DREDF Disability Rights Education and Defense Fund, Inc.

Law, Public Policy, Training and Technical Assistance

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PRELIMINARY COMMENTS ON PROPOSED REGULATIONS TO IMPLEMENT TITLE I BY THE EEOC (56 FED. REG. 8578, 8586-8603)

DEFINITIONS - SECTION 1630.2, PP. 8587-88

Substantially Limits - General §1630.2(j)(1), pp. 8587; 8593

The definitions of the terms "disability", "physical or mental impairments" and "major life activities" come directly from either the ADA or the regulations implementing Section 504 of the 1973 Rehabilitation Act. However, the EEOC, for the first time, proposes a definition of "substantially limits."

The definition of "disability" in 1630.2(g) is taken directly from the statute and includes:

(1) a physical or mental impairment that substantially limits one or more major life activities, (referred to as "first prong"),

(2) a record of such an impairment, (referred to as "second prong"),

(3) being regarded as having such an impairment, (referred to as "third prong").

The proposed EEOC regulations define "substantially limits" as follows:

The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

The Appendix which contains "Interpretive Guidance," provides an explanation of the new proposal. The example given of the "unable to perform" subsection (j)(i), is an individual whose legs are paralyzed and therefore cannot walk. Examples of the "significantly restricted" subsection (j)(ii), include individuals who use artificial legs (manner), who can walk for only very brief periods of time (duration), or who rely on medication (condition). (56 Fed. Reg. 8593)

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The proposed regulation lists several factors which should be considered in determining whether an individual is substantially limited. Section 1630.2(j)(2) provides:

> The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
>
> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

The Appendix explains that "duration" refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. For example, while a broken leg is of brief duration, the impact could be a resulting limp from improper healing. (56 Fed. Reg. 8593)

The Appendix also explains under the heading "Frequently Disabling Impairments" that there are "a number of impairments that far more often than not result in disability." However, the Appendix explains that an individual is not "automatically" covered because he or she has a listed impairment. The relevant factor is the extent of the impact on the performance of major life activities. (id.) Hence, accordingly, the disabilities listed in the Appendix, which include "visual, speech and hearing impairments, tuberculosis, HIV infection, AIDS, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation or mental illness" (p. 8594) do not automatically trigger coverage. In other words, a person with one of these traditional disabilities could be denied coverage under the first prong of the definition.

The proposed "substantially limits" provisions, could, perhaps inadvertently, exclude from coverage under the first prong of the definition of disability, persons with traditional disabilities who are functioning well because of assistive devices or equipment or medication or reasonable accommodations, or simply because the disability is in remission or the individual with the disability has learned to minimize or eliminate the effects of the disability.

In determining whether an individual has a disability, the first inquiry is whether he or she has an "impairment." [§1630.2(h)] The Appendix explains that the "existence of an

DISPARATE IMPACT

The provisions in Title I as well as language in Title II appear to envision the application of the disparate impact theory as a means of proving discrimination. In simple terms, the disparate impact theory is that theory which permits an individual to make out a prima facie case of discrimination simply on the basis of statistics, without any showing of discriminatory intent. This theory does not appear specifically in the language of Title VII of the Civil Rights Act of 1964, but was devised by courts as a means of scrutinizing the discriminatory impact of certain facially-neutral selection criteria -- such as a height requirement or a requirement that an individual have a high school diploma -- which did not specifically exclude women or minorities but which did have a disproportionate impact on a protected group.

The manner in which the disparate impact theory has been incorporated into the ADA raises several concerns. First, unlike the disparate impact theory under Title VII, which applies to practices which disproportionately exclude women or minorities from job opportunities, the drafters of the ADA have applied the theory to standards, tests or criteria which tend to identify or limit any class of qualified individuals with disabilities.

The inclusion of the term "identify" is new. That term does not appear in the Section 504 regulations. What is a test which tends to identify individuals with disabilities? Is this provision intended as a subtle prohibition on the use of pre-employment physical examinations? Last year's version of the bill specifically prohibited such examinations. Does the language in this year's version also prohibit the use of post-employment physicals, used by many employers as a baseline examination? None of the explanatory materials provided by the sponsors discusses the term "identify", so it is difficult to determine what is intended by the addition of that term. Some proponents have suggested that its use in the bill is designed simply to prevent employers from making inappropriate pre-employment inquiries about an individual's disability. If this is all that is intended, it would seem that a better provision could be drafted.

For example, government contractors subject to Section 503 of the Rehabilitation Act are required routinely to give individuals an opportunity to identify themselves as an "individual with handicaps." The Section 503 regulations issued by the Department of Labor spell out language that is used to advise a handicapped individual that the employer has an affirmative action plan and to inquire about any accommodations that might be made. See 41 CFR § 60-741, Appendix B. This

The regulations must also make it clear that persons with mental disabilities are covered, even if they can perform major life activities. For example, a person with mental retardation, who lives independently and works, should not be excluded from the first prong of the definition.

Finally, comparisons to the "average person" may serve to unintentionally disqualify persons with disabilities who are capable of above-average performance. For example, persons with learning disabilities who have above-average intelligence and can perform on an "average" level without accommodation, but could excel with accommodation may be excluded. A person with a limp (given in the Appendix as an example of a "permanent" disability) may be able to walk faster than the average person without a disability, because of specialized training.

Substantially Limited in the Major Life Activity of Working - 1630.2(j)(3), pp. 8587; 8593

The EEOC proposals regarding "substantially limited in working" will cause excessive litigation and will waste agency resources in order to determine coverage. The proposals will also unduly restrict coverage, contrary to legislative intent. Finally, the proposals place an impossible, cumbersome burden on employers, persons with disabilities and the EEOC.

The proposed regulation rejects the inability to perform a particular job as sufficient grounds to trigger coverage under the first prong, when "working" is the only life activity affected by the disability.

Proposed Section 1630.2(j)(3)(i) states that, "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."

It also states that the term "substantially limits" means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."

Proposed Section 1630.2(j)(3)(ii) lists three other factors to consider in making a determination under (j).

(A) the geographical area to which the individual has reasonable access;

(B) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

This approach should be rejected. It is tremendously cumbersome and impractical. The problems with this approach are numerous. Who defines what "similar training, knowledge or skills" means? How broadly or narrowly should the terms be applied? For example, does training mean being a doctor or being a pediatrician? Does skill mean being a welder or being a welder of aircraft carriers which requires additional skill and ability? Does knowledge incorporate experience? How will the "number and type" of these similar jobs be determined? How will the jobs "not utilizing similar training, knowledge or skills" be determined? How will it be determined whether the person would be disqualified from these similar and not similar jobs? What objective evidence is available? How will it be obtained? What evidence will suffice when objective evidence is not available? What is meant by geographic area? Coverage for the same physical impairment will depend on where the person lives because of the "geographical area" test. In fact, the same person could be "disabled" in one location and not in another.

The employer must make this determination in the first instance. There is an obligation to accommodate a person who is covered, and no obligation to accommodate a person who is not covered. The proposal gives employers no certainty as to who is covered. If a complaint is filed, the EEOC must make this determination. How does the EEOC intend to do this? An extraordinary amount of agencies' resources would be required to make this initial inquiry. If the case goes to court, how will the plaintiff or defendant (see burden of proof discussion below) prove the factors. Discovery cannot be conducted on every business in the entire geographical area. There is simply no ways to obtain the information required (even if it existed).

None of the cases cited by the EEOC have provided any guidance to the morass of problems listed above. In E. E. Black,

the court held that the disqualifying criteria must be assumed to be in general use. (see discussion below) In Jasany v. U.S. Postal Service, 755 F2d. 1244 (6th Cir. 1985), the parties stipulated that the plaintiff's impairment only affected his ability to operate a particular machine. In Forrisi v. Bowen, 794 F2d 931 (4th Cir. 1986), the plaintiff also stated that the impairment (acrophobia) had no effect in his life other than in the particular job in question.

The legislative history cites none of the cases cited in the EEOC rule because the reasoning based on the E.E. Black factors was not adopted.

The danger of misapplication of the rule is great. While the EEOC intends for the "substantially limited in working" test to apply only to those people whose impairments do not substantially limit other life activities, the likelihood that this test will be applied in all situations involving employment discrimination is great. These rules are read and implemented in the first instance by lay people. Moreover, without the explanation in the Appendix, there is no indication that the test should not apply to all employment discrimination situations. Persons with traditional disabilities who are not "substantially limited in working" will face this confusion every time a claim of employment discrimination is made to an employer.

Finally, it makes no sense to exclude a person who has a physical or mental impairment which precludes him/her from doing his/her job. The overriding intent of the ADA is to promote employment opportunities and to discourage unnecessary unemployment because of physical or mental impairments. A person who is unable to do his/her job because of a physical or mental impairment and who is not protected from discharge for this reason, will likely be converted from a tax-payer to a tax-user. Moreover, the rule ignores reality. There is no life activity which is more "major" in most people's lives than their jobs. A person spends eight hours a day at work and relies on the salary to live. Few events could have a more "major" effect on a person's life than losing his/her job. The proposed formulation relies on a theoretical job market which in many instances will have no relationship to the reality of finding another job, with the same salary and benefits.

A better approach which is set forth in the legislative history would be to look at the degree to which the ability to perform a particular job is affected. If the only manifestation of a disability is in a particular job, and no other life activities are affected, the plaintiff must show that the ability

to perform the job is severely affected. Minor complaints and manifestations will not be sufficient to invoke coverage in this situation.

The Judiciary Report explains the distinction in this way:

> A person with an impairment who is discriminated against in employment is also limited in the major life activity of working. However, a person who is limited in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in the major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field in which the painter works.
>
> However, if a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder. The cause of a disability is always irrelevant to the determination of disability. In such a case, a reasonable accommodation to the employee may include assignment to other areas where the particular paint is not used. (emphasis added) (Judiciary Report, p. 29)

This is consistent with the approach taken in the Senate Report that "[p]ersons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity." (Senate Report, p. 23)

Hence, a person who experiences minor discomfort in a particular job would not be covered by prong one which requires an impairment which substantially limits a major life activity. However, if the person is severely restricted in the performance of the particular job, then coverage would be triggered under the first prong.

Even assuming that the proposed formulation is adopted, the proposal (or appendix) must clarify at least three critical issues. First, there is a wide gap between inability to perform "a single, particular job" (which does not trigger coverage) and being "significantly restricted in the ability to perform a class of jobs" (which does trigger coverage). The inability to perform a single job standard implies that the inability to perform more

than a single job would trigger coverage, e.g. two jobs in a field. However, the "significantly restricted" standard seems to imply that the percentage of jobs affected must be significant. Is this over 10%, 20%, 30%, 50%, etc.? The factors listed in subpart (ii) do not help in this regard, still leaving open the question of degree.

At a minimum, the regulation should drop the significantly restricted test. The most that could possibly be justified (and we think it is not) from the above-quoted legislative history, is the "single, particular" and unique job test. The employer would have to show that the disqualifying criteria is truly unique to the particular job involved. (See discussion below on burden of proof.)

The confusion involved in defining the "job" is illustrated in the Appendix which adds additional limitations not included in the regulation and which will lead to confusion and unjustified exclusion. The Appendix adds to those not considered to be substantially limited, a person who is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. One example that is given is that of a surgeon who has an impairment that results in a shaky hand. The analysis excludes this person from coverage because he or she would only be excluded from a "narrow range of jobs and would still be able to perform various other positions in the same class, utilizing his or her training as a physician. For instance, the surgeon could continue to examine patients and advise on the need for surgery, or teach medicine or surgical techniques within the same geographical area." p. 8593

This example points out the extreme arbitrariness of the EEOC formulation. There can be no doubt that the "single job" criterion is being applied in an arbitrary manner to obtain a desired result. Clearly, it could be argued and it would be more reflective of reality that performing surgery is a class of jobs. Certainly, the ability to perform surgery is not a "single, particular job." If, as the EEOC suggests, "surgery" is to be interpreted as a single, particular job, then the rule becomes so over-broad that it could exclude almost anyone from coverage. If a cancer researcher becomes allergic to a substance used in cancer research, is he or she not "substantially limited" because "cancer research" is the "single, particular job" which he or she cannot perform? According to the EEOC, the cancer researcher would not be "substantially limited in working merely because of the inability to perform this chosen specialty." (id.)

Class of jobs is defined to be jobs "utilizing similar training, knowledge, skills and abilities." How broadly does the EEOC intend this to be applied? In the example of the surgeon, the EEOC blithely states that he or she could teach medicine in the same geographical area. This assumes that teaching utilizes the same "skills and abilities" as surgery. This is a presumptuous and uninformed assumption which illustrates the danger in the proposed regulation.

Who decides and based on what evidence? The examples of conflicting opinions, often based on ignorance, are endless. The task of substantiating the opinion with objective evidence is daunting and a waste of everyone's resources. Employers will be responsible for implementing this regulation in the first instance. How is the employer going to determine the appropriate scope for "class of jobs," let alone the number and types of such jobs available in the geographical area? How is the EEOC going to make this determination? Clearly, arbitrary assumptions will not suffice.

The only way the regulation can work is to limit the inquiry to the actual, particular job in question. The person should be considered not to be "substantially limited," only if the impairment is manifest only in the particular, actual job.

In the case of the surgeon, the shaky hand would affect all jobs performing surgery. Therefore, the surgeon would be covered by the ADA. However, the surgeon would not be a "qualified individual with a disability" unless a reasonable accommodation was available to eliminate the shaky hand. Another accommodation would be to reassign the surgeon to the other kinds of jobs suggested by the EEOC, teaching, examining patients, etc.

The second critical issue involves burden of proof. If a person is subject to an adverse action in a particular job, e.g. firing, refusal to provide reasonable accommodation, because of a physical or mental impairment, whose burden is it to show that the effects of the disability go beyond that particular job? Whose burden is it to produce the evidence required by subpart (ii)? It is critical that this burden fall on the employer who took the adverse action. In other words, the plaintiff in such a case would have presented a prima facie case of coverage by showing that the adverse action was based on a physical or mental impairment or by raising an inference that the adverse action was based on an impairment. At that point, the employer would have to show that the disability only affected the person in the particular job. It would be the employer's burden to produce the evidence required in subpart (ii) to show that the disqualifying

criteria was not in general use. (However, this also is problematic, as discussed below because it encourages and sanctions non-job-related discriminatory criteria).

This approach is consistent with the E. E. Black decision which forms the basis of the proposed rule. (Appendix p. 8593) Throughout the E. E. Black decision, the court states that it must be assumed that the disqualifying criteria is in use generally.

> In evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process. (497 F. Supp. 110)

The court in E. E. Black underscored the importance of a presumption of common usage of the discriminatory criteria. Otherwise, according to the court, an employer using some "aberrational type of job qualification . . . would be rewarded if his reason for rejecting the application was ridiculous enough." (497 F. Supp. 1099, 1100)

Therefore, if an applicant is rejected from a job because of an actual or perceived impairment, the rejected applicant or employee is presumed to be substantially limited or perceived to be substantially limited in employment. The employer must demonstrate that the disqualifying criterion is not in use generally.

> There has been no showing that similar positions would have been available to Mr. Crosby had all firms used Black's criteria . . . (p. 1102).

This quote only makes sense when read to mean that the employer must make the "showing." Given the context of the case, the plaintiff would have no interest in making such a "showing."

The burden is not on the plaintiff to prove the general applicability of the disqualifying criterion. This burden allocation makes sense from both a fairness and practical point of view. The employer is in a far superior position to know and investigate general practices in the industry involved.

As discussed above, plaintiff has no way of knowing whether a criteria is used in the industry and does not have access to this information in discovery. A tremendous flaw in the cases which use this approach is the lack of any discussion about how the information is obtained.

Moreover, in situations where the disability is manifest in only one location, E. E. Black assumes an attempt by the employer to place an individual with an actual or perceived impairment in similar jobs.

In E. E. Black, the Assistant Secretary found that an individual is substantially limited if "the impairment is a current bar to the employment of one's choice . . ." (p. 1099).

The Court rejected this definition only because it would create a claim by a person whose only limitation in jobs by a particular employer was at a specific location. The Court lists several examples why the Assistant Secretary's definition must be rejected. All of these assume that the worker was offered other jobs by the same employer.

> Thus, for example, a worker who was offered a particular job by a company at all of its plants but one, but was denied employment at that plant because of the presence of plant matter to which the employee was allergic, would be covered by the Act. An individual with acrophobia who was offered 10 deputy assistant accountant jobs with a particular company, but was disqualified from one job because it was on the 37th floor, would be covered by the Act. An individual with some type of hearing sensitivity who was denied employment at a location with very loud noise, but was offered positions at other locations, would be covered by the Act. (p. 1099)

Hence, if the employer has similar jobs (for which the worker is qualified) in locations that do not trigger the disability, the employer must offer those jobs to the applicant or employee. Otherwise, an employer could limit coverage willfully with impunity. Taking the examples given by the Court, an employer could offer the worker who was allergic employment only in the plant that contained the substance that caused the allergy; the deputy assistant accountant with acrophobia could be offered only the job on the 37th floor and the individual with a hearing impairment, only a job at the noisy location.

The E. E. Black decision, at a minimum, assumes that the person with the actual or perceived disability is offered all similar jobs for which he or she is qualified. Otherwise, the employer could undermine coverage by purposefully placing a person in a location in which the person cannot work because of his or her disability, and then claim that the disqualifying criteria (e.g. being able to work at tall heights) is not in general use, when in fact the person has been rejected in all

similar jobs by the employer.

If E. E. Black is adopted to limit coverage, it must also be adopted to allocate the burden of proof to the employer to prove the singularity of the negative job impact and an employer should be foreclosed from doing so if it has not offered the applicant or employee similar available jobs.

Third, the proposed regulation does not consider rate of pay, seniority or accrued benefits in determining the impact of the impairment on employment opportunities. This is a notable omission since the E. E. Black decision states that "in evaluating the number of employers offering the same or similar job, who are not affected by the criteria, an important consideration could be the salary, and other benefits offered." (497 F. Supp. 1088, 1101n. 13)

Thus, in the example above, the mail sorter who is severely allergic to plant matter in one facility may have 20 years seniority and accrued benefits. The availability of similar jobs should be only those which offer the same or similar pay and benefits. As a practical matter, entry-level jobs in mail sorting are not "the same or similar" to a job with higher salary and benefits.

Record of - 1630.2(k), p. 8587; 8594

The Appendix explains that under this section, the "impairment indicated in the record must be a physical or mental impairment that substantially limits a major life activity." This could bring all the problems in the "substantially limited" in working definition into the second prong of the definition. If an employer relies on the fact that a person was terminated from a previous job because of a mental or physical impairment, a determination that the person was "substantially limited in working" would have to be made in order for coverage to be triggered. This determination would be fraught with all the problems discussed above.

Regarded as - 1630.2(i), pp. 8587-88; 8594

This section adopts the broad definition of "regardless as" contained in the Section 504 regulations. Section 1630.2(l) provides:

Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not

substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) 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

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity has having such an impairment.

The Appendix adopts the presumption of general applicability of the disqualifying criteria discussed above.

> In determining whether or not an individual is regarded as substantially limited in the major life activity of working, it should be assumed that all similar employers would apply the same exclusionary qualification standard that the employer charged with discrimination has used. The determination of whether there is a substantial limitation in working is contingent upon the number and types of jobs from which the individual is excluded because of an impairment. An assessment of the number and types of jobs from which an individual "regarded as" disabled in working would be excluded can only be achieved if the qualification standard of the employer charged with discrimination is attributed to all similar employers. Were it otherwise, an employer would be able to use a discriminatory qualification standard as long as the standard was not widely followed. (p. 8594)

This is a very important clarification of the "regarded as" determination which may serve to mitigate the exclusionary effect of the first prong, "substantially limited in working" test. However, the same rationale should be applied in the first prong, as discussed above.

The legislative history of the ADA clearly rejects the E. E. Black many jobs standard for the "regarded as" prong of the definition. The Senate Report includes among those covered by the "regarded as" prong, "people who are rejected for a particular job for which they apply because of findings of a back anomaly on an x-ray." To the extent that E. E. Black required more than rejection from a particular job, it has been specifically rejected.

The Judiciary Report is also explicit in clarifying that a plaintiff is covered by the third prong if he or she is subject to an adverse employment action, "whether or not the employer's views are shared by others in the field."

> Thus, a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition. (Judiciary Report, p. 30)

The Judiciary Report provides further guidance about the determination of coverage under the "regarded as" prong, which should be explicitly adopted in the Appendix to the EEOC regulations.

The Judiciary report states:

> In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff 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 employer's perception is inaccurate, e.g., that he will be accepted by others, or that insurance rates will not increase, in order to be qualified for the job.

<u>Qualified Individual with a Disability - 1630.2(m), pp. 8588; 8594-95</u>

This definition is taken directly from the statute. The Appendix to this section should incorporate the legislative history which clarifies that the determination of whether a person with a disability is "qualified" should be made at the time of the hiring decision, and cannot be based on future inability to perform the job, or increased health insurance or worker's compensation costs. (<u>See</u>, e.g. House Judiciary Report, p. 71; House Education and Labor Report, p. 136) (See discussion below on direct threat.)

