ACTION ITEM

AC TRANSIT DISTRICT **GM Memo No. 06-078 a**
Board of Directors
Executive Summary Meeting Date: April 19, 2006

Committees:

Planning Committee	☐	Finance Committee	☐
External Affairs Committee	☐	Operations Committee	☐
Board of Directors	☒	**Financing Corporation**	☐

SUBJECT: **US DEPARTMENT OF TRANSPORTATION (USDOT) NOTICE OF PROPOSED RULEMAKING (NPRM) REGARDING TRANSPORTATION FOR INDIVIDUALS WITH DISABILITIES (49 CFR PARTS 27, 37, AND 38. DOCKET NUMBER [OST-2006-23985]).**

RECOMMENDED ACTION:

☐ **Information Only** ☐ **Briefing Item** ☒ **Recommended Motion**

Authorize the following actions:

1. Joining as a signatory on the proposed letter from the coalition of transit attorneys;

2. Submittal of AC Transit's comments on the proposed NPRM that include the recommendations from the Accessibility Advisory Committee (AAC)

Fiscal Impact: **None**

BOARD ACTION: **Approved as Recommended [ ]** **Other [ ]**
Approved with Modification(s) [ ]

[To be filled in by District Secretary after Board/Committee Meeting]

The above order was passed and adopted on _____, 2006.

Rose Martinez, District Secretary
By _____

Background/Discussion:

At its April 5, 2006 meeting, the Planning Committee considered the content of GM Memo No. 06-078 and recommended the Board approve the motion set forth in it. See Attachment 1.

Since the drafting of that memo the General Counsel's Office has been involved with a coalition of transit attorneys across the country regarding the content of the NPRM. A draft of a proposed letter is provided as Attachment 2.

The AAC, at its meeting of April 11, 2006, considered the content of GM Memo No. 06-078 and comments from the General Counsel's Office. The AAC's recommendations are set forth below.

- To support the staff recommendation that no additional regulatory language be added to the regulations.

- Support the existing origin-to-destination language in the regulations. The definition of origin-to-destination is best left to the service providers. No regulatory change.

- The support of the maintenance of the origin-to-destination language, in the existing regulations by the AAC, with the caveat that AC Transit will involve consumers and the community should, if AC Transit's definition of origin-to-destination changes.

- Based on the information provided by legal counsel, the AAC advises the Board to oppose the establishment of the DLCC through this NPRM.
- The AAC does not support a change in the definition of a common wheelchair.

Based on the AAC's recommendations and the General Counsel's Office review of the coalition letter, a separate letter from AC Transit has been prepared that also would be sent. See Attachment 3.

The NPRM contained eight items the USDOT requested comment on by May 30, 2006. While three of those items were addressed in GM Memo No. 06-078, the AAC deferred consideration of those items until its May 9th meeting. A draft letter commenting on those items will be provided for the Board's consideration at the May 17, 2006 meeting.

Prior Relevant Board Actions/Policies:

Commented on selected proposals in previous NPRMs regarding ADA rule changes: Oct 1994 (GM Memo 94-301) and Jan 1996 (GM Memo 96-23)

Attachments:

1. GM Memo No. 06-078, including Notice of Proposed Rulemaking 49 CFR Parts 27, 37, and 38 (2/27/06)
2. Draft letter from coalition of transit attorneys
3. Draft AC Transit letter

Approved by: Rick Fernandez, General Manager
Kenneth C. Scheidig, General Counsel

Reviewed By: Nancy Skowbo, Deputy General Manager, Service Development
Mallory Nestor-Brush, Accessible Services Manager

Prepared by: Kenneth C. Scheidig, General Counsel

Date Prepared: April 14, 2006

GM Memo 06-078a
Attachment 1

ACTION ITEM

AC TRANSIT DISTRICT **GM Memo No. 06-078**
Board of Directors
Executive Summary Meeting Date: April 5, 2006

Committees:

Planning Committee	☐	Finance Committee	☐
External Affairs Committee	☐	Operations Committee	☒
Board of Directors	☐	**Financing Corporation**	☐

SUBJECT:
US Department of Transportation (USDOT) Notice of Proposed Rulemaking (NPRM) Regarding Transportation for Individuals with Disabilities (49 CFR Parts 27, 37, and 38. Docket Number [OST-2006-23985])**.**

RECOMMENDED ACTION:

☐ **Information Only** ☐ **Briefing Item** ☒ **Recommended Motion**

Authorize staff and the Accessibility Advisory Committee (AAC) to submit comments to USDOT regarding their NPRM concerning transportation for Individuals with Disabilities.

Fiscal Impact:
None

Background/Discussion:
The USDOT has issued a NPRM which proposes to amend its previously issued (September, 1991) Americans with Disabilities Act (ADA) and section 504 regulations,

BOARD ACTION: **Approved as Recommended [ ]** **Other [ ]**
Approved with Modification(s) [ ]

[To be filled in by District Secretary after Board/Committee Meeting]

The above order was passed and adopted on _____, 2006.

Rose Martinez, District Secretary
By _____

which provide requirements for accessibility on fixed route service, mandated comparable paratransit service to be provided by fixed-route operators, and similar issues. This NPRM proposes updates to the current regulations. It defines, clarifies and/or modifies some of the existing regulatory language and deletes obsolete rules.

In the past, the AC Transit Board of Directors has either commented on previous NPRMs relating to the ADA, and/or has supported the AAC's comments on accessibility issues addressed by the NPRMs.

Comments about this NPRM must be submitted to the USDOT by April 28, 2006.

Due to the timing of the receipt of the NPRM, and the frequency of AAC meetings, the NPRM could not be provided to the AAC in time for them to fully consider and discuss its contents at their March meeting. Therefore, the NPRM will be reviewed and addressed at their meeting on April 11, 2006. Afterward, staff expects to be able to forward the AAC's comments, (accompanied by staff recommendations) to the Board at their meeting on April 19, with a request for the Board to authorize the submission of the comments to the USDOT by the April 28, 2006 deadline.

Notice of Proposed Rulemaking Issues:

There are a number of proposals in the NPRM which are not relevant to the District's delivery of service and therefore will not be addressed in this GM Memo.

The current NPRM considers the following topics:

1. The NPRM suggests that regulatory language from the Department of Justice (DOJ) regulations be incorporated into the DOT regulations. The NPRM will require all public entities to make reasonable modifications to policies or practices so that persons with disabilities will be able to use their service or programs. There will be exceptions to the reasonable accommodation requirement if the modification will impose an undue burden or if it will require a fundamental change in the nature of the service provided. Where it is determined that a modification would create an undue burden or create a fundamental alteration, an alternative solution that does not do so must be sought.

Discussion: Current DOT regulations stipulate appropriate service levels and requirements. At the same time, current DOT rules give sufficient discretion in service delivery methods, and avoid over-regulating and thereby mandating a *one-size-fits-all*

approach. Thus, they enable transit operators to develop creative service delivery approaches which better serve the community under local conditions.

All of AC Transit's equipment is already accessible and lift equipped, and our paratransit service has been federally audited and determined to be ADA compliant. District policies, service contracts and staff training all require full ADA compliance.

Staff comment: Although staff believes that the effect of this rule change may not have significant impact upon the District's fixed route or paratransit service, if an expansive interpretation were given to the new language, substantial expense to the District could result. Therefore, staff does not believe that additional regulatory language is necessary or desirable. For example, one could argue that the provision of ADA complementary paratransit service is, in fact, already a reasonable accommodation. Requiring additional reasonable accommodations for an already reasonable accommodation is probably excessive.

2. The NPRM addresses a long-standing controversy regarding the obligation for provision of *curb-to-curb* vs. *door-to-door* paratransit service, by commenting upon a relevant court case, and providing a clarifying service requirement explanation. Rather than requiring either *curb-to-curb* or *door-to-door* paratransit service, the proposed rule requires provision of rides from "origin to destination."

Discussion: Despite many requests to do so, the USDOT declined to require that paratransit service be either *curb-to-curb* or *door-to-door.* They stated that individual needs, weather conditions, or locations circumstances might require one type of service or the other, but they felt that this was an operational issue, and best left to the service provider. However, to ensure that service is actually provided from the user's point of origin to his or her destination point, they therefore chose open-ended language which may require reasonable accommodation for an individual, but which would not require a change to a reasonable general policy under ordinary circumstances. They provided a functional definition of the requirement, rather than a strictly technical one.

Staff comment: Staff believes that if implemented, this rule would not have significant impact upon the District's paratransit service. EBP has historically provided curb-to-curb service, with door-to-door service upon request. As a general rule, service requests are accommodated, except where they conflict with safety issues, labor agreements, or other legal requirements. However, the USDOT does not view transit providers' functions as extending to the provision of personal services. Therefore,

current EBP policy requires that drivers cannot enter into residence buildings to locate paratransit riders, cannot lift passengers in wheelchairs up steps, cannot carry heavy packages, and they cannot lose sight of their vehicles.

3. The NPRM formalizes the establishment of a Disability Law Coordinating Council to coordinate all written USDOT guidance and interpretations on disability related matters, and clarifies when their guidances are binding. It also assures that interpretations are consistent among USDOT offices and with the Office of the Secretary of Transportation Regulations.

Discussion: This proposal would codify an already existing DOT internal mechanism, which is in place and is reported to be functioning effectively. In the past DOT and FTA staff had occasionally given out conflicting explanations or interpretations of DOT regulations to individuals or transit agencies. This body will review all such communications issued by DOT, prior to their publication and distribution, to prevent such discrepancies and misunderstandings in the future.

Staff comment: This appears to be an improvement in DOT functioning, and will ultimately benefit all concerned. Transit operators will be assured of a consistency in the interpretation of regulations that affect them and that impact their delivery of service. The new council will also provide improved communication flows and general information delivery between regulators and transit operators, and thereby facilitate compliance for operators.

Request for Comment on Other Issues:

The NPRM also requests comments on whether additional language is needed regarding several issues, and other current topics of interest to the transit community, including for example:

1. The FTA proposes that Bus Rapid Transit (BRT) vehicles should be treated as buses for ADA purposes. Feedback is sought regarding ramp/bridge plate slopes and measurements, whether detectable warnings should be required, whether mobility aid securement systems should be required, and what other provisions should be added to parts 37 and 38 re: BRT service, etc.

Staff comment: As the District's BRT vehicles will all be low floor buses, the issues of ramps will probably not impact our service delivery. Staff believes that the proposed rule, in which BRT vehicles are treated as buses for ADA purposes (accessibility, interior circulation, securements for mobility devices, etc.) would not negatively impact the implementation of the District's planned BRT projects, and should be supported. On BRT routes where there are clearly identified stations, which are separate from adjacent sidewalks and constructed for BRT's exclusive use, staff supports requiring detectable warnings for safety and liability reasons. However, at stations which are located on normal street sidewalks, due to the many potential site constraints resulting from local conditions, and over which the transit operator has no control, staff believes that detectable warnings should be optional. Staff does not have additional provisions to suggest at this time.

2. Manufacturers periodically modify or develop new mobility devices. Comment was sought regarding the department's recently issued guidance regarding "Segways". They also asked about whether the existing definition of the "common wheelchair" should be changed.

