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DEPARTMENT OF TRANSPORTATION

4910-9X

49 CFR Parts 27 and 37

[Docket OST–2006–23985]

RIN 2105–AE15

Transportation for Individuals with Disabilities; Reasonable Modification of Policies and Practices

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Final Rule.

SUMMARY: The Department is revising its rules under the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act of 1973, as amended (section 504), specifically to provide that transportation entities are required to make reasonable modifications/accommodations to policies, practices, and procedures to avoid discrimination and ensure that their programs are accessible to individuals with disabilities.

DATES: This rule is effective [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: This final rule concerning reasonable modification of transportation provider policies and practices is based on a notice of proposed rulemaking (NPRM) issued February 27, 2006 (71 FR 9761). The NPRM also concerned several other subjects, most notably nondiscriminatory access to new and altered rail station platforms. The Department issued a final rule on these other subjects on September 19, 2011 (76 FR 57924).

Executive Summary

I. Purpose of the Regulatory Action

This final rule is needed to clarify that public transportation entities are required to make reasonable modifications/accommodations to their policies, practices, and procedures to ensure program accessibility. While this requirement is not a new obligation for public transportation entities receiving Federal financial assistance (see section 504 of the Rehabilitation Act), including the National Passenger Railroad Corporation (Amtrak), courts have identified an unintended gap in our Americans with Disabilities Act (ADA) regulations. This final rule will fill in the gap. The real-world effect will be that the nature of an individual's disability cannot preclude a public transportation entity from providing full access to the entity's service unless some exception applies. For example, an individual using a wheelchair who needs to access the bus will be able to board the bus even though sidewalk construction or snow prevents the individual from boarding the bus from the bus stop; the operator of the bus will need

to slightly adjust the boarding location so that the individual using a wheelchair may board from an accessible location.

Reasonable modification/accommodation requirements are a fundamental tenet of disability nondiscrimination law—for example, they are an existing requirement for recipients of Federal assistance and are contained in the U.S. Department of Justice’s (DOJ) ADA rules for public and private entities, the U.S. Department of Transportation’s (DOT) ADA rules for passenger vessels, and DOT rules under the Air Carrier Access Act. In addition, section 504 has long been interpreted by the courts to require recipients of Federal financial assistance—virtually all public transportation entities subject to this final rule—to provide reasonable accommodations by making changes to policies, practices, and procedures if needed by an individual with a disability to enable him or her to participate in the recipient’s program or activity, unless providing such accommodations are an undue financial and administrative burden or constitute a fundamental alteration of the program or activity. Among the Department’s legal authorities to issue this rulemaking are section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and the Americans with Disabilities Act (ADA), 42 U.S.C. 12101–12213.

II. Summary of the Major Provisions of the Regulatory Action

Public entities providing designated public transportation (e.g., fixed route, demand-responsive, and ADA complementary paratransit) service will need to make reasonable modifications/accommodations to policies and practices to ensure program accessibility subject to several exceptions. These exceptions include when the modification/accommodation would cause a direct threat to the health or safety of others,

would result in a fundamental alteration of the service, would not actually be necessary in order for the individual with a disability to access the entity's service, or (for recipients of Federal financial assistance) would result in an undue financial and administrative burden. Appendix E of this final rule provides specific examples of requested modifications that public transportation entities typically would not be required to grant for one or more reasons.

Public entities providing designated public transportation service will need to implement their own processes for making decisions and providing reasonable modifications under the ADA to their policies and practices. In many instances, entities already have compliant processes in place. This final rule does not prescribe the exact processes entities must adopt or require DOT approval of the processes. However, DOT reserves the right to review an entity's process as part of its normal oversight. *See* 49 CFR 37.169.

III. Costs and Benefits

The Department estimates that the costs associated with this final rule will be minimal for two reasons. First, modifications to policies, practices, and procedures, if needed by an individual with a disability to enable him or her to participate in a program or activity, are already required by other Federal law that applies to recipients of Federal financial assistance. Since virtually every entity subject to this final rule receives Federal financial assistance, each entity should already be modifying its policies, practices, and procedures when necessary. Second, the reasonable modification/accommodation requirements contained in this final rule are not very different from the origin-to-destination requirement already applicable to complementary paratransit service, as

required by current DOT regulations at 49 CFR 37.129(a) and as described in its implementing guidance.

The Reasonable Modification NPRM

Through amendments to the Department's ADA regulations at 49 CFR 37.5 and 37.169, the NPRM proposed that transportation entities, including, but not limited to, public transportation entities required to provide complementary paratransit service, must make reasonable modifications to their policies and practices to avoid discrimination on the basis of disability and ensure program accessibility. Making reasonable modifications to policies and practices is a fundamental tenet of disability nondiscrimination law, reflected in a number of DOT (e.g., 49 CFR 27.11(c)(3), 14 CFR 382.7(c)) and DOJ (e.g., 28 CFR 35.130(b)(7)) regulations. Moreover, since at least 1979, section 504 has been interpreted to require recipients of Federal financial assistance to provide reasonable accommodations to program beneficiaries. See, e.g., Alexander v. Choate, 469 U.S. 287 (1985); Southeastern Community College v. Davis, 442 U.S. 397 (1979). In accordance with these decisions of the U.S. Supreme Court (e.g., Choate and Davis), the obligation to modify policies, practices, and procedures is a longstanding obligation under section 504, and the U.S. Department of Justice, which has coordination authority for section 504 pursuant to Executive Order 12250, is in agreement with this interpretation.

However, as the NPRM explained, DOT's 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, intended 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. A 1997 court decision appeared to share the Department's intention regarding the relationship between DOT and DOJ requirements (Burkhart v. Washington Area Metropolitan Transit Authority, 112 F.3d 1207 (D.C. Cir. 1997)).

However, more recent cases that addressed the issue directly held that, in the absence of a DOT regulation explicitly requiring transportation entities to make reasonable modifications, transportation entities were not obligated to make such modifications under the ADA. The leading case on this issue was Melton v. Dallas Area Rapid Transit (DART), 391 F.3d 669 (5th Cir. 2004); *cert. denied* 125 S. Ct. 2273 (2005). In this case, the court upheld DART's refusal to pick up a paratransit passenger with a disability in a public alley behind his house, rather than in front of his house (where a steep slope allegedly precluded access by the passenger to DART vehicles). The DART argued 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, provided 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 the [DOJ] regulations in 28 CFR Part 35.

Id. Two other cases, Boose v. Tri-County Metropolitan Transportation District of Oregon, 587 F.3d 997 (9th Cir. 2009) and Abrahams v. MTA Long Island Bus, 644 F.3d 110 (2d Cir. 2011), subsequently agreed with Melton.

