

DEPARTMENT OF JUSTICE**28 CFR Parts 35 and 36**

[CRT Docket No. 2004–DRS01; AG Order No. 2736–2004]

RIN 1190–AA46 and 1190–AA44

**Civil Rights Division;
Nondiscrimination on the Basis of
Disability in State and Local
Government Services;
Nondiscrimination on the Basis of
Disability by Public Accommodations
and in Commercial Facilities****AGENCY:** Department of Justice, Civil Rights Division.**ACTION:** Advance notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is issuing this Advance Notice of Proposed Rulemaking (ANPRM) in order to begin the process of adopting Parts I and III of the revised guidelines implementing the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA),¹ published by the Architectural and Transportation Barriers Compliance Board (Access Board) on July 23, 2004, at 69 FR 44083.² The ADA requires the Department to adopt enforceable accessibility standards that are “consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board” (42 U.S.C. 12186). The Department adopts and enforces standards consistent with the Access Board’s guidelines under the Department’s regulations implementing Title II (Subtitle A) and Title III of the ADA as the ADA Standards for Accessible Design (ADA Standards). Prior to their adoption by the Department, the revised Access Board guidelines are effective only as guidance to the Department; they have no legal effect on the public until the Department issues a final rule adopting revised ADA Standards. In this ANPRM, the current, legally enforceable ADA Standards will be referred to as the “current ADA Standards,” while the revisions that will be proposed in the NPRM, based on Parts I and III of the revised ADA and ABA Accessibility Guidelines, will be referred to as the

“revised ADA Standards.” The Access Board’s revised ADA Accessibility Guidelines will be cited as “ADAAG.”

The purpose of this ANPRM is twofold: To solicit public input on various issues relating to the potential application of the revisions to the ADA Standards and to obtain background information for the regulatory assessment that the Department must prepare in the process of adopting the revisions to the ADA Standards.

DATES: All comments must be received by January 28, 2005.

ADDRESSES: Submit electronic comments and other data to adaanprm.org or www.regulations.gov. See **SUPPLEMENTARY INFORMATION—Electronic Submission of Comments and Electronic Access** for file formats and other information about electronic filing.

Address all written comments concerning this ANPRM to P.O. Box 1032, Merrifield, VA 22116–1032.

FOR FURTHER INFORMATION CONTACT: Anne Beckman or Kate Nicholson, Attorneys, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department’s toll-free ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

You may obtain copies of this rule in large print, audiotape, or computer disk by calling the ADA Information Line at (800) 514–0301 (voice) and (800) 514–0383 (TTY). This rule is also available in an accessible format on the ADA Home Page at www.ada.gov.

SUPPLEMENTARY INFORMATION:**Electronic Submission of Comments and Electronic Access**

You may submit electronic comments to adaanprm.org or www.regulations.gov. You may view an electronic version of this proposed rule at www.regulations.gov. This rule is also available in an accessible format on the ADA Home Page at www.ada.gov. When submitting comments electronically, you must include CRT Docket No. 2004–DRS01 in the subject box and you must include your full name and address.

Inspection of Comments

All comments will be available to the public online at adaanprm.org and, by appointment, during normal business hours, at the office of the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, located at 1425 New York Avenue, Suite 4039, Washington, DC 20005. To arrange an

appointment to review the comments, please contact the ADA Information Line listed above.

Purpose

On July 26, 1990, President George H.W. Bush signed into law the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*), a comprehensive civil rights law prohibiting discrimination on the basis of disability. In 2001, President George W. Bush underscored the nation’s commitment to ensuring the rights of over 50 million individuals with disabilities nationwide by announcing the New Freedom Initiative (www.whitehouse.gov/infocus/newfreedom). The New Freedom Initiative builds upon the legacy of the ADA by promoting improved access to assistive and universally designed technology, educational opportunities, the workplace, and community living for individuals with disabilities. The New Freedom Initiative also expressly recognizes the importance of ADA enforcement. The Access Board’s publication of revised accessibility guidelines is the culmination of a long-term effort to facilitate ADA compliance and enforcement by eliminating inconsistencies among Federal accessibility requirements and between Federal accessibility requirements and State and local building codes. In support of this effort, the Department is announcing its intention to adopt, in a separate Notice of Proposed Rulemaking (NPRM) to follow this ANPRM, standards consistent with Parts I and III of the Access Board’s revised guidelines as the ADA Standards for Accessible Design. To facilitate this process, the Department is seeking public comment on the issues discussed in this notice.

The ADA and Department of Justice Regulations

The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life and, in addition, requires that newly designed and constructed or altered public accommodations and commercial facilities be readily accessible to and usable by individuals with disabilities. Under the ADA, the Department is responsible for issuing regulations to implement Title II and Title III of the Act, except to the extent that transportation providers subject to Title II or Title III are regulated by the Department of Transportation.

Title II applies to State and local government entities, and, in Subtitle A, protects qualified individuals with

¹ Part II of the Architectural Transportation Barriers Compliance Board’s revised guidelines applies to facilities subject to the ABA. Regulations implementing the ABA are issued by the Department of Defense, the Department of Housing and Urban Development, the General Services Administration, and the U.S. Postal Service.

² The Access Board’s revised ADA Accessibility Guidelines are available on the Access Board’s Web site at www.access-board.gov.

disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition of discrimination established by section 504 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act) (29 U.S.C. 794) (hereinafter, Section 504), to all activities of State and local governments regardless of whether these entities receive Federal financial assistance (42 U.S.C. 12131 *et seq.*). Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of twelve categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities like factories, warehouses, or office buildings)—to comply with the ADA Standards (42 U.S.C. 12182 *et seq.*).

On July 26, 1991, the Department issued its final rules implementing Title II and Title III, which are codified at 28 CFR part 35 (Title II) and part 36 (Title III). Appendix A of the Title III regulation, at 28 CFR part 36, contains the current ADA Standards, which were based upon the ADAAG published by the Access Board on the same date. Under the Department's regulation implementing Title III, places of public accommodation and commercial facilities are required to comply with the current ADA Standards with respect to newly constructed or altered facilities. By contrast, under the regulation implementing Title II, State and local government entities are currently permitted to choose to apply either the requirements contained in the Uniform Federal Accessibility Standards (UFAS) or those contained in the ADA Standards with respect to their newly constructed or altered facilities. For greater uniformity, when the Department proposes to adopt the revised ADA Standards, the Department will also propose to withdraw the option of using UFAS under Title II.

The Roles of the Access Board and the Department of Justice

The Access Board was established by section 502 of the Rehabilitation Act, 29 U.S.C. 792. The Board consists of thirteen public members appointed by the President, of whom a majority must be individuals with disabilities, and twelve Federal agencies designated by law, including the Department of Justice

and the Department of Transportation. The ADA requires the Access Board to “issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter * * * to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities” (42 U.S.C. 12204). The ADA requires the Department of Justice to issue regulations that include enforceable accessibility standards applicable to facilities subject to Title II or Title III that are consistent with the minimum guidelines issued by the Access Board (42 U.S.C. 12134, 12186).

The Department of Justice was extensively involved in the development of the ADAAG. As a Federal member of the Access Board, the Department voted to approve the revised guidelines. Although the enforceable standards issued by the Department under Title II and Title III must be consistent with the minimum guidelines published by the Access Board, it is the responsibility solely of the Department of Justice to promulgate standards and to interpret and enforce those standards.

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

The Revised Guidelines

The revised ADA and ABA Accessibility Guidelines are the product of ten years of effort to modify and update the current guidelines, reflecting compromise and the cooperative efforts of a host of private and public entities. Part I provides scoping requirements for facilities subject to the ADA; scoping is a term used in the revised guidelines to describe requirements (set out in Parts I and II) that prescribe what elements and spaces and, in some cases, how many, must comply with the technical specifications set out in Part III. Part II provides scoping requirements for facilities subject to the ABA, and Part III provides uniform technical specifications for facilities subject to either statute. This revised format is intended to eliminate unintended

conflicts between the two Federal accessibility standards and to minimize conflicts between the Federal regulations and the model codes that form the basis of many State and local building codes.

Since 1998, the Access Board has amended ADAAG four times, adding specific guidelines in the following areas: State and local government facilities (63 FR 2000, Jan. 13, 1998); building elements designed for use by children (63 FR 2060, Jan. 13, 1998); play areas (65 FR 62497, Oct. 18, 2000); and recreation facilities (67 FR 56352, Sept. 3, 2002). These amendments to ADAAG have not previously been adopted by the Department as ADA Standards.

The revisions to ADAAG that were published by the Access Board on July 23, 2004, represented the culmination of a lengthy review process. In 1994, the Access Board began the process of updating the original ADAAG by establishing an advisory committee comprised of members of the design and construction industry, the building code community, State and local government entities, and people with disabilities. In 1999, based largely on the report and recommendations of this advisory committee,³ the Access Board issued a proposed rule to jointly update and revise its ADA and ABA accessibility guidelines, 64 FR 62248–01 (Nov. 16, 1999). In response to its rule, the Access Board received more than 2,500 comments from individuals with disabilities, affected industries, State and local governments, and others. The Access Board provided further opportunity for participation by holding public hearings throughout the nation. From the beginning, the Access Board also worked vigorously to harmonize the ADA and ABA Accessibility Guidelines with industry standards and model codes that form the basis for many state and local building codes. The Access Board released an interim draft of its guidelines to the public in April 2002, 67 FR 15509, in order to provide an opportunity for entities with model codes to consider amendments that would promote further harmonization. By the date of its final publication on July 23, 2004, 69 FR 44083, the revised ADA Accessibility Guidelines had been the subject of extraordinary public participation and review. Through this ANPRM, the Department is announcing its intention to publish a proposed rule that will

³ After a two-year process of collaboration with the Access Board, the Advisory Committee issued “Recommendations for a New ADAAG” in September 1996.

adopt revised ADA Standards consistent with all of the amendments to ADAAG since 1998.

The Department's Request for Comments

Before publishing a proposed rule, the Department is seeking public comment on the issues discussed below. These issues have been divided into four substantive sections in this ANPRM: I. General Issues; II. Specific Issues; III. Miscellaneous Matters; and IV. Regulatory Assessment Issues.

Because the Department, as a member of the Access Board, has already had the opportunity to review comments provided to the Access Board during its development of the amendments to ADAAG, it is not necessary to resubmit those comments to the Department. In addition to seeking comments in response to the specific questions raised in this ANPRM, the Department is particularly interested in receiving comments from covered entities and from individuals with disabilities about the potential application of the new or revised ADAAG requirements as they may apply to existing facilities.

I. General Issues

The prospect of adopting revised ADA Standards raises a number of general issues, ranging from setting an effective date for the application of the revised ADA Standards to determining what effect the new provisions will have on those elements of facilities that are already in compliance with the current ADA Standards. Responses should clearly identify the specific question being addressed according to the numbered questions in this document.

Effective Date: Time Period

Current Approach. The Department must set an effective date for the application of the revised ADA Standards to facilities that will be newly constructed or altered following the publication of a final rule. When the ADA was enacted, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Title II and Title III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. New construction under Title II and alterations under either Title II or Title III had to comply with the design standards on that date. For new construction under Title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—eighteen months after the ADA

Standards were published by the Department.⁴

Possible New Approaches. The Department is seeking comment on the following three options.

Option I: Eighteen months. Under this option, the effective date of the proposed revised ADA Standards would be eighteen months after publication of the final rule—the same time period used for the effective date of the ADA as a whole and for the effective date of the current ADA Standards with respect to new construction under Title III. Although this time period has the advantage of ample precedent, it was originally used in the context of a new law with which there was little or no familiarity or experience. It may be inappropriately long in the current context.

Option II: Six months. Under the second option, the effective date of the proposed revised ADA Standards would be six months after publication of the final rule—the time period used for newly constructed and altered facilities subject to Subtitle A of Title II of the ADA and for altered facilities subject to Title III. The Department is considering this shorter period of time because the changes in scoping and technical specifications to the revised ADA Standards are primarily incremental. Further, those requirements that are new (for elements and spaces that are not addressed in the current ADA Standards) have been developed with extensive public participation and, in some cases, have been available to the public through the amended editions of ADAAG for several years. Finally, the new format and organization of the revised ADA Standards would follow the format and organization of the model codes and should be more familiar to covered entities and design professionals than were the current ADA Standards when adopted. The Department recognizes, however, that because covered entities may have large ongoing construction projects, such entities may need longer than this proposed six-month period to incorporate the final changes to the revised ADA Standards into the design of those projects.

