

DEPARTMENT OF TRANSPORTATION**49 CFR Part 37**

[Docket OST-1998-3648; Notice No. 98-15]

RIN 2105-ACOO

Transportation for Individuals with Disabilities**AGENCY:** Department of Transportation, Office of the Secretary.**ACTION:** Notice of proposed rulemaking (NPRM).

SUMMARY: The Department is proposing regulations to require the accessibility of new over-the-road buses (OTRBs) and to require accessible OTRB service. The proposed rules, under the authority of the Americans with Disabilities Act (ADA), apply both to intercity and other fixed-route bus operators and to charter/tour operators. The rules would ensure that passengers with disabilities could use OTRBs, which are the last major mode of surface transportation that are not subject to final accessibility requirements.

DATES: Comments are requested on or before May 26, 1998. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent, preferably in triplicate, to Docket Clerk, Docket No. OST-1998-3648, Department of Transportation, 400 7th Street, S.W., Room PL-401, Washington, D.C., 20590. Comments will be available for inspection at this address from 10:00 a.m. to 5:00 p.m., Monday through Friday. Commenters who wish the receipt of their comments to be acknowledged should include a stamped, self-addressed postcard with their comments. The Docket Clerk will date-stamp the postcard and mail it back to the commenter.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, S.W., Room 10424, Washington, D.C., 20590. (202) 366-9306 (voice); (202) 755-7687 (TDD), or Donald Trilling, Director, Office of Environment, Energy, and Safety, same street address, Room 9222, (202) 366-4220.

SUPPLEMENTARY INFORMATION: For purposes of the Americans with Disabilities Act (ADA), an OTRB is "a bus characterized by an elevated passenger deck located over a baggage compartment" (section 301(5)). The Department's ADA regulation (49 CFR 37.3) repeats this definition without change. OTRBs are a familiar type of bus

used by Greyhound and other fixed-route intercity bus carriers as well as charter and tour operators.

As provided by the ADA, the Department issued limited interim OTRB regulations with its 1991 final ADA rules. The statute originally provided for the Department to issue final regulations by mid-1994, which would go into effect in July 1996 for larger operators and July 1997 for smaller operators. The Department fell behind the statutory schedule. In recognition of this fact, Congress amended the ADA in 1995 to put the final rules into effect two years from the date of their issuance (three years for small entities). The Secretary of Transportation has made issuance of final OTRB rules a priority, and the Department has established a schedule calling for publication of a final rule by September 15, 1998. On this schedule, the rules would begin to apply to larger entities in October 2000 and to smaller entities in October 2001.

Regulatory Activity

In October 1993, the Department issued an advance notice of proposed rulemaking (ANPRM) that asked a variety of questions about the scope of accessibility requirements, interim service requirements, operational and fleet composition issues, lavatories and rest stops, training, and economic issues concerning OTRBs. Also in the autumn of 1993, the Department convened a public meeting at which DOT staff discussed OTRB issues with representatives of the disability community and OTRB industry. On various occasions, former Secretary of Transportation Federico Peña, Secretary of Transportation Rodney Slater and other DOT officials have met with disability community and bus industry groups to discuss the issues involved.

It is clear from the responses to the ANPRM, the public meeting, and comments in meetings that the bus industry and disability community hold quite different views of the course the Department should follow in these regulations. The disability community believes that all new OTRBs should be accessible. The bus industry believes that a "service-based" approach, involving such elements as a small pool of accessible buses, alternate means of access (e.g., station-based lifts and scalamobils), and on-call service. In support of its position, the disability community cites the accessibility requirements of other transportation provisions of the ADA, which uniformly require new vehicles to be accessible, and gaps and inequalities in service that they believe the industry approach

would create. In support of its position, the industry cites the higher costs of purchasing and operating accessible vehicles, their projections that demand for accessible service would be low, the economic problems of the intercity bus industry, and their view that their approach is more cost-effective.

Studies

There are two principal studies of over-the-road bus accessibility that the Department has considered in preparing this NPRM. The first was a Congressionally-mandated study prepared in 1993 by the Office of Technology Assessment (OTA), a small Federal agency (Access to Over-the-Road Buses for Persons with Disabilities, U.S. Congress, Office of Technology Assessment, OTA-SET-547 (Washington, D.C., U.S. Government Printing Office, May 1993)). The second was prepared for Greyhound by Nathan Associates, a consulting firm.

On potential ridership, the OTA study presents (admittedly crude) estimates that, if OTRB trip rates for disabled passengers are about the same as for the general passenger population, there would be 180,000 annual trips on fixed-route OTRB service by wheelchairs (plus another 200,000 by people using other mobility aids). Greyhound, using the experience of limited accessible OTRB operations in Massachusetts, Colorado, and Ontario, projects an annual demand of 13,600 trips for wheelchair passengers for Greyhound.

The OTA study takes the view that transferring a wheelchair user out of his or her own wheelchair has safety and effectiveness problems, and therefore concludes that, to meet the requirements of the ADA, boarding assistance options must allow an individual to remain in his or her own wheelchair. This could include not only lift-equipped buses, but also station-based or portable lifts in combination with a door and securement location for an individual's wheelchair. The Greyhound study takes the position that, in addition to 75-bus pool of accessible buses, the use of boarding assistance methods that involve transfers from wheelchair to boarding device to vehicle seat (e.g., scalamobils or station-based lifts in combination with boarding chairs) would provide acceptable access for mobility-impaired passengers.

The ADA does not authorize the Department to require accessible restrooms on buses if doing so will result in the loss of seating capacity. All current accessible restroom units would result in a loss of seating capacity. The OTA study recognizes this fact, but

suggests that, in the absence of an accessible restroom, there must be a way for mobility-impaired passengers to use rest stops on a sufficiently frequent basis (OTA suggests every 1.5–2 hours). The Greyhound study finds that requiring accessible restrooms would more than double the costs of accessibility, compared to lift-equipped buses without accessible restrooms. The Greyhound study does not address the issue of rest stops, though previous industry comments have suggested that requiring additional rest stops could be costly and might disrupt schedules.