Essential Functions - 1630.2(n), pp. 8588, 8595

The regulations contain the first comprehensive definition of "essential functions." No such definition was contained in the Section 504 regulations. The proposal appears to be a fair attempt to provide guidance to employers and the courts.

However, while the discussion in the Appendix is helpful, the case citations are not and should be eliminated. The Appendix cites Treadwell v. Alexander, 707 F2d. 473 (11th Cir. 1983) and Dexler v. Tish, 660 F2d. 1418 (D. Conn. 1987). Neither case reflects the EEOC proposals. The Treadwell case characterizes job-restructuring as "doubling up." There was no indication that the tasks that the plaintiff could not perform were "essential functions" of the job. Dexler is a very negative case which rejected the provision of a stool to a person of short stature because it "would impair productivity because time would be required to move the stool into position." (660 F. Supp. at 1423) Dexler is not a good example of "an employer's limited flexibility in reorganizing operating procedures," as it is used in the Appendix.

Reasonable Accommodation - Section 1630.2(o), pp. 8588; 8595

The EEOC's proposed definition of reasonable accommodation provides additional guidance to that which is provided in the statute. The statutory language is taken directly from the Section 504 regulations which lists types of accommodation. The proposed regulation provides generic definitions which clarify that reasonable accommodation is applicable to the application process, the work environment, the manner or circumstances under which the job is performed and to all of the benefits and privileges of employment. [1630.2(o)(i)(ii)(iii)] This is extremely helpful language and should be maintained.

The Appendix explains that the accommodation of making existing facilities accessible includes those areas where the actual job is performed, as well as non-work areas, such as break rooms, lunchrooms, and training facilities. This clarification is very important. However, restrooms should be specifically added to the list. Whether or not restrooms must be accessible as a reasonable accommodation is often disputed.

However, the proposal and the Appendix raise three issues which must be addressed. First, the regulation modifies each definition of "reasonable accommodation" with the phrase, "and which will not impose an undue hardship on the covered entity's business." The limitation of undue hardship should not be

contained in the definition of reasonable accommodation. This is conceptually incorrect. The first step is to determine the appropriate reasonable accommodation. A reasonable accommodation should provide a meaningful equal employment opportunity. As stated in the Senate Report, "a meaningful equal employment opportunity means an opportunity to attain the same level of performance as is available to non-disabled employees having similar skills and abilities." (Senate Report, p. 35) Only after this determination is made, is the limitation of undue hardship relevant. The definition of reasonable accommodation should omit reference to undue hardship. The substantive section dealing with reasonable accommodation, Section 1630.9, states directly that an employer is not required to provide a reasonable accommodation that would impose an undue hardship. The definitions section should define reasonable accommodation without the reference to undue hardship.

Second, the Appendix must clarify that daily attendant care is a reasonable accommodation. (Senate Report, p. 33) The Appendix which explains the definition lists "personal assistants--such as a page turner or travel attendant" as possible reasonable accommodations. However, this could be interpreted to mean that personal assistance on a daily basis, for example, for toileting, is not required. The danger of this interpretation is increased by the Appendix explanation of the substantive reasonable accommodation section, Section 1630.9 (p. 8598) which states:

> The obligation to make reasonable accommodation is a form of nondiscrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide.

The regulations must explicitly state that daily attendant care during work hours for toileting, eating, driving, etc. is not "primarily for the personal benefit of the individual with a disability." Without this explicit clarification, many severely disabled individuals will be unable to attain or retain employment. Therefore, <u>this issue is of the highest priority</u>.

Third, it should be made clear in the regulation and the Appendix that the requirement to provide reasonable accommodation is a continuing one, and not a one-shot deal. An accommodation which may be an undue hardship one year may not be the next. If a series of accommodations are needed, they could be phased in over a number of years, upon the request of the employee.

Undue Hardship - 1630.2(p), pp. 8588; 8596

The definitions in this section come from the statute, except for an additional section added by the EEOC. Section 1630.2(p)(v) provides an additional factor:

> The impact of the accommodation upon the operation of the site, including the impact on the ability of other employees to perform their duties and the impact on the sites ability to conduct business.

The Appendix to this section should make clear that this section must be interpreted to exclude any "impact" based on prejudice or fears of the reactions of others. This type of explanation is contained in the Appendix in the explanation of "defenses to not making reasonable accommodation." [Section 1630.15(d), (p. 8602)]

Direct Threat - 1630.2(r), pp. 8588; 8596-97

The definition of "direct threat" which is a "significant risk of substantial harm" is excellent. The Appendix clarifies that this is a "high probability of substantial harm." However, two significant problems exist with the proposal.

First, the proposal extends the statutory language of "risk to others" to include "risk to self." "Risk to self" is perhaps the most pervasive basis of discrimination against persons with disabilities. The concern about risk to self is usually economic or paternalistic. Neither are strong policy reasons to deny work to a disabled person for "his own good." Moreover, the determination of risk to self is often based on speculation. As stated in the Judiciary Report, p. 42, "it is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant."

Thus, at a minimum, the Appendix should clarify that concerns about increased costs or paternalism based on stereotype will not suffice. Moreover, the Appendix should clarify that the risk must be a present risk based on the person's present condition, and not based on speculation about the future course

of the disability. (Judiciary Report, p. 46)

The Appendix adopts legislative history which underscores that the determination of risk must be based on the actual job functions and not on general conditions, such as stress. This is essential. The quoted legislative history states:

> Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. (p. 8597)

The Appendix should specifically illustrate this concept in the context of mental health (if the risk to self language is not deleted entirely). For example, a law firm would not be permitted to reject an applicant with a history of mental illness because the stress of trying to make partner would trigger the mental illness or exacerbate it. The opinion of a psychiatrist that the stress would likely cause such a reaction, based on past history, could not be used to justify the exclusion. Speculation based on past conduct should be considered insufficient grounds to justify rejection under the "risk to self" standard.

Second, the regulation and Appendix must be clear that a determination by the EEOC and/or court of direct threat must be made on the basis of the objective evidence before the decision maker. The fact that the employer relied on a "reasonable medical judgment" is not the determining factor. Even if the employer based his decision on "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence," the EEOC and/or court must make an independent judgment based on the evidence before it. In other words, the employer's state of mind, or good faith is not relevant to the ultimate determination of whether a person with a disability poses a direct threat.

PROHIBITED MEDICAL EXAMINATIONS AND INQUIRIES - SECTION 1630.13

Pre-employment Examination or Inquiry - 1630.13(a), pp. 8590; 8601

The regulations make clear that an employer may not make inquiries of applicants about disability.

The Appendix explaining 1630.13(a) states that an employer

may make inquiries about the applicant's ability to perform both essential and marginal job functions. However the Appendix states that the applicant with a disability may not be rejected because of the inability to perform marginal functions.

Allowing an employer to ask about marginal functions makes no sense and is inconsistent with the legislative history cited in the Appendix to support it.

The Senate Report states that an employer may ask questions which relate to the ability to perform the job, and gives the following example:

For example, an employer may ask whether the applicant has a driver's license, <u>if driving is an essential job function,</u> . . . (Senate Report, p. 39)

Allowing employers to ask about the ability to perform marginal job-functions serves no legitimate purpose, and would serve to undermine the purpose of the bar on pre-employment inquiries. For example, if an employer wished to screen out all applicants with bad backs, it could ask each applicant for a sedentary position if he/she could lift 50 lbs., because occasionally boxes of files need to be moved. An employer could ask all applicants if they had a driver's license, even if driving was an infrequent, non-essential convenience, thus screening out many people with seizure disorders and visual impairments.

The whole point of the bar on pre-employment inquiries, as extensively described in the legislative history, is to eliminate bias from the initial application process and to isolate discriminatory rejections. An employee who did not have a license because of disability, would have no way of isolating that criteria as the reason for rejection if the inquiry is made pre-offer.

<u>Medical Examinations and Inquiries Specifically Permitted - 1630.14, pp. 8590; 8601</u>

The proposed regulations in this section follow the statute. However, the explanation of subsection 1630.14(3) in the Appendix is problematic. This section allows post-offer physical exams which are not job-related. Consistent with the statute, the subsection states that, "if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity."

The Appendix to this section states that, "[o]nly those employees who meet the employer's relevant physical and psychological criteria for the job will be qualified to receive confirmed offers of employment and begin working." (emphasis added) Whether a job criterion is "relevant" is not the correct inquiry under this section. The criterion must be "job-related and consistent with business necessity."

The example given to illustrate this section is also problematic. The Appendix states that if an essential function of the job is to work every day for the next three months, an offer could be withdrawn if a disability is revealed which will require treatment that will render the applicant unable to work for a portion of the three month period. Most employers believe that daily attendance is essential in most jobs. This example should not be used unless more facts are given as to why daily attendance is an "essential function of the job." Moreover, few applicants without disabilities can guarantee daily attendance for a three month period.

DEFENSES - SECTION 1630.15, pp. 8590-91; 8602-3

Section 1630.15 states that the defenses to an allegation of discrimination "include but are not limited to" the listed defenses. The Appendix also states that the list is not intended to be exhaustive. This opens the door too wide to defenses not contemplated in the legislation. What are examples of these other defenses? This language needs to either be further clarified or eliminated.

Section 1630.15(a) deals with charges of disparate treatment--that an individual was treated differently because of disability. The defense to this type of charge is that the "challenged activity is justified by a legitimate, nondiscriminatory reason." The Appendix cites several cases under Title VII which establish this defense. In the context of disability, it should be explicitly stated in the Appendix that increased costs associated with hiring a person with a disability, such as higher insurance premiums, is not a "legitimate, nondiscriminatory reason" to refuse to hire persons with disabilities.

DREDF Preliminary Comments
Title I

Charges of Not Making Reasonable Accommodation - 1630.15(d), pp. 8591; 8602

The Appendix to this section is excellent. The Appendix makes it clear that the employer has the burden of demonstrating undue hardship. The determination will be made on a case by case basis. The "employer would have to show that the cost is undue as compared to the employer's budget." This is a strong standard and accurately reflects Congressional intent.

Finally, the Appendix states that the "employer would not be able to show undue hardship if the disruption of its employees was the result of those employees' fears or prejudices" toward people with disabilities. This is an important statement. It should also be made clear that the effect of providing a reasonable accommodation on employee morale is not a defense.

Conflict with Other Federal Laws - Section 1630.15(e), pp. 8591; 8602

This section states that it is a defense to discrimination under the ADA if the challenged action is required or necessitated by another federal law or regulation. This provision is in direct conflict with the statute which provides that the ADA does not invalidate or limit any other federal (or state) law which provides greater or equal protection for the rights of persons with disabilities than are provided in the ADA. (42 USC 12201) Therefore, the converse is true. The ADA does invalidate other federal laws which provide less protection to the rights of persons with disabilities.

Drug Testing - Section 1630.16(c), pp. 8591; 8603

This section states that a drug test is not a medical test. This is taken from the statute. The proposed regulation also states that, therefore, drug tests may be given to applicants and employees. The Appendix to this section states that if the results of the drug test reveals information about a person's medical condition, this additional information should be treated as confidential. This is not enough protection at the pre-offer stage. The employer should be precluded from conducting a drug test pre-offer which would reveal the existence of a disability because of the ban on pre-employment examinations and inquiries. If the drug test could reveal a disability, it must be given post-offer. This approach is more consistent with the legislative history cited by the EEOC. As stated in the cited portion of the Judiciary Report, p. 47:

However, the Committee wishes to emphasize that this provision may not be applied to conflict with the right of individuals who are legally taking drugs (e.g., taking drugs under medical supervision for their disability) not to disclose their medical condition before a conditional offer of employment has been given. Thus, employers must either give drug tests after conditional offers of employment have been made (the employer may then make the job offer strictly contingent on the person not testing positive on the drug test for the illegal use of drugs) or ensure that any drug test given before a conditional job offer will be used to test strictly for the illegal use of drugs and not for drugs that are taken legally pursuant to medical supervision.

Hence, a sentence should be added to the regulation which states that drug tests may not be used to identify a disability of an applicant or an employee in contravention of 1630.13.

Health Insurance, Life Insurance, and Other Benefit Plans - Section 1630.16(f), pp. 8591; 8603

The Appendix to this section makes clear that "an employer cannot deny a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks." This is helpful. However, it needs to be further clarified that an employer must offer whatever the current coverage is to all employees to the person with a disability, even if the insurance company raises rates because of the participation of the person with a disability. The same policy, on the same terms must be offered by the employer even if the increased premium is justified by increased risk.

As stated by the Senate Report, "[a]ll people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees" (p. 29) and an employer cannot deny a qualified applicant a job ". . . because of the increased costs of the insurance." (p. 85)

March, 1991

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Key Industries, Inc.
Makers of "The Nation's Finest" Work and Leisure Wear
GENERAL OFFICE, FORT SCOTT, KANSAS 66701 PHONE 316-223-2000
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February 12, 1991

Senator Robert Dole
2213 Dirksen Bldg.
Washington, D.C. 20510

Dear Senator Dole,

I am writing to ask you to sponsor a major amendment to the Americans With Disabilities Act of 1990 (ADA). The provisions of this law are so extremely vague that it is a horror story for American employers. The "reasonable accommodation" provisions are so broad and general that presumably an employer would have to undertake any expense required up to the point just short of bankruptcy for that employer. This law constitutes a hunting license for lawyers and for unscrupulous persons with fictitious or questionable "disabilities". If it cannot be greatly improved it should be abolished.

I am anxious to hear your views on this matter.

Sincerely Yours,

Key Industries, Inc.

Bill Pollock
President

BP:mg

February 22, 1991, Friday, Final Edition

SECTION: FINANCIAL; PAGE C1

LENGTH: 595 words

HEADLINE: Rules Proposed on Disability Act Compliance;
Justice Department Outlines Strict Guidelines for Businesses

SERIES: Occasional

BYLINE: Warren Brown, Washington Post Staff Writer

BODY:
Blind people would be guaranteed the right to take their guide dogs into stores and restaurants under draft public accommodations rules presented yesterday by the Justice Department under the Americans with Disabilities Act.

The rules would require that people in wheelchairs be admitted to general-seating areas of theaters and arenas, not segregated in special

sections. Clothing stores would have to permit handicapped shoppers to take companions into dressing rooms if assistance is necessary.

Public places of all sorts, from restaurants to auto dealerships, would be required to install ramps, widen doorways or make other "achievable" modifications to provide easier access for physically disabled people, according to the draft regulations.

Nearly 4 million businesses would have to make the changes by July 1992 if the rules are adopted.

The proposed rules, scheduled to be published today in the Federal Register, would be refined after a series of public hearings.

The sharply debated legislation, signed by President Bush in July, is intended to protect 43 million disabled Americans from discrimination at work, on mass transportation and in public places of business and entertainment.

Hospitals, homeless shelters, private schools, homes used for offices or day-care centers, and rooms in churches and private clubs that are leased to groups for public functions are covered by the law. Other changes requiring physical modifications of buildings were proposed Jan. 22 by the Architectural

and Transportation Barriers Compliance Board.

Stricter standards, requiring a "high degree of convenient access" for the disabled, would be imposed for facilities being altered and buildings that open after Jan. 26, 1993.

The law allows the exclusion of customers who "pose a direct threat to the health or safety of others" in the establishment but otherwise bars discrimination against the disabled, including people infected with HIV, the AIDS-causing virus.

The measure's sponsors hope the plan would change the way way Americans think about and treat disabled people. The plan is recognized as a costly remedy by proponents and opponents, but supporters, including Bush, have said it could eventually pay enormous national dividends.

Supporters yesterday applauded the draft rules. "The regulations show a clear understanding of the issues of discrimination against people with disabilities, " said Patrisha A. Wright, director of governmental affairs for the Disability Rights Education and Defense Fund Inc.

However, she conceded the rules are seeded with many of the same issues that sparked political debate last year. For example: What is "achievable" and what isn't in modifying a building to accommodate the disabled? What constitutes a legitimate alternative way of meeting the regulations?

Such issues are expected to be raised during a series of public hearings on the proposed regulations. The hearings are scheduled to take place March 13 to 15 in Washington and on other dates next month in Dallas, San Francisco and Chicago.

The proposed rules appear to contain "no surprises" for business, said John Satagaj, president of the Washington-based Small Business Legislative Council, which represents many of the establishments affected by the law.

"My organization didn't oppose the law, per se," Satagaj said. "Our major concern was that the law allow flexibility. We were trying to communicate to our people: 'Don't panic. Don't feel that you have to run out and make all of these alterations right away. You have alternatives.' "

TYPE: NATIONAL NEWS

(c) 1991 The Washington Post, February 22, 1991

SUBJECT: CIVIL RIGHTS; HANDICAPPED ACCESS; BUSINESSES AND INDUSTRIES

ORGANIZATION: JUSTICE DEPARTMENT; AMERICANS WITH DISABLITIES ACT

The New York Times

February 22, 1991, Friday, Late Edition - Final

SECTION: Section A; Page 14; Column 4; National Desk

LENGTH: 1276 words

HEADLINE: U.S. Rules Would Force Businesses To Make Alterations for the Disabled

BYLINE: By STEVEN A. HOLMES, Special to The New York Times

DATELINE: WASHINGTON, Feb. 21

BODY:

The Bush Administration today proposed rules that would require businesses to make structural alterations to offices and stores to accommodate the disabled unless they can show that the expense would be too great or if they furnish an alternative way of providing service.

The regulations, spelling out how last year's Americans with Disablities Act will be enforced, would also require that businesses, including professional practitioners, insure that disabled consumers receive the same level of services as other customers as much as possible, even if that means altering the way business is conducted.

The rules, to be published Friday in the Federal Register, follow the publication of guidelines last month for enforcing the new law, which prohibits discrimination against people with physical and mental impairments in employment, transportation, telecommunications services and public accommodations.

The guidelines were written by a Federal advisory agency, the Architectural and Transportation Compliance Board, to help the Department of Justice set "accessibility standards" for commercial establishments being built or renovated.

Rules for Existing Businesses

The Justice Department rules proposed today incorporate those guidelines and go further by covering what existing businesses must do. Last month's rules simply specified the structural provisions that must be made to accommodate

the handicapped when a building is built or renovated.

The rules, which are subject to revision after a 60-day period of public comment, are to go into effect Jan. 26, 1992. Businesses with 25 or fewer employees will have an additional six months to comply, and businesses with 10 or fewer workers will not be covered until Jan. 26, 1993.

In addition to specifying the structural changes required by the disabilities act, the draft rules issued today address changes in services.

For example, restaurants would have to make sure that blind customers are aware of what dishes are available, either by providing menus in Braille or having a waiter read the selections. Banks would have to make automatic teller machines accessible to disabled individuals, largely by building or moving the machines low enough to be reached by people in wheelchairs.

Millions of Businesses

"These regulations represent a fair and balanced enforcement tool for the Americans with Disabilities Act," Attorney General Dick Thornburgh said in a statement that accompanied the release of the draft rules. "The Department of Justice has sought to strike a balance between the right of persons with

disabilities to enter the mainstream of society and the workplace, and the financial and physical limits of the business community."

According to the Census Bureau, 1.7 million Americans are deaf in both ears, 7.7 million Americans have trouble hearing what is said in normal conversations and more than 13 million have impaired vision. At least 1.3 million people use wheelchairs or walkers, and 8 million have severe difficulty walking.

The regulations proposed today deal exclusively with the public accommodation provisions of the law. They will affect more than 3.8 million companies that operate an estimated five million commercial establishments, including hotels, motels, theaters, concert halls, restaurants, banks, retail outlets, museums, doctors and lawyers offices, gyms, day care centers, parks and rental car companies. Private clubs, churches and establishments run by religious organizations are exempt from the regulations.

Violators are subject to a fine of up to $50,000 for the first offense and up to $100,000 for subsequent offenses. Disabled people or the Justice Department may seek a court order to enforce the law, and the Justice Department may also seek civil damages on behalf of disabled people who complain of biased treatment.

Pat Wright, director of government affairs for the Disability Rights Education and Defense Fund, a advocacy group based in Berkeley, Calif., said that she was generally pleased with the draft regulations but that lobbyists for disabled groups would seek to toughen some of the proposals to allow more access for the disabled to various businesses and services.

'Fine Tuning' Sought

"I think they reflect the spirit of the law," she said. "But I think they need some fine tuning." Ms. Wright added that about 70 disabled groups would be meeting here next week to analyze the regulations line by line.

Officials from the United States Chamber of Commerce, which has raised concerns about the potential cost to business, said they had not yet analyzed the regulations and therefore would not comment on them.

Under the disabilities law, enacted in July, all new commercial establishments must be accessible to people with physical disabilities, including those in wheelchairs. Existing businesses must alter their premises so disabled individuals can enter and easily conduct their business. Such alterations, the regulations say, might include placing ramps over stairways, widening aisle and lowering shelves.