Because the Department believed that, as in all other areas of disability nondiscrimination law, making reasonable modifications to policies and practices is a crucial element of nondiscriminatory and accessible service to people with disabilities, we proposed to fill the gap the courts had identified in our regulations. Consequently, the 2006 NPRM proposed amending the DOT rules to require that transportation entities, both fixed route and paratransit, make reasonable modifications in the provisions of their services when doing so is necessary to avoid discrimination or to provide program accessibility to services.

In § 37.5, the general nondiscrimination section of the ADA rule, the Department proposed to 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 was based on DOJ's requirements and, like the DOJ regulation, would not require a modification if doing so would fundamentally alter the nature of the entity's service.

The NPRM also proposed to place parallel language in a revised § 37.169, replacing an obsolete provision related to over-the-road buses. Under the proposal, in order to deny a request for a modification, the head of a public entity providing designated public transportation services would have had to make a written determination that a needed reasonable modification created a fundamental alteration or undue burden. The entity would not have been 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 a fundamental alteration or undue burden, the entity would be obligated to seek an alternative solution that would not create such an undue burden or fundamental alteration.

The ADA and part 37 contain numerous provisions requiring transportation entities to ensure that persons with disabilities can access and use transportation services on a nondiscriminatory basis. Some of these provisions relate to the acquisition of vehicles or the construction or alteration of transportation facilities. Others concern the

provision of service by public and private entities, in modes ranging from public demand-responsive service for the general public to private over-the-road buses. Still others concern the provision of complementary paratransit service.

In all of these cases, public transportation entities are likely to put policies and procedures in place to carry out applicable requirements. In order to achieve the objectives of the underlying requirements in certain individual cases, entities may need to depart from these otherwise acceptable policies. This final rule concerns the scope of situations in which such departures—i.e., reasonable modifications—are essential. The underlying provisions of the rule describe the “bottom line” of what transportation entities must achieve. This reasonable modification rule describes how transportation entities get to that “bottom line” in individual situations where entities’ normal procedures do not achieve the intended result.

As comments to the NPRM made clear, an important concern of transportation entities is that the DOT final rule makes it possible to understand clearly what modifications are expected; in other words, which requested modifications would be “reasonable” and which would not. For example, in the fixed route context, we believe that stopping a bus a short distance from a bus stop sign to allow a wheelchair user to avoid an obstacle to boarding using a lift (e.g., a utility repair, a snowdrift) would generally be reasonable. Establishing a “flag stop” policy that allowed a passenger to board a bus anywhere, without regard to bus stop locations, would not. In the complementary paratransit context, the Department would expect, in many circumstances, that drivers would provide assistance outside a vehicle where needed to overcome an obstacle, but drivers would not have to provide personal services that extend

beyond the doorway into a building to assist a passenger. Appendix E to this final rule addresses issues of this kind in greater detail.

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 NPRM sought comment on whether it would be useful to incorporate any additional provisions from the DOJ rules into Part 37.

Comments to the NPRM

The Department received over 300 comments on the reasonable modification provisions of the NPRM. These comments were received during the original comment period, a public meeting held in August 2010, and a reopened comment period at the time of that meeting. The comments were polarized, with almost all disability community commenters favoring the proposal and almost all transit industry commenters opposing it.

The major themes in transit industry comments opposing the proposal were the following. Many transit industry commenters opposed the application of the concept of reasonable modification to transportation, and a few commenters argued that it was not the job of transit entities to surmount barriers existing in communities. Many transit commenters said that the rule would force them to make too many individual, case-by-case decisions, making program administration burdensome, leading to pressure to take unreasonable actions, creating the potential for litigation, and making service slower and less reliable. Some of these commenters also objected to the proposal that the head of an entity, or his designee, would be required to make the decision that a requested modification was a fundamental alteration or would result in an undue burden, and

provide a written decision to the requestor, stating this requirement would take substantial staff time to complete. Many commenters provided examples or, in some cases, extensive lists, of the kinds of modifications they had been asked or might be asked to make, many of which they believed were unreasonable. A number of commenters said the rule would force paratransit operators to operate in a door-to-door mode, eliminating, as a practical matter, the curb-to-curb service option. A major comment from many transit industry sources was that reasonable modification would unreasonably raise the costs of providing paratransit. Per-trip costs would rise, various commenters said, because of increased dwell time at stops, the need for additional personnel (e.g., an extra staff person on vehicles to assist passengers), increased insurance costs, lower service productivity, increased need for training, or preventing providers from charging fees for what they would otherwise view as premium service. Some of these commenters attached numbers to their predictions of increased costs (e.g., the costs of paratransit would rise from 22–50 percent, nationwide costs would rise by \$1.89–2.7 billion), though, with few exceptions, these numbers appeared to be based on extrapolations premised on assumptions about the requirements of the NPRM that were contrary to the language of the NPRM’s regulatory text and preamble or on no analysis at all.

Commenters opposed to the proposal also raised safety issues, again principally in the context of paratransit. Making some reasonable modifications would force drivers to leave vehicles, commenters said. This could result in other passengers being left alone, which could expose them to hazards. Drivers leaving a vehicle would have to turn off the vehicle’s engine, resulting in no air conditioning or heating for other passengers in the

time the driver was outside the vehicle. The driver could be exposed to injury outside the vehicle (e.g., from a trip and fall).

A smaller number of commenters also expressed concern about the application of the reasonable modification concept to fixed route bus service. Some commenters said that the idea of buses stopping at other than a designated bus stop was generally unsafe and burdensome, could cause delays, and impair the clarity of service. A number of these commenters appeared to believe that the NPRM could require transit entities to stop anywhere along a route where a person with a disability was flagging a bus down, which they said would be a particularly burdensome practice.

Commenters also made legal arguments against the proposal. Some commenters supported the approach taken by the court in Melton. Others said that the Department lacks statutory authority under the ADA to require reasonable modification or that reasonably modifying paratransit policies and practices would force entities to exceed the “comparable” service requirements of the statute. Some of these commenters said that the proposal would push entities too far in the direction of providing individualized, human service-type transportation, rather than mass transit. A number of commenters also said that it was good policy to maintain local option for entities in terms of the service they provide. Others argued that the proposed action was inconsistent with statutes or Executive Orders related to unfunded mandates and Federalism.

A variety of commenters—in both the disability community and transportation industry—noted that a significant number of paratransit operators already either provide door-to-door service as their basic mode of service (some commenters said as many as 50 percent of paratransit operators provide door-to-door service) or follow what, in effect, is

curb-to-curb with reasonable modification approach for paratransit, or allowed fixed route buses flexibility in terms of where they stop. Some of these commenters said that transit operators imposed conditions on the kind of modifications that could be made (e.g., drivers could only leave the vehicle for a limited time or distance).

In some cases, commenters said, while they use their discretion to make the kinds of modifications the NPRM proposed, they wanted these actions to remain discretionary, rather than being the subject of a Federal mandate. A smaller number of commenters asked for additional guidance on expectations under a reasonable modification rule or for clarification of an enforcement mechanism for the proposed requirement.

