

Section 35.161 requires that, where a public entity communicates with applicants and beneficiaries by telephone, TDD's or equally effective telecommunication systems be used to communicate with individuals with impaired speech or hearing.

Problems arise when a public entity which does not have a TDD needs to communicate with an individual who uses a TDD or vice versa. Title IV of the ADA addresses this problem by requiring establishment of telephone relay services to permit communications between individuals who communicate by TDD and individuals who communicate by the telephone alone. The relay services required by title IV would involve a relay operator using both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user.

Section 204(b) of the ADA requires that the regulation implementing title II with respect to communications be consistent with the Department's regulation implementing section 504 for its federally conducted programs and activities at 28 CFR pt. 39. Section 35.161, which is taken from §39.160(a)(2) of that regulation, requires the use of TDD's or equally effective telecommunication systems for communication with people who use TDD's. Of course, where relay services, such as those required by title IV of the ADA are available, a public entity may use those services to meet the requirements of this section.

Many commenters were concerned that public entities should not rely heavily on the establishment of relay services. The commenters explained that while relay services would be of vast benefit to both public entities and individuals who use TDD's, the services are not sufficient to provide access to all telephone services. First, relay systems do not provide effective access to the increasingly popular automated systems that require the caller to respond by pushing a button on a touch tone phone. Second, relay systems cannot operate fast enough to convey messages on answering machines, or to permit a TDD user to leave a recorded message. Third, communication through relay systems may not be appropriate in cases of crisis lines pertaining to rape, domestic violence, child abuse, and drugs. The Department believes that it is more appropriate for the Federal Communications Commission to address these issues in its rulemaking under title IV.

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Some commenters requested that those entities with frequent contacts with clients who use TDD's have on-site TDD's to provide for direct communication between the entity and the individual. The Department encourages those entities that have extensive telephone contact with the public such as city halls, public libraries, and public aid offices, to have TDD's to insure more immediate access. Where the provision of telephone service is a major function of the entity, TDD's should be available.

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§35.162 Telephone emergency services.

Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDD's and computer modems.

ANALYSIS

Section 35.162 Telephone emergency services.

Many public entities provide telephone emergency services by which individuals can seek immediate assistance from police, fire, ambulance, and other emergency services. These telephone emergency services--including "911" services--are clearly an important public service whose reliability can be a matter of life or death. The legislative history of title II specifically reflects congressional intent that public entities must ensure that telephone emergency services, including 911 services, be accessible to persons with impaired hearing and speech through telecommunication technology (Conference report at 67; Education and Labor report at 84-85).

Proposed §35.162 mandated that public entities provide emergency telephone services to persons with disabilities that are "functionally equivalent" to voice services provided to others. Many commenters urged the Department to revise the section to make clear that direct access to telephone emergency services is required by title II of the ADA as indicated by the legislative history (Conference report at 67-68; Education and Labor report at 85). In response, the final rule mandates "direct access," instead of "access that is functionally equivalent" to that provided to all other telephone users. Telephone emergency access through a third party or through a relay service would not satisfy the requirement for direct access.

Several commenters asked about a separate seven-digit emergency call number for the 911 services. The requirement for direct access disallows the use of a separate seven-digit number where 911 service is available. Separate seven-digit emergency call numbers would be unfamiliar to many individuals and also more burdensome to use. A standard emergency 911 number is easier to remember and would save valuable time spent in searching in telephone books for a local seven-digit emergency number.

Many commenters requested the establishment of minimum standards of service (e.g., the quantity and location of TDD's and computer modems needed in a given emergency center). Instead of establishing these scoping requirements, the Department has established a performance standard through the mandate for direct access.

Section 35.162 requires public entities to take appropriate steps, including equipping their emergency systems with

modern technology, as may be necessary to promptly receive and respond to a call from users of TDD's and computer modems. Entities are allowed the flexibility to determine what is the appropriate technology for their particular needs. In order to avoid mandating use of particular technologies that may become outdated, the Department has eliminated the references to the Baudot and ASCII formats in the proposed rule.

Some commenters requested that the section require the installation of a voice amplification device on the handset of the dispatcher's telephone to amplify the dispatcher's voice. In an emergency, a person who has a hearing loss may be using a telephone that does not have an amplification device. Installation of speech amplification devices on the handsets of the dispatchers' telephones would respond to that situation. The Department encourages their use.

Several commenters emphasized the need for proper maintenance of TDD's used in telephone emergency services. Section 35.133, which mandates maintenance of accessible features, requires public entities to maintain in operable working condition TDD's and other devices that provide direct access to the emergency system.

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§35.163 Information and signage.

(a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(b) A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

ANALYSIS

§35.163 Information and signage.

Section 35.163(a) requires the public entity to provide information to individuals with disabilities concerning accessible services, activities, and facilities. Paragraph (b) requires the public entity to provide signage at all inaccessible entrances to each of its facilities that directs users to an accessible entrance or to a location with information about accessible facilities.

Several commenters requested that, where TDD-equipped pay phones or portable TDD's exist, clear signage should be posted indicating the location of the TDD. The Department believes that this is required by paragraph (a). In addition, the Department recommends that, in large buildings that house TDD's, directional signage indicating the location of available TDD's should be placed adjacent to banks of telephones that do not contain a TDD.

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§35.164 Duties.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

ANALYSIS

§35.164 Duties.

Section 35.164, like paragraph (a)(3) of §35.150, is taken from the section 504 regulations for federally conducted programs. Like paragraph (a)(3), it limits the obligation of the public entity to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it. It also includes specific requirements for determining the existence of undue financial and administrative burdens. The preamble discussion of §35.150(a) regarding that determination is applicable to this section and further explains the public entity's obligation to comply with §§35.160-35.164. Because of the essential nature of the services provided by telephone emergency systems, the Department assumes that §35.164 will rarely be applied to §35.162.

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Subpart F -- Compliance Procedures

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Subpart F -- Compliance Procedures

Subpart F sets out the procedures for administrative enforcement of this part. Section 203 of the Act provides that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) for enforcement of section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap in programs and activities that receive Federal financial assistance, shall be the remedies, procedures, and rights for enforcement of title II. Section 505, in turn, incorporates by reference the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d to 2000d-4a). Title VI, which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs, is enforced by the Federal agencies that provide the Federal financial assistance to the covered programs and activities in question. If voluntary compliance cannot be achieved, Federal agencies enforce title VI either by the termination of Federal funds to a program that is found to discriminate, following an administrative hearing, or by a referral to this Department for judicial enforcement.

Title II of the ADA extended the requirements of section 504 to all services, programs, and activities of State and local governments, not only those that receive Federal financial assistance. The House Committee on Education and Labor explained the enforcement provisions as follows:

It is the Committee's intent that administrative enforcement of section 202 of the legislation should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act of 1973. The Attorney General should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area.

The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local governments. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, . . . the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice.

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The Department of Justice may then proceed to file suits in Federal district court. As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action.

Education & Labor report at 98. See also S. Rep. No. 116, 101st Cong., 1st Sess., at 57-58 (1989).

Subpart F effectuates the congressional intent by deferring to section 504 procedures where those procedures are applicable, that is, where a Federal agency has jurisdiction under section 504 by virtue of its provision of Federal financial assistance to the program or activity in which the discrimination is alleged to have occurred. Deferral to the 504 procedures also makes the sanction of fund termination available where necessary to achieve compliance. Because the Civil Rights Restoration Act (Pub. L. 100-259) extended the application of section 504 to all of the operations of the public entity receiving the Federal financial assistance, many activities of State and local governments are already covered by section 504. The procedures in subpart F apply to complaints concerning services, programs, and activities of public entities that are covered by the ADA.

Subpart G designates the Federal agencies responsible for enforcing the ADA with respect to specific components of State and local government. It does not, however, displace existing jurisdiction under section 504 of the various funding agencies. Individuals may still file discrimination complaints against recipients of Federal financial assistance with the agencies that provide that assistance, and the funding agencies will continue to process those complaints under their existing procedures for enforcing section 504. The substantive standards adopted in this part for title II of the ADA are generally the same as those required under section 504 for federally assisted programs, and public entities covered by the ADA are also covered by the requirements of section 504 to the extent that they receive Federal financial assistance. To the extent that title II provides greater protection to the rights of individuals with disabilities, however, the funding agencies will also apply the substantive requirements established under title II and this part in processing complaints covered by both this part and section 504, except that fund

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termination procedures may be used only for violations of section 504.

Subpart F establishes the procedures to be followed by the agencies designated in subpart G for processing complaints against State and local government entities when the designated agency does not have jurisdiction under section 504.

REGULATION

§35.170 Complaints.

(a) Who may file. An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

(b) Time for filing. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.

(c) Where to file. An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in §35.171(a)(2).

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§35.170 Complaints.

Section 35.170 provides that any individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part within 180 days of the date of the alleged discrimination, unless the time for filing is extended by the agency for good cause. Although §35.107 requires public entities that employ 50 or more persons to establish grievance procedures for resolution of complaints, exhaustion of those procedures is not a prerequisite to filing a complaint under this section. If a complainant chooses to follow the public entity's grievance procedures, however, any resulting delay may be considered good cause for extending the time allowed for filing a complaint under this part.

Filing the complaint with any Federal agency will satisfy the requirement for timely filing. As explained below, a complaint filed with an agency that has jurisdiction under section 504 will be processed under the agency's procedures for enforcing section 504.

Some commenters objected to the complexity of allowing complaints to be filed with different agencies. The multiplicity of enforcement jurisdiction is the result of following the statutorily mandated enforcement scheme. The Department has, however, attempted to simplify procedures for complainants by making the Federal agency that receives the complaint responsible for referring it to an appropriate agency.

The Department has also added a new paragraph (c) to this section providing that a complaint may be filed with any agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice. Under §35.171(a)(2), the Department of Justice will refer complaints for which it does not have jurisdiction under section 504 to an agency that does have jurisdiction under section 504, or to the agency designated under subpart G as responsible for complaints filed against the public entity that is the subject of the complaint or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission. Complaints filed with the Department of Justice may be sent to the Coordination and Review Section, P.O. Box 66118, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20035-6118.

REGULATION

§35.171 Acceptance of complaints.

(a) Receipt of complaints. (1)(i) Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall promptly review the complaint to determine whether it has jurisdiction over the complaint under section 504.

(ii) If the agency does not have section 504 jurisdiction, it shall promptly determine whether it is the designated agency under subpart G of this part responsible for complaints filed against that public entity.

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

(ii) When the Department of Justice receives a complaint for which it does not have jurisdiction under section 504 and is not the designated agency, it shall refer the complaint to an agency that does have jurisdiction under section 504 or to the appropriate agency designated in subpart G of this part or, in the case of an

ANALYSIS

§35.171 Acceptance of complaints.

Section 35.171 establishes procedures for determining jurisdiction and responsibility for processing complaints against public entities. The final rule provides complainants an opportunity to file with the Federal funding agency of their choice. If that agency does not have jurisdiction under section 504, however, and is not the agency designated under subpart G as responsible for that public entity, the agency must refer the complaint to the Department of Justice, which will be responsible for referring it either to an agency that does have jurisdiction under section 504 or to the appropriate designated agency, or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

Whenever an agency receives a complaint over which it has jurisdiction under section 504, it will process the complaint under its section 504 procedures. When the agency designated under subpart G receives a complaint for which it does not have jurisdiction under section 504, it will treat the complaint as an ADA complaint under the procedures established in this subpart.

Section 35.171 also describes agency responsibilities for the processing of employment complaints. As described in connection with §35.140, additional procedures regarding the coordination of employment complaints will be established in a coordination regulation issued by DOJ and EEOC. Agencies with jurisdiction under section 504 for complaints alleging employment discrimination also covered by title I will follow the procedures established by the coordination regulation for those complaints. Complaints covered by title I but not section 504 will be referred to the EEOC, and complaints covered by this part but not title I will be processed under the procedures in this part.

employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

(3)(i) If the agency that receives a complaint has section 504 jurisdiction, it shall process the complaint according to its procedures for enforcing section 504.

(ii) If the agency that receives a complaint does not have section 504 jurisdiction, but is the designated agency, it shall process the complaint according to the procedures established by this subpart.

(b) Employment complaints. (1) If a complaint alleges employment discrimination subject to title I of the Act, and the agency has section 504 jurisdiction, the agency shall follow the procedures issued by the Department of Justice and the Equal Employment Opportunity Commission under section 107(b) of the Act.

(2) If a complaint alleges employment discrimination subject to title I of the Act, and the designated agency does not have section 504 jurisdiction, the agency shall refer the complaint to the Equal Employment Opportunity Commission for processing under title I of the Act.

REGULATION

§35.172 Resolution of complaints.

(a) The designated agency shall investigate each complete complaint, attempt informal resolution, and, if resolution is not achieved, issue to the complainant and the public entity a Letter of Findings that shall include --

(1) Findings of fact and conclusions of law;

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

(3) Notice of the rights available under paragraph (b) of this section.

(b) If the designated agency finds noncompliance, the procedures in §§35.173 and 35.174 shall be followed. At any time, the complainant may file a private suit pursuant to section 203 of the Act, whether or not the designated agency finds a violation.

ANALYSIS

§35.172 Resolution of complaints.

Section 35.172 requires the designated agency to either resolve the complaint or issue to the complainant and the public entity a Letter of Findings containing findings of fact and conclusions of law and a description of a remedy for each violation found.

The Act requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies. The Committee Reports make clear that Congress intended to provide a private right of action with the full panoply of remedies for individual victims of discrimination. Because the Act does not require exhaustion of administrative remedies, the complainant may elect to proceed with a private suit at any time.

REGULATION

§35.174 Referral.

If the public entity declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency shall refer the matter to the Attorney General with a recommendation for appropriate action.

ANALYSIS

§35.174 Referral.

Section 35.174 provides for referral of the matter to the Department of Justice if the agency is unable to obtain voluntary compliance.

REGULATION

§35.175 Attorney's fees.

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

ANALYSIS

§35.175 Attorney's fees.

Section 35.175 states that courts are authorized to award attorneys fees, including litigation expenses and costs, as provided in section 505 of the Act. Litigation expenses include items such as expert witness fees, travel expenses, etc. The Judiciary Committee Report specifies that such items are included under the rubric of "attorneys fees" and not "costs" so that such expenses will be assessed against a plaintiff only under the standard set forth in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). (Judiciary report at 73.)

Regulation

§35.176 Alternative means of dispute resolution.

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 Act and this part.

Analysis

§35.176 Alternative means of dispute resolution.

Section 35.176 restates section 513 of the Act, which encourages use of alternative means of dispute resolution.

REGULATION

§35.177 Effect of unavailability of technical assistance.

A public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

ANALYSIS

§35.177 Effect of unavailability of technical assistance.

Section 35.177 explains that, as provided in section 506(e) of the Act, a public entity is not excused from compliance with the requirements of this part because of any failure to receive technical assistance.

REGULATION

§35.178 State immunity.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

§§35.179-35.189 [Reserved]

ANALYSIS

§35.178 State immunity.

Section 35.178 restates the provision of section 502 of the Act that a State is not immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court for violations of the Act, and that the same remedies are available for any such violations as are available in an action against an entity other than a State.

REGULATION

Subpart G -- Designated Agencies

§35.190 Designated agencies.

(a) The Assistant Attorney General shall coordinate the compliance activities of Federal agencies with respect to State and local government components, and shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part.

(b) The Federal agencies listed in paragraph (b)(1)-(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(1) Department of Agriculture: all programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services.

(2) Department of Education: all programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions, institutions of higher education and voca-

ANALYSIS

Subpart G -- Designated Agencies

§35.190 Designated agencies.

Subpart G designates the Federal agencies responsible for investigating complaints under this part. At least 26 agencies currently administer programs of Federal financial assistance that are subject to the nondiscrimination requirements of section 504 as well as other civil rights statutes. A majority of these agencies administer modest programs of Federal financial assistance and/or devote minimal resources exclusively to "external" civil rights enforcement activities. Under Executive Order 12250, the Department of Justice has encouraged the use of delegation agreements under which certain civil rights compliance responsibilities for a class of recipients funded by more than one agency are delegated by an agency or agencies to a "lead" agency. For example, many agencies that fund institutions of higher education have signed agreements that designate the Department of Education as the "lead" agency for this class of recipients.

The use of delegation agreements reduces overlap and duplication of effort, and thereby strengthens overall civil rights enforcement. However, the use of these agreements to date generally has been limited to education and health care recipients. These classes of recipients are funded by numerous agencies and the logical connection to a lead agency is clear (e.g., the Department of Education for colleges and universities, and the Department of Health and Human Services for hospitals).

The ADA's expanded coverage of State and local government operations further complicates the process of establishing Federal agency jurisdiction for the purpose of investigating complaints of discrimination on the basis of disability. Because all operations of public entities now are covered irrespective of the presence or absence of Federal financial assistance, many additional State and local government functions and organizations now are subject to Federal jurisdiction. In some cases, there is no historical or single clear-cut subject matter relationship with a Federal agency as was the case in the education example described above. Further, the 33,000 governmental jurisdictions subject to the ADA differ greatly in their organization, making a detailed and workable division of Federal agency jurisdiction by individual State, county, or municipal entity unrealistic.

REGULATION

tional education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries.

(3) Department of Health and Human Services: all programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools, the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs, and preschool and daycare programs.

(4) Department of Housing and Urban Development: all programs, services, and regulatory activities relating to state and local public housing, and housing assistance and referral.

(5) Department of Interior: all programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums.

(6) Department of Justice: all programs, services, and regulatory activities relating to law enforcement,

ANALYSIS

This regulation applies the delegation concept to the investigation of complaints of discrimination on the basis of disability by public entities under the ADA. It designates eight agencies, rather than all agencies currently administering programs of Federal financial assistance, as responsible for investigating complaints under this part. These "designated agencies" generally have the largest civil rights compliance staffs, the most experience in complaint investigations and disability issues, and broad yet clear subject area responsibilities. This division of responsibilities is made functionally rather than by public entity type or name designation. For example, all entities (regardless of their title) that exercise responsibilities, regulate, or administer services or programs relating to lands and natural resources fall within the jurisdiction of the Department of Interior.

Complaints under this part will be investigated by the designated agency most closely related to the functions exercised by the governmental component against which the complaint is lodged. For example, a complaint against a State medical board, where such a board is a recognizable entity, will be investigated by the Department of Health and Human Services (the designated agency for regulatory activities relating to the provision of health care), even if the board is part of a general umbrella department of planning and regulation (for which the Department of Justice is the designated agency). If two or more agencies have apparent responsibility over a complaint, section 35.190(c) provides that the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

Thirteen commenters, including four proposed designated agencies, addressed the Department of Justice's identification in the proposed regulation of nine "designated agencies" to investigate complaints under this part. Most comments addressed the proposed specific delegations to the various individual agencies. The Department of Justice agrees with several commenters who pointed out that responsibility for "historic and cultural preservation" functions appropriately belongs with the Department of Interior rather than the Department of Education. The Department of Justice also agrees with the Department of Education that "museums" more appropriately should be delegated to the Department of Interior, and that "preschool and daycare programs" more appropriately should be assigned to the Department of Health and Human Services, rather than to the Department of Education. The final rule reflects these decisions.

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public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

(7) Department of Labor: all programs, services, and regulatory activities relating to labor and the work force.

(8) Department of Transportation: all programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.

(c) Responsibility for the implementation of subpart F of this part for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specific designated agencies

ANALYSIS

The Department of Commerce opposed its listing as the designated agency for "commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business". The Department of Commerce cited its lack of a substantial existing section 504 enforcement program and experience with many of the specific functions to be delegated. The Department of Justice accedes to the Department of Commerce's position, and has assigned itself as the designated agency for these functions.

In response to a comment from the Department of Health and Human Services, the regulation's category of "medical and nursing schools" has been clarified to read "schools of medicine, dentistry, nursing, and other health-related fields". Also in response to a comment from the Department of Health and Human Services, "correctional institutions" have been specifically added to the public safety and administration of justice functions assigned to the Department of Justice.

The regulation also assigns the Department of Justice as the designated agency responsible for all State and local government functions not assigned to other designated agencies. The Department of Justice, under an agreement with the Department of the Treasury, continues to receive and coordinate the investigation of complaints filed under the Revenue Sharing Act. This entitlement program, which was terminated in 1986, provided civil rights compliance jurisdiction for a wide variety of complaints regarding the use of Federal funds to support various general activities of local governments. In the absence of any similar program of Federal financial assistance administered by another Federal agency, placement of designated agency responsibilities for miscellaneous and otherwise undesignated functions with the Department of Justice is an appropriate continuation of current practice.

The Department of Education objected to the proposed rule's inclusion of the functional area of "arts and humanities" within its responsibilities, and the Department of Housing and Urban Development objected to its proposed designation as responsible for activities relating to rent control, the real estate industry, and housing code enforcement. The Department has deleted these areas from the lists assigned to the Departments of Education and Housing and Urban

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by paragraph (b) of this section may be assigned to other specific agencies by the Department of Justice.

(d) If two or more agencies have apparent responsibility over a complaint, the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

§§35.191-5.999 [Reserved]

ANALYSIS

Development, respectively, and has added a new paragraph (c) to section 35.190, which provides that the Department of Justice may assign responsibility for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specific designated agencies by paragraph (b) of this section to other appropriate agencies. The Department believes that this approach will provide more flexibility in determining the appropriate agency for investigation of complaints involving those components of State and local governments not specifically addressed by the listings in paragraph (b). As provided in §§35.170 and 35.171, complaints filed with the Department of Justice will be referred to the apropriate agency.

Several commenters proposed a stronger role for the Department of Justice, especially with respect to the receipt and assignment of complaints, and the overall monitoring of the effectiveness of the enforcement activities of Federal agencies. As discussed above, §§35.170 and 35.171 have been revised to provide for referral of complaints by the Department of Justice to appropriate enforcement agencies. Also, language has been added to §35.190(a) of the final regulation stating that the Assistant Attorney General shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of this part.

Nondiscrimination On The Basis Of Disability by Public Accommodations and in Commercial Facilities

1. Summary

This rule implements title III of the Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination on the basis of disability by private entities in places of public accommodation, requires that all new places of public accommodation and commercial facilities be designed and constructed so as to be readily accessible to and usable by persons with disabilities, and requires that examinations or courses related to licensing or certification for professional and trade purposes be accessible to persons with disabilities.

The effective date of this rule is January 26, 1992.

For further information about this rule contact the Office on the Americans with Disabilities Act, Civil Rights Division; all of the U.S. Department of Justice, Washington, DC 20530. (202)514-0301 (Voice), (202)514-0383 (TDD). These telephone numbers are not toll-free numbers.

Copies of this rule are available in the following alternate formats: large print, Braille, electronic file on computer disk, and audio-tape. Copies may be obtained from the Office on the Americans with Disabilities Act at (202)514-0301 (Voice) or (202)514-0381 (TDD). The rule is also available on electronic bulletin board at (202)514-6193. These telephone numbers are not toll-free numbers.

2. Background

The landmark Americans with Disabilities Act ("ADA" or "the Act"), enacted on July 26, 1990, provides comprehensive civil rights protections to individuals with disabilities in the areas of employment, public accommodations, State and local government services, and telecommunications.

The legislation was originally developed by the National Council on Disability, an independent Federal agency that reviews and makes recommendations concerning Federal laws, programs, and policies affecting individuals with disabilities. In its 1986 study, "Toward Independence," the National Council on Disability recognized the inadequacy of the existing, limited patchwork of protections for individuals with disabilities, and recommended the enactment of a comprehensive civil rights law requiring equal opportunity for individuals with disabilities throughout American life. Although the 100th Congress did not act on the legislation, which was first introduced in 1988, then-Vice-President George Bush endorsed the concept of comprehensive disability rights legislation during his presidential campaign and became a dedicated advocate of the ADA.

The ADA was reintroduced in modified form in May 1989 for consideration by the 101st Congress. In June 1989, Attorney General Dick Thornburgh, in testimony before the Senate Committee on Labor and Human Resources, reiterated the Bush Administration's support for the ADA

and suggested changes in the proposed legislation. After extensive negotiations between Senate sponsors and the Administration, the Senate passed an amended version of the ADA on September 7, 1989, by a vote of 76-8.

In the House, jurisdiction over the ADA was divided among four committees, each of which conducted extensive hearings and issued detailed committee reports: the Committee on Education and Labor, the Committee on the Judiciary, the Committee on Public Works and Transportation, and the Committee on Energy and Commerce. On October 12, 1989, the Attorney General testified in favor of the legislation before the Committee on the Judiciary. The Civil Rights Division, on February 22, 1990, provided testimony to the Committee on Small Business, which although technically without jurisdiction over the bill, conducted hearings on the legislation's impact on small business.

After extensive committee consideration and floor debate, the House of Representatives passed an amended version of the Senate bill on May 22, 1990, by a vote of 403-20. After resolving their differences in conference, the Senate and House took final action on the bill -- the House passing it by a vote of 377-28 on July 12, 1990, and the Senate, a day later, by a vote of 91-6. The ADA was enacted into law with the President's signature at a White House ceremony on July 26, 1990.

3. Rulemaking History

On February 22, 1991, the Department of Justice published a notice of proposed rulemaking (NPRM) implementing title III of the ADA in the Federal Register (56 FR 7452). On February 28, 1991, the Department published a notice of proposed rulemaking implementing subtitle A of title II of the ADA in the Federal Register (56 FR 8538). Each NPRM solicited comments on the definitions, standards, and procedures of the proposed rules. By the April 29, 1991, close of the comment period of the NPRM for title II, the Department had received 2,718 comments on the two proposed rules. Following the close of the comment period, the Department received an additional 222 comments.

In order to encourage public participation in the development of the Department's rules under the ADA, the Department held four public hearings. Hearings were held in Dallas, Texas on March 4-5, 1991; in Washington, DC on March 13-14-15, 1991; in San Francisco, California on March 18-19, 1991; and in Chicago, Illinois on March 27-28, 1991. At these hearings, 329 persons testified and 1,567 pages of testimony were compiled. Transcripts of the hearings were included in the Department's rulemaking docket.

The comments that the Department received occupy almost six feet of shelf space and contain over 10,000 pages. The Department received comments from individuals from all fifty States and the District of Columbia. Nearly 75% of the comments came from individuals and from organizations representing the interests of persons with disabilities. The Department received 292 comments from entities covered by the ADA and trade associations representing businesses in the private sector, and 67 from government units, such as mayors' offices, public school districts, and various State agencies working with individuals with disabilities.

The Department received one comment from a consortium of 511 organizations representing a broad spectrum of persons with disabilities. In addition, at least another 25 commenters endorsed

the position expressed by this consortium or submitted identical comments on one or both proposed regulations.

An organization representing persons with hearing impairments submitted a large number of comments. This organization presented the Department with 479 individual comments, each providing in chart form a detailed representation of what type of auxiliary aid or service would be useful in the various categories of places of public accommodation.

The Department received a number of comments based on almost ten different form letters. For example, individuals who have a heightened sensitivity to a variety of chemical substances submitted 266 post cards detailing how exposure to various environmental conditions restricts their access to places of public accommodation and to commercial facilities. Another large group of form letters came from groups affiliated with independent living centers.

The vast majority of the comments addressed the Department's proposal implementing title III. Just over 100 comments addressed only issues presented in the proposed title II regulation.

The Department read and analyzed each comment that was submitted in a timely fashion. Transcripts of the four hearings were analyzed along with the written comments. The decisions that the Department has made in response to these comments, however, were not made on the basis of the number of commenters addressing any one point but on a thorough consideration of the merits of the points of view expressed in the comments. Copies of the written comments, including transcripts of the four hearings, will remain available for public inspection in Room 854 of the HOLC Building, 320 First Street, N.W., Washington, D.C. from 10:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays, until August 30, 1991.

The Americans with Disabilities Act gives to individuals with disabilities civil rights protections with respect to discrimination that are parallel to those provided to individuals on the basis of race, color, national origin, sex, and religion. It combines in its own unique formula elements drawn principally from two key civil rights statutes -- the Civil Rights Act of 1964 and title V of the Rehabilitation Act of 1973. The ADA generally employs the framework of titles II (42 U.S.C. 2000a to 2000a-6) and VII (42 U.S.C. 2000e to 2000e-16) of the Civil Rights Act of 1964 for coverage and enforcement and the terms and concepts of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for what constitutes discrimination.

Other recently enacted legislation will facilitate compliance with the ADA. As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers. The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing barriers, providing auxiliary aids, and acquiring or modifying equipment or devices.

In addition, the Communications Act of 1934 has been amended by the Television Decoder Circuitry Act of 1990, Public Law 101-431, to require as of July 1, 1993, that all televisions with screens of 13 inches or wider have built-in decoder circuitry for displaying closed captions. This new law will eventually lessen dependence on the use of portable decoders in achieving compliance with the auxiliary aids and services requirements of the rule.

4. Overview of the Rule

The final rule establishes standards and procedures for the implementation of title III of the Act, which addresses discrimination by private entities in places of public accommodation, commercial facilities, and certain examinations and courses. The careful consideration Congress gave title III is reflected in the detailed statutory provisions and the expansive reports of the Senate Committee on Labor and Human Resources and the House Committees on the Judiciary, and Education and Labor. The final rule follows closely the language of the Act and supplements it, where appropriate, with interpretive material found in the committee reports.

The rule is organized into six subparts. Subpart A, "General," includes the purpose and application sections, describes the relationship of the Act to other laws, and defines key terms used in the regulation.

Subpart B, "General Requirements," contains material derived from what the statute calls the "General Rule," and the "General Prohibition," in sections 302(a) and 302(b)(1), respectively, of the Act. Topics addressed by this subpart include discriminatory denials of access or participation, landlord and tenant obligations, the provision of unequal benefits, indirect discrimination through contracting, the participation of individuals with disabilities in the most integrated setting appropriate to their needs, and discrimination based on association with individuals with disabilities. Subpart B also contains a number of "miscellaneous" provisions derived from title V of the Act that involve issues such as retaliation and coercion for asserting ADA rights, illegal drug use, insurance, and restrictions on smoking in places of public accommodation. Finally, subpart B contains additional general provisions regarding direct threats to health or safety, maintenance of accessible features of facilities and equipment, and the coverage of places of public accommodation located in private residences.

Subpart C, "Specific Requirements," addresses the "Specific Prohibitions" in section 302(b)(2) of the Act. Included in this subpart are topics such as discriminatory eligibility criteria; reasonable modifications in policies, practices or procedures; auxiliary aids and services; the readily achievable removal of barriers and alternatives to barrier removal; the extent to which inventories of accessible or special goods are required; seating in assembly areas; personal devices and services; and transportation provided by public accommodations. Subpart C also incorporates the requirements of section 309 of title III relating to examinations and courses.

Subpart D, "New Construction and Alterations," sets forth the requirements for new construction and alterations based on section 303 of the Act. It addresses such issues as what facilities are covered by the new construction requirements, what an alteration is, the application of the elevator exception, the path of travel obligations resulting from an alteration to a primary function

area, requirements for commercial facilities located in private residences, and the application of alterations requirements to historic buildings and facilities.

Subpart E, "Enforcement," describes the Act's title III enforcement procedures, including private actions, as well as investigations and litigation conducted by the Attorney General. These provisions are based on sections 308 and 310(b) of the Act.

Subpart F, "Certification of State Laws or Local Building Codes," establishes procedures for the certification of State or local building accessibility ordinances that meet or exceed the new construction and alterations requirements of the ADA. These provisions are based on section 308(b)(1)(A)(ii) of the Act.

The section-by-section analysis of the rule explains in detail the provisions of each of these subparts.

The Department is also today publishing a final rule for the implementation and enforcement of subtitle A of title II of the Act. This rule prohibits discrimination on the basis of disability against qualified individuals with disabilities in all services, programs, or activities of State and local government.

5. Regulatory Process Matters

This final rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12291. The Department is preparing a regulatory impact analysis (RIA) of this rule, and the Architectural and Transportation Barriers Compliance Board is preparing an RIA for its Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) that are incorporated in Appendix A of the Department's final rule. Draft copies of both preliminary RIAs are available for comment; the Department will provide copies of these documents to the public upon request. Commenters are urged to provide additional information as to the costs and benefits associated with this rule. This will facilitate the development of a final RIA by January 1, 1992.

The Department's RIA will evaluate the economic impact of the final rule. Included among those title III provisions that are likely to result in significant economic impact are the requirements for auxiliary aids, barrier removal in existing facilities, and readily accessible new construction and alterations. An analysis of the costs of these provision will be included in the RIA.

The preliminary RIA prepared for the notice of proposed rulemaking contained all of the available information that would have been included in a preliminary regulatory flexibility analysis, had one been prepared under the Regulatory Flexibility Act, concerning the rule's impact on small entities. The final RIA will contain all of the information that is required in a final regulatory flexibility analysis, and will serve as such an analysis. Moreover, the extensive notice and comment procedure followed by the Department in the promulgation of this rule, which included public hearings, dissemination of materials, and provision of speakers to affected groups, clearly provided any interested small entities with the notice and opportunity for comment provided for under the Regulatory Flexibility Act procedures.