The OTA study focused on the costs and benefits of OTRB transportation alone. The Greyhound study also makes comparisons with other modes (e.g., intercity rail and air travel), in conjunction with Greyhound's argument that it should not have relatively higher costs than other modes in making its system accessible.

The foregoing discussion does not comprehensively summarize the two studies, but it does illustrate the very different views of OTRB accessibility, and its costs and benefits, that they take. The Department's regulatory evaluation discusses the issues addressed by these studies in greater detail.

Scope of the Department's Legal Discretion

Statutory Provisions

The Department's OTRB rulemaking implements several provisions of Title III of the Americans with Disabilities Act (ADA). Section 304(a) sets forth the general rule that—

no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

Section 304(b)(1) lists four types of conduct that constitute discrimination in general for all entities covered by Section 304. The first, in § 304(b)(1) is—the imposition or application * * * of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered.

Section 304(b)(2) adds the following to the list of actions the failure to do which constitutes discrimination:

(A) mak[ing] reasonable modifications consistent with those required under section 302(b)(2)(A)(ii);¹

(B) Provid[ing] auxiliary aids and services consistent with the requirements of section 302(b)(2)(A)(iii);² and

(C) remov[ing] barriers consistent with the requirements of section 302(b)(2)(A)³ and with the requirements of section 303(a)(2).⁴ Section 304(b)(3) begins the statute's specific treatment of vehicle accessibility requirements. It states that discrimination includes—

the purchase or lease by such an entity of a new vehicle (other than * * * an over-the-road bus) * * * that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the vehicle is used solely in a demand responsive system and the entity can demonstrate that the system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public. (emphasis added).

As the underlined language indicates, the requirements of this paragraph do not cover OTRBs. Instead, Section 304(b)(4)(A) provides that discrimination includes “the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 306(a)(2); and * * * any other failure of such entity to comply with such regulations * * *.”

¹ Discrimination includes “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford goods services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations.”

² Discrimination includes “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”

³ Discrimination includes “a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles* * * used by an establishment for transporting individuals (not including barriers that can be removed only through the retrofitting of vehicles* * * by the installation of a* * * lift), where such removal is readily achievable; and where an entity can demonstrate the removal of [such] a barrier* * * is not readily achievable, a failure to make goods, services, privileges, advantages, or accommodations, available through alternative methods if such methods are readily achievable.”

⁴ This section requires making alterations to existing facilities “readily accessible to and usable by” individuals with disabilities, to the maximum extent feasible.

Section 306(a)(2)(A) required the Department to issue interim regulations concerning over-the-road bus service. These rules, which the Department published as 49 CFR 37.169 (56 FR 45640–41; September 6, 1991), had to require operators to “provide accessibility to such bus” for individuals with disabilities, except that structural changes to make buses wheelchair-accessible and the purchase of boarding assistance devices could not be required. The Department views this provision as prohibiting the interim rules from requiring lifts on buses or the acquisition of particular devices to provide accessibility for wheelchair users. The interim rules consequently required boarding assistance without specifying the means. The interim rules also require OTRB operators to provide on-board storage of passengers' wheelchairs.

Section 304(a)(2)(B) concerns the Department's “final requirement,” which is to be issued after the Department studies the interim regulations and the OTA study. Section 306(a)(2)(B)(ii) directs the Department to

issue new regulations * * * to carry out section 304(b)(4) and 302(b)(2)(D)(ii)⁵ that require, taking into account the purposes of the study under section 305 and recommendations resulting from such study, each private entity which uses an over-the-road bus to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs. This section provides that, not later than one year after the date of the OTA study, the Department must issue these final regulations. As noted above, the Department fell well behind this schedule. Originally, the ADA provided that the Department's final regulations would take effect

with respect to small providers of transportation (as defined by the Secretary), 7 years after the date the enactment of this Act [i.e., July 26, 1997]; and * * * with respect to other providers of transportation, 6 years after such date of enactment [i.e., July 26, 1996]. (section 304(a)(2)(B)(iii)).

In recognition of the fact that the Department did not meet the statutory schedule for issuing the final rules, Congress amended section 306(a)(2)(B)(3)(iii) to put the final rules into effect two years from their effective date (three years for small entities).

The ADA provides that the Department's final rules may not require

⁵ This section provides that discrimination includes, for private entities not primarily in the business of transporting people, “the purchase or lease of an over-the-road-bus which does not comply with the regulations issued under section 306(a)(2) * * * and any other failure by such entity to comply with such regulations.”

“the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.” (section 304(a)(2)(C). To the best of the Department’s knowledge, all existing accessible restroom units would result in the loss of seating capacity, so this provision effectively bars the Department from requiring accessible restrooms in buses.

The ADA specifies in some detail what the OTA study was intended to accomplish. Section 305(a) said that the OTA study was to determine—

(1) The access needs of individuals with disabilities to over-the-road buses and to over-the-road bus service; and (2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service, particularly for individuals who use wheelchairs, through all forms of boarding options.

Section 305(b) told OTA to analyze several factors:

(1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.

(2) The degree to which such buses and service, including any service required under sections 304(b)(2) and 306(a)(2), are readily accessible to and usable by individuals with disabilities.

(3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.

(4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost-saving developments in equipment and devices.

(5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible rest rooms which do not result in a loss of seating capacity.

(6) The impact of accessibility requirements on the continuation of over-the-road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

Legislative History

The Senate and House versions of the bill that became the ADA contained similar, but somewhat different, provisions concerning OTRBs. The Senate bill provided that it was discrimination to purchase or lease a new OTRB “that is not readily accessible to and usable by individuals with disabilities.” (S. Rept. 101–116 at 73). This term meant “able to be entered into and exited from safely and effectively used by individuals with disabilities, including individuals who use wheelchairs.” (Id.) The Senate Committee on Labor and Human Resources then provided more specific guidance on what constituted a vehicle

that was readily accessible and usable by individuals with disabilities:

Lifts, ramps, and fold-up seats or other wheelchair spaces with appropriate securement devices are among the current features necessary to make transit vehicles readily accessible to and usable by individuals with disabilities. The requirement that a vehicle is to be readily accessible obviously entails that each vehicle is to have some spaces for individuals who use wheelchairs or three-wheeled mobility aids; how many spaces are to be made available for wheelchairs is, however, a determination that depends on various factors, including the number of vehicles in the fleet, seat vacancy rates, and usage by people with disabilities * * * [C]onsistent with these general factors, the determination of how many spaces must be available should be flexible and generally left up to the provider; provided that at least some spaces on each vehicle are accessible. (Id. at 73–74)

Senator Hatch, in a separate statement of additional views, criticized the provision of the Senate bill requiring new OTRBs to be “readily accessible to and usable by” individuals with disabilities as imposing a requirement to purchase lift-equipped buses, which he said would impose overly onerous costs on the private bus industry. He believed that no such requirement should be imposed by Congress until the results of the OTA study were available. (Id. at 102–105.)