Option III: Twelve months. Under the third option, the effective date of the revised ADA Standards would be twelve

months after publication of the final rule. This option shortens the time period envisioned by Option I, while providing more time than Option II in order to allow for the integration of the revised ADA Standards into larger construction projects.

Question 1. Should the effective date of the proposed revised ADA Standards be modeled on the effective date used to implement the current ADA Standards—eighteen months after publication of the final rule—or a shorter period? If you favor a shorter period, please indicate which period you favor and provide as much detail as possible in support of your view.

Effective Date: Triggering Event

The term “triggering event” identifies the event or action that compels compliance with the ADA Standards. The Department’s regulations implementing Title II (28 CFR Part 35) and Title III of the ADA (28 CFR Part 36) establish the separate triggering events for new construction and alterations that are explained below. The Department’s experience to date indicates that these triggering events work well; therefore, the Department is reluctant to change them. The Department recognizes, however, that ADAAG now includes requirements for types of facilities, such as recreation and play areas, that may pose design and construction issues compelling a different result.

Current Approach. Title III of the ADA and the implementing regulations provide that covered entities must design and construct facilities “for first occupancy” after the effective date in accordance with the current ADA Standards (28 CFR 36.401). Thus, for purposes of Title III, the triggering event for newly constructed facilities, which is dictated by statute, is first occupancy. The Title III regulation defines “first occupancy” in relation to the completion of the application for a building permit (which had to have been completed less than twelve months before the effective date) and the issuance of a certificate of occupancy (which had to have been completed after the effective date). With respect to altered facilities under Title III, the triggering event is the date “physical alteration begins” (28 CFR 36.402(a)(2)). The implementing regulation for Title II provides that the triggering event for both new construction and alterations is the commencement of construction (28 CFR 35.151).

Possible Additional Approach. To the extent applicable, the Department intends to continue to use the same triggering event for each category

⁴ Subtitle A of Title III of the ADA, at 42 U.S.C. 12183, prohibits the design or construction of facilities that are not readily accessible to and usable by individuals with disabilities when such facilities are intended for first occupancy more than 30 months after enactment of the ADA, except in cases of structural impracticability. This requirement is implemented in the Department’s Title III regulation at 28 CFR 36.401.

described above; that is, for new construction under Title III, first occupancy;⁵ for alterations under Title III, when physical alteration begins; and under Title II, for both new construction and alterations, the commencement of construction. The Department is concerned, however, that while these triggering events are appropriate for most building situations, they may not necessarily be appropriate for all of them—particularly if there are Title III facilities that do not require building permits or that do not receive certificates of occupancy. The Department is concerned that, as applied to these different types of facilities, the triggering events established under the Title II and Title III regulations may be difficult to apply. Therefore, the Department is considering “first use” as an alternative trigger for such facilities.

Question 2. The Department is asking the public to identify any facilities for which the current triggering events might prove unworkable. Are there facilities covered by the revised ADA Standards that are subject to Title III for which first occupancy/physical alteration do not apply in the new construction/alteration context? Please be specific about the type of facility that would be affected, and what other event, such as “first use,” would work better for each specified type of facility. Are there facilities subject to Title II for which commencement of construction would be difficult to apply? Please be specific about the type of facility, and what other event, such as “first use,” would work better for each specified type of facility.

Revised ADA Standards: Existing Facilities

As noted above, the Department anticipates proposing revised ADA Standards for new construction and alterations that are consistent with ADAAG. In making this proposal, one of the most important issues that the Department must address is the effect that new or changed ADA Standards will have on the continuing obligation of public accommodations to remove architectural, transportation, and communication barriers in existing facilities to the extent that it is readily achievable to do so. This issue has not been addressed in ADAAG because it is outside of the scope of the Access Board’s authority under the ADA.

Responsibility for implementing Title III’s requirement that public accommodations eliminate existing architectural barriers where it is readily achievable to do so rests solely with the Department of Justice.

The Department’s current regulation implementing Title III of the ADA, 28 CFR 36.304, establishes the requirements for readily achievable barrier removal by public accommodations. Under this regulation, the Department uses the ADA Standards as a guide to identify what constitutes an architectural barrier. Once adopted, the revised ADA Standards will present a new reference point for Title III’s requirement to remove the architectural barriers in existing places of public accommodation. The Department is concerned that the incremental changes in ADAAG may place significant cost burdens on businesses that have already complied with the ADA Standards in their existing facilities. The Department therefore seeks to strike an appropriate balance to ensure that people with disabilities are able to achieve access to buildings and facilities without imposing unnecessary financial burdens on existing places of public accommodation with respect to their continuing obligations under the readily achievable barrier removal requirement.

The Department is considering several ways in which to reduce such financial burdens. One approach is to establish a safe harbor under which the Department would deem compliance with scoping and technical requirements in the current ADA Standards by elements in existing facilities to constitute compliance with the ADA for purposes of meeting barrier removal obligations. Another possible approach is to reduce the scoping requirements for some of the new or changed requirements as they are applied to existing facilities. Yet another potential approach is to determine that certain new or revised technical requirements are inappropriate for barrier removal and thus would not be required in satisfaction of a barrier removal obligation. These approaches can be used alone or in combination.

Option I: Safe harbor for compliant elements. This option would provide a safe harbor for any elements of existing facilities that are in compliance with the specific requirements (scoping and technical specifications) of the current ADA Standards. For this purpose, compliance with the scoping and technical requirements of the current ADA Standards would be determined on an element-by-element basis in each covered facility; that is, only those elements in each covered facility that

are in compliance with applicable scoping and technical requirements in the current ADA Standards would be subject to the safe harbor. Elements that are addressed for the first time in the revised ADA Standards, however, would not be subject to the safe harbor.

Several considerations support this approach. To the extent places of public accommodation have complied with the specific scoping and technical requirements of the current ADA Standards, it would be an inefficient use of resources to require them to retrofit simply to comply with the revised ADA Standards if the change provides only a minimal improvement in accessibility. In addition, covered entities would have a strong disincentive to comply voluntarily with the readily achievable barrier removal requirement if, every time the ADA Standards are revised, they are required once again to retrofit elements just to keep pace with the current standards.

The Department recognizes that there are also considerations opposing this approach. When adopted, some of the revised ADA Standards will reflect up-to-date technologies that could provide critical access for individuals with disabilities in certain contexts that is not provided under the current ADA Standards. While the incremental benefit of the revisions may be minimal with respect to some elements, with respect to others the revised ADA Standards could confer a significant benefit on some individuals with disabilities that would be forgone if this option is adopted. Because there are valid arguments on both sides of this issue, the Department is seeking public comment on the issue of whether or not to provide a safe harbor for design elements that comply with the current ADA Standards.

This safe harbor option would, of course, have no effect on noncompliant elements. To the extent that elements in existing facilities are not already in compliance with scoping and technical requirements in the current ADA Standards, existing public accommodations would be required to remove barriers, to the extent readily achievable, to make elements comply with the revised ADA Standards.

Here is an example of how that option would work. The current ADA Standards address maximum side reach ranges, which are required to be no higher than 54 inches. The revised ADA Standards lower that range to 48 inches (ADAAG 308.3). If this option was adopted, a public accommodation, e.g., a hotel chain, that had lowered its light switches to 54 inches or an entity that had lowered its pay phones to 54 inches

⁵ If the Department decides to use the six-month effective date of Option II in Question 1, above, the application of the two-step test for first occupancy (building permit and certificate of first occupancy) currently used for new construction under Title III would be modified to fit within that period.

would not be required to do further barrier removal to reduce those elements to 48 inches. However, if this option was not adopted, even existing facilities that had complied with the current ADA Standards by ensuring that all required accessible elements were no higher than 54 inches would be required to retrofit those elements to lower them to 48 inches, assuming it was readily achievable to do so. Under both options, however, existing facilities that had not complied with the current ADA Standards (whose required accessible elements were, for example, located 60 inches high) would still be required to undertake barrier removal to lower them to 48 inches, if readily achievable.

This option involves only those elements that are addressed by, and in compliance with, specific requirements (scoping and technical specifications) in the current ADA Standards. Elements that will be addressed for the first time in the revised ADA Standards would not be eligible for the safe harbor.

Question 3. Should the Department provide any type of safe harbor so that elements of facilities already in compliance with the current ADA Standards need not comply with the revised ADA Standards? Please provide as much detail as possible in support of your view.

Option II: Reduced scoping for specified requirements. The scoping requirements in the revised ADA Standards apply to new construction and alterations. Under a reduced scoping option, the Department would, for the purposes of barrier removal, provide an alternative set of reduced scoping requirements applicable to certain specific new or changed technical requirements in the revised ADA Standards. Examples of such new technical requirements might include specific elements in the guidelines adopted for play areas and recreation facilities.

For example, ADAAG now requires a swimming pool over 300 feet in perimeter to have two accessible means of entry to the pool (ADAAG 242.2). The Department anticipates adopting new standards based on this requirement. Under the current ADA Standards, while there have been requirements addressing parking, the entrance to the facility, common areas, and the route to the pool, there has been no scoping or technical requirement addressing entry into and exit from the pool itself.

In implementing this new requirement with respect to existing facilities pursuant to the readily achievable barrier removal requirement, the Department is considering whether it might be appropriate to state that

providing only one accessible means of entry to an existing pool satisfies the obligation for readily achievable barrier removal. Even with this reduced scoping, the readily achievable defense would still be available to covered entities that cannot afford to provide even one means of entry. Under this option, however, even if it would be readily achievable for that entity to provide two accessible means of entry, it would only be required to provide one. This is just one example of a requirement for which reduced scoping might be appropriate. Others might include the minimum number of accessible saunas and steam rooms required in existing facilities or the minimum number of accessible boat slips required in existing boating facilities.

Option III: Exemption from specified requirements. The Department is also considering whether to identify particular elements in the scoping and technical requirements in the revised ADA Standards that will not be required for barrier removal. Among the possibilities is the requirement that handrails on stairs must meet accessibility requirements even in buildings that have elevator access (ADAAG 210). Under this option, the Department could determine that entities will not be required, for purposes of compliance with the readily achievable barrier removal requirement, to make handrails on stairs in an already existing elevator-accessible facility comply with the scoping and technical requirements in the revised ADA Standards.

There is precedent for this third option in the Department's current regulations, which currently exempt employee work areas from any obligation to retrofit pursuant to the readily achievable barrier removal requirement. Because the purpose of Title III is to ensure that public accommodations are accessible to their clients and customers, it is the Department's longstanding view that the barrier removal requirement does not apply to areas used exclusively as employee work areas (28 CFR part 36, App. B). The Department intends to continue this exemption in the new regulations but notes that, notwithstanding this exemption, Title I of the ADA requires employers to provide reasonable accommodation for any employee with a disability. Thus, to the extent any provisions in the revised ADA Standards address elements or spaces in work areas, compliance with those provisions with respect to those elements or spaces will not be necessary to comply with an entity's obligations

under the readily achievable barrier removal requirement.

Question 4. Reducing or exempting specified requirements.

a. Should the Department adopt Option II, and develop an alternative set of reduced scoping requirements for the barrier removal obligation? If so, which specific requirements or elements should be addressed? If possible, provide detailed information about the costs or difficulties that would be incurred in making the modification.

b. Should the Department adopt Option III, and exempt certain scoping and technical requirements in the revised ADA Standards that will not be required for barrier removal? If so, which specific requirements or elements should be addressed? If possible, provide detailed information about the costs or difficulties that would be incurred in making the modification.

II. Specific Issues

The prospect of adopting revised ADA Standards also raises a number of issues for the Department with respect to specific provisions, ranging from whether altered detention and correction cells should be required to be accessible to what kinds of housing currently classified as transient should be reclassified as residential.

Reduced Scoping for Large Assembly Facilities

The ADAAG section 221 will reduce the number of wheelchair spaces and companion seats required in assembly areas that seat more than 500 patrons. The current ADA Standards provide that assembly areas with more than 500 seats must provide six wheelchair spaces plus one additional wheelchair space for each additional 100 seats. ADAAG provides that assembly areas that have 501 to 5000 seats must provide six wheelchair spaces plus one additional wheelchair space for each additional 150 seats (or fraction thereof) between 501 and 5000. Assembly areas that have more than 5000 seats must provide 36 wheelchair spaces plus one additional wheelchair space for each 200 seats (or fraction thereof) over 5000. Both the current ADA Standards and ADAAG require assembly areas to provide a companion seat adjacent to each wheelchair space.