Discussion: The ADA provides a clear definition of a *"common wheelchair"* which all transit operators are required to carry. Transit operators and vehicle and lift manufactures have developed equipment and service based upon these FTA regulations . ADA compliant vehicles normally have a 12 year life expectancy, so if the current definition is modified, it could take up to 12 years to replace current equipment and become fully compliant, unless the District is required to retrofit vehicles, an extremely expensive task.

Wheelchair and mobility device manufacturers do not have similar compliance requirements, and as a result, although they are aware of the ADA requirements, they continue to design wheelchairs which do not fit within the FTA's guidelines, either because of size or construction design. Staff suggests that USDOT should be informed that transportation should be a joint effort between the transportation industry and wheelchair and mobility device manufacturers; and that it is unreasonable to expect the transportation industry to bear the compliance obligation alone, and be forced to continue to play catch up at increasing cost.

Staff comment: Staff believes that the current definition and regulations should continue in force unchanged, but that the wheelchair manufactures should be encouraged by USDOT, HHS, or other federal entity, or provided some sort of incentive,

to work with the transit industry to develop chairs that fit within the ADA's defined envelope.

3. A major topic of confusion and controversy, and which could affect FTA findings of compliance for transit operators, relates to the definition of trip denials, and how they should be counted. USDOT's regulations prohibit "substantial numbers of trip denials or missed trips." The goal is to provide a *consistently applied measure* to all transit systems.

Discussion: USDOT explains that a missed or denied trip is any trip that an eligible passenger seeks but is unable to take because of the action of the transit provider. They are suggesting that a trip to and from someplace should be counted as two trips, for ADA denial counting purposes. Thus, when a consumer calls and attempts to schedule a trip which EBP is unable to provide, the proposed rule would require that the denial should be counted as *two* denials, for the outgoing and return trips. EBP's trip counting method varies slightly from the proposed method. EBP currently uses the following procedures to ensure that schedulers are properly tracking trip denials:

When a request for a trip is made, an East Bay Paratransit (EBP) Customer Service Representative will book the trip or code it as a scheduled denial (if the trip was outside the ADA window but accepted by the passenger), code it as a capacity denial (if no capacity was available) or as a refused (trip was offered outside the ADA window and was refused by the passenger).

In the case that the initial leg of the trip could not be accommodated for any reason and the passenger desires to schedule a return trip, the EBP Customer Service Representative will again either book the trip or code it as a scheduled denial (if the trip was outside the ADA window but accepted by the passenger), code it as a capacity denial (if no capacity was available) or as a refused (trip was offered outside the ADA window and was refused by the passenger).

In the case that a round trip is requested at the outset by the passenger and neither the initial nor the return trip can be accommodated an EBP Customer Service Representative would count this as two denials following the procedures and coding as suggested in the NPRM.

Staff comment: Automatically counting the initial denial as a denial of two trips artificially and inaccurately inflates the denial statistic. The procedures described above

give a truer picture of actual service delivery actions and statistics. In staff's view, imposition of regulatory language mandating the double counting would therefore be inappropriate.

Prior Relevant Board Actions/Policies:

Commented on selected proposals in previous NPRMs regarding ADA rule changes: Oct 1994 (GM Memo 94-301) and Jan 1996 (GM Memo 96-23)

Attachments:
1. Notice of Proposed Rulemaking 49 CFR Parts 27, 37, and 38 (2/27/06)

Approved by: Rick Fernandez, General Manager

Reviewed By: Nancy Skowbo, Deputy General Manager, Service Development
Mallory Nestor-Brush, Accessible Services Manager

Prepared by: Francis Masson, Accessible Services Specialist

Date Prepared: April 14, 2006

Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: FEMA proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed base flood elevations and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. As a result, a regulatory flexibility analysis has not been prepared.

Regulatory Classification. This proposed rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

State	City/town/county	Source of flooding	Location	#Depth in feet above ground *Elevation in feet (NGVD) •Elevation in feet (NAVD)	
				Existing	Modified
California	Rohnert Park (City), Sonoma County.	Laguna de Santa Rosa Creek.	At downstream side of Redwood Highway South (US Route 101).	*95	*94
			Approximately 0.80 mile upstream of Redwood Highway South.	*105	*94
Maps available for inspection at the Rohnert Park City Public Works Department, 6750 Commerce Boulevard, Rohnert Park, California. Send comments to Mr. Steve Donley, Rohnert Park City Manager, 6750 Commerce Boulevard, Rohnert Park, California 94928.					
California	Tulare County (Unincorporated Areas).	Sheet Flow west of Sand Creek.	Approximately 0.47 mile downstream of Avenue 440.	#2	#1
			Approximately 0.56 mile upstream of Avenue 440.	#2	#1
Maps available for inspection at Tulare County Resource Management Agency, 5961 South Mooney Boulevard, Visalia, California. Send comments to Mr. Brian Haddix, Tulare County Administrative Officer, 2800 West Burrel Avenue, Visalia, California 93291.					

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: February 3, 2006.

David I. Maurstad,

Acting Director, Mitigation Division, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E6–2691 Filed 2–24–06; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF TRANSPORTATION

49 CFR Parts 27, 37, and 38

[Docket OST–2006–23985]

RIN 2105–AD54

Transportation for Individuals With Disabilities

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department is proposing to amend its Americans with Disabilities Act (ADA) and section 504 regulations to update requirements concerning rail station platforms, clarify that public transit providers are required to make modifications to policies and practices to ensure that their programs are accessible to individuals with disabilities, and codify the Department's practice concerning the issuance of guidance on disability matters.

Comment Closing Date: Comments should be submitted by April 28, 2006 for the proposed regulatory changes in this notice. Comments should be submitted by May 30, 2006 for responses to the seven items under the heading "Request for Comment on Other Issues." Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments identified by the docket number [OST–

2006–23985] by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Fax: 1–202–493–2251.
- Mail: Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- Hand Delivery: To the Docket Management System; Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: You must include the agency name and docket number [OST–2006–23985] or the Regulatory Identification Number (RIN) for this notice at the beginning of your comment. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act section of this document.

Docket: You may view the public docket through the Internet at *http://dms.dot.gov* or in person at the Docket Management System office at the above address.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590. (202) 366–9306 (voice); (202) 755–7687 (TDD), *bob.ashby@dot.gov* (e-mail). You may also contact Bonnie Graves, in the Office of Chief Counsel for the Federal Transit Administration, same mailing address, Room 9316 (202–366–4011), e-mail *bonnie.graves@fta.dot.gov*; and Richard Cogswell, of the Office of Railroad Development in the Federal Railroad Administration, VFRA Stop 20, 1120 Vermont Avenue, NW., Washington, DC 20005 (202–493–6388), e-mail *richard.cogswell@fra.dot.gov.*

SUPPLEMENTARY INFORMATION: This proposed rule concerns two main substantive subjects, reasonable modifications to policies and practices of transportation providers and platform accessibility in commuter and intercity rail systems.

Reasonable Modifications of Policies and Practices

In proposed amendments to 49 CFR 37.5 and 37.169, the NPRM would clarify that transportation providers, including, but not limited to, public transportation entities required to provide complementary paratransit service, must make reasonable modifications to their policies and practices to ensure program accessibility. Making reasonable modifications to policies and practices is a fundamental tenet of disability nondiscrimination law, reflected in a number of Department of Transportation (DOT) and Department of Justice (DOJ) regulations (*e.g.*, 49 CFR 27.11(c) (3), 14 CFR 382.7(c); 28 CFR 35.130(b)(7)).

However, the DOT ADA regulations do not include language specifically requiring regulated parties to make reasonable modifications to policies and practices. The Department, when drafting 49 CFR part 37, assumed that § 37.21(c) would incorporate the DOJ provisions on this subject, by saying the following:

> Entities to which this part applies also may be subject to ADA regulations of the Department of Justice (28 CFR parts 35 or 36, as applicable). The provisions of this part shall be interpreted in a manner that will make them consistent with applicable Department of Justice regulations.

Under this language, provisions of the DOJ regulations concerning reasonable modifications of policies and practices applicable to public entities, such as 28 CFR 35.130(b)(7), could apply to public entities regulated by DOT, while provisions of DOJ regulations on this subject applicable to private entities (*e.g.*, 28 CFR 36.302) could apply to private entities regulated by DOT. The one court decision that, until recently, had addressed the issue appeared to share the Department's assumption about the relationship between DOT and DOJ requirements (see *Burkhart* v. *Washington Area Metropolitan Transit Authority*, 112 F.3d 1207; DC Cir., 1997).

However *Melton* v. *Dallas Area Rapid Transit (DART)*, 391 F. 3d 691; 5th Cir., 2004; cert. denied 125 S. Ct. 2273 (2005) took a contrary approach. In this case, the court upheld DART's refusal to pick up a disabled paratransit passenger in a public alley in back of his house, rather than in front of his house (where a steep slope allegedly precluded access by the passenger to DART vehicles). DART argued in the case that paratransit operations are not covered by DOJ regulations. "Instead," as the court summarized DART's argument, "paratransit services are subject only to Department of Transportation regulations found in 49 CFR part 37. The Department of Transportation regulations contain no analogous provision requiring reasonable modification to be made to paratransit services to avoid discrimination." (391 F.3d at 673).

The court essentially adopted DART's argument, noting that the permissive language of § 37.21(c) ("may be subject") did not impose coverage under provisions of DOJ regulations which, by their own terms, said that public transportation programs were "not subject to the requirements of [28 CFR part 35]." See 391 F.3d at 675. "It is undisputed," the court concluded

> That the Secretary of Transportation has been directed by statute to issue regulations relating specifically to paratransit transportation. Furthermore, even if the Secretary only has the authority to promulgate regulations relating directly to transportation, the reasonable modification requested by the Meltons relates specifically to the operation of DART's service and is, therefore, exempt from [DOJ] regulations in 28 CFR part 35 (Id.)

When a public entity like DART is operating under a plan approved by the Federal Transit Administration (FTA) under part 37, in the court's view, it is not required to make any further modifications in its service to meet ADA nondiscrimination requirements (Id.)

While the *Melton* decision is the controlling precedent only in the states covered by the 5th Circuit, the Department believes that it would be useful to amend its rules to clarify, nationwide, that public entities that provide designated public transportation, including but not limited to complementary paratransit, have the obligation to make reasonable modifications in the provisions of their services when doing so is necessary to avoid discrimination or provide program accessibility to services. The Department will do so by proposing to add language to a number of provisions of its ADA and 504 regulations.

First, in § 37.5, the general nondiscrimination section of the ADA rule, the Department would add a paragraph requiring all public entities providing designated public transportation to make reasonable modifications to policies and practices where needed to avoid discrimination on the basis of disability or to provide program accessibility to services. The language is based on DOJ's requirements and, like the DOJ regulation, does not require a modification if it would create an undue burden or fundamentally alter the nature of the entity's service.

Parallel language would be placed in revised § 37.169, replacing an obsolete provision pertaining to over-the-road buses. Under the proposed language, the head of an entity would have to make a written determination that a needed

reasonable modification created an undue burden or fundamental alteration. The entity would not be required to seek DOT approval for the determination, but DOT could review the entity's action (e.g., in the context of a complaint investigation or compliance review) as part of a determination about whether the entity had discriminated against persons with disabilities. In the case where the entity determined that a requested modification created an undue burden or fundamental alteration, the entity would be obligated to seek an alternative solution that would not create such an undue burden or fundamental alteration.