The House Committee on Public Works and Transportation began its discussion of OTRB requirements by addressing the relationship between the general nondiscrimination requirements of § 304 and the vehicle-specific requirements of the section:

The examples of discrimination contained in section 304(b) are intended to address situations that are not covered in the specific vehicle and system requirements * * * The general rule contained in paragraph (a) and the examples of discrimination contained in paragraph (b) are not intended to override the specific requirements contained in the sections referenced in the previous sentence. For example, an individual with a disability could not make a successful claim under section 304(a) that he or she had been discriminated against in the full and equal enjoyment of public transportation services on the grounds that an over-the-road bus was not wheelchair lift-equipped, if a lift was not required under 304(b) or 306(a)(2). (H. Rept. 101–485, Pt. 1, at 39)

Commenting on the regulations to be issued by DOT, the Committee added:

Section 304(b)(4) requires over-the-road buses to comply with the regulations issued under section 306(a)(2) and makes it discrimination to purchase or lease an over-the-road-bus which does not meet those requirements. Two sets of regulations will be issued by the Department of Transportation under section 306(a)(2) which include

vehicle specific requirements for over-the-road buses. (Id. at 40.)

The first of these two regulations is the interim rule which the Department has already issued as 49 CFR 37.169. “While these interim requirements are in effect,” the Committee said, “it will not be considered discrimination for a private entity to purchase or lease an over-the-road bus which is not wheelchair lift-equipped or to which a boarding chair/ramp is not provided to board such bus.” (Id. at 43.) With respect to the second regulation, the Committee said the following:

Section 306(a)(2)(B) requires the Secretary of Transportation to review the OTA study and issue final regulations not later than one year after the submission of the study to the Secretary. The regulations shall require, taking into account the purposes of the study under section 305 and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities. The regulations will be effective 7 years after date of enactment for small providers, as defined by the Secretary, and 6 years after date of enactment for other providers. The Secretary may define small providers using current ICC class definitions. The extra year for compliance for these providers acknowledges the increased burden that implementation of some accessibility requirements could have on operators with relatively small fleets. Section 306(a)(2)(C) states that no regulations may require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity. The term “seating capacity” has the same meaning discussed under section 305—a reduction in the number of seats in which passengers can ride comfortably. (Id.)

Statements of additional views by Congressman Hammerschmidt and several colleagues, and Congressman Shuster and several colleagues, praised the House version of the OTRB language as representing a constructive compromise acceptable to all interested parties, including the disability community and the OTRB industry. (Id. at 60, 64–65.)

The Conference Committee report described the construction of the final version of these provisions the bill as follows:

The Senate bill specifies that over-the-road buses must be readily accessible and usable by individuals with disabilities within 7 years for small providers and 6 years for other providers * * * The House amendment deletes the specific obligation to make each bus “readily accessible to and usable by” individuals with disabilities at the end of the 6 or 7 year period * * * Instead, the House amendment specifies that the purchase of new over-the-road buses must be made in accordance with regulations issued

by the Secretary of Transportation * * *. The Senate recedes. (H. Rept. 101-596 at 79.) The Congressional reports also discussed the purposes of the OTA study. The House Committee made the following statements:

Section 305(a) directs the Office of Technology Assessment (OTA) to conduct a study to determine (1) the access needs of individuals with disabilities to over-the-road bus service; and (2) the most-cost effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities through all forms of boarding options. During its hearings on the legislation, the Committee heard conflicting testimony on the cost and reliability of wheelchair lifts or other boarding assistance devices with regard to their use on over-the-road buses. Therefore, before mandating these or any other boarding options in this Act, a thorough study of the access needs of individuals with disabilities to these buses and the cost-effectiveness of different methods of providing such access is required by the Act. Section 305(b) specifies which issues must be analyzed by the study, but is not intended to be all-inclusive. The analysis required by the legislation includes a review of accessibility issues relating to vehicle-specific aspects of over-the-road buses, as well as to system-wide aspects of over-the-road bus service. Both aspects of over-the-road bus accessibility are included so that neither is favored over the other in the organization of the study. (H. Rept. 101-485, Pt. q, at 40-41.)

With respect to different boarding assistance options, the Committee directed OTA to examine—

the effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities. All types of methods (including the use of boarding chairs, ramps, wheelchair lifts, and other boarding assistance devices) which may, or may not, involve the physical lifting of a boarding assistance device should be analyzed in terms of their effectiveness. (Id. at 41.)

Consistent with the Senate bill's provision requiring OTRBs to be "readily accessible to and usable by" individuals with disabilities, the Senate Committee's comments on the purposes of the study had a different emphasis than those of the House Committee:

Section 305 of the legislation directs the Architectural and Transportation Barriers Compliance Board to undertake a study to determine the access needs of individuals with disabilities to over-the-road buses readily accessible to and usable by individuals with disabilities. In determining the most cost-effective methods for making over-the-road buses readily accessible to and usable by persons with disabilities, particularly individuals who use wheelchairs, the legislation specifies that the study should analyze the cost of providing accessibility, recent technological and cost saving developments in equipment and

devices, and possible design changes. Thus, the Committee is interested in having the study include a review of current technology such as lifts that enable persons with mobility impairments, particularly those individuals who use wheelchairs, to get on and off buses without being carried; alternative designs to the current lifts; as well as alternative technologies and modifications to the design of buses that may be developed that will also enable such individuals to get on and off over-the-road buses without being carried. (S. Rept. 101-116 at 74.)