Disability community commenters were virtually unanimous in supporting the proposal, saying that curb-to-curb paratransit service was often inadequate for some people with disabilities, who, in some circumstances, could not make use of ADA-mandated paratransit service. For example, medical oxygen users should not have to use part of their supply waiting at the curb for a vehicle; blind passengers may need wayfinding assistance to get to or from a vehicle; or bad weather may make passage to or from a vehicle unduly difficult for wheelchair users. Some disability community commenters supported the inclusion in the rule of various other provisions of the DOJ ADA regulations (e.g., with respect to auxiliary aids and services).

DOT Response to Comments

Reasonable modification is a central concept of disability nondiscrimination law, based on the principle that it is essential for entities to consider individuals with disabilities as individuals, not simply as members of a category. The concept recognizes that entities may have general policies, legitimate on their face, that prevent

nondiscriminatory access to entities' service, programs, or facilities by some individuals with disabilities under some circumstances. The concept calls on entities to make individual exceptions to these general policies, where needed to provide meaningful, nondiscriminatory access to services, programs, or facilities, unless making such an exception would require a fundamental alteration of an entity's programs.

Reasonable modification requirements are part of existing requirements for recipients of Federal financial assistance, DOJ ADA rules for public and private entities, DOT ADA rules for passenger vessels, and DOT rules under the Air Carrier Access Act. In none of these contexts has the existence of a reasonable modification requirement created a significant obstacle to the conduct of the wide variety of public and private functions covered by these rules. Nor has it led to noticeable increases in costs. At this point, surface transportation entities are the only class of entities not explicitly covered by an ADA regulatory reasonable modification requirement. Having reviewed the comments to this rulemaking, the Department has concluded that commenters failed to make a persuasive case that there is legal justification for public transportation entities to be treated differently than other transportation entities. Further, per the analysis above, section 504 requires entities receiving Federal financial assistance to make reasonable accommodations to policies and practices when necessary to provide nondiscriminatory access to services. This existing requirement applies to nearly all public transportation entities.

As stated in the NPRM, DOT recognizes that not all requests by individuals with disabilities for modifications of transportation provider policies are, in fact, reasonable. The NPRM recognized three types of modifications that would not create an obligation

for a transportation provider to agree with a request: (1) those that would fundamentally alter the provider's program, (2) those that would create a direct threat, as defined in 49 CFR 37.3, as a significant risk to the health or safety of others, and (3) those that are not necessary to enable an individual to receive the provider's services. The NPRM provided some examples of modifications that should be or need not be granted. Commenters from both the disability community and the transit industry provided a vastly larger set of examples of modifications that they had encountered or believed either should or should not be granted.

To respond to commenters' concerns that, given the wide variety of requests that can be made, it is too difficult to make the judgment calls involved, the Department has created an Appendix E to its ADA regulation that lists examples of types of requests that we believe, in most cases, either will be reasonable or not. This guidance recognizes that, given the wide variety of circumstances with which transportation entities and passengers deal, there may be some generally reasonable requests that could justly be denied in some circumstances, and some requests that generally need not be granted that should be granted in other circumstances. In addition, we recognize that no list of potential requests can ever be completely comprehensive, since the possible situations that can arise are far more varied than can be set down in any document. That said, we hope that this Appendix will successfully guide transportation entities' actions in a substantial majority of the kinds of situations commenters have called to our attention, substantially reducing the number of situations in which from-scratch judgment calls would need to be made, and will provide an understandable framework for transportation entities' thinking about

specific requests not listed. Of course, as the Department learns of situations not covered in the Appendix, we may add to it.

The Department wants again to make clear that, as stated in the preamble to the last rulemaking:

[the] September 2005 guidance concerning origin-to-destination service remains the Department's interpretation of the obligations of ADA complementary paratransit providers under existing regulations. As with other interpretations of regulatory provisions, the Department will rely on this interpretation in implementing and enforcing the origin-to-destination requirement of part 37. 76 FR 57924, 57934 (Sept. 19, 2011).

Thus, achieving the objective of providing origin-to-destination service does not require entities to make door-to-door service their basic mode of service provision. It remains entirely consistent with the Department's ADA rule to provide ADA complementary paratransit in a curb-to-curb mode. When a paratransit operator does so, however, it would need to make exceptions to its normal curb-to-curb policy where a passenger with a disability makes a request for assistance beyond curb-to-curb service that is needed to provide access to the service and does not result in a fundamental alteration or direct threat to the health or safety of others. Given the large number of comments on this issue, and to further clarify the Department's position on this, we have added a definition of "origin-to-destination" in part 37.

As commenters noted, a significant number of paratransit operators already follow an origin-to-destination policy that addresses the needs of passengers that require assistance beyond the curb in order to use the paratransit service. This fact necessarily means that these providers can and do handle individual requests successfully. When a significant number of complementary paratransit systems already do essentially what this

rule requires, or more, it is difficult to argue that it cannot be done without encountering insuperable problems.

To respond to commenters' concerns about an asserted onerous review process of requested modifications, the Department has removed the requirement that a response to a request be in writing, and is amending the complaint procedure in 49 CFR 27.13, and then mirroring that provision in a new section 37.17, to ensure it applies not just to recipients of Federal funds but to all designated public transportation entities. A person who is denied a modification may file a complaint with the entity, but the process would be the same as with any other complaint, so no separate complaint procedure is listed in 37.169.

With respect to fixed route bus service, the Department's position—elaborated upon in Appendix E—is that transportation providers are not required to stop at nondesignated locations. That is, a bus operator would not have to stop and pick up a person who is trying to flag down the bus from a location unrelated to or not in proximity to a designated stop, regardless of whether or not that person has a disability. On the other hand, if a person with a disability is near a bus stop, but cannot get to the precise location of the bus stop sign (e.g., because there is not an accessible path of travel to that precise location) or cannot readily access the bus from the precise location of the bus stop sign (e.g., because of construction, snow, or a hazard that makes getting onto the lift from the area of the bus stop sign too difficult or dangerous), then it is consistent both with the principle of reasonable modification and with common sense to pick up that passenger a modest distance from the bus stop sign. Doing so would not fundamentally alter the service or cause significant delays or degradation of service.

While it is understandable that commenters opposed to reasonable modification would support the outcome of Melton and cases that followed, it is important to understand that the reasoning of these cases is based largely on the proposition that, in the absence of a DOT ADA regulation, transportation entities could not be required to make reasonable modifications on the basis of DOJ requirements, standing alone. This final rule will fill the regulatory gap that Melton identified. While Melton stated that there was a gap in coverage with respect to public transportation and paratransit, as § 37.5(f) notes, private entities that were engaged in the business of providing private transportation services have always been obligated to provide reasonable modifications under title III of the ADA. Further, as stated above, reasonable accommodation is a requirement under section 504 of the Rehabilitation Act of 1973.