The Department wants to make sure that transit providers understand that the proposed new language concerning modification of policies, as well as other new provisions of the rule, are incorporated in the obligations that transit providers assume through their financial assistance relationships with FTA. In this connection, we would point out standard language in the FTA Master Agreement:

> The Recipient acknowledges that Federal laws, regulations, policies, and related administrative practices applicable to the Project on the date FTA's authorized official signs the Grant Agreement or Cooperative Agreement may be modified from time to time. In particular, new Federal laws, regulations, policies, and administrative practices may be promulgated after the date when the Recipient executes the Grant Agreement or Cooperative Agreement, and might apply to that Grant Agreement or Cooperative Agreement. The Recipient agrees that the most recent of such Federal requirements will govern the administration of the Project at any particular time, unless FTA issues a written determination otherwise. Master Agreement at Section 2(c), Application of Federal, State, and Local Laws and Regulations

While it appears to the Department that this language is sufficient, we seek comment on whether any additional regulatory text language is needed on this point.

We would point out that language in the existing paratransit requirements of part 37 has an effect on paratransit providers very similar to that of the proposed reasonable modification language. 49 CFR 37.129(a) provides that, with the exception of certain situations in which on-call bus service or feeder paratransit service is appropriate, "complementary paratransit service for ADA paratransit eligible persons shall be origin-to-destination service." This language was the subject of a recent guidance document posted on the Department's Web sites.

This guidance notes that the term "origin to destination" was deliberately chosen to avoid using either the term "curb-to-curb" service or the term "door-to-door" service and to emphasize the obligation of transit providers to ensure that eligible passengers are actually able to use paratransit service to get from their point of origin to their point of destination.

> The preamble discussion of this provision made the following points: Several comments asked for clarification of whether [origin-to-destination] service was meant to be door-to-door or curb-to-curb, and some recommended one or the other, or a combination of the two. The Department declines to characterize the service as either. *The main point, we think, is that the service must go from the user's point of origin to his or her destination point.* It is reasonable to think that service *for some individuals or locations* might be better if it is door-to-door, while curb-to-curb might be better in other instances. This is exactly the sort of detailed operational decision best left to the development of paratransit plans at the local level. (56 FR 45604; September 6, 1991; emphasis added.)

In the local paratransit planning process, it would be consistent with this provision for a transit provider to establish either door-to-door or curb-to-curb service as the basic mode of paratransit service. Where the local planning process establishes curb-to-curb service as the basic paratransit service mode, however, provision should still be made to ensure that the service available to each passenger actually gets the passenger from his or her point of origin to his or her destination point. To meet this origin to destination requirement, service may need to be provided to some individuals, or at some locations, in a way that goes beyond curb-to-curb service.

For instance, the nature of a particular individual's disability, adverse weather conditions, or terrain obstacles may prevent him or her from negotiating the distance from the door of his or her home to the curb. A physical barrier (*e.g.*, sidewalk construction) may prevent a passenger from traveling between the curb and the door of his or her destination point. In these and similar situations, to ensure that service is actually provided "from the user's point of origin to his or her destination point," the service provider may need to offer assistance beyond the curb, even though the basic service mode for the transit provider remains curb-to-curb.

Meeting this "origin to destination" requirement may well involve what is, in effect, a modification of an otherwise reasonable general policy provided for in an entity's paratransit plan. Like any reasonable modification, such assistance would not need to be provided if it created an undue burden or fundamental alteration. For example, the Department does not view transit providers' functions as extending to the provision of personal services. Drivers would not have to provide services that exceed "door-to-door" service (*e.g.*, go beyond the doorway into a building to assist a passenger). Nor would drivers, for lengthy periods of time, have to leave their vehicles unattended or lose the ability to keep their vehicles under visual observation, or take actions that would present a direct threat to safety. These activities would come under the heading of "fundamental alteration" or "undue burden."

In the interest of clarifying the Department's section 504 regulation, as well as its ADA regulation, on the issue of reasonable modifications of policies and practices, the Department is also proposing an amendment to 49 CFR part 27. This regulation, in § 27.11(c)(2)(iii), already requires recipients of DOT financial assistance to "begin to modify * * * any policies or practices that do not meet the requirements of this part." To avoid any possibility of misunderstanding with respect to the obligation to make reasonable modifications, however, we propose to add a new paragraph (e) to the general nondiscrimination section. The language of this section is similar to that of proposed § 37.5(g) in the ADA regulation.

Consistent with the addition of the "modifications of policies and practices" language, we are also adding a definition of "direct threat," using the language of the DOJ regulations (see 36 CFR 207(b)). It is important to note that, in order to be a basis for placing restrictions on access to individuals with disabilities, a transit provider would have to determine that a direct threat exists to the health or safety *of others*. The direct threat provision is not intended to permit restrictions that are aimed solely at protecting people with disabilities themselves. Moreover, a finding of direct threat must be based on evidence, not merely on speculation or apprehension about the possibility of a safety problem. In three different rulemakings (concerning use of three-wheeled scooters on transit vehicles, the accessibility of bus stops, and requirements for over-the-road buses), the Department has consistently emphasized that placing restrictions on access is not permissible in the absence of meeting a stringent direct threat standard. Transportation providers would not be required to seek the

Department's approval before applying the direct threat standard in a particular case. However, they should document such applications for possible FTA review in the context of compliance reviews or complaint investigations.

In considering the effect of the "reasonable modification" language on paratransit operators, the Department wants to emphasize, in the strongest possible terms, that operators are not required to change their basic mode of service provision. An operator that has chosen "curb-to-curb" service is not required to change its system to be a "door-to-door" system for everyone. However, a "curb-to-curb" operator, in individual situations where it was genuinely necessary to take additional steps to ensure that a passenger can actually use the service, would have an obligation to make exceptions to its normal policy subject, as always, to the "direct threat" and "undue burden/fundamental alteration" limitations. Because of the limited, case-by-case nature of these exceptions, the Department believes that the proposed amendment would not have significant cost implications, but we seek comments on all the implications of the proposal.

We would also note that the effect of this proposal is not limited to paratransit. For example, fixed route bus systems often have a policy of stopping only at designated bus stops. However, there may be instances where there is a barrier at a particular bus stop to its use by passengers with disabilities (*e.g.*, construction, snowdrifts). In such a case, where it would not be unduly burdensome or pose a direct threat, it would be appropriate for the bus to move a short distance from the stop to pick up a passenger using a wheelchair at a place where the passenger could readily board the vehicle.

In addition to the "modification of policies" language from the DOJ ADA rules, there are other features of those rules that are not presently incorporated in the DOT ADA rules (e.g., pertaining to auxiliary aids and services). The Department seeks comment on whether it would be useful to incorporate any additional provisions from the DOJ rules into part 37.

Commuter and Intercity Rail Station Platform Accessibility

The second substantive change to the Department's ADA rules concerns rail station platforms in commuter and intercity rail modes. The revised § 37.41 would replace, for purposes of these modes, material presently found in §10.3.1(9) of Appendix A to Part 37. One of the purposes of this amendment is to maintain the status quo with respect to this requirement, given the adoption by DOT of the new ADAAG standards, which do not include this language. The NPRM would also make conforming amendments to provisions in 49 CFR part 38 concerning commuter rail and intercity rail cars.

Under the present § 10.3.1(9), level entry boarding is defined, in effect, as involving a vertical gap between car entrances and platform of no more than ⅝ inch, with a horizontal gap of no more than 3 inches. Exception 2 to § 10.3.1(9) provides that, "where it is not operationally or structurally feasible to meet the horizontal gap or vertical difference requirement, mini-high platforms, car-borne or platform-mounted lifts, ramps or bridge plates, or similar manually deployed devices * * * shall suffice." Consistent with a recent guidance/interpretation document issued by the Department, this language should not be viewed as providing an unconstrained choice among various alternatives.

The Department strongly believes that, in choosing accessibility solutions, it is important—as the Department's 504 regulation has long stated (see 49 CFR 27.7(b)(2))—that service be provided "in the most integrated setting that is reasonably achievable." In proposed §§ 37.5(h) and 37.169(c), the Department proposes to specifically include this principle in its ADA regulation as well. The implication of this principle in the rail station context is that the accessibility solution that provides service the most integrated setting should be chosen.

In the course of recent discussions with one rail system about its proposed platform design, a serious problem with the existing provisions of § 10.3.1(9) came to light. Because of physical and operational characteristics of intercity and commuter rail systems—as distinct from light and rapid rail systems—Federal Railroad Administration (FRA) staff advised that the 3 inch and ⅝ inch gap requirements were unrealistic: *i.e.*, it is very unlikely that any commuter or intercity rail system could ever meet these requirements. An FRA staff paper discussing this issue in greater detail has been placed in the docket for this rulemaking. The Department seeks comment on whether any other matters raised in this paper should be added to the ADA regulation, or whether a version of this paper should be made an appendix to the final rule.

To address both the technical feasibility and integrated, accessible service issues, the Department is proposing to revise platform design requirements. It should be noted that these requirements are intended to apply to *new* commuter and intercity rail facilities and systems. The Department seeks comment on whether the same approach should be followed with respect to alterations to existing stations and to commuter rail key stations and intercity rail stations that have not yet been modified for accessibility as required by the ADA, and on cost, feasibility, or other issues that may arise in that context.

Under the proposed § 37.41, level-entry boarding is the basic requirement. If the original 3 inch and ⅝ inch gap requirements can be met, then nothing further need be done. Otherwise, platforms (in coordination with cars) must meet a maximum 10–13 inch horizontal gap requirement. With respect to the vertical gap, the requirement would be that the vertical gap between the car floor and the boarding platform would be able to be mitigated by a bridge plate or ramp with a 1:8 slope or less, under a 50% passenger load consistent with 49 CFR 38.95(c). Such gaps are typical of longstanding passenger rail systems and do not present a hazard to boarding for the majority of passengers.

Bridge plates would be used to connect the platform with each accessible car to facilitate independent boarding by wheelchair users and other passengers who cannot step across the platform gaps. This means that it is not adequate to provide access to some cars but not others, which is contrary to the principle of providing service in an integrated setting. The only exception would be for an old, inaccessible car being used on the system (*e.g.*, certain 1950s-era two-level cars still being used on some systems, which cannot readily be entered and used by most persons with disabilities even if platform and door heights are coordinated). The Department seeks comment on whether a ramp slope of 1:8 provides an appropriate opportunity for independent access to cars by wheelchair users. If not, what sort of assistance, if any, would be appropriate to require? We note that, in some systems, requiring a slope less steep than 1:8 might require bridge plates or ramps to be impractically long.

The Department seeks comment on any operational issues that could arise in the context of level-entry boarding to all cars in a train (*e.g.*, dwell time or headway issues resulting from deployment—particularly manual deployment—of bridge plates or ramps). As with any proposal, we seek comment on any cost or feasibility issues that could be involved.