This final rule will preempt State laws affecting entities subject to the ADA only to the extent that those laws directly conflict with the statutory requirements of the ADA. Therefore, this rule is not subject to Executive Order 12612, and a Federalism Assessment is not required.

The reporting and recordkeeping requirements described in subpart F of the rule are considered to be information collection requirements as that term is defined by the Office of Management and Budget in 5 CFR part 1320. Accordingly, those information collection requirements have been submitted to OMB for review pursuant to the Paperwork Reduction Act.

6. Outline of the Rule

Part 36 -- NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; Pub. L. 101-336, 42 U.S.C. 12186.

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Subpart A -- General

§36.101 Purpose.

The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

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Subpart A -- General

Section 36.101 Purpose.

Section 36.101 states the purpose of the rule, which is to effectuate title III of the Americans with Disabilities Act of 1990. This title prohibits discrimination on the basis of disability by public accommodations, requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part, and requires that examinations or courses related to licensing or certification for professional or trade purposes be accessible to persons with disabilities.

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§36.102 Application.

(a) General. This part applies to any--

(1) Public accommodation;

(2) Commercial facility; or

(3) Private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.

(b) Public accommodations.

(1) The requirements of this part applicable to public accommodations are set forth in subparts B, C, and D of this part.

(2) The requirements of subparts B and C of this part obligate a public accommodation only with respect to the operations of a place of public accommodation.

(3) The requirements of subpart D of this part obligate a public accommodation only with respect to--

(i) A facility used as, or designed or constructed for use as, a place of public accommodation; or

(ii) A facility used as, or

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Section 36.102 Application.

Section 36.102 specifies the range of entities and facilities that have obligations under the final rule. The rule applies to any public accommodation or commercial facility as those terms are defined in §36.104. It also applies, in accordance with section 309 of the ADA, to private entities that offer examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes. Except as provided in §36.206, "Retaliation or coercion," this part does not apply to individuals other than public accommodations or to public entities. Coverage of private individuals and public entities is discussed in the preamble to §36.206.

As defined in §36.104, a public accommodation is a private entity that owns, leases or leases to, or operates a place of public accommodation. Section 36.102(b)(2) emphasizes that the general and specific public accommodations requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. This distinction is drawn in recognition of the fact that a private entity that meets the regulatory definition of public accommodation could also own, lease or lease to, or operate facilities that are not places of public accommodation. The rule would exceed the reach of the ADA if it were to apply the public accommodations requirements of subparts B and C to the operations of a private entity that do not involve a place of public accommodation. Similarly, §36.102(b)(3) provides that the new construction and alterations requirements of subpart D obligate a public accommodation only with respect to facilities used as, or designed or constructed for use as, places of public accommodation or commercial facilities.

On the other hand, as mandated by the ADA and reflected in §36.102(c), the new construction and alterations requirements of subpart D apply to a commercial facility whether or not the facility is a place of public accommodation, or is owned, leased, leased to, or operated by a public accommodation.

Section 36.102(e) states that the rule does not apply to any private club, religious entity, or public entity. Each of these terms is defined in §36.104. The exclusion of private clubs and religious entities is derived from section 307 of the ADA; and the exclusion of public entities is based on the

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designed and constructed for use as, a commercial facility.

(c) Commercial facilities. The requirements of this part applicable to commercial facilities are set forth in subpart D of this part.

(d) Examinations and courses. The requirements of this part applicable to private entities that offer examinations or courses as specified in paragraph (a) of this section are set forth in §36.309.

(e) Exemptions and exclusions. This part does not apply to any private club (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation), or to any religious entity or public entity.

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statutory definition of public accommodation in section 301(7) of the ADA, which excludes entities other than private entities from coverage under title III of the ADA.

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§36.103 Relationship to other laws.

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

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

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

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Section 36.103 Relationship to other laws.

Section 36.103 is derived from sections 501 (a) and (b) of the ADA. Paragraph (a) provides that, except as otherwise specifically provided by this part, the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790-794), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard from title V. Where the ADA explicitly provides a different standard from section 504, the ADA standard applies to the ADA, but not to section 504. For example, section 504 requires that all federally assisted programs and activities be readily accessible to and usable by individuals with handicaps, even if major structural alterations are necessary to make a program accessible. Title III of the ADA, in contrast, only requires alterations to existing facilities if the modifications are "readily achievable," that is, able to be accomplished easily and without much difficulty or expense. A public accommodation that is covered under both section 504 and the ADA is still required to meet the "program accessibility" standard in order to comply with section 504, but would not be in violation of the ADA unless it failed to make "readily achievable" modifications. On the other hand, an entity covered by the ADA is required to make "readily achievable" modifications, even if the program can be made accessible without any architectural modifications. Thus, an entity covered by both section 504 and title III of the ADA must meet both the "program accessibility" requirement and the "readily achievable" requirement.

Paragraph (b) makes explicit that the rule does not affect the obligation of recipients of Federal financial assistance to comply with the requirements imposed under section 504 of the Rehabilitation Act of 1973.

Paragraph (c) makes clear that Congress did not intend to displace any of the rights or remedies provided by other Federal laws or other State or local laws (including State common law) that provide greater or equal protection to individuals with disabilities. A plaintiff may choose to pursue claims under a State law that does not confer greater substantive rights, or even confers fewer substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, assume that a person with a physical disability seeks damages under a State

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law that allows compensatory and punitive damages for discrimination on the basis of physical disability, but does not allow them on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

A commenter had concerns about privacy requirements for banking transactions using telephone relay services. Title IV of the Act provides adequate protections for ensuring the confidentiality of communications using the relay services. This issue is more appropriately addressed by the Federal Communications Commission in its regulation implementing title IV of the Act.

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§36.104 Definitions.

For purposes of this part, the term--

Act means the Americans with Disabilities Act of 1990 (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

Commerce means travel, trade, traffic, commerce, transportation, or communication--

(1) Among the several States;

(2) Between any foreign country or any territory or possession and any State; or

(3) Between points in the same State but through another State or foreign country.

Commercial facilities means facilities --

(1) Whose operations will affect commerce;

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Section 36.104 Definitions.

"Act." The word "Act" is used in the regulation to refer to the Americans with Disabilities Act of 1990, Pub. L. 101-336, which is also referred to as the "ADA."

. . .

"Commerce." The definition of "commerce" is identical to the statutory definition provided in section 301(1) of the ADA. It means travel, trade, traffic, commerce, transportation, or communication among the several States, between any foreign country or any territory or possession and any State, or between points in the same State but through another State or foreign country. Commerce is defined in the same manner as in title II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations.

The term "commerce" is used in the definition of "place of public accommodation." According to that definition, one of the criteria that an entity must meet before it can be considered a place of public accommodation is that its operations affect commerce. The term "commerce" is similarly used in the definition of "commercial facility."

The use of the phrase "operations affect commerce" applies the full scope of coverage of the Commerce Clause of the Constitution in enforcing the ADA. The Constitution gives Congress broad authority to regulate interstate commerce, including the activities of local business enterprises (e.g., a physician's office, a neighborhood restaurant, a laundromat, or a bakery) that affect interstate commerce through the purchase or sale of products manufactured in other States, or by providing services to individuals from other States. Because of the integrated nature of the national economy, the ADA and this final rule will have extremely broad application.

"Commercial facilities" are those facilities that are intended for nonresidential use by a private entity and whose operations affect commerce. As explained under §36.401, "New construction," the new construction and alteration requirements of subpart D of the rule apply to all commercial facilities, whether or not they are places of public accommo-

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(2) That are intended for nonresidential use by a private entity; and

(3) That are not --

(i) Facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601-3631);

(ii) Aircraft; or

(iii) Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars (including coaches, dining cars, sleeping cars, lounge cars, and food service cars), any other railroad cars described in section 242 of the Act or covered under title II of the Act, or railroad rights-of-way. For purposes of this definition, "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

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dation. Those commercial facilities that are not places of public accommodation are not subject to the requirements of subparts B and C (e.g., those requirements concerning auxiliary aids and general nondiscrimination provisions).

Congress recognized that the employees within commercial facilities would generally be protected under title I (employment) of the Act. However, as the House Committee on Education and Labor pointed out, "[t]o the extent that new facilities are built in a manner that make[s] them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 117 (1990) [hereinafter "Education and Labor report"]. While employers of fewer than 15 employees are not covered by title I's employment discrimination provisions, there is no such limitation with respect to new construction covered under title III. Congress chose not to so limit the new construction provisions because of its desire for a uniform requirement of accessibility in new construction, because accessibility can be accomplished easily in the design and construction stage, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is a place of public accommodation is always a possibility.

The term "commercial facilities" is not intended to be defined by dictionary or common industry definitions. Included in this category are factories, warehouses, office buildings, and other buildings in which employment may occur. The phrase, "whose operations affect commerce," is to be read broadly, to include all types of activities reached under the commerce clause of the Constitution.

Privately operated airports are also included in the category of commercial facilities. They are not, however, places of public accommodation because they are not terminals used for "specified public transportation." (Transportation by aircraft is specifically excluded from the statutory definition of "specified public transportation.") Thus, privately operated airports are subject to the new construction and alteration requirements of this rule (subpart D) but not to subparts B and C. (Airports operated by public entities are covered by title II of the Act.) Places of public accommodation located within airports, such as restaurants, shops, lounges, or conference centers, however, are covered by subparts B and C of this part.

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Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

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The statute's definition of "commercial facilities" specifically includes only facilities "that are intended for nonresidential use" and specifically exempts those facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601-3631). The interplay between the Fair Housing Act and the ADA with respect to those facilities that are "places of public accommodation" was the subject of many comments and is addressed in the preamble discussion of the definition of "place of public accommodation."

"Current illegal use of drugs." The phrase "current illegal use of drugs" is used in §36.209. Its meaning is discussed in the preamble for that section.

"Disability." The definition of the term "disability" is comparable to the definition of the term "individual with handicaps" in section 7(8)(B) of the Rehabilitation Act and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban Development in its regulation implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply fully to the term "disability" (Education and Labor report at 50).

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by the Congress to make use of up-to-date, currently accepted terminology. The terminology applied to individuals with disabilities is a very significant and sensitive issue. As with racial and ethnic terms, the choice of words to describe a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as "handicapped person" or "the handicapped." In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the

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name of the National Council on the Handicapped to the National Council on Disability (Pub. L. 100-630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should be attributed to this change in phraseology.

The term "disability" means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. It has worked well since it was adopted in 1974. There is a substantial body of administrative interpretation and judicial precedent on this definition. Finally, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

(1) The phrase physical or mental impairment means --

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special

Test A -- A Physical or Mental Impairment That Substantially Limits One or More of the Major Life Activities of Such Individual

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1)(i) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal;

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sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;

(iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

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special sense organs (including speech organs that are not respiratory, such as vocal cords, soft palate, and tongue); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, e.g., 45 CFR 84.3(j)(2)(i)).

Many commenters asked that "traumatic brain injury" be added to the list in paragraph (1)(i). Traumatic brain injury is already included because it is a physiological condition affecting one of the listed body systems, i.e., "neurological." Therefore, it was unnecessary for the Department to add the term to the regulation.

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future. However, the list of examples in paragraph (1)(iii) of the definition includes: orthopedic, visual, speech and hearing impairments; cerebral palsy; epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

The examples of "physical or mental impairments" in paragraph (1)(iii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease (symptomatic or asymptomatic)" and "tuberculosis" to the list of examples. These additions are based on the ADA committee reports, caselaw, and official legal opinions interpreting section 504. In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the Arline decision, this Department's Office of Legal Counsel issued a legal opinion

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(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase is regarded as having an impairment means --

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a private entity as having such an impairment.

(5) The term disability does not include --

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

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that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 346 (1989). The phrase "symptomatic or asymptomatic" was inserted in the final rule after "HIV disease" in response to commenters who suggested that the clarification was necessary to give full meaning to the Department's opinion.

Paragraph (1)(iv) of the definition states that the phrase "physical or mental impairment" does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

Substantial limitation of a major life activity. Under Test A, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. For example, a person who is paraplegic is substantially

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(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

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limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

The Department received many comments on the proposed rule's inclusion of the word "temporary" in the definition of "disability." The preamble indicated that impairments are not necessarily excluded from the definition of "disability" simply because they are temporary, but that the duration, or expected duration, of an impairment is one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. The preamble recognized, however, that temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial. Nevertheless, many commenters objected to inclusion of the word "temporary" both because it is not in the statute and because it is not contained in the definition of "disability" set forth in the title I regulations of the Equal Employment Opportunity Commission (EEOC). The word "temporary" has been deleted from the final rule to conform with the statutory language. The question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

The question of whether a person has a disability should

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be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect).

Sometimes respiratory or neurological functioning is so severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all of the protections afforded by the Act and this part. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life activity of breathing may be somewhat, but not substantially, impaired. In such circumstances, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents.

In sum, the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized by the commenters as environmental illness are disabilities covered by the regulation must be made using the same case-by-case analysis that is applied to all other physical or mental impairments. Moreover, the addition of specific regulatory provisions relating to environmental illness in the final rule would be inappropriate at this time pending future consideration of the issue by the Architectural and Transportation Barriers Compliance Board, the Environmental Protection Agency, and the Occupational Safety and Health Administration of the

Department of Labor.

Test B -- A Record of Such an Impairment

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

Test C -- Being Regarded as Having Such an Impairment

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a private entity or public accommodation as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

(iv) "Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph

(k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The perception of the private entity or public accommodation is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test. A person would be covered under this test if a restaurant refused to serve that person because of a fear of "negative reactions" of others to that person. A person would also be covered if a public accommodation refused to serve a patron because it perceived that the patron had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." Id. at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Id. at 284.

Thus, a person who is not allowed into a public accommodation because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public

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accommodation can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public accommodation's perception is inaccurate (e.g., that he will be accepted by others, or that insurance rates will not increase) in order to be admitted to the public accommodation.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of "disability." The excluded conditions are: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)) or section 504, the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments under section 504. (Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Amendments Act of 1988, Pub. L. 100-430, §6(b).) The phrase "current illegal use of drugs" used in this definition is explained in the preamble to §36.209.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

"Drug." The definition of the term "drug" is taken from section 510(d)(2) of the ADA.

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property,

"Facility." "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. Committee reports made clear that the definition of facility was drawn from the definition of facility in current Federal regulations (see, e.g., Education and Labor report at 114). It includes both indoor and outdoor areas where human-con-

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structure, or equipment is located.

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structed improvements, structures, equipment, or property have been added to the natural environment.

The term "rolling stock or other conveyances" was not included in the definition of facility in the proposed rule. However, commenters raised questions about the applicability of this part to places of public accommodation operated in mobile facilities (such as cruise ships, floating restaurants, or mobile health units). Those places of public accommodation are covered under this part, and would be included in the definition of "facility." Thus the requirements of subparts B and C would apply to those places of public accommodation. For example, a covered entity could not discriminate on the basis of disability in the full and equal enjoyment of the facilities (§36.201). Similarly, a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are "necessary," as provided in §36.301.

However, standards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by §36.406 and incorporated in Appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements.

Requirements pertaining to accessible transportation services provided by public accommodations are included in §36.310 of this part; standards pertaining to accessible vehicles will be issued by the Secretary of Transportation pursuant to section 306 of the Act, and will be codified at 49 CFR Part 37.

A public accommodation has obligations under this rule with respect to a cruise ship to the extent that its operations are subject to the laws of the United States.

The definition of "facility" only includes the site over which the private entity may exercise control or on which a place of public accommodation or a commercial facility is located. It does not include, for example, adjacent roads or walks controlled by a public entity that is not subject to this part. Public entities are subject to the requirements of title II of the Act. The Department's regulation implementing title II,

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Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs" does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the private entity acts on the basis of such use.

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

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the estab-

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which will be codified at 28 CFR part 35, addresses the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

"Illegal use of drugs." The definition of "illegal use of drugs" is taken from section 510(d)(1) of the Act and clarifies that the term includes the illegal use of one or more drugs.

"Individual with a disability" means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public accommodation acts on the basis of such use. The phrase "current illegal use of drugs" is explained in the preamble to §36.209.

"Place of public accommodation." The term "place of public accommodation" is an adaptation of the statutory definition of "public accommodation" in section 301(7) of the ADA and appears as an element of the regulatory definition of public accommodation. The final rule defines "place of public accommodation" as a facility, operated by a private entity, whose operations affect commerce and fall within at least one of 12 specified categories. The term "public accommodation," on the other hand, is reserved by the final rule for the private entity that owns, leases (or leases to), or operates a place of public accommodation. It is the public accommodation, and not the place of public accommodation, that is subject to the regulation's nondiscrimination requirements. Placing the obligation not to discriminate on the public accommodation, as defined in the rule, is consistent with section 302(a) of the ADA, which places the obligation not to

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lishment as the residence of the proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, drycleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used for specified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

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discriminate on any person who owns, leases (or leases to), or operates a place of public accommodation.

Facilities operated by government agencies or other public entities as defined in this section do not qualify as places of public accommodation. The actions of public entities are governed by title II of the ADA and will be subject to regulations issued by the Department of Justice under that title. The receipt of government assistance by a private entity does not by itself preclude a facility from being considered as a place of public accommodation.

The definition of place of public accommodation incorporates the 12 categories of facilities represented in the statutory definition of public accommodation in section 301(7) of the ADA:

1. Places of lodging.
2. Establishments serving food or drink.
3. Places of exhibition or entertainment.
4. Places of public gathering.
5. Sales or rental establishments.
6. Service establishments.
7. Stations used for specified public transportation.
8. Places of public display or collection.
9. Places of recreation.
10. Places of education.
11. Social service center establishments.
12. Places of exercise or recreation.

In order to be a place of public accommodation, a facility must be operated by a private entity, its operations must affect commerce, and it must fall within one of these 12 categories. While the list of categories is exhaustive, the representative examples of facilities within each category are not. Within

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(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

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each category only a few examples are given. The category of social service center establishments would include not only the types of establishments listed, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, but also establishments such as substance abuse treatment centers, rape crisis centers, and halfway houses. As another example, the category of sales or rental establishments would include an innumerable array of facilities that would sweep far beyond the few examples given in the regulation. For example, other retail or wholesale establishments selling or renting items, such as bookstores, videotape rental stores, car rental establishments, pet stores, and jewelry stores would also be covered under this category, even though they are not specifically listed.

Several commenters requested clarification as to the coverage of wholesale establishments under the category of "sales or rental establishments." The Department intends for wholesale establishments to be covered under this category as places of public accommodation except in cases where they sell exclusively to other businesses and not to individuals. For example, a company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these transactions. If this company operates a road side stand where its crops are sold to the public, the road side stand would be a sales establishment covered by the ADA. Conversely, a sales establishment that markets its goods as "wholesale to the public" and sells to individuals would not be exempt from ADA coverage despite its use of the word "wholesale" as a marketing technique.

Of course, a company that operates a place of public accommodation is subject to this part only in the operation of that place of public accommodation. In the example given above, the wholesale produce company that operates a road side stand would be a public accommodation only for the purposes of the operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access to the extent that it is readily achievable to do so (see §36.304); however, in the event that it is not readily achievable to remove barriers, for example, by replacing a gravel surface or regrading the area around the stand to permit access by persons with mobility impairments, the company could meet its obligations through

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alternative methods of making its goods available, such as delivering produce to a customer in his or her car (see §36.305). The concepts of readily achievable barrier removal and alternatives to barrier removal are discussed further in the preamble discussion of §§36.304 and 36.305.

Even if a facility does not fall within one of the 12 categories, and therefore does not qualify as a place of public accommodation, it still may be a commercial facility as defined in §36.104 and be subject to the new construction and alterations requirements of subpart D.

A number of commenters questioned the treatment of residential hotels and other residential facilities in the Department's proposed rule. These commenters were essentially seeking resolution of the relationship between the Fair Housing Act and the ADA concerning facilities that are both residential in nature and engage in activities that would cause them to be classified as "places of public accommodation" under the ADA. The ADA's express exemption relating to the Fair Housing Act applies only to "commercial facilities" and not to "places of public accommodation."

A facility whose operations affect interstate commerce is a place of public accommodation for purposes of the ADA to the extent that its operations include those types of activities engaged in or services provided by the facilities contained on the list of 12 categories in section 301(7) of the ADA. Thus, a facility that provides social services would be considered a "social service center establishment." Similarly, the category "places of lodging" would exclude solely residential facilities because the nature of a place of lodging contemplates the use of the facility for short-term stays.

Many facilities, however, are mixed use facilities. For example, in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA because of the nature of the occupancy of that part of the facility. This residential wing would, however, be covered by the Fair Housing Act. The separate nonresidential accommodations in the rest of the hotel would be a place of lodging, and thus a public accommodation subject to the requirements of this final rule. If a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility. Such determinations will need

to be made on a case-by-case basis. Any place of lodging of the type described in paragraph (1) of the definition of place of public accommodation and that is an establishment located within a building that contains not more than five rooms for rent or hire and is actually occupied by the proprietor of the establishment as his or her residence is not covered by the ADA. (This exclusion from coverage does not apply to other categories of public accommodations, for example, professional offices or homeless shelters, that are located in a building that is also occupied as a private residence.)

A number of commenters noted that the term "residential hotel" may also apply to a type of hotel commonly known as a "single room occupancy hotel." Although such hotels or portions of such hotels may fall under the Fair Housing Act when operated or used as long-term residences, they are also considered "places of lodging" under the ADA when guests of such hotels are free to use them on a short-term basis. In addition, "single room occupancy hotels" may provide social services to their guests, often through the operation of Federal or State grant programs. In such a situation, the facility would be considered a "social service center establishment" and thus covered by the ADA as a place of public accommodation, regardless of the length of stay of the occupants.

A similar analysis would also be applied to other residential facilities that provide social services, including homeless shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time. Such facilities should be analyzed under the Fair Housing Act to determine the application of that statute. The ADA, however, requires a separate and independent analysis. For example, if the facility, or a portion of the facility, is intended for or permits short-term stays, or if it can appropriately be categorized as a service establishment or as a social service establishment, then the facility or that portion of the facility used for the covered purpose is a place of public accommodation under the ADA. For example, a homeless shelter that is intended and used only for long-term residential stays and that does not provide social services to its residents would not be covered as a place of public accommodation. However, if this facility permitted short-term stays or provided social services to its residents, it would be covered under the ADA either as a "place of lodging" or as a "social service center establishment," or as both.

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A private home, by itself, does not fall within any of the 12 categories. However, it can be covered as a place of public accommodation to the extent that it is used as a facility that would fall within one of the 12 categories. For example, if a professional office of a dentist, doctor, or psychologist is located in a private home, the portion of the home dedicated to office use (including areas used both for the residence and the office, e.g., the entrance to the home that is also used as the entrance to the professional office) would be considered a place of public accommodation. Places of public accommodation located in residential facilities are specifically addressed in §36.207.

If a tour of a commercial facility that is not otherwise a place of public accommodation, such as, for example, a factory or a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and the tour must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route. Hence, the barrier removal requirements of §36.304 only apply to the physical route followed by the tour participants and not to work stations or other areas that are merely adjacent to, or within view of, the tour route. If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place of public accommodation and the tour is not subject to the requirements for public accommodations.

Public accommodations that receive Federal financial assistance are subject to the requirements of section 504 of the Rehabilitation Act as well as the requirements of the ADA.

Private schools, including elementary and secondary schools, are covered by the rule as places of public accommodation. The rule itself, however, does not require a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations of the Department of Education implementing section 504 of the Rehabilitation Act of 1973, as amended (34 CFR part 104), and regulations implementing the Individuals with Disabilities Education Act (34 CFR part 300). The receipt of Federal assistance by a private school, however, would trigger application of the Department of Education's regulations to

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Private club means a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)).

the extent mandated by the particular type of assistance received.

"Private club." The term "private club" is defined in accordance with section 307 of the ADA as a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964. Title II of the 1964 Act exempts any "private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of [a place of public accommodation as defined in title II]." The rule, therefore, as reflected in §36.102(e) of the application section, limits the coverage of private clubs accordingly. The obligations of a private club that rents space to any other private entity for the operation of a place of public accommodation are discussed further in connection with §36.201.

In determining whether a private entity qualifies as a private club under title II, courts have considered such factors as the degree of member control of club operations, the selectivity of the membership selection process, whether substantial membership fees are charged, whether the entity is operated on a nonprofit basis, the extent to which the facilities are open to the public, the degree of public funding, and whether the club was created specifically to avoid compliance with the Civil Rights Act. See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Daniel v. Paul, 395 U.S. 298 (1969); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974); Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855 (5th Cir. 1974); Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972); Stout v. YMCA, 404 F.2d 687 (5th Cir. 1968); United States v. Richberg, 398 F.2d 523 (5th Cir. 1968); Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968); United States v. Lansdowne Swim Club, 713 F. Supp. 785 (E.D. Pa. 1989); Durham v. Red Lake Fishing and Hunting Club, Inc., 666 F. Supp. 954 (W.D. Tex. 1987); New York v. Ocean Club, Inc., 602 F. Supp. 489 (E.D.N.Y. 1984); Brown v. Loudoun Golf and Country Club, Inc., 573 F. Supp. 399 (E.D. Va. 1983); United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis. 1979); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974).

Private entity means a person or entity other than a public entity.

"Private entity." The term "private entity" is defined as any individual or entity other than a public entity. It is used as part of the definition of "public accommodation" in this section.

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Public accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation.

Public entity means --

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act (45 U.S.C. 541)).

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The definition adds "individual" to the statutory definition of private entity (see section 301(6) of the ADA). This addition clarifies that an individual may be a private entity and, therefore, may be considered a public accommodation if he or she owns, leases (or leases to), or operates a place of public accommodation. The explicit inclusion of individuals under the definition of private entity is consistent with section 302(a) of the ADA, which broadly prohibits discrimination on the basis of disability by any person who owns, leases (or leases to), or operates a place of public accommodation.

"Public accommodation." The term "public accommodation" means a private entity that owns, leases (or leases to), or operates a place of public accommodation. The regulatory term, "public accommodation," corresponds to the statutory term, "person," in section 302(a) of the ADA. The ADA prohibits discrimination "by any person who owns, leases (or leases to), or operates a place of public accommodation." The text of the regulation consequently places the ADA's nondiscrimination obligations on "public accommodations" rather than on "persons" or on "places of public accommodation."

As stated in §36.102(b)(2), the requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. A public accommodation must also meet the requirements of subpart D with respect to facilities used as, or designed or constructed for use as, places of public accommodation or commercial facilities.

"Public entity." The term "public entity" is defined in accordance with section 201(1) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). It is used in the definition of "private entity" in §36.104. Public entities are excluded from the definition of private entity and therefore cannot qualify as public accommodations under this regulation. However, the actions of public entities are covered by title II of the ADA and by the Department's title II regulations codified at 28 CFR part 35.

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Qualified interpreter means an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary.

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"Qualified interpreter." The Department received substantial comment regarding the lack of a definition of "qualified interpreter." The proposed rule defined auxiliary aids and services to include the statutory term, "qualified interpreters" (§36.303(b)), but did not define that term. Section 36.303 requires the use of a qualified interpreter where necessary to achieve effective communication, unless an undue burden or fundamental alteration would result. Commenters stated that a lack of guidance on what the term means would create confusion among those trying to secure interpreting services and often result in less than effective communication.

Many commenters were concerned that, without clear guidance on the issue of "qualified" interpreter, the rule would be interpreted to mean "available, rather than qualified" interpreters. Some claimed that few public accommodations would understand the difference between a qualified interpreter and a person who simply knows a few signs or how to fingerspell.

In order to clarify what is meant by "qualified interpreter" the Department has added a definition of the term to the final rule. A qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. This definition focuses on the actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public accommodation and the individual with disabilities.

Public comment also revealed that public accommodations have at times asked persons who are deaf to provide family members or friends to interpret. In certain circumstances, notwithstanding that the family member or friend is able to interpret or is a certified interpreter, the family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret "effectively, accurately, and impartially."

Readily achievable means easily accomplishable and able to be carried out without much difficulty or

"Readily achievable." The definition of "readily achievable" follows the statutory definition of that term in section 301(9) of the ADA. Readily achievable means easily accomplishable and able to be carried out without much

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expense. In determining whether an action is readily achievable factors to be considered include--

(1) The nature and cost of the action needed under this part;

(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

(3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of

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difficulty or expense. The term is used as a limitation on the obligation to remove barriers under §§36.304(a), 36.305(a), 36.308(a), and 36.310(b). Further discussion of the meaning and application of the term "readily achievable" may be found in the preamble section for §36.304.

The definition lists factors to be considered in determining whether barrier removal is readily achievable in any particular circumstance. A significant number of commenters objected to §36.306 of the proposed rule, which listed identical factors to be considered for determining "readily achievable" and "undue burden" together in one section. They asserted that providing a consolidated section blurred the distinction between the level of effort required by a public accommodation under the two standards. The readily achievable standard is a "lower" standard than the "undue burden" standard in terms of the level of effort required, but the factors used in determining whether an action is readily achievable or would result in an undue burden are identical (see Education and Labor report at 109). Although the preamble to the proposed rule clearly delineated the relationship between the two standards, to eliminate any confusion the Department has deleted §36.306 of the proposed rule. That section, in any event, as other commenters noted, had merely repeated the lists of factors contained in the definitions of readily achievable and undue burden.

The list of factors included in the definition is derived from section 301(9) of the ADA. It reflects the congressional intention that a wide range of factors be considered in determining whether an action is readily achievable. It also takes into account that many local facilities are owned or operated by parent corporations or entities that conduct operations at many different sites. This section makes clear that, in some instances, resources beyond those of the local facility where the barrier must be removed may be relevant in determining whether an action is readily achievable. One must also evaluate the degree to which any parent entity has resources that may be allocated to the local facility.

The statutory list of factors in section 301(9) of the Act uses the term "covered entity" to refer to the larger entity of which a particular facility may be a part. "Covered entity" is not a defined term in the ADA and is not used consistently throughout the Act. The definition, therefore, substitutes the term "parent entity" in place of "covered entity" in paragraphs

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the parent corporation or entity.

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(3), (4), and (5) when referring to the larger private entity whose overall resources may be taken into account. This usage is consistent with the House Judiciary Committee's use of the term "parent company" to describe the larger entity of which the local facility is a part (H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 40-41, 54-55 (1990) [hereinafter "Judiciary report"]).

A number of commenters asked for more specific guidance as to when and how the resources of a parent corporation or entity are to be taken into account in determining what is readily achievable. The Department believes that this complex issue is most appropriately resolved on a case-by-case basis. As the comments reflect, there is a wide variety of possible relationships between the site in question and any parent corporation or other entity. It would be unwise to posit legal ramifications under the ADA of even generic relationships (e.g., banks involved in foreclosures or insurance companies operating as trustees or in other similar fiduciary relationships), because any analysis will depend so completely on the detailed fact situations and the exact nature of the legal relationships involved. The final rule does, however, reorder the factors to be considered. This shift and the addition of the phrase "if applicable" make clear that the line of inquiry concerning factors will start at the site involved in the action itself. This change emphasizes that the overall resources, size, and operations of the parent corporation or entity should be considered to the extent appropriate in light of "the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity."

Although some commenters sought more specific numerical guidance on the definition of readily achievable, the Department has declined to establish in the final rule any kind of numerical formula for determining whether an action is readily achievable. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodations requirements and the economic situation that any particular entity would find itself in at any moment. The final rule, therefore, implements the flexible case-by-case approach chosen by Congress.

A number of commenters requested that security considerations be explicitly recognized as a factor in determining

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whether a barrier removal action is readily achievable. The Department believes that legitimate safety requirements, including crime prevention measures, may be taken into account so long as they are based on actual risks and are necessary for safe operation of the public accommodation. This point has been included in the definition.

Some commenters urged the Department not to consider acts of barrier removal in complete isolation from each other in determining whether they are readily achievable. The Department believes that it is appropriate to consider the cost of other barrier removal actions as one factor in determining whether a measure is readily achievable.

Religious entity means a religious organization or entity controlled by a religious organization, including a place of worship.

"Religious entity." The term "religious entity" is defined in accordance with section 307 of the ADA as a religious organization or entity controlled by a religious organization, including a place of worship. Section 36.102(e) of the rule states that the rule does not apply to any religious entity.

The ADA's exemption of religious organizations and religious entities controlled by religious organizations is very broad, encompassing a wide variety of situations. Religious organizations and entities controlled by religious organizations have no obligations under the ADA. Even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage. Thus, if a church itself operates a day care center, a nursing home, a private school, or a diocesan school system, the operations of the center, home, school, or schools would not be subject to the requirements of the ADA or this part. The religious entity would not lose its exemption merely because the services provided were open to the general public. The test is whether the church or other religious organization operates the public accommodation, not which individuals receive the public accommodation's services.

Religious entities that are controlled by religious organizations are also exempt from the ADA's requirements. Many religious organizations in the United States use lay boards and other secular or corporate mechanisms to operate schools and an array of social services. The use of a lay board or other mechanism does not itself remove the ADA's religious exemption. Thus, a parochial school, having religious doctrine in its curriculum and sponsored by a religious order, could be exempt either as a religious organization or as an entity con-

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trolled by a religious organization, even if it has a lay board. The test remains a factual one -- whether the church or other religious organization controls the operations of the school or of the service or whether the school or service is itself a religious organization.