We do not agree with commenters who asserted that reasonable modification goes beyond the concept of comparable complementary paratransit found in the ADA, going too far in the direction of individualized, human services transportation, rather than mass transit. To the contrary, complementary paratransit remains a shared-ride service that must meet regulatory service criteria. Nothing in this final rule changes that. What the final rule does make clear is that in providing complementary paratransit service, transit authorities must take reasonable steps, even if case-by-case exceptions to general procedures, to make sure that eligible passengers can actually get to the service and use it for its intended purpose. ADA complementary paratransit remains a safety net for individuals with disabilities who cannot use accessible fixed route service. Adhering rigidly to policies that deny access to this safety net is inconsistent with the nondiscrimination obligations of transportation entities. Because transportation entities

would not be required to make any modifications to their general policies that would fundamentally alter their service, the basic safety net nature of complementary paratransit service remains unchanged.

By the terms of the Unfunded Mandates Reform Act of 1995, as amended, requirements to comply with nondiscrimination laws, including those pertaining to disability, are not unfunded mandates subject to the provisions of the Act. 2 U.S.C. § 1503. As a practical matter, for the vast majority of transportation entities subject to the DOT ADA regulation who receive FTA or other DOT financial assistance, compliance with any DOT regulations is, to a significant degree, a funded mandate. For both these reasons, comments suggesting that the proposal would impose an unfunded mandate were incorrect.

With respect to federalism, State and local governments were consulted about the rule, both by means of the opportunity to comment on the NPRM and a public meeting. Transportation authorities—many of which are likely to be State and local entities—did participate extensively in the rulemaking process, as the docket amply demonstrates. As stated previously, transportation industry commenters prefer to use their discretion to make the kinds of modifications the NPRM proposed, rather than being subject to a Federal mandate. These entities continue to have the discretion to grant or deny requests for reasonable modification, albeit in the context of Appendix E.

The effects of the final rule on fixed route service are quite modest, and comments did not assert the contrary. The issue of the cost impact of the reasonable modification focused almost exclusively on ADA complementary paratransit. There was

little in the way of allegations that making exceptions to usual policies would increase costs in fixed route service.

In looking at the allegations of cost increases on ADA complementary paratransit, the Department stresses that all recipients of Federal financial assistance—which includes public transportation entities of complementary paratransit service—are already required to modify policies, practices, and procedures if needed by an individual with a disability to enable him or her to participate in the recipient's programs or activities, and this principle has been applied by Federal agencies and the courts accordingly. However, to provide commenters with a fuller response to their comments, the Department would further make three primary points. First, based on statements on transportation provider Web sites and other information, one-half to two-thirds of transit authorities already provide either door-to-door service as their basic mode of service or provide what amounts to curb-to-curb service with assistance beyond the curb as necessary in order to enable the passenger to use the service. The rule would not require any change in behavior, or any increase in costs, for these entities. Second, the effect of providing paratransit service in a door-to-door, or curb-to-curb, with reasonable modification, mode on per-trip costs is minimal. In situations where arrangements for reasonable modification are made in advance, which would be a significant portion of all paratransit modification requests, per-trip costs could even be slightly lower. The concerns expressed by commenters that per-trip costs would escalate markedly appear not to be supported by the data. Third, there could be cost increases, compared to current behavior, for paratransit operators that do not comply with existing origin-to-destination requirements of the rule. Suppressing paratransit ridership by preventing eligible

individuals from using the service or making the use of the service inconvenient saves money for entities. Conversely, making service more usable, and hence more attractive, could increase usage. Because of the operating cost-intensive nature of paratransit service, providing service to more people tends to increase costs. The Department estimated that increased costs from increased ridership stemming from improved service could amount to \$55 million per year nationwide for those public transportation entities who are not in compliance with the current DOT origin-to-destination regulations.

This estimate would be at the upper end of the range of possible ridership-generated cost increases, since it is not clear that transportation entities with a strict curb-to-curb policy never provide modifications to their service. Analysts made the assumption that transportation agencies with curb-to-curb policies did not make modifications when modifications were not mentioned on the entities' Web sites. Disability community commenters suggested that, as a practical matter, transportation entities often provide what amounts to modifications even if their formal policies do not call for doing so.

In addition, it should be emphasized that transportation entities who comply with the existing rule's origin-to-destination requirement will not encounter ridership-related cost increases. In an important sense, any paratransit operation that sees an increase in ridership when this rule goes into effect are experiencing increased costs at this time because of their unwillingness to comply with existing requirements over the past several years.

Provisions of the Final Rule

In amendments to 49 CFR part 27 (the Department's section 504 rule) and part 37 (the Department's ADA rule for most surface transportation), the Department is incorporating specific requirements to clarify that public transportation entities are required to modify policies, practices, procedures that are needed to ensure access to programs, benefits, and services.

With regard to the Department's section 504 rule at 49 CFR part 27, we are revising the regulation to specifically incorporate the preexisting reasonable accommodation requirement recognized by the U.S. Supreme Court (see, e.g., Choate and Davis). The revised section 27.7 will clarify that recipients of Federal financial assistance are required to provide reasonable accommodations to policies, practices, or procedures when the accommodations are necessary to avoid discrimination on the basis of disability unless making the modifications (1) would fundamentally alter the nature of the service, program, or activity, or (2) would result in undue financial and administrative burdens.

With regard to the Department's ADA regulations in part 37, we are revising the regulation to further clarify this requirement and to fill in the gap identified by the courts. Under our revised part 37 regulations, public transportation entities may deny requests for modifications to their policies and practices on one or more of the following grounds: making the modifications (1) would fundamentally alter the nature of the service, program, or activity, (2) would result in a direct threat to the health or safety of others, or (3) without the requested modification, the individual with a disability is able to fully use the entity's services, programs, or activities for their intended purpose. Please note that

under our section 504 regulations at part 27, there is an undue financial and administrative burden defense, which is not relevant to our ADA regulations at part 37.

This final rule revises section 37.169, which focuses on the reasonable modification obligations of public entities providing designated public transportation, including fixed route, demand-responsive, and complementary paratransit service. The key requirement of the section is that these types of transportation entities implement their own processes for making decisions on and providing reasonable modifications to their policies and practices. In many cases, agencies are handling requests for modifications during the paratransit eligibility process, customer service inquiries, and through the long-existing requirement in the Department's section 504 rule for a complaint process. Entities will need to review existing procedures and conform them to the new rule as needed. The Department is not requiring that the process be approved by DOT, and the shape of the process is up to the transportation provider, but it must meet certain basic criteria. The DOT can, however, review an entity's process as part of normal program oversight, including compliance reviews and complaint investigations.