In the Conference Committee, as noted above, the Senate receded, and the House provision became part of the final bill. The Conference Committee report said that—

the purpose of the study is revised to include a determination of the access needs of individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options. The study must analyze, among other things, the effectiveness of various methods of providing access to such buses and service to individuals with disabilities. (H. Rept. 101-596 at 79.)

OTA Legal Analysis

In the study mandated by section 305 of the ADA, the OTA set forth a view of the OTRB requirements of the statute that leaves the Department relatively little regulatory discretion. OTA states that "[s]ection 304(b)(4)(A) clarifies that the exclusion of OTRBs from 304(b)(3) is with respect to the compliance date and specific standards, not from the requirement for accessibility." (OTA study at 6.) Unlike situations in which the concept of "undue burden" applies, OTA asserts, "transportation services must meet accessibility standards regardless of cost considerations." (Id.) Moreover, "OTA could find no language in the ADA stating or implying that OTRBs can be held to a lesser standard than other modes of transportation, nor does the ADA give guidance on promulgating such a lesser standard." (Id.) The section 305 requirement for the OTA study is not "an exemption or retreat from the policies and goals of the ADA," and section 306 requires that "DOT's regulations must apply specified previous sections of the ADA to OTRBs and must require OTRB operators to provide accessible service." (Id. at 6-7.)

OTA defines an "accessible OTRB" as one having a level change mechanism (on-board or station-based) that allows individuals to remain in their wheelchairs, a sufficiently wide door to accommodate persons with mobility impairments, two wheelchair securement locations, a means to communicate with persons with sensory or cognitive disabilities, and provisions

for the use of accessible restroom facilities. (Id. at 25.) OTA asserts that—

[f]or fixed-route transportation systems, the ADA requires private operators to install accessibility technologies when purchasing or leasing a vehicle. Eventually, all scheduled fixed-route service will use accessible vehicles. In the case of privately operated OTRBs, there is some debate about whether DOT has the latitude to promulgate regulations under a different, perhaps lesser, standard of accessibility. However, the OTA expects that the same standard of accessibility will be applied to all private operators of public transportation within the jurisdiction of the ADA * * * Therefore, OTA anticipates that ADA's standard of accessible service for fixed-route private operators of other public transportation systems extends to fixed route service using OTRBs. In other words, to meet the requirements of the ADA, all OTRBs leased or purchased for use in fixed route service must be accessible.

Charter and tour services meet the definition of demand-responsive systems. For demand-responsive transportation systems (other than those using OTRBs or automobiles), the ADA has required each private operator * * * [w]hen purchasing a new vehicle, * * * to purchase an accessible vehicle, unless the operator can show that the system, when viewed in its entirety, provides the same level of service to individuals with disabilities as to those without. As with fixed-route service, OTA anticipates that the ADA's standard of accessibility for private operators of other demand-responsive transportation systems applies to demand-responsive services using OTRBs * * * In other words, to meet the requirements of the ADA, private operators of demand-responsive OTRB service must eventually have access to enough accessible OTRBs to meet the demand. (Id. at 25-26, emphasis in original.)

OTA also takes the view that—

the ADA does not allow operators to provide accessible service through the use of alternative vehicles or through reservations systems used solely for persons with disabilities. For example, a tour operator could not provide accessible service with an accessible van that transports passengers with disabilities while the rest of the tour patrons ride in an OTRB. (Id. at 26.)

Views of Commenters to the DOT ANPRM

Bus industry commenters argued that DOT has considerable flexibility in fashioning OTRB requirements. For example, Greyhound argued that the ADA tells DOT to consider "all forms of boarding options" and the "access needs of individuals," rather than binding DOT to a requirement for all new accessible buses. It also asserted that the portions of section 305 that direct OTA to study the economic consequences of accessibility requirements, the anticipated demand for accessible service, and the cost-

effectiveness of means of providing accessibility imply that DOT could rely on such factors to devise a requirement other than requiring all new buses to have lifts. Greyhound also pointed to the distinction between the section 306 requirement of "accessibility to such bus" and what it regards as the more stringent requirement, elsewhere in the ADA, for making facilities or services "readily accessible to and usable by" individuals with disabilities. The American Bus Association expressed similar views.

Disability community commenters took the opposite position. For example, the Paralyzed Veterans of America/ Consortium of Citizens with Disabilities (PVA/CCD) comments said that the "accessibility to such bus" term in section 306 demonstrated that "Congress plainly indicated its preference for judging accessibility by a vehicle standard rather than a service equivalency standard." The Department's OTRB regulations should be consistent with those for other "private primarily engaged" operators except where the OTRB statutory language differs. Moreover, OTA's findings and conclusions should be "presumptively determinative" of the Department's regulatory decisions. PVA/CCD also assert that OTRB requirements are properly viewed as applying to used as well as new OTRBs. The Disability Rights Education and Defense Fund (DREDF) made similar arguments, stating that Congress mandated that "each individual OTRB should be accessible," rather than allowing a generalized service standard. In addition, DREDF supported, with respect to service in the interim before all buses are accessible, having a boarding chair on each bus and opposed any advance notice requirements.

Analysis

The Department takes the position that it has substantial legal discretion to devise regulations to implement the OTRB requirements of the ADA. DOT could require that OTRB operators meet standards like those applied to other "private, primarily engaged" transportation providers by section 304(b)(3), but the Department is not required to do so. The Department may consider both vehicle-based and service-based approaches to OTRB accessibility, and may consider other factors such as cost. However, the Department is also not mandated by the statute or its legislative history to choose the least costly, or arguably most cost-effective, approach to OTRB access.

1. Separate Statutory Requirements

The first reason for this conclusion is that Congress explicitly separated the requirements for most "private primarily engaged" transportation providers, set forth in section 304(b)(3), from those for OTRB operators, set forth in section 304(b)(4). The former requirement tells fixed route operators to purchase or lease accessible new (but not used) vehicles and tells demand responsive operators to purchase or lease accessible new (but not used) vehicles or ensure that they can provide equivalent service to individuals with disabilities. The latter requirement is simply that the purchase or lease of OTRBs (with no distinction stated between new and used buses) must comply with the regulations issued by DOT under section 306(a)(2).