Although a religious organization or a religious entity that is controlled by a religious organization has no obligations under the rule, a public accommodation that is not itself a religious organization, but that operates a place of public accommodation in leased space on the property of a religious entity, which is not a place of worship, is subject to the rule's requirements if it is not under control of a religious organization. When a church rents meeting space, which is not a place of worship, to a local community group or to a private, independent day care center, the ADA applies to the activities of the local community group and day care center if a lease exists and consideration is paid.

Service animal means any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

"Service animal." The term "service animal" encompasses any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. The term is used in §36.302(c), which requires public accommodations generally to modify policies, practices, and procedures to accommodate the use of service animals in places of public accommodation.

Specified public transportation means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

"Specified public transportation." The definition of "specified public transportation" is identical to the statutory definition in section 301(10) of the ADA. The term means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis. It is used in category (7) of the definition of "place of public accommodation," which includes stations used for specified public transportation.

The effect of this definition, which excludes transporta-

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State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include--

(1) The nature and cost of the action needed under this part;

(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including

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tion by aircraft, is that it excludes privately operated airports from coverage as places of public accommodation. However, places of public accommodation located within airports would be covered by this part. Airports that are operated by public entities are covered by title II of the ADA and, if they are operated as part of a program receiving Federal financial assistance, by section 504 of the Rehabilitation Act. Privately operated airports are similarly covered by section 504 if they are operated as part of a program receiving Federal financial assistance. The operations of any portion of any airport that are under the control of an air carrier are covered by the Air Carrier Access Act. In addition, airports are covered as commercial facilities under this rule.

"State." The definition of "State" is identical to the statutory definition in section 3(3) of the ADA. The term is used in the definitions of "commerce" and "public entity" in §36.104.

"Undue burden." The definition of "undue burden" is analogous to the statutory definition of "undue hardship" in employment under section 101(10) of the ADA. The term undue burden means "significant difficulty or expense" and serves as a limitation on the obligation to provide auxiliary aids and services under §36.303 and §§36.309(b)(3) and (c)(3). Further discussion of the meaning and application of the term undue burden may be found in the preamble discussion of §36.303.

The definition lists factors considered in determining whether provision of an auxiliary aid or service in any particular circumstance would result in an undue burden. The factors to be considered in determining whether an action would result in an undue burden are identical to those to be considered in determining whether an action is readily achievable. However, "readily achievable" is a lower standard than "undue burden" in that it requires a lower level of effort on the part of the public accommodation (see Education and Labor report at 109).

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crime prevention measures; or the impact otherwise of the action upon the operation of the site;

(3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

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Further analysis of the factors to be considered in determining undue burden may be found in the preamble discussion of the definition of the term "readily achievable."

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Subpart B -- General Requirements

§36.201 General.

(a) Prohibition of discrimination. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation.

(b) Landlord and tenant responsibilities. Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.

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Subpart B -- General Requirements

Subpart B includes general prohibitions restricting a public accommodation from discriminating against people with disabilities by denying them the opportunity to benefit from goods or services, by giving them unequal goods or services, or by giving them different or separate goods or services. These general prohibitions are patterned after the basic, general prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, color, religion, or national origin.

Section 36.201 General.

Section 36.201(a) contains the general rule that prohibits discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others to the extent possible with such accommodations as may be required by the Act and these regulations. It does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability. For example, an exercise class cannot exclude a person who uses a wheelchair because he or she cannot do all of the exercises and derive the same result from the class as persons without a disability.

Section 302(a) of the ADA states that the prohibition against discrimination applies to "any person who owns, leases (or leases to), or operates a place of public accommodation," and this language is reflected in §36.201(a). The coverage is quite extensive and would include sublessees, management companies, and any other entity that owns, leases, leases to, or operates a place of public accommodation, even if the operation is only for a short time.

The first sentence of paragraph (b) of §36.201 reiterates the general principle that both the landlord that owns the building that houses the place of public accommodation, as well as the tenant that owns or operates the place of public accommodation, are public accommodations subject to the requirements of this part. Although the statutory language could be interpreted as placing equal responsibility on all private entities, whether lessor, lessee, or operator of a public accommodation, the committee reports suggest that liability

may be allocated. Section 36.201(b) of that section of the proposed rule attempted to allocate liability in the regulation itself. Paragraph (b)(2) of that section made a specific allocation of liability for the obligation to take readily achievable measures to remove barriers, and paragraph (b)(3) made a specific allocation for the obligation to provide auxiliary aids.

Numerous commenters pointed out that these allocations would not apply in all situations. Some asserted that paragraph (b)(2) of the proposed rule only addressed the situation when a lease gave the tenant the right to make alterations with permission of the landlord, but failed to address other types of leases, e.g., those that are silent on the right to make alterations, or those in which the landlord is not permitted to enter a tenant's premises to make alterations. Several commenters noted that many leases contain other clauses more relevant to the ADA than the alterations clause. For example, many leases contain a "compliance clause," a clause which allocates responsibility to a particular party for compliance with all relevant Federal, State, and local laws. Many commenters pointed out various types of relationships that were left unaddressed by the regulation, e.g., sale and leaseback arrangements where the landlord is a financial institution with no control or responsibility for the building; franchises; subleases; and management companies which, at least in the hotel industry, often have control over operations but are unable to make modifications to the premises.

Some commenters raised specific questions as to how the barrier removal allocation would work as a practical matter. Paragraph (b)(2) of the proposed rule provided that the burden of making readily achievable modifications within the tenant's place of public accommodation would shift to the landlord when the modifications were not readily achievable for the tenant or when the landlord denied a tenant's request for permission to make such modifications. Commenters noted that the rule did not specify exactly when the burden would actually shift from tenant to landlord and whether the landlord would have to accept a tenant's word that a particular action is not readily achievable. Others questioned if the tenant should be obligated to use alternative methods of barrier removal before the burden shifts. In light of the fact that readily achievable removal of barriers can include such actions as moving of racks and displays, some commenters doubted the appropriateness of requiring a landlord to become involved in day-to-day operations of its tenants' businesses.

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The Department received widely differing comments in response to the preamble question asking whether landlord and tenant obligations should vary depending on the length of time remaining on an existing lease. Many suggested that tenants should have no responsibilities in "shorter leases," which commenters defined as ranging anywhere from 90 days to three years. Other commenters pointed out that the time remaining on the lease should not be a factor in the rule's allocation of responsibilities, but is relevant in determining what is readily achievable for the tenant. The Department agrees with this latter approach and will interpret the rule in that manner.

In recognition of the somewhat limited applicability of the allocation scheme contained in the proposed rule, paragraphs (b)(2) and (b)(3) have been deleted from the final rule. The Department has substituted instead a statement that allocation of responsibility as between the parties for taking readily achievable measures to remove barriers and to provide auxiliary aids and services both in common areas and within places of public accommodation may be determined by the lease or other contractual relationships between the parties. The ADA was not intended to change existing landlord/tenant responsibilities as set forth in the lease. By deleting specific provisions from the rule, the Department gives full recognition to this principle. As between the landlord and tenant, the extent of responsibility for particular obligations may be, and in many cases probably will be, determined by contract.

The suggested allocation of responsibilities contained in the proposed rule may be used if appropriate in a particular situation. Thus, the landlord would generally be held responsible for making readily achievable changes and providing auxiliary aids and services in common areas and for modifying policies, practices, or procedures applicable to all tenants, and the tenant would generally be responsible for readily achievable changes, provision of auxiliary aids, and modification of policies within its own place of public accommodation.

Many commenters objected to the proposed rule's allocation of responsibility for providing auxiliary aids and services solely to the tenant, pointing out that this exclusive allocation may not be appropriate in the case of larger public accommodations that operate their businesses by renting space out to

smaller public accommodations. For example, large theaters often rent to smaller traveling companies and hospitals often rely on independent contractors to provide childbirth classes. Groups representing persons with disabilities objected to the proposed rule because, in their view, it permitted the large theater or hospital to evade ADA responsibilities by leasing to independent smaller entities. They suggested that these types of public accommodations are not really landlords because they are in the business of providing a service, rather than renting space, as in the case of a shopping center or office building landlord. These commenters believed that responsibility for providing auxiliary aids should shift to the landlord, if the landlord relies on a smaller public accommodation or independent contractor to provide services closely related to those of the larger public accommodation, and if the needed auxiliary aids prove to be an undue burden for the smaller public accommodation. The final rule no longer lists specific allocations to specific parties but, rather, leaves allocation of responsibilities to the lease negotiations. Parties are, therefore, free to allocate the responsibility for auxiliary aids.

Section 36.201(b)(4) of the proposed rule, which provided that alterations by a tenant on its own premises do not trigger a path of travel obligation on the landlord, has been moved to §36.403(d) of the final rule.

An entity that is not in and of itself a public accommodation, such as a trade association or performing artist, may become a public accommodation when it leases space for a conference or performance at a hotel, convention center, or stadium. For an entity to become a public accommodation when it is the lessee of space, however, the Department believes that consideration in some form must be given. Thus, a Boy Scout troop that accepts donated space does not become a public accommodation because the troop has not "leased" space, as required by the ADA.

As a public accommodation, the trade association or performing artist will be responsible for compliance with this part. Specific responsibilities should be allocated by contract, but, generally, the lessee should be responsible for providing auxiliary aids and services (which could include interpreters, braille programs, etc.) for the participants in its conference or performance as well as for assuring that displays are accessible to individuals with disabilities.

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Some commenters suggested that the rule should allocate responsibilities for areas other than removal of barriers and auxiliary aids. The final rule leaves allocation of all areas to the lease negotiations. However, in general landlords should not be given responsibility for policies a tenant applies in operating its business, if such policies are solely those of the tenant. Thus, if a restaurant tenant discriminates by refusing to seat a patron, it would be the tenant, and not the landlord, who would be responsible, because the discriminatory policy is imposed solely by the tenant and not by the landlord. If, however, a tenant refuses to modify a "no pets" rule to allow service animals in its restaurant because the landlord mandates such a rule, then both the landlord and the tenant would be liable for violation of the ADA when a person with a service dog is refused entrance. The Department wishes to emphasize, however, that the parties are free to allocate responsibilities in any way they choose.

Private clubs are also exempt from the ADA. However, consistent with title II of the Civil Rights Act (42 U.S.C. 2000a(e),) a private club is considered a public accommodation to the extent that "the facilities of such establishment are made available to the customers or patrons" of a place of public accommodation. Thus, if a private club runs a day care center that is open exclusively to its own members, the club, like the church in the example above, would have no responsibility for compliance with the ADA. Nor would the day care center have any responsibilities because it is part of the private club exempt from the ADA.

On the other hand, if the private club rents to a day care center that is open to the public, then the private club would have the same obligations as any other public accommodation that functions as a landlord with respect to compliance with title III within the day care center. In such a situation, both the private club that "leases to" a public accommodation and the public accommodation lessee (the day care center) would be subject to the ADA. This same principle would apply if the private club were to rent to, for example, a bar association, which is not generally a public accommodation but which, as explained above, becomes a public accommodation when it leases space for a conference.

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§36.202 Activities.

(a) Denial of participation. A public accommodation shall not subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

(b) Participation in unequal benefit. A public accommodation shall not afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(c) Separate benefit. A public accommodation shall not provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility,

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Section 36.202 Activities.

Section 36.202 sets out the general forms of discrimination prohibited by title III of the ADA. These general prohibitions are further refined by the specific prohibitions in subpart C. Section 36.213 makes clear that the limitations on the ADA's requirements contained in subpart C, such as "necessity" (§36.301(a)) and "safety" (§36.301(b)), are applicable to the prohibitions in §36.202. Thus, it is unnecessary to add these limitations to §36.202 as has been requested by some commenters. In addition, the language of §36.202 very closely tracks the language of section 302(b)(1)(A) of the Act, and that statutory provision does not expressly contain these limitations.

Deny participation -- Section 36.202(a) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

A public accommodation may not exclude persons with disabilities on the basis of disability for reasons other than those specifically set forth in this part. For example, a public accommodation cannot refuse to serve a person with a disability because its insurance company conditions coverage or rates on the absence of persons with disabilities. This is a frequent basis of exclusion from a variety of community activities and is prohibited by this part.

Unequal benefit -- Section 36.202(b) prohibits services or accommodations that are not equal to those provided others. For example, persons with disabilities must not be limited to certain performances at a theater.

Separate benefit -- Section 36.202(c) permits different or separate benefits or services only when necessary to provide persons with disabilities opportunities as effective as those provided others. This paragraph permitting separate benefits "when necessary" should be read together with §36.203(a), which requires integration in "the most integrated setting appropriate to the needs of the individual." The preamble to that section provides further guidance on separate programs. Thus, this section would not prohibit the designation of parking spaces for persons with disabilities.

Each of the three paragraphs (a)-(c) prohibits discrimina-

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privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(d) Individual or class of individuals. For purposes of paragraphs (a) through (c) of this section, the term "individual or class of individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement.

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tion against an individual or class of individuals "either directly or through contractual, licensing, or other arrangements." The intent of the contractual prohibitions of these paragraphs is to prohibit a public accommodation from doing indirectly, through a contractual relationship, what it may not do directly. Thus, the "individual or class of individuals" referenced in the three paragraphs is intended to refer to the clients and customers of the public accommodation that entered into a contractual arrangement. It is not intended to encompass the clients or customers of other entities. A public accommodation, therefore, is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers. For example, if an amusement park contracts with a food service company to operate its restaurants at the park, the amusement park is not responsible for other operations of the food service company that do not involve clients or customers of the amusement park. Section 36.202(d) makes this clear by providing that the term "individual or class of individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement.

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§36.203 Integrated settings.

(a) General. A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(b) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this subpart, a public accommodation shall not deny an individual with a disability an opportunity to participate in such programs or activities that are not separate or different.

(c) Accommodations and services. (1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit available under this part that such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

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Section 36.203 Integrated settings.

Section 36.203 addresses the integration of persons with disabilities. The ADA recognizes that the provision of goods and services in an integrated manner is a fundamental tenet of nondiscrimination on the basis of disability. Providing segregated accommodations and services relegates persons with disabilities to the status of second-class citizens. For example, it would be a violation of this provision to require persons with mental disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability the full use of a health spa because of stereotypes about the person's ability to participate. Section 36.203(a) states that a public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual. Section 36.203(b) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Section 306.203(c), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public accommodations are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

Sections 36.203(b) and (c) make clear that individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

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For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

Further, it would not be a violation of this section for an establishment to offer recreational programs specially designed for children with mobility impairments in those limited circumstances. However, it would be a violation of this section if the entity then excluded these children from other recreational services made available to nondisabled children, or required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public accommodation's obligations within the integrated program when it offers a separate program, but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications are required in the integrated program. Rather, each situation must be assessed individually. Assuming the integrated program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications will depend not only on what the individual needs but also on the limitations set forth in subpart C. For example, it may constitute an undue burden for a particular public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

The preamble to the proposed rule contained a statement that some interpreted as encouraging the continuation of separate schools, sheltered workshops, special recreational programs, and other similar programs. It is important to emphasize that §36.202(c) only calls for separate programs when such programs are "necessary" to provide as effective an opportunity to individuals with disabilities as to other individuals. Likewise, §36.203(a) only permits separate

programs when a more integrated setting would not be "appropriate." Separate programs are permitted, then, in only limited circumstances. The sentence at issue has been deleted from the preamble because it was too broadly stated and had been erroneously interpreted as Departmental encouragement of separate programs without qualification.

The proposed rule's reference in §36.203(b) to separate programs or activities provided in accordance with "this section" has been changed to "this subpart" in recognition of the fact that separate programs or activities may, in some limited circumstances, be permitted not only by §36.203(a) but also by §36.202(c).

In addition, some commenters suggested that the individual with the disability is the only one who can decide whether a setting is "appropriate" and what the "needs" are. Others suggested that only the public accommodation can make these determinations. The regulation does not give exclusive responsibility to either party. Rather, the determinations are to be made based on an objective view, presumably one which would take into account views of both parties.

Some commenters expressed concern that §36.203(c), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 36.203(c) has been revised to make it clear that paragraph (c) is inapplicable to the concern of the commenters. A new paragraph (c)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (c) clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, e.g., Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C 794); Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 36.203(c)(1) and (2) are based on section 501(d) of the ADA. Section 501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to

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accept special accommodations and services for individuals with disabilities that may segregate them:

The Committee added this section [501(d)] to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

(Judiciary report at 71-72.) The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual chooses to participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Section 36.213 makes clear that the limitations contained in subpart C are to be read into subpart B. Thus, the integration requirement is subject to the various defenses contained in subpart C, such as safety, if eligibility criteria are at issue (§36.301(b)), or fundamental alteration and undue burden, if the concern is provision of auxiliary aids (§36.303(a)).

REGULATION

§36.204 Administrative methods.

A public accommodation shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discrimina-ting on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

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Section 36.204 Administrative methods.

Section 36.204 specifies that an individual or entity shall not, directly, or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control. The preamble discussion of §36.301 addresses eligibility criteria in detail.

Section 36.204 is derived from section 302(b)(1)(D) of the Americans with Disabilities Act, and it uses the same language used in the employment section of the ADA (section 102(b)(3)). Both sections incorporate a disparate impact standard to ensure the effectiveness of the legislative mandate to end discrimination. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985). The Court in Choate explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." Id at 297 (footnote omitted).

Of course, §36.204 is subject to the various limitations contained in subpart C including, for example, necessity (§36.301(a)), safety (§36.301(b)), fundamental alteration (§36.302(a)), readily achievable (§36.304(a)), and undue burden (§36.303(a)).

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§36.205 Association.

A public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

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Section 36.205 Association.

Section 36.205 implements section 302(b)(1)(E) of the Act, which provides that a public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association. This section is unchanged from the proposed rule.

The individuals covered under this section include any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this part for a day care center to refuse admission to a child because his or her brother has HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. If a place of public accommodation refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(l)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities. For example, it would be a violation of this section to terminate the lease of a entity operating an independent living center for persons with disabilities, or to seek to evict a health care provider because that individual or entity provides services to persons with mental impairments.

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§36.206 Retaliation or coercion.

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

(c) Illustrations of conduct prohibited by this section include, but are not limited to:

(1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part;

(2) Threatening, intimidating, or interfering with an individual with a disability who is seeking to obtain or use the goods, services,

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Section 36.206 Retaliation or coercion.

Section 36.206 implements section 503 of the ADA, which prohibits retaliation against any individual who exercises his or her rights under the Act. This section is unchanged from the proposed rule. Paragraph (a) of §36.206 provides that no private entity or public entity shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no private entity or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

Illustrations of practices prohibited by this section are contained in paragraph (c), which is modeled on a similar provision in the regulations issued by the Department of Housing and Urban Development to implement the Fair Housing Act (see 24 CFR 100.400(c)(1)). Prohibited actions may include:

1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part;

2) Threatening, intimidating, or interfering with an individual who is seeking to obtain or use the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation;

3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or

4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

This section protects not only individuals who allege a

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facilities, privileges, advantages, or accommodations of a public accommodation;

(3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or

(4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

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violation of the Act or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under the Act or this part without regard to the ultimate resolution of the underlying allegations. Because this section prohibits any act of retaliation or coercion in response to an individual's effort to exercise rights established by the Act and this part (or to support the efforts of another individual), the section applies not only to public accommodations that are otherwise subject to this part, but also to individuals other than public accommodations or to public entities. For example, it would be a violation of the Act and this part for a private individual, e.g., a restaurant customer, to harass or intimidate an individual with a disability in an effort to prevent that individual from patronizing the restaurant. It would, likewise, be a violation of the Act and this part for a public entity to take adverse action against an employee who appeared as a witness on behalf of an indvidual who sought to enforce the Act.

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§36.207 Places of public accommodation located in private residences.

(a) When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this part, but that portion used exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for residential purposes is covered by this part.

(b) The portion of the residence covered under paragraph (a) of this section extends to those elements used to enter the place of public accommodation, including the homeowner's front sidewalk, if any, the door or entryway, and hallways; and those portions of the residence, interior or exterior, available to or used by customers or clients, including restrooms.

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Section 36.207 Places of public accommodation located in private residences.

A private home used exclusively as a residence is not covered by title III because it is neither a "commercial facility" nor a "place of public accommodation." In some situations, however, a private home is not used exclusively as a residence, but houses a place of public accommodation in all or part of a home (e.g., an accountant who meets with his or her clients at his or her residence). Section 36.207(a) provides that those portions of the private residence used in the operation of the place of public accommodation are covered by this part.

For instance, a home or a portion of a home may be used as a day care center during the day and a residence at night. If all parts of the house are used for the day care center, then the entire residence is a place of public accommodation because no part of the house is used exclusively as a residence. If an accountant uses one room in the house solely as his or her professional office, then a portion of the house is used exclusively as a place of public accommodation and a portion is used exclusively as a residence. Section 36.207 provides that when a portion of a residence is used exclusively as a residence, that portion is not covered by this part. Thus, the portions of the accountant's house, other than the professional office and areas and spaces leading to it, are not covered by this part. All of the requirements of this rule apply to the covered portions, including requirements to make reasonable modifications in policies, eliminate discriminatory eligibility criteria, take readily achievable measures to remove barriers or provide readily achievable alternatives (e.g., making house calls), provide auxiliary aids and services and undertake only accessible new construction and alterations.

Paragraph (b) was added in response to comments that sought clarification on the extent of coverage of the private residence used as the place of public accommodation. The final rule makes clear that the place of accommodation extends to all areas of the home used by clients and customers of the place of public accommodation. Thus, the ADA would apply to any door or entry way, hallways, a restroom, if used by customers and clients; and any other portion of the residence, interior or exterior, used by customers or clients of the public accommodation. This interpretation is simply an application of the general rule for all public accommodations,

which extends statutory requirements to all portions of the facility used by customers and clients, including, if applicable, restrooms, hallways, and approaches to the public accommodation. As with other public accommodations, barriers at the entrance and on the sidewalk leading up to the public accommodation, if the sidewalk is under the control of the public accommodation, must be removed if doing so is readily achievable.

The Department recognizes that many businesses that operate out of personal residences are quite small, often employing only the homeowner and having limited total revenues. In these circumstances the effect of ADA coverage would likely be quite minimal. For example, because the obligation to remove existing architectural barriers is limited to those that are easily accomplishable without much difficulty or expense (see §36.304), the range of required actions would be quite modest. It might not be readily achievable for such a place of public accommodation to remove any existing barriers. If it is not readily achievable to remove existing architectural barriers, a public accommodation located in a private residence may meet its obligations under the Act and this part by providing its goods or services to clients or customers with disabilities through the use of alternative measures, including delivery of goods or services in the home of the customer or client, to the extent that such alternative measures are readily achievable (see §36.305).

Some commenters asked for clarification as to how the new construction and alteration standards of subpart D will apply to residences. The new construction standards only apply to the extent that the residence or portion of the residence was designed or intended for use as a public accommodation. Thus, for example, if a portion of a home is designed or constructed for use exclusively as a lawyer's office or for use both as a lawyer's office and for residential purposes, then it must be designed in accordance with the new construction standards in the appendix. Likewise, if a homeowner is undertaking alterations to convert all or part of his residence to a place of public accommodation, that work must be done in compliance with the alterations standards in the appendix.

The preamble to the proposed rule addressed the applicable requirements when a commercial facility is located in a private residence. That situation is now addressed in §36.401(b) of subpart D.

REGULATION

§36.208 Direct threat.

(a) This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.

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

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

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Section 36.208 Direct threat.

Section 36.208(a) implements section 302(b)(3) of the Act by providing that this part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others. This section is unchanged from the proposed rule.

The Department received a significant number of comments on this section. Commenters representing individuals with disabilities generally supported this provision, but suggested revisions to further limit its application. Commenters representing public accommodations generally endorsed modifications that would permit a public accommodation to exercise its own judgment in determining whether an individual poses a direct threat.

The inclusion of this provision is not intended to imply that persons with disabilities pose risks to others. It is intended to address concerns that may arise in this area. It establishes a strict standard that must be met before denying service to an individual with a disability or excluding that individual from participation.

Paragraph (b) of this section explains that a "direct threat" is 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. This paragraph codifies the standard first applied by the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), in which the Court held that an individual with a contagious disease may be an "individual with handicaps" under section 504 of the Rehabilitation Act. In Arline, the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others may be excluded if reasonable modifications to the public accommodation's policies, practices, or procedures will not eliminate that risk. The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability; it must be based on an individual assessment that conforms to the requirements of paragraph (c) of this section.

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Paragraph (c) establishes the test to use in determining whether an individual poses a direct threat to the health or safety of others. A public accommodation is required to make an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in Arline. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

Many of the commenters sought clarification of the inquiry requirement. Some suggested that public accommodations should be prohibited from making any inquiries to determine if an individual with a disability would pose a direct threat to other persons. The Department believes that to preclude all such inquiries would be inappropriate. Under §36.301 of this part, a public accommodation is permitted to establish eligibility criteria necessary for the safe operation of the place of public accommodation. Implicit in that right is the right to ask if an individual meets the criteria. However, any eligibility or safety standard established by a public accommodation must be based on actual risk, not on speculation or stereotypes; it must be applied to all clients or customers of the place of public accommodation; and inquiries must be limited to matters necessary to the application of the standard.

Some commenters suggested that the test established in the Arline decision, which was developed in the context of an employment case, is too stringent to apply in a public accommodations context where interaction between the public accommodation and its client or customer is often very brief. One suggested alternative was to permit public accommodations to exercise "good faith" judgment in determining

whether an individual poses a direct threat, particularly when a public accommodation is dealing with a client or customer engaged in disorderly or disruptive behavior.

The Department believes that the ADA clearly requires that any determination to exclude an individual from participation must be based on an objective standard. A public accommodation may establish neutral eligibility criteria as a condition of receiving its goods or services. As long as these criteria are necessary for the safe provision of the public accommodation's goods and services and applied neutrally to all clients or customers, regardless of whether they are individuals with disabilities, a person who is unable to meet the criteria may be excluded from participation without inquiry into the underlying reason for the inability to comply. In places of public accommodation such as restaurants, theaters, or hotels, where the contact between the public accommodation and its clients is transitory, the uniform application of an eligibility standard precluding violent or disruptive behavior by any client or customer should be sufficient to enable a public accommodation to conduct its business in an orderly manner.

Some other commenters asked for clarification of the application of this provision to persons, particularly children, who have short-term, contagious illnesses, such as fevers, influenza, or the common cold. It is common practice in schools and day care settings to exclude persons with such illnesses until the symptoms subside. The Department believes that these commenters misunderstand the scope of this rule. The ADA only prohibits discrimination against an individual with a disability. Under the ADA and this part, a "disability" is defined as a physical or mental impairment that substantially limits one or more major life activities. Common, short-term illnesses that predictably resolve themselves within a matter of days do not "substantially limit" a major life activity; therefore, it is not a violation of this part to exclude an individual from receiving the services of a public accommodation because of such transitory illness. However, this part does apply to persons who have long-term illnesses. Any determination with respect to a person who has a chronic or long-term illness must be made in compliance with the requirements of this section.

REGULATION

§36.209 Illegal use of drugs.

(a) General. (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public accommodation shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who--

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) Health and drug rehabilitation services. (1) A public accommodation shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may

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Section 36.209 Illegal use of drugs.

Section 36.209 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Section 36.209 does not affect use of controlled substances pursuant to a valid prescription, under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by §36.209. Alcoholics are individuals with disabilities, subject to the protections of the statute.

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in §36.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 64 (1990), is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

Paragraph (a)(2)(i) specifies that an individual who has

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deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) Drug testing. (1) This part does not prohibit a public accommodation from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in this paragraph (c) shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

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successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation, to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. As explained further in the discussion of §36.302, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.

A commenter argued that health care providers should be permitted to use their medical judgment to postpone discretionary medical treatment of individuals under the influence of alcohol or drugs. The regulation permits a medical practitioner to take into account an individual's use of drugs in determining appropriate medical treatment. Section 36.209 provides that the prohibitions on discrimination in this part do not apply when the public accommodation acts on the basis of current illegal use of drugs. Although those prohibitions do apply under paragraph (b), the limitations established under this part also apply. Thus, under §36.208, a health care provider or other public accommodation covered under §36.209(b) may exclude an individual whose current illegal use of drugs poses a direct threat to the health or safety of others, and, under §36.301, a public accommodation may impose or apply eligibility criteria that are necessary for the provision of the services being offered, and may impose legitimate safety requirements that are necessary for safe operation. These same limitations also apply to individuals with disabilities who use alcohol or prescription drugs. The Department believes that these provisions address this commenter's concerns.

Other commenters pointed out that abstention from the use

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of drugs is an essential condition for participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings. The Department believes that this comment is well-founded. Congress clearly did not intend to exclude from drug treatment programs the very individuals who need such programs because of their use of drugs. In such a situation, however, once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or treatment program may deny participation to individuals who use drugs while they are in the program.

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to testing for illegal use of drugs. This paragraph implements the provision in section 510(b) of the Act that allows entities "to adopt or administer reasonable policies or procedures, including but not limited to drug testing," that ensure an individual who is participating in a supervised rehabilitation program, or who has completed such a program or otherwise been rehabilitated successfully, is no longer engaging in the illegal use of drugs. Paragraph (c) is not to be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

Paragraph (c) of §36.209 clarifies that it is not a violation of this part to adopt or administer reasonable policies or procedures to ensure that an individual who formerly engaged in the illegal use of drugs is not currently engaging in illegal use of drugs. Any such policies or procedures must, of course, be reasonable, and must be designed to identify accurately the illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of "illegal use of drugs."

One commenter argued that the rule should permit testing for lawful use of prescription drugs, but most favored the explanation that tests must be limited to unlawful use in order to avoid revealing the use of prescription medicine used to treat disabilities. Tests revealing legal use of prescription drugs might violate the prohibition in §36.301 of attempts to unnecessarily identify the existence of a disability.

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§36.210 Smoking.

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in places of public accommodation.

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Section 36.210 Smoking.

Section 36.210 restates the clarification in section 501(b) of the Act that the Act does not preclude the prohibition of, or imposition of restrictions on, smoking. Some commenters argued that §36.210 does not go far enough, and that the regulation should prohibit smoking in all places of public accommodation. The reference to smoking in section 501 merely clarifies that the Act does not require public accommodations to accommodate smokers by permitting them to smoke in places of public accommodations.

REGULATION

§36.211 Maintenance of accessible features.

(a) A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

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Section 36.211 Maintenance of accessible features.

Section 36.211 provides that a public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by, individuals with disabilities. This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or "accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

Some commenters objected that this section appeared to establish an absolute requirement and suggested that language from the preamble be included in the text of the regulation. It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Paragraph (b) of the final regulation provides that this section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the Act or this part. However, allowing obstructions or "out of service" equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance. Failure of the public accommodation to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access, would also violate this part.

Other commenters requested that this section be expanded to include specific requirements for inspection and maintenance of equipment, for training staff in the proper operation of equipment, and for maintenance of specific items. The Department believes that this section properly establishes the general requirement for maintaining access and that further, more detailed requirements are not necessary.

REGULATION

§36.212 Insurance.

(a) This part shall not be construed to prohibit or restrict —

(1) An insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(b) Paragraphs (a)(1), (2), and (3) of this section shall not be used as a subterfuge to evade the purposes of the Act or this part.

(c) A public accommodation shall not refuse to

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Section 36.212 Insurance.

The Department received numerous comments on proposed §36.212. Most supported the proposed regulation but felt that it did not go far enough in protecting individuals with disabilities and persons associated with them from discrimination. Many commenters argued that language from the preamble to the proposed regulation should be included in the text of the final regulation. Other commenters argued that even that language was not strong enough, and that more stringent standards should be established. Only a few commenters argued that the Act does not apply to insurance underwriting practices or the terms of insurance contracts. These commenters cited language from the Senate committee report (S. Rep. No. 116, 101st Cong., 1st Sess., at 84-86 (1989) [hereinafter "Senate report"]), indicating that Congress did not intend to affect existing insurance practices.

The Department has decided to adopt the language of the proposed rule without change. Sections 36.212(a) and (b) restate section 501(c) of the Act, which provides that the Act shall not be construed to restrict certain insurance practices on the part of insurance companies and employers, as long as such practices are not used to evade the purposes of the Act. Section 36.212(c) is a specific application of §36.202(a), which prohibits denial of participation on the basis of disability. It provides that a public accommodation may not refuse to serve an individual with a disability because of limitations on coverage or rates in its insurance policies (see Judiciary report at 56).

Many commenters supported the requirements of §36.212(c) in the proposed rule because it addressed an important reason for denial of services by public accommodations. One commenter argued that services could be denied if the insurance coverage required exclusion of people whose disabilities were reasonably related to the risks involved in that particular place of public accommodation. Sections 36.208 and 36.301 establish criteria for denial of participation on the basis of legitimate safety concerns. This paragraph does not prohibit consideration of such concerns in insurance policies, but provides that any exclusion on the basis of disability must be based on the permissible criteria, rather than on the terms of the insurance contract.