Alterations do not need to be made if the company demonstrates that they would be too difficult or too xpensive to undertake. Companies can also opt not to renovate if they devise an alternative method of serving disabled customers, like curbside service or home delivery.

Changing Habits, Not Just Offices

But beyond the issue of accessiblity, commercial outlets will have to modify some of their practices to accommodate individuals with physical or mental impairments.

Some of the modifications are relatively minor. Retail outlets could satisfy the needs of deaf or speech-impaired clients by providing pencils and pads. On the other hand, doctors discussing medical problems with a deaf patient could be required to hire a sign-language interpreter. Hotels and motels that have five or more rooms must be able to provide special telephones in the rooms upon request so that deaf and speech-impaired guests can make outside calls or contact the front desk or room service.

Businesses must also jettison policies that tend to exclude disabled individuals.

For example, businesses would no longer be able to use a drivers license as the only means of identification when cashing a check because such a policy excludes blind people. Companies would, however, be able to maintain policies that are necessary for the safe and effecient operation of the business. Thus, an amusement park operator could keep a height requirement for a ride if that criterion is considered a safety measure.

Integrating the Disabled

The regulations call for integrating the disabled as much as possible. For example, unless it is prohibitively expensive, movie houses, theaters, concert halls, sports arenas and auditoriums must maintain seating arrangements that allow disabled and able-bodied individuals to sit together.

The regulations specify that if a company declares that altering its facility or practices creates an undue financial hardship, a Federal court would be allowed to look at the finances of both the business and its parent company in assessing that claim.

Wendy Lechner, manager of research and policy development for the National Federation of Independent Business, a lobbying group for small businesses that has opposed certain provisions of the law, said that the regulations could

force some companies to abandon operations in less economically viable locations.

"It will make business owners think twice about where they will locate a facility," Ms. Lechner said. "It may hurt business in inner city or rural areas."

GRAPHIC: Chart: "Proposed Requirements For Handicapped Access" lists requirements made by the Justice Department for accessability for the handicapped.

SUBJECT: HANDICAPPED; DISCRIMINATION; AMERICANS WITH DISABILITIES ACT; LAW AND LEGISLATION; RESTAURANTS; HOTELS AND MOTELS; MOTION PICTURES ; RETAIL STORES AND TRADE; GARAGES AND SERVICE STATIONS

NAME: HOLMES, STEVEN A; BUSH, GEORGE (PRES)

GEOGRAPHIC: UNITED STATES; UNITED STATES

LEVEL 1 - 1 OF 2 STORIES

The New York Times

February 23, 1991, Saturday, Late Edition - Final

SECTION: Section 1; Page 11; Column 1; National Desk

LENGTH: 870 words

HEADLINE: Businesses Contend Rules on Disabled Are Vague

BYLINE: By STEVEN A. HOLMES, Special to The New York Times

DATELINE: WASHINGTON, Feb. 22

BODY:

Business groups contended today that proposed Federal regulations on how commercial establishments must treat disabled customers were so vague that the courts would end up setting the standards.

At issue are Justice Department rules, proposed Thursday, requiring that businesses make physical alterations to accommodate disabled consumers or

provide an alternative way of delivering services to them.

The draft rules spell out how businesses must comply with the provisions of the Americans with Disabilities Act. The law, passed last July, bars discrimination against the disabled in employment, transportation, public accommodations and in access to telecommunications services.

The proposed rules for existing structures are flexible, allowing businesses, including professional practitioners, to be exempted from making modifications or providing an alternative service if those steps are considered too difficult or too expensive to accomplish. No such exemptions would be available for those undertaking new construction or remodeling.

What Is 'Too Difficult'?

Business groups said today that the Justice Department did not clearly spell out what was meant by "too difficult or too expensive" and predicted that it would be left to the courts to sort out.

"They said that they want flexibility to look at each situation on a case-by-case basis," said Wendy Lechner, manager of research and policy development for the National Federation of Independent Business, a trade group

for small businesses. "They seem to want the courts to define the terms on the backs of small businesses."

Justice Department officials said they had considered being more concrete, for instance, by declaring that a business could be exempt from making its premises accessible to the disabled if the cost of an alteration exceeded a certain percentage of revenue or profit. But they said they rejected such a formula as too restrictive.

Advocates for the disabled say the fears of litigation are exaggerated. They

noted that since plaintiffs could not get monetary damages, the disabled would find it difficult to hire lawyers, who usually get fees based on the size of cash awards. And public interest law firms are reluctant to take cases involving small businesses, the advocates said.

Civil fines of up to $50,000 for the first offense ad up to $100,000 for subsequent offenses can be levied only if a case is brought by the Justice Department. But advocates for the disabled and Justice Department officials said that it was doubtful the department would bring such cases against small businesses. Department officials said they would instead concentrate on large corporations.

"When Justice starts suing mom and pop operations over not putting in a $250 ramp, that's when the N.F.I.B. should start complaining," said James Weisman, a lawyer for the Eastern Paralyzed Veterans Association, an advocacy group in New York.

Some Taking Steps

Some major corporations say they have already been taking steps to improve access for the disabled.

A spokesman for the Hilton Hotels Corporation said the company, which operates 260 hotels with 94,582 rooms in this country, was prepared to comply with the new requirements. "We will promptly move to be in accordance once the rules become final," the spokesman said, adding that the company had already begun installing ramps and making other changes to improve access to its hotels.

An official of the McDonald's Corporation, the nation's largest chain of fast food restaurants, said the company had been providing blind customers with menus in Braille since 1979.

"Every restaurant we have built since 1975 has been accessible to the handicapped," said Rebecca Caruso, a McDonald's spokeswoman. As older

restaurants are remodeled, she said, they are also made accessible. She said counters, tables and restrooms have been designed to accommodate those with physical handicaps.

At the Dayton Hudson Corporation, a major chain of retail stores in the Midwest, a spokeswoman, Sue Sorenson, said the company had kept access for the disabled in mind as it remodeled stores. "We have adapted things for the convenience of all our customers, as well as those who are limited physically," she said.

Spokesmen for several trade associations in Washington insisted that the proposed regulations would drive some small operations out of business. They also contended that allowing the courts to examine the financial soundness of both local outlets and their parent companies to determine if a store must make alterations would cause corporations to close marginal establishments.

But Mr. Weisman and other advocates for the disabled disagreed. They said the proposed rules would allow a tax credit of up to $5,000 annually for the cost of making physical alterations to accommodate the disabled. Any alteration costing more than $5,000, Mr. Weisman said, would probably be considered too expensive for a small company to undertake.

Justice Department officials said the Internal Revenue Service had not yet determined if the tax credit would be available to branch and franchise operations of major corporations or just to independent small businesses.

SUBJECT: Terms not available

Rules Proposed on Disability Act Compliance

Justice Department Outlines Strict Guidelines for Businesses

WP 2-22-91 p. C1

By Warren Brown
Washington Post Staff Writer

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Nearly 4 million businesses would have to make the changes by July 1992 if the rules are adopted.

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See DISABLED, C2, Col. 3

Justice Dept. Proposes Compliance Rules for Disability Act

DISABLED, From C1

the Architectural and Transportation Barriers Compliance Board.

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However, she conceded the rules are seeded with many of the same issues that sparked political debate last year. For example: What is "achievable" and what isn't in modifying a building to accommodate the disabled? What constitutes a legitimate alternative way of meeting the regulations?

Such issues are expected to be raised during a series of public hearings on the proposed regulations. The hearings are scheduled to take place March 13 to 15 in Washington and on other dates next month in Dallas, San Francisco and Chicago.

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2-23-91 A11

Businesses Contend Rules on Disabled Are Vague

By STEVEN A. HOLMES
Special to The New York Times

WASHINGTON, Feb. 22 — Business groups contended today that proposed Federal regulations on how commercial establishments must treat disabled customers were so vague that the courts would end up setting the standards.

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What Is 'Too Difficult'?

But business groups said today that the Justice Department did not clearly spell out what was meant by "too difficult or too expensive" and predicted that it would be left to the courts to sort out.

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Advocates for the disabled say the fears of litigation are exaggerated. They note that since plaintiffs cannot get monetary damages, the disabled would find it difficult to hire lawyers, who usually get fees based on the size of cash awards. And public interest law firms are reluctant to take cases involving small businesses, the advocates said.

Will proposed regulations on the disabled end up in court?

Civil fines of up to $50,000 for the first offense and up to $100,000 for subsequent offenses can be levied only if a case is brought by the Justice Department. But advocates for the disabled and Justice Department officials said it was doubtful the department would bring such cases against small businesses. Department officials said they would instead concentrate on large corporations.

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Concerns for Small Businesses

Spokesmen for several trade associations in Washington insisted that the proposed regulations would drive some small operations out of business. They also contended that allowing the courts to examine the financial soundness of both local outlets and their parent companies to determine if a store must make alterations would cause corporations to close marginal establishments.

But Mr. Weisman and other advocates for the disabled disagreed. They said the proposed rules would allow a tax credit of up to $5,000 annually for the cost of making physical alterations to accommodate the disabled. Any alteration costing more than $5,000, Mr. Weisman said, would probably be considered too expensive for a small company to undertake.

Justice Department officials said the Internal Revenue Service had not yet determined if the tax credit would be available to branch and franchise operations of major corporations or just to independent small businesses.

U.S. Rules Would Force Business To Make Alterations for the Disabled

By STEVEN A. HOLMES
Special to The New York Times

WASHINGTON, Feb. 21 — The Bush Administration today proposed rules that would require businesses to make structural alterations to offices and stores to accommodate the disabled unless they can show that the expense would be too great.

The regulations, spelling out how last year's Americans with Disabilities Act will be enforced, would also require that businesses insure that as much as possible, disabled consumers receive the same level of services as other customers, even if that means altering the way business is conducted.

The rules published today follow the publication of guidelines last month in The Federal Register for enforcing the new law, which prohibits discrimination against people with physical and mental impairments in employment, transportation, telecommunications services and public accommodations.

The guidelines were written by a Federal advisory agency, the Architectural and Transportation Compliance Board, to help the Department of Justice set "accessibility standards" for commercial establishments being built or renovated.

Rules for Existing Businesses

The Justice Department rules proposed today incorporate those guidelines and go further by covering what existing businesses must do. Last month's rules simply specified the structural provisions that must be made to accommodate the handicapped when a building is built or renovated.

Under today's draft rules, which are subject to revisions during a 60-day period of public comment, existing businesses would have to alter their premises to accommodate the disabled unless they can prove that the financial burden would be too great, or if they provide equivalent services outside the premises, as in delivery.

The new rules are to go into effect Jan. 26, 1992. Businesses with 25 or fewer employees will have an additional six months to comply, and businesses with 10 or fewer workers will not be covered until Jan. 26, 1993.

Today's draft rules also address services, which were not dealt with in last month's construction guidelines.

For example, restaurants would have to make sure that blind customers are aware of what dishes are available, either by providing menus in Braille or having a waiter read the selections. New banks would have to make automatic teller machines accessible to disabled individuals, largely by building the machines low enough to be reached by people in wheelchairs.

Millions of Businesses

"These regulations represent a fair and balanced enforcement tool for the Americans with Disabilities Act," Attorney General Dick Thornburgh said in a statement that accompanied the release of the draft rules. "The Department of Justice has sought to strike a balance between the right of persons with disabilities to enter the mainstream of society and the workplace, and the financial and physical limits of the business community."

The regulations proposed today deal exclusively with the public accommodation provisions of the law. They will affect more than 3.6 million companies that operate an estimated five million commercial establishments, including hotels, motels, theaters, concert halls, restaurants, banks, retail outlets, museums, doctors and lawyers offices, gyms, day care centers, parks and rental car companies. Private clubs, churches and establishments run by religious organizations are exempt from the regulations.

Violators are subject to a fine of up to $50,000 for the first offense and $100,000 for subsequent offenses. In addition, the Justice Department may seek civil damages on behalf of disabled people who complain of biased treatment.

Pat Wright, director of government affairs for the Disability Rights Education and Defense Fund, a advocacy group based in Berkeley, Calif., said that she was generally pleased with the draft regulations but that lobbyists for disabled groups would seek to toughen some of the proposals to allow more access for the disabled to various businesses and services.

'Fine Tuning' Sought

"I think they reflect the spirit of the law," she said. "But I think they need some fine tuning." Ms. Wright added that about 70 disabled groups would be meeting here next week to analyze the regulations line by line.

Officials from the United States Chamber of Commerce, which has raised concerns about the potential cost to business, said they had not yet analyzed the regulations and therefore would not comment on them.

Under the regulations, all new commercial establishments must be accessible to people with physical disabilities, including those in wheelchairs. Existing businesses must alter their premises so disabled individuals can enter and easily conduct their business.

As a result of the regulation, existing businesses will have to take such steps as placing ramps over stairways, widening aisles and lowering shelves, unless the company demonstrates that such alterations would be too difficult or too expensive to undertake.

Companies can opt not to renovate if they devise an alternative method of serving disabled customers, like curbside service or home delivery.

But beyond the issue of accessibility, commercial outlets will have to modify some of their practices to accommodate individuals with physical or mental impairments.

Some of the modifications are relatively minor. Retail outlets could satisfy the needs of deaf or speech-impaired clients by providing pencils and pads. On the other hand, doctors discussing medical problems with a deaf patient could be required to hire a sign-language interpreter. Hotels and motels that have five or more rooms must be able to provide special telephones in the rooms upon request so that deaf and speech-impaired guests can make outside calls or contact the front desk or room service.

Businesses must also jettison policies that tend to exclude disabled individuals.

For example, businesses would no longer be able to use a drivers license as the only means of identification when cashing a check because such a policy excludes blind people. Companies would, however, be able to maintain policies that are necessary for the safe and effecient operation of the business. Thus, an amusement park operator could keep a height requirement for a ride if that criterion is considered a safety measure.

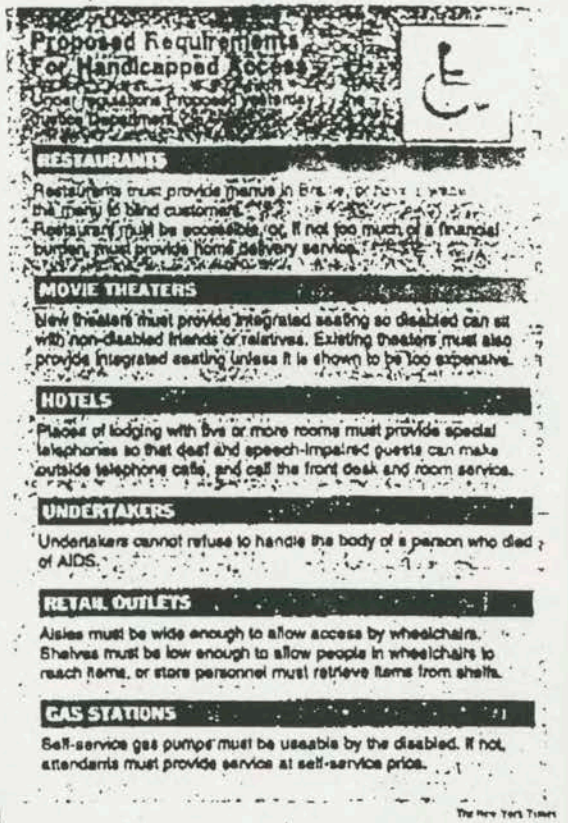
Integrating the Disabled

The regulations call for integrating the disabled as much as possible. For example, unless it is prohibitively expensive, movie houses, theaters, concert halls, sports arenas and auditoriums must maintain seating arrangements that allow disabled and able bodied individuals to sit together.

The regulations specify that if a company declares that altering its facilities or practices creates an undue financial hardship, a Federal court would be allowed to look at the finances of both the business and its parent company in assessing that claim.

Wendy Lechner, manager of research and policy development for the National Federation of Independent Business, a lobbying group for small businesses that has opposed certain provisions of the law, said that the regulations could force some companies to abandon operations in less economically viable locations.

"It will make business owners think twice about where they will locate a facility," Ms. Lechner said. "It may hurt business in inner city or rural areas."



For handicapped access, changes in structures and in services.

March 20th
staff mtg.

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ADA Regs

ADA 9.a. - Dec. 5th - vol 50237

#6 on TA - supp. approp.

12 ATBCB - 1/22/91 - FR vol 56 - 2296 comment 3/25/91

10 EEOC (2 sets) PA 2/22/91 vol 56 - 7452 comment expires

by DOJ → S.C. 2/28/91 vol 56 8538 comment 4/23/91

FCC 4/29/91

2/28/91 by 8578 4/29/91 comment

9.6 DOT - paratransit

meetings across country
more specific examples
copies of Regs - Bobby

final form 1 yr ρ enactment - time Regs
4 yrs for 7% Regs/88

DOJ - 514-0301
hearing

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Unions
Nutter
CEC briefing
Ashton
Lanis letter
Letters on Article

Office of the Attorney General
Washington, D.C. 20530

March 5, 1991

The Honorable Robert Dole
Minority Leader
United States Senate
Washington, D.C. 20510

Dear Senator Dole:

I am enclosing a copy of this Department's Notice of Proposed Rulemaking to implement title III of the Americans with Disabilities Act of 1990 (ADA), Pub. L. 101-336, which was published in the Federal Register on February 22, 1991.

This proposed rule fully and fairly implements the landmark Americans with Disabilities Act. It ensures that the over 43 million individuals with disabilities in this country will have equal access to the goods and services of nearly five million places of public accommodation. In writing this rule, the Department of Justice has worked very hard to guarantee rights to persons with disabilities without unduly taxing the financial and physical limits of the American business community.

The Department is now seeking comments on this proposed rule. We will be accepting comments until April 23, 1991. In addition, to facilitate public participation, we have scheduled nine days of public hearings, in four regional centers, at which Departmental officials will receive comments from interested persons. Our hearings will be held in Dallas, Texas (March 4-5); Washington, D.C. (March 13-15); San Francisco, California (March 18-19); and Chicago, Illinois (March 27-28).

I would welcome your views on this proposed rule.

Sincerely,

Dick Thornburgh
Attorney General

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Sincerely,

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Attorney General

Enclosure

NATIONAL COUNCIL ON INDEPENDENT LIVING

COMMENTS ON ADA REGULATIONS REGARDING ACCESS TO BUILDINGS AND FACILITIES PUBLISHED JANUARY 22, 1991 IN THE FEDERAL REGISTER BY THE ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Generally speaking, NCIL is pleased with the ATBCB's proposed Guidelines though some important concerns must be raised. With some specific improvements they will carry out the letter and spirit of the Americans with Disabilities Act and its legislative history. The guidelines provide important instruction and serve as a critical vehicle for eliminating structural barriers to disabled people. At the same time they do not pose unnecessary or extensive economic burdens on the building industry. These proposed guidelines should become finalized without being weakened and should reflect some important additions based on responses to the questions the board has posed.

It is our hope that the Board will give careful consideration to all new data gathered during the hearing process and the written comment period. The 60 questions asked in the proposed Guidelines cover many important issues and where there is new information and opportunity the board must use its policy making authority to address old and new concerns in a way that truly carries out the intent of Congress and the Americans with Disabilities Act non-discrimination mandate. As we all know this is the time to set the tone and standards which assure full and equal access for those with disabilities for a long time to come.

The following comments are arranged in three major sections. First are comments on the questions posed by the board followed by additional comments on the Guidelines themselves. The numbers before each paragraph correspond to question numbers or the section numbers in the propose Guidelines. Last are comments on other issues not presented in the Guidelines.

RESPONSES TO A FEW OF THE ATBCB'S QUESTIONS

1. NCIL supports the boards efforts to establish standards that are meaningful for disabled children. The lack of appropriate standards has left schools and other facilities used by children without appropriate standards for access.

2. The Guidelines should address all examination tables as well as similar fixtures, machines, or devices that may be used by patients and the people accompanying them i.e. disabled parent accompanying a non-disabled child. Examining tables should be adjustable in height. In addition, many examining rooms have racks displaying educational materials which should be accessible. Coat hooks, charts, and other

permanantly posted information should also be accessible.

3. Look out galleries should be better defined and those which are for public use should not be exempt from access requirements.

4. The guidelines should address radio broadcast booths, camera operator booths, and news booths in sport arenas as well as jury boxes orchestra pits, and stages. These should be accessible in new construction and where alterations are made.

5. Scoping provisions for van parking spaces should be specified in the Guidelines. These should be required to be a percentage of the total number of accessible spaces. In addition, small islands or other barriers such as shopping cart collectors, often placed at the end of a row of parking spaces should be prohibited.

6. Higher numbers of accessible parking spaces should be required for non-medical facilities that serve individuals with disabilities such as vocational rehabilitation facilities. NCIL feels that the standard for these facilities should be 40%.

7. The Board should make accessible portable toilet units mandatory. There should be at least 10% but not less than 1 accessible portable unit per cluster of units.

8. NCIL believes that all stairs in new construction should be accessible.

9. Whenever an elevator is present, it should definitely service each floor of the building. Requiring this is not burdensome in new construction and will make it easier for everyone to use the building.