The Department has been asked whether the regulations requiring the maintenance of accessible features in covered facilities would require existing assembly areas that comply with the scoping of the current ADA Standards to maintain that level of scoping, or if those assembly areas would be permitted to reduce the number of

wheelchair locations and companion seats to the level established in ADAAG. The Department's regulations contain two provisions that would apply to this situation. The regulations implementing Title II and Title III both provide that covered entities are to maintain in operable condition "those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities" (28 CFR 35.133 and 36.211). In addition, the current ADA Standards prohibit alterations that decrease accessibility below the requirements for new construction in effect at the time of the alteration, 28 CFR pt. 36, App. A, 4.1.6 (1) (a). Because these provisions clearly establish that covered entities must maintain only the required level of accessibility, the Department expects that the operators of existing assembly areas who want to adjust the number of wheelchair spaces in their facility to comply with the revised ADA Standards will be permitted to do so.

Alteration of Cells in Correctional Facilities

ADAAG establishes requirements for the design and construction of cells in detention and correctional facilities. The Access Board accepted comments on this issue during two separate rulemaking proceedings: the rulemaking that developed the guidelines for State and local government facilities completed in 1998, and the rulemaking that developed the guidelines that the Department is now proposing to adopt. The Department anticipates that it will propose revised ADA Standards that are consistent with the ADAAG requirements. However, when it adopted these new requirements, the Access Board specifically deferred one decision to the Attorney General. ADAAG sections 232.2 and 232.3 provide that "Alterations to cells shall not be required to comply, except to the extent determined by the Attorney General." This provision first appeared in the Access Board's 1999 proposed rule. At that time, the Access Board explained that—

In publishing final amendments for State and local government facilities, the Board acknowledged that prison operators commenting on the proposed amendments urged that access not be required in altered correctional facilities because some existing facilities would not be able to support inmates with disabilities even if cells were made accessible. These comments also pointed to difficulties in complying due to design constraints unique to correctional facilities. In response, the Board had reserved a proposed scoping requirement for altered cells, but noted that public entities, including correctional entities, have an obligation to

provide program access, as required by the Department of Justice (DOJ) title II regulations. Further, the Board noted that the program access requirement may effectively determine the degree of access necessary in an alteration. 64 FR 62259 (Nov. 16, 1999).

The Department anticipates that when it proposes to adopt ADA Standards consistent with ADAAG requirements applicable to facilities subject to Title II, the Department will establish requirements for alterations to cells. Therefore, the Department is now seeking public comment about the most effective means to ensure that existing correctional facilities are made accessible to prisoners with disabilities. The Department offers the three following alternatives for consideration:

Option 1: Require all altered elements to be accessible. The first option is to maintain the current policy applicable to other ADA alterations requirements. Under the current regulations, when a facility is altered, each altered element and space must comply with the applicable provisions of the ADA Standards. Applying this rule would require correctional facilities to provide accessible elements as existing cells are altered until the required number of accessible cells has been provided.

Option 2: Permit substitute cells to be made accessible within the same facility. The second option is to modify the alterations requirement by permitting the correctional authorities to meet their obligation by providing the required accessible features in cells within the same facility other than those specific cells in which alterations are planned. This would provide flexibility in deference to the unique circumstances presented in correctional and detention facilities by permitting local officials to choose between providing accessibility in the altered area or providing an appropriate accessible cell elsewhere in the altered facility. This alternative responds to the concern that the ADA's alterations provision as applied to correctional facilities may result in piecemeal accessibility that does not always provide the level of accessibility needed by individuals with disabilities. This option permits correctional and detention facility operators to select the most appropriate location for the accessible cells, while retaining the requirement for providing accessibility at the time of an alteration.

Option 3: Permit substitute cells to be made accessible within a prison system. This option also responds to the expressed concern that the alterations requirement as applied to prisons results in piecemeal accessibility. The Department's Title II regulation requires

public entities to operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities (28 CFR 35.150). The idea behind this alternative is to focus on ensuring that prisoners who have disabilities are housed in the facilities that best meet their needs. Under this option, correctional officials would not be required to include accessible cells in each facility that is being altered. Instead, they would be required to provide an equivalent accessible cell in an existing facility that is sufficiently accessible to ensure that prisoners can have access to the programs offered in the facility where they are housed. This option would address concerns that have been expressed that piecemeal alterations of cells may result in accessible cells being located in older facilities in which the existing construction provides limited opportunities to provide access to other areas of the facility.

If this option is adopted, the Department anticipates that the regulation would specify that public entities that elect to provide accessibility through this alternative for detention and correctional facilities would be required to ensure that prisoners with disabilities are housed in facilities appropriate to the level of confinement that would apply to any other individual sentenced for a similar offense. Such facilities would also be required to make available a range of programs and benefits similar to that made available to the general prison population.

Question 5. Should the Department retain the current ADA requirement to make each altered facility accessible to the extent required by the ADA Standards or should it adopt an alternative approach to ensure accessibility in correctional institutions? If you favor an alternative approach, please indicate which approach you favor and provide as much detail as possible in support of your view.

Recreation Facilities: Golf Courses

ADAAG now establishes comprehensive requirements for the design and construction of accessible golf courses. In addition to establishing scoping and technical requirements for individual elements in or serving the golf course, section 206.2.15 provides that—

At least one accessible route shall connect accessible elements and spaces within the boundary of the golf course. In addition, accessible routes serving golf car rental areas; bag drop areas; course weather shelters

complying with 238.2.3; course toilet rooms; and practice putting greens, practice teeing grounds, and teeing stations at driving ranges complying with 238.3 shall comply with Chapter 4 except as modified by 1006.2. EXCEPTION: Golf car passages complying with 1006.3 shall be permitted to be used for all or part of accessible routes required by 206.2.15.

The Department anticipates that it will propose to adopt the ADAAG requirements for golf courses. However, the Department is aware that these requirements may raise operational issues that are within the purview of the Department's enforcement responsibilities.

The Department has been asked whether, and under what circumstances, a golf course must make specially designed or adapted golf cars available to persons with mobility impairments who are not able to walk from a golf car passage to the fairways or to the green.

The Department is considering addressing this issue in its ADA regulations by requiring each golf course that provides golf cars to make at least one, and possibly two, specialized golf cars available for the use of persons with disabilities, with no greater advance notice to be required from the disabled golfer than from other golfers. The Department believes that relevant considerations in determining whether and under what circumstances this requirement should be imposed include (i) whether the golf course makes golf cars available to golfers who are not disabled, (ii) the burden that such a requirement would impose on golf course facilities, and (iii) whether the course requires the use of golf cars during play.

The Department understands that the principal type of special golf car currently available is a one-seater with hand controls and a swivel seat (the swivel seat enables the golfer to play from the car). Golf course operators have expressed concern in the past that the available one-person cars (i) tip over easily on steep terrain and (ii) are too heavy for green use. Producers of newer designs for one-person cars claim to have overcome these problems.

Question 6. To what extent should golf courses be required to make accessible golf cars available to people with disabilities? Please provide as much detail as possible in support of your view. The Department also requests specific information concerning the extent to which the one-person machines on the market are, in fact, stable, lightweight, and moderately priced. The Department also requests information about whether golf cars are

being manufactured that are readily adaptable for the addition of hand controls and swivel seats and whether such cars are otherwise suitable for driving on fairways and greens.

Coverage of Homeless Shelters, Halfway Houses, Transient Group Homes, and Other Social Service Establishments

For the first time, ADAAG includes specific scoping and technical provisions that apply to new construction and alteration of residential facilities. Residential facilities are facilities that contain dwelling units used primarily as long-term residences. Residential facilities can be distinguished from transient lodging facilities, which are facilities that provide short-term accommodations used primarily for sleeping (such as hotels). Previously existing ADAAG requirements for transient lodging facilities have been revised. As part of this revision, the Access Board deleted section 9.5 of the 1991 ADAAG, which established scoping and technical requirements for homeless shelters, group homes, and similar social service establishments. This deletion creates a gap in coverage that the Department's regulation must address.

The Department anticipates that when the ADA Standards are revised, the Department will provide that the facilities now covered by section 9.5 will be subject to the ADAAG requirements for residential facilities rather than the requirements for transient lodging. The Department considers this approach to be the most appropriate because the listed facilities are subject to the ADA because of the nature of the services that they provide, not the duration of those services. Program participants may be housed on either a short-term or a long-term basis in facilities such as shelters, halfway houses, and group homes.

The Department anticipates that this classification will also make it easier for the covered entities to satisfy their obligations under both the ADA and Section 504. The Department believes that many of these listed entities are recipients of Federal financial assistance from the Department of Housing and Urban Development (HUD). Therefore, they are subject to the requirements of both HUD's Section 504 regulation and the ADA Standards. ADAAG's specifications for the design of residential dwelling units have been coordinated with HUD's Section 504 requirements to eliminate inconsistencies and potential conflicts. The specifications for transient lodging

units have not been similarly coordinated.

Therefore, if the Department continues to treat these listed facilities as transient lodging, the facilities may be subject to the provisions of two separate, and possibly conflicting, regulatory requirements for design and construction. If the Department modifies its current ADA Standards to permit these facilities to be designed in compliance with the requirements applicable to residential dwelling units, the potential conflict will be eliminated.

The Department is seeking public comment on this proposal.

Equipment Issues

In ADAAG, the Access Board has established guidelines applicable to a range of fixed equipment—equipment that is built into or permanently attached to a new or altered facility—that is subject to the ADA. The Department intends to adopt regulations based on these ADAAG specifications to govern the installation of newly manufactured equipment in new construction or alterations. Because the Access Board's jurisdiction extends only to the design, construction, and alteration of buildings and facilities, ADAAG does not address operational issues such as the acquisition of previously owned equipment, and it does not address coverage of movable or portable equipment or other personal property such as furniture. These issues are, however, within the jurisdiction of the Department. Therefore, the Department is seeking comments on the issues discussed below.

Previously Owned Fixed Equipment. The Department is aware that some building elements to which the ADA Standards apply, such as ATMs or amusement rides, utilize manufactured equipment that becomes built into the structure of a facility (so-called fixed equipment), which differs from equipment that continues to be portable or movable (so-called free-standing equipment). This fixed equipment may be new for the covered entity, but it is not necessarily newly manufactured. Some businesses traditionally elect to conserve costs by installing previously owned equipment and have expressed their concern that the Department will consider such fixed equipment as new for purposes of compliance with the revised ADA Standards merely because its first use occurs after the effective date of the revised ADA Standards. The Department generally views the installation of previously used equipment in a new location as an alteration, rather than new construction. Therefore, only the elements of the

facility that are actually altered, such as the route to the equipment, the mounting height, or the entrance that provides access to the equipment must comply with the revised Standards. Previously owned equipment installed as fixed equipment will not be treated as new for purposes of compliance with the revised ADA Standards.

Application of ADA Standards and ADA to Free-Standing Equipment. The Department is also aware that the public has expressed some uncertainty with respect to whether the ADA Standards apply to free-standing equipment, such as soft-drink dispensers, video arcade machines, free-standing ATMs, and furniture. Because ADAAG is intended to implement the ADA requirements applicable to the design, new construction, and alteration of buildings and facilities, the revised ADA Standards will apply directly only to fixed equipment—as described above, equipment that becomes built into the structure of a facility—and not to free-standing equipment.

The ADA itself, however, extends beyond the boundaries of new construction and alterations. The Department is required to develop regulations that implement the general nondiscrimination requirements of Title II and Title III, as well as the specific prohibitions on discrimination in Title III. Under this authority, the Department may establish requirements affecting equipment that is not fixed to ensure that people with disabilities have an equal opportunity to participate in the programs, services, and activities offered by covered entities. In establishing these requirements, the Department may look to the ADA Standards for guidance in determining whether various types of equipment or furnishings are accessible to people with disabilities.

The Department's current regulations implementing Title II and Title III of the ADA address equipment in several different contexts. The definition of "facility" in each regulation expressly includes "equipment" (28 CFR 35.104 and 36.104). Fixed equipment required to be accessible in new construction and alterations is identified in the ADA Standards (28 CFR part 36, App. A). Examples of accessible equipment that may be required are included in the definitions of auxiliary aids in 28 CFR 35.104 and 36.104. In addition, Appendix B to the Title III regulation, 28 CFR part 36, App. B, Proposed Section 36.309, second paragraph, further explains that—

Purchase or modification of equipment is required in certain instances by the

provisions in 36.201 and 36.202 [general prohibitions on discrimination]. For example, an arcade may need to provide accessible video machines in order to ensure full and equal enjoyment of the facilities and to provide an opportunity to participate in the services and facilities it provides. The barrier removal requirements of 36.304 will apply as well to furniture and equipment.
* * *

Because covered entities continue to raise questions about the extent of their obligation to provide accessible free-standing equipment, the Department is considering whether there is a need for the Department's ADA regulations to contain specific language about the acquisition and use of mobile, portable, and other free-standing equipment or furnishings used by covered entities to provide services. If the Department does address specific requirements for free-standing equipment, it may look to the ADA Standards for guidance in determining whether various types of free-standing equipment are accessible to people with disabilities.