Language in the committee reports indicates that Congress intended to reach insurance practices by prohibiting

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serve an individual with a disability because its insurance company conditions coverage or rates on the absence of individuals with disabilities.

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differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified. "Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks" (Senate report at 84; Education and Labor report at 136). Section 501(c)(1) of the Act was intended to emphasize that "insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are based on sound actuarial data and not on speculation" (Judiciary report at 70 (emphasis added); see also Senate report at 85; Education and Labor report at 137).

The committee reports indicate that underwriting and classification of risks must be "based on sound actuarial principles or be related to actual or reasonably anticipated experience" (see, e.g., Judiciary report at 71). Moreover, "while a plan which limits certain kinds of coverage based on classification of risk would be allowed . . ., the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience" (Senate report at 85; Education and Labor report at 136-37; Judiciary report at 71). The ADA; therefore, does not prohibit use of legitimate actuarial considerations to justify differential treatment of individuals with disabilities in insurance.

The committee reports provide some guidance on how nondiscrimination principles in the disability rights area relate to insurance practices. For example, a person who is blind may not be denied coverage based on blindness independent of actuarial risk classification. With respect to group health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy, but cannot be denied coverage for illness or injuries unrelated to the pre-existing condition. Also, a public accommodation may offer insurance policies that limit coverage for certain procedures or treatments, but may not entirely deny coverage to a person with a disability.

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The Department requested comment on the extent to which data that would establish statistically sound correlations are available. Numerous commenters cited pervasive problems in the availability and cost of insurance for individuals with disabilities and parents of children with disabilities. No commenters cited specific data, or sources of data, to support specific exclusionary practices. Several commenters reported that, even when statistics are available, they are often outdated and do not reflect current medical technology and treatment methods. Concern was expressed that adequate efforts are not made to distinguish those individuals who are high users of health care from individuals in the same diagnostic groups who may be low users of health care. One insurer reported that "hard data and actuarial statistics are not available to provide precise numerical justifications for every underwriting determination," but argued that decisions may be based on "logical principles generally accepted by actuarial science and fully consistent with state insurance laws." The commenter urged that the Department recognize the validity of information other than statistical data as a basis for insurance determinations.

The most frequent comment was a recommendation that the final regulation should require the insurance company to provide a copy of the actuarial data on which its actions are based when requested by the applicant. Such a requirement would be beyond anything contemplated by the Act or by Congress and has therefore not been included in the Department's final rule. Because the legislative history of the ADA clarifies that different treatment of individuals with disabilities in insurance may be justified by sound actuarial data, such actuarial data will be critical to any potential litigation on this issue. This information would presumably be obtainable in a court proceeding where the insurer's actuarial data was the basis for different treatment of persons with disabilities. In addition, under some State regulatory schemes, insurers may have to file such actuarial information with the State regulatory agency and this information may be obtainable at the State level.

A few commenters representing the insurance industry conceded that underwriting practices in life and health insurance are clearly covered, but argued that property and casualty insurance are not covered. The Department sees no reason for this distinction. Although life and health insurance are the areas where the regulation will have its greatest

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application, the Act applies equally to unjustified discrimination in all types of insurance provided by public accommodations. A number of commenters, for example, reported difficulties in obtaining automobile insurance because of their disabilities, despite their having good driving records.

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§36.213 Relationship of subpart B to subparts C and D of this part.

Subpart B of this part sets forth the general principles of nondiscrimination applicable to all entities subject to this part. Subparts C and D of this part provide guidance on the application of the statute to specific situations. The specific provisions, including the limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply.

§§36.214-36.300: (Reserved)

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Section 36.213 Relationship of subpart B to subparts C and D.

This section explains that subpart B sets forth the general principles of nondiscrimination applicable to all entities subject to this regulation, while subparts C and D provide guidance on the application of this part to specific situations. The specific provisions in subparts C and D, including the limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply. Resort to the general provisions of subpart B is only appropriate where there are no applicable specific rules of guidance in subparts C or D. This interaction between the specific requirements and the general requirements operates with regard to contractual obligations as well.

One illustration of this principle is its application to the obligation of a public accommodation to provide access to services by removal of architectural barriers or by alternatives to barrier removal. The general requirement, established in subpart B by §36.203, is that a public accommodation must provide its services to individuals with disabilities in the most integrated setting appropriate. This general requirement would appear to categorically prohibit "segregated" seating for persons in wheelchairs. Section 36.304, however, only requires removal of architectural barriers to the extent that removal is "readily achievable." If providing access to all areas of a restaurant, for example, would not be "readily achievable," a public accommodation may provide access to selected areas only. Also, §36.305 provides that, where barrier removal is not readily achievable, a public accommodation may use alternative, readily achievable methods of making services available, such as curbside service or home delivery. Thus, in this manner, the specific requirements of §§36.304 and 36.305 control over the general requirement of §36.203.

REGULATION

Subpart C -- Specific Requirements

§36.301 Eligibility criteria.

(a) General. A public accommodation shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

(b) Safety. A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(c) Charges. A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of mea-

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Subpart C -- Specific Requirements

In general, subpart C implements the "specific prohibitions" that comprise section 302(b)(2) of the ADA. It also addresses the requirements of section 309 of the ADA regarding examinations and courses.

Section 36.301 Eligibility criteria.

Section 36.301 of the rule prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered. This prohibition is based on section 302(b)(2)(A)(i) of the ADA.

It would violate this section to establish exclusive or segregative eligibility criteria that would bar, for example, all persons who are deaf from playing on a golf course or all individuals with cerebral palsy from attending a movie theater, or limit the seating of individuals with Down's syndrome to only particular areas of a restaurant. The wishes, tastes, or preferences of other customers may not be asserted to justify criteria that would exclude or segregate individuals with disabilities.

Section 36.301 also prohibits attempts by a public accommodation to unnecessarily identify the existence of a disability; for example, it would be a violation of this section for a retail store to require an individual to state on a credit application whether the applicant has epilepsy, mental illness, or any other disability, or to inquire unnecessarily whether an individual has HIV disease.

Section 36.301 also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public accommodations may not require that an individual with a disability be accompanied by an attendant. As provided by §36.306, however, a public accommodation is not required to provide services of a personal nature including assistance in toileting, eating, or dressing.

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sures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

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Paragraph (c) of §36.301 provides that public accommodations may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids and services, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, and procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

A number of commenters inquired as to whether deposits required for the use of auxiliary aids, such as assistive listening devices, are prohibited surcharges. It is the Department's view that reasonable, completely refundable, deposits are not to be considered surcharges prohibited by this section. Requiring deposits is an important means of ensuring the availability of equipment necessary to ensure compliance with the ADA.

Other commenters sought clarification as to whether §36.301(c) prohibits professionals from charging for the additional time that it may take in certain cases to provide services to an individual with disabilities. The Department does not intend §36.301(c) to prohibit professionals who bill on the basis of time from charging individuals with disabilities on that basis. However, fees may not be charged for the provision of auxiliary aids and services, barrier removal, alternatives to barrier removal, reasonable modifications in policies, practices, and procedures, or any other measures necessary to ensure compliance with the ADA.

Other commenters inquired as to whether day care centers may charge for extra services provided to individuals with disabilities. As stated above, §36.302(c) is intended only to prohibit charges for measures necessary to achieve compliance with the ADA.

Another commenter asserted that charges may be assessed for home delivery provided as an alternative to barrier removal under §36.305, when home delivery is provided to all customers for a fee. Charges for home delivery are permissible if home delivery is not considered an alternative to barrier removal. If the public accommodation offers an alternative, such as curb, carry-out, or sidewalk service for which no surcharge is assessed, then it may charge for home delivery in accordance with its standard pricing for home delivery.

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In addition, §36.301 prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public accommodation may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities, if the criteria are necessary for the safe operation of the public accommodation. Examples of safety qualifications that would be justifiable in appropriate circumstances would include height requirements for certain amusement park rides or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

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§36.302 Modifications in policies, practices, or procedures.

(a) General. A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

(b) Specialties. (1) General. A public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring public accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

(2) Illustration--medical specialties. A health care provider may refer an individual with a disability to another provider, if that individual is seeking, or

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Section 36.302 Modifications in policies, practices, or procedures.

Section 36.302 of the rule prohibits the failure to make reasonable modifications in policies, practices, and procedures when such modifications may be necessary to afford any goods, services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations. This prohibition is based on section 302(b)(2)(A)(ii) of the ADA.

For example, a parking facility would be required to modify a rule barring all vans or all vans with raised roofs, if an individual who uses a wheelchair-accessible van wishes to park in that facility, and if overhead structures are high enough to accommodate the height of the van. A department store may need to modify a policy of only permitting one person at a time in a dressing room, if an individual with mental retardation needs and requests assistance in dressing from a companion. Public accommodations may need to revise operational policies to ensure that services are available to individuals with disabilities. For instance, a hotel may need to adopt a policy of keeping an accessible room unoccupied until an individual with a disability arrives at the hotel, assuming the individual has properly reserved the room.

One example of application of this principle is specifically included in a new §36.302(d) on check-out aisles. That paragraph provides that a store with check-out aisles must ensure that an adequate number of accessible check-out aisles is kept open during store hours, or must otherwise modify its policies and practices, in order to ensure that an equivalent level of convenient service is provided to individuals with disabilities as is provided to others. For example, if only one check-out aisle is accessible, and it is generally used for express service, one way of providing equivalent service is to allow persons with mobility impairments to make all of their purchases at that aisle. This principle also applies with respect to other accessible elements and services. For example, a particular bank may be in compliance with the accessibility guidelines for new construction incorporated in Appendix A with respect to automated teller machines (ATM) at a new branch office by providing one accessible walk-up machine at that location, even though an adjacent walk-up ATM is not accessible and the drive-up ATM is not

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requires, treatment or services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services. A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition, but is not required to treat the individual for a different condition.

(c) Service animals. (1) General. Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(2) Care or supervision of service animals. Nothing in this part requires a public accommodation to supervise or care for a service animal.

(d) Check-out aisles. A store with check-out aisles shall ensure that an adequate number of accessible check-out aisles is kept open during store hours, or shall otherwise modify its policies and practices, in order to ensure that an equivalent level of convenient service is provided to individuals with disabilities as is provided to others. If only one check-out aisle is accessible, and it

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accessible. However, the bank would be in violation of this section if the accessible ATM was located in a lobby that was locked during evening hours while the drive-up ATM was available to customers without disabilities during those same hours. The bank would need to ensure that the accessible ATM was available to customers during the hours that any of the other ATM's was available.

A number of commenters inquired as to the relationship between this section and §36.307, "Accessible or special goods." Under §36.307, a public accommodation is not required to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities. The rule enunciated in §36.307 is consistent with the "fundamental alteration" defense to the reasonable modifications requirement of §36.302. Therefore, §36.302 would not require the inventory of goods provided by a public accommodation to be altered to include goods with accessibility features. For example, §36.302 would not require a bookstore to stock brailled books or order brailled books, if it does not do so in the normal course of its business.

The rule does not require modifications to the legitimate areas of specialization of service providers. Section 36.302(b) provides that a public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring public accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

For example, it would not be discriminatory for a physician who specializes only in burn treatment to refer an individual who is deaf to another physician for treatment of an injury other than a burn injury. To require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice and, therefore, not be required by this section.

A clinic specializing exclusively in drug rehabilitation could similarly refuse to treat a person who is not a drug addict, but could not refuse to treat a person who is a drug addict simply because the patient tests positive for HIV. Conversely, a clinic that specializes in the treatment of indi-

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is generally used for express service, one way of providing equivalent service is to allow persons with mobility impairments to make all their purchases at that aisle.

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viduals with HIV could refuse to treat an individual that does not have HIV, but could not refuse to treat a person for HIV infection simply because that person is also a drug addict.

Some commenters requested clarification as to how this provision would apply to situations where manifestations of the disability in question, itself, would raise complications requiring the expertise of a different practitioner. It is not the Department's intention in §36.302(b) to prohibit a physician from referring an individual with a disability to another physician, if the disability itself creates specialized complications for the patient's health that the physician lacks the experience or knowledge to address (see Education and Labor report at 106).

Section 36.302(c)(1) requires that a public accommodation modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability in any area open to the general public. The term "service animal" is defined in §36.104 to include guide dogs, signal dogs, or any other animal individually trained to provide assistance to an individual with a disability.

A number of commenters pointed to the difficulty of making the distinction required by the proposed rule between areas open to the general public and those that are not. The ambiguity and uncertainty surrounding these provisions has led the Department to adopt a single standard for all public accommodations.

Section 36.302(c)(1) of the final rule now provides that "[g]enerally, a public accommodation shall modify policies, practices, and procedures to permit the use of a service animal by an individual with a disability." This formulation reflects the general intent of Congress that public accommodations take the necessary steps to accommodate service animals and to ensure that individuals with disabilities are not separated from their service animals. It is intended that the broadest feasible access be provided to service animals in all places of public accommodation, including movie theaters, restaurants, hotels, retail stores, hospitals, and nursing homes (see Education and Labor report at 106; Judiciary report at 59). The section also acknowledges, however, that, in rare circumstances, accommodation of service animals may not be required because a fundamental alteration would result in the nature of the goods, services, facilities, privileges, or accom-

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modations offered or provided, or the safe operation of the public accommodation would be jeopardized.

As specified in §36.302(c)(2), the rule does not require a public accommodation to supervise or care for any service animal. If a service animal must be separated from an individual with a disability in order to avoid a fundamental alteration or a threat to safety, it is the responsibility of the individual with the disability to arrange for the care and supervision of the animal during the period of separation.

A museum would not be required by §36.302 to modify a policy barring the touching of delicate works of art in order to enhance the participation of individuals who are blind, if the touching threatened the integrity of the work. Damage to a museum piece would clearly be a fundamental alteration that is not required by this section.

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§36.303 Auxiliary aids and services.

(a) General. A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

(b) Examples. The term "auxiliary aids and services" includes--

(1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

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Section 36.303 Auxiliary aids and services.

Section 36.303 of the final rule requires a public accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. This requirement is based on section 302(b)(2)(A)(iii) of the ADA.

Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech. To give emphasis to this underlying obligation, §36.303(c) of the rule incorporates language derived from section 504 regulations for federally conducted programs (see e.g., 28 CFR 39.160(a)) that requires that appropriate auxiliary aids and services be furnished to ensure that communication with persons with disabilities is as effective as communication with others.

Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. Use of the most advanced technology is not required so long as effective communication is ensured. The Department's proposed §36.303(b) provided a list of examples of auxiliary aids and services that was taken from the definition of auxiliary aids and services in section 3(1) of the ADA and was supplemented by examples from regulations implementing section 504 in federally conducted programs (see e.g., 28 CFR 39.103). A substantial number of commenters suggested that additional examples be added to this list. The Department has added several items to this list but wishes to clarify that the list is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and such an attempt would omit new devices that will become available with emerging technology.

The Department has added videotext displays, computer-aided transcription services, and open and closed captioning to the list of examples. Videotext displays have become an important means of accessing auditory communications

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(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

(c) Effective communication. A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

(d) Telecommunication devices for the deaf (TDD's). (1) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make available, upon request, a TDD for the use of an individual who has impaired hearing or a communication disorder.

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

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through a public address system. Transcription services are used to relay aurally delivered material almost simultaneously in written form to persons who are deaf or hard of hearing. This technology is often used at conferences, conventions, and hearings. While the proposed rule expressly included television decoder equipment as an auxiliary aid or service, it did not mention captioning itself. The final rule rectifies this omission by mentioning both closed and open captioning.

In this section, the Department has changed the proposed rule's phrase, "orally delivered materials," to the phrase, "aurally delivered materials." This new phrase tracks the language in the definition of "auxiliary aids and services" in section 3 of the ADA and is meant to include nonverbal sounds and alarms and computer-generated speech.

Several persons and organizations requested that the Department replace the term "telecommunications devices for deaf persons" or "TDD's" with the term "text telephone." The Department has declined to do so. The Department is aware that the Architectural and Transportation Barriers Compliance Board has used the phrase "text telephone" in lieu of the statutory term "TDD" in its final accessibility guidelines. Title IV of the ADA, however, uses the term "Telecommunications Device for the Deaf," and the Department believes it would be inappropriate to abandon this statutory term at this time.

Paragraph (b)(2) lists examples of aids and services for making visually delivered materials accessible to persons with visual impairments. Many commenters proposed additional examples such as signage or mapping, audio description services, secondary auditory programs (SAP), telebraillers, and reading machines. While the Department declines to add these items to the list in the regulation, they may be considered appropriate auxiliary aids and services.

Paragraph (b)(3) refers to the acquisition or modification of equipment or devices. For example, tape players used for an audio-guided tour of a museum exhibit may require the addition of brailled adhesive labels to the buttons on a reasonable number of the tape players to facilitate their use by individuals who are blind. Similarly, permanent or portable assistive listening systems for persons with hearing impairments may be required at a hotel conference center.

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(e) Closed caption decoders. Places of lodging that provide televisions in five or more guest rooms and hospitals that provide televisions for patient use shall provide, upon request, a means for decoding captions for use by an individual with impaired hearing.

(f) Alternatives. If provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in such an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.

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Several commenters suggested the addition of current technological innovations in microelectronics and computerized control systems (e.g., voice recognition systems, automatic dialing telephones, and infrared elevator and light control systems) to the list of auxiliary aids and services. The Department interprets auxiliary aids and services as those aids and services designed to provide effective communications, i.e., making aurally and visually delivered information available to persons with hearing, speech, and vision impairments. Methods of making services, programs, or activities accessible to, or usable by, individuals with mobility or manual dexterity impairments are addressed by other sections of this part, including the requirements for modifications in policies, practices, or procedures (§36.302), the elimination of existing architectural barriers (§36.304), and the provision of alternatives to barriers removal (§36.305).

Paragraph (b)(4) refers to other similar services and actions. Several commenters asked for clarification that "similar services and actions" include retrieving items from shelves, assistance in reaching a marginally accessible seat, pushing a barrier aside in order to provide an accessible route, or assistance in removing a sweater or coat. While retrieving an item from a shelf might be an "auxiliary aid or service" for a blind person who could not locate the item without assistance, it might be a readily achievable alternative to barrier removal for a person using a wheelchair who could not reach the shelf, or a reasonable modification to a self-service policy for an individual who lacked the ability to grasp the item. (Of course, a store would not be required to provide a personal shopper.) As explained above, auxiliary aids and services are those aids and services required to provide effective communications. Other forms of assistance are more appropriately addressed by other provisions of the final rule.

The auxiliary aid requirement is a flexible one. A public accommodation can choose among various alternatives as long as the result is effective communication. For example, a restaurant would not be required to provide menus in braille for patrons who are blind, if the waiters in the restaurant are made available to read the menu. Similarly, a clothing boutique would not be required to have brailled price tags if sales personnel provide price information orally upon request; and a bookstore would not be required to make available a sign language interpreter, because effective communication can be conducted by notepad.

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A critical determination is what constitutes an effective auxiliary aid or service. The Department's proposed rule recommended that, in determining what auxiliary aid to use, the public accommodation consult with an individual before providing him or her with a particular auxiliary aid or service. This suggestion sparked a significant volume of public comment. Many persons with disabilities, particularly persons who are deaf or hard of hearing, recommended that the rule should require that public accommodations give "primary consideration" to the "expressed choice" of an individual with a disability. These commenters asserted that the proposed rule was inconsistent with congressional intent of the ADA, with the Department's proposed rule implementing title II of the ADA, and with longstanding interpretations of section 504 of the Rehabilitation Act.

Based upon a careful review of the ADA legislative history, the Department believes that Congress did not intend under title III to impose upon a public accommodation the requirement that it give primary consideration to the request of the individual with a disability. To the contrary, the legislative history demonstrates congressional intent to strongly encourage consulting with persons with disabilities. In its analysis of the ADA's auxiliary aids requirement for public accommodations, the House Education and Labor Committee stated that it "expects" that "public accommodation[s] will consult with the individual with a disability before providing a particular auxiliary aid or service" (Education and Labor report at 107). Some commenters also cited a different committee statement that used mandatory language as evidence of legislative intent to require primary consideration. However, this statement was made in the context of reasonable accommodations required by Title I with respect to employment (Education and Labor report at 67). Thus, the Department finds that strongly encouraging consultation with persons with disabilities, in lieu of mandating primary consideration of their expressed choice, is consistent with congressional intent.

The Department wishes to emphasize that public accommodations must take steps necessary to ensure that an individual with a disability will not be excluded, denied services, segregated or otherwise treated differently from other individuals because of the use of inappropriate or ineffective auxiliary aids. In those situations requiring an interpreter, the public accommodations must secure the services of a qualified interpreter, unless an undue burden would result.

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In the analysis of §36.303(c) in the proposed rule, the Department gave as an example the situation where a note pad and written materials were insufficient to permit effective communication in a doctor's office when the matter to be decided was whether major surgery was necessary. Many commenters objected to this statement, asserting that it gave the impression that only decisions about major surgery would merit the provision of a sign language interpreter. The statement would, as the commenters also claimed, convey the impression to other public accommodations that written communications would meet the regulatory requirements in all but the most extreme situations. The Department, when using the example of major surgery, did not intent to limit the provision of interpreter services to the most extreme situations.

Other situations may also require the use of interpreters to ensure effective communication depending on the facts of the particular case. It is not difficult to imagine a wide range of communications involving areas such as health, legal matters, and finances that would be sufficiently lengthy or complex to require an interpreter for effective communication. In some situations, an effective alternative to use of a notepad or an interpreter may be the use of a computer terminal upon which the representative of the public accommodation and the customer or client can exchange typewritten messages.

Section 36.303(d) specifically addresses requirements for TDD's. Partly because of the availability of telecommunications relay services to be established under title IV of the ADA, §36.303(d)(2) provides that a public accommodation is not required to use a telecommunication device for the deaf (TDD) in receiving or making telephone calls incident to its operations. Several commenters were concerned that relay services would not be sufficient to provide effective access in a number of situations. Commenters argued that relay systems (1) do not provide effective access to the automated systems that require the caller to respond by pushing a button on a touch tone phone, (2) cannot operate fast enough to convey messages on answering machines, or to permit a TDD user to leave a recorded message, and (3) are not appropriate for calling crisis lines relating to such matters as rape, domestic violence, child abuse, and drugs where confidentiality is a concern. The Department believes that it is more appropriate for the Federal Communications Commission to address these issues in its rulemaking under title IV.

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A public accommodation is, however, required to make a TDD available to an individual with impaired hearing or speech, if it customarily offers telephone service to its customers, clients, patients, or participants on more than an incidental convenience basis. Where entry to a place of public accommodation requires use of a security entrance telephone, a TDD or other effective means of communication must be provided for use by an individual with impaired hearing or speech.

In other words, individual retail stores, doctors' offices, restaurants, or similar establishments are not required by this section to have TDD's, because TDD users will be able to make inquiries, appointments, or reservations with such establishments through the relay system established under title IV of the ADA. The public accommodation will likewise be able to contact TDD users through the relay system. On the other hand, hotels, hospitals, and other similar establishments that offer nondisabled individuals the opportunity to make outgoing telephone calls on more than an incidental convenience basis must provide a TDD on request.

Section 36.303(e) requires places of lodging that provide televisions in five or more guest rooms and hospitals to provide, upon request, a means for decoding closed captions for use by an individual with impaired hearing. Hotels should also provide a TDD or similar device at the front desk in order to take calls from guests who use TDD's in their rooms. In this way guests with hearing impairments can avail themselves of such hotel services as making inquiries of the front desk and ordering room service. The term "hospital" is used in its general sense and should be interpreted broadly.

Movie theaters are not required by §36.303 to present open-captioned films. However, other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required to make such information accessible to persons with hearing impairments. Captioning is one means to make the information accessible to individuals with disabilities.

The rule specifies that auxiliary aids and services include the acquisition or modification of equipment or devices. For example, tape players used for an audio-guided tour of a museum exhibit may require the addition of brailled adhesive labels to the buttons on a reasonable number of the tape players to facilitate their use by individuals who are blind.

Similarly, a hotel conference center may need to provide permanent or portable assistive listening systems for persons with hearing impairments.

As provided in §36.303(f), a public accommodation is not required to provide any particular aid or service that would result either in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations offered or in an undue burden. Both of these statutory limitations are derived from existing regulations and caselaw under section 504 and are to be applied on a case-by-case basis (see, e.g., 28 CFR 39.160(d) and Southeastern Community College v. Davis, 442 U.S. 397 (1979)). Congress intended that "undue burden" under §36.303 and "undue hardship," which is used in the employment provisions of title I of the ADA, should be determined on a case-by-case basis under the same standards and in light of the same factors (Judiciary report at 59). The rule, therefore, in accordance with the definition of undue hardship in section 101(10) of the ADA, defines undue burden as "significant difficulty or expense" (see §§36.104 and 36.303(a)) and requires that undue burden be determined in light of the factors listed in the definition in 36.104.

Consistent with regulations implementing section 504 in federally conducted programs (see, e.g., 28 CFR 39.160(d)), §36.303(f) provides that the fact that the provision of a particular auxiliary aid or service would result in an undue burden does not relieve a public accommodation from the duty to furnish an alternative auxiliary aid or service, if available, that would not result in such a burden.

Section §36.303(g) of the proposed rule has been deleted from this section and included in a new §36.306. That new section continues to make clear that the auxiliary aids requirement does not mandate the provision of individually prescribed devices, such as prescription eyeglasses or hearing aids.

The costs of compliance with the requirements of this section may not be financed by surcharges limited to particular individuals with disabilities or any group of individuals with disabilities (§36.301(c)).

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§36.304 Removal of barriers.

(a) General. A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.

(b) Examples. Examples of steps to remove barriers include, but are not limited to, the following actions--

(1) Installing ramps;

(2) Making curb cuts in sidewalks and entrances;

(3) Repositioning shelves;

(4) Rearranging tables, chairs, vending machines, display racks, and other furniture;

(5) Repositioning telephones;

(6) Adding raised markings on elevator control buttons;

(7) Installing flashing alarm lights;

(8) Widening doors;

(9) Installing offset

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Section 36.304 Removal of barriers.

Section 36.304 requires the removal of architectural barriers and communication barriers that are structural in nature in existing facilities, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense. This requirement is based on section 302(b)(2)(A)(iv) of the ADA.

A number of commenters interpreted the phrase "communication barriers that are structural in nature" broadly to encompass the provision of communications devices such as TDD's, telephone handset amplifiers, assistive listening devices, and digital check-out displays. The statute, however, as read by the Department, limits the application of the phrase "communications barriers that are structural in nature" to those barriers that are an integral part of the physical structure of a facility. In addition to the communications barriers posed by permanent signage and alarm systems noted by Congress (see Education and Labor report at 110), the Department would also include among the communications barriers covered by §36.304 the failure to provide adequate sound buffers, and the presence of physical partitions that hamper the passage of sound waves between employees and customers. Given that §36.304's proper focus is on the removal of physical barriers, the Department believes that the obligation to provide communications equipment and devices such as TDD's, telephone handset amplifiers, assistive listening devices, and digital check-out displays is more appropriately determined by the requirements for auxiliary aids and services under §36.303 (see Education and Labor report at 107-108). The obligation to remove communications barriers that are structural in nature under §36.304, of course, is independent of any obligation to provide auxiliary aids and services under §36.303.

The statutory provision also requires the readily achievable removal of certain barriers in existing vehicles and rail passenger cars. This transportation requirement is not included in §36.304, but rather in §36.310(b) of the rule.

In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction. In existing facilities, which are the subject of §36.304, where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new

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hinges to widen doorways;

(10) Eliminating a turnstile or providing an alternative accessible path;

(11) Installing accessible door hardware;

(12) Installing grab bars in toilet stalls;

(13) Rearranging toilet partitions to increase maneuvering space;

(14) Insulating lavatory pipes under sinks to prevent burns;

(15) Installing a raised toilet seat;

(16) Installing a full-length bathroom mirror;

(17) Repositioning the paper towel dispenser in a bathroom;

(18) Creating designated accessible parking spaces;

(19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;

(20) Removing high pile, low density carpeting; or

(21) Installing vehicle hand controls.

(c) Priorities. A public

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construction and alterations (see §§36.401-36.406) where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction.

For example, a bank with existing automatic teller machines (ATM's) would have to remove barriers to the use of the ATM's, if it is readily achievable to do so. Whether or not it is necessary to take actions such as ramping a few steps or raising or lowering an ATM would be determined by whether the actions can be accomplished easily and without much difficulty or expense.

On the other hand, a newly constructed bank with ATM's would be required by §36.401 to have an ATM that is "readily accessible to and usable by" persons with disabilities in accordance with accessibility guidelines incorporated under §36.406.

The requirement to remove architectural barriers includes the removal of physical barriers of any kind. For example, §36.304 requires the removal, when readily achievable, of barriers caused by the location of temporary or movable structures, such as furniture, equipment, and display racks. In order to provide access to individuals who use wheelchairs, for example, restaurants may need to rearrange tables and chairs, and department stores may need to reconfigure display racks and shelves. As stated in §36.304(f), such actions are not readily achievable to the extent that they would result in a significant loss of selling or serving space. If the widening of all aisles in selling or serving areas is not readily achievable, then selected widening should be undertaken to maximize the amount of merchandise or the number of tables accessible to individuals who use wheelchairs. Access to goods and services provided in any remaining inaccessible areas must be made available through alternative methods to barrier removal, as required by §36.305.

Because the purpose of title III of the ADA is to ensure that public accommodations are accessible to their customers, clients, or patrons (as opposed to their employees, who are the focus of title I), the obligation to remove barriers under §36.304 does not extend to areas of a facility that are used exclusively as employee work areas.

Section 36.304(b) provides a wide-ranging list of the types of modest measures that may be taken to remove

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accommodation is urged to take measures to comply with the barrier removal requirements of this section in accordance with the following order of priorities.

(1) First, a public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces.

(2) Second, a public accommodation should take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These measures include, for example, adjusting the layout of display racks, rearranging tables, providing brailled and raised character signage, widening doors, providing visual alarms, and installing ramps.

(3) Third, a public accommodation should take measures to provide access to restroom facilities. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage,

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barriers and that are likely to be readily achievable. The list includes examples of measures, such as adding raised letter markings on elevator control buttons and installing flashing alarm lights, that would be used to remove communications barriers that are structural in nature. It is not an exhaustive list, but merely an illustrative one. Moreover, the inclusion of a measure on this list does not mean that it is readily achievable in all cases. Whether or not any of these measures is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented and the factors listed in the definition of readily achievable (§36.104).

A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. Ramping a single step, however, will likely be readily achievable, and ramping several steps will in many circumstances also be readily achievable. The readily achievable standard does not require barrier removal that requires extensive restructuring or burdensome expense. Thus, where it is not readily achievable to do, the ADA would not require a restaurant to provide access to a restroom reachable only by a flight of stairs.

Like §36.405, this section permits deference to the national interest in preserving significant historic structures. Barrier removal would not be considered "readily achievable" if it would threaten or destroy the historic significance of a building or facility that is eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470, et seq.), or is designated as historic under State or local law.

The readily achievable defense requires a less demanding level of exertion by a public accommodation than does the undue burden defense to the auxiliary aids requirements of §36.303. In that sense, it can be characterized as a "lower" standard than the undue burden standard. The readily achievable defense is also less demanding than the undue hardship defense in section 102(b)(5) of the ADA, which limits the obligation to make reasonable accommodation in employment. Barrier removal measures that are not easily accomplishable and are not able to be carried out without much difficulty or expense are not required under the readily achievable standard, even if they do not impose an undue burden or an undue hardship.

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widening of toilet stalls, and installation of grab bars.

(4) Fourth, a public accommodation should take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

(d) Relationship to alterations requirements of subpart D of this part. (1) Except as provided in paragraph (d)(2) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in §36.402 and §§36.404-36.406 of this part for the element being altered. The path of travel requirements of §36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section.

(2) If, as a result of compliance with the alterations requirements specified in paragraph (d)(1) of this section, the measures required to remove a barrier would not be readily achievable, a public accommodation may take other readily achievable measures to remove the barrier that do not fully comply with the specified requirements. Such measures include, for

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Section 36.304(f)(1) of the proposed rule, which stated that "barrier removal is not readily achievable if it would result in significant loss of profit or significant loss of efficiency of operation," has been deleted from the final rule. Many commenters objected to this provision because it impermissibly introduced the notion of profit into a statutory standard that did not include it. Concern was expressed that, in order for an action not to be considered readily achievable, a public accommodation would inappropriately have to show, for example, not only that the action could not be done without "much difficulty or expense", but that a significant loss of profit would result as well. In addition, some commenters asserted use of the word "significant," which is used in the definition of undue hardship under title I (the standard for interpreting the meaning of undue burden as a defense to title III's auxiliary aids requirements) (see §§36.104, 36.303(f)), blurs the fact that the readily achievable standard requires a lower level of effort on the part of a public accommodation than does the undue burden standard.