Had Congress wished to mandate that OTRB requirements be identical with those applying to other "private primarily engaged" transportation providers, Congress could simply have included OTRBs under the requirements of section 304(b)(3), perhaps with an effective date delayed until 1996/97. Instead, Congress specifically said that section 304(b)(3) requirements apply to vehicles "other than * * * an over-the-road bus" and assigned to the Department responsibility for devising OTRB requirements.

2. Different Accessibility Language

The second reason is that Congress intentionally chose different language to express the accessibility requirements for OTRB operators and other "private primarily engaged" providers, respectively. As noted above, section 306(a)(2) provides that the Department's regulations must require "each private entity which uses an over-the-road bus to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs." Disability group comments asserted that the "accessibility to such bus" language should be understood to require that each OTRB must be an accessible bus (e.g., have the accessibility features identified by OTA).

While this language does lend some support to the idea that Congress intended buses to be accessible, it differs from language Congress used elsewhere in the ADA (e.g., section 304(b)(3)), where Congress required that a vehicle be "readily accessible to and usable by" individuals with disabilities. This latter phrase clearly refers to a vehicle that has accessibility features of the kind cited by OTA or required by 49 CFR Part 38. By using a different term, "accessibility to such bus," Congress at

least left open the possibility of accessibility being provided by other means.

3. Intent of OTA Study

The third reason for the Department's conclusion concerning its discretion flows from an analysis of the ADA's language and legislative history concerning the OTA report. Section 306(a)(2)(B)(ii) tells the Department to consider not only the recommendations of the OTA study but also its "purposes." The House legislative history said that one important purpose, to be achieved before mandating any particular boarding options, was to study "the access needs of individuals with disabilities to these buses and the cost-effectiveness of different methods of providing such access." (H. Rept. 101-485, Pt. 1, at 40-41). Specifically, the study was to review both "vehicle-specific aspects of over-the-road buses * * * [and] system-wide aspects of over-the-road bus service. Both aspects * * * are included so that neither is favored over the other in the organization of the study." (Id.) All types of methods (including boarding chairs, lifts, ramps, and others) were to be considered. While the Senate legislative history had a stronger (though not exclusive) focus on the use of lift technology, the Conference Committee language states that all forms of boarding options and access to buses and bus service were to be analyzed by the study.

Since Congress intended OTA to study and make recommendations concerning these matters, it is fair to infer that DOT, mandated to take the purposes and recommendations of the study into account, is entitled to consider the same factors and options in its rulemaking. The same point applies with respect to other matters that Congress told OTA to study, such as the demand for accessible OTRB service, the cost of providing accessible OTRBs and OTRB service, and the impact of accessibility requirements on the continuation of OTRB service, particularly in rural areas. Nothing in the statute or the legislative history requires that any of these factors be emphasized to the exclusion of others.

Policy Basis for Proposed Rule

We view the way that the Department uses its considerable legal discretion to shape this proposed regulation as being primarily a policy decision about what is necessary to ensure that individuals with disabilities, including wheelchair users, can realize the rights to nondiscriminatory treatment guaranteed them by the ADA and can effectively

use OTRB buses and service. In the Department's view, it is necessary, to achieve these goals, to ensure that passengers who use wheelchairs can ride, board, and disembark from OTRBs while using their own wheelchairs.

Approaches not permitting passengers to remain in their own wheelchairs involve a minimum of four transfers on each trip (not counting rest or intermediate stops)—from wheelchair to boarding chair or device, and from boarding chair or device to vehicle seat, at the start of the trip, with the process reversed at the end of the trip. This increases the probability of discomfort, indignity, and injury, compared to a trip that does not involve transfers.

Moreover, wheelchairs used by disabled passengers are often quite different from one another, reflecting the individual needs of their users. Vehicle seats are uniform, and consequently do not provide the same comfort and support as the passenger's own wheelchair. This can have health and safety implications for mobility-impaired passengers.

Many mobility-impaired passengers use electric wheelchairs. Many such chairs are large and heavy. Others are of the "scooter" type. It is likely that most electric wheelchairs will not fit into bus luggage compartments. Based on experience in the airline industry, the process of stowing and retrieving electric wheelchairs carries a significant risk of damage to the expensive devices. Bus service to passengers who use electric wheelchairs cannot be effective if transportation for the wheelchairs is unavailable.

Because accessible lavatories reduce seating capacity, the Department will not propose requiring them in OTRBs. This creates fewer problems for passengers if the buses are accessible. If passengers are seated in their own wheelchairs in lift-equipped buses, they can readily get on and off the bus at rest stops. If not, then four more transfers, and potential schedule disruptions, would be involved in allowing wheelchair users to take advantage of rest stops.

The bus industry has proposed meeting these objectives primarily through having a number of accessible OTRBs in a pool, available to disabled passengers who make reservations 48 hours in advance (similar to Option 3, summarized below). The industry asserts that such an arrangement could provide lift-equipped bus service to all passengers needing it, in a less costly and more cost-effective fashion (i.e., with a considerably lower cost per stimulated trip). The Department's regulatory assessment, summarized

below, displays the Department's estimates of the cost differences among options. The industry also asserts that this kind of service could become effective more rapidly than a requirement to make all new buses accessible, since it would take 12 years to move to full fleet accessibility.

Pooling and advance reservation systems have some merit, as they allow carriers to make more efficient use of the accessible buses they have to provide transportation to passengers with disabilities. Indeed, the proposed rule contemplates charter/tour operators using pooling arrangements. It also contemplates using pooling arrangements in fixed route service as an interim measure to provide accessible transportation in the years before fleets become fully accessible.

With respect to fixed route services, however, the drawback to pooling/advance reservation systems is one of equal treatment. This is a matter of significance in a rule implementing a nondiscrimination statute. While reservation service is available to passengers for fixed route service in many instances, fixed route OTRB passengers generally are not required to make reservations. Requiring disabled passengers to make reservations on a permanent basis falls short of providing equal conditions of service for disabled passengers, who may want to travel on short notice as much as other passengers. It also increases the probability of administrative error interfering with passengers' travel plans. While we understand the view of the industry that it is preferable, for cost-related reasons, to rely on on-call service with 48-hour advance reservations required, we find it difficult to reconcile this requirement with the ADA's nondiscrimination mandate.