10. NCIL believes that lifts are highly inferior to ramps and should be prohibited in new construction unless there is a second accessible (non-lift) route to the same area. Also, it should be required that any platform lift must be user-operable. Designing accessible routes which increase dependence by requiring assistance from another person is not providing accessibility and non-discrimination in the spirit of the ADA.

11. The Board should retain its requirement that in a split-level building, there should be at least one accessible entrance to each ground floor. The standard for entrances should be that all entrances that are major or primary points of pedestrian flow should be accessible.

12. NCIL supports a fifty percent standard for the number of accessible drinking fountains.

13. The decibel level for phone amplification should be 18.
15. The Board should definately use the total number of pay phones in a facility as the basis for determining when to require a TDD, rather than the number in a bank or cluster of phones. If the number of phones in a bank is the determining factor, designers and builders will seperate the telephones into a great number of small banks of phones to avoid having to install TDD's.

    NCIL believes that the ratio of TDD's to standard pay telephone should be higher than one in six. This determination should not be based on percentage of the population of TDD users, but rather on the need for TDD's by deaf and speech-impaired people in as many diverse places as by the general public. Also, the new integrated TDD unit should be further researched and potentially required to avoid vandalism. The Board should also deevelop a standard for Braille TDD's.

    The Guidelines should also require a minimum number of public TDD's according to the type of occupancy of a building. The types of facilities should be listed and concur with the Michigan law the Board describes.

16. Requiring 5% of fixed or built-in seating or tables would be adequate in very large facilities but inadequate in small facilities. The Board should develop a graduated standard which increases with the number of seats or tables available in the facility as a whole. On the low end of the scale, for example, when there are ten tables, more than "5% or a minimum of one" should be required (perhaps 15-20% or a minimum of two). On the high end of the scale, for example, in an auditorium with one thousand seats, 5% may be adequate.

19. NCIL is very doubtful that State historic preservation review boards and local historic review commissions will offer fair and proper judgements on access to historic facilities. Many of these groups have consistently ruled that almost any accessibility improvements at all will damage a facility's historic character. NCIL believes that these entities should not be given absolute authority to make access decisions. If they are given this authority they must be given strict and specific guidelines.

20. A bell, buzzer or other notification device should be added as a requirement for the "open (unlocked)" alternative accessible entrance in historic structures as these doors inevitably end up being locked.

21. NCIL supports option (3) which states "the route of travel for persons with disabilities, including and accessible building entrance and an accessible route, shall, to the maximum extent feasible, coincide with the route of travel for the general public."

25. Appropriate values for slip resistance should be included.

26. Slope should be required to be 1:12 or less where ever possible.

28. NCIL feels strongly that movable grab bars should not be required or recommended by thnese guidelines. Likewise, parallel bars mounted to the floor next to the toilet should not be allowed. Parallel bars could be placed in an adjacent stall other than the accessible one.

33. Sight lines should be considered in designing sports arenas and racetracks concert halls etc., since the audience frequently stands throughout a large portion of the game or event.

35. ATM's could be more accessible to people with visual impairments by providing a talking machine. This technology is already available and in use in several places. Alternatives might be to require the bank to install a permanant telephone receiver to obtain the information in privacy or issue something portable to each of its blind customenrs. The process for entering information and the layout of the machine should be standardized which could be learned by customers. The machine should be able to offer the option of a large print screen. Flashing cursurs which may trigger seizures should be eliminated. Also pull out foot stools should be provided for persons of short stature.

36. Handsets should not completely replace wideo displays.

37. Privacy could be accomplished by using a phone receiver or issuing a headset or earphone type of listening device.

38. Security is a concern particularly in isolated areas. Proper lighting should be provided. Concern is also raised about the current system of inserting the ATM card and having to open the door in a given amount of time. Perhaps some scannining device could be an alternative to inserting a card into a slot and more time could be allowed for door opening.

Specify amount (illegible)

39. Other sales machines should be required to have voice synthesizers wherever possible.

40. Percentages of accessible fixed tables should be similar to those for fixed seating (see Question 16 above).

46. a. An additional grab bar which is vertical should be required in accessible bathtubs for persons who stand. Also built-in seats positioned at the end of tubs should provide for drainage such that they can serve as a shower seat. Thus, shower spray hooks and faucets should be placed within reach.

b. Two mounting hooks for shower spray units should be provided in accessible bathtubs and shower stalls, to accommodate persons both standing and sitting.

c. At least one of the larger kinds of showers, which are usable by the most people, should be required. More should be required in facilities above a certain size. A fold-up shower seat should be installed to accommodate persons who do not use a wheelchair but need to sit down in the shower.

d. Movable grab bars are once again unacceptable.

47. Portable visual alarm devices pose problems in hotel situations because they are cumbersome and require trained staff to install them. NCIL does not recommend their use.

54. The Guidelines should address dressing and fitting rooms. The proposed percentages and specifications mentioned seem acceptable If this would allow enough room inside for an individual to use an attendant. They should definitely be incorporated as mandatory in the final rules.

59. The Board must absolutely adopt an alteration standard for state and local government buildings that is the same or higher as that for alterations requirements in both public accommodations and publicly funded transportation facilities. This is justified in the ADA's legislative history. It is also a far better standard, and without it, existing state and local government buildings will not become accessible. Give citation

NCIL believes that there is a clear Congessional intent that the public accommodations alterations standard should be the same or higher for the state and local government section of the law. Using the Uniform Federal Accessibility Standards (UFAS), will decrease the amount of accessibility when buildings are altered. The Board should adopt the same or higher alterations standard for state and local government buildings as for public accommodations and publicly funded transportation facilities.

NCIL COMMENTS ON THE GUIDELINES

2.2 EQUIVALENT FACILITATION

Performance standards such as those described in this section for elevators are an example of performance standards that should be developed by the board in order to give guidance to what can be permitted as equivalent facilitation.

3.5 DEFINITION OF BUILDING

This definition is a good one, since it covers (and should cover) structures like amphitheaters, open-air pavilions, concession stands, modular buildings, and circus tents.

3.5 DEFINITIONS OF STORY AND OCCUPIABLE

NCIL supports the Board's attempt to define these terms such that mezzanine levels must be served by elevators. However, it is incorrect not to consider basements or attics when counting the number of stories in a building. There is no legislative history to lead to the conclusion that, when Congress limited the number of stories a building can have to be exempt from the elevator requirement (i.e. less than three), that basements and attics were not to be included.

3.5 DEFINITION OF TECHNICALLY INFEASIBLE

The definition of technically infeasible proposed by the board has provided is too limited as it may results in interpretations which would exclude almost any existing building where structural changes need to be made.

3.5 DEFINITION OF TRANSIENT LODGING

The definition of transient lodging is an important one and should be given careful consideration. Facilities such as hotels, motels, and inns are not at all the same as homeless shelters, battered women's shelters, or other temporary residences. It is also important to note here that places such as residential psychiatric or substance abuse treatment programs, certain half-way houses, and group homes provide services primarily to persons with various disabilities. These should be viewed as another catagory of facilities which are somewhere in between a medical facility and lodging. Each of the programs listed above differ in the length of stay, the type and extent of services provided, and the party responsible for payment. Those programs which involve the provision of some type of treatment, and often involve an indefinite and potentially long term stay (meaning 30 days or more) should be required to comply with a higher standard for access than those which are truly transient, meaning short term. Perhaps these would more appropriately be specified as a catagory of medical facility.

add 5120.3

4.1.1 (4) TEMPORARY BUILDINGS

NCIL supports the Board's clarification that temporary structures like reviewing stands, exhibit areas, and temporary pedestrian passageways, etc. are covered by the Guidelines.

4.1.2 (5) PARKING

NCIL believes that the proposed standard for accessible parking spaces is too low and should be increased by at least one in each catagory above 25 spaces. Add van spaces

4.1.3 (9) and 4.3.11 FIRE AND SMOKE PARTITIONS; AREAS OF REFUGE

Safe areas of refuge and other methods of fire protection are important and appropriate for inclusion in the Guidelines. They

are critical in new buildings for persons who cannot climb steps and who would otherwise be trapped in a fire. The Board should require and adopt a standard for light weight evacuation chairs to be provided within buildings.

4.1.3 (11) and 4.1.6 (3) (e) TOILET ROOMS

NCIL approves of the scoping standard for accessible toilet rooms in both new construction and alterations. In new construction, all public and common use restrooms should be accessible, with others under an adaptability requirement. In alterations, accessible unisex toilets should be when full compliance is technically infeasible.

4.1.4 (17) TELEPHONES AND ASSISTIVE LISTENING SYSTEMS

The requirements for telephone volume controls and for Telephone Display Devices (TDD's) are important and should be increased. All public telephones could be equipped with a volume control. At a minimum where there is only one public telephone in a facility it should have a volume control. Newer models should be utilized to avoid vandalism. Public telephones (and especially those with volume controls) should be located in quiet areas and areas with minimal interference from electrical and electronic equipment. The symbol identifying a volume control should be easily visible.

NCIL also supports the Board's requirements for assistive listening systems and volume controls on public closed circuit telephones.

4.1.3 (19) ASSEMBLY AREAS

NCIL believes that the scoping provisions for accessible seating are too low and should be increased by at least 1 in each catagory over 75.

4.1.3 (20) EXCEPTION FOR DRIVE-UP ATM'S

While the Guidelines exempt drive-up ATM's from the requirements for controls and clearance/reach ranges, they should not be exempt from the controls requirements. This should be changed.

4.1.6 ALTERATIONS

NCIL supports The Board's scoping provisions for alterations. These provisions should facilitate accessibility but allow exceptions in legitimately difficult situations. These scoping provisions should not be weakened.

4.1.6 (1) EXCEPTION

NCIL believes that professional office should be clearly defined to include publically funded or non-profit clinics

not just private offices.

4.1.6 (2) DEFINITION OF "DISPROPORTIONATE" IN ALTERATIONS

The ADA requires that altered areas be accessible. The ADA further requires that alterations to areas containing a primary functional area of the building, have an accessible path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, if doing so would not be disproportionate in cost and scope to the overall alteration.

What would constitute a disproportionate expenditure is not defined in the Guidelines, since the statute directs the Attorney General to address this matter in regulations to be promulgated by the Department of Justice. However, since alterations are addressed by the ATBCB, NCIL strongly urges that the amount of 30% of the overall alteration, which is suggested in the ADA's legislative history by both the House Education and Labor and House Judiciary Committees, be used as the definition.

4.1.7 (2) (c) RESTROOMS IN HISTORIC BUILDINGS

NCIL supports the the Board's requirements for historic buildings stating that they must still provide minimal access even if providing full access would threaten a facility's historic significance.

4.9 STAIRS

The Guidelines should require detectable warnings for persons with visual requirements.

4.10 ELEVATORS

NCIL believes that hall call buttons and those located inside elevator cars should not require touch (heat sensitive) so as to be accessible to those who may reach with a stick or other device.

4.12 WINDOWS

NCIL believes that a standard should be set for window height. A maximum height for the bottom of the window should be established so as to allow persons in wheelchairs to operate the window where appropriate and to simply be able to see out non-opening windows.

4.17 TOILET STALLS

NCIL feels that the standard for toilets is adequate however grab bars or some other device for pulling the stall door closed should be required. Hook for coats

4.20.2 FLOOR SPACE IN FRONT OF BATHTUBS

Lavatories should be wall-mounted and not floor-mounted or enclosed in a cabinet to the floor to allow for flexibility in approach for wheel chair users. Add - ... can get more toe clearance

4.20.4 GRAB BARS IN BATHTUB

Figure 34 (a), like 34 (b), should show 48 inches minimum length for the grab bar, with 6 inches maximum on either side.

4.28.3 VISUAL ALARMS

Visual alarms are life saving features for people with hearing impairments. It is very important that facilitates covered by the ADA provide safety features as are described and specified in the proposed Guidelines. More research is needed and should be conducted on audible, visual, and auxiliary alarms. However, concerns of persons who experience seizures due to flashing lights should be taken into consideration.

4.29 DETECTABLE WARNINGS

The board should specify further as to proper provisions for safety at dangerous areas such as construction sites. For example using wooden horses to mark off an area are often inadequate as they may be easily moved, can fall, or can be spaced so that a person may pass through with out knowing. Specifications should call for a continuous barrier which surrounds the danger area, is detectable by a cane and which does not have features which protrude into the line of travel. The placement of the barrier should be such that it prevents persons from walking unnecessarily down a road or walkway which will only lead them to a dead end. Such as that which might lead up to a construction site easily viewed by a sighted person from a greater distance. & DCS

4.30.7 SYMBOLS OF ACCESSIBILITY

NCIL approves of the symbols and rules pertaining to them which are proposed. The Board should indicate which symbol is appropriate for assistive listening devices.

4.34 AUTOMATED TELLER MACHINES

NCIL commends the Board for its ATM requirements for people with both mobility and sensory impairments. There is no reason why newly designed ATM's cannot meet these and other requirements. (see answer to question 35 for further comment)

6. MEDICAL FACILITIES

NCIL believes that the scoping for access to patient rooms is too low. These are facilities in which it could be argued that a majority of the persons residing in the hospital are at least temporarily disabled and thus require greater level of access.

Patients may use wheel chairs temporarily or be otherwise incapacitated needing those accessible accomodations. While this may not be true for certain types of hospital units such as a maternity ward, the purpose of an area may change over time. It is also important to emphasize here that accessible rooms and bathrooms should be available throughout all specialized units of the hospital, including the day surgery and recovery area.

7.3 CHECK-OUT AISLES

The Guidelines are correct to require all check-out aisles in supermarkets and other such stores to be accessible. It should be noted that design options exist so that making all check-out aisles accessible needn't reduce the number of aisles that can be provided within a particular space.

9. ACCESSIBLE TRANSIENT LODGING

NCIL strongly supports the scoping requirements for sleeping rooms. The 5% requirement is very appropriate for the number of rooms to be fully accessible. It is also appropriate that the Guidelines require all doors and bathroom doors in guest rooms to be of an accessible width as there are not enough accessible rooms in hotels for disabled persons who could use a standard room if it has an accessible entrance and bathroom doors. Also, features in transient lodging for persons with hearing impairments are very important and should definitely appear in the final rule.

In addition NCIL, is concerned, as stated previously, that clarification be made of what constitutes transient lodging. This proposed standard may be appropriate for hotels, motels, and inns etc. but is far too low for facilities which provide services for their residents, and where people may actually reside for an extended period of time. These types of services are in great demand and should be better able to serve many more people with physical and sensory disabilities. Improved access in new programs as well as when alterations are made is critical to achieving this goal. Programs such as these should also be prohibited from moving to an in-accessible facility.

<u>OTHER COMMENTS/ISSUES</u>

WHEEL CHAIR ACCESS

It is important that the specifications for turning and manuevering of wheelchairs be sufficient for the maneuvering and turning of scooter type chairs as well.

SIGNAGE FOR VISUALLY IMPAIRED PERSONS

An audible system for announcing information othewise communicated through overhead signs should be available to annnounce lengthy or changing information and to direct

persons to an information site, when available, for further assistance. These announcements should be read at specified intervals. An information site should also be established where appropriate such as those often seen at airports for information on hotels and ground transportation. This could be a staffed desk or simply a telephone with a system utilizing touch-tones to select information or to reach an operator for assistance.

Remotely accessible audible sign

OTHER DISABILITY CATAGORIES

Several groups of persons with disabilities have been excluded from these regulations. One group that goes unmentioned is persons with speech impairments, who also need and benefit form communication accessibility features. The guidelines also make no mention of access for persons with cognitive disabilities, Environmental Illness, or Epilepsy. These groups present many concerns which should be addressed and which should be included in the guideleines where appropriate. Environmental Illness, which is still largely misunderstood, should be protected from the use of certain types of chemicals, building materials, cleaners, and room fresheners which can cause severe allergic or asthmatic reactions. These substances have also been shown to induce seizures.

which may affect major life function

PEDESTRIAN OVERPASSES

The Guidelines should cover pedestrian overpasses since accessible design options exist and they are often built with public funds. The Guidelines should establish functional criteria for alternative designs to provide accessibility.

Crown Plaza Kansas City connects two hotels by skywalks that are accessible.

Consortium for Citizens with Disabilities

ONE MORE HURDLE BEFORE THE FUN* BEGINS!!

URGENT ACTION NEEDED ON PROPOSED ADA REGULATIONS

The Department of Justice has issued proposed regulations on the public accommodations (Title III) and public services (Title II - activities of state and local governments) sections of the ADA. These proposed regulations are set out in what is called an "NPRM" or Notice of Proposed Rulemaking.

These are the regulations that affect all stores, restaurants, theaters, hotels, stadiums, doctor's offices, social service agencies and many other public accommodations as well as all commercial facilities and all agencies of state and local government, (police departments, recreation programs, and many other activities).

THE BUSINESS COMMUNITY IS DOING EVERYTHING IN ITS POWER TO WEAKEN THESE PROPOSED REGULATIONS. OWNERS OF PUBLIC ACCOMMODATIONS ARE REPRESENTED BY VERY LARGE TRADE ASSOCIATIONS THAT ARE CAPABLE OF GENERATING THOUSANDS OF LETTERS. WE MUST COUNTER THIS ATTACK.

In general, these proposed regulations are very strong and reflect the intent and letter of the law. However, there are some areas that need to be strengthened or clarified.

We have enclosed summaries of the most important issues in these proposed regulations which your letters should address. As we learned during the ADA's legislative process, personal letters which discuss the discriminatory barriers you have faced in public accommodations have the greatest impact because they demonstrate how strong regulations will positively impact your life, your family, friends, and other people with disabilities.

If you cannot send a personal letter, write a short note of support and send it in as a cover letter with the comments in the enclosed summaries. (DON'T INCLUDE THIS PAGE!). Be sure to include your name and address on your letters.

APRIL 23, 1991 - DEADLINE Title III Public Accommodations
APRIL 29, 1991 - DEADLINE Title II Public Services

(SEE OVER)

Please send a letter commenting on each NPRM. If possible the comments in your letters should refer to the specific section in the NPRM, which is listed in the enclosed summaries.

All letters should be sent to:

John L. Wodatch
Office on the Americans with Disabilities Act
Civil Rights Division, U.S. Department of Justice
Rulemaking Docket 003
P.O. Box 75087
Washington, D.C.20013

To get a copy of the proposed regulations (NPRM):

1) Call the Justice Department's ADA Information Line 202/514-0301 (voice) (202/514-0381 (TDD) These are not toll-free numbers. The proposed regulations are available in Braille, audio-tape, large print, electronic file on computer disc. It is also available on electronic bulletin board at 202/514-6193. (This is not a toll-free number.

2) The NPRMs are published in the Federal Register, which can usually be found in most public libraries and college or university libraries. The citation for the public accommodations NPRM is: 56 FR p.7452 (February 22, 1981). The citation for the public services NPRM is 56 FR p. 8538.(February 28, 1991).

ANY OTHER QUESTIONS?

Call one of the "ADA Reg Contacts" listed on the attached sheets. These "Reg Contacts" also have DREDF's detailed analysis of the proposed regulations.

THE JUSTICE DEPARTMENT WILL KEEP TRACK OF ALL LETTERS THEY RECEIVE. WE MUST MATCH THE BUSINESS COMMUNITY LETTER FOR LETTER TO INSURE THAT THE FINAL REGULATIONS ARE AS STRONG AS POSSIBLE. **EVERY LETTER COUNTS!**

NOTE: We will be sending out a summary on the Equal Employment Opportunity Commission's (EEOC) proposed regulations which apply to employment in a week or so. We will also notify you when the Department of Transportation's proposed regulations are issued.

* The "Fun" will be creating a nation of barrier busters to implement the ADA.

DREDF Disability Rights Education and Defense Fund, Inc.

Law, Public Policy, Training and Technical Assistance

SUMMARY OF COMMENTS ON DEPARTMENT OF JUSTICE PROPOSED REGULATIONS TO IMPLEMENT TITLE II OF THE ADA, GOVERNING NON-DISCRIMINATION IN STATE AND LOCAL GOVERNMENT

AUXILIARY AIDS AND SERVICES - Section 35.104

This section focuses on the types of services needed by persons with hearing and visual impairments. The regulation should include a definition of the term interpreter. The section should also explicitly address the types of auxiliary aids and services needed by people with physical disabilities. For example, the regulation should state that personal assistance to go to the bathroom may be required if necessary to participate in a public service, like serving on a jury. Services which are necessary for participation are not services of a "personal nature."

Section 35.160(b) provides that auxiliary aids and services must be provided where necessary to afford a person with a disability an equal opportunity to participate in public services. However, this provision is in Subpart E entitled Communications. The aids and services required by persons with physical disabilities should either be addressed in a different section or the subpart title should be changed.

SELF EVALUATION - Section 35.105; GRIEVANCE PROCEDURES - Section 35.107

The proposed regulations only require agencies of 50 or more employees to maintain a self-evaluation plan on file for public inspection for three years and to establish a grievance procedure.