Question 7. The Department invites public comment on its approach to these issues. Because the Department anticipates that it may issue further guidance with respect to the acquisition and use of mobile, portable, and other free-standing equipment and furnishings used by covered entities to provide services, the Department is seeking comment on the question whether such guidance is necessary. If you think that such guidance is needed, please provide specific examples of situations that should be addressed.

Stadium-Style Seating

Background. Beginning in the mid-1990s, the first stadium-style movie theaters were built in the United States. These theaters employed a new type of theater design whereby, rather than placing rows of seats on a gradually sloping floor as in traditional-style movie theaters, all but a few rows of seats near the front of each theater were located on a series of elevated tiers or risers (typically 12–18 inches in height). The enhanced lines of sight provided by these stadium-style movie theaters proved to be highly popular with the movie going public and, consequently, fueled a boom in stadium-style theater construction nationwide.

While stadium-style theater designs have evolved somewhat over the years and typically vary from theater circuit to theater circuit, two essential features have remained constant: (i) Movie patrons seated in the stadium sections of stadium-style theaters enjoy enhanced lines of sight to the screen as compared to patrons seated in the

traditional sections of these theaters; and (ii) movie patrons who use wheelchairs are excluded from the stadium sections of the great majority of existing stadium-style theaters nationwide.

Section 4.33.3 of the current ADA Standards requires, among other things, that "[w]heelchair areas * * * shall be provided * * * lines of sight comparable to those for members of the general public." This line-of-sight requirement has generated considerable debate as applied to stadium-style movie theaters. Persons with disabilities and disability rights organizations have complained to the Department that they are afforded inferior lines of sight when limited to the traditional section of stadium-style theaters. Specifically, they have complained that, due to design considerations particular to stadium-style theaters (such as, for example, typically larger and wider screens), sitting in rows close to the screen in the traditional section often results in a painful and uncomfortable viewing experience, as well as distortion of images on the screen. Movie theater owners and operators, on the other hand, have countered that they satisfy section 4.33.3's line-of-sight requirement by providing patrons who use wheelchairs with "unobstructed" views of the movie screen. The movie theater industry has also expressed its view to the Department that section 4.33.3 provides insufficient guidance for theater designers concerning the placement of wheelchair seating areas in stadium-style movie theaters. Indeed, in 1999, the National Association of Theater Owners (NATO) petitioned the Department to promulgate revised regulations specifically addressing stadium-style movie theaters and suggested its preferred regulatory language. The Department responded that it was planning to review and update the current ADA Standards covering assembly areas, including stadium-style movie theaters, upon issuance of the revised ADAAG.

As the entity charged with primary enforcement responsibility for Title III, the Department has played a central role in ensuring that persons with disabilities have full and equal enjoyment of stadium-style movie theaters. Since at least 1998, the Department has consistently and publicly stated through such forums as meetings with movie industry representatives, speeches to disability and business organizations, and litigation in Federal courts, that, when a movie theater company is marketing and selling the enhanced stadium-style movie going experience to the general

public, excluding patrons who use wheelchairs from these stadium sections violates Title III of the ADA. The Department has also emphasized that individuals who use wheelchairs need not be provided the best seats in the house, but neither should they be relegated categorically to locations with the worst views of the screen. Rather, the Department has interpreted section 4.33.3 as requiring a qualitative comparison—including viewing angles—between the view of the screen afforded patrons who use wheelchairs and the views of the screen provided most other members of the movie audience. Such a reading of section 4.33.3, the Department believes, best comports with the plain language of the regulation, the well-established usage of the term “lines of sight” in the theater industry, and the anti-discrimination goals underlying Title III of the ADA.

Nonetheless, both the debates and litigation have continued. Since 1999, the Department has initiated enforcement actions against several movie theater companies and participated as well as amicus curiae in other private ADA litigation involving stadium-style theaters. To date, all Federal courts except one have adopted or endorsed the Department’s interpretation of section 4.33.3’s line-of-sight requirement. See *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3513 (U.S. June 28, 2004) (No. 03–1131); *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), *cert. denied*, *Regal Cinemas, Inc. v. Stewmon*, 72 U.S.L.W. 3310 (U.S. June 28, 2004) (No. 03–641); *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000); *cert. denied*, 531 U.S. 944; *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73 (D. Mass. 2003), *appeals docketed*, Nos. 03–1646, 03–1787, and 03–1808 (1st Cir. June 5, 2003); *United States v. AMC Entm’t, Inc.*, 232 F. Supp. 2d 1092 (C.D. Cal. 2002).

Revised ADA Standards. Building on the line-of-sight heritage of the current ADA Standards, section 221.2.3 of ADAAG frames the basic comparability requirement in terms of viewing angles: “Wheelchair spaces shall provide spectators with * * * viewing angles that are substantially equivalent to, or better than, the * * * viewing angles available to all other spectators.” This ADAAG provision applies to all types of public accommodations, including stadium-style movie theaters, sports arenas, and concert halls. The Department intends to adopt this ADAAG provision for all assembly areas.

The Department believes that it is prudent to supplement these generic assembly area requirements with more specific guidance on stadium-style movie theaters. In light of several factors—including the contentious nature of the debate surrounding the application of the current ADA Standards to stadium-style movie theaters, the movie industry’s request for additional regulatory guidance relating to stadium-style movie theaters, as well as the Department’s significant experience with issues relating to stadium-style theaters—the Department is considering proposing regulations specifically applicable to stadium-style movie theaters. The purpose of such a rule would be twofold. The Department would be seeking to ensure that patrons with disabilities have full and equal enjoyment of, and access to, stadium-style movie theaters. The Department would also be seeking to provide theater designers with detailed guidance concerning acceptable placement of wheelchair seating locations in stadium-style theaters, while also affording design flexibility.

Therefore, the Department is now seeking public comment about the Department’s promulgation of rules specifically addressing stadium-style movie theaters. The Department anticipates such a regulation would only address line-of-sight issues. The Department also anticipates that the horizontal and vertical dispersion requirements set forth in ADAAG sections 221.2.3.1 and 221.2.3.2 would be adopted in their entirety and would apply independently of any line-of-sight regulation specifically applicable to stadium-style theaters. Finally, the Department does not believe that its proposed line-of-sight regulation represents a substantive change from the existing line-of-sight requirements of Standard 4.33.3 of the current ADA standards. As with the existing requirements, the proposed line-of-sight regulations would recognize the importance of viewing angles to the movie going experience and would be aimed at ensuring that movie patrons with disabilities are provided comparable views of the movie screen as compared to other theater patrons. The Department’s proposed stadium-style theater regulation would set forth two separate requirements. First, the regulation would require wheelchair seating locations to be placed in the stadium section of a stadium-style movie theater. Second, the regulation would also establish one or more standards governing the placement of wheelchair seating locations within the

stadium section. The Department offers the three following standards, either alone or in combination, for consideration and comment:

Option 1: Adopt Viewing Angle Requirement. One option would be simply to adopt the comparative viewing angle requirement set forth in ADAAG section 221.2.3. The advantage of this approach would be consistency of requirements as between stadium-style movie theaters and other types of public accommodation.

Option 2: Adopt “Distance From the Screen” Requirement. The second option would be to adopt a “distance from the screen” approach for locating wheelchair seating as established by some national consensus standards. For example, the American National Standards Institute (ANSI) recently published a standard specifying that wheelchair seating should be located within the rear 70% of the seats provided in a movie theater. While distance from the screen presents an easily applied standard for theater designers and code personnel, the Department’s experience with stadium-style theaters suggests that such a distance from the screen generally would not be sufficient to provide patrons who use wheelchairs with an equivalent viewing experience as compared to the rest of the movie audience. Thus, if the Department adopted a distance from the screen standard, it would likely specify that wheelchair seating must be located within the rear 60% of seats provided in a stadium-style theater.

Option 3: Adopt Combination Viewing Angle/Percentile Requirement. The third option would be to adopt a combination viewing angle and percentile approach as used by the Department in a settlement agreement with a national theater circuit. This agreement specifies that wheelchair seating locations should be placed “within the area of an auditorium in which the vertical viewing angles to the top of the screen are from the 50th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).” To date, the Department has found this approach to provide a workable and effective standard for locating wheelchair seating in stadium-style theaters.

Question 8. Should the Department promulgate a regulation specifically relating to stadium-style movie theaters? If so, should this regulation simply adopt ADAAG’s viewing angle requirement for lines of sight or should it instead also include alternative

distance from the screen or viewing angle/percentile approaches? How should the "stadium" section of a stadium-style theater be defined?

III. Miscellaneous Matters

There are a number of miscellaneous matters the Department may address in the NPRM.

Withdrawal of Outstanding NPRMs

The Department plans to notify the public of the withdrawal of three outstanding NPRMs: the joint NPRM of the Department and the Access Board dealing with children's facilities, published on July 22, 1996, at 61 FR 37964; the Department's proposal to extend the time period for providing curb cuts at existing pedestrian walkways, published on November 27, 1995, at 60 FR 58462; and the Department's proposal to adopt the Access Board's accessibility guidelines and specifications for State and local government facilities, published as an interim final rule by the Access Board on June 20, 1994, at 59 FR 31676, and by the Department as a proposed rule on June 20, 1994, at 59 FR 31808. To the extent that these amendments were republished in the July 23, 2004, publication of ADAAG, they will all be included in the Department's new NPRM.

Changes in Procedural Requirements for Certification of State Laws and Local Building Codes

Section 308 (b)(1)(A)(ii) of the ADA authorizes the Attorney General to certify the accessibility requirements of State and local governments that meet or exceed the minimum requirements for accessibility and usability of buildings and facilities covered by the new construction and alterations requirements of Title III of the Act (42 U.S.C. 12188 (b)(1)(A)(ii)). This procedure is voluntary and may be initiated at the discretion of a State or local government. In jurisdictions with certified accessibility codes, compliance with the certified code in the construction or alteration of covered buildings and facilities constitutes rebuttable evidence of compliance with the ADA in any enforcement proceeding that might be brought. The Department's regulations implementing the certification process are published in 28 CFR 36.601–36.608.

While most of these sections restate the statutory provision or establish the obligations of the Department in responding to a request for certification, one section, 28 CFR 36.603, establishes the obligations of a submitting authority that is seeking certification of its code.

The Department is considering ways in which these provisions can be streamlined to facilitate the process of seeking certification.

The Department anticipates that it will propose to delete section 36.603 from the current regulation. In its place, the Department will issue sub-regulatory guidance that will provide streamlined submission requirements.

Changes in Public Hearing Procedure. Section 36.605 (a)(2) of the Title III regulation requires that an informal hearing be held in Washington, DC, on the Department's decision to issue a preliminary determination of equivalency for a jurisdiction's accessibility code. The Department is considering substituting a requirement that an informal hearing be held within the relevant jurisdiction. The Department believes that a hearing conducted within the affected jurisdiction will generally provide a better opportunity for interested parties to comment.

Effect of the Revised ADA Standards on Certified Accessibility Codes. With the adoption of the revised ADA Standards, certifying State and local government codes as equivalent will be a more straightforward process because of the Access Board's extensive efforts to harmonize the revised guidelines with the model codes, which form the basis of many State codes. The Department is currently considering what impact the revised ADA Standards should have on the status of accessibility requirements for jurisdictions that were determined in the past to have met or exceeded the ADA Standards.

The Department invites public comment on each of these issues.

Title II Complaints

Complaint Investigation. One of the issues the Department will address in its upcoming NPRM relates to the Department's current procedures with respect to the investigation of complaints alleging discrimination on the basis of disability by public entities under Title II of the ADA. In its revised regulation implementing Title II, the Department will clarify its enforcement procedures in order to streamline the Department's internal procedures for investigating complaints, reduce the administrative burdens associated with implementing the statute, and ensure that the Department retains the flexibility to allocate its limited enforcement resources effectively and productively.

Subtitle A of Title II of the ADA defines the remedies, procedures, and rights provided for qualified individuals

with disabilities who are discriminated against on the basis of disability in the services, programs, or activities of State and local governments. While the ADA requires the Department to implement the requirements of Title II, it does not specify any particular means of doing so. It does not require the Department to investigate every complaint of discrimination, or even to rely upon complaints at all as a means of enforcement. The Department's current Title II regulation is based on the enforcement procedures established in regulations implementing Section 504. Thus, the Department's current regulation provides that the Department "shall investigate each complete complaint" alleging a violation of Title II and shall "attempt informal resolution" of such complaint (28 CFR 35.172(a)).