First, the entity must make information about the process, and how to use it, readily available to the public, including individuals with disabilities. For example, if a transportation provider uses printed media and a Web site to inform customers about bus and paratransit services, then it must use these means to inform people about the reasonable modification process. Of course, like all communications, this information must be provided by means accessible to individuals with disabilities.¹

Second, the process must provide an accessible means by which individuals with disabilities can request a reasonable modification/accommodation. Whenever feasible,

¹ See 28 CFR 35.160(b)(1).

requests for modifications should be made in advance. This is particularly appropriate where a permanent or long-term condition or barrier is the basis for the request (e.g., difficulty in access to a paratransit vehicle from the passenger's residence; the need to eat a snack on a rail car to maintain a diabetic's blood sugar levels; lack of an accessible path of travel to a bus stop, resulting in a request to have the bus stop a short distance from the bus stop location). In the paratransit context, it may often be possible to consider requests of this kind in conjunction with the eligibility process. The request from the individual with a disability should be as specific as possible and include information on why the requested modification is needed in order to allow the individual to use the transportation provider's services.

Third, the process must also provide for those situations in which an advance request and determination is not feasible. The Department recognizes that these situations are likely to be more difficult to handle than advance requests, but responding to them is necessary. For example, a passenger who uses a wheelchair may be able to board a bus at a bus stop near his residence but may be unable to disembark due to a parked car or utility repair blocking the bus boarding and alighting area at the stop near his destination. In such a situation, the transit vehicle operator would have the front-line responsibility for deciding whether to grant the on-the-spot request, though it would be consistent with the rule for the operator to call his or her supervisor for guidance on how to proceed.

Further, section 37.169 states three grounds on which a transportation provider could deny a requested modification. These grounds apply both to advance requests and on-the-spot requests. The first ground is that the request would result in a fundamental

alteration of the provider's services (e.g., a request for a dedicated vehicle in paratransit service, a request for a fixed route bus to deviate from its normal route to pick up someone). The second ground is that fulfilling a request for a modification would create a direct threat to the health or safety of others (e.g., a request that would require a driver to engage in a highly hazardous activity in order to assist a passenger, such as having to park a vehicle for a prolonged period of time in a no-parking zone on a high-speed, high-volume highway that would expose the vehicle to a heightened probability of being involved in a crash). Third, the requested modification would not be necessary to permit the passenger to use the entity's services for their intended purpose in a nondiscriminatory fashion (e.g., the modification might make transportation more convenient for the passenger, who could nevertheless use the service successfully to get where he or she is going without the modification). Appendix E provides additional examples of requested modifications that transportation entities usually would not be required to grant for one or more of these reasons.

Where a transportation provider has a sound basis, under this section, for denying a reasonable modification request, the entity would still need to do all it could to enable the requester to receive the services and benefits it provides (e.g., a different work-around to avoid an obstacle to transportation from the one requested by the passenger). Transportation agencies that are Federal recipients are required to have a complaint process in place. The Department has added a new section 37.17 that extends the changes made to 49 CFR 27.13 to all public and private entities that provide transportation services, regardless of whether the entity receives Federal funds.

By requiring entities to implement a local reasonable modification process, the Department intends decisions on individual requests for modification to be addressed at the local level. The Department does not intend to use its complaint process to resolve disagreements between transportation entities and individuals with disabilities about whether a particular modification request should have been granted. However, if an entity does not have the required process, it is not being operated properly (e.g., the process is inaccessible to people with disabilities, does not respond to communications from prospective complainants), it is not being operated in good faith (e.g., virtually all complaints are routinely rejected, regardless of their merits), or in any particular case raising a Federal interest, DOT agencies may intervene and take enforcement action.

REGULATORY ANALYSES AND NOTICES

Executive Order 12866 (Regulatory Planning and Review), DOT Regulatory Policies and Procedures, and Executive Order 13563 (Improving Regulation and Regulatory Review)

This final rule is not significant for purposes of Executive Orders 12866 and 13563 and the Department of Transportation's Regulatory Policies and Procedures. Therefore, it has not been reviewed by the Office of Management and Budget under Executive Order 12866 and Executive Order 13563. The costs of this rulemaking are expected to be minimal for two reasons. First, modifications to policies, practices, and procedures, if needed by an individual with a disability to enable him or her to participate in a program or activity, are already required by other Federal law that applies to recipients of Federal financial assistance. Since virtually every entity subject to this final rule receives Federal financial assistance, each entity should already be modifying its policies, practices, and procedures when necessary. Second, the reasonable modification/accommodation

requirements contained in this final rule are not very different from the origin-to-destination requirement already applicable to complementary paratransit service, as required by current DOT regulations at 49 CFR 37.129(a) and as described in its implementing guidance. However, the Department recognizes that it is likely that some regulated entities are not complying with the current section 504 requirements and origin-to-destination regulation. In those circumstances only, the Department estimates that increased costs from increased ridership stemming from improved service could amount to \$55 million per year nationwide for those public transportation entities who are not in compliance with the current DOT origin-to-destination regulations and section 504 requirements. Those costs are not a cost of this rule, but rather a cost of coming into compliance with current law.

Executive Order 13132 (Federalism)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This final rule does not include any provision that (1) has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various level of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. Therefore, the rule does not have federalism impacts sufficient to warrant the preparation of a Federalism Assessment.

Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments)

The final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084. Because this final rule does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial

direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule may affect actions of some small entities (e.g., small paratransit operations). However, the bulk of paratransit operators are not small entities, and the majority of all paratransit operators already appear to be in compliance. There are not significant cost impacts on fixed route service at all, and the number of small grantees who operate fixed route systems is not large. Since operators can provide service in a demand-responsive mode (e.g., route deviation) that does not require the provision of complementary paratransit, significant financial impacts on any given operator are unlikely.

Paperwork Reduction Act

This rule imposes no new information reporting or recordkeeping necessitating clearance by the Office of Management and Budget.

National Environmental Policy Act

The agency has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical

exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration's implementing procedures, "[p]romulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20). The purpose of this rulemaking is to provide that transportation entities are required to make reasonable modifications/accommodations to policies, practices, and procedures to avoid discrimination and ensure that their programs are accessible to individuals with disabilities. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

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 rule. These include the Unfunded Mandates Reform Act (which does not apply to nondiscrimination/civil rights requirements), Executive Order 12630 (concerning property rights), Executive Order 12988 (concerning civil justice reform), and Executive Order 13045 (protection of children from environmental risks).

List of Subjects

49 CFR Part 27

Administrative practice and procedure, Airports, Civil rights, Highways and roads, Individuals with disabilities, Mass transportation, Railroads, Reporting and recordkeeping requirements.

49 CFR Part 37

Buildings and facilities, Buses, Civil rights, Individuals with disabilities, Mass transportation, Railroads, Reporting and recordkeeping requirements, Transportation.

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

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

1. The authority citation for part 27 is revised to read as follows:

Authority: Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794); 49 U.S.C. 5332.

2. Amend § 27.7 by adding a new paragraph (e) to read as follows:

§ 27.7 Discrimination prohibited.