The obligation to engage in readily achievable barrier removal is a continuing one. Over time, barrier removal that initially was not readily achievable may later be required because of changed circumstances. Many commenters expressed support for the Department's position that the obligation to comply with §36.304 is continuing in nature. Some urged that the rule require public accommodations to assess their compliance on at least an annual basis in light of changes in resources and other factors that would be relevant to determining what barrier removal measures would be readily achievable.

Although the obligation to engage in readily achievable barrier removal is clearly a continuing duty, the Department has declined to establish any independent requirement for an annual assessment or self-evaluation. It is best left to the public accommodations subject to §36.304 to establish policies to assess compliance that are appropriate to the particular circumstances faced by the wide range of public accommodations covered by the ADA. However, even in the absence of an explicit regulatory requirement for periodic self-evaluations, the Department still urges public accommodations to establish procedures for an ongoing assessment of their compliance with the ADA's barrier removal requirements. The Department recommends that this process include appropriate consultation with individuals with disabili-

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example, providing a ramp with a steeper slope or widening a doorway to a narrower width than that mandated by the alterations requirements. No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others.

(e) Portable ramps. Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable. In order to avoid any significant risk to the health or safety of individuals with disabilities or others in using portable ramps, due consideration shall be given to safety features such as nonslip surfaces, railings, anchoring, and strength of materials.

(f) Selling or serving space. The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space.

(g) Limitation on barrier removal obligations. (1) The requirements for barrier removal under §36.304 shall not be interpreted to exceed the standards for alterations in subpart D of this part.

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ties or organizations representing them. A serious effort at self-assessment and consultation can diminish the threat of litigation and save resources by identifying the most efficient means of providing required access.

The Department has been asked for guidance on the best means for public accommodations to comply voluntarily with this section. Such information is more appropriately part of the Department's technical assistance effort and will be forthcoming over the next several months. The Department recommends, however, the development of an implementation plan designed to achieve compliance with the ADA's barrier removal requirements before they become effective on January 26, 1992. Such a plan, if appropriately designed and diligently executed, could serve as evidence of a good faith effort to comply with the requirements of §36.104. In developing an implementation plan for readily achievable barrier removal, a public accommodation should consult with local organizations representing persons with disabilities and solicit their suggestions for cost-effective means of making individual places of public accommodation accessible. Such organizations may also be helpful in allocating scarce resources and establishing priorities. Local associations of businesses may want to encourage this process and serve as the forum for discussions on the local level between disability rights organizations and local businesses.

Section 36.304(c) recommends priorities for public accommodations in removing barriers in existing facilities. Because the resources available for barrier removal may not be adequate to remove all existing barriers at any given time, §36.304(c) suggests priorities for determining which types of barriers should be mitigated or eliminated first. The purpose of these priorities is to facilitate long-term business planning and to maximize, in light of limited resources, the degree of effective access that will result from any given level of expenditure.

Although many commenters expressed support for the concept of establishing priorities, a significant number objected to their mandatory nature in the proposed rule. The Department shares the concern of these commenters that mandatory priorities would increase the likelihood of litigation and inappropriately reduce the discretion of public accommodations to determine the most effective mix of barrier removal measures to undertake in particular circumstances. Therefore, in the final rule the priorities are no longer mandatory.

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(2) To the extent that relevant standards for alterations are not provided in subpart D of this part, then the requirements of §36.304 shall not be interpreted to exceed the standards for new construction in subpart D of this part.

(3) This section does not apply to rolling stock and other conveyances to the extent that §36.310 applies to rolling stock and other conveyances.

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In response to comments that the priorities failed to address communications issues, the Department wishes to emphasize that the priorities encompass the removal of communications barriers that are structural in nature. It would be counter to the ADA's carefully wrought statutory scheme to include in this provision the wide range of communication devices that are required by the ADA's provisions on auxiliary aids and services. The final rule explicitly includes brailled and raised letter signage and visual alarms among the examples of steps to remove barriers provided in §36.304(c)(2).

Section 36.304(c)(1) places the highest priority on measures that will enable individuals with disabilities to physically enter a place of public accommodation. This priority on "getting through the door" recognizes that providing actual physical access to a facility from public sidewalks, public transportation, or parking is generally preferable to any alternative arrangements in terms of both business efficiency and the dignity of individuals with disabilities.

The next priority, which is established in §36.304(c)(2), is for measures that provide access to those areas of a place of public accommodation where goods and services are made available to the public. For example, in a hardware store, to the extent that it is readily achievable to do so, individuals with disabilities should be given access not only to assistance at the front desk, but also access, like that available to other customers, to the retail display areas of the store.

The Department agrees with those commenters who argued that access to the areas where goods and services are provided is generally more important than the provision of restrooms. Therefore, the final rule reverses priorities two and three of the proposed rule in order to give lower priority to accessible restrooms. Consequently, the third priority in the final rule (§36.304(c)(3)) is for measures to provide access to restroom facilities and the last priority is placed on any remaining measures required to remove barriers.

Section 36.304(d) requires that measures taken to remove barriers under §36.304 be subject to subpart D's requirements for alterations (except for the path of travel requirements in §36.403). It only permits deviations from the subpart D requirements when compliance with those requirements is not readily achievable. In such cases, §36.304(d) permits mea-

sures to be taken that do not fully comply with the subpart D requirements, so long as the measures do not pose a significant risk to the health or safety of individuals with disabilities or others.

This approach represents a change from the proposed rule which stated that "readily achievable" measures taken solely to remove barriers under §36.304 are exempt from the alterations requirements of subpart D. The intent of the proposed rule was to maximize the flexibility of public accommodations in undertaking barrier removal by allowing deviations from the technical standards of subpart D. It was thought that allowing slight deviations would provide access and release additional resources for expanding the amount of barrier removal that could be obtained under the readily achievable standard.

Many commenters, however, representing both businesses and individuals with disabilities, questioned this approach because of the likelihood that unsafe or ineffective measures would be taken in the absence of the subpart D standards for alterations as a reference point. Some advocated a rule requiring strict compliance with the subpart D standard.

The Department in the final rule has adopted the view of many commenters that (1) public accommodations should in the first instance be required to comply with the subpart D standards for alterations where it is readily achievable to do so and (2) safe, readily achievable measures must be taken when compliance with the subpart D standards is not readily achievable. Reference to the subpart D standards in this manner will promote certainty and good design at the same time that permitting slight deviations will expand the amount of barrier removal that may be achieved under §36.304.

Because of the inconvenience to individuals with disabilities and the safety problems involved in the use of portable ramps, §36.304(e) permits the use of a portable ramp to comply with §36.304(a) only when installation of a permanent ramp is not readily achievable. In order to promote safety, §36.304(e) requires that due consideration be given to the incorporation of features such as nonslip surfaces, railings, anchoring, and strength of materials in any portable ramp that is used.

Temporary facilities brought in for use at the site of a natural disaster are subject to the barrier removal requirements of §36.304.

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A number of commenters requested clarification regarding how to determine when a public accommodation has discharged its obligation to remove barriers in existing facilities. For example, is a hotel required by §36.304 to remove barriers in all of its guest rooms? Or is some lesser percentage adequate? A new paragraph (g) has been added to §36.304 to address this issue. The Department believes that the degree of barrier removal required under §36.304 may be less, but certainly would not be required to exceed, the standards for alterations under the ADA Accessibility Guidelines incorporated by subpart D of this part (ADAAG). The ADA's requirements for readily achievable barrier removal in existing facilities are intended to be substantially less rigorous than those for new construction and alterations. It, therefore, would be obviously inappropriate to require actions under §36.304 that would exceed the ADAAG requirements. Hotels, then, in order to satisfy the requirements of §36.304, would not be required to remove barriers in a higher percentage of rooms than required by ADAAG. If relevant standards for alterations are not provided in ADAAG, then reference should be made to the standards for new construction.

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§36.305 Alternatives to barrier removal.

(a) General. Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable.

(b) Examples. Examples of alternatives to barrier removal include, but are not limited to, the following actions--

(1) Providing curb service or home delivery;

(2) Retrieving merchandise from inaccessible shelves or racks;

(3) Relocating activities to accessible locations;

(c) Multiscreen cinemas. If it is not readily achievable to remove barriers to provide access by persons with mobility impairments to all of the theaters of a multiscreen cinema, the cinema shall establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to all films. Reasonable notice shall be provided to the public as to the location and time of accessible showings.

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Section 36.305 Alternatives to barrier removal.

Section 36.305 specifies that where a public accommodation can demonstrate that removal of a barrier is not readily achievable, the public accommodation must make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if such methods are readily achievable. This requirement is based on section 302(b)(2)(A)(v) of the ADA.

For example, if it is not readily achievable for a retail store to raise, lower, or remove shelves or to rearrange display racks to provide accessible aisles, the store must, if readily achievable, provide a clerk or take other alternative measures to retrieve inaccessible merchandise. Similarly, if it is not readily achievable to ramp a long flight of stairs leading to the front door of a restaurant or a pharmacy, the restaurant or the pharmacy must take alternative measures, if readily achievable, such as providing curb service or home delivery. If, within a restaurant, it is not readily achievable to remove physical barriers to a certain section of a restaurant, the restaurant must, where it is readily achievable to do so, offer the same menu in an accessible area of the restaurant.

Where alternative methods are used to provide access, a public accommodation may not charge an individual with a disability for the costs associated with the alternative method (see §36.301(c)). Further analysis of the issue of charging for alternative measures may be found in the preamble discussion of §36.301(c).

In some circumstances, because of security considerations, some alternative methods may not be readily achievable. The rule does not require a cashier to leave his or her post to retrieve items for individuals with disabilities, if there are no other employees on duty.

Section 36.305(c) of the proposed rule has been deleted and the requirements have been included in a new §36.306. That section makes clear that the alternative methods requirement does not mandate the provision of personal devices, such as wheelchairs, or services of a personal nature.

In the final rule, §36.305(c) provides specific requirements regarding alternatives to barrier removal in multiscreen cinemas. In some situations, it may not be readily achievable to remove enough barriers to provide access to all of the theaters

of a multiscreen cinema. If that is the case, §36.305(c) requires the cinema to establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to films being presented by the cinema. It further requires that reasonable notice be provided to the public as to the location and time of accessible showings. Methods for providing notice include appropriate use of the international accessibility symbol in a cinema's print advertising and the addition of accessibility information to a cinema's recorded telephone information line.

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§36.306 Personal devices and services.

This part does not require a public accommodation to provide its customers, clients, or participants with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing.

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Section 36.306 Personal devices and services.

The final rule includes a new §36.306, entitled "Personal devices and services." Section 36.306 of the proposed rule, "Readily achievable and undue burden: Factors to be considered," was deleted for the reasons described in the preamble discussion of the definition of the term "readily achievable" in §36.104. In place of §§36.303(g) and 36.305(c) of the proposed rule, which addressed the issue of personal devices and services in the contexts of auxiliary aids and alternatives to barrier removal, §36.306 provides a general statement that the regulation does not require the provision of personal devices and services. This section states that a public accommodation is not required to provide its customers, clients, or participants with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing.

This statement serves as a limitation on all the requirements of the regulation. The personal devices and services limitation was intended to have general application in the proposed rule in all contexts where it was relevant. The final rule, therefore, clarifies this point by including a general provision that will explicitly apply not just to auxiliary aids and services and alternatives to barrier removal, but across-the-board to include such relevant areas as modifications in policies, practices, and procedures (§36.302) and examinations and courses (§36.309), as well.

The Department wishes to clarify that measures taken as alternatives to barrier removal, such as retrieving items from shelves or providing curb service or home delivery, are not to be considered personal services. Similarly, minimal actions that may be required as modifications in policies, practices, or procedures under §36.302, such as a waiter's removing the cover from a customer's straw, a kitchen's cutting up food into smaller pieces, or a bank's filling out a deposit slip, are not services of a personal nature within the meaning of §36.306. (Of course, such modifications may be required under §36.302 only if they are "reasonable.") Similarly, this section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

Of course, if personal services are customarily provided to the customers or clients of a public accommodation, e.g., in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities using the public accommodation.

REGULATION

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Of course, if personal services are customarily provided to the customers or clients of a public accommodation, e.g., in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities using the public accommodation.

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§36.307 Accessible or special goods.

(a) This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.

(b) A public accommodation shall order accessible or special goods at the request of an individual with disabilities, if, in the normal course of its operation, it makes special orders on request for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business.

(c) Examples of accessible or special goods include items such as brailled versions of books, books on audio cassettes, closed-captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.

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Section 36.307 Accessible or special goods.

Section 36.307 establishes that the rule does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility features that are designed for, or facilitate use by, individuals with disabilities. As specified in §36.307(c), accessible or special goods include such items as brailled versions of books, books on audio-cassettes, closed captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.

The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes. The Department has been made aware, however, that the most recent titles in video-tape rental establishments are, in fact, closed captioned.

Although a public accommodation is not required by §36.307(a) to modify its inventory, it is required by §36.307(b), at the request of an individual with disabilities, to order accessible or special goods that it does not customarily maintain in stock if, in the normal course of its operation, it makes special orders for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business. For example, a clothing store would be required to order specially-sized clothing at the request of an individual with a disability, if it customarily makes special orders for clothing that it does not keep in stock, and if the clothing can be obtained from one of the store's customary suppliers.

One commenter asserted that the proposed rule could be interpreted to require a store to special order accessible or special goods of all types, even if only one type is specially ordered in the normal course of its business. The Department, however, intends for §36.307(b) to require special orders only of those particular types of goods for which a public accommodation normally makes special orders. For example, a book and recording store would not have to specially order brailled books if, in the normal course of its business, it only specially orders recordings and not books.

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§36.308 Seating in assembly areas.

(a) Existing facilities.

(1) To the extent that it is readily achievable, a public accommodation in assembly areas shall--

(i) Provide a reasonable number of wheelchair seating spaces and seats with removable aisle-side arm rests; and

(ii) Locate the wheelchair seating spaces so that they--

(A) Are dispersed throughout the seating area;

(B) Provide lines of sight and choice of admission prices comparable to those for members of the general public;

(C) Adjoin an accessible route that also serves as a means of egress in case of emergency; and

(D) Permit individuals who use wheelchairs to sit with family members or other companions.

(2) If removal of seats is not readily achievable, a public accommodation shall provide, to the extent that it is readily achievable to do so, a portable chair or other means to permit a family member or other companion to sit with an individual who uses a wheelchair.

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Section 36.308 Seating in assembly areas.

Section 36.308 establishes specific requirements for removing barriers to physical access in assembly areas, which include such facilities as theaters, concert halls, auditoriums, lecture halls, and conference rooms. This section does not address the provision of auxiliary aids or the removal of communications barriers that are structural in nature. These communications requirements are the focus of other provisions of the regulation (see §§36.303-36.304).

Individuals who use wheelchairs historically have been relegated to inferior seating in the back of assembly areas separate from accompanying family members and friends. The provisions of §36.308 are intended to promote integration and equality in seating.

In some instances it may not be readily achievable for auditoriums or theaters to remove seats to allow individuals with wheelchairs to sit next to accompanying family members or friends. In these situations, the final rule retains the requirement that the public accommodation provide portable chairs or other means to allow the accompanying individuals to sit with the persons in wheelchairs. Persons in wheelchairs should have the same opportunity to enjoy movies, plays, and similar events with their families and friends, just as other patrons do. The final rule specifies that portable chairs or other means to permit family members or companions to sit with individuals who use wheelchairs must be provided only when it is readily achievable to do so.

In order to facilitate seating of wheelchair users who wish to transfer to existing seating, paragraph (a)(1) of the final rule adds a requirement that, to the extent readily achievable, a reasonable number of seats with removable aisle-side armrests must be provided. Many persons in wheelchairs are able to transfer to existing seating with this relatively minor modification. This solution avoids the potential safety hazard created by the use of portable chairs and fosters integration. The final ADA Accessibility Guidelines incorporated by subpart D (ADAAG) also add a requirement regarding aisle seating that was not in the proposed guidelines. In situations when a person in a wheelchair transfers to existing seating, the public accommodation shall provide assistance in handling the wheelchair of the patron with the disability.

Likewise, consistent with ADAAG, the final rule adds in

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(3) The requirements of paragraph (a) of this section shall not be interpreted to exceed the standards for alterations in subpart D of this part.

(b) New construction and alterations. The provision and location of wheelchair seating spaces in newly constructed or altered assembly areas shall be governed by the standards for new construction and alterations in subpart D of this part.

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§36.308(a)(1)(ii)(B) a requirement that, to the extent readily achievable, wheelchair seating provide lines of sight and choice of admission prices comparable to those for members of the general public.

Finally, because Congress intended that the requirements for barrier removal in existing facilities be substantially less rigorous than those required for new construction and alterations, the final rule clarifies in §36.308(a)(3) that in no event can the requirements for existing facilities be interpreted to exceed the standards for alterations under ADAAG. For example, §4.33 of ADAAG only requires wheelchair spaces to be provided in more than one location when the seating capacity of the assembly area exceeds 300. Therefore, paragraph (a) of §36.308 may not be interpreted to require readily achievable dispersal of wheelchair seating in assembly areas with 300 or fewer seats. Similarly, §4.1.3(19) of ADAAG requires six accessible wheelchair locations in an assembly area with 301 to 500 seats. The reasonable number of wheelchair locations required by paragraph (a), therefore, may be less than six, but may not be interpreted to exceed six.

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Proposed Section 36.309 Purchase of furniture and equipment.

Section 36.309 of the proposed rule would have required that newly purchased furniture or equipment made available for use at a place of public accommodation be accessible, to the extent such furniture or equipment is available, unless this requirement would fundamentally alter the goods, services, facilities, privileges, advantages, or accommodations offered, or would not be readily achievable. Proposed §36.309 has been omitted from the final rule because the Department has determined that its requirements are more properly addressed under other sections, and because there are currently no appropriate accessibility standards addressing many types of furniture and equipment.

Some types of equipment will be required to meet the accessibility requirements of subpart D. For example, ADAAG establishes technical and scoping requirements in new construction and alterations for automated teller machines and telephones. Purchase or modification of equipment is required in certain instances by the provisions in §§36.201 and 36.202. For example, an arcade may need to provide accessible video machines in order to ensure full and equal enjoyment of the facilities and to provide an opportunity to participate in the services and facilities it provides. The barrier removal requirements of §36.304 will apply as well to furniture and equipment (lowering shelves, rearranging furniture, adding braille labels to a vending machine).

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§36.309 Examinations and courses.

(a) General. Any private entity 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.

(b) Examinations. (1) Any private entity offering an examination covered by this section must assure that --

(i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure);

(ii) An examination that

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Section 36.309 Examinations and courses.

Section 36.309(a) sets forth the general rule that any private entity 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.

Paragraph (a) restates section 309 of the Americans with Disabilities Act. Section 309 is intended to fill the gap that is created when licensing, certification, and other testing authorities are not covered by section 504 of the Rehabilitation Act or title II of the ADA. Any such authority that is covered by section 504, because of the receipt of Federal money, or by title II, because it is a function of a State or local government, must make all of its programs accessible to persons with disabilities, which includes physical access as well as modifications in the way the test is administered, e.g., extended time, written instructions, or assistance of a reader.

Many licensing, certification, and testing authorities are not covered by section 504, because no Federal money is received; nor are they covered by title II of the ADA because they are not State or local agencies. However, States often require the licenses provided by such authorities in order for an individual to practice a particular profession or trade. Thus, the provision was included in the ADA in order to assure that persons with disabilities are not foreclosed from educational, professional, or trade opportunities because an examination or course is conducted in an inaccessible site or without needed modifications.

As indicated in the "Application" section of this part (§36.102), §36.309 applies to any private entity that offers the specified types of examinations or courses. This is consistent with section 309 of the Americans with Disabilities Act, which states that the requirements apply to "any person" offering examinations or courses.

The Department received a large number of comments on this section, reflecting the importance of ensuring that the key gateways to education and employment are open to individuals with disabilities. The most frequent comments were objections to the fundamental alteration and undue burden provisions in §§36.309 (b)(3) and (c)(3) and to allowing

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is designed for individuals with impaired sensory, manual, or speaking skills is offered at equally convenient locations, as often, and in as timely a manner as are other examinations; and

(iii) The examination is administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made.

(2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.

(3) A private entity offering an examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden. Auxiliary aids and services required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing

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courses and examinations to be provided through alternative accessible arrangements, rather than in an integrated setting.

Although section 309 of the Act does not refer to a fundamental alteration or undue burden limitation, those limitations do appear in section 302(b)(2)(A)(iii) of the Act, which establishes the obligation of public accommodations to provide auxiliary aids and services. The Department, therefore, included it in the paragraphs of §36.309 requiring the provision of auxiliary aids. One commenter argued that similar limitations should apply to all of the requirements of §36.309, but the Department did not consider this extension appropriate.

Commenters who objected to permitting "alternative accessible arrangements" argued that such arrangements allow segregation and should not be permitted, unless they are the least restrictive available alternative, for example, for someone who cannot leave home. Some commenters made a distinction between courses, where interaction is an important part of the educational experience, and examinations, where it may be less important. Because the statute specifically authorizes alternative accessible arrangements as a method of meeting the requirements of section 309, the Department has not adopted this suggestion. The Department notes, however, that, while examinations of the type covered by §36.309 may not be covered elsewhere in the regulation, courses will generally be offered in a "place of education," which is included in the definition of "place of public accommodation" in §36.104, and, therefore, will be subject to the integrated setting requirement of §36.203.

Section 36.309(b) sets forth specific requirements for examinations. Examinations covered by this section would include a bar exam or the Scholastic Aptitude Test prepared by the Educational Testing Service. Paragraph (b)(1) is adopted from the Department of Education's section 504 regulation on admission tests to postsecondary educational programs (34 CFR 104.42(b)(3)). Paragraph (b)(1)(i) requires that a private entity offering an examination covered by the section must assure that the examination is selected and administered so as to best ensure that the examination accurately reflects an individual's aptitude or achievement level or other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).

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impairments, brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions.

(4) Alternative accessible arrangements may include, for example, provision of an examination at an individual's home with a proctor if accessible facilities or equipment are unavailable. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

(c) Courses. (1) Any private entity that offers a course covered by this section must make such modifications to that course as are necessary to ensure that the place and manner in which the course is given are accessible to individuals with disabilities.

(2) Required modifications may include changes in the length of time permitted for the completion of the course, substitution of specific requirements, or adaptation of the manner in which the course is conducted or course materials are distributed.

(3) A private entity that

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Paragraph (b)(1)(ii) requires that any examination specially designed for individuals with disabilities be offered as often and in as timely a manner as other examinations. Some commenters noted that persons with disabilities may be required to travel long distances when the locations for examinations for individuals with disabilities are limited, for example, to only one city in a State instead of a variety of cities. The Department has therefore revised this paragraph to add a requirement that such examinations be offered at locations that are as convenient as the location of other examinations.

Commenters representing organizations that administer tests wanted to be able to require individuals with disabilities to provide advance notice and appropriate documentation, at the applicants' expense, of their disabilities and of any modifications or aids that would be required. The Department agrees that such requirements are permissible, provided that they are not unreasonable and that the deadline for such notice is no earlier than the deadline for others applying to take the examination. Requiring individuals with disabilities to file earlier applications would violate the requirement that examinations designed for individuals with disabilities be offered in as timely a manner as other examinations.

Examiners may require evidence that an applicant is entitled to modifications or aids as required by this section, but requests for documentation must be reasonable and must be limited to the need for the modification or aid requested. Appropriate documentation might include a letter from a physician or other professional, or evidence of a prior diagnosis or accommodation, such as eligibility for a special education program. The applicant may be required to bear the cost of providing such documentation, but the entity administering the examination cannot charge the applicant for the cost of any modifications or auxiliary aids, such as interpreters, provided for the examination.

Paragraph (b)(1)(iii) requires that examinations be administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made.

Paragraph (b)(2) gives examples of modifications to examinations that may be necessary in order to comply with this section. These may include providing more time for completion of the examination or a change in the manner of

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offers a course covered by this section shall provide appropriate auxiliary aids and services for persons with impaired sensory, manual, or speaking skills, unless the private entity can demonstrate that offering a particular auxiliary aid or service would fundamentally alter the course or would result in an undue burden. Auxiliary aids and services required by this section may include taped texts, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, brailled or large print texts or qualified readers for individuals with visual impairments and learning disabilities, classroom equipment adapted for use by individuals with manual impairments, and other similar services and actions.

(4) Courses must be administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements must be made.

(5) Alternative accessible arrangements may include, for example, provision of the course through videotape, cassettes, or prepared notes. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

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giving the examination, e.g., reading the examination to the individual.

Paragraph (b)(3) requires the provision of auxiliary aids and services, unless the private entity offering the examination can demonstrate that offering a particular auxiliary aid would fundamentally alter the examination or result in an undue burden. Examples of auxiliary aids include taped examinations, interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments, readers for individuals with visual impairments or learning disabilities, and other similar services and actions. The suggestion that individuals with learning disabilities may need readers is included, although it does not appear in the Department of Education regulation, because, in fact, some individuals with learning disabilities have visual perception problems and would benefit from a reader.

Many commenters pointed out the importance of ensuring that modifications provide the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. For example, a reader who is unskilled or lacks knowledge of specific terminology used in the examination may be unable to convey the information in the questions or to follow the applicant's instructions effectively. Commenters pointed out that, for persons with visual impairments who read braille, braille provides the closest functional equivalent to a printed test. The Department has, therefore, added Brailled examinations to the examples of auxiliary aids and services that may be required. For similar reasons, the Department also added to the list of examples of auxiliary aids and services large print examinations and answer sheets; "qualified" readers; and transcribers to write answers.

A commenter suggested that the phrase "fundamentally alter the examination" in this paragraph of the proposed rule be revised to more accurately reflect the function affected. In the final rule the Department has substituted the phrase "fundamentally alter the measurement of the skills or knowledge the examination is intended to test."

Paragraph (b)(4) gives examples of alternative accessible arrangements. For instance, the private entity might be required to provide the examination at an individual's home with a proctor. Alternative arrangements must provide conditions for individuals with disabilities that are comparable to

the conditions under which other individuals take the examinations. In other words, an examination cannot be offered to an individual with a disability in a cold, poorly lit basement, if other individuals are given the examination in a warm, well lit classroom.

Some commenters who provide examinations for licensing or certification for particular occupations or professions urged that they be permitted to refuse to provide modifications or aids for persons seeking to take the examinations if those individuals, because of their disabilities, would be unable to perform the essential functions of the profession or occupation for which the examination is given, or unless the disability is reasonably determined in advance as not being an obstacle to certification. The Department has not changed its rule based on this comment. An examination is one stage of a licensing or certification process. An individual should not be barred from attempting to pass that stage of the process merely because he or she might be unable to meet other requirements of the process. If the examination is not the first stage of the qualification process, an applicant may be required to complete the earlier stages prior to being admitted to the examination. On the other hand, the applicant may not be denied admission to the examination on the basis of doubts about his or her abilities to meet requirements that the examination is not designed to test.

Paragraph (c) sets forth specific requirements for courses. Paragraph (c)(1) contains the general rule that any course covered by this section must be modified to ensure that the place and manner in which the course is given is accessible. Paragraph (c)(2) gives examples of possible modifications that might be required, including extending the time permitted for completion of the course, permitting oral rather than written delivery of an assignment by a person with a visual impairment, or adapting the manner in which the course is conducted (i.e., providing cassettes of class handouts to an individual with a visual impairment). In response to comments, the Department has added to the examples in paragraph (c)(2) specific reference to distribution of course materials. If course materials are published and available from other sources, the entity offering the course may give advance notice of what materials will be used so as to allow an individual to obtain them in braille or on tape, but materials provided by the course offerer must be made available in alternative formats for individuals with disabilities.

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In language similar to that of paragraph (b), paragraph (c)(3) requires auxiliary aids and services, unless a fundamental alteration or undue burden would result, and paragraph (c)(4) requires that courses be administered in accessible facilities. Paragraph (c)(5) gives examples of alternative accessible arrangements. These may include provision of the course through videotape, cassettes, or prepared notes. Alternative arrangements must provide comparable conditions to those provided to others, including similar lighting, room temperature, and the like. An entity offering a variety of courses, to fulfill continuing education requirements for a profession, for example, may not limit the selection or choice of courses available to individuals with disabilities.

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moval is readily achievable.

(c) Requirements for vehicles and systems. A public accommodation subject to this section shall comply with the requirements pertaining to vehicles and transportation systems in the regulations issued by the Secretary of Transportation pursuant to section 306 of the Act.

§§36.311-36.400 [Reserved]

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Paragraph (b) specifically provides that a public accommodation shall remove transportation barriers in existing vehicles to the extent that it is readily achievable to do so, but that the installation of hydraulic or other lifts is not required.

Paragraph (c) provides that public accommodations subject to this section shall comply with the requirements for transportation vehicles and systems contained in the regulations issued by the Secretary of Transportation.

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Subpart D--New Construction and Alterations

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Subpart D -- New Construction and Alterations.

Subpart D implements section 303 of the Act, which requires that newly constructed or altered places of public accommodation or commercial facilities be readily accessible to and usable by individuals with disabilities. This requirement contemplates a high degree of convenient access. It is intended to ensure that patrons and employees of places of public accommodation and employees of commercial facilities are able to get to, enter, and use the facility.

Potential patrons of places of public accommodation, such as retail establishments, should be able to get to a store, get into the store, and get to the areas where goods are being provided. Employees should have the same types of access, although those individuals require access to and around the employment area as well as to the area in which goods and services are provided.

The ADA is geared to the future -- its goal being that, over time, access will be the rule, rather than the exception. Thus, the Act only requires modest expenditures, of the type addressed in §36.304 of this part, to provide access to existing facilities not otherwise being altered, but requires all new construction and alterations to be accessible.

The Act does not require new construction or alterations; it simply requires that, when a public accommodation or other private entity undertakes the construction or alteration of a facility subject to the Act, the newly constructed or altered facility must be made accessible. This subpart establishes the requirements for new construction and alterations.

As explained under the discussion of the definition of "facility," §36.104, pending development of specific requirements, the Department will not apply this subpart to places of public accommodation located in mobile units, boats, or other conveyances.

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§36.401 New construction.

(a) General. (1) Except as provided in paragraphs (b) and (c) of this section, discrimination for purposes of this part includes a failure to design and construct facilities for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities.

(2) For purposes of this section, a facility is designed and constructed for first occupancy after January 26, 1993, only--

(i) If the last application for a building permit or permit extension for the facility is certified to be complete, by a State, County, or local government after January 26, 1992 (or, in those jurisdictions where the government does not certify completion of applications, if the last application for a building permit or permit extension for the facility is received by the State, County, or local government after January 26, 1992); and

(ii) If the first certificate of occupancy for the facility is issued after January 26, 1993.

(b) Commercial facilities located in private residences.

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Section 36.401 New construction.

General

Section 36.401 implements the new construction requirements of the ADA. Section 303(a)(1) of the Act provides that discrimination for purposes of section 302(a) of the Act includes a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment (i.e., after January 26, 1993) that are readily accessible to and usable by individuals with disabilities.

Paragraph 36.401(a)(1) restates the general requirement for accessible new construction. The proposed rule stated that "any public accommodation or other private entity responsible for design and construction" must ensure that facilities conform to this requirement. Various commenters suggested that the proposed language was not consistent with the statute because it substituted "private entity responsible for design and construction" for the statutory language; because it did not address liability on the part of architects, contractors, developers, tenants, owners, and other entities; and because it limited the liability of entities responsible for commercial facilities. In response, the Department has revised this paragraph to repeat the language of section 303(a) of the ADA. The Department will interpret this section in a manner consistent with the intent of the statute and with the nature of the responsibilities of the various entities for design, for construction, or for both.

Designed and constructed for first occupancy

According to paragraph (a)(2), a facility is subject to the new construction requirements only if a completed application for a building permit or permit extension is filed after January 26, 1992, and the facility is occupied after January 26, 1993.

The proposed rule set forth for comment two alternative ways by which to determine what facilities are subject to the Act and what standards apply. Paragraph (a)(2) of the final rule is a slight variation on Option One in the proposed rule. The reasons for the Department's choice of Option One are discussed later in this section.

Paragraph (a)(2) acknowledges that Congress did not contemplate having actual occupancy be the sole trigger for the accessibility requirements, because the statute prohibits a

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(1) When a commercial facility is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this subpart, but that portion used exclusively in the operation of the commercial facility or that portion used both for the commercial facility and for residential purposes is covered by the new construction and alterations requirements of this subpart.

(2) The portion of the residence covered under paragraph (b)(1) of this section extends to those elements used to enter the commercial facility, including the homeowner's front sidewalk, if any, the door or entryway, and hallways; and those portions of the residence, interior or exterior, available to or used by employees or visitors of the commercial facility, including restrooms.

(c) Exception for structural impracticability. (1) Full compliance with the requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorpora-

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failure to "design and construct for first occupancy," rather than requiring accessibility in facilities actually occupied after a particular date.