In the years since the current regulation went into effect, the Department has received many more complaints alleging violations of Title II than its resources permit it to investigate. The Department's experience dictates that it must have greater discretion to prioritize these complaints appropriately in order to ensure that resources are directed to resolving the most critical matters. Without the ability to exercise discretion in complaint processing, there will be substantial delays in the investigation of many meritorious complaints. These delays would make investigations more difficult, as witnesses disappear, memories fade, and circumstances change. In some time-sensitive cases, such delays might even result in an effective denial of justice as agency resources would be taken up by less sensitive cases. These problems would also result in increased uncertainty for complainants and covered entities, as they would be required to await disposition of their disputes without any knowledge of what might be required of them.

The approach of the current Title II regulation may be contrasted with that reflected in the current Title III regulation, which recognizes that the Department has the discretion not to investigate all complaints alleging discrimination on the basis of disability by places of public accommodation (28 CFR 36.502). To avoid the enforcement problems identified above, and to bring its Title II regulation into sync with its current enforcement procedures under both Title II and Title III, the Department will propose to clarify in its revised regulation that it may exercise its discretion in selecting Title II complaints for investigation and in determining the most effective means of

resolving those complaints. This clarification of the Department's enforcement procedures reflects the Department's determination to manage its Title II complaints as effectively as possible. It is not intended to create, eliminate, or otherwise alter any substantive rights or responsibilities under the ADA. It will not alter the Department's essential obligation to implement Title II of the ADA effectively, but will simply recognize the Department's discretion to determine how best to implement it.

As revised, the Department's Title II regulation will make clear that the Department may, within its discretion, dispose of complaints with inadequate legal or factual bases quickly, and, thus, dedicate more of its enforcement resources to complaints with stronger allegations. This process will allow the Department to continue to establish priorities and allocate resources to most effectively achieve the goals of the ADA. It will also allow the Department to respond more quickly to matters that need immediate resolution and to more fully address matters of systemic discrimination. The Department's resolution of those cases involving, for example, life-and-death situations, essential government services, and complex legal questions, will set high-profile precedents that will, in turn, facilitate local resolution of the types of complaints the Department is unable to pursue.

Exhaustion of Administrative Remedies. Another issue the Department will address in the NPRM involves the effect of the Prison Litigation Reform Act (PLRA), 42 U.S.C. 1997e, upon complaints by prisoners alleging unlawful discrimination on the basis of disability under Title II of the ADA. The PLRA amended the Civil Rights of Institutionalized Persons Act (CRIPA) to provide that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted" (42 U.S.C. 1997e(a)). The plain language of the statute provides that individuals seeking to challenge prison conditions by invoking the provisions of "any * * * Federal law" are required first to exhaust "such administrative remedies as are available." Title II of the ADA protects prisoners from unlawful discrimination on the basis of disability, and among the administrative remedies available to such individuals to redress discrimination is the filing of a Title II complaint with the Department.

Therefore, in order to properly implement this legislation, the Department's revised regulation implementing Title II of the ADA will provide that in order to exhaust administrative remedies as required under the PLRA, prisoners alleging unlawful discrimination on the basis of disability under Title II will be required to file an administrative complaint with the Department prior to filing suit in court. As with all complaints of discrimination under Title II, the Department may, in its discretion, investigate and attempt to resolve the allegations of unlawful discrimination made in these complaints. However, given the large number of prisoner complaints and the Department's limited resources, it is unlikely that the Department will be able to investigate every such complaint. The Department wishes to ensure that this requirement does not prove to be a bar for prisoners with disabilities seeking redress of their grievances in the courts. Therefore, the Department will propose that, for purposes of the PLRA, a complainant will be deemed to have successfully exhausted the administrative remedy of filing a complaint with the Department if no action has been taken upon the complaint by the Department within a 60-day administrative period.

IV. Regulatory Assessment Issues

A regulatory assessment—a report analyzing the economic costs and benefits of a regulatory action "is not required for this ANPRM. One purpose of this ANPRM, however, is to seek comment on the Department's proposed methodology for the regulatory assessment that the Department must prepare in connection with the issuance of the NPRM. A regulatory assessment will be required for the NPRM under Executive Order 12866, as amended without substantial change to its requirements by Executive Order 13258, and the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996. Executive Order 12866 requires Federal agencies to submit any "significant regulatory action" to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs for review and approval prior to publication in the **Federal Register**. A proposed regulatory action that is deemed to be economically significant under section 3(f)(1) of that order (having an annual effect on the economy of \$100 million or more) is required to include a formal benefit-cost analysis. A formal benefit-cost analysis must include both qualitative and quantitative

measurements of the benefits and costs of the proposed rule as well as a discussion of each potentially effective and reasonably feasible alternative.

As part of the Department's initial NPRM regulatory assessment, the Department expects to adopt the final regulatory assessment prepared by the Access Board for the final ADAAG and approved by OMB. (See regulatory assessment for ADAAG at www.access-board.gov. The assessment has also been placed in the dockets of both the Access Board and the Department and is available for public inspection.) However, the regulatory assessment for the Department's NPRM must be broader than that of the Access Board in several respects. First, the Department must include as part of the estimated annual cost of the revised ADA Standards the cost of each of the supplemental guidelines (now folded into the final ADAAG document) issued by the Access Board subsequent to the 1991 ADAAG. As discussed above, the Access Board adopted the supplemental guidelines in separate rulemaking initiatives before ultimately combining them into the final ADAAG document. The costs associated with these supplemental guidelines, therefore, were considered part of the Access Board's baseline, and not as new costs associated with the Board's issuance of ADAAG. Because the Department did not adopt any of the supplemental guidelines separately, the Department must consider their associated costs as part of adopting revised ADA Standards consistent with ADAAG.

Further, unlike the Access Board, the Department must prepare an assessment of the costs and benefits arising from any compliance with the revised ADA Standards that may be required for barrier removal in existing facilities. Which elements of existing facilities will be required to comply with the revised ADA Standards and in what manner will depend upon which option the Department selects with respect to existing facilities under Questions 3 and 4, above.

Because the regulatory assessment for the NPRM will include both the costs associated with the supplemental guidelines and those associated with the compliance of certain elements of existing facilities, the NPRM may be deemed economically significant. If so, the Department will have to prepare a full benefit-cost analysis in connection with the NPRM.

Also, consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including small

businesses, small nonprofit organizations, and small governmental jurisdictions. The Department will make an initial determination as to whether the proposed rule is likely to have a significant economic impact on a substantial number of small entities, and if so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small entities and regulatory alternatives that reduce the regulatory burden on small entities while achieving the goals of the regulation. In response to this ANPRM, the Department encourages small entities to provide cost data on the potential economic impact of applying specific provisions of ADAAG to existing facilities and recommendations on less burdensome alternatives, with cost information.

Basic Principles of Proposed Regulatory Framework

The Proposed Regulatory Framework, which is set forth in Appendix A, describes the approach that the Department is considering for the regulatory assessment that it must prepare in connection with the NPRM. In brief, the framework proposes to assess benefits and costs associated with a proposed adoption of revised ADA Standards consistent with ADAAG in accordance with the following principles:

- The proposed framework assumes that the regulatory analysis for the proposed regulation will be required to include a full benefit-cost analysis subject to the requirements of OMB Circular A-4. The framework is designed to conform with those requirements.
- The analysis will cover the benefits and costs of the revised ADA Standards for readily achievable barrier removal for existing buildings as well as the benefits and costs of the revised ADA Standards for new construction and alterations (only the latter has been estimated by the Access Board in its regulatory assessment for ADAAG).
- Only incremental benefits and costs of the revised ADA Standards will be assessed. Benefits and costs associated with the current ADA Standards will be considered baseline benefits and costs.
- Benefits will be addressed with regard to not only user value, but also insurance value and existence value, as explained in Appendix A.
- The analysis will address the alternative approaches to application of the revised ADA Standards set out under Questions 3 and 4, above.
- To estimate the incremental benefits and costs of the readily

achievable barrier removal obligation, a computer simulation model will be developed based upon statistical databases developed to show cost per element or space to be modified and number of elements or spaces to be modified, taking into account the factor of "readily achievable." The data will be stratified by age and size of facility, financial condition, and other applicable features.

- The risk of measurement error will be addressed through risk analysis and threshold analysis, as explained in Appendix A.

The following questions for public comment address issues raised in connection with the Proposed Regulatory Framework. The Department is seeking comments from covered entities, persons with disabilities, and all other members of the public with respect to both benefits and costs. Where applicable, responses should clearly identify the specific question being addressed according to the numbered question. For additional information, please see Appendix A to this document.

Data Collection Questions, By Type of Entity

The Department is not, in the following data collection questions, seeking information about the cost of applying revised ADA Standards to new construction and alterations. As stated above under Item IV, the Department expects to adopt the Access Board's final regulatory assessment (see regulatory assessment for ADAAG at www.access-board.gov) as its assessment of the cost that will be incurred for new construction and alterations, which is the situation addressed in the Access Board's regulatory assessment. The following data collection questions are intended to elicit information about the costs and benefits that will result if the new guidelines are used as the basis for mandatory barrier removal. Question 9 is a general question soliciting data about the potential costs and benefits of using any or all of the changed or new requirements in the new guidelines as the basis for mandatory barrier removal. Question 10 is a general question soliciting information about the effect of the new or changed requirements on the obligations of small entities with respect to barrier removal. Questions 11-47 contain numerous questions that reiterate this general question with respect to a sampling of specific new or changed requirements. The Department is seeking comments from all stakeholders "covered entities, persons with disabilities, and all other members

of the public "with respect to both costs and benefits. The Department also wishes to solicit comments on any areas where additional costs may be imposed or benefits may be realized indirectly as a result of the ultimate regulations. Where applicable, responses should clearly identify the specific question being addressed according to the numbered question.

All Types

Question 9. Many of the new and changed requirements in ADAAG are expected to have negligible cost for new construction and alteration, such as the change in the maximum side reach from 54 inches to 48 inches (ADAAG 308.3). See Chapter 6, item 6.20, of the regulatory assessment for ADAAG at www.access-board.gov. Other new and changed requirements are expected to have a cost impact for new construction and alterations. See Chapter 7 of the above cited regulatory assessment for ADAAG. The Department invites comments from covered entities, individuals with disabilities, and individuals without disabilities on the benefits and costs of applying these new and changed specifications to existing facilities pursuant to the readily achievable barrier removal requirement of Title III. Please be as specific as possible in your answers. (Changed requirements would not be applied under the barrier removal obligation to elements that comply with the current ADA Standards if the Department adopts the safe harbor provision addressed under Question 3. New requirements would be applied even if the Department adopts the safe harbor provision but their impact could be reduced under the options addressed under Question 4.)

Question 10. Consistent with the Regulatory Flexibility Act and Executive Order 13272, the Department will determine whether a proposed rule adopting all or part of the Access Board's ADAAG revisions would be likely to have a significant economic impact on a substantial number of small entities, and if so, what the Department could do to reduce that economic impact while achieving the goals of its regulation. The Department welcomes comments providing information on the rule's potential economic impact on covered small entities, including retrofitting costs. Also, please provide any potential regulatory alternatives that could reduce those burdens.

Question 11. The Department is considering excluding as a barrier removal obligation for existing facilities, if it selects Option II under Question 4, above, the requirement at ADAAG 210

that accessible handrails be added to stairs in buildings with elevators. The Department is soliciting comments from all stakeholders on this approach. Please be as specific as possible in your response.

Question 12. ADAAG 229.1 is a new requirement that at least one window be accessible to persons with disabilities in a room with windows that can be opened by persons without disabilities. The Department wishes to collect data about the effect of this new requirement if it is applied to existing facilities under the barrier removal requirement of Title III. Do you have rooms with windows that open, of the sliding or double hung type, in your existing facility? If so, how many? Would the hardware that works for new windows in new buildings work on these windows in your existing facility without additional cost?

Persons with disabilities and the general public are invited to comment on the incremental benefit of having at least one accessible window in each room that has windows that are operable by persons without disabilities.

Office Buildings

Question 13. New requirements at ADAAG 230.1 and 708.1 require two-way communications systems (except in residential facilities) to be equipped with visible as well as audible signals. The Department wishes to collect data about the effect of this new requirement if it is applied to existing facilities under the readily achievable barrier removal requirement of Title III. Do you use a two-way communications system in your existing office building? What would be the cost of equipping a unit with both audible and visible signals? How many two-way communications systems do you have in your existing office building?