The 50 or more employees standard should be eliminated. All agencies should maintain a self-evaluation plan on file. All agencies should have available a grievance procedure. Small agencies could form a joint grievance procedure.

PROGRAM ACCESSIBILITY - Section 35.150

The Department of Justice should take this opportunity to clarify that "program access" means equality of access. Under 504, recipients still argue that any access, no matter how second-class is program access. Specifically, the regulation should state that carrying a person with a disability is not program access.

NEW CONSTRUCTION - Section 35.151

This section should conform to Title III of the ADA which requires that when alterations affect usability of a primary function, a path of travel to the altered area must be created unless it would be disproportionate to the cost of the overall alteration. This requirement should be adopted for Title II as well.

This section does not require public entities to lease accessible buildings. At a minimum, the standards in the MGRAD regulations which apply to federal programs in leased buildings should be adopted. These regulations require 1) an accessible route from an accessible entrance to the main parts of the buildings, 2) an accessible bathroom, 3) accessible parking, if parking is provided.

REMOVAL OF BARRIERS - Section 36.304

This section states that "readily achievable" changes do not have to follow code requirements for new construction.

Readily achievable barrier removal must conform to the code specifications in the ADA Guidelines if compliance would be readily achievable, and if it isn't it must come as close to compliance as would be readily achievable. Not requiring compliance invites a great deal of abuse including dangerously steep ramps which are prevalent today. Stipulating that the changes must pose no danger is much too general a statement to be effective. Also, the rules are correct to require readily achievable to be a continuing requirement and not a one-shot deal, but this must be clarified (for example, as an annual requirement).

This section also states that barrier removal is not "readily achievable" if it would result in "significant loss of selling or serving space." The "significant loss" standard is a strong one in this context and should be maintained.

EXAMINATIONS AND COURSES - Section 36.310

The ADA requires all examinations and courses relating to licensing or certification to be accessible.

The proposed regulation imposes an undue burden limitation on the provision of auxiliary aids and services for exams. This limitation is not in the statute and is an unjustified weakening of the requirement. Also, providing accessibility to courses using segregated solutions like videotapes or prepared notes is not adequate, unless it is the least restrictive alternative, e.g. for someone who cannot leave home.

NEW CONSTRUCTION - Subpart D

The proposed regulations set forth two options for dates which should trigger new construction accessibility requirements. Option Two triggers new construction access requirements if the builder files a completed application for a building permit after the enactment of the ADA (July 26, 1990). Option One's trigger date is eighteen months later (effective date of Title III). Option Two should be adopted.

The Department is correct to use the date a complete permit application is received by the appropriate government entity as the date signifying that the design process is complete, rather than the date the permit is actually granted which can be significantly later.

The ADA provides that "shopping centers" are not subject to the elevator exemption for new construction and alterations of building of less than three floors or less than 3,000 square feet per floor. The proposed regulations define "shopping center" to include five or more sales or rental establishments. The proposed regulations also adds transportation terminals to the list of commercial facilities which are not subject to the elevator exemption. This addition is critical and must be maintained. The definition of "shopping center or mall" should count not only stores but also restaurants, banks, travel agencies, and other accommodations normally found in shopping centers.

ALTERATIONS - PATH OF TRAVEL - Section 36.403

The ADA provides that when alterations affect usability of a primary function, a path of travel to the altered area must be provided unless it would be "disproportionate" to the cost of the overall alteration. The proposals offer three figures for the "disproportionate" standard, 10%, 20% and 30%.

Thirty percent, rather than the other options of 10% or 20%, should be the figure adopted. This is the only option which is justified by the legislative history.

CERTIFICATION OF STATE AND LOCAL ACCESS CODES - Subpart F

The ADA provides that states may seek certification that state access codes comply with the ADA.

The certification process should include much more generous time limits than the 30 days provided for public comment in the proposed regulation, and the public hearing should be held in the locality applying for certification rather than in Washington, D.C., as provided in the proposed regulation.

USING EXAMPLES REFLECTING THE EXPERIENCE OF MORE DISABILITY GROUPS

Examples used in the regulations should include more disability groups, particularly people with mental disabilities and Environmental Illness.

ADA REGULATIONS CONTACT PERSONS

Name		Organization	Address	City	ST	Zip	Phone	TDD
Duane	French	Access Alaska, Inc.	3710 Woodland Dr. Suite 900	Anchorage	AK	99517	907/248-4777	same
					AL			
Gary	Edwards	Director, UCP	2430 - 11th Ave. North	Birmingham	AL	35234	205/251-0165	
Larry	Johnson	Director of	2129 E. S. Blvd.	Montgomery	AL	36111	205/281-8780	same
					AR			
Bonnie	Johnson	Arkansas Disabilities Coalition	10002 W. Markham, #B7	Little Rock	AR	72205	501/221-1330	same
					AZ			
Bob	Michaels	ABIL	1229 E. Washington St.	Phoenix	AZ	85034	602/256-2245	
					CA			
Mike	Suppe'	Dayle McIntosh Center	150 W. Cerritos, Bldg. 4	Anaheim	CA	92805	714/772-8285	714/772-8366
Gerald	Baptiste	CIL	2539 Telegraph Ave.	Berkeley	CA	94704	415/841-4776	415/848-3101
Hugh	Hallenberg		1379 Midvale, Unit 108	Los Angeles	CA	90024	213/747-1985	
Jackie	Tatum	Westside CIL	12901 Venice Blvd.	Los Angeles	CA	90066	213/390-3611	213/398-9204
Maggie	Dee		Box 783	Pittsburg	CA	94565	415/427-1219	
Frances	Gracechild	Resources for Independent Living	1211 H St. #B	Sacramento	CA	95814	916/446-3074	same
Wesley B.	Johnson	Accessible San Diego	2466 Bartel St.	San Diego	CA	92123	619/279-0704	
Linda	McDougal	Commission on Disability	701 Ocean Rm. 214	Santa Cruz	CA	95060	408/425-2003	
Debbie	Morris	Bridge to Jobs	505 W. Olive Ave. Suite 420	Sunnyvale	CA	94086	408/773-9696	
					CT			
Sheri	Valentine	Office for Persons with	45 Lyon Terrace Room #19	Bridgeport	CT	06604	203/576-8214	
Stan	Kosloski		7 Shadow Lane	Cromwell	CT	06416	203/297-4300	
Lynne	Leibowitz	Office for Persons with	611 Old Post Road, Fairfield	Fairfield	CT	06430		
Arthur	Pepine		100 Furman Rd.	Hamden	CT	06514	203/387-6176	
Suzanne	Tucker		100 Furman Rd.	Hamden	CT	06514	203/387-6176	
Joel	Kleinman		55 Corrigan Ave.	Meriden	CT	06450	203/238-9391	
Jayne	Kleinman		55 Corrigan Ave.	Meriden	CT	06450	203/238-9391	
Eileen	Horndt	Independence Northwest	581 Wolcott St.	Waterbury	CT	06705	203/573-1080	same
Richard	Schreiber	State of CT Commission on the	141 North Main St.	West Hartford	CT	06107		
Debbie	Sampson		587 Savin Ave.	West Haven	CT	06516		
Shelley	Teed-Wargo	Connecticut Union of Disability	30 Jordan Lane	Wethersfield	CT	06109	203/257-4371	same
					FL			
Jim	Parrish	Florida Disability Caucus.	16100 S.W. 74th Court	Miami	FL	33157	305/235-5274	same
Warren	Jernigan	FL Council of Handicapped	2210 Warren Jernigan Place	Pensicola	FL	32514	904/436-9861	
Barbara	Bernhart	SCAPH	1825-A Cogswell St.	Rockledge	FL	32955	407/633-6182	same
					HI			
Francine	Lee	Commission on Persons with	500 Ala Moana Blvd. #5-210	Honolulu	HI	96814	808/548-7606	same

ADA REGULATIONS CONTACT PERSONS

Name		Organization	Address	City	ST	Zip	Phone	TDD
Marc	Obatake	HCIL	677 Ala Moana Blvd. #118	Honolulu	HI	96813	808/537-1941	808/521-4400
					IA			
Rev. David	Johnston	Disability Action Comi.	206 N.E. 5th St.	Ankeny	IA	50021	515/964-7466	
Loren	Schmidtt		338 S. Governor Apt. 1	Iowa City	IA	52240	319/356-4240	
					ID			
Mark	Leeper	N. ID Ctr. for Independence	124 East Third St.	Moscow	ID	83843	208/883-0523	same
Kyle	Packer	Center Resources for Ind. People	707 N. Seventh, Suite A; Box	Pocatello	ID	83201	208/232-2747	
					IL			
Rene	Luna	Access Living	310 S. Peoria, Suite 201	Chicago	IL	60607	312/226-5900	312/226-1687
Jim	DeJong	Coalition of Cit. w/Dis. in IL	401 E. Adams	Springfield	IL	62701	217/522-7016	same
Chuck	Graham	Coalition of Cit. w/Dis. in IL	401 E. Adams	Springfield	IL	62701	217/522-7016	same
					IN			
Christine	Dahlberg	Gov's. Planning Council for People	143 W. Market St. #404	Indianapolis	IN	46204	317/232-7774	
					KS			
Ray	Petty	Independence, Inc.	1910 Haskell	Lawrence	KS	66046	913/841-0333	same
					KY			
Kathy	Williams	Office of Voc. Rehab.	Capital Plaza Tower, 9th Floor,	Frankfort	KY	40601	502/564-3694	502/564-4440
Elizabeth	Bunnell	Center for Accessible Living	981 South Third St.	Louisville	KY	40203	502/589-6620	502/589-3980
					LA			
Patsy	Barrett	Division of Rehab.	Box 94371	Baton Rouge	LA	70804	504/342-2719	
Lois	Simpson	Advocacy Center for the Elderly	210 O'Keefe Suite 700	New Orleans	LA	70112	504/522-2337	same
Sybil	Veatch	New Horizons ILC	4030 Wallace Ave.	Shreveport	LA	71108	318/635-3652	318/635-3488
					MA			
Jim	Gleich	MA Office on Disability	1 Ashburton Pl. Rm. 1305	Boston	MA	02108	617/727-7440	same
					ME			
Steve	Tremblay	Alpha One	85 E. Street, Suite 1	S. Portland	ME	04106	207/767-2189	same
					MI			
Donald	Lozen	Great Lakes Rehab. Corp./ILC	4 E. Alexandrine Towers, Suite	Detroit	MI	48201	313/745-9726	313/745-9868
Pat	Cannon	MI Comission on Handicapper	Box 30015, 201 N. Washington	Lansing	MI	48909	517/373-8397	same
					MN			
Sue	Abderholden	Executive Director, ARC	3225 Lyndale Ave. S.	Minneapolis	MN	55408	612/827-5641	
Rose Ann	Faber	Gov. Planning Council on Dev.	658 Cedar St., 300 Centennial	St. Paul	MN	55155	612/296-9958	612/296-9962
Margo	Imdieke	State Council on Dx	Suite 145, Metro Sq. Bldg, 7th &	St Paul	MN	55101	612/297-2920	same
					MO			
Ann	Morris	Southwest CIL	1856 E. Cinderella Rd., Suite E	Springfield	MO	65804	417/886-1188	same
Jim	Tuscher	Paraquad	4475 Castleman	St. Louis	MO	63110	314/776-4475	314/776-4415

ADA REGULATIONS CONTACT PERSONS

Name		Organization	Address	City	ST	Zip	Phone	TDD
					MS			
Wanda	Kenney	Division of Rehabilitation	Box 22806	Jackson	MS	39225	601/354-6100	800/622-6052
Mark	Smith	Coalition for Citizens with	Box 1698	Jackson	MS	39215	601/354-6272	
					MT			
Tim	Harris	Montana Independent Living	38 South Last Chance Gulch	Helena	MT	59601	406/442-5755	same
Bob	Maffitt	Rehab./Visual Svcs. Division	Box 4210	Helena	MT	59604	406/444-2590	
Jim	Marks	Disability Student Services,	University of Montana	Missoula	MT	59812	406/243-2243	same
Michael	Regnier	Summit Independent Living Center	1280 S. 3th St. W.	Missoula	MT	59801	406/728-1630	same
					NC			
Chester	Helms	Programs for Accessible Living	1012 S. Kings Dr., Bldg G-2	Charlotte	NC	28283	704/375-3977	same
David	Dawson, Jr.	Independent Living Rehabilitation	2245 Stantonsburg Rd. Suite J	Greenville	NC	27834	919/830-3471	
Ken	Franklin	GACPD	1318 Dale St. Suite 100	Raleigh	NC	27605	919/733-9250	same
					ND			
Jay	Johnson	OPTIONS I.R. CIL	211 DeMers Ave., Holiday Mall	East Grand	ND	56721	218/773-6100	same
					NH			
Larry	Robinson	Granite State Independent Living	172 Pembroke Rd.	Concord	NH	03301	603/228-9680	800/826-3700
					NJ			
Barbara	Esposito	ILC	838 Maple Ave.	Collingswood	NJ	08108	609/854-7781	
Colleen	Fraizer	UCP/NJ	354 S. Broad St.	Trenton	NJ	08608	609/392-4004	
Susan	Richmond	NJ DD Council	108-110 North Broad St.	Trenton	NJ	08625	609/292-3745	
					NM			
Judith K.	Myers	Gov. Comi. on Concerns o/t	Lamy Bldg. Room 117, 491 Old	Santa Fe	NM	87503	505/827-6465	505/827-6329
					NY			
Todd	Eggert	Ctr for Independence	845 Central Ave.	Albany	NY	12206	518/459-6422	
Maria	Dibble	Southern Tier Ind. Ctr.	107 Chenango St.	Binghamton	NY	13901	607/724-2111	same
Denise	McQuade	Brooklyn Center for Ind. of the	408 Jay St. Rm. 401	Brooklyn	NY	11201	718/625-7500	718/625-7712
Doug	Usiak	ILC of Western New York	3108 Main St.	Buffalo	NY	14214	716/836-0822	
Michael	McIntyre	Queens ILC	140-40 Queens Blvd.	Jamaica	NY	11435	718/658-2526	718/658-4720
Sam	Anderson	DIA	100 Haven Ave. #13G	New York	NY	10032	212/568-4421	
Eileen	Healy		4 Park Ave. Apt. 22C	New York	NY	10016	212/566-0972	
Frieda	James	N	60 First Ave. (2F)	New York	NY	10009	201/596-2996	
Nancy	Rolnick		20 East 9th St. (2V)	New York	NY	10003	212/674-2714	
Marilyn	Saviola	CIDNY	841 Broadway, Room 205	New York	NY	10003	212/674-2300	same
Burt	Danowitz	Resource ILC	401 Columbia St.	Utica	NY	13502	315/797-4642	315/797-5837
					OH			
Jenine	McKeown	MOBIL	1393 East Broad St.	Columbus	OH	43205	614/252-1661	614/252-2668

ADA REGULATIONS CONTACT PERSONS

Name		Organization	Address	City	ST	Zip	Phone	TDD
Beverlee	Rackett	MOBIL	1393 East Broad St.	Columbus	OH	43205	614/252-1661	614/252-2668
Bill	Payuk		5323 Elmwood	Maple Heights	OH	44137	216/475-4447	
Richard	Gunden	Ability Center of Greater Toledo	5605 Monroe	Sylvania	OH	43560	419/885-5733	419/882-2387
					OK			
Sandra G.	Beaseley	Northwest Oklahoma ILC	705 S. Oakwood Rd., Suite B-1	Enid	OK	73703	405/237-8505	same
Mike	Ward	Oklahoma Independent Living	321 South Third, Suite 2	McAlester	OK	74501	918/426-6220	918/426-6222
Steve	Cowden	Ability Resources	1724 East Eighth St.	Tulsa	OK	74104	918/592-1235	same
					OR			
John	Stark		2011 Hamilton Lane	Grants Pass	OR	97527	503/479-4275	
Grady	Landrum	Access Oregon	2600 S.E. Belmont, Suite A	Portland	OR	97214	503/230-1225	same
Eugene	Organ	Oregon Disabilities Commission	1880 Lancaster Dr. NE #106	Salem	OR	97310	503/378-3142	same
					PA			
Kathy	Hertzog	Community Resources for	2222 Fillmore Ave.	Erie	PA	16506	814/838-7222	814/838-8115
Miggy	Wayne	Community Resources for	2222 Fillmore Ave.	Erie	PA	16506	814/838-7222	814/838-8115
Ellen	Bleecker	UCP of PA	614 N. Front St.	Harrisburg	PA	17101	717/232-9576	
Keith	Williams	NE PA CIL	431 Wyoming Ave., Lower Level	Scranton	PA	18503	714/344-7211	same
Tim	Piccirillo	Community Resources for Ind. -	503 Arch St.	St. Mary's	PA	15857	814/781-3050	same
					RI			
Amy	Rafferty	PARI Independent Living Ctr.	500 Prospect St.	Pawtucket	RI	02860	401/725-1966	same
Bob	Cooper	Gov. Committee on the	555 Valley St. Bldg. 51 3rd Fl.	Providence	RI	02908	401/277-3731	same
					SD			
Dennis	Schmitz	Prarie Freedom Center f/t	301 South Garfield Ave. Suite 8	Sioux Falls	SD	57104	605/339-6558	same
					TN			
Roschelle	Williams-War	Trac & Trail (Tri-state Resource	1090 Chamberlain Ave.	Chattanooga	TN	37404	615/622-2172	
Tim	Craven		6500 Westside Dr.	Knoxville	TN	37909	615/675-2400	
Deborah	Cunningham	Memphis Center for Indep. Living	163 North Angelus	Memphis	TN	38104	901/726-6404	same
					TX			
Bob	Kafka		1208 Marshall Lane	Austin	TX	78703	512/482-8543	512/478-3366
Stephanie	Thomas		1208 Marshall Lane	Austin	TX	78703	512/482-8543	512/478-3366
Redge	Westbrook		1804 Corona Dr.	Austin	TX	78723	512/499-3252	
Robert	Powell		208 Barracuda Ave.	Galveston	TX	77550	409/766-4658	
					UT			
Helen	Roth	Options for Independence	1095 N. Main St.	Logan	UT	84321	801/753-5353	same
Debra	Mair	Utah ILC	764 South 200 West	Salt Lake City	UT	84101	801/359-2457	
					VA			
Sharon	Mistler	Endependence Ctr.	2111 Wilson Blvd., Suite 400	Arlington	VA	22201	703/525-3268	same

ADA REGULATIONS CONTACT PERSONS

Name		Organization	Address	City	ST	Zip	Phone	TDD
					VT			
Faye	Lawson	VT CIL	174 River St.	Montpelier	VT	05602	802/229-0501	same
David	Sagi	Vocational Rehabilitation	173 West St.	Rutland	VT	05701	802/773-5866	
Deborah	Lisi	RR 1 Box 1436	Blush Hill Road	Waterbury	VT	05676	802/244-5126	
					WA			
Sue	Ammeter	WA State Human Rights Comm.	1516 - 2nd Ave.	Seattle	WA	98101	206/464-6540	206/464-6500
					WI			
Michelle	Martini	SEWCIL	6222 West Capitol Dr.	Milwaukee	WI	53212	414/438-5622	414/438-5627
Lee	Schulz	SEWCIL	6222 West Capitol Dr.	Milwaukee	WI	53212	414/438-5622	414/438-5627
					WY			
Russ	Edwards		1724 North Grass Creek Road	Casper	WY	82604	307/234-6729	

ADA REGULATIONS CONTACT PERSONS

Name		Organization	Address	City	ST	Zip	Phone	TDD
Faye	Lawson	VT CIL	174 River St.	Montpelier	VT	05602	802/229-0501	same
David	Sagi	Vocational Rehabilitation	173 West St.	Rutland	VT	05701	802/773-5866	
Deborah	Lisi	RR 1 Box 1436	Blush Hill Road	Waterbury	VT	05676	802/244-5126	
Sue	Ammeter	WA State Human Rights Comm.	1516 - 2nd Ave.	Seattle	WA	98101	206/464-6540	206/464-6500
Michelle	Martini	SEWCIL	6222 West Capitol Dr.	Milwaukee	WI	53212	414/438-5622	414/438-5627
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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR PART 36

Nondiscrimination On The Basis Of Disability By Public Accommodations And In Commercial Facilities

AGENCY: Department of Justice.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This proposed rule implements title III of the Americans with Disabilities Act, Pub. L. 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.

DATES: To be assured of consideration, comments must be in writing and must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER]. Whenever possible, comments should refer to specific sections in the proposed regulation. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Comments should be sent to: John L. Wodatch, Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, Rulemaking Docket 003, P.O. Box 75087, Washington, D.C. 20013.

Comments received will be available for public inspection in Room 854 of the HOLC Building, 320 First Street, N.W., Washington, D.C., from 9:00 A.M. to 5:00 P.M., Monday through Friday, except legal holidays, from (Insert date two weeks after date of publication in the FEDERAL REGISTER) until the Department publishes this rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers.

Copies of this notice of proposed rulemaking 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 notice of proposed rulemaking is also available on electronic bulletin board at (202) 514-6193. These telephone numbers are not toll-free numbers.