The commenters overwhelmingly agreed with the Department's proposal to use a date certain; many cited the reasons given in the preamble to the proposed rule. First, it is helpful for designers and builders to have a fixed date for accessible design, so that they can determine accessibility requirements early in the planning and design stage. It is difficult to determine accessibility requirements in anticipation of the actual date of first occupancy because of unpredictable and uncontrollable events (e.g., strikes affecting suppliers or labor, or natural disasters) that may delay occupancy. To redesign or reconstruct portions of a facility if it begins to appear that occupancy will be later than anticipated would be quite costly. A fixed date also assists those responsible for enforcing, or monitoring compliance with, the statute, and those protected by it.

The Department considered using as a trigger date for application of the accessibility standards the date on which a permit is granted. The Department chose instead the date on which a complete permit application is certified as received by the appropriate government entity. Almost all commenters agreed with this choice of a trigger date. This decision is based partly on information that several months or even years can pass between application for a permit and receipt of a permit. Design is virtually complete at the time an application is complete (i.e., certified to contain all the information required by the State, county, or local government). After an application is filed, delays may occur before the permit is granted due to numerous factors (not necessarily relating to accessibility): for example, hazardous waste discovered on the property, flood plain requirements, zoning disputes, or opposition to the project from various groups. These factors should not require redesign for accessibility if the application was completed before January 26, 1992. However, if the facility must be redesigned for other reasons, such as a change in density or environmental preservation, and the final permit is based on a new application, the rule would require accessibility if that application was certified complete after January 26, 1992.

The certification of receipt of a complete application for a building permit is an appropriate point in the process because

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tion of accessibility features.

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

(3) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

(d) Elevator exemption. (1) For purposes of this paragraph (d) --

(i) Professional office of a health care provider means a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. The facility housing the "professional office of a health care provider" only includes floor

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certifications are issued in writing by governmental authorities. In addition, this approach presents a clear and objective standard.

However, a few commenters pointed out that in some jurisdictions it is not possible to receive a "certification" that an application is complete, and suggested that in those cases the fixed date should be the date on which an application for a permit is received by the government agency. The Department has included such a provision in §36.401(a)(2)(i).

The date of January 26, 1992, is relevant only with respect to the last application for a permit or permit extension for a facility. Thus, if an entity has applied for only a "foundation" permit, the date of that permit application has no effect, because the entity must also apply for and receive a permit at a later date for the actual superstructure. In this case, it is the date of the later application that would control, unless construction is not completed within the time allowed by the permit, in which case a third permit would be issued and the date of the application for that permit would be determinative for purposes of the rule.

Choice of Option One for defining "designed and constructed for first occupancy"

Under the option the Department has chosen for determining applicability of the new construction standards, a building would be considered to be "for first occupancy" after January 26, 1993, only (1) if the last application for a building permit or permit extension for the facility is certified to be complete (or, in some jurisdictions, received) by a State, county, or local government after January 26, 1992, and (2) if the first certificate of occupancy is issued after January 26, 1993. The Department also asked for comment on an Option Two, which would have imposed new construction requirements if a completed application for a building permit or permit extension was filed after the enactment of the ADA (July 26, 1990), and the facility was occupied after January 26, 1993.

The request for comment on this issue drew a large number of comments expressing a wide range of views. Most business groups and some disability rights groups favored Option One, and some business groups and most disability rights groups favored Option Two. Individuals and government entities were equally divided; several commenters proposed other options.

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levels housing at least one health care provider, or any floor level designed or intended for use by at least one health care provider.

(ii) Shopping center or shopping mall means--

(A) A building housing five or more sales or rental establishments; or

(B) A series of buildings on a common site, either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. For purposes of this section, places of public accommodation of the types listed in paragraph (5) of the definition of "place of public accommodation" in section §36.104 are considered sales or rental establishments. The facility housing a "shopping center or shopping mall" only includes floor levels housing at least one sales or rental establishment, or any floor level designed or intended for use by at least one sales or rental establishment.

(2) This section does not require the installation of an elevator in a facility that is less than three stories or has less than 3000 square feet per story, except with respect to any facility that houses

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Those favoring Option One pointed out that it is more reasonable in that it allows time for those subject to the new construction requirements to anticipate those requirements and to receive technical assistance pursuant to the Act. Numerous commenters said that time frames for designing and constructing some types of facilities (for example, health care facilities) can range from two to four years or more. They expressed concerns that Option Two, which would apply to some facilities already under design or construction as of the date the Act was signed, and to some on which construction began shortly after enactment, could result in costly redesign or reconstruction of those facilities. In the same vein, some Option One supporters found Option Two objectionable on due process grounds. In their view, Option Two would mean that in July 1991 (upon issuance of the final DOJ rule) the responsible entities would learn that ADA standards had been in effect since July 26, 1990, and this would amount to retroactive application of standards. Numerous commenters characterized Option Two as having no support in the statute and Option One as being more consistent with congressional intent.

Those who favored Option Two pointed out that it would include more facilities within the coverage of the new construction standards. They argued that because similar accessibility requirements are in effect under State laws, no hardship would be imposed by this option. Numerous commenters said that hardship would also be eliminated in light of their view that the ADA requires compliance with the Uniform Federal Accessibility Standards (UFAS) until issuance of DOJ standards. Those supporting Option Two claimed that it was more consistent with the statute and its legislative history.

The Department has chosen Option One rather than Option Two, primarily on the basis of the language of three relevant sections of the statute. First, section 303(a) requires compliance with accessibility standards set forth, or incorporated by reference in, regulations to be issued by the Department of Justice. Standing alone, this section cannot be read to require compliance with the Department's standards before those standards are issued (through this rulemaking). Second, according to section 310 of the statute, section 303 becomes effective on January 26, 1992. Thus, section 303 cannot impose requirements on the design of buildings before that date. Third, while section 306(d) of the Act requires compli-

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one or more of the following:

(i) A shopping center or shopping mall, or a professional office of a health care provider.

(ii) A terminal, depot, or other station used for specified public transportation, or an airport passenger terminal. In such a facility, any area housing passenger services, including boarding and debarking, loading and unloading, baggage claim, dining facilities, and other common areas open to the public, must be on an accessible route from an accessible entrance.

(3) The elevator exemption set forth in this paragraph (d) does not obviate or limit in any way the obligation to comply with the other accessibility requirements established in paragraph (a) of this section. For example, in a facility that houses a shopping center or shopping mall, or a professional office of a health care provider, the floors that are above or below an accessible ground floor and that do not house sales or rental establishments or a professional office of a health care provider, must meet the requirements of this section but for the elevator.

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ance with UFAS if final regulations have not been issued, that provision cannot reasonably be read to take effect until July 26, 1991, the date by which the Department of Justice must issue final regulations under title III.

Option Two was based on the premise that the interim standards in section 306(d) take effect as of the ADA's enactment (July 26, 1990), rather than on the date by which the Department of Justice regulations are due to be issued (July 26, 1991). The initial clause of section 306(d)(1) itself is silent on this question:

If final regulations have not been issued pursuant to this section, for new construction for which a . . . building permit is obtained prior to the issuance of final regulations . . . [interim standards apply].

The approach in Option Two relies partly on the language of section 310 of the Act, which provides that section 306, the interim standards provision, takes effect on the date of enactment. Under this interpretation the interim standards provision would prevail over the operative provision, section 303, which requires that new construction be accessible and which becomes effective January 26, 1992. This approach would also require construing the language of section 306(d)(1) to take effect before the Department's standards are due to be issued. The preferred reading of section 306 is that it would require that, if the Department's final standards had not been issued by July 26, 1991, UFAS would apply to certain buildings until such time as the Department's standards were issued.

General Substantive Requirements of the New Construction Provisions

The rule requires, as does the statute, that covered newly constructed facilities be readily accessible to and usable by individuals with disabilities. The phrase "readily accessible to and usable by individuals with disabilities" is a term that, in slightly varied formulations, has been used in the Architectural Barriers Act of 1968, the Fair Housing Act, the regulations implementing section 504 of the Rehabilitation Act of 1973, and current accessibility standards. It means, with respect to a facility or a portion of a facility, that it can be approached, entered, and used by individuals with disabilities (including mobility, sensory, and cognitive impairments) easily and conveniently. A facility that is constructed to meet the re-

quirements of the rule's accessibility standards will be considered readily accessible and usable with respect to construction. To the extent that a particular type or element of a facility is not specifically addressed by the standards, the language of this section is the safest guide.

A private entity that renders an "accessible" building inaccessible in its operation, through policies or practices, may be in violation of section 302 of the Act. For example, a private entity can render an entrance to a facility inaccessible by keeping an accessible entrance open only during certain hours (whereas the facility is available to others for a greater length of time). A facility could similarly be rendered inaccessible if a person with disabilities is significantly limited in her or his choice of a range of accommodations.

Ensuring access to a newly constructed facility will include providing access to the facility from the street or parking lot, to the extent the responsible entity has control over the route from those locations. In some cases, the private entity will have no control over access at the point where streets, curbs, or sidewalks already exist, and in those instances the entity is encouraged to request modifications to a sidewalk, including installation of curb cuts, from a public entity responsible for them. However, as some commenters pointed out, there is no obligation for a private entity subject to title III of the ADA to seek or ensure compliance by a public entity with title II. Thus, although a locality may have an obligation under title II of the Act to install curb cuts at a particular location, that responsibility is separate from the private entity's title III obligation, and any involvement by a private entity in seeking cooperation from a public entity is purely voluntary in this context.

Work Areas

Proposed paragraph 36.401(b) addressed access to employment areas, rather than to the areas where goods or services are being provided. The preamble noted that the proposed paragraph provided guidance for new construction and alterations until more specific guidance was issued by the ATBCB and reflected in this Department's regulation. The entire paragraph has been deleted from this section in the final rule. The concepts of paragraphs (b) (1), (2), and (5) of the proposed rule are included, with modifications and expansion, in ADAAG. Paragraphs (3) and (4) of the proposed

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rule, concerning fixtures and equipment, are not included in the rule or in ADAAG.

Some commenters asserted that questions relating to new construction and alterations of work areas should be addressed by the EEOC under title I, as employment concerns. However, the legislative history of the statute clearly indicates that the new construction and alterations requirements of title III were intended to ensure accessibility of new facilities to all individuals, including employees. The language of section 303 sweeps broadly in its application to all public accommodations and commercial facilities. EEOC's title I regulations will address accessibility requirements that come into play when "reasonable accommodation" to individual employees or applicants with disabilities is mandated under title I.

The issues dealt with in proposed §36.401(b)(1) and (2) are now addressed in ADAAG section 4.1.1(3). The Department's proposed paragraphs would have required that areas that will be used only by employees as work stations be constructed so that individuals with disabilities could approach, enter, and exit the areas. They would not have required that all individual work stations be constructed or equipped (for example, with shelves that are accessible or adaptable) to be accessible. This approach was based on the theory that, as long as an employee with disabilities could enter the building and get to and around the employment area, modifications in a particular work station could be instituted as a "reasonable accommodation" to that employee if the modifications were necessary and they did not constitute an undue hardship.

Almost all of the commenters agreed with the proposal to require access to a work area but not to require accessibility of each individual work station. This principle is included in ADAAG 4.1.1(3). Several of the comments related to the requirements of the proposed ADAAG and have been addressed in the accessibility standards.

Proposed paragraphs (b)(3) and (4) would have required that consideration be given to placing fixtures and equipment at accessible heights in the first instance, and to purchasing new equipment and fixtures that are adjustable. These paragraphs have not been included in the final rule because the rule in most instances does not establish accessibility standards for purchased equipment. (See discussion elsewhere in the preamble of proposed §36.309.) While the Department en-

courages entities to consider providing accessible or adjustable fixtures and equipment for employees, this rule does not require them to do so.

Paragraph (b)(5) of proposed §36.401 clarified that proposed paragraph (b) did not limit the requirement that employee areas other than individual work stations must be accessible. For example, areas that are employee "common use" areas and are not solely used as work stations (e.g., employee lounges, cafeterias, health units, exercise facilities) are treated no differently under this regulation than other parts of a building; they must be constructed or altered in compliance with the accessibility standards. This principle is not stated in §36.401 but is implicit in the requirements of this section and ADAAG.

Commercial Facilities in Private Residences

Section 36.401(b) of the final rule is a new provision relating to commercial facilities located in private residences. The proposed rule addressed these requirements in the preamble to §36.207, "Places of public accommodation located in private residences." The preamble stated that the approach for commercial facilities would be the same as that for places of public accommodation, i.e., those portions used exclusively as a commercial facility or used as both a commercial facility and for residential purposes would be covered. Because commercial facilities are only subject to new construction and alterations requirements, however, the covered portions would only be subject to subpart D. This approach is reflected in §36.401(b)(1).

The Department is aware that the statutory definition of "commercial facility" excludes private residences because they are "expressly exempted from coverage under the Fair Housing Act of 1968, as amended." However, the Department interprets that exemption as applying only to facilities that are exclusively residential. When a facility is used as both a residence and a commercial facility, the exemption does not apply.

Paragraph (b)(2) is similar to the new paragraph (b) under §36.207, "Places of public accommodation located in private residences." The paragraph clarifies that the covered portion includes not only the space used as a commercial facility, but also the elements used to enter the commercial facility, e.g.,

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the homeowner's front sidewalk, if any; the doorway; the hallways; the restroom, if used by employees or visitors of the commercial facility; and any other portion of the residence, interior or exterior, used by employees or visitors of the commercial facility.

As in the case of public accommodations located in private residences, the new construction standards only apply to the extent that a portion of the residence is designed or intended for use as a commercial facility. Likewise, if a homeowner alters a portion of his home to convert it to a commercial facility, that work must be done in compliance with the alterations standards in the appendix A.

Structural Impracticability

Proposed §36.401(c) is included in the final rule with minor changes. It details a statutory exception to the new construction requirement: the requirement that new construction be accessible does not apply where an entity can demonstrate that it is structurally impracticable to meet the requirements of the regulation. This provision is also included in ADAAG, at section 4.1.1(5)(a).

Consistent with the legislative history of the ADA, this narrow exception will apply only in rare and unusual circumstances where unique characteristics of terrain make accessibility unusually difficult. Such limitations for topographical problems are analogous to an acknowledged limitation in the application of the accessibility requirements of the Fair Housing Amendments Act (FHAA) of 1988.

Almost all commenters supported this interpretation. Two commenters argued that the DOJ requirement is too limiting and would not exempt some buildings that should be exempted because of soil conditions, terrain, and other unusual site conditions. These commenters suggested consistency with HUD's Fair Housing Accessibility Guidelines (56 FR 9472 (1991)), which generally would allow exceptions from accessibility requirements, or allow compliance with less stringent requirements, on sites with slopes exceeding 10%.

The Department is aware of the provisions in HUD's guidelines, which were issued on March 6, 1991, after passage of the ADA and publication of the Department's proposed rule. The approach taken in these guidelines, which apply to

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different types of construction and implement different statutory requirements for new construction, does not bind this Department in regulating under the ADA. The Department has included in the final rule the substance of the proposed provision, which is faithful to the intent of the statute, as expressed in the legislative history. (See Senate report at 70-71; Education and Labor report at 120.)

. . . .

The limited structural impracticability exception means that it is acceptable to deviate from accessibility requirements only where unique characteristics of terrain prevent the incorporation of accessibility features and where providing accessibility would destroy the physical integrity of a facility. A situation in which a building must be built on stilts because of its location in marshlands or over water is an example of one of the few situations in which the exception for structural impracticability would apply.

This exception to accessibility requirements should not be applied to situations in which a facility is located in "hilly" terrain or on a plot of land upon which there are steep grades. In such circumstances, accessibility can be achieved without destroying the physical integrity of a structure, and is required in the construction of new facilities.

Some commenters asked for clarification concerning when and how to apply the ADA rules or the Fair Housing Accessibility Guidelines, especially when a facility may be subject to both because of mixed use. Guidance on this question is provided in the discussion of the definitions of place of public accommodation and commercial facility. With respect to the structural impracticability exception, a mixed-use facility could not take advantage of the Fair Housing exemption, to the extent that it is less stringent than the ADA exemption, except for those portions of the facility that are subject only to the Fair Housing Act.

As explained in the preamble to the proposed rule, in those rare circumstances in which it is structurally impracticable to achieve full compliance with accessibility requirements under the ADA, places of public accommodation and commercial facilities should still be designed and constructed to incorporate accessibility features to the extent that the features are structurally practicable. The accessibility requirements should not be viewed as an all-or-nothing proposition in such circumstances.

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If it is structurally impracticable for a facility in its entirety to be readily accessible to and usable by people with disabilities, then those portions that can be made accessible should be made accessible. If a building cannot be constructed in compliance with the full range of accessibility requirements because of structural impracticability, then it should still incorporate those features that are structurally practicable. If it is structurally impracticable to make a particular facility accessible to persons who have particular types of disabilities, it is still appropriate to require it to be made accessible to persons with other types of disabilities. For example, a facility that is of necessity built on stilts and cannot be made accessible to persons who use wheelchairs because it is structurally impracticable to do so, must be made accessible for individuals with vision or hearing impairments or other kinds of disabilities.

Elevator Exemption

Section 36.401(d) implements the "elevator exemption" for new construction in section 303(b) of the ADA. The elevator exemption is an exception to the general requirement that new facilities be readily accessible to and usable by individuals with disabilities. Generally, an elevator is the most common way to provide individuals who use wheelchairs "ready access" to floor levels above or below the ground floor of a multi-story building. Congress, however, chose not to require elevators in new small buildings, that is, those with less than three stories or less that 3000 square feet per story. In buildings eligible for the exemption, therefore, "ready access" from the building entrance to a floor above or below the ground floor is not required, because the statute does not require that an elevator be installed in such buildings. The elevator exemption does not apply, however, to a facility housing a shopping center, a shopping mall, or the professional office of a health care provider, or other categories of facilities as determined by the Attorney General. For example, a new office building that will have only two stories, with no elevator planned, will not be required to have an elevator, even if each story has 20,000 square feet. In other words, having either less than 3000 square feet per story or less than three stories qualifies a facility for the exemption; it need not qualify for the exemption on both counts. Similarly, a facility that has five stories of 2800 square feet each qualifies for the exemption. If a facility has three or more stories at any point, it is not eligible for the elevator exemption unless all the stories are less than 3000 square feet.

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The terms "shopping center or shopping mall" and "professional office of a health care provider" are defined in this section. They are substantively identical to the definitions included in the proposed rule in §36.104, "Definitions." They have been moved to this section because, as commenters pointed out, they are relevant only for the purposes of the elevator exemption, and inclusion in the general definitions section could give the incorrect impression that an office of a health care provider is not covered as a place of public accommodation under other sections of the rule, unless the office falls within the definition.

For purposes of §36.401, a "shopping center or shopping mall" is (1) a building housing five or more sales or rental establishments, or (2) a series of buildings on a common site, either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. The term "shopping center or shopping mall" only includes floor levels containing at least one sales or rental establishment, or any floor level that was designed or intended for use by at least one sales or rental establishment.

Any sales or rental establishment of the type that is included in paragraph (5) of the definition of "place of public accommodation" (for example, a bakery, grocery store, clothing store, or hardware store) is considered a sales or rental establishment for purposes of this definition; the other types of public accommodations (e.g., restaurants, laundromats, banks, travel services, health spas) are not.

In the preamble to the proposed rule, the Department sought comment on whether the definition of "shopping center or mall" should be expanded to include any of these other types of public accommodations. The Department also sought comment on whether a series of buildings should fall within the definition only if they are physically connected.

Most of those responding to the first question (overwhelmingly groups representing people with disabilities, or individual commenters) urged that the definition encompass more places of public accommodation, such as restaurants, motion picture houses, laundromats, dry cleaners, and banks. They pointed out that often it is not known what types of establishments will be tenants in a new facility. In addition, they noted that malls are advertised as entities, that their

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appeal is in the "package" of services offered to the public, and that this package often includes the additional types of establishments mentioned.

Commenters representing business groups sought to exempt banks, travel services, grocery stores, drug stores, and freestanding retail stores from the elevator requirement. They based this request on the desire to continue the practice in some locations of incorporating mezzanines housing administrative offices, raised pharmacist areas, and raised areas in the front of supermarkets that house safes and are used by managers to oversee operations of check-out aisles and other functions. Many of these concerns are adequately addressed by ADAAG. Apart from those addressed by ADAAG, the Department sees no reason to treat a particular type of sales or rental establishment differently from any other. Although banks and travel services are not included as "sales or rental establishments," because they do not fall under paragraph (5) of the definition of place of public accommodation, grocery stores and drug stores are included.

The Department has declined to include places of public accommodation other than sales or rental establishments in the definition. The statutory definition of "public accommodation" (section 301(7)) lists 12 types of establishments that are considered public accommodations. Category (E) includes "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." This arrangement suggests that it is only these types of establishments that would make up a shopping center for purposes of the statute. To include all types of places of public accommodation, or those from 6 or 7 of the categories, as commenters suggest, would overly limit the elevator exemption; the universe of facilities covered by the definition of "shopping center" could well exceed the number of multitenant facilities not covered, which would render the exemption almost meaningless.

For similar reasons, the Department is retaining the requirement that a building or series of buildings must house five or more sales or rental establishments before it falls within the definition of "shopping center." Numerous commenters objected to the number and requested that the number be lowered from five to three or four. Lowering the number in this manner would include an inordinately large number of two-story multitenant buildings within the category of those required to have elevators.

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The responses to the question concerning whether a series of buildings should be connected in order to be covered were varied. Generally, disability rights groups and some government agencies said a series of buildings should not have to be connected, and pointed to a trend in some areas to build shopping centers in a garden or village setting. The Department agrees that this design choice should not negate the elevator requirement for new construction. Some business groups answered the question in the affirmative, and some suggested a different definition of shopping center. For example, one commenter recommended the addition of a requirement that the five or more establishments be physically connected on the non-ground floors by a common pedestrian walkway or pathway, because otherwise a series of stand-alone facilities would have to comply with the elevator requirement, which would be unduly burdensome and perhaps infeasible. Another suggested use of what it characterized as the standard industry definition: "a group of retail stores and related business facilities, the whole planned, developed, operated and managed as a unit." While the rule's definition would reach a series of related projects that are under common control but were not developed as a single project, the Department considers such a facility to be a shopping center within the meaning of the statute. However, in light of the hardship that could confront a series of existing small stand-alone buildings if elevators were required in alterations, the Department has included a common access route in the definition of shopping center or shopping mall for purposes of §36.404.

Some commenters suggested that access to restrooms and other shared facilities open to the public should be required even if those facilities were not on a shopping floor. Such a provision with respect to toilet or bathing facilities is included in the elevator exception in final ADAAG 4.1.3(5).

For purposes of this subpart, the rule does not distinguish between a "shopping mall" (usually a building with a roofed-over common pedestrian area serving more than one tenant in which a majority of the tenants have a main entrance from the common pedestrian area) and a "shopping center" (e.g., a "shopping strip"). Any facility housing five or more of the types of sales or rental establishments described, regardless of the number of other types of places of public accommodation housed there (e.g., offices, movie theatres, restaurants), is a shopping center or shopping mall.

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For example, a two-story facility built for mixed-use occupancy on both floors (e.g., by sales and rental establishments, a movie theater, restaurants, and general office space) is a shopping center or shopping mall if it houses five or more sales or rental establishments. If none of these establishments is located on the second floor, then only the ground floor, which contains the sales or rental establishments, would be a "shopping center or shopping mall," unless the second floor was designed or intended for use by at least one sales or rental establishment. In determining whether a floor was intended for such use, factors to be considered include the types of establishments that first occupied the floor, the nature of the developer's marketing strategy, i.e., what types of establishments were sought, and inclusion of any design features particular to rental and sales establishments.

A "professional office of a health care provider" is defined as a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. In a two-story development that houses health care providers only on the ground floor, the "professional office of a health care provider" is limited to the ground floor unless the second floor was designed or intended for use by a health care provider. In determining if a floor was intended for such use, factors to be considered include whether the facility was constructed with special plumbing, electrical, or other features needed by health care providers, whether the developer marketed the facility as a medical office center, and whether any of the establishments that first occupied the floor was, in fact, a health care provider.

In addition to requiring that a building that is a shopping center, shopping mall, or the professional office of a health care provider have an elevator regardless of square footage or number of floors, the ADA (section 303(b)) provides that the Attorney General may determine that a particular category of facilities requires the installation of elevators based on the usage of the facilities. The Department, as it proposed to do, has added to the nonexempt categories terminals, depots, or other stations used for specified public transportation, and airport passenger terminals. Numerous commenters in all categories endorsed this proposal; none opposed it. It is not uncommon for an airport passenger terminal or train station, for example, to have only two floors, with gates on both floors. Because of the significance of transportation, because

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a person with disabilities could be arriving or departing at any gate, and because inaccessible facilities could result in a total denial of transportation services, it is reasonable to require that newly constructed transit facilities be accessible, regardless of square footage or number of floors. One comment suggested an amendment that would treat terminals and stations similarly to shopping centers, by requiring an accessible route only to those areas used for passenger loading and unloading and for other passenger services. Paragraph (d)(2)(ii) has been modified accordingly.

Some commenters suggested that other types of facilities (e.g., educational facilities, libraries, museums, commercial facilities, and social service facilities) should be included in the category of nonexempt facilities. The Department has not found adequate justification for including any other types of facilities in the nonexempt category at this time.

Section 36.401(d)(2) establishes the operative requirements concerning the elevator exemption and its application to shopping centers and malls, professional offices of health care providers, transit stations, and airport passenger terminals. Under the rule's framework, it is necessary first to determine if a new facility (including one or more buildings) houses places of public accommodation or commercial facilities that are in the categories for which elevators are required. If so, and the facility is a shopping center or shopping mall, or a professional office of a health care provider, then any area housing such an office or a sales or rental establishment or the professional office of a health care provider is not entitled to the elevator exemption.

The following examples illustrate the application of these principles:

1. A shopping mall has an upper and a lower level. There are two "anchor stores" (in this case, major department stores at either end of the mall, both with exterior entrances and an entrance on each level from the common area). In addition, there are 30 stores (sales or rental establishments) on the upper level, all of which have entrances from a common central area. There are 30 stores on the lower level, all of which have entrances from a common central area. According to the rule, elevator access must be provided to each store and to each level of the anchor stores. This requirement could be satisfied with respect to the 60 stores through eleva-

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tors connecting the two pedestrian levels, provided that an individual could travel from the elevator to any other point on that level (i.e., into any store through a common pedestrian area) on an accessible path.

2. A commercial (nonresidential) "townhouse" development is composed of 20 two-story attached buildings. The facility is developed as one project, with common ownership, and the space will be leased to retailers. Each building has one accessible entrance from a pedestrian walk to the first floor. From that point, one can enter a store on the first floor, or walk up a flight of stairs to a store on the second floor. All 40 stores must be accessible at ground floor level or by accessible vertical access from that level. This does not mean, however, that 20 elevators must be installed. Access could be provided to the second floor by an elevator from the pedestrian area on the lower level to an upper walkway connecting all the areas on the second floor.

3. In the same type of development, it is planned that retail stores will be housed exclusively on the ground floor, with only office space (not professional offices of health care providers) on the second. Elevator access need not be provided to the second floor because all the sales or rental establishments (the entities that make the facility a shopping center) are located on an accessible ground floor.

4. In the same type of development, the space is designed and marketed as medical or office suites, or as a medical office facility. Accessible vertical access must be provided to all areas, as described in example 2.

Some commenters suggested that building owners who knowingly lease or rent space to nonexempt places of public accommodation would violate §36.401. However, the Department does not consider leasing or renting inaccessible space in itself to constitute a violation of this part. Nor does a change in use of a facility, with no accompanying alterations (e.g., if a psychiatrist replaces an attorney as a tenant in a second-floor office, but no alterations are made to the office) trigger accessibility requirements.

Entities cannot evade the requirements of this section by constructing facilities in such a way that no story is intended to constitute a "ground floor." For example, if a private entity constructs a building whose main entrance leads only to

stairways or escalators that connect with upper or lower floors, the Department would consider at least one level of the facility a ground story.

The rule requires in §36.401(d)(3), consistent with the proposed rule, that, even if a building falls within the elevator exemption, the floor or floors other than the ground floor must nonetheless be accessible, except for elevator access, to individuals with disabilities, including people who use wheelchairs. This requirement applies to buildings that do not house sales or rental establishments or the professional offices of a health care provider as well as to those in which such establishments or offices are all located on the ground floor. In such a situation, little added cost is entailed in making the second floor accessible, because it is similar in structure and floor plan to the ground floor.

There are several reasons for this provision. First, some individuals who are mobility impaired may work on a building's second floor, which they can reach by stairs and the use of crutches; however, the same individuals, once they reach the second floor, may then use a wheelchair that is kept in the office. Secondly, because the first floor will be accessible, there will be little additional cost entailed in making the second floor, with the same structure and generally the same floor plan, accessible. In addition, the second floor must be accessible to those persons with disabilities who do not need elevators for level changes (for example, persons with sight or hearing impairments and those with certain mobility impairments). Finally, if an elevator is installed in the future for any reason, full access to the floor will be facilitated.

One commenter asserted that this provision goes beyond the Department's authority under the Act, and disagreed with the Department's claim that little additional cost would be entailed in compliance. However, the provision is taken directly from the legislative history (see Education and Labor report at 114).

One commenter said that where an elevator is not required, platform lifts should be required. Two commenters pointed out that the elevator exemption is really an exemption from the requirement for providing an accessible route to a second floor not served by an elevator. The Department agrees with the latter comment. Lifts to provide access between floors are not required in buildings that are not

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required to have elevators. This point is specifically addressed in the appendix to ADAAG (§ 4.1.3(5)). ADAAG also addresses in detail the situations in which lifts are permitted or required.

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§36.402 Alterations.

(a) General. (1) Any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) An alteration is deemed to be undertaken after January 26, 1992, if the physical alteration of the property begins after that date.

(b) Alteration. For the purposes of this part, an alteration is a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof.

(1) Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to

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Section 36.402 Alterations.

Sections 36.402-36.405 implement section 303(a)(2) of the Act, which requires that alterations to existing facilities be made in a way that ensures that the altered portion is readily accessible to and usable by individuals with disabilities. This part does not require alterations; it simply provides that when alterations are undertaken, they must be made in a manner that provides access.

Section 36.402(a)(1) provides that any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The proposed rule provided that an alteration would be deemed to be undertaken after January 26, 1992, if the physical alteration of the property is in progress after that date. Commenters pointed out that this provision would, in some cases, produce an unjust result by requiring the redesign or retrofitting of projects initiated before this part established the ADA accessibility standards. The Department agrees that the proposed rule would, in some instances, unfairly penalize projects that were substantially completed before the effective date. Therefore, paragraph (a)(2) has been revised to specify that an alteration will be deemed to be undertaken after January 26, 1992, if the physical alteration of the property begins after that date. As a matter of interpretation, the Department will construe this provision to apply to alterations that require a permit from a State, County or local government, if physical alterations pursuant to the terms of the permit begin after January 26, 1992. The Department recognizes that this application of the effective date may require redesign of some facilities that were planned prior to the publication of this part, but no retrofitting will be required of facilities on which the physical alterations were initiated prior to the effective date of the Act. Of course, nothing in this section in any way alters the obligation of any facility to remove architectural barriers in existing facilities to the extent that such barrier removal is readily achievable.

Paragraph (b) provides that, for the purposes of this part, an "alteration" is a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof. One

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mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.

(2) If existing elements, spaces, or common areas are altered, then each such altered element, space, or area shall comply with the applicable provisions of appendix A to this part.

(c) To the maximum extent feasible. The phrase "to the maximum extent feasible," as used in this section, applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches, those who have impaired vision or hearing, or those who have other impairments).

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commenter suggested that the concept of usability should apply only to those changes that affect access by persons with disabilities. The Department remains convinced that the Act requires the concept of "usability" to be read broadly to include any change that affects the usability of the facility, not simply changes that relate directly to access by individuals with disabilities.

The Department received a significant number of comments on the examples provided in paragraphs (b)(1) and (b)(2) of the proposed rule. Some commenters urged the Department to limit the application of this provision to major structural modifications, while others asserted that it should be expanded to include cosmetic changes such as painting and wallpapering. The Department believes that neither approach is consistent with the legislative history, which requires this Department's regulation to be consistent with the accessibility guidelines (ADAAG) developed by the Architectural and Transportation Barriers Compliance Board (ATBCB). Although the legislative history contemplates that, in some instances, the ADA accessibility standards will exceed the current MGRAD requirements, it also clearly indicates the view of the drafters that "minor changes such as painting or papering walls . . . do not affect usability" (Education and Labor report at 111, Judiciary report at 64), and, therefore, are not alterations. The proposed rule was based on the existing MGRAD definition of "alteration." The language of the final rule has been revised to be consistent with ADAAG, incorporated as Appendix A to this part.

Some commenters sought clarification of the intended scope of this section. The proposed rule contained illustrations of changes that affect usability and those that do not. The intent of the illustrations was to explain the scope of the alterations requirement; the effect was to obscure it. As a result of the illustrations, some commenters concluded that any alteration to a facility, even a minor alteration such as relocating an electrical outlet, would trigger an extensive obligation to provide access throughout an entire facility. That result was never contemplated.