Persons with disabilities and the general public are invited to comment on the incremental benefit of having both audible and visual signals on two-way communications systems in existing office buildings.

Question 14. Under the current ADA Standards, men's toilet rooms with six or more water closets and urinals, but fewer than six toilet compartments, are not required to provide an ambulatory accessible toilet compartment with grab bars. Under ADAAG 213.1, urinals will be counted, so that if there are a total of six urinals or water closets, an ambulatory accessible toilet compartment with grab bars will be newly required. Additional costs in new construction include the costs of adding grab bars but because of fire code requirements, no cost is allocated with

respect to new construction and alterations to the requirement that an accessible compartment must be between 35 and 37 inches wide and 60 inches deep. The Department wishes to collect data about the effect of this requirement in existing facilities. Are some or all of the men's rooms in your existing office building required to have an ambulatory accessible toilet compartment? Will the changed requirement result in more such compartments being necessary in your existing office building? If so, what would be the unit cost of adding such a compartment? How many additional ambulatory accessible toilet compartments would you be required to add in your existing office building?

Persons with disabilities and the general public are invited to comment on the incremental benefit of having additional ambulatory accessible toilet compartments in men's rooms in existing office buildings.

Question 15. Under the current ADA Standards, a private office building must provide a public TTY if there are four or more public pay telephones in the building. Under the revised ADA Standards, a private office building will also be required to provide a public TTY on each floor that has four or more public telephones (ADAAG 217.4.2) and in each telephone bank that has four or more telephones (ADAAG 217.4.1). The Department wishes to collect data about the effect of this requirement if it is applied to existing facilities under the barrier removal requirement of Title III. Will the changed requirement result in more TTYs being necessary in your existing office building? How many more? Can a TTY be added to an existing facility at the same cost as to a new or altered facility?

Persons with disabilities and the general public are invited to comment on the incremental benefit of having additional TTYs in existing office buildings.

Question 16. What data source do you recommend to assist the Department in estimating the number of existing office buildings categorized by such features as size, age, type, physical condition, and financial condition?

Question 17. What data source do you recommend to assist the Department in estimating the extent to which existing office buildings comply with the current ADA Standards?

Question 18. What data source do you recommend to assist the Department in estimating the incremental cost of making noncompliant elements of existing office buildings comply with the revised ADA Standards?

Hotels and Motels

Question 19. A new requirement at ADAAG 806.2.4.1 provides that if vanity counter top space is provided in nonaccessible hotel guest toilet or bathing rooms, comparable vanity space must be provided in accessible hotel guest toilet or bathing rooms. The Department wishes to collect data about the effect of this requirement if it is applied to existing facilities under the readily achievable barrier removal requirement of Title III. Do you currently provide any accessible vanity counter space in your existing accessible guest toilet or bathing rooms? How much available extra room, usable for an accessible vanity counter top, is there on average in your existing accessible guest toilet or bathing rooms?

Persons with disabilities and the general public are invited to comment on the incremental benefit of having comparable vanity space in accessible hotel guest toilet or bathing rooms.

Question 20. What data source do you recommend to assist the Department in estimating the number of existing hotels and motels categorized by such features as size, age, type, physical condition, and financial condition?

Question 21. What data source do you recommend to assist the Department in estimating the extent to which existing hotels and motels comply with the current ADA Standards?

Question 22. What data source do you recommend to assist the Department in estimating the incremental cost of bringing noncompliant elements of existing hotels and motels into compliance with the revised ADA Standards?

Stadiums and Arenas

Question 23. What data source do you recommend to assist the Department in estimating the number of existing stadiums and arenas categorized by such features as size, age, type, physical condition, and financial condition?

Question 24. Are there data sources that the Department could consult to estimate the extent to which existing stadiums and arenas comply with the current ADA Standards?

Question 25. What data source do you recommend to assist the Department in estimating the incremental cost of bringing noncompliant elements of existing stadiums and arenas into compliance with the revised ADA Standards?

Hospitals and Long Term Care Facilities

Question 26. A new requirement at ADAAG 607.6 provides that the shower spray unit in an accessible shower

compartment must have an on-off switch. The Department wishes to collect data about the effect of this requirement if it is applied to existing facilities under the readily achievable barrier removal requirement of Title III. Do all of the shower spray units that you currently use for accessible shower compartments in your existing hospital or long-term care facility have on-off switches? If not, how many shower spray units in accessible shower compartments do you have without on-off switches? Would you have to purchase a new shower spray unit to add the on-off feature or is there a way to adapt your current unit for this purpose?

Persons with disabilities and the general public are invited to comment on the incremental benefit of having an on-off switch on the shower spray unit in an accessible shower compartment.

Question 27. What data source do you recommend to assist the Department in estimating the number of existing hospitals and long-term care facilities categorized by such features as size, age, type, physical condition, and financial condition?

Question 28. Are there data sources that the Department could consult to estimate the extent to which existing hospitals and long-term care facilities comply with the current ADA Standards?

Question 29. Are there data sources that the Department could consult to assess the incremental cost of bringing noncompliant elements of existing hospitals and long-term care facilities into compliance with the revised ADA Standards?

Residential Dwelling Units

Question 30. A changed requirement at ADAAG 804.2 requires a 60-inch (rather than the current 40-inch) clearance space in so-called galley kitchens, which have cabinets and appliances on opposite walls, if there is only one entry to the kitchen. The Department wishes to collect data about the effect of this requirement if it is applied to existing facilities under the readily achievable barrier removal requirement of Title III. Are any of the kitchens in the accessible dwelling units of your existing housing facility of the one-entry galley type? Is clearance of 60 inches provided? If not, is extra space available for this purpose?

Persons with disabilities and the general public are invited to comment on the incremental benefit of having a 60-inch (rather than the current 40-inch) clearance space in galley kitchens.

Question 31. What data source do you recommend to assist the Department in

estimating the number of existing residential dwelling units categorized by such features as size, age, type, physical condition, and financial condition?

Question 32. What data source do you recommend to assist the Department in estimating the extent to which existing residential dwelling units comply with the current ADA Standards?

Question 33. What data source do you recommend to assist the Department in estimating the incremental cost of bringing noncompliant elements of existing residential dwelling units into compliance with the revised ADA Standards?

State and Local Government Buildings: Cells and Courtrooms

Question 34. How many State and local detention and holding cells were newly constructed or altered in each of the past five years? How many would you project will be newly constructed or altered in each of the next five years?

Question 35. How many State and local courtrooms were newly constructed or altered in each of the past five years? How many would you project will be newly constructed or altered in each of the next five years?

Question 36. What data source do you recommend to assist the Department in estimating the number of existing cells and courtrooms categorized by such features as size, age, type, physical condition, and financial condition?

Question 37. What would be a good source to assist the Department in estimating how many State and local government building codes already meet the requirements that will be in the revised ADA Standards for cells and courtrooms?

Question 38. What would be a good source to assist the Department in estimating the cost of bringing existing cells and courtrooms into compliance with the revised ADA Standards?

Play Areas

Question 39. Among the new requirements at ADAAG 240 are new scoping provisions for the minimum number of ground level and elevated play components that are required to be on an accessible route for newly constructed or altered play areas. The basic requirement for ground level play components is that one of each type must be on an accessible route. If a new or altered play area contains elevated play components that fail to meet specified accessibility requirements, then a specified greater number of ground level play components must be on an accessible route. The Department wishes to collect data about the effect of

this requirement in existing play areas. Are any of the ground level play components in your existing play area on an accessible route? Is one of each type of ground level play component in your existing play area on an accessible route? Are there elevated play components in your existing play area? Are any of them on an accessible route?

Question 40. What data source do you recommend to assist the Department in estimating the number of existing play areas categorized by such features as size, age, type, physical condition, and financial condition?

Question 41. What would be a good source to assist the Department in estimating the cost of bringing existing play areas into compliance with the revised ADA Standards?

Recreation Facilities

Question 42. A new requirement at ADAAG 234.3 provides that every new or altered amusement ride must provide at least one wheelchair space or transfer seat or transfer device. The preamble to the final recreation facilities guidelines provides that the transfer device may be separate from, rather than integral to, the ride. The Department wishes to collect data about the effect of this requirement if it is applied to existing amusement rides under the barrier removal requirement of Title III. With respect to your existing rides, have you used transfer devices or other means to make the ride accessible to persons with disabilities? If so, what did the transfer device cost?

Persons with disabilities and the general public are invited to comment on the incremental benefit of having transfer devices available for use on existing rides.

Question 43. A new requirement at ADAAG 235.2 requires accessible boat slips to be provided in accordance with a table, which ranges from one accessible boat slip for facilities with 25 or fewer boat slips to 12 accessible boat slips for facilities with 901 to 1,000 boat slips. ADAAG 1003.3.1 provides that an accessible boat slip must be at least 60 inches wide along its entire length (with an exception for two-foot sections at least 36 inches wide if separated by 60-inch wide sections at least 60 inches in length). The Department wishes to collect data about the effect of this requirement if it is applied to existing boat slips under the readily achievable barrier removal requirement of Title III. How many boat slips are there in your existing facility? When was your facility built? The Department is considering reducing the number of boat slips that must be accessible in existing facilities if it selects Option II under Question 4,

above. The Department is soliciting comments from all stakeholders on this approach. Please be as specific as possible in your response.

Question 44. An exception to the new requirement at ADAAG 206.2.15 permits the accessible route requirements (which must connect all greens, weather shelters, rental areas, and the like) for golf courses to be satisfied by golf car passages, defined at ADAAG 1006.3 as a 48-inch wide passage, providing 60-inch wide openings in curbs or other constructed barriers every 75 yards. The Department wishes to collect data about the effect of this requirement if it is applied to existing golf courses under the readily achievable barrier removal requirement of Title III. What would you have to do to your existing golf course to make it comply with the requirements for golf car passages?

Question 45. A new requirement at ADAAG 242.1 requires a new swimming pool whose perimeter is over 300 linear feet to have at least two accessible means of entry, at least one of which must be a lift or a sloped entry. The Department is considering reducing the number of accessible entries for a pool over 300 feet in perimeter in existing facilities if it selects Option II under Question 4, above. The Department is soliciting comments from all stakeholders on this approach. Please be as specific as possible in your response.

Question 46. What data source do you recommend to assist the Department in estimating the number of existing recreational areas of each type to be covered in the revised ADA Standards, categorized by such features as size, age, type, physical condition, and financial condition?

Question 47. What data source do you recommend to assist the Department in estimating the cost of making each of the following types of existing recreation facilities comply with the revised ADA Standards: amusement rides, boating facilities, fishing piers and platforms, golf, miniature golf, sports facilities (bowling, shooting, and exercise facilities, among others), and swimming pools and spas?

General Data Collection Questions Concerning Benefits

Question 48. Do you have any general comments or concerns about the Department's proposed methodology for determining benefits? As discussed in the text of the proposed framework, the Department is charged with ascertaining the value of the benefits that the revised ADA Standards will provide for both people with disabilities and others. The Department is seeking comments from

the public on how best to quantify, monetize, or describe the benefits provided by the proposed revised regulations, including suggestions on how to quantify, monetize or describe use values, insurance values, and existence values, each as described in Appendix A.

Question 49. What benefits do you see in the revised ADA Standards for people with disabilities? For example, how might the revised requirements for accessible routes be of benefit to the users of a building? How could these benefits be quantified?

Question 50. The proposed framework states that the Department will "roll up" the elements by type of building facility, the five principal regulatory groupings, new construction and alterations, and the entire proposed revisions. Is this a sufficiently detailed organization of the benefits and costs? Will it give all stakeholders an accurate picture of how the proposed revisions will be of benefit? If not, what sort of organization of the benefits would be more useful for accurately conveying the important information?

Regulatory Assessment Process Questions

OMB Circular A-4 (www.whitehouse.gov/omb/circulars/a004/a-4.pdf) provides guidance to Federal agencies on the development of regulatory analysis. Regulatory analysis is a tool agencies use to anticipate and evaluate the likely consequences of rules. It provides a formal way of organizing the evidence on the key effects of the various alternatives that should be considered in developing regulations. The motivation is to (i) learn if the benefits of an action are likely to justify the costs or (ii) discover which of various possible alternatives would be the most cost-effective.

This ANPRM seeks additional information to assist the Department in preparing a regulatory analysis under Circular A-4, in particular the provisions of sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs).