Only if the rail system determines—with the concurrence of the FRA or Federal Transit Administration (FTA) Administrator—that meeting these requirements is operationally or structurally infeasible could the rail system use an approach not involving level-entry boarding, such as mini-high platforms or lifts. Even in such a case, the rail system would have to ensure that access was provided to each accessible car on a train. The concept we have of infeasibility is twofold. On one hand, there could be some situations in which, from a design or engineering point of view, meeting these requirements simply cannot be done. On the other hand, there could be situations in which meeting the requirements creates an undue burden. We believe from our experience that situations falling into either of these categories are likely to be extremely rare, but we think it would be useful to have a mechanism in the regulation for assessing any situations that may arguably fall into one of them. We also seek comment on whether there are any "bright line" criteria that the Department might usefully add to this section to assist transit providers in determining whether meeting the proposed requirements is infeasible in a given situation.

The Department is aware that, on a range of issues, there can be disagreements between commuter rail authorities and freight railroads whose track the commuter railroads use. Where any such disagreements pertain to the accessibility of a commuter rail station, we believe that 49 CFR 37.57 (based on a statutory provision in the ADA, 42 U.S.C. 12162(e)(2)(C)) is relevant. This section provides that "An owner or person in control of an intercity or commuter rail station shall provide reasonable cooperation to the responsible person(s) for that station with respect to the efforts of the responsible person to comply with the requirements of this subpart." We seek comment on whether any additions to this provision are necessary in order to ensure that disagreements between freight railroads and commuter rail authorities or Amtrak do not thwart the efforts of passenger railroads to ensure accessibility to passenger stations.

In some existing and proposed systems using mini-high platforms set back from the platform edge, the platform design has had the effect of channeling passengers into a narrow space between the face of the higher-level platform and the edge of the lower platform. The FRA regards such an arrangement as a hazard to passenger safety, since it may place passengers uncomfortably close to moving trains. Consequently the proposed rule would prohibit such designs. In addition, following FRA safety advice, the proposed rule would require that any obstructions on a platform (stairwells, elevator shafts, seats, etc.) must be set at least 6 feet back from the edge of a platform.

To ensure coordination of these requirements for platform accessibility with rail cars, a proposed amendment to § 37.85 would require new cars purchased for commuter rail systems to have floor heights identical to those of Amtrak cars serving the area in which the commuter system will be operated. This means that cars in the eastern part of the U.S. would have floor heights of 48 inches above top of rail, while those in the western part of the U.S. would have floor heights of 15 inches above top of rail. The purpose of this proposal is to prevent situations—some of which the Department has encountered—in which Amtrak and commuter rail cars with different floor heights use the same station platforms, complicating the provision of level entry boarding.

The Department assumes that the interior car floor will remain level with the car entrance for a sufficient distance to permit level entry to wheelchair positions in the car. The Department seeks comment on whether it is necessary to make this point part of the regulatory text.

Disability Law Coordinating Council

In addition to these two main topics, the proposal would codify an existing internal administrative mechanism used to coordinate DOT guidance and interpretations on disability-related matters. Under a March 2003 memorandum signed by Secretary of Transportation Norman Mineta, the Department uses an internal working group known as the Disability Law Coordinating Council (DLCC) to review written guidance and interpretations before they are issued by any of the Department's offices. The purpose of the DLCC is to ensure that guidance and interpretations are consistent among DOT offices and consistent with the Office of the Secretary regulations that carry out the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act, and the Air Carrier Access Act (49 CFR part 37 and 38, 49 CFR part 27, and 14 CFR part 382, respectively). Under the Secretary's memorandum, written guidance and interpretations on these matters must be approved by the Department's General Counsel.

The DLCC mechanism is in place and functioning effectively. The proposed regulatory change will codify this procedure and provide better notice to the public and greater certainty over time about this feature of the Department's implementation of its disability nondiscrimination responsibilities. This codified provision would revise 49 CFR 37.15 to parallel existing provisions of other Department-wide regulations, namely the disadvantaged business enterprise regulation (49 CFR 26.9(b)) and drug testing procedures regulation (49 CFR 40.5). The proposed language would replace existing § 37.15, an obsolete provision concerning a now-lapsed suspension of certain requirements pertaining to detectable warnings.

Clarification of § 37.23

The NPRM would also clarify § 37.23. This section provides that when a public entity enters into a contract or other arrangement or relationship with a private entity to provide service, the public entity must ensure that the private entity meets the requirements that would apply if the public entity provided the service itself. The NPRM would add a parenthetical making explicit what the Department has always intended: That an "arrangement or relationship" other than a contract includes arrangements and relationships such as grants, subgrants, and cooperative agreements. The additional words, which are consistent with an interpretation of the existing language that the Department recently posted on its Web sites, ensures that a passenger with a disability will be provided the appropriate level of service, whether a private entity providing the service does so through a contract with a public entity or otherwise receives funding through the public entity.

Deletion of Obsolete Provisions

Finally, the NPRM would delete certain obsolete provisions, including §§ 37.71 (b)–(g), 37.77, 37.103 (b) and (c) (language referring to over-the-road buses), and 37.193 (a) (2) and (c). The first two deletions concern a waiver procedure for situations in which accessible buses were not available from manufacturers. This waiver provision was included in response to concerns that, when the ADA rule went into effect in 1991, there would be a shortage of accessible buses available to transit authorities. That is no longer a reasonable apprehension, and the waiver provision has never been used. The latter two provisions concern over-the-road bus service, and have been overtaken by events, notably the 1998 issuance of an over-the-road bus

regulation (codified at Part 37, Subpart H).

Request for Comment on Other Issues

We also seek comment on several issues that the current regulation does not explicitly address.

1. One of the current issues of interest to the transit community concerns "bus rapid transit" (BRT). FTA recently held a conference on accessibility of BRT systems. Generally, FTA has expressed the view that BRT vehicles should be treated as buses for ADA purposes and that ramp slopes (e.g., for a ramp or bridge plate between a vehicle and a platform) should be measured from the height of the surface of the boarding platform. Other issues that have been raised concern where, if at all, detectable warnings should be required; whether interior circulation requirements should differ from those for buses; what requirements should pertain to vehicles that are boarded from the left as well as the right side at some stations/stops; how to handle vehicle and stop accessible requirements in systems that have both platform and street-level boarding; and whether mobility aid securement systems are necessary. The Department seeks comment on these or other issues concerning BRT accessibility, and on what, if any, specific provisions should be added to parts 37 and 38 concerning BRT.

2. On occasion, the Department receives questions about rail stations that were not originally identified as key stations, because they did not meet the criteria for key stations. However, circumstances have changed (e.g., when a station becomes a major destination due to new development, such as a stadium, convention center, etc.), placing the station within one or more of the criteria. In this situation, should transit authorities have any responsibility for identifying the station as an addition to their list of key stations and making accessibility modifications? What, if any, procedures should the regulation provide in such instances?

3. "Heritage fleets" are fleets of vintage streetcars acquired in the global marketplace for use in regular revenue service (the Market Street line in San Francisco is a well-known example). In some cases, an entire fleet used on a system or line will consist of restored "vintage" streetcars operated over newly-laid tracks. Many provisions of the Department's rules may not readily apply in such situations (e.g., the exception for historical systems, the "one car per train" rule, the "good faith efforts" provision for used vehicles). If the heritage streetcars cannot be made accessible without compromising their structural integrity, there might be no way of ensuring accessibility to such systems under the present rule. Is it acceptable to have completely inaccessible heritage trolley systems? If not, what, if any changes in the regulation should be made to address accessibility issues in these systems?

4. The existing intercity rail section of the ADA itself and DOT regulations speak specifically to Amtrak. The Department recognizes that other rail projects (e.g., for high-speed rail) or changes in the way that rail service between cities is provided could result in service not provided by Amtrak. What, if any, changes to the regulation should the Department contemplate in order to require appropriate accessibility in rail service between cities provided by someone other than Amtrak?

5. The Department seeks comment on an issue concerning vehicle acquisition by public entities operating demand responsive systems for the general public. Unlike public fixed route operators (see § 37.73), operators of demand responsive systems for the general public are not required, under § 37.77, to make good faith efforts to find accessible vehicles when acquiring used vehicles. We request comment on whether the absence of such a provision has been a problem, and on whether we should add a used vehicle provision of this kind to § 37.77.

6. From time to time, there are changes in mobility devices used by individuals with disabilities. For example, the Department recently issued guidance concerning the use of "Segways" on transit vehicles. Another example concerns wheelchairs that do not fit the Department's existing definition of a "common wheelchair" (a three-or four-wheeled mobility device that, together with its user, does not exceed 600 pounds and fits a specific dimensional envelope. Some newer wheelchair designs have six wheels, rather than three or four; others may be longer, wider, or heavier than contemplated by the current definition. The Department seeks comment on how best to accommodate such change, while still providing certainty to designers and manufacturers of vehicles.

7. 49 CFR part 38 contains requirements for the designation and signage of priority seating for individuals with disabilities in several modes: § 38.27 for buses, § 38.55 for light rail, § 38.75 for rapid rail, and, § 38.105 for commuter rail. There are no parallel requirements for intercity rail and over-the-road bus. We seek comment on whether it would be useful to add priority seating requirements in these other modes. We also seek comment on whether any provisions of § 37.167, concerning the implementation of priority seating provisions, should be modified.

8. Finally, the Department seeks comment on the matter of how providers of ADA paratransit should count trips. The Department's ADA implementing regulations prohibit "substantial numbers of trip denials or missed trips" for purposes of providing complementary paratransit service that is comparable to the fixed-route system. This issue concerns how missed or denied trips should be counted, in order to provide a consistently applied measure to all FTA-assisted transit systems.

The key objective of the ADA is to ensure the nondiscriminatory provision of transportation service to individuals with disabilities. Denied or missed trip statistics are a useful performance measure of the degree to which paratransit providers meet their passenger service obligations.[1] From this passenger service perspective, a missed or denied trip should be viewed as any trip that an eligible passenger seeks to take that, as a practical matter, he or she is unable to take because of the action of the transit provider.

In our view, the simplest and clearest approach is to think of each individual leg of a journey as a trip. If a passenger's journey goes from Point A to Point B, and then back from Point B to Point A, the passenger has taken two trips. If a passenger's journey goes from Point A to Point B, then from Point B to Point C, and finally from Point C back to Point A, the passenger has taken three trips.

For example, suppose an eligible passenger calls a paratransit operator in a timely manner and asks to schedule a trip the next day from Point A to Point B at 9 a.m. and a return trip from Point B to Point A at 1 p.m. The transit operator tells the individual that it can provide the return trip from B to A, but that a vehicle to provide the initial trip from A to B is unavailable. From the point of view of the passenger—which we believe to be the most relevant point of view in evaluating ADA-mandated services—the action of the paratransit

[1] A "denied" trip involves a situation where an eligible passenger attempts to schedule a trip in a timely fashion but is told by the transit provider that the trip cannot be scheduled as the Department's ADA rules require. A "missed" trip is one that has been scheduled, but then is not completed successfully because of an action of the transit provider (e.g., the vehicle does not show up). The discussion of counting trips applies equally to missed and denied trips.

provider in denying the initial trip has made it impossible for him or her to take the return trip as well. Because the paratransit provider will not take the passenger from Point A to Point B, the passenger will never arrive at Point B. The action of the provider precludes the passenger from traveling from Point B to Point A just as effectively as if the provider had told the passenger that no vehicle was available for the trip.[2]

If the passenger was successfully provided both the initial and return trips, it would be reasonable to count two trips made. Since the passenger in this hypothetical case was, by action of the paratransit provider, precluded from taking both trips, it is reasonable to count two trips denied. We do not believe it would be reasonable to treat as a "refusal" of a trip by a passenger a situation in which the passenger's journey is precluded by the paratransit provider's own actions. In this situation, there is not a real offer to the passenger of the transportation he or she has requested, and it is reasonable to count both legs of the trip as having been denied.