Therefore, in this final rule paragraph (b)(1) has been revised to include the major provisions of paragraphs (b)(1) and (b)(2) of the proposed rule. The examples in the proposed rule have been deleted. Paragraph (b)(1) now provides that alterations include, but are not limited to, remodeling, renova-

tion, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of building or facility.

Paragraph (b)(2) of this final rule was added to clarify the scope of the alterations requirement. Paragraph (b)(2) provides that if existing elements, spaces, or common areas are altered, then each such altered element, space, or area shall comply with the applicable provisions of Appendix A (ADAAG). As provided in §36.403, if an altered space or area is an area of the facility that contains a primary function, then the requirements of that section apply.

Therefore, when an entity undertakes a minor alteration to a place of public accommodation or commercial facility, such as moving an electrical outlet, the new outlet must be installed in compliance with ADAAG. (Alteration of the elements listed in §36.403(c)(2) cannot trigger a path of travel obligation.) If the alteration is to an area, such as an employee lounge or locker room, that is not an area of the facility that contains a primary function, that area must comply with ADAAG. It is only when an alteration affects access to or usability of an area containing a primary function, as opposed to other areas or the elements listed in §36.403(c)(2), that the path of travel to the altered area must be made accessible.

The Department received relatively few comments on paragraph (c), which explains the statutory phrase "to the maximum extent feasible." Some commenters suggested that the regulation should specify that cost is a factor in determining whether it is feasible to make an altered area accessible. The legislative history of the ADA indicates that the concept of feasibility only reaches the question of whether it is possible to make the alteration accessible in compliance with this part. Costs are to be considered only when an alteration to an area containing a primary function triggers an additional requirement to make the path of travel to the altered area accessible.

Section 36.402(c) is, therefore, essentially unchanged from the proposed rule. At the recommendation of a

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commenter, the Department has inserted the word "virtually" to modify "impossible" to conform to the language of the legislative history. It explains that the phrase "to the maximum extent feasible" as used in this section applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In the occasional cases in which full compliance is impossible, alterations shall provide the maximum physical accessibility feasible. Any features of the facility that are being altered shall be made accessible unless it is technically infeasible to do so. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches or who have impaired vision or hearing, or those who have other types of impairments).

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§36.403 Alterations: Path of travel.

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

(b) Primary function. A "primary function" is a major activity for which the facility is intended. Areas that contain a primary function include, but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, and restrooms are not areas containing a primary function.

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Section 36.403 Alterations: Path of travel.

Section 36.403 implements the statutory requirement that any alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area, and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration. Paragraph (a) restates this statutory requirement.

Paragraph (b) defines a "primary function" as a major activity for which the facility is intended. This paragraph is unchanged from the proposed rule. Areas that contain a primary function include, but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and all other work areas in which the activities of the public accommodation or other private entities using the facility are carried out. The concept of "areas containing a primary function" is analogous to the concept of "functional spaces" in §3.5 of the existing Uniform Federal Accessibility Standards, which defines "functional spaces" as "[t]he rooms and spaces in a building or facility that house the major activities for which the building or facility is intended."

Paragraph (b) provides that areas such as mechanical rooms, boiler rooms, supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, corridors, and restrooms are not areas containing a primary function. There may be exceptions to this general rule. For example, the availability of public restrooms at a place of public accommodation at a roadside rest stop may be a major factor affecting customers' decisions to patronize the public accommodation. In that case, a restroom would be considered to be an "area containing a primary function" of the facility.

Most of the commenters who addressed this issue supported the approach taken by the Department; but a few commenters suggested that areas not open to the general public or those used exclusively by employees should be excluded from the definition of primary function. The preamble to the proposed rule noted that the Department

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(c) Alterations to an area containing a primary function. (1) Alterations that affect the usability of or access to an area containing a primary function include, but are not limited to --

(i) Remodeling merchandise display areas or employee work areas in a department store;

(ii) Replacing an inaccessible floor surface in the customer service or employee work areas of a bank;

(iii) Redesigning the assembly line area of a factory; or

(iv) Installing a computer center in an accounting firm.

(2) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.

(d) Landlord/tenant: If a tenant is making alterations as defined in §36.402 that would trigger the requirements of this section, those alterations by the tenant in areas that only the tenant occupies do not trigger a path of travel obligation upon the landlord with

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considered an alternative approach to the definition of "primary function," under which a primary function of a commercial facility would be defined as a major activity for which the facility was intended, while a primary function of a place of public accommodation would be defined as an activity which involves providing significant goods, services, facilities, privileges, advantages, or accommodations. However, the Department concluded that, although portions of the legislative history of the ADA support this alternative, the better view is that the language now contained in §36.403(b) most accurately reflects congressional intent. No commenter made a persuasive argument that the Department's interpretation of the legislative history is incorrect.

When the ADA was introduced, the requirement to make alterations accessible was included in section 302 of the Act, which identifies the practices that constitute discrimination by a public accommodation. Because section 302 applies only to the operation of a place of public accommodation, the alterations requirement was intended only to provide access to clients and customers of a public accommodation. It was anticipated that access would be provided to employees with disabilities under the "reasonable accommodation" requirements of title I. However, during its consideration of the ADA, the House Judiciary Committee amended the bill to move the alterations provision from section 302 to section 303, which applies to commercial facilities as well as public accommodations. The Committee report accompanying the bill explains that:

New construction and alterations of both public accommodations and commercial facilities must be made readily accessible to and usable by individuals with disabilities .... Essentially, [this requirement] is designed to ensure that patrons and employees of public accommodations and commercial facilities are able to get to, enter and use the facility.... The rationale for making new construction accessible applies with equal force to alterations.

Judiciary report at 62-63 (emphasis added).

The ADA, as enacted, contains the language of section 303 as it was reported out of the Judiciary Committee. Therefore, the Department has concluded that the concept of "primary function" should be applied in the same manner to places of public accommodation and to commercial facilities, thereby

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respect to areas of the facility under the landlord's authority, if those areas are not otherwise being altered.

(e) Path of travel. (1) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

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

(3) For the purposes of this part, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving the altered area.

(f) Disproportionality. (1) Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the

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including employee work areas in places of public accommodation within the scope of this section.

Paragraph (c) provides examples of alterations that affect the usability of or access to an area containing a primary function. The examples include: remodeling a merchandise display area or employee work areas in a department store; installing a new floor surface to replace an inaccessible surface in the customer service area or employee work areas of a bank; redesigning the assembly line area of a factory; and installing a computer center in an accounting firm. This list is illustrative, not exhaustive. Any change that affects the usability of or access to an area containing a primary function triggers the statutory obligation to make the path of travel to the altered area accessible.

When the proposed rule was drafted, the Department believed that the rule made it clear that the ADA would require alterations to the path of travel only when such alterations are not disproportionate to the alteration to the primary function area. However, the comments that the Department received indicated that many commenters believe that even minor alterations to individual elements would require additional alterations to the path of travel. To address the concern of these commenters, a new paragraph (c)(2) has been added to the final rule to provide that alterations to such elements as windows, hardware, controls (e.g. light switches or thermostats), electrical outlets, or signage will not be deemed to be alterations that affect the usability of or access to an area containing a primary function. Of course, each element that is altered must comply with ADAAG (Appendix A). The cost of alterations to individual elements would be included in the overall cost of an alteration for purposes of determining disproportionality and would be counted when determining the aggregate cost of a series of small alterations in accordance with §36.403(h) if the area is altered in a manner that affects access to or usability of an area containing a primary function.

Paragraph (d) concerns the respective obligations of landlords and tenants in the cases of alterations that trigger the path of travel requirement under §36.403. This paragraph was contained in the landlord/tenant section of the proposed rule, §36.201(b). If a tenant is making alterations upon its premises pursuant to terms of a lease that grant it the authority to do so (even if they constitute alterations that trigger the

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cost of the alteration to the primary function area.

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

(i) Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

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

(iii) Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a telecommunications device for deaf persons (TDD);

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

(g) Duty to provide accessible features in the event of disproportionality. (1) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is

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path of travel requirement), and the landlord is not making alterations to other parts of the facility, then the alterations by the tenant on its own premises do not trigger a path of travel obligation upon the landlord in areas of the facility under the landlord's authority that are not otherwise being altered. The legislative history makes clear that the path of travel requirement applies only to the entity that is already making the alteration, and thus the Department has not changed the final rule despite numerous comments suggesting that the tenant be required to provide a path of travel.

Paragraph (e) defines a "path of travel" as a continuous, unobstructed way of pedestrian passage by means of which an altered area may be approached, entered, and exited; and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility. This concept of an accessible path of travel is analogous to the concepts of "accessible route" and "circulation path" contained in section 3.5 of the current UFAS. Some commenters suggested that this paragraph should address emergency egress. The Department disagrees. "Path of travel" as it is used in this section is a term of art under the ADA that relates only to the obligation of the public accommodation or commercial facility to provide additional accessible elements when an area containing a primary function is altered. The Department recognizes that emergency egress is an important issue, but believes that it is appropriately addressed in ADAAG (appendix A), not in this paragraph. Furthermore, ADAAG does not require changes to emergency egress areas in alterations.

Paragraph (e)(2) is drawn from section 3.5 of UFAS. It provides that an accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of such elements. Paragraph (e)(3) provides that, for the purposes of this part, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving an altered area.

Although the Act establishes an expectation that an accessible path of travel should generally be included when alterations are made to an area containing a primary function, Congress recognized that, in some circumstances, providing an accessible path of travel to an altered area may be sufficiently

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disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

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

(i) An accessible entrance;

(ii) An accessible route to the altered area;

(iii) At least one accessible restroom for each sex or a single unisex restroom;

(iv) Accessible telephones;

(v) Accessible drinking fountains; and

(vi) When possible, additional accessible elements such as parking, storage, and alarms.

(h) Series of smaller alterations. (1) The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been

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burdensome in comparison to the alteration being undertaken to the area containing a primary function as to render this requirement unreasonable. Therefore, Congress provided, in section 303(a)(2) of the Act, that alterations to the path of travel that are disproportionate in cost and scope to the overall alteration are not required.

The Act requires the Attorney General to determine at what point the cost of providing an accessible path of travel becomes disproportionate. The proposed rule provided three options for making this determination.

Two committees of Congress specifically addressed this issue: the House Committee on Education and Labor and the House Committee on the Judiciary. The reports issued by each committee suggested that accessibility alterations to a path of travel might be "disproportionate" if they exceed 30% of the alteration costs (Education and Labor report at 113; Judiciary report at 64). Because the Department believed that smaller percentage rates might be appropriate, the proposed rule sought comments on three options: 10%, 20%, or 30%.

The Department received a significant number of comments on this section. Commenters representing individuals with disabilities generally supported the use of 30% (or more); commenters representing covered entities supported a figure of 10% (or less). The Department believes that alterations made to provide an accessible path of travel to the altered area should be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area. This approach appropriately reflects the intent of Congress to provide access for individuals with disabilities without causing economic hardship for the covered public accommodations and commercial facilities.

The Department has determined that the basis for this cost calculation shall be the cost of the alterations to the area containing the primary function. This approach will enable the public accommodation or other private entity that is making the alteration to calculate its obligation as a percentage of a clearly ascertainable base cost, rather than as a percentage of the "total" cost, an amount that will change as accessibility alterations to the path of travel are made.

Paragraph (f)(2) (paragraph (e)(2) in the proposed rule) is

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performed as a single undertaking.

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

(ii) Only alterations undertaken after January 26, 1992, shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.

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unchanged. It provides examples of costs that may be counted as expenditures required to provide an accessible path of travel. They include:

-Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

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

- Costs associated with providing accessible telephones, such as relocating telephones to an accessible height, installing amplification devices, or installing telecommunications devices for deaf persons (TDD's);

- Costs associated with relocating an inaccessible drinking fountain.

Paragraph (f)(1) of the proposed rule provided that when the cost of alterations necessary to make the path of travel serving an altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the maximum extent feasible. In response to the suggestion of a commenter, the Department has made an editorial change in the final rule (paragraph (g)(1)) to clarify that if the cost of providing a fully accessible path of travel is disproportionate, the path of travel shall be made accessible "to the extent that it can be made accessible without incurring disproportionate costs."

Paragraph (g)(2) (paragraph (f)(2) in the NPRM) establishes that priority should be given to those elements that will provide the greatest access, in the following order: an accessible entrance; an accessible route to the altered area; at least one accessible restroom for each sex or a single unisex restroom; accessible telephones; accessible drinking fountains; and, whenever possible, additional accessible elements such as parking, storage, and alarms. This paragraph is unchanged from the proposed rule.

Paragraph (h) (paragraph (g) in the proposed rule) provides that the obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations

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could have been performed as a single undertaking. If an area containing a primary function has been altered without providing an accessible path of travel to serve that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making the path of travel serving that area accessible is disproportionate. Only alterations undertaken after January 26, 1992, shall be considered in determining if the cost of providing accessible features is disproportionate to the overall cost of the alterations.

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§36.404 Alterations: Elevator exemption.

(a) This section does not require the installation of an elevator in an altered facility that is less than three stories or has less than 3,000 square feet per story, except with respect to any facility that houses a shopping center, a shopping mall, the professional office of a health care provider, a terminal, depot, or other station used for specified public transportation, or an airport passenger terminal.

(1) For the purposes of this section, "professional office of a health care provider" means a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. The facility that houses a "professional office of a health care provider" only includes floor levels housing by at least one health care provider, or any floor level designed or intended for use by at least one health care provider.

(2) For the purposes of this section, shopping center or shopping mall means--

(i) A building housing five or more sales or rental establishments; or

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Section 36.404 Alterations: Elevator Exemption.

Section 36.404 implements the elevator exemption in section 303(b) of the Act as it applies to altered facilities. The provisions of section 303(b) are discussed in the preamble to §36.401(d) above. The statute applies the same exemption to both new construction and alterations. The principal difference between the requirements of §36.401(d) and §36.404 is that, in altering an existing facility that is not eligible for the statutory exemption, the public accommodation or other private entity responsible for the alteration is not required to install an elevator if the installation of an elevator would be disproportionate in cost and scope to the cost of the overall alteration as provided in §36.403(f)(1). In addition, the standards referenced in §36.406 (ADAAG) provide that installation of an elevator in an altered facility is not required if it is "technically infeasible."

This section has been revised to define the terms "professional office of a health care provider" and "shopping center or shopping mall" for the purposes of this section. The definition of "professional office of a health care provider" is identical to the definition included in §36.401(d).

It has been brought to the attention of the Department that there is some misunderstanding about the scope of the elevator exemption as it applies to the professional office of a health care provider. A public accommodation, such as the professional office of a health care provider, is required to remove architectural barriers to its facility to the extent that such barrier removal is readily achievable (see §36.304), but it is not otherwise required by this part to undertake new construction or alterations. This part does not require that an existing two story building that houses the professional office of a health care provider be altered for the purpose of providing elevator access. If, however, alterations to the area housing the office of the health care provider are undertaken for other purposes, the installation of an elevator might be required, but only if the cost of the elevator is not disproportionate to the cost of the overall alteration. Neither the Act nor this part prohibits a health care provider from locating his or her professional office in an existing facility that does not have an elevator.

Because of the unique challenges presented in altering existing facilities, the Department has adopted a definition of "shopping center or shopping mall" for the purposes of this

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(ii) A series of buildings on a common site, connected by a common pedestrian access route above or below the ground floor, that is either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. For purposes of this section, places of public accommodation of the types listed in paragraph (5) of the definition of "place of public accommodation" in §36.104 are considered sales or rental establishments. The facility housing a "shopping center or shopping mall" only includes floor levels housing at least one sales or rental establishment, or any floor level designed or intended for use by at least one sales or rental establishment.

(b) The exemption provided in paragraph (a) of this section does not obviate or limit in any way the obligation to comply with the other accessibility requirements established in this subpart. For example, alterations to floors above or below the accessible ground floor must be accessible regardless of whether the altered facility has an elevator.

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section that is slightly different from the definition adopted under §36.401(d). For the purposes of this section, a "shopping center or shopping mall" is (1) a building housing five or more sales or rental establishments, or (2) a series of buildings on a common site, connected by a common pedestrian access route above or below the ground floor, either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. As is the case with new construction, the term "shopping center or shopping mall" only includes floor levels housing at least one sales or rental establishment, or any floor level that was designed or intended for use by at least one sales or rental establishment.

The Department believes that it is appropriate to use a different definition of "shopping center or shopping mall" for this section than for §36.401, in order to make it clear that a series of existing buildings on a common site that is altered for the use of sales or rental establishments does not become a "shopping center or shopping mall" required to install an elevator, unless there is a common means of pedestrian access above or below the ground floor. Without this exemption, separate, but adjacent, buildings that were initially designed and constructed independently of each other could be required to be retrofitted with elevators, if they were later renovated for a purpose not contemplated at the time of construction.

Like §36.401(d), §36.404 provides that the exemptions in this paragraph do not obviate or limit in any way the obligation to comply with the other accessibility requirements established in this subpart. For example, alterations to floors above or below the ground floor must be accessible regardless of whether the altered facility has an elevator. If a facility that is not required to install an elevator nonetheless has an elevator, that elevator shall meet, to the maximum extent feasible, the accessibility requirements of this section.

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§36.405 Alterations: Historic preservation.

(a) Alterations to buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), or are designated as historic under State or local law, shall comply to the maximum extent feasible with section 4.1.7 of appendix A to this Part.

(b) If it is determined under the procedures set out in section 4.1.7 of appendix A that it is not feasible to provide physical access to an historic property that is a place of public accommodation in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of subpart C of this part.

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Section 36.405 Alterations: Historic preservation.

Section 36.405 gives effect to the intent of Congress, expressed in section 504(c) of the Act, that this part recognize the national interest in preserving significant historic structures. Commenters criticized the Department's use of descriptive terms in the proposed rule that are different from those used in the ADA to describe eligible historic properties. In addition, some commenters criticized the Department's decision to use the concept of "substantially impairing" the historic features of a property, which is a concept employed in regulations implementing section 504 of the Rehabilitation Act of 1973. Those commenters recommended that the Department adopt the criteria of "adverse effect" published by the Advisory Council on Historic Preservation under the National Historic Preservation Act (36 CFR 800.9) as the standard for determining whether an historic property may be altered.

The Department agrees with these comments to the extent that they suggest that the language of the rule should conform to the language employed by Congress in the ADA. Therefore, the language of this section has been revised to make it clear that this provision applies to buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.) and to buildings or facilities that are designated as historic under State or local law. The Department believes, however, that the criteria of adverse effect employed under the National Historic Preservation Act are inappropriate for this rule because section 504(c) of the ADA specifies that special alterations provisions shall apply only when an alteration would "threaten or destroy the historic significance of qualified historic buildings and facilities."

The Department intends that the exception created by this section be applied only in those very rare situations in which it is not possible to provide access to an historic property using the special access provisions in ADAAG. Therefore, paragraph (a) of §36.405 has been revised to provide that alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of ADAAG. Paragraph (b) of this section has been revised to provide that if it has been determined, under the procedures established in ADAAG, that it is not feasible to provide physical access to an historic property that is a place of public accommodation in a manner that will not threaten or destroy the historic significance of the property, alternative methods of access shall be provided pursuant to the requirements of Subpart C.

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§36.406 Standards for new construction and alterations.

(a) New construction and alterations subject to this part shall comply with the standards for accessible design published as appendix A to this part (ADAAG).

(b) The chart in the appendix to this section provides guidance to the user in reading appendix A to this part (ADAAG) together with subparts A through D of this part, when determining requirements for a particular facility.

Appendix to section 36.406

This chart has no effect for purposes of compliance or enforcement. It does not necessarily provide complete or mandatory information.

§§36.407-36.500 [Reserved]

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Section 36.406 Standards for New Construction and Alterations.

Section 36.406 implements the requirements of sections 306(b) and 306(c) of the Act, which require the Attorney General to promulgate standards for accessible design for buildings and facilities subject to the Act and this part that are consistent with the supplemental minimum guidelines and requirements for accessible design published by the Architectural and Transportation Barriers Compliance Board (ATBCB or Board) pursuant to section 504 of the Act. This section of the rule provides that new construction and alterations subject to this part shall comply with the standards for accessible design published as Appendix A to this part.

Appendix A contains the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), which is being published by the ATBCB as a final rule elsewhere in this issue of the Federal Register. As proposed in this Department's proposed rule, §36.406(a) adopts ADAAG as the accessibility standard applicable under this rule.

Paragraph (b) was not included in the proposed rule. It provides, in chart form, guidance for using ADAAG together with subparts A through D of this part when determining requirements for a particular facility. This chart is intended solely as guidance for the user; it has no effect for purposes of compliance or enforcement. It does not necessarily provide complete or mandatory information.

Proposed §36.406(b) is not included in the final rule. That provision, which would have taken effect only if the final rule had followed the proposed Option Two for §36.401(a), is unnecessary because the Department has chosen Option One, as explained in the preamble for that section.

Section 504(a) of the ADA requires the ATBCB to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for Accessible Design (MGRAD) (36 CFR part 1190) for purposes of title III. According to section 504(b) of the Act, the guidelines are to establish additional requirements, consistent with the Act, "to ensure that buildings and facilities are accessible, in terms of architecture and design, ... and communication, to individuals with disabilities." Section 306(c) of the Act requires that the

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accessibility standards included in the Department's regulations be consistent with the minimum guidelines, in this case ADAAG.

As explained in the ATBCB's preamble to ADAAG, the substance and form of the guidelines are drawn from several sources. They use as their model the 1984 Uniform Federal Accessibility Standards (UFAS) (41 CFR part 101, subpart 101-19.6, appendix), which are the standards implementing the Architectural Barriers Act. UFAS is based on the Board's 1982 MGRAD. ADAAG follows the numbering system and format of the private sector American National Standard Institute's ANSI A117.1 standards. (American National Specifications for Making Buildings and Facilities Accessible to and Usable by Physically Handicapped People (ANSI A117-1980) and American National Standard for Buildings and Facilities -- Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1-1986).) ADAAG supplements MGRAD. In developing ADAAG, the Board made every effort to be consistent with MGRAD and the current and proposed ANSI Standards, to the extent consistent with the ADA.

ADAAG consists of nine main sections and a separate appendix. Sections 1 through 3 contain general provisions and definitions. Section 4 contains scoping provisions and technical specifications applicable to all covered buildings and facilities. The scoping provisions are listed separately for new construction of sites and exterior facilities; new construction of buildings; additions; alterations; and alterations to historic properties. The technical specifications generally reprint the text and illustrations of the ANSI A117.1 standard, except where differences are noted by italics. Sections 5 through 9 of the guidelines are special application sections and contain additional requirements for restaurants and cafeterias, medical care facilities, business and mercantile facilities, libraries, and transient lodging. The appendix to the guidelines contains additional information to aid in understanding the technical specifications. The section numbers in the appendix correspond to the sections of the guidelines to which they relate. An asterisk after a section number indicates that additional information appears in the appendix.

ADAAG's provisions are further explained under Summary of ADAAG, below.

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General Comments

One commenter urged the Department to move all or portions of subpart D, New Construction and Alterations, to the Appendix (ADAAG) or to duplicate portions of subpart D in the Appendix. The commenter correctly pointed out that subpart D is inherently linked to ADDAG, and that a self-contained set of rules would be helpful to users. The Department has attempted to simplify use of the two documents by deleting some paragraphs from subpart D (e.g., those relating to work areas), because they are included in ADAAG. However, the Department has retained in subpart D those sections that are taken directly from the statute or that give meaning to specific statutory concepts (e.g., structural impracticability, path of travel). While some of the subpart D provisions are duplicated in ADAAG, others are not. For example, issues relating to path of travel and disproportionality in alterations are not addressed in detail in ADAAG. (The structure and contents of the two documents are addressed below under Summary of ADAAG.) While the Department agrees that it would be useful to have one self-contained document, the different focuses of this rule and ADAAG do not permit this result at this time. However, the chart included in §36.406(b) should assist users in applying the provisions of subparts A through D, and ADAAG together.

Numerous business groups have urged the Department not to adopt the proposed ADAAG as the accessibility standards, because the requirements established are too high, reflect the "state of the art," and are inflexible, rigid, and impractical. Many of these objections have been lodged on the basis that ADAAG exceeds the statutory mandate to establish "minimum" guidelines. In the view of the Department, these commenters have misconstrued the meaning of the term "minimum guidelines." The statute clearly contemplates that the guidelines establish a level of access -- a minimum -- that the standards must meet or exceed. The guidelines are not to be "minimal" in the sense that they would provide for a low level of access. To the contrary, Congress emphasized that the ADA requires a "high degree of convenient access." Education and Labor report at 117-18. The legislative history explains that the guidelines may not "reduce, weaken, narrow or set less accessibility standards than those included in existing MGRAD" and should provide greater guidance in communication accessibility for individuals with hearing and vision impairments. Id. at 139. Nor did

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Congress contemplate a set of guidelines less detailed than ADAAG; the statute requires that the ADA guidelines supplement the existing MGRAD. When it established the statutory scheme, Congress was aware of the content and purpose of the 1982 MGRAD; as ADAAG does with respect to ADA, MGRAD establishes a minimum level of access that the Architectural Barriers Act standards (i.e., UFAS) must meet or exceed, and includes a high level of detail.

Many of the same commenters urged the Department to incorporate as its accessibility standards the ANSI standard's technical provisions and to adopt the proposed scoping provisions under development by the Council of American Building Officials' Board for the Coordination of Model Codes (BCMC). They contended that the ANSI standard is familiar to and accepted by professionals, and that both documents are developed through consensus. They suggested that ADAAG will not stay current, because it does not follow an established cyclical review process, and that it is not likely to be adopted by nonfederal jurisdictions in State and local codes. They urged the Department and the Board to coordinate the ADAAG provisions and any substantive changes to them with the ANSI A117 committee in order to maintain a consistent and uniform set of accessibility standards that can be efficiently and effectively implemented at the State and local level through the existing building regulatory processes.

The Department shares the commenters' goal of coordination between the private sector and Federal standards, to the extent that coordination can lead to substantive requirements consistent with the ADA. A single accessibility standard, or consistent accessibility standards, that can be used for ADA purposes and that can be incorporated or referenced by State and local governments, would help to ensure that the ADA requirements are routinely implemented at the design stage. The Department plans to work toward this goal.

The Department, however, must comply with the requirements of the ADA, the Federal Advisory Committee Act (5 USC App. 1 et seq.) and the Administrative Procedure Act (5 USC 551 et seq.). Neither the Department nor the Board can adopt private requirements wholesale. Furthermore, neither the 1991 ANSI A117 Standard revision nor the BCMC process is complete. Although the ANSI and BCMC provisions are not final, the Board has carefully considered both the draft BCMC scoping provisions and draft ANSI technical standards

and included their language in ADAAG wherever consistent with the ADA.

Some commenters requested that, if the Department did not adopt ANSI by reference, the Department declare compliance with ANSI/BCMC to constitute equivalency with the ADA standards. The Department has not adopted this recommendation but has instead worked as a member of the ATBCB to ensure that its accessibility standards are practical and usable. In addition, as explained under subpart F, Certification of State Laws or Local Building Codes, the proper forum for further evaluation of this suggested approach would be in conjunction with the certification process.

Some commenters urged the Department to allow an additional comment period after the Board published its guidelines in final form, for purposes of affording the public a further opportunity to evaluate the appropriateness of including them as the Department's accessibility standards. Such an additional comment period is unnecessary and would unduly delay the issuance of final regulations. The Department put the public on notice, through the proposed rule, of its intention to adopt the proposed ADAAG, with any changes made by the Board, as the accessibility standards. As a member of the Board and of its ADA Task Force, the Department participated actively in the public hearings held on the proposed guidelines and in preparation of both the proposed and final versions of ADAAG. Many individuals and groups commented directly to the Department's docket, or at its public hearings, about ADAAG. The comments received on ADAAG, whether by the Board or by this Department, were thoroughly analyzed and considered by the Department in the context of whether the proposed ADAAG was consistent with the ADA and suitable for adoption as both guidelines and standards. The Department is convinced that ADAAG as adopted in its final form is appropriate for these purposes. The final guidelines, adopted here as standards, will ensure the high level of access contemplated by Congress, consistent with the ADA's balance between the interests of people with disabilities and the business community.

A few commenters, citing the Senate report (at 70) and the Education and Labor report (at 119), asked the Department to include in the regulations a provision stating that departures from particular technical and scoping requirements of the accessibility standards will be permitted so long as the

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alternative methods used will provide substantially equivalent or greater access to and utilization of the facility. Such a provision is found in ADAAG 2.2 and by virtue of that fact is included in these regulations.

Comments on specific provisions of proposed ADAAG

During the course of accepting comments on its proposed rule, the Department received numerous comments on ADAAG. Those areas that elicited the heaviest response included assistive listening systems, automated teller machines, work areas, parking, areas of refuge, telephones (scoping for TDD's and volume controls) and visual alarms. Strenuous objections were raised by some business commenters to the proposed provisions of the guidelines concerning check-out aisles, counters, and scoping for hotels and nursing facilities. All these comments were considered in the same manner as other comments on the Department's proposed rule and, in the Department's view, have been addressed adequately in the final ADAAG.

Largely in response to comments, the Board made numerous changes from its proposal, including the following:

- Generally, at least 50% of public entrances to new buildings must be accessible, rather than all entrances, as would often have resulted from the proposed approach.

- Not all check-out aisles are required to be accessible.

- The final guidelines provide greater flexibility in providing access to sales counters, and no longer require a portion of every counter to be accessible.

- Scoping for TDD's or text telephones was increased. One TDD or text telephone, for speech and hearing impaired persons, must be provided at locations with 4, rather than 6, pay phones, and in hospitals and shopping malls. Use of portable (less expensive) TDD's is allowed.

- Dispersal of wheelchair seating areas in theaters will be required only where there are more than 300 seats, rather than in all cases. Seats with removable armrests (i.e., seats into which persons with mobility impairments can transfer) will also be required.

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- Areas of refuge (areas with direct access to a stairway, and where people who cannot use stairs may await assistance during a emergency evacuation) will be required, as proposed, but the final provisions are based on the Uniform Building Code. Such areas are not required in alterations.

- Rather than requiring 5% of new hotel rooms to be accessible to people with mobility impairments, between 2 and 4% accessibility (depending on total number of rooms) is required. In addition, 1% of the rooms must have roll-in showers.

- The proposed rule reserved the provisions on alterations to homeless shelters. The final guidelines apply alterations requirements to homeless shelters, but the requirements are less stringent than those applied to other types of facilities.

- Parking spaces that can be used by people in vans (with lifts) will be required.

- As mandated by the ADA, the Board has established a procedure to be followed with respect to alterations to historic facilities.

Summary of ADAAG

This section of the preamble summarizes the structure of ADAAG, and highlights the more important portions.

- Sections 1 through 3

Sections 1 through 3 contain general requirements, including definitions.

- Section 4.1.1, Application

Section 4 contains scoping requirements. Section 4.1.1, Application, provides that all areas of newly designed or newly constructed buildings and facilities and altered portions of existing buildings and facilities required to be accessible by §4.1.6 must comply with the guidelines unless otherwise provided in §4.1.1 or a special application section. It addresses areas used only by employees as work areas, temporary structures, and general exceptions.

Section 4.1.1(3) preserves the basic principle of the

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proposed rule: areas that may be used by employees with disabilities shall be designed and constructed so that an individual with a disability can approach, enter, and exit the area. The language has been clarified to provide that it applies to any area used only as a work area (not just to areas "that may be used by employees with disabilities"), and that the guidelines do not require that any area used as an individual work station be designed with maneuvering space or equipped to be accessible. The appendix to ADAAG explains that work areas must meet the guidelines' requirements for doors and accessible routes, and recommends, but does not require, that 5% of individual work stations be designed to permit a person using a wheelchair to maneuver within the space.

Further discussion of work areas is found in the preamble concerning proposed §36.401(b).

Section 4.1.1(5)(a) includes an exception for structural impracticability that corresponds to the one found in §36.401(c) and discussed in that portion of the preamble.

'Section 4.1.2, Accessible Sites and Exterior Facilities: New Construction

This section addresses exterior features, elements, or spaces such as parking, portable toilets, and exterior signage, in new construction. Interior elements and spaces are covered by §4.1.3.

The final rule retains the UFAS scoping for parking but also requires that at least one of every eight accessible parking spaces be designed with adequate adjacent space to deploy a lift used with a van. These spaces must have a sign indicating that they are van-accessible, but they are not to be reserved exclusively for van users.

'Section 4.1.3, Accessible Buildings: New Construction

This section establishes scoping requirements for new construction of buildings and facilities.

Sections 4.1.3(1) through (4) cover accessible routes, protruding objects, ground and floor surfaces, and stairs.

Section 4.1.3(5) generally requires elevators to serve each level in a newly constructed building, with four exceptions

included in the subsection. Exception 1 is the "elevator exception" established in §36.401(d), which must be read with this section. Exception 4 allows the use of platform lifts under certain conditions.

Section 4.1.3(6), Windows, is reserved. Section 4.1.3(7) applies to doors.