* * * * *

(e) *Reasonable accommodations.* A recipient shall make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability unless the recipient can demonstrate that making the accommodations would fundamentally alter the nature of the service, program, or activity or result in an undue financial and administrative burden. For the purposes of this section, the term reasonable accommodation shall be interpreted in a manner

consistent with the term “reasonable modifications” as set forth in the Americans with Disabilities Act title II regulations at 28 CFR 35.130(b)(7), and not as it is defined or interpreted for the purposes of employment discrimination under title I of the ADA (42 U.S.C. 12111-12112) and its implementing regulations at 29 CFR part 1630.

3. Revise § 27.13 to read as follows:

§ 27.13 Designation of responsible employee and adoption of complaint procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of complaint procedures.* A recipient shall adopt procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part and 49 CFR parts 37, 38, and 39. The procedures shall meet the following requirements:

(1) The process for filing a complaint, including the name, address, telephone number, and email address of the employee designated under paragraph (a) of this section, must be sufficiently advertised to the public, such as on the recipient’s Web site;

(2) The procedures must be accessible to and usable by individuals with disabilities;

(3) The recipient must promptly communicate its response to the complaint allegations, including its reasons for the response, to the complainant by a means that will result in documentation of the response.

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

4. The authority citation for part 27 continues to read as follows:

AUTHORITY: 42 U.S.C. 12101-12213; 49 U.S.C. 322.

5. In § 37.3, add a definition of “Origin-to-destination service” in alphabetical order to read as follows:

§ 37.3 Definitions.

* * * * *

Origin-to-destination service means providing service from a passenger’s origin to the passenger’s destination. A provider may provide ADA complementary paratransit in a curb-to-curb or door-to-door mode. When an ADA paratransit operator chooses curb-to-curb as its primary means of providing service, it must provide assistance to those passengers who need assistance beyond the curb in order to use the service unless such assistance would result in in a fundamental alteration or direct threat.

* * * * *

6. Amend § 37.5 by revising paragraph (h) and adding paragraph (i) to read as follows:

§ 37.5 Nondiscrimination.

* * * * *

(h) It is not discrimination under this part for an entity to refuse to provide service to an individual with disabilities because that individual engages in violent, seriously disruptive, or illegal conduct, or represents a direct threat to the health or safety of others. However, an entity shall not refuse to provide service to an individual with disabilities solely because the individual’s disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience employees of the entity or other persons.

(i) *Public and private entity distinctions.*— (1) *Private entity–private transport.* Private entities that are primarily engaged in the business of transporting people and whose operations affect commerce shall not discriminate against any individual on the basis of

disability in the full and equal enjoyment of specified transportation services. This obligation includes, with respect to the provision of transportation services, compliance with the requirements of the rules of the Department of Justice concerning eligibility criteria, making reasonable modifications, providing auxiliary aids and services, and removing barriers (28 CFR 36.301-36.306).

(2) *Private entity–public transport.* Private entities that provide specified public transportation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

(3) *Public entity–public transport.* Public entities that provide designated public transportation 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 their services, subject to the limitations of § 37.169(c)(1)-(3). This requirement applies to the means public entities use to meet their obligations under all provisions of this part.

(4) In choosing among alternatives for meeting nondiscrimination and accessibility requirements with respect to new, altered, or existing facilities, or designated or specified 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 appropriate to the needs of individuals with disabilities.

7. Add § 37.17 to read as follows:

§ 37.17 Designation of responsible employee and adoption of complaint procedures.

(a) *Designation of responsible employee.* Each public or private entity subject to this part shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of complaint procedures.* An entity shall adopt procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part and 49 CFR parts 27, 38 and 39. The procedures shall meet the following requirements:

(1) The process for filing a complaint, including the name, address, telephone number, and email address of the employee designated under paragraph (a) of this section, must be sufficiently advertised to the public, such as on the entity's Web site;

(2) The procedures must be accessible to and usable by individuals with disabilities;

(3) The entity must promptly communicate its response to the complaint allegations, including its reasons for the response, to the complainant and must ensure that it has documented its response.

8. Add § 37.169 to read as follows:

§ 37.169 Process to be used by public entities providing designated public transportation service in considering requests for reasonable modification.

(a)(1) A public entity providing designated public transportation, in meeting the reasonable modification requirement of § 37.5(g)(1) with respect to its fixed route, demand responsive, and complementary paratransit services, shall respond to requests for reasonable modification to policies and practices consistent with this section.

(2) The public entity shall make information about how to contact the public entity to make requests for reasonable modifications readily available to the public through the same means it uses to inform the public about its policies and practices.

(3) This process shall be in operation no later than [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(b) The process shall provide a means, accessible to and usable by individuals with disabilities, to request a modification in the entity's policies and practices applicable to its transportation services.

(1) Individuals requesting modifications shall describe what they need in order to use the service.

(2) Individuals requesting modifications are not required to use the term "reasonable modification" when making a request.

(3) Whenever feasible, requests for modifications shall be made and determined in advance, before the transportation provider is expected to provide the modified service, for example, during the paratransit eligibility process, through customer service inquiries, or through the entity's complaint process.

(4) Where a request for modification cannot practicably be made and determined in advance (e.g., because of a condition or barrier at the destination of a paratransit or fixed route trip of which the individual with a disability was unaware until arriving), operating personnel of the entity shall make a determination of whether the modification should be provided at the time of the request. Operating personnel may consult with the entity's management before making a determination to grant or deny the request.

(c) Requests for modification of a public entity's policies and practices may be denied only on one or more of the following grounds:

(1) Granting the request would fundamentally alter the nature of the entity's services, programs, or activities;

(2) Granting the request would create a direct threat to the health or safety of others;

(3) Without the requested modification, the individual with a disability is able to fully use the entity's services, programs, or activities for their intended purpose.

(d) In determining whether to grant a requested modification, public entities shall be guided by the provisions of Appendix E to this Part.

(e) In any case in which a public entity denies a request for a reasonable modification, the entity shall take, to the maximum extent possible, any other actions (that would not result in a direct threat or fundamental alteration) to ensure that the individual with a disability receives the services or benefit provided by the entity.

(f)(1) Public entities are not required to obtain prior approval from the Department of Transportation for the process required by this section.

(2) DOT agencies retain the authority to review an entity's process as part of normal program oversight.

9. Add a new Appendix E to Part 37 to read as follows:

Appendix E to Part 37—Reasonable Modification Requests

A. This appendix explains the Department's interpretation of §§ 37.5(g) and 37.169. It is intended to be used as the official position of the Department concerning the meaning and implementation of these provisions. The Department also issues guidance by other means, as provided in § 37.15. The Department also may update this appendix

periodically, provided in response to inquiries about specific situations that are of general relevance or interest.