(W) [393-0800] Lindsey Smith
(H) (703) 751-3864

Proposal Widens Access for Disabled

Administration Plan Seeks Change at Big and Small Businesses

By Frank Swoboda
and Cindy Skrzycki
Washington Post Staff Writers

The Bush administration yesterday proposed the first in a series of major new regulations to require all but the smallest businesses to provide access to the 43 million Americans who are disabled.

The rules proposed yesterday cover every type of business from health spas and private schools to restaurants, grocery stores and automatic teller machines. The specifics range from the placement of toilet paper rolls to the type of carpeting that can be used in public facilities to the distance between library stacks and the height of raised numbers on a telephone.

Like federal safety laws, the regulations spell out in inches and even millimeters the appropriate height, number and position of everything from parking lot spaces to how far from the wall a telephone can protrude.

Many of the biggest national retailers and restaurant chains already have begun to implement some of features set out in the new regulations. But for most other restaurants, hotels, supermarkets, clothiers, banks, conference centers, theaters and sports complexes, the regulations could alter significantly their plans as they build new stores or renovate existing ones.

For example, hotels would have to have at least 5 percent of their rooms equipped for the disabled, restaurants would have to have a specified number of movable tables proportionately distributed among smoking and nonsmoking areas, and every supermarket checkout counter nationwide would have to be accessible to customers in wheelchairs.

The regulations proposed yesterday by the Architectural and Transportation Barriers Compliance Board are only the first of three sets of sweeping business regulations that will be proposed in the coming weeks under the Americans with Disabilities Act of 1990.

The biggest impact on business from the new law is expected next month when the Equal Employment Opportunity Commission (EEOC) issues proposed regulations governing employment of the disabled.

Patrisha A. Wright, director of governmental affairs for the Disability Rights Education and Defense Fund Inc., called the technical regulations governing the structure of facilities "a good first step," but said the real test would be the "philosophical regulations that come out of Justice [Department] and the EEOC."

Those guidelines will detail what steps employers must take to ensure that they are not discriminating against qualified job applicants with a disability. To comply, employers not only will have to hire people with disabilities but also modify work sites and equipment to meet the needs of those individuals.

The Justice Department will also issue regulations next month designed to protect the disabled from being discriminated against in their treatment by various establishments—perhaps barring a restaurant from seating the disabled in separate areas away from other diners.

The regulations governing physical access apply only to new construction or business renovations after Jan. 1, 1992. The law initially applies to companies with 25 or more employees, but that number drops to 15 employees in 1995. The employment and public accommodation regulations are scheduled to go into effect in July 1992.

Business reaction to the proposed regulations yesterday was muted. Most businesses said they would have no comment until they had seen all the government proposals. "It's a matter of digesting at this point," said Anne Curtis of the National Restaurant Association in Washington.

Corrie Zowotow of Burger King Corp., a fast-food chain with new construction or renovations almost constantly underway, said the chain already complies with all the proposed access requirements. "It's part of our upfront costs," she said. "It's baked into the culture."

Accurate estimates on how much it would cost business to implement the regulations are an unknown. Pete Lunnie of the National Association of Manufacturers said many larger corporations have made changes to accommodate the disabled under the 1973 law governing federal contractors. But he could not quantify how much it would cost business under the new law.

U.S. Issues Proposed Rules on Hiring Disabled People

By STEVEN A. HOLMES
Special to The New York Times

WASHINGTON, March 11 — The Bush Administration has issued another set of proposed rules for carrying out the new Americans With Disabilities Act, this time on hiring and accommodating disabled workers.

For example, the regulations, which like earlier rules seek to eliminate barriers that keep the disabled out of full participation in society, place strict limits on how far employers may go in inquiring about a job applicant's disability.

Under the rules, employers may not directly ask about an applicant's disability, whether it is an obvious impairment like blindness or a hidden condition like diabetes, high blood pressure or AIDS. In addition, employers would also be barred from requiring applicants to undertake physical examinations unless an offer of a job had already been made.

The regulations do permit employers to detail the physical requirements of a particular job and to ask whether the applicant can fulfill them. If the applicant says that he can do the job and it is later determined that he cannot, he could be dismissed. And if the examination shows an impairment that would prevent a worker from doing the particular job, the job offer can be withdrawn.

The latest proposed rules, drafted by the Equal Employment Opportunities Commission and issued on Feb. 28, are subject to a 60-day period for comment from the public before final rules are issued. The proposed rules are intended to give employers, disabled people and Federal judges guidance in interpreting the new disabilities law.

The law, passed last July, forbids discrimination against the disabled in public transportation, telecommunications services, public accommodations and employment.

So far, draft regulations have been issued on new construction and major renovations of existing buildings. Other regulations have been proposed to discourage discrimination against people with disabilities who use public accommodations and telecommunications services. In the next few months the Department of Transportation is expected to issue the final set of draft regulations, those covering mass transit systems.

Evan Kemp, chairman of the Equal Employment Opportunity Commission, the Federal agency that drew up the proposed employment rules, said they were intended to "flesh out" what the new law calls for. "They tell employers and the disability community all they should know about complying with the employment provisions of the law," he said.

Detailed Definitions Lacking

But a lawyer who represents corporate clients said today that the regulations did not define in sufficient detail some important terms — what constitutes a disability, for example, or what is considered reasonable accommadations.

The law specifies that employers must make "reasonable accommodations" that would allow qualified disabled workers to perform a given job — unless they show it to be too much of a financial burden. Such accommodations could include physical renovations, like building ramps. Or it could mean changes in employment practices — shifting work schedules, for example.

Instead of spelling out detailed definitions, the rules list a number of factors that may be used on a case-by-case basis to determine if an employer has violated the law.

"Employers have a very high need for certainty," said David Copus, a law partner in the Washington office of Jones, Day, Reavis & Pogue and whose clients include many corporations. "When they make a decision, they need to have a high degree of confidence that the decision is lawful."

Who Would Be Affected

All companies or government agencies with 25 or more employees will be covered by the employment provisions of the law when they become effective on July 26, 1992. Two years after that, employers with 15 or more workers will be covered by the law.

The law is to take effect gradually and in some cases over a long period of time. Some provisions, like the requirement that all new buses and subway cars be accessible to those with physical disabilities, is already in force. But the employment provisions will not become effective for years.

Violators could be subject to civil suits. Judges could order companies to make accommodations that would allow a disabled person to work. Judges could also award back pay to disabled plaintiffs who were denied a job or a promotion.

The Americans With Disabilities Act covers viturally every phase of employment, including recruitment, hiring, promotions, dismissals, pay, training, tenure, layoffs and fringe benefits. It also covers collective bargaining agreements

Bush Sends Crime Bill to Congress, Reviving Hotly Debated Proposals

By DAVID JOHNSTON
Special to The New York Times

WASHINGTON, March 11 — Urging Congressional action within 100 days, President Bush today sent lawmakers an anticrime bill that revives Administration proposals that died last year in a fractious debate on Capitol Hill.

In remarks to law-enforcement officials at the White House, Mr. Bush seemed to underscore how the Administration is trying to translate its triumph in the Persian Gulf war into quick legislative victories on a languishing domestic agenda.

Referring to the returning troops, Mr. Bush said, "The real way to honor them is to welcome them back to an America that is worthy of their sacrifice by joining together with Congress to move forward on the domestic front."

The President added: "And most of all, our veterans deserve to come home to an America where it is safe to walk the streets. Well, we can't do that before they come, but we can have that on our minds as something we are determined to do."

Provisions From the Past

Like last year's bill, the new legislation would expand the number of Federal crimes punishable by death, limit appeals by death row inmate and permit the use in court of illegally obtained evidence if the police acted in good faith.

The House and Senate passed different versions of the bill last year. Mr. Bush threatened to veto the House version, which included a clause that would have allowed defendants to escape death sentences if they could prove statistically that their punishment was a result of racial bias. The Senate's version of the bill included a partial ban on some military-style assault rifles, which the White House opposed.

A conference committee was unable to reconcile the measures, and the bill that emerged centered primarily on law-enforcement measures relating to the savings and loan industry, including increased penalties for bank fraud.

This year's bill includes several new features. It would allow the admission of firearms as evidence in Federal court even when the legality of the weapon's seizure was in doubt. It would also require a minimum five-year prison term for possession of a firearm by a felon with one prior conviction. Current law provides for a 15-year sentence for possession of a firearm by felons with three prior convictions.

Two Top Domestic Priorities

The crime bill, along with a transportation measure that would provide states with more than $100 billion over five years to modernize roads and mass transit, are emerging as the Administration's two top domestic legislative priorities.

"We'd like to get these two passed in that 100 days, sure," Marlin Fitzwater, the Presidential spokesman, said today. "The highway bill and this bill are ones that have provisions that are not totally new to the Congress and we are hopeful that they will be able to consider it rather quickly."

But some Democratic lawmakers and Congressional aides expressed doubt that Congress would act promptly unless Mr. Bush was willing to tighten restrictions on firearms. So far, the Administration has banned some foreign-made assault rifles but has opposed a prohibition on similar domestic weapons.

Senator Joseph R. Biden Jr., Democrat of Delaware, said he would offer his own anticrime legislation on Tuesday.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 28, 1991

The Honorable Robert J. Dole
United States Senate
Washington, D.C. 20510

Dear Senator Dole:

The Equal Employment Opportunity Commission (EEOC) has responsibility for enforcing Title I of the Americans with Disabilities Act (ADA), which was signed into law on July 26, 1990 (P.L. 101-336). Title I of the ADA protects qualified individuals with a disability from discrimination in job application procedures, hiring or discharge, compensation, advancement, training or other terms, conditions and privileges of employment.

Today the EEOC published its notice of proposed rulemaking on regulations to implement Title I of the ADA in the Federal Register for public comment. There is a 60-day comment period on the proposed regulations. Should you or your constituents wish to provide comments, these comments must be submitted in writing to Frances M. Hart, Executive Officer, EEOC, 1801 L Street, N.W., Washington, D.C. 20507.

EEOC expects to issue final regulations by the July 26, 1991 deadline mandated by the ADA.

Please contact my office at 663-4900 if you have any questions on ADA or any other law enforced by EEOC.

Sincerely,

James C. Lafferty/edw

James C. Lafferty
Director of Communications
and Legislative Affairs

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 26, 1991

CONGRESSIONAL STAFF:

We are conducting this briefing today to inform you about the Equal Employment Opportunity Commission's draft regulations under Title I of the Americans with Disabilities Act prior to the publication of the regulations in the Federal Register later this week.

The copy of the draft regulations that we are providing you today is embargoed until Wednesday, February 27. We ask that you respect our request not to make public these draft regulations before that time.

Thank you.

Billing Code 6750-06

Equal Employment Opportunity Commission

29 CFR Part 1630

Equal Employment Opportunity for Individuals with Disabilities

AGENCY: Equal Employment Opportunity Commission

ACTION: Notice of proposed rulemaking

SUMMARY: On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law. Section 106 of the ADA requires that the Equal Employment Opportunity Commission (EEOC) issue substantive regulations implementing Title I (Employment) within one year of the date of enactment of the Act. Pursuant to this mandate the Commission is publishing a proposed new part 1630 to its regulations to implement Title I and Sections 3(2), 3(3), 501, 503, 508, 510 and 511 of the ADA as those Sections pertain to employment. These regulations prohibit discrimination against qualified individuals with disabilities in all aspects of employment.

DATES: To be assured of consideration, comments must be in writing and must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER]. The Commission will consider any comments received on or before the closing date and thereafter adopt final regulations. Comments that are received after the closing date will be considered to the extent

practicable.

ADDRESSES: Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 "L" Street N.W., Washington, D.C. 20507.

As a convenience to commenters, the Executive Secretariat will accept public comments transmitted by facisimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll-free number). Only public comments of six or fewer pages will be accepted via FAX transmittal. THis limiation is necessary in order to assure access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat Staff at (202) 663-4078. (This is not a toll-free number).

Comments received will be available for public inspection in the EEOC Library, Room 6502, by appointment only, from 9:00 A.M. to 5:00 P.M., Monday through Friday except legal holidays, from [Insert date two weeks after date of publication in the FEDERAL REGISTER] until the Commission publishes the rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To

schedule an appointment call (202) 663-4630 (voice), (202) 663-4630 (TDD).

Copies of this notice of proposed rulemaking 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 of Equal Employment Opportunity by calling (202) 663-4395 (voice) or (202) 663-4399 (TDD).

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Deputy Legal Counsel, (202) 663-4638 (voice), (202) 663-7026 (TDD).

SUPPLEMENTARY INFORMATION: The Commission actively solicited and considered public comment in the development of proposed part 1630. On August 1, 1990, the Commission published an advance notice of proposed rulemaking (ANPRM), 55 FR 31192, informing the public that the Commission had begun the process of developing substantive regulations pursuant to Title I of the ADA and inviting comment from interested groups and individuals. The comment period ended on August 31, 1990. In response to the ANPRM, the Commission received 138 comments from various disability rights organizations, employer groups, and individuals. Comments were also solicited at 62 ADA input meetings conducted by Commission field offices throughout the country. More than 2400 representatives from disability rights organizations and employer groups participated in these meetings.

The format of the regulations reflects congressional intent, as expressed in the legislative history, that the regulations implementing the employment provisions of the ADA be modeled on the regulations implementing Section 504 of the Rehabilitation Act of 1973, as amended, 34 CFR Part 104. Accordingly, in developing these regulations, the Commission has been guided by the Section 504 regulations and the case law interpreting those regulations.

It is the intent of Congress that these regulations be comprehensive and easily understood. Proposed part 1630, therefore, defines terms not previously defined in the regulations implementing Section 504 of the Rehabilitation Act, such as "substantially limits," "essential functions," and "reasonable accommodation." Of necessity, many of the determinations that may be required by this proposed part must be made on a case by case basis. Where possible the regulations establish parameters to serve as guidelines in such inquiries.

The Commission is also issuing interpretive guidance concurrently with the issuance of part 1630 in order to ensure that qualified individuals with disabilities understand their rights under these regulations and to facilitate and encourage compliance by covered entities. Therefore, proposed part 1630 is accompanied by a proposed Appendix. This proposed Appendix represents the Commission's interpretation of the issues discussed and the

Commission will be guided by it when resolving charges of employment discrimination. The proposed Appendix addresses the major provisions of the regulations and explains the major concepts of disability rights.

One especially complex area for which the Commission has attempted to provide additional definitions and parameters involves the question of how to determine whether an employer regards a particular individual as having an impairment that substantially limits the major life activity of working. This question arises only when the individual is being regarded as substantially limited in working as opposed to substantially limited in any of his or her other major life activities. Also, it does not apply when an individual has an actual disability, or has a record of being an individual with a disability. The Commission has proposed, in the Appendix to part 1630, that an employer be considered to regard an individual as substantially limited in the major life activity of working if the employer's qualification standard excluding individuals with a particular impairment, would, if assumed to be generally applied by employers facing comparable hiring decisions, exclude the individual from a class of jobs or from a broad range of jobs in various classes. The Commission invites specific comment on this proposal.

More detailed guidance on specific issues will be forthcoming in the Commission's Compliance Manual. Several Compliance Manual

sections and policy guidances on ADA issues are currently under development and are expected to be issued prior to the effective date of the Act. Among the issues to be addressed in depth are the theories of discrimination; definitions of disability and of qualified individual with a disability; reasonable accommodation and undue hardship, including such matters as the scope of reassignment and supported employment; and pre-employment inquiries.

To assist us in developing this guidance, the Commission requests comment from disability rights organizations, employers, unions, State agencies concerned with employment or worker's compensation practices, and interested individuals on the following specific questions concerning the application of Title I of the ADA.

Insurance

1. What are the current risk assessment or classification practices with respect to health and life insurance coverage in the area of employment?

2. Must risk assessment or classification be based on actuarial statistics?

3. What is the relationship between "risk" and "cost?"

4. Must an employer or insurance company consider the effect on

individuals with disabilities before making cost saving changes in its insurance coverage?

Worker's Compensation

1. Is submission of medical information to worker's compensation offices a permissible use of information obtained as a result of a medical examination or inquiry?

2. Is an inquiry into the history of an individual's worker's compensation claims a prohibited pre-employment inquiry? Is such an inquiry ever permissible as an inquiry that is job-related and consistent with business necessity?

3. What has been the experience of federal contractors subject to Section 503 of the Rehabilitation Act with respect to State worker's compensation requirements?

Collective Bargaining Agreements

1. Can the effect of a particular accommodation on the provisions of a collective bargaining agreement ever be considered an undue hardship? For example, may an employer decline to restructure a job or refuse to grant light duty because to do so would violate seniority or other provisions of the collective bargaining agreement?

2. What is the relationship between collective bargaining agreements and the accommodation of reassignment to a vacant position?

3. Should a position be considered "vacant" when the employer has other obligations, such as consent decrees or arbitration agreements, with respect to filling the position?

4. If a necessary reasonable accommodation is challenged as a violation of a collective bargaining agreement, would the employer or union violate the confidentiality requirements of the ADA by explaining that the accommodation was made to comply with the ADA?

Executive Order 12291 and Regulatory Flexibility Act

The Commission has determined that this proposed rule will not exceed the threshold level of $100 million and thus is not a major rule for the purposes of Executive Order 12291. In making this determination the Commission prepared a Preliminary Regulatory Impact Analysis, copies of which are available from Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 "L" Street N.W., Washington, D.C. 20507.

The Commission certifies that this proposed rule will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis

under the Regulatory Flexibility Act is not required.

Preliminary Regulatory Impact Analysis

Executive Summary

The following analysis estimates three economic effects likely to result form the regulation implementing Title I of the Americans with Disabilities Act. Reasonable accommodation expenses are estimated at approximately $16 million, productivity gains are estimated at more than $164 million and decreased support payments and increased tax revenue is estimated at about $222 million. Lost benefits of not promulgating the rule could exceed $400 million.

It appears that the rule is unlikely to have a significant economic impact on smaller entities. Because small entities employ fewer workers, the chance that an individual small business will be required to take reasonable accommodation is quite low. Further, the availability of tax credits, the two-year exemption period and the lack of reporting requirements all reduce the economic effect of the rule on these firms.

Introduction

The Equal Employment Opportunity Commission (EEOC) has drafted regulations to implement Title I of the Americans with Disabilities Act (ADA), requiring equal employment opportunity for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities. The Commission is required by the ADA to issue regulations to enforce Title I within one year of the date of enactment. The regulation raises no issues for discretionary rulemaking. Title I of the ADA is an unusual statute in that it contains a level of detail more commonly found in regulations, leaving very little room for regulatory discretion, and thus limits regulatory costs to those preset by the Congress in its choice of statutory requirements. The regulation merely explains and provides guidance on the statutory requirements by relying primarily on existing case law[1], which is another limitation on Commission discretion in constructing the regulation.

The purpose of this preliminary regulatory impact analysis is to determine the costs and benefits of the proposed rule as required by Executive Order 12291, 46 Fed Reg. 131391 (1981). This preliminary analysis suffers from a number of constraints. The ADA

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[1] Case law is a result of experiences encountered in implementing the Rehabilitation Act of 1973.

establishes very stringent time frames for developing implementing regulations. The limited time available necessitates the use of very rough estimates that can readily be drawn from existing literature. Additionally, a lack of regulatory alternatives available to the Commission and a scarcity of data relevant to the regulation at hand prevent this analysis from being an ideal application of cost benefit analysis. Even more limiting is the lack of a clear definition of costs associated with the rule as benefits, costs or simply transfers. Nevertheless, this analysis will address the five areas proscribed as necessary elements of a regulatory impact analysis by the Office of Management and Budget.[2] These areas are: (1) statement of potential need for the proposal, (2) an examination of alternative approaches, (3) an analysis of benefits and costs, (4) rationale for choosing the proposed regulatory action, and (5) a statement of statutory authority. Also included in the final section of this preliminary regulatory impact analysis is a regulatory flexibility analysis.

Background

On July 26, 1990, the ADA was signed into law. The Commission invited public comment on the development of regulations through the publication of an advanced notice of proposed rulemaking on

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[2] "Appendix V, Regulatory Impact Analysis Guidance", Regulatory Program of the United States Government, April 1, 1990-March 31, 1991, The Executive Office of the President, Office of Management and Budget, pp. 653-666.

August 1, 1990. As directed by the legislative history, the regulations are modeled on those implementing Section 504 of the Rehabilitation Act of 1973, as amended, 34 C.F.R. Part 104. Substantively, the regulations parallel the act. Succinctly stated, the act and the regulations prohibit employers from discriminating in employment decisions against qualified individuals with disabilities. This includes the requirement that employers make reasonable accommodation to known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. There are certain economic effects expected as a result of Title I: (1) reasonable accommodation expenses, (2) reduction of social welfare payments and an increase in tax revenues, and (3) increased labor productivity. As will be discussed, these costs can be viewed as being positive (benefits), negative (costs) or neutral (transfers). Government administrative costs in implementing Title I could also be considered an economic effect.