Of course, if a passenger is able to compensate for the unavailable trip (e.g., by taking a taxi or getting a ride with a family member) and is then able to accept the return trip, one trip has been taken and only one trip has been denied.

This approach recognizes that a shortage of capacity at one time of the day can have a ripple effect that affects the true availability of passenger service at other times. In addition, treating paratransit trips in this way will enable all providers to count successes and failures in service provision in a consistent manner. It should also create greater comparability across transit systems and improve the Federal Transit Administration's ability to monitor grantees' program performance.

We recognize, however, that information on the actual availability of vehicles to make trips at particular times of day can be very helpful to transit properties for planning purposes (e.g., in determining future acquisition needs). The set of statistics discussed above, while very important for determining transit providers' success in meeting ADA passenger service requirements, may not be ideally suited to this separate purpose. Consequently, transit operators might want to keep a second, separate set of statistics on vehicle availability for their own planning purposes. The Department seeks comment on the Department's approach to this issue.

For all the issues discussed in this section, the Department seeks comment on whether it is advisable to add regulatory text language or whether it would be sufficient to provide guidance to recipients.

[2] This point applies equally if the transit provider was able to supply the initial trip from Point A to Point B, but not the return. In this case, the passenger would be precluded from taking the initial trip because he or she would be stranded at Point B.

Regulatory Analyses and Notices

This NPRM is nonsignificant for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. The NPRM clarifies the Department's existing requirements concerning new commuter and intercity rail platforms and the obligation of paratransit providers and other regulated entities to make reasonable modifications of policies and practices to accommodate the needs of persons with disabilities in individual cases. These proposals do not represent significant departures from existing regulations and policy and are not expected to have noteworthy cost impacts on regulated parties. As with all rulemakings, however, the Department will consider comments related to costs (e.g., with respect to operations) that could be involved. The NPRM also codifies existing internal administrative practices concerning disability law guidance. This proposal would have no cost impacts on regulated parties. The rule does not have Federalism impacts sufficient to warrant the preparation of a Federalism Assessment.

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities. The rule may affect actions of some small entities (e.g., small paratransit operations). The proposed amendment to § 37.23 is merely a clarification reflecting the Department's interpretation of its current language, and in any case is unlikely to affect a substantial number of operators (i.e., because the number of small subgrantees that operate fixed-route systems is not expected to be large). Since operators can provide service in a demand-responsive mode (e.g., route deviation) that does not require the provision of complementary paratransit, and because the undue burden waiver provision of § 37.151–37.155, significant financial impacts on any given operator are unlikely. As with all rulemakings, however, the Department will consider comments related to costs that could be involved. As a general matter, compared to the existing rule, the matters discussed in the NPRM should not have noticeable incremental economic effects on small entities.

There are a number of other statutes and Executive Orders that apply to the rulemaking process that the Department considers in all rulemakings. However, none of them is relevant to this NPRM. These include the Unfunded Mandates Reform Act (which does not apply to nondiscrimination/civil rights requirements), the National Environmental Policy Act, E.O. 12630 (concerning property rights), E.O. 12988 (concerning civil justice reform), and E.O. 13045 (protection of children from environmental risks).

List of Subjects

49 CFR Part 27

Administrative Practice and Procedure, Airports, Civil Rights, Handicapped, Individuals with Disabilities, Highways and Roads, Reporting and Recordkeeping Requirements, Transportation

49 CFR Part 37

Buildings, Buses, Civil Rights, Handicapped, Individuals with Disabilities, Mass Transportation, Railroads, Reporting and Recordkeeping Requirements, Transportation

49 CFR Part 38

Buses, Civil Rights, Handicapped, Individuals with Disabilities, Mass Transportation, Railroads, Reporting and Recordkeeping Requirements, Transportation

Issued this 15th Day of February, 2006, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation proposes to amend 49 CFR parts 27, 37, and 38 as follows:

PART 27—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for 49 CFR part 27 continues to read as follows:

Authority: Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794); sec. 16 (a) and (d) of the Federal Transit Act of 1964, as amended (49 U.S.C. 5310(a) and (f)); sec. 165(b) of the Federal-aid Highway Act of 1973, as amended (23 U.S.C. 142 nt.).

2. In 49 CFR part 27, amend § 27.7 by adding a new paragraph (e), to read as follows:

§ 27.7 Discrimination prohibited

* * * * *

(e) Recipients shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability or to provide program accessibility to its services, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity, or would result in undue administrative or financial burdens.

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

3. The authority citation for part 37 continues to read as follows:

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

§ 37.3 [Amended]

4. In § 37.3, add a definition of "direct threat" following the definition of "designated public transportation," to read as follows:

"*Direct threat*" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, procedures, or by the provision of auxiliary aids or services.

5. Amend § 37.5 by redesignating paragraphs (g) and (h) as paragraphs (i) and (j), respectively, and adding new paragraphs (g) and (h), to read as follows:

§ 37.5 Nondiscrimination.

* * * * *

(g) Public entities providing designated public transportation services shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability or to provide program accessibility to its services, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity, or would result in undue administrative or financial burdens.

(h) In choosing among alternatives for meeting nondiscrimination and accessibility requirements with respect to new, altered, or existing facilities, or designated or specified public transportation services, public and private entities shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting that is reasonably achievable.

6. Revise § 37.15 to read as follows:

§ 37.15 Interpretations and Guidance

The Secretary of Transportation, Office of the Secretary of Transportation, and Operating Administrations may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance shall be developed through the Department's coordinating mechanism for disability matters, the Disability Law Coordinating Council. Written interpretations and guidance are valid and binding, and constitute the official position of the Department of Transportation, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR parts 27, 37, 38 and 14 CFR part 382, as applicable.

§ 37.23 [Amended]

7. In § 37.23, in paragraphs (a), (c), and (d), add the words "(including, but not limited to, a grant, subgrant, or cooperative agreement)" after the word "arrangement."

8. Revise § 37.41 to read as follows:

§ 37.41 Construction of transportation facilities by public entities

(a) A public entity shall construct any new facility to be used in providing designated public transportation services so that the facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. This requirement also applies to the construction of a new station for use in intercity or commuter rail transportation. For purposes of this section, a facility (including a station) is "new" if its construction began (*i.e.*, issuance of a notice to proceed) after January 25, 1992, or, in the case of intercity or commuter rail stations, after October 7, 1991.

(b)(1) Full compliance with the requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(2) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(3) If providing accessibility in conformance with this section to individuals with certain disabilities (*e.g.*, those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities (*e.g.*, those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

(c) Except as otherwise provided in this section, new commuter and intercity rail stations shall provide level-entry boarding to all accessible cars in each train using the station. In order to permit level-entry boarding over the full length of the platform, stations and cars shall be designed to minimize the vertical difference between (1) the distance from top of rail to platform surface and (2) the distance between top of rail and car entrance.

(d) Where it is feasible to coordinate the floor height of rail vehicles with the platform height such that the horizontal gap is no more than 3 inches and the vertical gap is no more than 5/8 inch, measured when the vehicle is at rest, the station shall provide level-entry boarding meeting these specifications to all accessible cars on each train using the platform. In stations meeting these specifications, no additional method of assisting boarding (*e.g.*, use of bridge plates) is necessary.

(e) In stations where it is not feasible to meet the 3 inch horizontal gap and 5/8 inch vertical gap specifications of paragraph (c) of this section, the platform design shall be coordinated with rail cars so that the horizontal gap between the floor of a car at rest and the platform shall be no greater than 10 inches on tangent track and 13 inches on curves. The vertical gap between the car floor and the boarding platform must be able to be mitigated by a bridge plate or ramp with a 1:8 slope or less, under 50% passenger load consistent with 49 CFR 38.95(c). In such a station, level entry boarding shall be provided to all accessible cars on each train using the platform by using a bridge plate connecting each car and the platform.

(f) Where necessary to allow for freight movements (including overdimensional loads) while still providing level-entry boarding as required by paragraphs (c) through (e) of this section, commuter and intercity stations shall use such means as gauntlet tracks, bypass tracks, and retractable edges.

(g) Only if it is technically or operationally infeasible to provide level-entry boarding as required by paragraphs (c) through (e) of this section may the commuter or intercity rail

operator use a different means to provide accessibility. To demonstrate infeasibility, a commuter or intercity railroad operator would have to demonstrate that providing level entry boarding is physically impossible or would impose an undue burden.

(1) Any such means must serve all accessible cars of the train (*e.g.*, if mini-high platforms are used, there must be a platform that serves each accessible car; if car-borne or station-based lifts are used; a lift must serve each accessible car). Such a means shall also ensure that accessible means of entry to each car align with the stopping point of the train.

(2) In any situation using a combination of high and low platforms, a commuter or intercity rail operator shall not employ a solution that has the effect of channeling passengers into a narrow space between the face of the higher-level platform and the edge of the lower platform. Any obstructions on a platform (stairwells, elevator shafts, seats, etc.) shall be set at least 6 feet back from the edge of a platform.

(3) Any determination of the infeasibility of level entry boarding under this paragraph, as well as the means chosen to provide accessibility in the absence of level-entry boarding, must be approved by the Federal Transit Administration (for commuter rail systems) or the Federal Railroad Administration (for intercity rail systems). The Federal Transit Administration and Federal Railroad Administration shall make this determination jointly in any situation in which both a commuter rail system and an intercity or freight railroad use the tracks serving the platform.

(h) In the event of any inconsistency between this section and Appendix A to this part or provisions of 49 CFR part 38, this section shall prevail with respect to new intercity and commuter rail stations and systems.

§ 37.71 [Amended]

9. In § 37.71, remove paragraphs (b) through (g).

§ 37.77 [Amended]

10. In § 37.77, remove paragraph (e).

11. Amend § 37.85 by designating the existing language as paragraph (a) and adding a new paragraph (b), to read as follows:

§ 37.85 Purchase or lease of new commuter rail cars.

* * * * *

(b) A new commuter rail system, in ordering cars for the system, shall ensure that the floor height of the cars is the same as that used in intercity rail in the part of the country in which the commuter system is located (*e.g.*, 48 inches above of top of rail in eastern systems; 15–17 inches above top of rail in western systems).

§ 37.103 [Amended]

12. In § 37.103 (b) and (c), remove the words "or an over-the-road bus,".

13. Revise § 37.169 to read as follows:

§ 37.169 Program accessibility obligation of public entities providing designated public transportation.

(a) A public entity providing designated public transportation shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This obligation includes making reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability or to provide program accessibility to the entity's services.

(b) Paragraph (a) of this section does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or undue financial or administrative burdens. In circumstances where personnel of the public entity believe that an action necessary to comply with paragraph (a) of this section would fundamentally alter the service, program, or activity or would result in undue financial or administrative burdens, the entity has the burden of proving that compliance with paragraph (a) of this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(c) In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting that is reasonably achievable.