B. The Department's ADA regulations contain numerous requirements concerning fixed route, complementary paratransit, and other types of transportation service. Transportation entities necessarily formulate policies and practices to meet these requirements (e.g., providing fixed route bus service that people with disabilities can use to move among stops on the system, providing complementary paratransit service that gets eligible riders from their point of origin to their point of destination). There may be certain situations, however, in which the otherwise reasonable policies and practices of entities do not suffice to achieve the regulation's objectives. Implementing a fixed route bus policy in the normal way may not allow a passenger with a disability to access and use the system at a particular location. Implementing a paratransit policy in the usual way may not allow a rider to get from his or her origin to his or her destination. In these situations, subject to the limitations discussed below, the transportation provider must make reasonable modifications of its service in order to comply with the underlying requirements of the rule. These underlying provisions tell entities the end they must achieve; the reasonable modification provision tells entities how to achieve that end in situations in which normal policies and practices do not succeed in doing so.

C. As noted above, the responsibility of entities to make requested reasonable modifications is not without some limitations. There are four classes of situations in which a request may legitimately be denied. The first is where granting the request would fundamentally alter the entity's services, programs, or activities. The second is where granting the request would create a direct threat to the health or safety of others.

The third is where without the requested modification, the individual with a disability is able to fully use the entity's services, programs, or activities for their intended purpose.

The fourth, which applies only to recipients of Federal financial assistance, is where granting the request would cause an undue financial and administrative burden. In the examples that follow, these limitations are taken into account.

D. The examples included in this appendix are neither exhaustive nor exclusive. Transportation entities may need to make determinations about requests for reasonable modification that are not described in this appendix. Importantly, reasonable modification applies to an entities' own policies and practices, and not regulatory requirements contained in 49 CFR parts 27, 37, 38, and 39, such as complementary paratransit service going beyond $\frac{3}{4}$ mile of the fixed route, providing same day complementary paratransit service, etc.

EXAMPLES

1. Snow and Ice. Except in extreme conditions that rise to the level of a direct threat to the driver or others, a passenger's request for a paratransit driver to walk over a pathway that has not been fully cleared of snow and ice should be granted so that the driver can help the passenger with a disability navigate the pathway. For example, ambulatory blind passengers often have difficulty in icy conditions, and allowing the passenger to take the driver's arm will increase both the speed and safety of the passenger's walk from the door to the vehicle. Likewise, if snow or icy conditions at a bus stop make it difficult or impossible for a fixed route passenger with a disability to get to a lift, or for the lift to deploy, the driver

should move the bus to a cleared area for boarding, if such is available within reasonable proximity to the stop (see Example 4 below).

2. Pick Up and Drop Off Locations with Multiple Entrances. A paratransit rider's request to be picked up at home, but not at the front door of his or her home, should be granted, as long as the requested pick-up location does not pose a direct threat. Similarly, in the case of frequently visited public places with multiple entrances (e.g., shopping malls, employment centers, schools, hospitals, airports), the paratransit operator should pick up and drop off the passenger at the entrance requested by the passenger, rather than meet them in a location that has been predetermined by the transportation agency, again assuming that doing so does not involve a direct threat.
3. Private Property. Paratransit passengers may sometimes seek to be picked up on private property (e.g., in a gated community or parking lot, mobile home community, business or government facility where vehicle access requires authorized passage through a security barrier). Even if the paratransit operator does not generally have a policy of picking up passengers on such private property, the paratransit operator should make every reasonable effort to gain access to such an area (e.g., work with the passenger to get the permission of the property owner to permit access for the paratransit vehicle). The paratransit operator is not required to violate the law or lawful access restrictions to meet the passenger's requests. A public or private entity that unreasonably denies access to a paratransit vehicle may be subject to a complaint to the U.S. Department of

Justice or U.S. Department of Housing and Urban Development for discriminating against services for persons with disabilities.

4. Obstructions. For fixed route services, a passenger's request for a driver to position the vehicle to avoid obstructions to the passenger's ability to enter or leave the vehicle at a designated stop location, such as parked cars, snow banks, and construction, should be granted so long as positioning the vehicle to avoid the obstruction does not pose a direct threat. To be granted, such a request should result in the vehicle stopping in reasonably close proximity to the designated stop location. Transportation entities are not required to pick up passengers with disabilities at nondesignated locations. Fixed route operators would not have to establish flag stop or route-deviation policies, as these would be fundamental alterations to a fixed route system rather than reasonable modifications of a system. Likewise, subject to the limitations discussed in the introduction to this appendix, paratransit operators should be flexible in establishing pick up and drop off points to avoid obstructions.
5. Fare Handling. A passenger's request for transit personnel (e.g., the driver, station attendant) to handle the fare media when the passenger with a disability cannot pay the fare by the generally established means should be granted on fixed route or paratransit service (e.g., in a situation where a bus passenger cannot reach or insert a fare into the farebox). Transit personnel are not required to reach into pockets or backpacks in order to extract the fare media.
6. Eating and Drinking. If a passenger with diabetes or another medical condition requests to eat or drink aboard a vehicle or in a transit facility in order to avoid

adverse health consequences, the request should be granted, even if the transportation provider has a policy that prohibits eating or drinking. For example, a person with diabetes may need to consume a small amount of orange juice in a closed container or a candy bar in order to maintain blood sugar levels.

7. Medicine. A passenger's request to take medication while aboard a fixed route or paratransit vehicle or in a transit facility should be granted. For example, transit agencies should modify their policies to allow individuals to administer insulin injections and conduct finger stick blood glucose testing. Transit staff need not provide medical assistance, however, as this would be a fundamental alteration of their function.
8. Boarding Separately From Wheelchair. A wheelchair user's request to board a fixed route or paratransit vehicle separately from his or her device when the occupied weight of the device exceeds the design load of the vehicle lift should generally be granted. (Note, however, that under § 37.165(b), entities are required to accommodate device/user loads and dimensions that exceed the former "common wheelchair" standard, as long as the vehicle and lift will accommodate them.)
9. Dedicated vehicles or special equipment in a vehicle. A paratransit passenger's request for special equipment (e.g., the installation of specific hand rails or a front seat in a vehicle for the passenger to avoid nausea or back pain) can be denied so long as the requested equipment is not required by the Americans with Disabilities Act or the Department's rules. Likewise, a request for a dedicated vehicle (e.g., to avoid residual chemical odors) or a specific type or appearance of

vehicle (e.g., a sedan rather than a van, in order to provide more comfortable service) can be denied. In all of these cases, the Department views meeting the request as involving a fundamental alteration of the provider's service.

10. Exclusive or Reduced Capacity Paratransit Trips. A passenger's request for an exclusive paratransit trip may be denied as a fundamental alteration of the entity's services. Paratransit is by nature a shared-ride service.

11. Outside of the Service Area or Operating Hours. A person's request for fixed route or paratransit service may be denied when honoring the request would require the transportation provider to travel outside of its service area or to operate outside of its operating hours. This request would not be a reasonable modification because it would constitute a fundamental alteration of the entity's service.