Statement of Potential Need for the Proposal

Beyond the legislative requirements for the regulations, Office of Management and Budget (OMB) guidance requires regulatory impact analyses to establish the potential need for a proposal by demonstrating that "(a) market failure exists that is (b) not

adequately resolved by measures other than Federal regulation".[3] The labor market failures at issue here include those addressed by other equal employment opportunity requirements. These failures have been explained in three different ways in the seminal works of Becker, Thurow and Arrow. These works originally addressed race discrimination but they are applicable to discrimination against disabled workers.[4] Becker treats discrimination as a commodity in which employers, co-workers and consumers all have to determine their discrimination coefficient, that is, their taste for discrimination or how much discrimination will affect their utility.[5] Here the market failure is the substitution of a human capital factor (that is, a qualification for or contributor to labor productivity) with factors unrelated to productivity, such as race, sex, or disability. Becker indicates that individuals and firms are willing to accept the reduced productivity arising from using such factors because they prefer not to be associated (due to uncomfortableness or displeasure) with blacks, women or disabled workers in the work place. Becker's general theorem on market discrimination assumes that all employees in a given market are

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[3] "Appendix V, Regulatory Impact Analysis Guidance", Regulatory Program of the United States Government, April 1, 1990-March 31, 1991, The Executive Office of the President, Office of Management and Budget, p. 653.

[4] The term "disabled worker" is used to refer to applicants and employees covered by the act. It is not intended to be a legal term but is simply a term of convenience for this analysis.

[5] Becker, Gary S. The Economics of Discrimination, The University of Chicago Press, 1957.

either perfect substitutes or perfect complements. Discrimination by employers converts minority or female wage rates into a net wage rate with the added costs of discrimination. The discrimination cost adds to the actual wage rate by adding costs from employees, customers, unions and others who prefer not to associate with certain classes of individuals. This cost of discrimination makes the black, female, or disabled worker more expensive to the firm and therefore stimulates the employer to discriminate in wages or to fail to hire these individuals. The effect on the labor market is that it artificially constricts the labor pool and allows a non-human capital factor to be considered in labor decisions, thus reducing gross productivity.

Thurow relies strongly on the marginal productivity theory in labor economics[6]. The author explains that in studying discrimination, the important source of income is individual labor. Labor income is determined by labor's marginal productivity, its contribution to the firm's production. Firms are expected to set labor costs equal to labor's marginal productivity. As productivity increases, income should increase. In explaining employment discrimination, Thurow rejects Becker's notion of tastes for discrimination. Instead he sees the discriminator as a profit maximizer. Given a situation where firms pay black, female, ethnic or disabled workers less for comparable work, Becker would suggest

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[6] Thurow, Lester C. Poverty and Discrimination, The Brookings Institute, Washington, D.C., 1969.

that a portion of these workers' marginal productivity must go to buy off discrimination tastes. Thurow would argue that it occurs because the firm knows it can use that portion of a black, female, ethnic or disabled worker's marginal productivity as profit. Thurow's theory has limited applicability to hiring discrimination because if firms were able to capture wage disparities as profits, they would place a greater demand on these workers. This seems to be a particular weakness with respect to disabled workers because of the high rate of disabled unemployment. Nevertheless, Thurow provides a theoretical basis for observed wage disparities between equally qualified disabled and non-disabled workers. Thurow's theory also points out another market failure having to do with human capital. Although Thurow's theory could not create an artificially constricted labor market, as Becker's theory does, it would reduce returns on human capital investments for certain workers[7]. As a result, disabled workers (and others that are discriminated against in the manner described by Thurow) would be less willing and less able to make human capital investments. This will result in a less qualified work force than would be expected in a perfectly competitive market. This again can have serious national productivity effects.

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[7] Such human capital investments would include education and training. For a detailed discussion of human capital theory see, Mincer, Jacob, Schooling, Experience and Earnings, National Bureau of Economic Research, New York, 1974.

Arrow, like Becker, operates from an assumption that disparities between black and white employment (and in the present instance, disabled and non-disabled employment) are caused in part by discriminatory tastes, and that these discriminatory tastes have a certain utility for an employer and for the actors in an economy such as complementary workers[8]. However, Arrow concludes that, if Becker's model is correct, in the long run the likely outcome or equilibrium point would be perfectly segregated labor pools and no disparity in wages. Noting that this condition cannot be observed in reality, he offers an alternative explanation: imperfect information. Employers, according to Arrow's theory, may have a preconceived notion that black workers (or in this case, disabled workers) are less productive than white (or non-disabled) workers and will reduce black wages or employment opportunities accordingly. Arrow notes that in making employment decisions, an employer seeks information about candidates and this information has varying costs. Some information such as race, sex, ethnicity or disability status is particularly cheap, as the employer can usually observe these traits. In many instances the employer uses this cheap (and irrelevant) information to predict performance. The employer is able to do this and not have a disadvantage in the market because other employers also use this cheap information and because the market is sufficiently noncompetitive as to allow the

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[8] Arrow, Kenneth J. Arrow, "The Theory of Discrimination", Discrimination in Labor Markets, edited by Orley Ashenfelter and Albert Rees, Princeton University Press, Princeton, New Jersey, 1973, pp. 3-33.

use of such inefficient information. By using the cheap information (race, sex, ethnicity, and/or disability), the employer saves money in the short run and ignores the long run productivity losses. This, of course, imposes a cost on society in the form of lost productivity that stems from the use of a less competitive labor market.

Burkhauser and Haveman indicate that there are other market failure rationales for government policy in the disability area.[9] Three market failures are offered by the authors as general justification for government intervention. Burkhauser and Haveman view these three market failures as externalities. The first externality occurs, according to the authors, because when an individual becomes impaired, the costs of impairment become shared. Under this condition then one can view the welfare payments received by disabled workers as a type of externality and the reduction in these benefits caused by equal employment requirements will result in a decrease in this externality. While in some circumstances, such welfare payments may be viewed as a transfer, it is appropriate to view the reduction of the payments as a benefit as individuals become more responsible for the cost of their impairments and the externality is reduced. Expressed in another manner, the individual's income becomes more directly

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[9] Burkhauser, Richard V. and Robert H. Haveman, Disability and Work: the Economics of American Policy, The Johns Hopkins University Press, 1982, pp. 18-22.

related to his/her productivity.

The second externality cited by these authors is relevant to the need to provide support for these individuals. In explaining this market failure, the authors point out that the amount individuals are willing to contribute to provide support is likely to depend on the contributions by others and an optimal level of support is not reached. This occurs as even individuals who prefer providing support will attempt to avoid such payments by taking a "free ride" on the contributions of others. The ADA's reasonable accommodation requirement might be viewed in this light. This requirement fixes the cost and eliminates the "free rider" problem. By selecting the employer to bear the cost the responsibility is fixed on the individual that receives the benefits of the disabled worker's productivity, thus approaching a more competitive market place. Ideally, however, the employee would be expected to bear such costs. This brings us to the third externality cited by these authors. This problem stems from the fact that disabled workers are constrained in financing investments in human capital which are frequently reflected in reasonable accommodation, for example, the purchase of a TDD by a hearing impaired individual. The authors point out that due to the lack of economic well-being among disabled workers such investments by these workers are likely to be less than optimal. Transferring the cost to the employer through government intervention is more likely to produce the optimal investment.

Burkhauser and Haveman's view of disability as an externality raises a number of issues for calculating the cost benefit of the Title I regulations. Their view indicates that welfare disability payments can be viewed as an externality that forces others to share in the cost of an individual's disability. Analysts often view such payments as transfers. Instead, it may be possible to view the reduction of such payments as a social benefit reflecting the ability to have individuals bear the costs of their own disabilities. Also their view can be used to argue that at a certain level reasonable accommodation costs are simply pecuniary as employers bear human capital investment costs rather than the disabled worker. By having the employer, who is more sound financially, bear the costs, investments will be more optimal. Therefore, the reasonable accommodation costs which are required by Title I can be viewed as those that would not be taken voluntarily by the disabled worker due to financial constraints and all such costs could be viewed as benefits. V i e w i n g disability as an externality, changes the way that many researchers have defined costs and benefits of requiring equal employment opportunity for disabled workers. Traditionally, one would normally view the reduction in social welfare payments as a transfer rather than a benefit and one would view reasonable accommodation as a cost rather than a transfer with some benefits. As it is necessary to rely on prior studies to provide estimates of costs and benefits, Burkhauser and Haveman's view of market

failures raises issues that cannot be readily resolved. This makes the calculation of a cost benefit ratio difficult as there is no clear consensus on what factors are benefits and which are costs. Rather than calculate a cost benefit ratio, it will be much more valuable to simply outline regulatory costs with the recognition that these costs will be viewed as positive (benefits), as negative (costs), and as neutral (transfers) but with no definitive consistency in this view.

If the market failures, outlined above, exist, we might expect to see them reflected in disabled workers having lower employment status than similarly qualified non-disabled workers. Haveman and Wolfe make such a finding with respect to wages.[10] These authors calculate the ratio of real earnings of disabled to non-disabled males controlling for age (a proxy for experience), years of education and race. For example, in 1984, disabled workers with 13 or more years of education earned only 71 percent of the earnings of a non-disabled worker with that amount of education. The disparities were even greater when educational levels were lower. Disabled workers with less than 12 years of education earned less than one-third of that earned by non-disabled workers with less than 12 years of education. Similarly, a study by Johnson and Lambrinos indicates that 35 percent of the difference

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[10] Haveman, Robert and Barbara Wolfe, "The Economic Well-Being of the Disabled, 1962-1984", The Journal of Human Resources, Vol 25 No 1, 1990, pp. 32-54.

between disabled and non-disabled workers' wages is due to discrimination[11].

Unemployment rates also reflect the lower employment status of the disabled, that would be expected particularly from Becker and Arrow's theories. The Congressional Research Service, using a 1978 Social Security Administration survey, reports that disabled men in the work force had an unemployment rate of 5.8 percent, in contrast to 3.5 percent for non-disabled men. Disabled women had an unemployment rate of 9.0 percent compared to 5.9 percent for non-disabled women.[12] Even these disparities do not completely capture the extent of unemployment, as disabled workers have been historically excluded from the work force. A Lou Harris poll found that two-thirds of disabled Americans between ages 16 and 64 are not working. Sixty-six percent of those not working say that they would like to work.[13]

In conclusion, discrimination against disabled individuals can be viewed, like discrimination against minorities and women,

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[11] Johnson, William G. and James Lambrinos, "Employment Discrimination", Society, March/April 1983, pp. 47-50.

[12] Digest of Data on Persons with Disabilities, Congressional Research Service, June 1984.

[13] The ICD Survey of Disabled Americans, Bringing Disabled Americans Into Mainstream, a Nationwide Survey of the 1,000 Disabled People, ICD-International Center for the Disabled and Lou Harris and Associates, Ind., 1986.

as a market failure due to a taste for discrimination, short run profit maximizing, and/or use of imperfect information. It can also be viewed as an externality where others pay for the cost of an individual's disability, which becomes particularly problematic without government intervention because optimal investments in human capital (including accommodations) are not made. The effect of this failure is a reduction in national productivity that stems from use of a constricted labor market, failure to accurately return investments on human capital, failure to make optimal investments in human capital and/or use of imperfect information to predict productivity. Additionally, all theories of discrimination recognize that society suffers when there is an inequitable work force.

An Examination of Alternative Approaches

The regulation implementing the ADA represents a direct adoption of statutory requirements. Little leeway is seen for discretionary rulemaking and hence regulatory alternatives. To demonstrate this limitation, it is useful to briefly examine the seven different regulatory alternatives recommended by the regulatory impact analysis guidance[14]. The first alternative is the use of performance-oriented standards. While these types of

[14] "Appendix V, Regulatory Impact Analysis Guidance", Regulatory Program of the United States Government, April 1, 1990-March 31, 1991, The Executive Office of the President, Office of Management and Budget.

standards have been shown to be useful alternatives for environmental regulation, they probably have limited utility in this area due to, among other factors, equity considerations for both disabled and non-disabled individuals.

The second type of alternative recommended in the regulatory impact analysis guidance is to impose different requirements for different segments of the regulated population. This is not a viable alternative for the subject regulation, as the rule represents a bare minimum compliance standard. Under somewhat similar regulations, like Section 503 of the Rehabilitation Act of 1973, there are differing standards based on the value of the employer's federal contracts. With more extensive compliance requirements like affirmative action programs, it is possible to have greater variation in regulatory requirements such as only requiring employers with large contracts to have written plans. This type of gradation is not possible with a simple nondiscrimination requirement and the Commission is not given this authority in the ADA.

The third type of requirement recommended is alternative level of stringency. This type of regulation is not appropriate to the current rule for a number of reasons. First, the Act specifies level of stringency. Second, unlike pollution or risk in occupational safety, it is difficult to have little or to have much

nondiscrimination. Third, even if graduated discrimination standards could be developed, it would result in the denial of individual rights to certain employees. Such a denial is certain to be tested in the courts, imposing significant costs on the government.

The fourth alternative is variation of effective dates of compliance. This has already been addressed in the Act. Any further variation would be confusing to the public and might also be challenged through litigation.

The fifth alternative is alternative methods of ensuring compliance. The proposed regulation makes no assumptions about methods of ensuring compliance. Considering that the statute is new and the Commission has no experience in implementing the Act, it is not reasonable at this time to develop, through regulation, alternative compliance techniques.

The sixth alternative is to provide informational measures. This is a viable approach, given that one of the cited market failures creating the need for the regulation is the use of imperfect information by employers. Additionally, the employer will have information needs when determining appropriate types of reasonable accommodation. Unfortunately, neither of these information needs is well met by government intervention. The employer is much more capable of determining the information needed

to make personnel decisions. Given a prohibition against using cheap discriminatory information like an individual's disability, the employer will be best able to determine the most cost effective alternatives. With respect to information regarding reasonable accommodation, since accommodations are tailored to the individual, the most cost effective manner for designing them is information exchange between employee and employer. Increased information regarding reasonable accommodation solutions will both increase compliance and reduce compliance costs. It should be noted that information can be provided by the government and can aid employers' compliance efforts. The ADA imposes such a requirement on the Commission. The Commission will provide technical assistance to employers and general information through a variety of activities, including the development of a technical assistance manual, participation in conferences and the publication of booklets and brochures.

The seventh alternative is to create more market-oriented approaches. This alternative is difficult to apply to equal employment opportunity requirements, as the buying and selling of individual rights is different than the buying and selling of tax deductions or pollution rights. Some incentives, however, through tax credits and tax deductions related to the Act, are available and will be discussed in a later section.

Faced with a scarcity of alternatives, relevant guidance has

been provided.

> Ordinarily, one of the alternatives will be to promulgate no regulation at all, and this alternative will commonly serve as a base from which increments in benefits and costs are calculated for the other alternatives. Even if alternatives such as no regulation are not permissible statutorily, it is often desirable to evaluate the benefits and costs of such alternatives to determine if statutory change would be desirable.[15]

Therefore the two alternatives to be examined in this analysis are the proposed regulation and no regulation.[16]

Reasonable Accommodation Expenses

The Title I substantive regulations contain compliance but not reporting requirements. Of compliance requirements, the cost borne by employers is reflected in their provision of reasonable accommodation. However, as the prior discussion of market failures indicates, it is not clear whether these costs should be viewed as positive or negative costs. While traditionally viewed as negative costs, Burkhauser and Haveman's perception that disability is an

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[15] "Appendix V, Regulatory Impact Analysis Guidance", Regulatory Program of the United States Government, April 1, 1990-March 31, 1991, The Executive Office of the President, Office of Management and Budget, p. 656.

[16] Because the alternative of no regulation appears to be intended, by OMB, to serve as a base for comparing regulatory alternatives, no regulation will be treated as if there was no legislation. While Title I of the ADA could be implemented without regulations, treating no regulation as no legislation will provide the most useful contrast. Additionally the effect of this alternative is more readily computed when viewed in this manner.

externality would make reasonable accommodation expenses a benefit. Nevertheless, there is rather abundant literature indicating that accommodation expenses are normally quite low. The literature comes from a wide array of sources. For example, an official charged with implementing Section 503 of the Rehabilitation Act noted that "there really is not any great cost attached to making accommodations."[17] A major corporation reported that "The cost of most accommodations is nominal".[18]

The basic method to estimate the economic cost of reasonable accommodation is to multiply the expected number of accommodations by the expected cost of accommodations. Four variables are needed to estimate number and cost of accommodations: the expected proportion of employment opportunities to be gained by disabled workers, the number of employees covered, the average cost of accommodation, and turnover rates.

The expected proportion of employment opportunities to be gained by disabled workers is critical in determining the number of accommodations expected. Given some knowledge of relevant employment opportunities, this figure will indicate the number of

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[17] Rougeau, Weldon, Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor, statement before Congress, Equal Employment Opportunity for the Handicapped Act of 1979: Hearings on S. 446 Before the Senate Committee on Labor and Human Resources, 96th Congress 1st Session 103 (1979) p. 103.

[18] Equal to the Task, 1981 DuPont Survey of Employment of the Handicapped, 1982, pp. 17-18.

opportunities that disabled workers would be expected to receive. Availability estimates of disabled workers range from 1.1 percent to 10 percent. The Digest of Data on Persons with Disabilities uses Social Security Administration data reports to estimate that 10 percent of those 18 to 64 years old who participate in the labor force are disabled.[19] The much lower estimate of 1.1 percent availability represents that proportion of the federal work force having targeted disabilities.[20] The 10 percent availability figure is only appropriate if immediate and total compliance is expected. That is, as soon as the regulations are implemented, employers begin filling job vacancies with disabled workers at the same rate as these workers are available for employment (10 percent according to the estimate above). As few regulations ever achieve immediate and total compliance, it is useful to introduce another estimate that accounts for experience in compliance behavior. The 1.1 percent estimate reflecting compliance of federal agencies may not be appropriate, as it is limited to targeted disabilities, is from a relatively unique labor market and also represents an extreme estimate. In its place, an estimate of the employment of disabled workers by federal contractors subject to Section 503 of the Rehabilitation Act can be used. A 1982 study conducted for the Department of Labor found that 3.5 percent of federal contractors'

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[19] Digest of Data on Persons with Disabilities, Congressional Research Service, June 1984.

[20] D'Innocenzio, Anne, "Accommodating Disabilities", Government Executive, October 1990, p. 2.

work forces were disabled. Note that this figure was reached nearly ten years after federal contractors were subject to Section 503.

The number of employees covered by Title I is another variable necessary to estimate the number of expected accommodations. The impact of Title I on the economy is limited because a large number of employees are already covered by Federal, state and local statutes that require equal employment opportunity for the disabled. Two estimates of newly covered employees are relevant[21]. Twenty million employees not already covered by the Rehabilitation Act or State statutes comparable to the ADA will be covered by Title I. If State statutes similar to ADA are included, only 15 million employees will be newly covered.[22]

The cost of accommodation is, of course, critical to determining the influence of Title I on the nation's economy. (For

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[21] Estimates were developed by the Commission's Office of Program Operations, Program Research and Surveys Division. The estimates begin from an initial estimate of the number of employers and employees subject to the Uniform Guidelines on Employee Selection Procedures. These figures can be shown to be consistent with estimates developed privately and for other purposes by Dunn and Bradstreet. Employers and their work forces are then classified depending on their coverage by State statutes resembling in some way the ADA.

[22] As the analysis will depend on the number of workers likely to be affected by Title I, terms like "15 million newly covered employees" is used. The more accurate term might be "covered employers employing 15 million employees" as employers rather than employees will be covered by Title I.

this analysis, average cost of accommodation refers to the average cost per disabled employee, not average cost per accommodation. This is necessary to account for the large proportion of disabled workers who do not require accommodation). One estimate is provided by the Berkeley Planning Associates (BPA) survey of federal contractors subject to Section 503.[23] The study provides a table with percentage of accommodations within cost ranges. For example, most frequently cited are the first three ranges, where 51.1 percent of all accommodations are made at no cost, 18.5 percent at costs between $1 and $99 and 11.9 percent at costs between $100 and $499. Thus more than 80 percent of all accommodations cost less than $500. The average cost of accommodation according to that report is $304 when (1) mid-points of the published cost ranges are used for calculation, (2) it is recognized that at least one-half of disabled workers require no accommodation[24], and (3) the highest cost range accounting for only 1.6 percent of accommodations is excluded as expenses of this

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[23] A Study of Accommodations Provided to Handicapped Employees by Federal Contractors, Vol 1: Study Findings, Berkeley Planning Associates for the U.S. Department of Labor, Employment Standards Administration, June 17, 1982, p. 29.

[24] Not all disabled workers require accommodation, The ICD Survey of Disabled Americans, Bringing Disabled Americans Into the Mainstream, a Nationwide Survey of 1,000 Disabled People, ICD-International Center for the Disabled and Lou Harris Associates, Inc., 1986 reports that only 35 percent of disabled persons who are employed, report some sort of accommodation. Another study (Finnegan, Daniel, Robert Reuter and Gail Armstrong Taff, "The Costs and Benefits Associated with the Americans with Disabilities Act", Quality Planning Associates, September 11, 1989) indicates that one-half of disabled employees would require accommodation.

caliber are likely to be structural changes that are probably covered by Title III.