§ 37.193 [Amended]

14. Remove and reserve § 37.193(a)(2) and (c).

PART 38—AMERICANS WITH DISABILITIES ACT (ADA) ACCESSIBILITY SPECIFICATIONS FOR TRANSPORTATION VEHICLES

15. The authority citation for 49 CFR part 38 continues to read as follows:

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

§ 38.91 [Amended]

16. Amend § 38.91(c)(1) by removing the words "wherever structurally and operationally practicable" and adding in their place the words "unless structurally or operationally infeasible."

17. Amend § 38.91(c)(2) by removing the words "not structurally or operationally practicable" and adding, in their place, the words "is structurally or operationally infeasible".

18. Revise § 38.93(d) to read as follows:

§ 38.93 Doorways.

* * * * *

(d) *Coordination with boarding platform.* Cars shall be coordinated with platforms to provide level-entry boarding as provided in 49 CFR 37.41 (c) through (h).

* * * * *

§ 38.95 [Amended]

19. Amend § 38.95(a)(2) by removing the words "If portable or platform lifts, ramps, or bridge plates meeting the applicable requirements of this section are provided on station platforms or other stops required to be accessible, or mini-high platforms complying with § 38.93(d) are provided," and adding, in their place, the words "If level-entry boarding is provided, consistent with 49 CFR 37.41 (c) through (h),".

§ 38.111 [Amended]

20. Amend § 38.111(b)(1) by removing the words "If physically and operationally practicable" and adding, in their place, the words "Unless technically or operationally infeasible."

21. Amend § 38.111(b)(2) by removing the words "not structurally or operationally practicable" and adding, in their place, the words "is technically or operationally infeasible".

22. Revise § 38.113(d) to read as follows:

§ 38.113 Doorways.

* * * * *

(d) Coordination with boarding platform. Cars shall be coordinated with platforms to provide level-entry

boarding as provided in 49 CFR 37.41 (c) through (h).

* * * * *

§ 38.125 [Amended]

23. Amend § 38.125(a)(2) by removing the words "If portable or platform lifts, ramps, or bridge plates meeting the applicable requirements of this section are provided on station platforms or other stops required to be accessible, or mini-high platforms complying with § 38.113(d) are provided," and adding, in their place, the words "If level-entry boarding is provided, consistent with 49 CFR 37.41 (c) through (h),".

[FR Doc. 06–1658 Filed 2–22–06; 11:30 am]
BILLING CODE 4910–62–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. I.D. 021606B]

RIN 0648–AU06

Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea And Aleutian Islands King and Tanner Crab Fishery Resources

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability of fishery management plan amendment; request for comments.

SUMMARY: Congress amended the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) to require the Secretary of Commerce (Secretary) to approve the Bering Sea/Aleutian Islands (BSAI) Crab Rationalization Program (Program). The Program allocates BSAI crab resources among harvesters, processors, and coastal communities. The Program was implemented by Amendments 18 and 19 to the Fishery Management Plan for BSAI King and Tanner Crabs (FMP). Amendment 20 would modify the FMP and the Program to increase resource conservation and improve economic efficiency in the Chionoecetes bairdi crab (Tanner crab) fisheries that are subject to the Program. This action is intended to promote the goals and objectives of the Magnuson-Stevens Act, the FMP, and other applicable laws.

DATES: Comments on the amendment must be submitted on or before April 28, 2006.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Records Office. Comments may be submitted by:

- Mail: P.O. Box 21668, Juneau, AK 99802.
- Hand Delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.
- Facsimile: 907–586–7557.
- E-mail: *0648–AU06–KTC20–NOA@noaa.gov*. Include in the subject line of the e-mail the following document identifier: Crab Rationalization RIN 0648–AU06. E-mail comments, with or without attachments, are limited to 5 megabytes.
- Webform at the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions at that site for submitting comments.

Copies of Amendment 20 and the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) for this action may be obtained from the NMFS Alaska Region at the address above or from the Alaska Region Web site at *http://www.fakr.noaa.gov/sustainablefisheries.htm*.

FOR FURTHER INFORMATION CONTACT: Glenn Merrill, 907–586–7228 or *glenn.merrill@noaa.gov*.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Act requires that each regional fishery management council submit any fishery management plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary. The Magnuson-Stevens Act also requires that NMFS, upon receiving a fishery management plan amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment.

The king and Tanner crab fisheries in the exclusive economic zone of the BSAI are managed under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Act as amended by the Consolidated Appropriations Act of 2004 (Pub. L. 108–199, section 801). Amendments 18 and 19 to the FMP amended the FMP to include the Program. A final rule implementing these amendments was published on March 2, 2005 (70 FR 10174). NMFS also published three corrections to the final rule (70 FR 13097; March 18, 2005), (70 FR 33390; June 8, 2005), and (70 FR 75419; December 20, 2005).

The Council submitted Amendment 20 to the FMP for Secretarial review, which would make minor changes to the FMP necessary for the management of the Tanner crab fisheries under the Program. If approved, Amendment 20 to the FMP would modify the allocation of harvesting shares and processing shares for Bering Sea Tanner crab. Under authority deferred to the State of Alaska (State) by the FMP, the State has determined that the Bering Sea District Tanner crabs are in two geographically separate stocks, and should be managed as two separate stocks; one east of 166° W longitude, the other west of 166° W longitude. Currently, under the Program, harvester quota share (QS), processor quota share (PQS), individual fishing quota (IFQ), and individual processing quota (IPQ) are issued for one Tanner crab fishery. Amendment 20 would modify the FMP to allocate QS and PQS and the resulting IFQ and IPQ for two Tanner crab fisheries one east of 166° W longitude, the other west of 166° W longitude.

The current allocations are not consistent with management of the species as two stocks. Revision of the QS and PQS allocations would resolve this inconsistency, reduce administrative costs for managers and reduce potential operational costs and increase flexibility for harvesters and processors.

April __, 2006

Docket Management Facility
U.S. Department of Transportation
400 Seventh Street, S.W.
Nassif Building, PL-401
Washington, DC 200590-0001

Re: NPRM: Docket No. OST-2006-23985, RIN 215-AD54
49 C.F.R. Parts 27, 37 and 38, 71 Fed. Reg. No. 38, 9761, *et seq*. (Feb. 27, 2006)
Transportation for Individuals with Disabilities
Comments of a Coalition of ADA Paratransit Providers

Dear Docket Clerk:

We are a coalition of public transportation entities that provide fixed route transportation and paratransit pursuant to the requirements of the Americans with Disabilities Act of 1990 ("ADA"). We submit these comments in response to the referenced Notice of Proposed Rulemaking ("NPRM"). The NPRM proposes to further expand ADA obligations on public transportation providers through amendments to the regulations which implement the ADA, currently codified at 49 C.F.R. Parts 37 and Part 38, and §504 of the Rehabilitation Act, currently codified at 49 C.F.R. Part 27. These comments are addressed to the proposal to add a "reasonable modification" requirement to Title II. Subtitle B of ADA, particularly with respect to paratransit service, and to the proposal relating to the establishment of a Disability Law Coordinating Council.

The "reasonable modification" rule, if adopted in its proposed form, would produce severe adverse impacts on our transit systems, particularly paratransit, and its implementation would result in USDOT exceeding the scope of the powers delegated to it in the ADA statute.

The Department of Transportation ("DOT") does not explain the purpose of its rulemaking proposal relating to the Disability Law Coordinating Council ("DLCC"), since such a function is a wholly internal administrative process that is not subject to the Administrative Procedures Act's rulemaking requirements. Thus, it appears that DOT may be trying to insulate itself and its constituent administrations from their Administrative Procedure Act obligations when issuing "binding obligation" pronouncements.

We urge DOT to rescind both proposals in their entirety.

A. The Coalition

The coalition submitting this comment consists of ___ transit agencies, identified in its Appendix attached describing the transit services provided. Together we deliver

more than ___ fixed route and more than ___ paratransit rides per year and expend a combined amount of $_____ in doing so.

B. Complementary ADA Paratransit and its Costs

The purpose of Subtitle B of Title II of the ADA (Public Transportation Provided by Public Entities) was to assure that persons with disabilities would have the same right to public transportation as the general public. The principal means of assuring transportation access for the disabled was to require that public entities make their fixed route systems accessible to persons with disabilities.

For those individuals with disabilities prevented from using even accessible fixed route transportation, public entities were required to create and maintain paratransit at service levels **"**comparable" (or in the case of response time, "comparable to the extent practicable") to the transit operator's fixed route system (42 U.S.C.12143(a)).

As DOT noted in the Preamble to its ADA regulations when issued in 1991:

> "The ADA is a civil rights statute, not a transportation or social service program statute. ….Under the ADA, complementary paratransit is not intended to be a comprehensive system of transportation for individuals with disabilities**."** 56 FR 45584, 45601 (1991).

The Secretary of Transportation explained that it was the DOT's intent to exercise its discretion in adopting the regulations "…conservatively, to minimize the addition of costs to public and private entities beyond what the statute itself imposes*"* (56 FR 45620).

Despite the Secretary's conservative intent in developing the initial DOT ADA regulations [49 C.F.R. part 37], the annual cost of complementary ADA paratransit in the United States now exceeds approximately $1.9 billion dollars[1] - a number many times more than the official estimates made at the time the regulations were adopted. This is due to two factors: first, the inherent differences in paratransit and fixed route make paratransit preferable to disabled riders. Experience shows that most persons with disabilities, given a choice, will elect to ride complementary ADA paratransit rather than the accessible bus despite the fact that it costs the rider twice as much to do so. Many agencies offer riders an incentive to ride the fixed route in the form of free fare, yet any positive effects of those policies have been negligible at best. The second is that the studies on which the original government estimates were based assumed that systems would operate with a substantial denial rate. However, beginning in 1998, DOT through the Federal Transit Administration ("FTA") began to interpret the ADA as requiring a zero denial rate, and the Court of Appeals for the Second Circuit has adopted that interpretation.

[1] Summary of Nationwide Demand Response Service: 640 Transit Agencies Reporting to NTD CY, 2004

Public transit in general is a highly subsidized system utilizing both local, State and Federal Funding. The fare revenue does not cover the actual cost of the ride and the difference is funded by taxpayer dollars. However, on fixed route transit (bus and non-commuter rail), the fare subsidy is reasonable. For example, a 10-mile bus ride might cost $2.00, of which the rider pays $1.25, for a subsidized cost of $.75, a 38% subsidy. Moreover, as ridership on the bus system increases, the amount of subsidy needed, all other things being equal, diminishes. In comparison, paratransit, utilizing ADA-required service parameters, is a highly inefficient means of public transit. The same 10-mile ride on paratransit will cost $30.00. The rider cannot be charged more than $2.50, thus requiring a subsidy of $27.50, or a 92% subsidy that must be provided by taxpayers. For the same ride the subsidized cost on paratransit is typically more than 36 times that of the fixed route. In addition, increased paratransit ridership does not diminish costs per trip but in many circumstances will increase it. Thus, the ADA emphasized the obligation to make fixed route transit accessible to persons with disabilities as the primary method of achieving its accessible transportation goals, not only as a means to mainstream persons with disabilities, but also to promote the most efficient means of achieving the access goal**.**

C. Proposed Regulation: Reasonable Modification of Policies, Practices and Procedures

The DOT proposes to amend its ADA and 504 regulations to impose a requirement of "reasonable modification" of policies, practices and procedures on public transportation under Subtitle B of Title II. In doing so it asserts that this is a mere clarification of existing law and that it is supported by prior regulatory interpretations and case law. It contends that for this reason the proposal does not represent a significant departure from existing regulations and policy and is not expected to have "noteworthy cost impacts". All of these contentions are unsupportable. If the DOT intends to pursue this proposal, it is incumbent upon it to comply with the Executive Order 12866 and its own Regulatory Policies and Procedures applicable to significant rulemakings.