Requiring all new buses to be lift-equipped is consistent with the requirements for all other modes of transportation under the ADA (e.g., all new fixed-route transit buses; all new rapid, commuter, and intercity rail cars; and all new full-size fixed-route private buses other than OTRBs are already required to be accessible). We believe that there is considerable merit in proposing requirements that parallel the requirements of other portions of the ADA.

The Department is not persuaded, however, that the intermodal cost comparisons put forward in the Greyhound study are germane. The ADA imposes accessibility requirements on each mode independently (e.g., urban mass transit bus and rail, intercity rail) without making any statement that

relative burdens somehow must be equalized across very different types of transportation. In particular, Greyhound's comparison between intercity bus and airline service overlooks the fact that FAA safety regulations concerning seats and seat anchorages preclude disabled passengers from remaining in their own wheelchairs aboard aircraft. The Department's Air Carrier Access Act rules involve assisted boarding and transfers out of passengers' own wheelchairs because safety requirements peculiar to aviation leave no better accessibility option available. Where better options are available, as they are for OTRBs, it is difficult to argue that they should not be used.

The Department has paid careful attention to the cost and demand data presented in the OTA and Greyhound studies. There is no question that requiring new accessible buses is a costlier option than the pooling/transfer alternatives suggested by the Greyhound study (though the costs of the proposed provisions, as estimated by the regulatory assessment, do not appear to impose an undue financial burden on the industry). In the context of the ADA, however, cost determinations, standing alone, are not necessarily determinative. The statute does not provide that the Department is compelled to meet the needs of disabled passengers in "a cost-effective manner." Cost-effectiveness is one of the considerations that OTA was directed to study, and which the Department is taking into account, but the statute does not mandate that cost-effectiveness considerations trump all others in determining how to make bus travel accessible.

We are concerned that the Greyhound study appears to confuse cost-effectiveness with profitability (i.e., it identifies as cost-effective only those options that result in a net surplus to the company). The study also bases its conclusions about cost-effectiveness on very low demand estimates drawn from a few, scattered systems that require advance notice and do not offer connectivity to the national transportation network that Greyhound provides other customers. While OTA demand estimates may err on the side of generosity, the Greyhound estimates may err on the side of conservatism.

The Department will continue to consider costs as it decides, after reviewing comments, what to require in a final rule. The Department remains open to considering options other than the one it is proposing. However, the Department believes, at this time, that the following provisions would most appropriately implement the

nondiscrimination requirements of the ADA.

Description of the Proposed Rule

The NPRM would create a new subpart of the Department's ADA rule (49 CFR Part 37, Subpart F). Proposed § 37.111 would restate the statutory compliance dates of two years for larger carriers and three years for smaller carriers. If the final regulation is published on the Department's target date of September 15, 1998, then the rule would begin to apply to larger carriers in October 2000 and to smaller carriers in October 2001. We propose to distinguish between larger and smaller carriers based on the class into which the carrier falls. Class I carriers (i.e., passenger carriers with gross annual transportation operating revenues of \$5 million or more, as provided in Surface Transportation Board regulations found in 49 CFR 1249.3, including the "deflator" provision of those rules) would be viewed as larger carriers. Everyone else would be regarded as a smaller carrier. We would add an item to the definitions section of the rule incorporating this distinction.

Section 37.112 states the basic requirement of the proposed rule. Beginning on the dates mentioned above, fixed route carriers ("private entities primarily engaged in providing transportation to people") would have to ensure that new OTRBs they receive are accessible. By an accessible bus, we mean one that meets the OTRB requirements we are proposing to add to 49 CFR part 38. The Part 38 requirements are identical to the proposed OTRB guidelines being promulgated by the Access Board, and include on-board lifts and wheelchair securement locations. It should be noted that, while these guidelines include information about accessible restrooms, the Department is not proposing to require accessible restrooms on OTRBs, since existing accessible restrooms would result in a loss of seating capacity.

We call commenters' attention to the fact that all new OTRBs received by entities after the applicability date would have to be accessible. In the 1990 ADA rule for mass transit, the Department provided that all new transit buses ordered after the effective date had to be accessible. We propose to handle this issue differently in this rule because OTRB operators have 2-3 years from the effective date of a final regulation before accessibility requirements fully apply. The transit rules began to apply 30 days from the issuance of the rule. Unlike the transit operators, OTRB operators will have

plenty of time to place orders for accessible vehicles well in advance of the application date.

As in the case of other operators covered by the ADA "private primarily" rules, OTRB operators would not have to ensure that used buses were accessible. Nor would they be required to retrofit vehicles. While the Department has the legal discretion to impose such a requirement with respect to OTRBs, requiring either the purchase of accessible used vehicles (which will not be available in large numbers for some years) or retrofitting (a costly procedure on a bus which has consumed part of its expected useful life) would be too costly and unnecessarily inconsistent with the ADA's requirements in similar contexts. However, as in other parts of the ADA rule, proposed § 37.118 would require remanufactured buses to be made accessible.

Demand-responsive carriers (e.g., charter/tour operators) who obtain new buses would also have to obtain accessible buses, unless and until they fully meet the fleet and service requirements of §§ 37.114-37.115, discussed below. This parallels the accessible vehicle or equivalent service scheme of other ADA requirements for demand-responsive service.

Proposed § 37.113 is a fleet accessibility requirement for fixed route operators. It would require each large operator to ensure that, within 6 years from the applicability date of the rule (e.g., October 2006), half its OTRBs were accessible. All its OTRBs would have to be accessible within 12 years (e.g., October 2012). The 6- and 12-year time frames are based on information in the Greyhound study that Greyhound replaces 1/12 of its fleet per year. (For cost analysis purposes, the Department is using an 11-year fleet replacement period for the entire industry.) The Department seeks comment on the best number of years to include for this purpose (e.g., would 4 and 10 years be better, given the 2-3 years carriers have available before the effective date of the rule?). In addition to being consistent with existing industry practice, this provision is intended to provide a disincentive to carriers obtaining large numbers of inaccessible buses in the time between now and the applicability date of the rules or to deferring purchases of accessible OTRBs until much later in the process, either of which would postpone full fleet accessibility.