12. Personal Care Attendant (PCA). While PCAs may travel with a passenger with a disability, transportation agencies are not required to provide a personal care attendant or personal care attendant services to meet the needs of passengers with disabilities on paratransit or fixed route trips. For example, a passenger's request for a transportation entity's driver to remain with the passenger who, due to his or her disability, cannot be left alone without an attendant upon reaching his or her destination may be denied. It would be a fundamental alteration of the driver's function to provide PCA services of this kind.

13. Intermediate Stops. The Department views granting a paratransit passenger's request for a driver to make an intermediate stop, where the driver would be required to wait, as optional. For example, a passenger with a disability arranges

to be picked up at a medical facility and dropped off at home. On the way, the passenger with a disability wishes to stop by a pharmacy and requests that the driver park outside of the pharmacy, wait for the passenger to return, and then continue the ride home. While this can be a very useful service to the rider, and in some cases can save the provider's time and money (by scheduling and providing a separate trip to and from the drug store), such a stop in the context of a shared ride system is not required. Since paratransit is, by its nature, a shared ride system, requests that could disrupt schedules and inconvenience other passengers could rise to the level of a fundamental alteration.

14. Payment. A passenger's request for a fixed route or paratransit driver to provide the transit service when the passenger with a disability cannot or refuses to pay the fare may be denied. If the transportation agency requires payment to ride, then to provide a free service would constitute a fundamental alteration of the entity's service.

15. Caring for Service Animals. A paratransit or fixed route passenger's request that the driver take charge of a service animal may be denied. Caring for a service animal is the responsibility of the passenger or a PCA.

16. Opening Building Doors. For paratransit services, a passenger's request for the driver to open an exterior entry door to a building to provide boarding and/or alighting assistance to a passenger with a disability should generally be granted as long as providing this assistance would not pose a direct threat, or leave the vehicle unattended or out of visual observation for a lengthy period of time.¹

¹ Please see guidance issued on this topic. U.S. Department of Transportation, *Origin-to-Destination Service*, September 1, 2005, available at http://www.fta.dot.gov/12325_3891.html (explaining that, "the

Note that a request for “door-through-door” service (i.e., assisting the passenger past the door to the building) generally would not need to be granted because it could rise to the level of a fundamental alteration.

17. Exposing Vehicle to Hazards. If the passenger requests that a vehicle follow a path to a pick up or drop off point that would expose the vehicle and its occupants to hazards, such as running off the road, getting stuck, striking overhead objects, or reversing the vehicle down a narrow alley, the request can be denied as creating a direct threat.

18. Hard-to-Maneuver Stops. A passenger may request that a paratransit vehicle navigate to a pick-up point to which it is difficult to maneuver a vehicle. A passenger’s request to be picked up in a location that is difficult, but not impossible or impracticable, to access should generally be granted as long as picking up the passenger does not expose the vehicle to hazards that pose a direct threat (e.g., it is unsafe for the vehicle and its occupants to get to the pick-up point without getting stuck or running off the road).

19. Specific Drivers. A passenger’s request for a specific driver may be denied. Having a specific driver is not necessary to afford the passenger the service provided by the transit operator.

20. Luggage and Packages. A passenger’s request for a fixed route or paratransit driver to assist with luggage or packages may be denied in those instances where it is not the normal policy or practice of the transportation agency to assist with luggage or packages. Such assistance is a matter for the passenger or PCA, and

Department does not view transit providers’ obligations as extending to the provision of personal services. . . 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 be clearly unsafe. . .”).

providing this assistance would be a fundamental alteration of the driver's function.

21. Request to Avoid Specific Passengers. A paratransit passenger's request not to ride with certain passengers may be denied. Paratransit is a shared-ride service. As a result, one passenger may need to share the vehicle with people that he or she would rather not.
22. Navigating an Incline, or Around Obstacles. A paratransit passenger's request for a driver to help him or her navigate an incline (e.g., a driveway or sidewalk) with the passenger's wheeled device should generally be granted. Likewise, assistance in traversing a difficult sidewalk (e.g., one where tree roots have made the sidewalk impassible for a wheelchair) should generally be granted, as should assistance around obstacles (e.g., snowdrifts, construction areas) between the vehicle and a door to a passenger's house or destination should generally be granted. These modifications would be granted subject, of course, to the proviso that such assistance would not cause a direct threat, or leave the vehicle unattended or out of visual observation for a lengthy period of time.
23. Extreme Weather Assistance. A passenger's request to be assisted from his or her door to a vehicle during extreme weather conditions should generally be granted so long as the driver leaving the vehicle to assist would not pose a direct threat, or leave the vehicle unattended or out of visual observation for a lengthy period of time. For example, in extreme weather (e.g., very windy or stormy conditions), a person who is blind or vision-impaired or a frail elderly person may have difficulty safely moving to and from a building.

24. Unattended Passengers. Where a passenger's request for assistance means that the driver will need to leave passengers aboard a vehicle unattended, transportation agencies should generally grant the request as long as accommodating the request would not leave the vehicle unattended or out of visual observation for a lengthy period of time, both of which could involve direct threats to the health or safety of the unattended passengers. It is important to keep in mind that, just as a driver is not required to act as a PCA for a passenger making a request for assistance, so a driver is not intended to act as a PCA for other passengers in the vehicle, such that he or she must remain in their physical presence at all times.

25. Need for Return Trip Assistance. A passenger with a disability may need assistance for a return trip when he or she did not need that assistance on the initial trip. For example, a dialysis patient may have no problem waiting at the curb for a ride to go to the dialysis center, but may well require assistance to the door on his or her return trip because of physical weakness or fatigue. To the extent that this need is predictable, it should be handled in advance, either as part of the eligibility process or the provider's reservations process. If the need arises unexpectedly, then it would need to be handled on an ad hoc basis. The paratransit operator should generally provide such assistance, unless doing so would create a direct threat, or leave the vehicle unattended or out of visual observation for a lengthy period of time.

26. Five-Minute Warning or Notification of Arrival Calls. A passenger's request for a telephone call 5 minutes (or another reasonable interval) in advance or at time of

vehicle arrival generally should be granted. As a matter of courtesy, such calls are encouraged as a good customer service model and can prevent “no shows.” Oftentimes, these calls can be generated through an automated system. In those situations where automated systems are not available and paratransit drivers continue to rely on hand-held communication devices (e.g., cellular telephones) drivers should comply with any State or Federal laws related to distracted driving.

27. Hand-Carrying. Except in emergency situations, a passenger’s request for a driver to lift the passenger out of his or her mobility device should generally be denied because of the safety, dignity, and privacy issues implicated by hand-carrying a passenger. Hand-carrying a passenger is also a PCA-type service which is outside the scope of driver duties, and hence a fundamental alteration.

**ISSUED THIS 6th DAY OF March, 2015, AT WASHINGTON, D.C. under
authority delegated in 49 CFR 1.27(a):**

**Kathryn B. Thomson,
General Counsel.**

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