We demonstrate below that this proposed regulation is contrary to existing case law and 15 years of operating experience without any indication by DOT or FTA that transit properties, in providing accessible fixed route transportation and paratransit had any obligations beyond those incorporated in the regulations, and, for paratransit, beyond what was incorporated in their FTA-approved paratransit plans. If promulgated, this regulation will have a powerful impact in reducing the already-low productivity rate of this inefficient means of public transportation and constitute a very significant and costly change in ADA obligations. Moreover, as we also show, it is beyond the statutory mandate and therefore if enacted would exceed DOT's authority to promulgate ADA regulations.

1. Background of Reasonable Modification and Title II

Subtitle A. of Title II of the ADA precludes public entities from discriminating against persons with disabilities by excluding them "by reason of such disability" from

participating in public services (42 U.S.C. 12132). Regulations by the Department of Justice ("DOJ") (28 C.F.R. Part 35) flesh out what discrimination means in the context of general public services provided by a public entity. Historically, government programs and activities intended for the general public had been designed without regard to accessibility to those programs and activities by members of the public who are disabled. DOJ regulations therefore necessarily established a reasonable modification requirement because there are such a wide variety of general public services that developing specific non-discrimination regulations with respect to each of them would be impossible. However, DOJ regulations (28 CFR 35.102(b)), specifically exempt public transit because it is the one public service singled out for specific statutory treatment in Title II, Subpart B (42 U.S.C. §12141 *et seq*.) and regulations promulgated there under by the DOT at 49 C.F.R. Part 37. DOT regulations as originally promulgated did not have a "reasonable modification" requirement for public entities.

Public transit is the only public service specifically and separately addressed by the ADA (under Subtitle B of Title II). The goal of the public transit provisions of the ADA is to assure access to public transit by persons with disabilities. For those who cannot ride the accessible fixed route, complementary ADA paratransit comparable to the fixed route is required to be offered.

.

The eligibility, design and the "comparable" operating parameters for paratransit are set forth in the original and detailed DOT regulations. Fixed route operators designed their paratransit systems accordingly and submitted, as required by the ADA itself and the DOT regulations, a plan as to how this specialized service would be provided (42 U.S.C.§12143(c)(7)). FTA approved the plan when "...viewed in its entirety it provides for service comparable to the entity's fixed route service" and is therefore compliant with the antidiscrimination provisions of 42 U.S.C. §12143 (See 49 C.F.R. 37.147(d)).

The Department's proposed rule would superimpose over the modifications of the fixed route system imposed by Subtitle B of Title II of the ADA including complementary ADA paratransit, a requirement of further modification by rider demand on a case-by-case basis. We believe that this proposal is unnecessary, unworkable and contrary to the intent of the ADA.

2. The proposed rule is not a clarification of existing rules supported by prior interpretation and existing case law.

There are no reasonable modification requirements in the original DOT regulations and the DOJ regulations that do have such a provision are inapplicable to public transportation (28 CFR 35.102(b)). The only Court of Appeals to directly address the issue determined that reasonable modification was not required for activities covered under Title II.B. *Melton v. Dart*, 391 F.3d 669 (5th Cir. 2004); *cert. denied,* 125 S.Ct. 2273 (2005). *Melton* involved a plaintiff who sought to compel the paratransit agency to modify its curb-to-curb policy and pick up the plaintiff in an alleyway as opposed to the curb in front of his house. The Court determined that the concept of "reasonable modification" did not apply to paratransit. As the *Melton* Court found:

> "Because paratransit service is meant to act as the disability complement to established fixed route transportation services, this comprehensive regulatory scheme signals that no interim extra-plan modification is statutorily or otherwise required by a public entity when the public entity is properly operating under a FTA-approved plan. The FTA-approved plan is itself the accommodation to the disabled by the public transportation entity. It is the violation of the plan itself that constitutes the prohibited discrimination under title II, not the failure to modify the plan to address particularized complaints."

In *Disabled in Action of Pennsylvania, et. Al. v. National Passenger Railroad Corporation* ("Amtrack") (--- F.Supp.2d ----, 2005 WL 1459338 (E.D.Pa. 2005), 16 A.D. Cases 1596, 30 NDLRP172) the setting was fixed route and the court determined that reasonable modification was not required for matters covered under Subtitle B of Title II.

The DOT's reference to *Burkhart v. Washington Area Metropolitan Transit Authority*, 112 F.3d 1207 (1997), as appearing "to share the Department's assumption about the relationship between the DOT and the DOJ requirements" (71 Fed. Reg. 9762) is misplaced. As pointed out in *Melton,* the *Burkhart* court did not decide whether or not the transit authority was exempt from the DOJ regulations on reasonable modification because it was not raised in the Court below (*Melton,* at p. 674 n.6; *Burkhart,* 112 F.3d at 1210 n. 1).

For more than 15 years, up until the issuance in September of 2005 of its guidance regarding origin-to-destination paratransit service, in an attempt to "overrule" *Melton,* the Department's own actions demonstrated that "reasonable modification" was not a regulation applicable to Subtitle B of Title II. Since FTA approved our paratransit plans, none of which contained a policy to provide modifications of service on rider request, there has been no indication that anything beyond complying with the paratransit service criteria was required.

Nor can the Department bolster its argument by its own unprecedented act of issuing its first guidance on paratransit in the more than 14 years since the ADA was adopted and after this NPRM was drafted, by contending that the "origin-to-destination" regulation meant that the transit operator had to "reasonably modify its service model of curb-to-curb service on request of any rider.[2] This interpretation also contradicted years of contrary interpretations proffered by FTA officials and relied upon by transit agencies. For example, on June 14, 2003 at the Community Transportation Association of America annual conference in Seattle, Michael Winter, Chief of FTA's Office of Civil Rights, sought to persuade transit operators to address mobility needs of the disabled by providing service beyond that required by ADA. However, he conceded that the paratransit regulations require no better than curb-to-curb service and that whether to go beyond that and provide door-to-door service for ADA eligible riders is left to local

[2] see http://www.fta.dot.gov/14531_17514_ENG_HTML.htm;

decision-making processes. [3]This was in keeping with other FTA pronouncements indicating that despite the "origin- to destination" language of 49 CFR 37.129, "[t]he exact location of pick-up and drop-off sites are an operational issue not governed by the regulations."[4]

Even as to §504 of the Rehabilitation Act, the Department has apparently changed its mind. Before the ADA was passed the author of the current NPRM, Mr. Ashby, expressly stated that "special accommodations" (the equivalent of "reasonable modification") for persons with mental, visual or hearing impairments were not required under 504 as interpreted by Department regulations and to impose such a requirement would require an amendment to the regulations (52 F.R. 30803 (DOT Docket 24277)). We are unaware of any such amendment ever being made.

3. The Proposed Rule is Unnecessary.

Specific regulations already establish what is required for accessible fixed route and paratransit service [49 C.F.R. Part 37and Part 38] and state that compliance with those regulations complies with the obligation to not discriminate. [49 C.F.R. §§37.7, 37.9] These regulations provide the accommodation or "reasonable modification" of the fixed route (a general public service) for persons with disabilities and have been the basis for the design and operation of those systems for more than 15 years.

On a practical level, the rule is unnecessary because transit agencies do make best efforts to comply with modification requests by their riders. Some examples of reasonable modification include, call outs 5 minutes before vehicle arrival, back up service for trips that are late, transporting oversized mobility devices, etc. It is essential, however, for the good and safety of all of the passengers, not to mention the need to try to constrain costs on this service which was supposed to have been a limited service for a limited group of people that these decisions are kept within the discretion of the transit operators, who are the accountable parties. There is no data in the NPRM to indicate that there is a problem needing correction. A few complaints or lawsuits, given the approximately 83,000,000 trips per year currently being given on paratransit and the billions of rides on bus and subway service, would seem to indicate that in general riders needs in this regard are being met. Under these circumstances, it is inexplicable why the DOT wishes to promulgate a regulation that includes a burdensome administrative process not only to make each such determination but also to document compliance?

4. As to Paratransit, the Proposed Rule is Improper.

The ADA, at 42 U.S.C. §12143(c) (3), authorizes the Department to set forth the levels of service necessary for ADA paratransit systems to be deemed comparable to the applicable fixed route and therefore nondiscriminatory. By now attempting to superimpose on these prescribed service levels an amorphous condition that will be defined by rider request on a trip-by-trip basis, DOT exceeds its statutory authority. In

[3] 2004 PaceCom Incorporated, "Transit Access Reports", May 10, 2004, pps 1,6
[4] FTA January 1, 2001 Response to Complaint No. 00-0263; FTA April 3, 2001 Response to Complaint No. 00-0269.

effect, this proposed regulation would negate the statutory language that in meeting prescribed service levels a transit operator is in compliance with ADA.

5. As to Paratransit, the Propose Rule Makes No Sense.

Paratransit is not a service for the general public that needs to be adapted or modified to meet the special needs of persons with disabilities. It is designed from the ground up as a modification of fixed route service to accommodate a subset of persons with disabilities who cannot use accessible fixed route service

6. The Proposed Rule Will Add Substantial Uncertainty, Operational Issues, And Costs To An Already Costly And Difficult Service To Deliver.

If a public agency must reasonably modify each trip in which it is requested to do so by the rider, then one can envision a service in which many if not most trips are so customized. It is not possible to predict all of the circumstances in which modifications might be sought and therefore accurately forecast its potential cost. The Department's positions on at least three such instances are either discussed in the NPRM or in other Department pronouncements. These are door-to-door paratransit service [71 FR 9763], allowing wheelchair users to ride sideways [November 8, 2005 FTA Complaint Santa Cruz Metropolitan Transit District] and the case-by-case abandonment of designated bus stops on fixed route service. [71 FR 9764] In suggesting these to be "reasonable modifications," the DOT makes it clear that it does not consider these to be "fundamental alterations" of service. If not, one would be hard pressed to think what requests would be considered unreasonable.

(a) Modification of Paratransit Service. The safety and productivity costs of on-demand door-to-door service are well known by transit agencies. These costs include increased dwell time, risk to other passengers and the vehicle when left unattended, and decreased system capacity because of lower efficiency, resulting in increased operating costs.

When drivers have voluntarily assisted riders to their doors, there have been incidents of the vehicle being stolen with another rider in it. In one case, the driver was shot by a relative of the rider believing him to be a burglar.