One alternative that has been suggested to a fleet accessibility time frame is a requirement that companies retrofit any inaccessible OTRB obtained

between the effective date of the final rule and the applicability date to the company (e.g., between October 1998 and October 2000 for large operators). This would also be a disincentive to purchasing large numbers of inaccessible OTRBs in the interim, but would potentially be more costly and would not address the issue of deferred purchases of accessible vehicles. We seek comment on this and other alternatives.

The NPRM proposes an important exception to the fleet accessibility rule. If small operators did not obtain enough new buses to replace 50 percent of their fleet in 6 years or all of their fleet in 12, they would be excused from this requirement. This exception is proposed in light of the practice of many smaller operators of obtaining most or all of their vehicles used. Absent the proposed exception, these companies would have to buy new buses or retrofit used buses to meet the fleet accessibility requirement. The exception will allow these operators to continue their existing procurement practices, thereby reducing potential economic burdens on small entities. Their fleets will become accessible in later years when their sources of used buses have fleets consisting of accessible vehicles. In the meantime, they would have to meet interim service requirements (see proposed § 37.116).

Demand-responsive operators would also have a fleet accessibility requirement (proposed § 37.114). These operators would have to ensure that 10 percent of their fleets are accessible within two years of the applicability date of the rule to them. The Department seeks comment both on the fleet accessibility percentage and the time frame. Again, there would be an exception for small operators who did not obtain enough new buses in the two year period to replace 10 percent of their fleets.

Proposed § 37.115 sets forth a service requirement for demand-responsive operators. Beginning two years after the applicability date of the rule to an entity, the entity would have to ensure that a disabled passenger who asked for service in an accessible OTRB would get it. The operator could ask for 48 hours' advance notice. Advance notice is less onerous in a charter/tour situation, for which most passengers book seats in advance. For example, suppose a small Baltimore charter/tour operator has 20 buses. By October 2005, the operator may well have two accessible OTRBs in its fleet. When the operator is running a trip to Atlantic City, a mobility-impaired passenger who calls 48 hours in advance will have to receive service

in an accessible OTRB. If the operator does not have an accessible OTRB, or one of its own is not available at the time, the operator would obtain an accessible OTRB from a pool or a sharing arrangement with other operators. The Department seeks comment on whether it is realistic to assume that pool arrangements are practicable, particularly for small operators.

Section 37.116 concerns interim service, which operators would have to provide in the years before they had fully implemented all their accessibility requirements. The section would work as follows. From the effective date of the rule (e.g., October 1998) until the applicability date of accessibility requirements to operators (e.g., October 2000 or 2001, depending on the size of the operator), the existing interim service requirements of § 37.169 would continue to apply to operators. In the two-year period beginning with that applicability date (e.g., October 2000–October 2002 for a large operator), operators would continue to comply with existing § 37.169, unless they had already complied with all of its permanent accessibility requirements. Section 37.169 would be phased out for large operators four years after the effective date of this rule and for small operators five years after the effective date of this rule (e.g., October 2002 or 2003, respectively).

By two years from the applicability date of the rule (e.g., October 2002 for large operators) demand-responsive operators would be required to meet their permanent requirements of 10 percent accessible buses in their fleets plus providing on-call accessible bus service on 48 hours' advance notice. Since it will take fixed-route operators longer to acquire enough buses to have a fully accessible fleet, they would have to meet a continuing interim service requirement. Beginning in 2002, large operators would have to provide on-call accessible bus service on 48 hours' advance notice until such time as their fleets became fully accessible. The requirements for small operators would be the same, but they would start a year later.

So far, the rule has focused on private entities primarily in the business of transporting people. Proposed section 37.117 concerns private entities not primarily in this business. The rules parallel other ADA transportation requirements. Operators providing fixed route service, when they get new buses, must get accessible buses (paralleling the requirements for "private not primaries" in the ADA and DOT's regulations, this requirement applies to

all buses an operator obtains, not just new buses). Demand responsive operators, when they get new buses, must either get accessible buses or ensure that they can provide equivalent service. "Private not primaries" would not have fleet accessibility or interim requirements.

Proposed § 37.119 concerns the issue of intermediate and rest stops. This issue arises on both fixed route and demand-responsive service. The NPRM proposes that, when an accessible OTRB makes a rest or intermediate stop, a mobility-impaired passenger will have a chance to take advantage of the stop the same as other passengers, through the use of the lift to leave and re-enter the bus. The situation is more problematic when an inaccessible OTRB is involved. We propose that a mobility-impaired passenger will have the chance to use the rest stop, with the driver's assistance in leaving and re-entering the vehicle, to the extent feasible, without unreasonably delaying the trip. That is, if getting a portable lift out of the baggage compartment, doing four transfers, using the facilities, and reversing the process takes so long that the schedule is seriously disrupted, the operator could decline to provide the service. This clearly presents problems to disabled passengers, especially given the absence of on-board accessible restrooms, which is one of the reasons we believe that accessible buses are a superior long-term solution.

We seek comments on two matters concerning rest stops on trips provided by inaccessible buses. First, should the ability of an operator to decline to provide rest stop service to a passenger on the basis of delay apply only to express trips, where the effects of delay would be most detrimental? Second, how long a delay should be regarded as unreasonable, such that an operator could decline to provide the service to passengers with disabilities?

Proposed § 37.120 would make applicable to OTRB operators the training, service and lift maintenance requirements that apply to other forms of bus service. The Department seeks comments whether any provisions should be added, deleted, or changed. With respect to training, the training requirements section of the Department's existing ADA rule (49 CFR § 37.173) requires all transportation providers to ensure that their personnel are trained to proficiency to operate vehicles and equipment safely and properly and safely and properly assist passengers with disabilities. This requirement would apply to carriers using OTRBs with respect to all equipment and services provided for

under the proposed rule. The Department's cost estimates for this NPRM include the costs of this training. The Department seeks comment on whether any additional or more specific training or service requirements should be added concerning OTRBs. For example, should there be any requirements concerning how OTRB operators should provide service when the number of wheelchair users seek to travel on a particular trip exceeds the number of wheelchair locations on the bus?