Under §4.1.3(8), at least 50% of all public entrances must be accessible. In addition, if a building is designed to provide access to enclosed parking, pedestrian tunnels, or elevated walkways, at least one entrance that serves each such function must be accessible. Each tenancy in a building must be served by an accessible entrance. Where local regulations (e.g., fire codes) require that a minimum number of exits be provided, an equivalent number of accessible entrances must be provided. (The latter provision does not require a greater number of entrances than otherwise planned.)

ADAAG §4.1.3(9), with accompanying technical requirements in §4.3, requires an area of rescue assistance (i.e., an area with direct access to an exit stairway and where people who are unable to use stairs may await assistance during an emergency evacuation) to be established on each floor of a multi-story building. This was one of the most controversial provisions in the guidelines. The final ADAAG is based on current Uniform Building Code requirements and retains the requirement that areas of refuge (renamed "areas of rescue assistance") be provided, but specifies that this requirement does not apply to buildings that have a supervised automatic sprinkler system. Areas of refuge are not required in alterations.

The next seven subsections deal with drinking fountains (§4.1.3(10)); toilet facilities (§4.1.3(11)); storage, shelving, and display units (§4.1.3(12)), controls and operating mechanisms (§4.1.3(13)), emergency warning systems (§4.1.3(14), detectable warnings (§4.1.3(15)), and building signage (§4.1.3(16)). Paragraph 11 requires that toilet facilities comply with §4.22, which requires one accessible toilet stall (60" x 60") in each newly constructed restroom. In response to public comments, the final rule requires that a second accessible stall (36" x 60") be provided in restrooms that have six or more stalls.

ADAAG §4.1.3(17) establishes requirements for accessi-

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bility of pay phones to persons with mobility impairments, hearing impairments (requiring some phones with volume controls), and those who cannot use voice telephones. It requires one interior "text telephone" to be provided at any facility that has a total of four or more public pay phones. (The term "text telephone" has been adopted to reflect current terminology and changes in technology.) In addition, text telephones will be required in specific locations, such as covered shopping malls, hospitals (in emergency rooms, waiting rooms, and recovery areas), and convention centers.

Paragraph 18 of §4.1.3 generally requires that at least five percent of fixed or built-in seating or tables be accessible.

Paragraph 19, covering assembly areas, specifies the number of wheelchair seating spaces and types and numbers of assistive listening systems required. It requires dispersal of wheelchair seating locations in facilities where there are more than 300 seats. The guidelines also require that at least one percent of all fixed seats be aisle seats without armrests (or with moveable armrests) on the aisle side to increase accessibility for persons with mobility impairments who prefer to transfer from their wheelchairs to fixed seating. In addition, the final ADAAG requires that fixed seating for a companion be located adjacent to each wheelchair location.

Paragraph 20 requires that where automated teller machines are provided, at least one must comply with §4.34, which, among other things, requires accessible controls, and instructions and other information that are accessible to persons with sight impairments.

Under paragraph 21, where dressing rooms are provided, five per cent or at least one must comply with §4.35.

'Section 4.1.5, Additions

Each addition to an existing building or facility is regarded as an alteration subject to §§36.402 through 36.406 of subpart D, including the date established in §36.402(a). But additions also have attributes of new construction, and to the extent that a space or element in the addition is newly constructed, each new space or element must comply with the applicable scoping provisions of §§4.1.1 to 4.1.3 for new construction, the applicable technical specifications of §§4.2 through 4.34, and any applicable special provisions in §§5 through 10. For

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instance, if a restroom is provided in the addition, it must comply with the requirements for new construction. Construction of an addition does not, however, create an obligation to retrofit the entire existing building or facility to meet requirements for new construction. Rather, the addition is to be regarded as an alteration and to the extent that it affects or could affect the usability of or access to an area containing a primary function, the requirements in §4.1.6(2) are triggered with respect to providing an accessible path of travel to the altered area and making the restrooms, telephones, and drinking fountains serving the altered area accessible. For example, if a museum adds a new wing that does not have a separate entrance as part of the addition, an accessible path of travel would have to be provided through the existing building or facility unless it is disproportionate to the overall cost and scope of the addition as established in §36.403(f).

- Section 4.1.6, Alterations

An alteration is a change to a building or facility that affects or could affect the usability of or access to the building or facility or any part thereof. There are three general principles for alterations. First, if any existing element or space is altered, the altered element or space must meet new construction requirements (§4.1.6(1)(b)). Second, if alterations to the elements in a space when considered together amount to an alteration of the space, the entire space must meet new construction requirements (§4.1.6(1)(c)). Third, if the alteration affects or could affect the usability of or access to an area containing a primary function, the path of travel to the altered area and the restrooms, drinking fountains, and telephones serving the altered area must be made accessible unless it is disproportionate to the overall alterations in terms of cost and scope as determined under criteria established by the Attorney General (§4.1.6(2)).

Section 4.1.6 should be read with §§36.402 through 36.405. Requirements concerning alterations to an area serving a primary function are addressed with greater detail in the latter sections than in §4.1.6(2). Section 4.1.6(1)(j) deals with technical infeasibility. Section 4.1.6(3) contains special technical provisions for alterations to existing buildings and facilities.

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- Section 4.1.7, Historic Preservation

This section contains scoping provisions and alternative requirements for alterations to qualified historic buildings and facilities. It clarifies the procedures under the National Historic Preservation Act and their application to alterations covered by the ADA. An individual seeking to alter a facility that is subject to the ADA guidelines and to State or local historic preservation statutes shall consult with the State Historic Preservation Officer to determine if the planned alteration would threaten or destroy the historic significance of the facility.

- Sections 4.2 Through 4.35

Sections 4.2 through 4.35 contain the technical specifications for elements and spaces required to be accessible by the scoping provisions (§§4.1 through 4.1.7) and special application sections (§§5 through 10). The technical specifications are the same as the 1980 version of ANSI A117.1 standard, except as noted in the text by italics.

- Sections 5 Through 9

These are special application sections and contain additional requirements for restaurants and cafeterias, medical care facilities, business and mercantile facilities, libraries, and transient lodging. For example, at least 5 percent, but not less than one, of the fixed tables in a restaurant must be accessible.

In §7, Business and Mercantile, paragraph 7.2 (Sales and Service Counters, Teller Windows, Information Counters) has been revised to provide greater flexibility in new construction than did the proposed rule. At least one of each type of sales or service counter where a cash register is located shall be made accessible. Accessible counters shall be dispersed throughout the facility. At counters such as bank teller windows or ticketing counters, alternative methods of compliance are permitted. A public accommodation may lower a portion of the counter, provide an auxiliary counter, or provide equivalent facilitation through such means as installing a folding shelf on the front of the counter at an accessible height to provide a work surface for a person using a wheelchair.

Section 7.3., Check-out Aisles, provides that, in new construction, a certain number of each design of check-out

aisle, as listed in a chart based on the total number of check-out aisles of each design, shall be accessible. The percentage of check-outs required to be accessible generally ranges from 20% to 40%. In a newly constructed or altered facility with less than 5,000 square feet of selling space, at least one of each type of check-out aisle must be accessible. In altered facilities with 5,000 or more square feet of selling space, at least one of each design of check-out aisle must be made accessible when altered, until the number of accessible aisles of each design equals the number that would be required for new construction.

- Section 9, Accessible Transient Lodging

Section 9 addresses two types of transient lodging: hotels, motels, inns, boarding houses, dormitories, resorts, and other similar places (§§9.1 through 9.4); and homeless shelters, halfway houses, transient group homes, and other social service establishments (§9.5). The interplay of the ADA and Fair Housing Act with respect to such facilities is addressed in the preamble discussion of the definition of "place of public accommodation" in §36.104.

The final rule establishes scoping requirements for accessibility of newly constructed hotels. Four percent of the first hundred rooms, and roughly two percent of rooms in excess of 100, must meet certain requirements for accessibility to persons with mobility or hearing impairments, and an additional identical percentage must be accessible to persons with hearing impairments. An additional 1% of the available rooms must be equipped with roll-in showers, raising the actual scoping for rooms accessible to persons with mobility impairments to 5% of the first hundred rooms and 3% thereafter. The final ADAAG also provides that when a hotel is being altered, one fully accessible room and one room equipped with visual alarms, notification devices, and amplified telephones shall be provided for each 25 rooms being altered until the number of accessible rooms equals that required under the new construction standard. Accessible rooms must be dispersed in a manner that will provide persons with disabilities with a choice of single or multiple-bed accommodations.

In new construction, homeless shelters and other social service entities must comply with ADAAG; at least one type of amenity in each common area must be accessible. In a

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facility that is not required to have an elevator, it is not necessary to provide accessible amenities on the inaccessible floors if at least one of each type of amenity is provided in accessible common areas. The percentage of accessible sleeping accommodations required is the same as that required for other places of transient lodging. Requirements for facilities altered for use as a homeless shelter parallel the current MGRAD accessibility requirements for leased buildings. A shelter located in an altered facility must have at least one accessible entrance, accessible sleeping accommodations in a number equivalent to that established for new construction, at least one accessible toilet and bath, at least one accessible common area, and an accessible route connecting all accessible areas. All accessible areas in a homeless shelter in an altered facility may be located on one level.

Section 10, Transportation Facilities

Section 10 of ADAAG is reserved. On March 20, 1991, the ATBCB published a supplemental notice of proposed rulemaking (56 FR 11874) to establish special access requirements for transportation facilities. The Department anticipates that when the ATBCB issues final guidelines for transportation facilities, this part will be amended to include those provisions.

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Subpart E - Enforcement.

§36.501 Private suits.

(a) General. Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in the civil action if the Attorney General or his or her designee certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security. Nothing in this section shall require a person with a disability to engage in a futile gesture if the person has actual notice that a person or organization covered by title III of the Act or this part does not intend to comply with its provisions.

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Subpart E -- Enforcement.

Because the Department of Justice does not have authority to establish procedures for judicial review and enforcement, subpart E generally restates the statutory procedures for enforcement.

Section 36.501 describes the procedures for private suits by individuals and the judicial remedies available. In addition to the language in section 308(a)(1) of the Act, §36.501(a) of this part includes the language from section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) which is incorporated by reference in the ADA. A commenter noted that the proposed rule did not include the provision in section 204(a) allowing the court to appoint an attorney for the complainant and authorize the commencement of the civil action without the payment of fees, costs, or security. That provision has been included in the final rule.

Section 308(a)(1) of the ADA permits a private suit by an individual who has reasonable grounds for believing that he or she is "about to be" subjected to discrimination in violation of section 303 of the Act (subpart D of this part), which requires that new construction and alterations be readily accessible to and usable by individuals with disabilities. Authorizing suits to prevent construction of facilities with architectural barriers will avoid the necessity of costly retrofitting that might be required if suits were not permitted until after the facilities were completed. To avoid unnecessary suits, this section requires that the individual bringing the suit have "reasonable grounds" for believing that a violation is about to occur, but does not require the individual to engage in a futile gesture if he or she has notice that a person or organization covered by title III of the Act does not intend to comply with its provisions.

Section 36.501(b) restates the provisions of section 308(a)(2) of the Act, which states that injunctive relief for the failure to remove architectural barriers in existing facilities or the failure to make new construction and alterations accessible "shall include" an order to alter these facilities to make them readily accessible to and usable by persons with disabilities to the extent required by title III. The Report of the Energy and Commerce Committee notes that "an order to make a facility readily accessible to and usable by individuals with disabilities is mandatory" under this standard. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt 4, at 64 (1990).

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(b) Injunctive relief. In the case of violations of §36.304, §36.308, §36.310(b), §36.401, §36.402, §36.403, and §36.405 of this part, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by the Act or this part. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part.

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Also, injunctive relief shall include, where appropriate, requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by title III of the Act and this part.

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§36.502 Investigations and compliance reviews.

(a) The Attorney General shall investigate alleged violations of the Act or this part.

(b) Any individual who believes that he or she or a specific class of persons has been subjected to discrimination prohibited by the Act or this part may request the Department to institute an investigation.

(c) Where the Attorney General has reason to believe that there may be a violation of this part, he or she may initiate a compliance review.

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Section 36.502 is based on section 308(b)(1)(A)(i) of the Act, which provides that the Attorney General shall investigate alleged violations of title III and undertake periodic reviews of compliance of covered entities. Although the Act does not establish a comprehensive administrative enforcement mechanism for investigation and resolution of all complaints received, the legislative history notes that investigation of alleged violations and periodic compliance reviews are essential to effective enforcement of title III, and that the Attorney General is expected to engage in active enforcement and to allocate sufficient resources to carry out this responsibility. Judiciary Report at 67.

Many commenters argued for inclusion of more specific provisions for administrative resolution of disputes arising under the Act and this part in order to promote voluntary compliance and avoid the need for litigation. Administrative resolution is far more efficient and economical than litigation, particularly in the early stages of implementation of complex legislation when the specific requirements of the statute are not widely understood. The Department has added a new paragraph (c) to this section authorizing the Attorney General to initiate a compliance review where he or she has reason to believe there may be a violation of this rule.

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§36.503 Suit by the Attorney General.

Following a compliance review or investigation under §36.502, or at any other time in his or her discretion, the Attorney General may commence a civil action in any appropriate United States district court if the Attorney General has reasonable cause to believe that --

(a) Any person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act or this part; or

(b) Any person or group of persons has been discriminated against in violation of the Act or this part and the discrimination raises an issue of general public importance.

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Section 36.503 describes the procedures for suits by the Attorney General set out in section 308(b)(1)(B) of the Act. If the Department has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by title III or that any person or group of persons has been denied any of the rights granted by title III and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court. The proposed rule provided for suit by the Attorney General "or his or her designee." The reference to a "designee" has been omitted in the final rule because it is unnecessary. The Attorney General has delegated enforcement authority under the ADA to the Assistant Attorney General for Civil Rights. 55 Fed. Reg. 40653 (October 4, 1990) (to be codified at 28 CFR §0.50(l).)

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§36.504 Relief.

(a) Authority of court. In a civil action under §36.503, the court —

(1) May grant any equitable relief that such court considers to be appropriate, including, to the extent required by the Act or this part —

(i) Granting temporary, preliminary, or permanent relief;

(ii) Providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) Making facilities readily accessible to and usable by individuals with disabilities;

(2) May award other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(3) May, to vindicate the public interest, assess a civil penalty against the entity in an amount —

(i) Not exceeding $50,000 for a first violation; and

(ii) Not exceeding $100,000 for any subsequent violation.

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Section 36.504 describes the relief that may be granted in a suit by the Attorney General under section 308(b)(2) of the Act. In such an action, the court may grant any equitable relief it considers to be appropriate, including granting temporary, preliminary, or permanent relief, providing an auxiliary aid or service, modification of policy or alternative method, or making facilities readily accessible to and usable by individuals with disabilities, to the extent required by title III. In addition, a court may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved, when requested by the Attorney General.

Furthermore, the court may vindicate the public interest by assessing a civil penalty against the covered entity in an amount not exceeding $50,000 for a first violation and not exceeding $100,000 for any subsequent violation. Section 36.504(b) of the rule adopts the standard of section 308(b)(3) of the Act. This section makes it clear that, in counting the number of previous determinations of violations for determining whether a "first" or "subsequent" violation has occurred, determinations in the same action that the entity has engaged in more than one discriminatory act are to be counted as a single violation. A "second violation" would not accrue to that entity until the Attorney General brought another suit against the entity and the entity was again held in violation. Again, all of the violations found in the second suit would be cumulatively considered as a "subsequent violation."

Section 36.504(c) clarifies that the terms "monetary damages" and "other relief" do not include punitive damages. They do include, however, all forms of compensatory damages, including out-of-pocket expenses and damages for pain and suffering.

Section 36.504(a)(3) is based on section 308(b)(2)(C) of the Act, which provides that, "to vindicate the public interest," a court may assess a civil penalty against the entity that has been found to be in violation of the Act in suits brought by the Attorney General. In addition, §36.504(d), which is taken from section 308(b)(5) of the Act, further provides that, in considering what amount of civil penalty, if any, is appropriate, the court shall give consideration to "any good faith effort or attempt to comply with this part." In evaluating such good faith, the court shall consider "among other factors

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(b) Single violation. For purposes of paragraph (a)(3) of this section, in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(c) Punitive damages. For purposes of paragraph (a)(2) of this section, the terms "monetary damages" and "such other relief" do not include punitive damages.

(d) Judicial consideration. In a civil action under §36.503, the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this part by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

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it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability."

The "good faith" standard referred to in this section is not intended to imply a willful or intentional standard - that is, an entity cannot demonstrate good faith simply by showing that it did not willfully, intentionally, or recklessly disregard the law. At the same time, the absence of such a course of conduct would be a factor a court should weigh in determining the existence of good faith.

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§36.505 Attorneys fees.

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

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Section 36.505 states that courts are authorized to award attorneys fees, including litigation expenses and costs, as provided in section 505 of the Act. Litigation expenses include items such as expert witness fees, travel expenses, etc. The Judiciary Committee Report specifies that such items are included under the rubric of "attorneys fees" and not "costs" so that such expenses will be assessed against a plaintiff only under the standard set forth in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). (Judiciary report at 73.)

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§36.506 Alternative means of dispute resolution.

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 Act and this part.

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Section 36.506 restates section 513 of the Act, which encourages use of alternative means of dispute resolution.

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§36.507 Effect of unavailability of technical assistance.

A public accommodation or other private entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

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Section 36.507 explains that, as provided in section 506(e) of the Act, a public accommodation or other private entity is not excused from compliance with the requirements of this part because of any failure to receive technical assistance.

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§36.508 Effective date.

(a) General. Except as otherwise provided in this section and in this part, this part shall become effective on January 26, 1992.

(b) Civil actions. Except for any civil action brought for a violation of section 303 of the Act, no civil action shall be brought for any act or omission described in section 302 of the Act that occurs--

(1) Before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of $1,000,000 or less.

(2) Before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of $500,000 or less.

(c) Transportation services provided by public accommodations. Newly purchased or leased vehicles required to be accessible by §36.310 must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, if the solicitation for the vehicle is made after August 25, 1990.

§§36.509-35.600 [Reserved]

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Section 36.508 Effective Date.

In general, title III is effective 18 months after enactment of the Americans with Disabilities Act, i.e., January 26, 1992. However, there are several exceptions to this general rule contained throughout title III. Section 36.508 sets forth all of these exceptions in one place.

Paragraph (b) contains the rule on civil actions. It states that, except with respect to new construction and alterations, no civil action shall be brought for a violation of this part that occurs before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of $1,000,000 or less; and before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of $500,000 or less. In determining what constitutes gross receipts, it is appropriate to exclude amounts collected for sales taxes.

Paragraph (c) concerns transportation services provided by public accommodations not primarily engaged in the business of transporting people. The 18-month effective date applies to all of the transportation provisions except those requiring newly purchased or leased vehicles to be accessible. Vehicles subject to that requirement must be accessible to and usable by individuals with disabilities if the solicitation for the vehicle is made on or after August 26, 1990.

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Subpart F--Certification of State Laws or Local Building Codes

§36.601 Definitions.

Assistant Attorney General means the Assistant Attorney General for Civil Rights or his or her designee.

Certification of equivalency means a final certification that a code meets or exceeds the minimum requirements of title III of the Act for accessibility and usability of facilities covered by that title.

Code means a State law or local building code or similar ordinance, or part thereof, that establishes accessibility requirements.

Model code means a nationally recognized docu-

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Subpart F -- Certification of State Laws or Local Building Codes

Subpart F establishes procedures to implement section 308(b)(1)(A)(ii) of the Act, which provides that, on the application of a State or local government, the Attorney General may certify that a State law or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the Act. In enforcement proceedings, this certification will constitute rebuttable evidence that the law or code meets or exceeds the ADA's requirements.

Three significant changes, further explained below, were made from the proposed subpart, in response to comments. First, the State or local jurisdiction is required to hold a public hearing on its proposed request for certification and to submit to the Department, as part of the information and materials in support of a request for certification, a transcript of the hearing. Second, the time allowed for interested persons and organizations to comment on the request filed with the Department (§36.605(a)(1)) has been changed from 30 to 60 days. Finally, a new §36.608, Guidance concerning model codes, has been added.

Section 36.601 establishes the definitions to be used for purposes of this subpart. Two of the definitions have been modified, and a definition of "model code" has been added. First, in response to a comment, a reference to a code "or part thereof" has been added to the definition of "code." The purpose of this addition is to clarify that an entire code need not be submitted if only part of it is relevant to accessibility, or if the jurisdiction seeks certification of only some of the portions that concern accessibility. The Department does not intend to encourage "piecemeal" requests for certification by a single jurisdiction. In fact, the Department expects that in some cases, rather than certifying portions of a particular code and refusing to certify others, it may notify a submitting jurisdiction of deficiencies and encourage a reapplication that cures those deficiencies, so that the entire code can be certified eventually. Second, the definition of "submitting official" has been modified. The proposed rule defined the submitting official to be the State or local official who has principal responsibility for administration of a code. Commenters pointed out that in some cases more than one code within the same jurisdiction is relevant for purposes of certification. It was also suggested that the Department allow a State to submit a single application on behalf of the State,

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ment developed by a private entity for use by State or local jurisdictions in developing codes as defined in this section. A model code is intended for incorporation by reference or adoption in whole or in part, with or without amendment, by State or local jurisdictions.

Preliminary determination of equivalency means a preliminary determination that a code appears to meet or exceed the minimum requirements of title III of the Act for accessibility and usability of facilities covered by that title.

Submitting official means the State or local official who --

(1) Has principal responsibility for administration of a code, or is authorized to submit a code on behalf of a jurisdiction; and

(2) Files a request for certification under this subpart.

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as well as on behalf of any local jurisdictions required to follow the State accessibility requirements. Consistent with these comments, the Department has added to the definition language clarifying that the official can be one authorized to submit a code on behalf of a jurisdiction.

A definition of "model code" has been added in light of new §36.608.

Most commenters generally approved of the proposed certification process. Some approved of what they saw as the Department's attempt to bring State and local codes into alignment with the ADA. A State agency said that this section will be the backbone of the intergovernmental cooperation essential if the accessibility provisions of the ADA are to be effective.

Some comments disapproved of the proposed process as time consuming and laborious for the Department, although some of these comments pointed out that, if the Attorney General certified model codes on which State and local codes are based, many perceived problems would be alleviated. (This point is further addressed by new §36.608.)

Many of the comments received from business organizations, as well as those from some individuals and disability rights groups, addressed the relationship of the ADA requirements and their enforcement, to existing State and local codes and code enforcement systems. These commenters urged the Department to use existing code-making bodies for interpretations of the ADA, and to actively participate in the integration of the ADA into the text of the national model codes that are adopted by State and local enforcement agencies. These issues are discussed in preamble section 36.406 under General comments.

Many commenters urged the Department to evaluate or certify the entire code enforcement system (including any process for hearing appeals from builders of denials by the building code official of requests for variances, waivers, or modifications). Some urged that certification not be allowed in jurisdictions where waivers can be granted, unless there is a clearly identified decision-making process, with written rulings and notice to affected parties of any waiver or modification request. One commenter urged establishment of a dispute resolution mechanism, providing for interpretation

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§36.602 General rule.

On the application of a State or local government, the Assistant Attorney General may certify that a code meets or exceeds the minimum requirements of the Act for the accessibility and usability of places of public accommodation and commercial facilities under this part by issuing a certification of equivalency. At any enforcement proceeding under title III of the Act, such certification shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of title III.

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(usually through a building official) and an administrative appeals mechanism (generally called Boards of Appeal, Boards of Construction Appeals, or Boards of Review), before certification could be granted.

The Department thoroughly considered these proposals but has declined to provide for certification of processes of enforcement or administration of State and local codes. The statute clearly authorizes the Department to certify the codes themselves for equivalency with the statute; it would be ill-advised for the Department at this point to inquire beyond the face of the code and written interpretations of it. It would be inappropriate to require those jurisdictions that grant waivers or modifications to establish certain procedures before they can apply for certification, or to insist that no deviations can be permitted. In fact, the Department expects that many jurisdictions will allow slight variations from a particular code, consistent with ADAAG itself. ADAAG includes in §2.2 a statement allowing departures from particular requirements where substantially equivalent or greater access and usability is provided. Several sections specifically allow for alternative methods providing equivalent facilitation and, in some cases, provide examples. (See, e.g., §4.31.9, Text Telephones; §7.2(2)(iii), Sales and Service Counters.) Section 4.1.6 includes less stringent requirements that are permitted in alterations, in certain circumstances.

However, in an attempt to ensure that it does not certify a code that in practice has been or will be applied in a manner that defeats its equivalency with the ADA, the Department will require that the submitting official include, with the application for certification, any relevant manuals, guides, or any other interpretive information issued that pertain to the code. (§36.603(c)(1).) The requirement that this information be provided is in addition to the NPRM's requirement that the official provide any pertinent formal opinions of the State Attorney General or the chief legal officer of the jurisdiction.

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§36.603 Filing a request for certification.

(a) A submitting official may file a request for certification of a code under this subpart.

(b) Before filing a request for certification of a code, the submitting official shall ensure that --

(1) Adequate public notice of intention to file a request for certification, notice of a hearing, and notice of the location at which the request and materials can be inspected is published within the relevant jurisdiction;

(2) Copies of the proposed request and supporting materials are made available for public examination and copying at the office of the State or local agency charged with administration and enforcement of the code; and

(3) The local or State jurisdiction holds a public hearing on the record, in the State or locality, at which the public is invited to comment on the proposed request for certification.

(c) The submitting official shall include the following materials and information in support of the request:

(1) The text of the

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The first step in the certification process is a request for certification, filed by a "submitting official" (§36.603). The Department will not accept requests for certification until after January 26, 1992, the effective date of this part. The Department received numerous comments from individuals and organizations representing a variety of interests, urging that the hearing required to be held by the Assistant Attorney General in Washington, D.C., after a preliminary determination of equivalency (§36.605(a)(2)), be held within the State or locality requesting certification, in order to facilitate greater participation by all interested parties. While the Department has not modified the requirement that it hold a hearing in Washington, it has added a new subparagraph 36.603(b)(3) requiring a hearing within the State or locality before a request for certification is filed. The hearing must be held after adequate notice to the public and must be on the record; a transcript must be provided with the request for certification. This procedure will insure input from the public at the State or local level and will also insure a Washington, D.C., hearing as mentioned in the legislative history.

The request for certification, along with supporting documents (§36.603(c)), must be filed in duplicate with the office of the Assistant Attorney General for Civil Rights. The Assistant Attorney General may request further information. The request and supporting materials will be available for public examination at the office of the Assistant Attorney General and at the office of the State or local agency charged with administration and enforcement of the code. The submitting official must publish public notice of the request for certification.

jurisdiction's code; any standard, regulation, code, or other relevant document incorporated by reference or otherwise referenced in the code; the law creating and empowering the agency; any relevant manuals, guides, or any other interpretive information issued that pertain to the code; and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the code;

(2) Any model code or statute on which the pertinent code is based, and an explanation of any differences between the model and the pertinent code;

(3) A transcript of the public hearing required by paragraph (b)(3) of this section; and

(4) Any additional information that the submitting official may wish to be considered.

(d) The submitting official shall file the original and one copy of the request and of supporting materials with the Assistant Attorney General. The submitting official shall clearly label the request as a "request for certification" of a code. A copy of the request and supporting materials will be available for public examination and copying at the

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offices of the Assistant Attorney General in Washington, D.C. The submitting official shall ensure that copies of the request and supporting materials are available for public examination and copying at the office of the State or local agency charged with administration and enforcement of the code. The submitting official shall ensure that adequate public notice of the request for certification and of the location at which the request and materials can be inspected is published within the relevant jurisdiction.

(e) Upon receipt of a request for certification, the Assistant Attorney General may request further information that he or she considers relevant to the determinations required to be made under this subpart.

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§36.604 Preliminary determination.

After consultation with the Architectural and Transportation Barriers Compliance Board, the Assistant Attorney General shall make a preliminary determination of equivalency or a preliminary determination to deny certification.

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Next, under §36.604, the Assistant Attorney General's office will consult with the ATBCB and make a preliminary determination to either (1) find that the code is equivalent (make a "preliminary determination of equivalency") or (2) deny certification. The next step depends on which of these preliminary determinations is made.

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§36.605 Procedure following preliminary determination of equivalency.

(a) If the Assistant Attorney General makes a preliminary determination of equivalency under §36.604, he or she shall inform the submitting official, in writing, of that preliminary determination. The Assistant Attorney General shall also -

(1) Publish a notice in the Federal Register that advises the public of the preliminary determination of equivalency with respect to the particular code, and invite interested persons and organizations, including individuals with disabilities, during a period of at least 60 days following publication of the notice, to file written comments relevant to whether a final certification of equivalency should be issued;

(2) After considering the information received in response to the notice described in paragraph (a) of this section, and after publishing a separate notice in the Federal Register, hold an informal hearing in Washington, D.C., at which interested persons, including individuals with disabilities, are provided an opportunity to express their views with respect to the preliminary determination of equivalency; and

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If the preliminary determination is to find equivalency, the Assistant Attorney General, under §36.605, will inform the submitting official in writing of the preliminary determination and publish a notice in the Federal Register informing the public of the preliminary determination and inviting comment for 60 days. (This time period has been increased from 30 days in light of public comment pointing out the need for more time within which to evaluate the code.) After considering the information received in response to the comments, the Department will hold an informal hearing in Washington. This hearing will not be subject to the formal requirements of the Administrative Procedure Act. In fact, this requirement could be satisfied by a meeting with interested parties. After the hearing, the Assistant Attorney General's office will consult again with the ATBCB and make a final determination of equivalency or a final determination to deny the request for certification, with a notice of the determination published in the Federal Register.

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(b) The Assistant Attorney General, after consultation with the Architectural and Transportation Barriers Compliance Board, and consideration of the materials and information submitted pursuant to this section and §36.603, shall issue either a certification of equivalency or a final determination to deny the request for certification. He or she shall publish notice of the certification of equivalency or denial of certification in the Federal Register.

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§36.606 Procedure following preliminary denial of certification.

(a) If the Assistant Attorney General makes a preliminary determination to deny certification of a code under §36.604, he or she shall notify the submitting official of the determination. The notification may include specification of the manner in which the code could be amended in order to qualify for certification.

(b) The Assistant Attorney General shall allow the submitting official not less than 15 days to submit data, views, and arguments in opposition to the preliminary determination to deny certification. If the submitting official does not submit materials, the Assistant Attorney General shall not be required to take any further action. If the submitting official submits materials, the Assistant Attorney General shall evaluate those materials and any other relevant information. After evaluation of any newly submitted materials, the Assistant Attorney General shall make either a final denial of certification or a preliminary determination of equivalency.

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If the preliminary determination is to deny certification, there will be no hearing (§36.606). The Department will notify the submitting official of the preliminary determination, and may specify how the code could be modified in order to receive a preliminary determination of equivalency. The Department will allow at least 15 days for the submitting official to submit relevant material in opposition to the preliminary denial. If none is received, no further action will be taken. If more information is received, the Department will consider it and make either a final decision to deny certification or a preliminary determination of equivalency. If at that stage the Assistant Attorney General makes a preliminary determination of equivalency, the hearing procedures set out in §36.605 will be followed.

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§36.607 Effect of certification.

(a) (1) A certification shall be considered a certification of equivalency only with respect to those features or elements that are both covered by the certified code and addressed by the standards against which equivalency is measured.

(2) For example, if certain equipment is not covered by the code, the determination of equivalency cannot be used as evidence with respect to the question of whether equipment in a building built according to the code satisfies the Act's requirements with respect to such equipment. By the same token, certification would not be relevant to construction of a facility for children, if the regulations against which equivalency is measured do not address children's facilities.

(b) A certification of equivalency is effective only with respect to the particular edition of the code for which certification is granted. Any amendments or other changes to the code after the date of the certified edition are not considered part of the certification.

(c) A submitting official may reapply for certification of amendments or other changes to a code that has already received certification.

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Section 36.607 addresses the effect of certification. First, certification will only be effective concerning those features or elements that are both (1) covered by the certified code and (2) addressed by the regulations against which they are being certified. For example, if children's facilities are not addressed by the Department's standards, and the building in question is a private elementary school, certification will not be effective for those features of the building to be used by children. And if the Department's regulations addressed equipment but the local code did not, a building's equipment would not be covered by the certification.

In addition, certification will be effective only for the particular edition of the code that is certified. Amendments will not automatically be considered certified, and a submitting official will need to reapply for certification of the changed or additional provisions.

Certification will not be effective in those situations where a State or local building code official allows a facility to be constructed or altered in a manner that does not follow the technical or scoping provisions of the certified code. Thus, if an official either waives an accessible element or feature or allows a change that does not provide equivalent facilitation, the fact that the Department has certified the code itself will not stand as evidence that the facility has been constructed or altered in accordance with the minimum accessibility requirements of the ADA. The Department's certification of a code is effective only with respect to the standards in the code; it is not to be interpreted to apply to a State or local government's application of the code. The fact that the Department has certified a code with provisions concerning waivers, variances, or equivalent facilitation shall not be interpreted as an endorsement of actions taken pursuant to those provisions.