Question 51. Circular A-4 describes several analytical approaches including benefit-cost analysis and cost-effectiveness analysis. Stakeholders are encouraged to express their views and to advise the Department as to how best to conduct these analyses as part of any rulemaking that is published to adopt the revised ADA Standards.

Question 52. The Department is seeking comment, advice, and information on its proposed approach in the three key application areas, as follows:

a. Categorizing the revised ADA Standards for purposes of identifying benefits and costs;

b. Defining baselines in accordance with OMB Circular A-4, sec. E.2.; and

c. Identifying and quantifying benefits and costs.

Question 53. Stakeholders are invited to provide the Department with comments and advice on the proposed classification, the proposed roll-ups, and other related matters.

Question 54. With respect to elements in existing facilities that may be subject to the revised ADA Standards through the readily achievable barrier removal requirement, the use of market prices (or willingness to pay) as a measure of benefits may be insufficient where a given provision in the revised ADA Standards renders an existing facility more accessible rather than newly accessible. Such might be the case, for example, with respect to the provision requiring an independent means of getting in and out of the pool in an otherwise accessible swimming facility. The public is asked to comment on ways and means of handling this issue.

Dated: September 23, 2004.

John Ashcroft,
Attorney General.

Appendix A—Proposed Framework for the Regulatory Analysis

1. Introduction

As directed by Executive Order 12866 and OMB Circular A-4, as well as the Regulatory Flexibility Act and Executive Order 13272, the Department may be required to conduct a comprehensive Regulatory Impact Analysis of the revised ADA Standards. A Regulatory Impact Analysis may include a statement of need for the proposed regulation, the identification of a reasonable range of alternatives, the conduct of a Benefit-Cost Analysis of the proposed regulation and the alternatives, and an analysis of uncertainty in the identification and quantification of costs and benefits. The Benefit-Cost Analysis entails the comprehensive description of the incremental costs and benefits of each alternative, to the extent practicable, in terms of monetary value. In this context, a Benefit-Cost Analysis would apply to each of the new or changed scoping and technical provisions in the revised ADA Standards that represent substantive changes from the current ADA Standards, as well as to possible alternatives to those provisions. The proposed Regulatory Impact Analysis would be included as part of the NPRM, and while the public will have an opportunity to comment on its assumptions and results at that time, this is the time to suggest significant changes to the Department's proposed methodology. In presenting in this ANPRM its current thinking on how it might approach the regulatory analysis, the Department seeks to engage the public in the choice of its methodology before significant

time and effort is expended on its implementation.

Role of Regulatory Impact Analysis in the ADA Regulatory Process

Regulatory Impact Analysis is intended to inform stakeholders in the regulatory process of the effects, both positive and negative, of proposed new regulations. The principal stakeholders are those who will be directly affected by the proposed regulations, namely people with disabilities and the owners and developers of facilities that will incur the direct costs of compliance. However, the public at large, including people both with and without disabilities, is also a key stakeholder in the regulatory process. The costs and cost savings associated with the proposed regulatory action will ripple throughout the economy, potentially affecting business costs and consumer prices. Businesses may respond to the new and revised requirements in a number of ways, some of which entail costs that may be easily measurable, such as increased or reduced construction, operating, and maintenance costs, and others of which entail costs that may not be as easily measurable, such as delays in construction and renovation. Thus, in addition to their effect on direct capital, operating, and maintenance costs, new and revised accessibility requirements influence less obvious but equally genuine aspects of cost, such as construction schedules. Construction schedules might be lengthened where the regulations impose new requirements and shortened where the burden of a given scoping or technical provision has been reduced relative to the current ADA Standards. The Regulatory Impact Analysis will seek to recognize and account for such schedule-related changes in costs.

The public at large will also benefit from the proposed regulations. Accessible facilities benefit persons with and without disabilities alike. This represents their use value. For individuals with disabilities, use value will include benefits arising from the ability to participate in previously inaccessible facility-based activities, or the availability of more convenient or independently usable facility elements or spaces. In addition, because people who do not need the protections of the ADA in the present may need them in the future, like an insurance policy, people without disabilities may place a value on accessible features. People may also place some value on the existence of accessible features unrelated to their anticipation of future personal need for them. This is reflected in people's possible willingness to pay something to ensure that equal access is provided for others (family, friends, and other members of society) who are or might become temporarily or permanently disabled, or to safeguard the principle of equal protection for people with disabilities, regardless of the risk of onset or the general incidence of disability. Benefit-Cost Analysis helps the general public ascertain whether the value of these "nonuse" related benefits is quantitatively significant relative to the costs.

Some stakeholders might believe that economic analysis of any kind is simply

irrelevant with respect to the implementation of a civil rights statute. The ADA is a comprehensive civil rights statute protecting the rights of persons with disabilities, and as such, could provide sufficient justification for regulatory action even if the Benefit-Cost Analysis were to produce negative results. Others might believe that, although economic yardsticks must not override the protections laid down in Federal statutes, the comprehensive articulation, if not quantification, of all benefits, including the nonuse values discussed above, can help promote understanding and further societal implementation of the protections established in law. Some might also believe that Benefit-Cost Analysis can be helpful in evaluating options for exempting certain elements or spaces in existing facilities from the provisions of the revised ADA Standards. Stakeholders are encouraged to express their views and to advise the Department as to how best to conduct these analyses as part of any rulemaking that is published to adopt the revised ADA Standards.

2. Scope of the Regulatory Impact Analysis

In conducting its analysis, the Department will be required to take a broader approach to the assessment of the benefits and costs of the revised ADA Standards than the Access Board was required to take in assessing ADAAG. The Department's broader approach is required for two reasons. First, while the Access Board developed the guidelines contained in ADAAG incrementally over several years, the Department is now proposing to adopt ADAAG as a whole, as the revised ADA Standards. Since 1992, the Access Board has undertaken five separate and distinct rulemaking actions. The most recent of those rulemaking actions involves 68 substantive changes and additions to the scoping and technical requirements provided in the current ADA Standards (estimated to impose annual incremental costs on new or altered facilities of between \$12.6 and \$26.7 million). The other four rulemaking actions involved the adoption of supplemental guidelines for children's facilities (\$0); state and local facilities; play areas (between \$37 and \$84 million); and recreational facilities (between \$26.7 and \$34.4 million). Examined singly, the Board estimated each of the five rulemaking actions to entail incremental annual costs of less than \$100 million, which is the threshold established in OMB Circular A-4 as the trigger for the Benefit-Cost Analysis requirement.

The Department, however, is proposing to adopt the revisions to the current ADA Standards and the four supplemental guidelines as a whole as the revised ADA Standards. When combined, the Access Board's estimated annual cost of all of the ADAAG revisions falls within a range between \$76.3 million and \$145.1 million (uncorrected for between-year inflation). With the mid-point of this range at about \$111 million, there is a material probability that the combined cost of adopting the revised ADA Standards as a whole will exceed the \$100 million threshold.

The second reason that the Department will likely be required to undertake a full Benefit-Cost Analysis is that the Department,

unlike the Access Board, is responsible for implementing the requirements of the ADA with respect to existing facilities. Thus, the Department must account for the additional incremental costs and benefits attributable to the adoption of the revised ADA Standards to the extent that the new or revised provisions will apply to existing facilities. The additional incremental cost associated with these requirements increases the likelihood that the total regulatory costs will exceed the \$100 million threshold for Benefit-Cost Analysis.

To the extent practicable, the Department proposes to apply state-of-the-art methods of Benefit-Cost Analysis as provided in OMB Circular A-4. While Circular A-4 is definitive with respect to principles, it leaves Federal agencies with discretion with respect to the means and methods of application. The Department is seeking comment, advice, and information on its proposed approach in the three key application areas, as follows: (1) Categorizing the revised ADA Standards for purposes of identifying costs and benefits; (2) defining baselines and incremental costs; and (3) identifying and quantifying costs and benefits.

3. Categorization of the Revised ADA Standards for Purposes of Assessing Costs and Benefits

The adoption of the current ADA Standards represented a fundamental change in the accessibility of facilities and, accordingly, in the extent to which people with disabilities are able to participate in the mainstream activities of daily life. Most provisions of the revised ADA Standards represent improvements in the quality of accessibility and the degree of inclusion. However, unlike the current ADA Standards, many of the improvements in the quality and degree of accessibility resulting from the revised ADA Standards will derive from changes in the scoping, design, and features of specific elements and spaces of a facility, rather than as a result of changes to the facility as whole.

The various elements and spaces addressed in the revised ADA Standards vary among different types of facilities and will be classified accordingly. In addition, the impact of the new and revised requirements may be fundamentally different with respect to facilities that are newly constructed or altered after the effective date of the revised ADA Standards, on the one hand, and existing facilities, on the other. This in turn requires an additional level of categorization. The Department and the stakeholders in this regulatory action have an interest in viewing the combined costs, benefits, and net benefits with respect to the substantive new and revised provisions in the revised ADA Standards both as a whole and as applied to particular types of facilities.

Under the Department's proposed categorization scheme, the Department will assess costs and benefits for each element addressed in the revised ADA Standards, as categorized by building and facility type, separately for newly constructed or altered facilities and existing facilities. Once costs and benefits are assessed for each element, they (costs, benefits, and net benefits) will be

aggregated ("rolled-up") with respect to (i) the type of building and facility; (ii) newly constructed or altered facilities; (iii) existing facilities; and (iv) the revised ADA Standards as a whole. The different "roll-ups" will enable stakeholders to examine the regulatory analysis from their particular perspective.

4. Distinguishing the Baselines From the Incremental Costs and Benefits

OMB Circular A-4 stipulates that a regulatory analysis is only supposed to account for those costs and benefits that arise as a result of the proposed regulatory action itself. Such costs and benefits are called "incremental" because they reflect only the costs and benefits imposed by the adoption of the regulation—excluded are any costs and benefits that are imposed by already existing requirements. The latter costs and benefits constitute the "baseline" against which the incremental costs and benefits of the new regulation are compared. The baseline thus represents the costs and benefits that would arise whether or not the proposed regulations are adopted. Although the current enforceable ADA Standards clearly impose costs and benefits upon society, for the purpose of the proposed Regulatory Impact Analysis, which will be designed to identify the incremental costs and benefits of the proposed rulemaking, the current ADA Standards and other Federal requirements will be considered the baseline, and as such, will be assigned zero costs and benefits. Thus, technically, if compliance with a current requirement costs \$40, and compliance with the changed requirement costs \$50, this will be stated as baseline of zero, incremental cost of \$10.

As a general principle, the Department proposes to determine the incremental cost for each element or space addressed by a new or revised standard in the revised ADA Standards by first determining whether or not the current ADA Standards specify scoping and technical requirements for that element or space. If the current ADA Standards do address the element or space, then the provision in the revised ADA Standards will be referred to as a change in existing requirements. If not, the provision in the revised ADA Standards will be referred to as a new requirement.

Incremental Costs Applied to Newly Constructed or Altered Facilities

Where a given provision in the revised ADA Standards reflects a change in the existing requirements applicable to a particular element or space, the incremental cost (or savings) for that element or space in facilities newly constructed or altered after the effective date of the revised ADA Standards will be only the difference between the costs and benefits imposed by the requirement in the current ADA Standards and other Federal requirements with respect to that element or space and the costs and benefits imposed by the changed requirement. This is because, if the revised ADA Standards were not adopted, those elements in such facilities would still be required to comply with the current ADA Standards and other Federal requirements. If,

with respect to any given element or space, it costs more to implement the revised Standard than it would have cost to implement the current Standards, the assessment of incremental cost will capture that additional amount. If it costs less, the assessment of incremental savings will capture that amount.

With respect to new requirements, the entire actual cost of compliance will be attributed to the revised ADA Standards. New requirements are those applicable to elements and spaces for which there were previously no standards. For example, all amusement rides built or altered after the effective date of the revised ADA Standards are required to be accessible to persons who use wheelchairs or other mobility devices. Neither the current ADA Standards nor other Federal requirements contain any requirement with respect to amusement rides. Therefore, the costs and benefits of complying with this requirement can be attributed entirely to the revised ADA Standards.

In its regulatory analysis, the Access Board presented results based on two baseline concepts, one in which the baseline is taken as the current ADAAG requirements, and a second in which the baseline is taken as the voluntary model codes, in which the requirements are very similar to the revised ADA Standards that will be proposed in the NPRM. That regulatory analysis also discussed the extent to which State and local governments have adopted the model codes. The Department may take a similar approach in its Regulatory Impact Analysis or it may calculate incremental costs in new and altered facilities, with respect to those States and localities that have adopted a model code, as the difference between the model code requirements and the revised ADA Standards if that is determined to be practicable.