Dwell time is increased because the driver is helping the rider to their door and returning to the vehicle. Assuming that an additional 4 minutes is needed at each of the trip (pick up and drop off) to provide door- to-door service, and that one-half of all rides will eventually request door-to-door service, we estimate that paratransit variable costs will increase by 10.29% (workers compensation and maintenance running costs would actually increase by more than 10%) and fixed costs would increase by 5.44%. This represents a total cost increase of 8.18% or more than $155,420,000 for this single aspect of reasonable modification alone!

System capacity is decreased by the increase in dwell time and, to some lesser degree, requests that limit capacity in the vehicle such as sideways facing mobility devices, insistence on riding in the front seat only, van or sedan only and the like will have to be accommodated.

(b) Fixed Route. Surely, it does not require extensive analysis to know that leaving it to the discretion of every bus driver to pick up and drop off passengers wherever any passenger asserting a disability requests, on penalty of a civil rights violation, is an unacceptable proposal and will increase vehicle accidents, passenger injuries and deaths, and detract from the on-time performance of the fixed route.

(c) Administrative Problems. The Department envisions that the local transit agency will make the individual case by case determinations as to whether a request for modification is reasonable or involves a "direct threat", "fundamental alteration" or "undue burden", subject to the Department's right of review and the further obligation if the request is rejected to seek another means of achieving the goal of the requested modification of the policy that would not be a direct threat, undue burden or fundamental alteration (71 Fed. Reg. 9762-63). What is not clear is how this time-consuming process could possibly work in the real world of mass transit. Although some of the circumstances seem to clearly involve requests that will occur in the field and might not be able to be evaluated in the abstract, it is unlikely that any public agency would want to entrust to its drivers or reservationists the task of making complex decisions exposing it to civil rights violations and tort liability for injuries, deaths and vehicle damage. Aside from this conundrum, assume an average paratransit service schedules 1,000 rides per day and assume only 10% of those request a reasonable modification, how could an executive of the agency possibly have time to consider and rule on the propriety of 100 such requests to say nothing of the paperwork to support any denial and the time necessary to come up with an alternative as the rule indicates would be required!

7. The proposed rule is unnecessarily vague as to what constitutes a modifiable "policy, practice or procedure" and fails to include any of the limitations the Department itself has suggested should apply.

The proposed regulation does not define what constitutes a "policy, practice or procedure" that must be "reasonably modified." Clearly, in the Department's view, just because something is contained in an FTA approved paratransit plan, does not make it immune from this requirement as the curb-to-curb, door-to-door discussion illustrates. However much of what is in paratransit plans is intended to conform with the eligibility [49 C.F.R. 37.123-125] and service criteria [49 C.F.R. §37.131] for complementary paratransit imposed by existing DOT regulations. Therefore, if despite our arguments to the contrary, the "reasonable modification" rule is adopted it should be made clear that the "policies, practices and procedures" that are subject to "reasonable modification" do not include those minimum requirements set forth in 49 C.F.R §37.131 and that services beyond that specified in 49 C.F.R. §37.131 are not required to be provided. We note that

this would be consistent with the FTA's "Premium Charges for Paratransit Services" guidance[5] and subsequent pronouncements.

Further, we believe that at a minimum, the Department's view of applicable limitations on the requirement [71 F.R. 9763] should also be specifically stated in the proposed rule, to wit:

> a. As to paratransit which operates on a day before reservation system, the transit agency can require that the request for modification must be provided at or before the time of making the reservation and treat any tardy requests only on a best efforts basis. (Origin to Destination Service[6])
> b. Door-to-door service is not required as a reasonable modification.
> c. Reasonable modification does not require an amendment of an approved paratransit plan.
> d. Reasonable modification does not require that personal services be rendered by a driver to a rider.
> e. Reasonable modification does not require that drivers, for lengthy periods of time, have to leave their vehicles unattended or lose the ability to keep their vehicles under visual observation, or take actions that would be clearly unsafe (e.g., back a vehicle down a narrow alley in specific circumstances that would present a direct threat to safety).

D. <u>Proposed Rule: Disability Law Coordinating Counsel</u>

The Department does not explain why it seeks to promulgate by regulation an internal administrative process that the Administrative Procedure Act ("APA") clearly exempts because it is a rule of "agency organization, procedure or practice," (5 U.S.C. §553(b)(3)(A)); one, moreover, which USDOT states "is in place and functioning effectively" (71 Fed. Reg. at 9765). If a regulation were required, it would have to have been promulgated prior to the DLCC's creation, and, thus, any of its pronouncements to date are necessarily suspect as to validity. A stated need to have all of the Department's constituent administrations issue consistent interpretations is an inappropriate goal given that the statutory provisions and regulations for the different transportation modes under the jurisdiction of FRA, FTA and FAA are different. Proper interpretations would reflect those differences not ignore them.

While the Department can continue this DLCC process with or without a regulation, unfortunately, transit properties do not agree that the DLCC is functioning effectively with respect to agencies subject to FTA. The DLCC seems to be focused on overturning all of the settled expectations concerning ADA to date, which had been based, appropriately, on guidance provided over all these years by FTA.

---

[5] http://www.fta.dot.gov/transit_data_info/transit_info_for/riders_with_disabilities/1631_4952_ENG_HTML.htm

[6] http://www.fta.dot.gov/14531_17514_ENG_HTML.htm

Moreover, the process by which prior interpretations are "overruled" seems to be poorly designed. It appears to be a process whereby a disability advocate or disabled rider complains to USDOT that some transit property has refused to grant some service modification request, the DLCC considers it, agrees with the complainant, and then issues a "guidance" imposing new obligations on all public transit agencies across-the-board. There is no attempt to determine if the complaint is true; no survey of how widespread the issue may be; no request made for information from public transit in order to fully understand the issue or the potential ramifications of imposing a new "guidance," whether in terms of safety, cost, or other adverse impacts; no survey of riders done to determine whether what the complainant wants" is actually shared by the average paratransit rider (and whether if granted would interfere with the other riders' service quality).

Consequently, if the DLCC is to continue, its legitimacy will not depend on it being established through a regulation but by changing its process to require sufficient and objective fact-finding and comment from all stakeholders before issuing interpretations and by limiting its pronouncements to what are truly reasonable interpretations of promulgated regulations and not attempts to create new rules without rulemaking.

Given no express or apparent reason for the creation of DLCC by regulation, we are concerned that it may be intended to circumvent the APA and the recent amendment to the Federal Transit Act in § 3032(l) of SAFETEA-LU enacted in August 2005. It amends §5334 of the Code to require that the rulemaking procedures under §553 of Title 5 (APA) be followed before any FTA statement or guidance is issued that imposes a "binding obligation" on transit properties and those similarly situated. It is surmised that DOT and FTA will argue that by promulgating a regulation establishing an internal procedure to announce binding obligations the agencies have insulated themselves from challenges to recurring impositions of new obligations on public transit. Such a strategy, if that is what DOT and FTA have in mind, is reminiscent of those agencies' recent statements that the SAFETA-LU amendment does not affect pronouncements about ADA because ADA regulations are those of DOT not FTA, and SAFETEA-LU only amends the Federal Transit Act. Both agencies well know that new binding obligations under ADA are the specific intended targets of the amendment, and that DOT acts through its constituent administrations. If we are wrong in our assumptions, then surely in the interests of transparent government, the Department should withdraw this clearly unnecessary rule.

Appendix

[List of all agencies, including address, contact person and brief summary of agency, who concur with their names being listed]

April __, 2006

Docket Management Facility
U.S. Department of Transportation
400 Seventh Street, S.W.
Nassif Building, PL-401
Washington, DC 200590-0001

Re: NPRM: Docket No. OST-2006-23985, RIN 215-AD54
49 C.F.R. Parts 27, 37 and 38, 71 Fed. Reg. No. 38, 9761, *et seq*. (Feb. 27, 2006)
Transportation for Individuals with Disabilities
Comments of a Coalition of ADA Paratransit Providers

Dear Docket Clerk:

AC Transit is a public transit district furnishing bus and paratransit service in Oakland and surrounding cities in the San Francisco Bay Area. We submit these comments in response to the referenced Notice of Proposed Rulemaking ("NPRM"). The NPRM proposes to impose substantially expanded obligations on public transportation providers, through amendments to the regulations implementing the ADA, currently codified at 49 C.F.R. Parts 37 and Part 38, and §504 of the Rehabilitation Act, currently codified at 49 C.F.R. Part 27. These comments are addressed to the proposal to add a "reasonable modification" requirement to Title II. Subtitle B of ADA, particularly with respect to paratransit service, and to the proposal relating to the establishment of a Disability Law Coordinating Council.

AC Transit concurs with the comments being submitted separately by a national group of transit agencies, and in the interests of brevity we will not repeat the points they are making. We take this position with the support and endorsement of the Accessability Advisory Committee, a group of bus riders with disabilities who are active in advising AC Transit as to service issues. In addition, we offer some additional comment as follows.

A. The District

AC Transit regularly operates approximately 700 buses in fixed-route service, employing over 1300 bus operators. AC Transit is also the primary participant in the East Bay Paratransit Consortium (EBPC), an arrangement with the Bay Area Rapid Transit District (BART) to jointly provide paratransit service within these Districts' overlapping service area. ***[Add some more stats?]***

B. The proposed "direct threat" rule would not clarify, but would contradict, existing law.

One of the problems with the proposed change is that it would import an illogical and dangerous definition of "direct threat" that has been rejected by the United States Supreme Court. The proposed rule would go beyond clarifying existing rules, and is unsupported by decisional or statutory laws, in that it would require service modifications

that present a *direct threat* to the safety of disabled riders, unless other people are also endangered. This would conflict with existing law and place transit providers in a liability trap.

California law has required since 1872 that a common carrier must use the utmost care and diligence for the safety of passengers, must exercise a reasonable degree of skill to that end, and must provide vehicles that are safe and fit for their intended purpose (California Civil Code section 2100 *et seq.*) No intentional violation of these standards can be exonerated by an agreement (as, for example, an agreed "reasonable modification") in advance (*Ibid,* section 2175). To abrogate this body of law, just because the danger threatens only the disabled passenger and not others, or because of an ill-advised request by the passenger, would violate an express requirement of the ADA. Section 12201 of the ADA requires that nothing in the ADA be construed to limit the remedies, rights and procedures of State laws that provide greater protection for the rights of individuals with disabilities than the ADA does. The state law requiring utmost care for passengers' safety is such a law, furnishing a right to service under the highest standards of safety. There is no comparable ADA provision. Transit providers should not be caught in a crossfire between tort and discrimination law.

The exclusion from the "direct threat" defense of threats to the safety of the disabled passenger would import into Title II a misconstruction of the ADA's Title I provisions that was specifically overturned by the United States Supreme Court in *Chevron U.S.A. v. Echazabal*, 536 U.S. 73 (2002). While that case applies in the employment context, its rationale applies here: the hypothetical possibility that overbearing safety rules might be used as a pretext to impede access to transit is dealt with by the anti-discrimination provisions of the ADA and its implementing regulations, so the mere fact that *others* are not confronted by a *direct threat* is no reason to defeat the protection of passenger safety. The proposed changes would amount to "reversal by clarification" of the *Chevron* rule, by gratuitously importing into Title II the very rule *Chevron* reversed.

We urge that the proposed changes be rejected.