A second estimate can be developed from a study conducted for the Business Roundtable regarding Section 503 and other regulatory costs.[25] This study calculated that the annual cost of complying with Section 503 was $3,574,000 per year. Cost estimates specific to reasonable accommodation were not made. It would be expected that these costs are much higher than those required by Title I because Section 503 requires federal contractors to take affirmative action. As affirmative action requirements necessitate costs such as reporting and affirmative action plan development that are not necessary under Title I, this estimate is upwardly biased. To determine the average cost of accommodations, the number of annual employment opportunities in the work force of survey firms (2,800,000 employees) was estimated by using the monthly turnover rate of large firms, 0.8 percent[26], to estimate that there were 22,400 employment opportunities each month, or 268,000 vacancies per year. Since the Berkeley Planning Associates study found that 3.5 percent of federal contractor's work forces were disabled, it is assumed that 3.5 percent of these vacancies

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[25] Cost of Government Regulation Study for the Business Roundtable, Arthur Anderson & Co. for the Business Roundtable, March 1979).

[26] Turnover rates used in this analysis are from "BNA's Job Absence and Turnover Report -- 2nd Quarter 1990", Bulletin to Management, The Bureau of National Affairs, September 13, 1990, pp. 293.

went to disabled individuals. Thus the $3,574,000 required to comply with Section 503 can be divided among 9,408 disabled employees for an average cost of $380.

Using an analysis of Section 504 costs, a study projecting the impact of the "Americans with Disabilities Act of 1989 estimated that the average cost of accommodations was $200 but this average cost did not account for their estimate that one-half of accommodations require no cost.[27] Thus the average cost would actually be $100.

Relevant estimates then of the average cost of accommodation are $304, $380, and $100. These estimates are quite consistent considering the divergency of the sources. The mean of these three estimates is $261. This figure can be used to predict accommodation expenses that might result from Title I.

If we count as newly covered employees those without either a comparable or similar State statute, then 15 million employees will annually produce 1,800,000 vacancies applying a 1 percent monthly turnover rate. If we assume the same level of compliance as Berkeley Planning Associates observed by federal contractors,

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[27] Finnegan, Daniel, Robert Reuter and Gail Armstrong Taff, "The Costs and Benefits Associated with the Americans with Disabilities Act", Quality Planning Associates, September 11, 1989, p. 38.

then 3.5 percent or 63,000 vacancies would go to disabled workers, resulting in annual accommodation expenses of $16,443,000.

Productivity Gains

Title I is expected to increase productivity because employers will use a larger labor pool, and there will be more optimal investments in human capital. In order to estimate productivity gains from the Act, it must be assumed that as the marginal productivity theory of labor economics suggests, a worker's increased marginal productivity will equal the worker's increased marginal income. Thus, the increased wages of disabled workers after ADA will indicate increased productivity. This approach was used by O'Neill in his finding that benefits far outweigh costs in the Department of Health Education and Welfare's (HEW) implementation of Section 504.[28] He estimated that the $50 million required to implement the employment provisions (reasonable accommodation expenses) would yield $500 million in benefits (increased productivity). Therefore the benefits are 10 times greater than the costs. Given the range of cost benefit estimates cited by Martin, O'Neill's estimate is conservative. His estimate is particularly relevant to the Title I rule since it is modeled

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[28] O'Neill, Dave M., "Discrimination Against Handicapped Persons, the Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance", Public Research Institute, February 18, 1976.

on the Section 504 regulation. If O'Neill's cost/benefit ratio is applied to the reasonable accommodation expenses presented above, increased productivity that can be attributed to the rule can be estimated at $164,430,000.

Decreased Support Payments

The social benefits of decreasing support payments and increasing tax revenues by expanding the employment of the disabled seem particularly important currently as Federal, state and local governments are frequently confronting budget deficits. Reduced support and increased tax payments have been examined in various contexts involving legislation affecting disabled workers.

Hearne explains the setting for understanding the gains to be achieved if support payments are reduced.

> If these billions of dollars [spent on an annual basis for supplemental social security income for the disabled] are continually spent to keep [the disabled] . . . population alive and not spent by Congress or by the States on access to employment, on transportation, on the real issues that affect disabled people, it is far more costly, since there is no return with this money. If this money is turned into vocational rehabilitation funds [or funds for reasonable accommodation] and individuals are placed in jobs, they become taxpayers. So that there is a two-fold benefit: One, they are taken off the public assistance rolls; and two, not only are they functionally employed and attaining independent lives as well as economic independence, but they are also paying taxes and broadening the tax base.

In 1974 the three public benefit programs -- public

assistance, which is the State welfare, AFDC and home relief; social security disability insurance, which is primarily paid to injured workers; and SSI which, as I mentioned earlier, is the benefit program which goes to most disabled people unemployed -- payments amounted to a total of about $8.3 billion.[29]

A summary of research regarding Section 504 of the Rehabilitation Act of 1973 provides an indication of tax revenues lost as a result of no regulation.

One study commissioned by the Department of Health, Education and Welfare's Office of Civil Rights estimated that eliminating discrimination against handicapped people in HEW funded grant programs would yield $1 billion annually in increased employment and earnings for handicapped people. In addition to increasing the gross national product it has been estimated that such an earnings increase by handicapped workers would result in some $58 million in additional tax revenues to Federal, State and local governments.[30]

In support of a national rehabilitation program in 1973, Senator Cranston noted the same increase in tax revenues but also addressed the reduction in support payments. "And these figures do not reflect the approximately $33 million in savings to Federal and State governments in 1972 caused by removal of many rehabilitation

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[29] Hearne, Paul G., statement in Civil Rights Issues of Handicapped Americans: Public Policy Implications, consultation before the U.S. Commission on Civil Rights, Washington, D.C., May 13-14, 1980, p. 200.

[30] Accommodating the Spectrum of Individual Abilities, United States Commission on Civil Rights, Clearinghouse Publication 81, 1983, p. 75.

opportunities for the disabled. It was also noted that two-thirds of disabled Americans are not working and that of these, two-thirds say they would like to work. Thus we might expect as much as 44 percent (0.66 times 0.66) or 27,720 of these employment opportunities to go to individuals receiving support payments. Using Tucker's modest estimate of tax and support payment savings of $8,000 per worker results in total savings of $221,760,000 per year. This is an extremely rough estimate, but it may be conservative. For example, tax revenues would be based on income, and the assumption that the average income of the newly employed disabled workers would be $10,000 is clearly too low.

Benefits of Equity

The utility of cost benefit analysis for equal employment opportunity rules has been questioned, as it is difficult to quantify benefits like equity. This argument has been applied specifically to equal employment opportunity for the disabled.

> The degree to which cost-benefit analysis may be applied appropriately to government programs for handicapped people has been the subject of controversy. Many authorities agree that the analysis of financial costs and benefits is an important consideration in selecting the most efficient alternative among several choices for reaching a particular goal. It is not so clear, however, that using cost-benefit analysis to select societal goals or evaluate social programs is appropriate. Cost benefit analysis strongly favors quantifiable data, usually dollars and cents, on the theory that marketplace prices, fixed by supply and demand, are more reliable than subjective value judgments. Many social programs exist, however, because the marketplace does not adequately provide needed public services or because it is unfairly

biased.[34]

It is clear that even if one accepts cost benefit analysis for the Title I rule, the benefits of the regulation will be vastly underestimated due to the inability to quantify the value of a more equitable labor market.

Administrative Costs

OMB guidance indicates that one cost that should be considered in projecting regulatory impact is government administrative costs. The main administrative cost from implementation of Title I is the salaries for EEOC employees investigating charges received from individuals alleging discrimination in violation of Title I. While, other substantial administrative costs, such as staff training and information system modifications, will be incurred during the initial implementation of Title I, these costs will eventually decline. EEOC has estimated that the cost of the first full year of implementation is roughly $25 million. This excludes some one-time only expenses such as modification of management information systems. Table 1 summarizes Title I costs, both positive, negative and neutral from the three major effects on the economy plus EEOC administrative costs.

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[34] Accommodating the Spectrum of Individual Abilities, United States Commission on Civil Rights, Clearinghouse Publication 81, September 1983, p. 73.

TABLE 1
SUMMARY OF ANNUAL EFFECTS
ON THE ECONOMY
AS A RESULT OF TITLE I

REASONABLE ACCOMMODATION EXPENSES	$16,443,000
PRODUCTIVITY GAINS	$164,430,000
DECREASED SUPPORT PAYMENTS AND INCREASED TAXES	$221,760,000
EEOC ADMINISTRATIVE COSTS	$25,000,000

Cost Benefit Ratio

Due to the inability to clearly define costs as positive or negative, it is not particularly useful to calculate a cost benefit ratio. However, there is considerable evidence that the cost/benefit ratio of the proposed regulation is positive. Martin indicates that "conservative estimates of the ratio of benefits to costs for such requirements have ranged between 8 to 1 to 35 to 1".[35] Irrespective of how the economic effects outlined above are labelled, the cost benefit ratio of Title I is clearly positive.

The No Regulation Alternative

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[35] Martin, Mark E., "Accommodating the Handicapped: the Meaning of Discrimination Under Section 504 of the Rehabilitation Act", (a note) New York University Law Review, Vol 55, November 1980, p. 901.

In examining the "no regulation" alternative, there are clearly no costs. Therefore the analysis focuses on lost benefits, that is, social benefits that will be lost if the regulation is not promulgated. As discussed earlier, it is possible to treat each of the effects on the economy except administrative costs borne by EEOC as benefits. This approach would indicate that the annual total benefits lost by not promulgating Title I is $402,663,000. If a more traditional approach is taken and reasonable accommodation expenses are counted as costs rather than benefits, the lost annual benefits are still quite substantial at $386,190,000.

Biases in Estimates

It is important to briefly explain biases in the estimates provided above. First, the estimates of economic impact do not account for the transferability of accommodations. Whenever an accommodation is made, there is a possibility that the accommodation can be used for future hires. This suggests that while the provided expense estimates might be appropriate during an earlier period of compliance, future expenses will be much lower. It is also probable that some accommodations may be used by more than one individual with a disability, for example, a sign interpreter may serve several hearing impaired employees.

Second, while in the analysis above, costs of some structural accommodations were eliminated, some of the less expensive of these accommodations may still be included in the estimates. Since the elimination of these barriers are likely to be made as a result of Title II or Title III of the ADA, they overstate costs under the employment provisions of Title I.

Third, the number of newly covered employees, used in this analysis, does not exclude employees who are already covered by local statutes comparable or similar to the ADA. Failure to account for local statutes overestimates the number of Title I required accommodations. Thus, the economic effect of accommodation expenses, productivity gains and reduction in support

payments and increased tax revenues may be less than estimated. Fourth, reasonable accommodation estimates are based, in two instances, on experience implementing Section 503. This Section contains an affirmative action requirement, and the Department of Labor requires written affirmative action plans. It is possible that the costs of meeting the affirmative action requirement are, in part, reflected in contractors' estimations of the cost of reasonable accommodation. This is certainly the case when using the Business Roundtable estimate.

Fourth, the estimates do not account for tax deductions or tax credits available to firms making accommodations. Tax credits are available for small businesses that are equal to 50 percent of reasonable accommodation expenses between $250 and $10,250. The effect of these credits, using Berkeley Planning Associates breakdown of accommodations by cost ranges, is demonstrated in Table 2. It is based on an assumption that those

TABLE 2
CALCULATION OF TAX CREDITS

PERCENT	NUMBER	COST (DOLLARS)	TAX CREDIT	TOTAL TAX CREDIT
11.9%	250	$299.5	$149.75	$37,422.52
6.2%	130	$749.5	$374.75	$48,792.45
4.3%	90	$1,499.5	$749.75	$67,702.43
3.8%	80	$3,499.5	$1,749.75	$139,630.05
1.0%	21	$7,499.5	$3,749.75	$78,744.75
TOTAL				$372,292.20

eligible for the credit are employing between 15 and 25 employees. There are only one million newly covered employees in this group. The 1 percent monthly turnover rate and 3.5 percent availability rate indicate that the expected number of accommodations for these firms is 2,100. Thus the 63,000 new employment opportunities for disabled workers expected as a result of ADA, would produce tax credits offsetting reasonable accommodation expenses by about $372,292. The tax credits are underestimated, as some firms with more than 25 employees would qualify. Tax deductions will also lower costs, but sufficient information to estimate the full effect of the deductions is not readily available. While tax credits and deductions can be viewed as transfers rather than pecuniary costs, it indicates a lower level of expense may be required by businesses.

Finally, no attempt was made to place the estimates of economic effects in constant dollars. While a number of estimates are based on data collected around 1980, the estimate of administrative costs is very recent. As the rate of inflation during the 1980's was relatively low (for example, 5.5 percent from 1980 to 1985) and the estimates are quite rough, adjustments for inflation would not be useful. However, the failure to make adjustments will tend to overestimate administrative costs relative to other estimated costs.

Rationale for Choosing the Proposed Regulatory Action

As mentioned previously, the ADA does not provide much discretion in the Commission's development of implementing regulations. Therefore the true rationale for the proposed regulatory action is legislative direction. However, absent this direction, the adopted course of action seems to be the most appropriate one. Whether reasonable accommodation expenses are defined as costs or benefits, the Title I regulation is likely to have benefits exceeding costs.

A Statement of Statutory Authority

The statutory authority is Title I of the Americans with Disabilities Act.

Impact on Smaller Businesses

According to guidance published by the Small Business Administration, a Regulatory Flexibility Analysis (RFA) requires:

> the agencies of the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared and published in the Federal

Register describing the impact.[36]

A key rationale for this requirement is found in Section 2 (a)(2) of the Regulatory Flexibility Act,

> uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources.

The cost of reasonable accommodation is not uniform across firms but dependent on the number of disabled applicants and employees who need an accommodation. This will ultimately be related to the number of employment opportunities. Therefore a significant economic impact on small entities is not expected.

Because smaller firms have fewer employees, the rule can be expected to impose fewer costs on these employers as they will have fewer employment opportunities and fewer applicants and employees who need an accommodation. The values used to calculate reasonable accommodation expenses can be used as an example. Recall 15 million newly covered employees are expected under Title I. Of these, 14 million work for firms with more than 25 employees. There were 56,100 such firms. Based on a 1 percent monthly turnover rate, the expected proportion of employment opportunities

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[36] "The Regulatory Flexibility Act", U.S. Small Business Administration", October 1982, p. 11.

to be gained by disabled workers of 3.5 percent and recognizing that 50 percent of disabled workers require no accommodation, these firms would be expected to make 29,400 accommodations per year, or 0.524 accommodations per firm. Firms with between 15 and 25 employees only employ one million of the newly covered employees. Based on the same turnover and availability rates, these employers, which number 141,200, would be expected to make 2,100 accommodations per year, or 0.015 per firm. So on average, smaller firms would rarely make an accommodation and larger firms are more than 30 times more likely to make an accommodation. Further, firms with fewer than 15 employees are not covered by the Title I regulation and would not be required to make any accommodations.

The economic impact of the rule is also less on smaller firms, those between 15 and 25 employees, than on larger firms because smaller firms are not covered during the first two years that Title I is in effect. This lag benefits smaller businesses by directly reducing the economic burden and by allowing smaller employers to benefit from technological or production innovations in accommodations made by larger firms during the period when smaller firms are not covered.

Finally, it should be noted again that the Title I rule has no reporting requirements. A major concern regarding the inequitable impact of regulation on small firms is that reporting and accompanying record keeping requirements can be as costly to

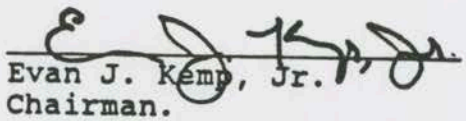
smaller firms as large ones. The absence of reporting requirements eliminates this concern for the Title I regulation.

In conclusion, the economic impact of the rule on small entities is not expected to be significant, with the vast majority of small businesses not expected to make an accommodation during a year. Additionally, there are aspects of the rule that result in small businesses having lower compliance costs than large businesses.

List of Subjects in 29 CFR Part 1630

Equal employment opportunity, Handicapped, Individuals with disabilities.

For the Commission,



Evan J. Kemp, Jr.
Chairman.

Accordingly, it is proposed to amend 29 CFR Chapter XIV by adding part 1630 to read as follows:

PART 1630 -- REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Sec.

Authority: 42 U.S.C. 12116.

1630.1 Purpose, applicability, and construction.

(a) Purpose. The purpose of this part is to implement Title I of the Americans with Disabilities Act (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) Applicability. This part applies to "covered

entities" as defined at section 1630.2(b).

(c) Construction. -- (1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 - 794a), or the regulations issued by Federal agencies pursuant to that title.

(2) Relationship to other laws. This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

1630.2 Definitions.

(a) Commission means the Equal Employment Opportunity Commission established by Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) 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.

(e) Employer. -- (1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include --

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an employer.

(g) Disability means, with respect to an individual --

(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) a record of such an impairment; or

(3) being regarded as having such an impairment.

(See section 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic 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; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits. -- (1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general

population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of "working," --

(i) The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors should be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities,

within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such 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.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such

limitation;

(2) 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

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having such an impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience and education requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See section 1630.3 for exceptions to this definition).

(n) Essential functions. -- (1) In general. The term essential functions means primary job duties that are intrinsic to the employment position the individual holds or desires. The term "essential

functions" does not include the marginal or peripheral functions of the position that are incidental to the performance of primary job functions.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence that may be considered in determining whether a particular function is essential includes but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(ii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The work experience of past incumbents in the job; and/or

(vi) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation. - (1) The term reasonable accommodation means:

(i) Any modification or adjustment to a job application process that enables a qualified individual with a disability to be considered

for the position such qualified individual desires, and which will not impose an undue hardship on the covered entity's business; or

(ii) Any modification or adjustment to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position, and which will not impose an undue hardship on the operation of the covered entity's business; or

(iii) Any modification or adjustment that enables a covered entity's employee with a disability to enjoy the same benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities, and which will not impose an undue hardship on the operation of the covered entity's business.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) Undue hardship. -- (1) In general. Undue hardship means, with respect to the provision of an

accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and cost of the accommodation needed under this Part;

(ii) The overall financial resources of the site or sites involved in the provision of the reasonable accommodation, the number of persons employed at such site, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the site or sites in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the site, including the impact on the ability of other employees to perform their duties and the impact on the site's ability to conduct business.

(3) Site means a geographically separate subpart of a covered entity.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired. Qualification standards may include a requirement that an individual not pose a direct threat to the health or safety of the individual or

others. (See section 1630.10 Qualification standards, tests and other selection criteria).

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation. The determination that an individual with a disability poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm; and

(3) The likelihood that the potential harm will occur.

1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."

(a) The terms disability and qualified individual with

a disability do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(1) 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).

(2) Illegal use of drugs means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(b) However, the terms disability and qualified individual with a disability may not exclude an individual who:

(1) Has successfully completed a supervised drug rehabilitation program and is no longer

engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or

(2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) It shall not be a violation of this part for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b)(1) or (2) of this section is no longer engaging in the illegal use of drugs. (See section 1630.16(c) Drug testing).

(d) Disability does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

(e) Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part.

1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination , right of return

from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(g) Selection and financial support for training, including, apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

The term "discrimination" includes but is not limited to the acts

in sections 1630.5 through 1630.13 of this part.

1630.5 Limiting, segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.

1630.6 Contractual or other arrangements.

(a) In general. It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(b) Contractual or other arrangement defined. The phrase contractual or other arrangement or relationship includes, but is not limited to, a relationship with an employment or referral agency; labor union, including collective bargaining agreements; an organization providing fringe benefits to an employee of the covered entity; or an organization providing training and apprenticeship programs.

(c) Application. This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

1630.7 Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

1630.8 Relationship or association with an individual with a disability.

It is unlawful for a covered entity to exclude or

otherwise deny equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from 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 ADA.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

1630.10 Qualification standards, tests, and other selection criteria. --

(a) In general. It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and

is consistent with business necessity.

(b) Direct Threat as a qualification standard. Notwithstanding paragraph (a) of this section, a covered entity may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others. (See section 1630.2(r) defining direct threat).

1630.11 Administration of tests.

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

1630.12 Retaliation and coercion.

(a) Retaliation. It is unlawful to 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 to enforce any provision contained in this part.

(b) Coercion, interference or intimidation. It is unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this Part.

1630.13 Prohibited medical examinations and inquiries.

(a) Pre-employment examination or inquiry. Except as permitted by section 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) Examination or inquiry of employees. Except as permitted by section 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity.

1630.14 Medical examinations and inquiries specifically permitted.

(a) Acceptable pre-employment inquiry. A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

(b) Employment entrance examination. - A covered entity may require a medical examination after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination, if all entering employees in the same job category are subjected to such an examination regardless of disability.

(1) Information obtained regarding the medical