Incremental Costs Applied to Existing Facilities

The same principles will apply with respect to incremental costs applicable to elements and spaces in existing facilities (those that were or will be newly constructed or altered prior to the effective date of the revised ADA Standards). Thus, with respect to elements and spaces in existing facilities, the relevant incremental costs (savings) will be only the difference between the costs and benefits imposed by the requirement in the current ADA Standards and other Federal requirements with respect to that element or space and the costs and benefits imposed by the changed requirement.

The Department is considering several options with respect to existing facilities with respect to their continuing obligations under the readily achievable barrier removal requirement. Which options the Department chooses will affect the calculation of costs and benefits with respect to elements and spaces in those existing facilities with respect to that requirement. For example, if the Department were to exempt elements and spaces that are compliant with the current ADA Standards from any obligation to comply with the revised ADA Standards pursuant to the readily achievable barrier

removal requirement, the incremental costs and benefits of the revised ADA Standards with respect to those elements and spaces will be zero. In that case, only the incremental costs and benefits (actual costs and benefits of the revised ADA Standards, minus the costs and benefits of the current ADA Standards) of implementing the revised ADA Standards with respect to noncompliant (nonexempt) elements of such facilities, to whatever extent that may be required under the readily achievable barrier removal requirement, would be counted.

The Department is also considering other options that may affect the calculation of incremental costs and benefits for existing facilities with respect to their obligations under the readily achievable barrier removal requirement. Under one option, existing facilities would be permitted to apply reduced scoping requirements for specified elements and spaces in the revised ADA Standards, such as the number of accessible entries to swimming pools. Whether or not this option is selected, the entire cost of the requirement would be attributable to the revised ADA Standards because, in the absence of the new regulation, there would be no requirement applicable to these elements or spaces. However, should the Department elect to apply reduced scoping to such elements and spaces, the incremental costs and benefits of the revised ADA Standards will likely be lower than they would be if the Department did not apply reduced scoping. Under another option, for purposes of the readily achievable barrier requirement, the Department may simply exempt existing facilities from compliance with certain scoping and technical requirements in the revised ADA Standards that are deemed inappropriate for barrier removal. Under this option, the incremental costs and benefits will also be lower than they would be if the Department did not provide such exemption.

5. Identifying and Quantifying Costs, Benefits, and Net Benefits

While the revised ADA Standards will apply directly to newly constructed or altered facilities, the Department will determine in its ADA regulation whether and to what extent the revised ADA Standards will apply to existing facilities. The cost of any required compliance with the revised ADA Standards by existing facilities will be more difficult to determine than the cost of compliance for newly constructed and altered facilities. Many existing facilities are subject only to the readily achievable barrier removal requirement. Under that requirement, what is readily achievable for any given facility must be determined on a case-by-case basis and, by statute, has no monetary or other absolute parameters. In addition, cost estimates are more readily available with respect to newly constructed and altered facilities. Thus, while the basic principles are the same for both, the Department is considering rather different technical approaches to the Benefit-Cost Analysis of the revised ADA Standards with respect to newly constructed and altered facilities, on the one hand, and existing facilities, on the other.

Costs and Benefits of Provisions Applied to Newly Constructed and Altered Facilities

For facilities that will be newly constructed or altered after the effective date of the revised ADA Standards, the Department will seek to estimate the economic value of the incremental costs and benefits of each new or revised provision, and from there the net costs or benefits of the rule as a whole, by fairly conventional means. Using the Access Board's estimates of direct unit costs as a starting point, the Department will estimate the direct life-cycle costs (based on an estimated 50-year life cycle of a building) imposed by each provision. These direct costs may include one-time cash expenditures occurring at the time of construction or alteration (also known as "capital" costs), annual cash expenditures necessary to cover the incremental costs of maintaining and operating accessible elements and spaces, and any loss of economic value caused by the reduction of productive space or productivity. Indirect costs include losses in social value that may arise as a result of the revised ADA Standards, such as reduced accessibility or, due to the increased cost of construction, a reduction in the number of total facilities and buildings that are constructed.

Benefits are primarily represented by the creation of social value, and can be divided into three categories. "Use value" is the value that people both with and without disabilities derive from the use of accessible facilities. "Insurance value" is the value that people both with and without disabilities derive from the opportunity to obtain the benefit of accessible facilities. Finally, "existence value" is the value that people both with and without disabilities derive from the guarantees of equal protection and non-discrimination that are accorded through the provision of accessible facilities. Other kinds of benefits include the saving of direct costs, such as from reduced construction, alteration, or retrofitting expenses resulting from reduced accessibility requirements.

Based on the estimates of costs and benefits, the Department will calculate the annualized value and the net present value of the rule as a whole. In addition to requiring the presentation of annualized costs and benefits, OMB Circular A-4 stipulates that net present value is to be regarded as a principal measure of value produced by a Benefit-Cost Analysis when costs and benefits are separated from each other over time (*i.e.*, when some people benefit from accessible facilities long after their construction). A net present value greater than zero would indicate that benefits exceed costs and that the regulation can be expected to increase the general level of economic welfare accordingly. While a net present value of less than zero could mean that costs exceed benefits, the existence of significant unmeasured and qualitative benefits must be taken into account. The Department proposes to identify and discuss all unmeasured and qualitative benefits. As one means of accounting for measurement risk, the Department also proposes to adopt the method of Threshold Analysis. Under this method, if quantitatively measured costs

appear to exceed quantitatively measured benefits, the Department will calculate the value that society would need to assign to un-quantified benefits in order to balance the ledger. This "threshold value" will be reported for public review and comment in the NPRM, along with a qualitative description of the un-quantified benefits at issue.

Quantification of Costs and Benefits

Among the conventions of economic analysis, and an accepted principle in OMB Circular A-4, is that the amount of money people either pay or are willing to pay for goods and services represents a reasonable index of the total benefit they derive from such goods and services. This is called "willingness to pay." The Department recognizes that the research community has made significant progress in the measurement of willingness to pay using proxies from market prices, surveys, and other methods. The Department also recognizes that some values nevertheless defy measurement. For example, while society clearly values the existence of constitutional protections, ascertaining the monetary equivalence of such values might be controversial and technically impracticable. Accordingly, the Department proposes to express benefits that are difficult to measure in qualitative rather than quantitative terms.

Circular A-4 indicates that, where available and relevant, market prices represent the appropriate starting point for ascertaining willingness to pay. Thus, for example, if a movie theater or swimming pool becomes newly accessible as a result of the revised ADA Standards, the resulting user value could be determined by multiplying the volume of new visits by people with disabilities by the market price of entry (namely, the ticket price). However, an issue with market prices arises where a provision in the revised ADA Standards renders an existing facility "more" accessible rather than newly accessible. Such might be the case, for example, with respect to the provision requiring an independent means of getting in and out of the pool in an otherwise accessible swimming facility, or the provision requiring equal access to the good seats in an otherwise accessible theater. In such cases, it may be argued that the price of entry overstates the value of the provision, since entry *per se* would still be feasible without the change. On the other hand, others may argue that the swimming or theater experience is fundamentally altered, perhaps even newly facilitated in a meaningful way, by the availability of improved, independent access. In practice, practitioners of Benefit-Cost Analysis employ empirical data, opinion surveys, expert judgment, and sensitivity analysis to obtain reasoned estimates of use value.

Economists also recognize that, as applied to people with low incomes, the willingness-to-pay index can underestimate economic value from the perspective of public policy. For example, the food purchases of single parents living below the poverty line are smaller than similarly constituted households with higher incomes. While both

constitute willingness-to-pay data, for the low-income household, the data indicate affordability, not the economic value obtained from nutrition. In this regard, the Department recognizes that the median income among people with disabilities is significantly lower (about half) than that of the U.S. population generally. As a result, the willingness of people with disabilities to pay for access to architecturally improved facilities might not reflect the value of such facilities as viewed by the framers of the ADA and other policy makers. In practice, most Regulatory Impact Analyses use benefit values, such as a value of a statistical life in assessing health and safety regulations, assuming that the population receiving the benefits is of average income.

Another issue that arises when willingness to pay is used as an index of value is that market prices simply do not exist for all goods and services. Such might be the case with a municipal swimming pool provided free of charge, or for a token, largely subsidized user fee. Another example might be the improvement of a particular element or space, such as a kitchen or toilet, in an otherwise accessible office building. Survey-based information is the principal means of obtaining willingness-to-pay data in such cases. A commonly used survey approach in Regulatory Impact Analysis is called the "Stated Preference" method. Stated Preference surveys pose carefully conceived and scientifically structured hypothetical choices and trade-offs to random samples of survey respondents. Special statistical analysis of the survey data is then employed in order to obtain estimates of willingness to pay. A concern with the Stated Preference surveys is that respondents may not have sufficient incentives to offer thoughtful responses that are consistent with their preferences, or that respondents may be inclined to bias their responses for one reason or another. Without a real budgetary constraint, for example, respondents with disabilities might be inclined to exaggerate their willingness to pay for more accessible facilities. On the other hand, respondents without disabilities might understate their true willingness to pay for accessibility measures due to a tendency to underestimate the risk of becoming disabled oneself. Additionally, people might have difficulty articulating the strength of their feelings regarding, for example, the integration of a child with a disability into a mainstream school or play area if they do not have a child with a disability. Perhaps people are more likely to underestimate than overestimate their willingness to pay for the existence of legal protections if they have not experienced disability first-hand or within their family. The Department recognizes the need to anticipate the risk of both under- and over-estimation of value based on the hypothetical willingness-to-pay questions posed in Stated Preference surveys. The Department recognizes as well that, other things being equal, "revealed preference" data—data based on actual transactions—is to be preferred over Stated Preference data because revealed preferences represent actual decisions in which market participants enjoy or suffer the consequences of their decisions.

Finally, measurement error is inevitable in the assessment of both costs and benefits. The revised Standards will have different implications for elements and spaces in facilities of different types and different ages. The number of elements and spaces in facilities is itself uncertain. Data will often be sparse and will be subject to recording errors of many kinds. In addition to the method of Threshold Analysis described above, the Department proposes to adopt the method of Risk Analysis to help ensure that the analysis is transparent with respect to measurement risk. While rather technical in application, the principle is straightforward: with Risk Analysis, every number employed in the analysis is expressed as a range—what statisticians call a “probability distribution”—that reflects the whole array of possible outcomes and the probability of each occurring. When all the ranges are combined into estimates of total costs and total benefits for a given regulatory provision, the result is not a single “best guess” of net benefit, but a probability range of possible outcomes.

Costs and Benefits of Provisions Applied to Existing Facilities Under the Barrier Removal Requirement: Proposed Simulation Model

Title III of the ADA reflects Congress's specific intent not to establish—either in the statute or regulations—absolute technical or monetary standards for what constitutes

readily achievable barrier removal in existing buildings. Some stakeholders, particularly businesses (and especially small businesses), have long expressed concern regarding the need to assess the costs of compliance with the readily achievable barrier removal requirement in absolute terms, notwithstanding the essentially relative nature of the statutory requirement.

The Department is considering the development of a computer simulation model to estimate the incremental costs and benefits of the revised ADA Standards as applied to existing facilities that may be required to retrofit particular elements or spaces only to the extent required by the readily achievable barrier removal requirement. For each new or revised scoping or technical provision in the revised ADA Standards representing a substantive change from the current ADA Standards, the computer model would assess the statistical probability that existing facilities would be required to implement the provision pursuant to the readily achievable barrier removal requirement. In order to determine whether a provision would apply to a given facility, the Department contemplates plugging a range of different factors relevant to the “readily achievable” analysis into the model, including the possibility of using multiple criteria that distinguish among small- and large-sized enterprises.

Two statistical databases would be developed in order to implement the simulation model. One is a database of costs associated with retrofitting elements and spaces in existing facilities, where the facilities are stratified by type, age, physical condition, and financial size. This database would also include estimates of user and nonuser benefits. The second database would include the estimated number of elements and spaces in existing facilities that would be subject to the readily achievable barrier removal requirement (in each year of the life-cycle analysis) in each stratum. Within each stratum, the incidence of facilities in various classes would permit the model to be executed for each of the options under Departmental consideration. The Department would collect the information used to populate the databases from all available sources. As set out above, all entries in the databases would be expressed as a range of probabilities in order to account for the inevitable risk of error and varying degrees of sampling quality. Thus, the model would be statistical by nature, which means that different types and sizes of facilities would be represented as sample data, not data for each facility in the nation. Costs would be statistical in the same sense.

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