The Access Board and the Department elsewhere in this issue of the **Federal Register** are also publishing proposed accessibility guidelines for OTRBs. They would become part of 49 CFR part 38, the Department's accessibility rules that accompany the DOT ADA rule. One issue on which we seek comment is whether, if a bus meets the requirements for wheelchair locations and an entry door accessible to wheelchair users but does not have an on-board lift, it is appropriate to regard the bus as accessible if it will always be used only for trips between stations that are equipped with station-based lifts that will accommodate passengers' own wheelchairs.

Regulatory Analyses and Notices

This is a significant regulatory proposal under Executive Order 12866 and the Department's Regulatory Policies and Procedures, both because of its cost impacts on the industry and the strong public interest in accessibility matters. The Department has prepared a regulatory evaluation to accompany the NPRM, which we have placed in the docket for the rulemaking. The Office of Management and Budget (OMB) has reviewed this NPRM.

In considering what to propose in this NPRM, the Department considered three basic options for fixed route service. These options are discussed in detail in the regulatory evaluation. The following are summaries of these options and their overall costs. The costs for each option include the costs for the proposed accessibility requirements for demand-responsive systems, but all the variance among the options is accounted for by differences among the fixed route options.

1. *Accessible OTRBs*—All new OTRBs must be accessible. Fleets of large fixed route carriers must be 50% accessible within 6 years and 100% accessible within 12 years. Used buses do not have to be accessible. Small carriers do not have fleet accessibility requirements. Since many small carriers buy primarily used buses, this means that their fleets would not become accessible until accessible used buses became widely

available in the market. Interim service that makes accessible OTRBs available on 48 hours' notice is required beginning after two years. The estimated total cost of this option ranges from \$349.7 to \$470.9 million over 22 years (net present value over 22 years is \$203.6–\$261.4 million). The difference between the high and low ends of the range is determined principally by whether operators choose to obtain less or more expensive lifts.

2. *Station-Based Lifts Only*—This option is similar to the following option, except that there is no accessible OTRB or on-call service requirement. It provides less service than other options and has a lower cost. The estimated total cost is \$62.2 million over 22

years (net present value over 22 years is \$22.7 million).

3. *Station-Based Lifts with On-call Accessible Buses*—Service would be provided through station-based lifts or other appropriate technology for 50% of a carrier's boardings within 2 years and 80% within 7 years. Within two years, 15% of a large carrier's fleet would have to be accessible. Beginning in two years, carriers would have to provide service in accessible buses, on 48 hours' notice, to passengers who could not be served adequately by a station-based-lift system. To make such a system work for small intercity carriers, especially those who did not yet have accessible buses of their own, there would have to be pooling

arrangements among carriers. The estimated total cost is \$152.9 million over 22 years (net present value over 22 years is \$92.5 million).

The following table displays the annual aggregate costs (discounted and annualized) of each of the three fixed route options, expressed in millions of year 2000 dollars. Again, the costs for each option include the costs for the proposed accessibility requirements for demand-responsive systems, but all the variance among the options is accounted for by differences among the fixed route options.

| Option | 1 (high) | 1 (low) | 2 | 3 (low) |
|--------------------------|----------|---------|-------|---------|
| Gross Costs | 45.20 | 39.07 | 16.23 | 18.72 |
| Increased Revenues | 19.90 | 19.90 | 11.00 | 14.11 |
| Net Costs | 25.30 | 19.17 | 5.23 | 4.61 |

A number of points of explanation are needed to understand this table. "Gross costs" include equipment (e.g., lifts on buses) and training, as well as the costs of seating capacity lost when wheelchair users travel on bus trips that are within three persons of being filled to capacity. "Increased revenues" include the revenue generated by stimulated trips taken by disabled passengers and their friends or family. "Net costs" are the difference between the two. It should also be noted that the costs stated for Options 2 and 3 cover only intercity fixed route services and do not include the local fixed route services that are included under Option 1.

As noted elsewhere in this preamble, there is a great deal of uncertainty about

the amount of demand that would be stimulated by accessible OTRB service. We believe that Option 2 would generate significantly fewer trips than Option 1. For purposes of our analysis, we have assumed that Option 2 would generate only 25 percent as many trips as would be realized with a system of all lift-equipped buses, and we have projected the revenues accordingly. We believe that it is even more difficult to predict—or even assume—that Option 3 would generate a particular percentage of the demand stimulated by a system of all life-equipped buses. Consequently, the increased revenue figure found in the table for Option 3 (\$13.85 million) represents the stimulated demand (about 70 percent of

demand generated if all buses are lift-equipped) that would be necessary for increased revenue to break even with fixed route accessibility costs. We do not know whether Option 3 would succeed in obtaining this percentage of demand generated by a system of all lift-equipped buses, however.

Another way of comparing costs is on the basis of cost per stimulated trip. The following table displays, in millions of year 2000 dollars, the gross and net annualized costs for additional each trip generated by each of the options. The notes about the previous table apply to this table as well.

| Option | 1 (high) | 1 (low) | 2 | 3 (low) |
|------------------|----------|---------|-------|---------|
| Gross Cost | 53.49 | 46.24 | 27.92 | 27.81 |
| Net Cost | 29.95 | 23.55 | 8.99 | 6.84 |

It should be noted that, if the costs of accessibility are spread over all trips made by OTRB passengers, rather than only over stimulated trips, the per trip costs are much smaller, in the area of \$.35 per trip.

The NPRM proposes the first option, since it does the best job of providing meaningful accessibility and avoiding discriminatory treatment of passengers with disabilities. In the Department's view, the costs of the first option, while higher than the other two options, are not so great as to impose undue or unreasonable burdens on bus operators. The Department will consider comments concerning all the options, and others which commenters may wish to suggest, as we work toward a final rule. In addition, in the period between

the issuance of the final rule and the compliance dates for carriers, the Department will be willing to consider suggestions for modification of whatever option is chosen if it appears that fully satisfactory, but different, arrangements are in place to meet the travel needs of passengers with disabilities in a nondiscriminatory manner.

In terms of the Regulatory Flexibility Act, this proposal is likely to have a significant economic impact on a substantial number of small entities. We have incorporated a Regulatory Flexibility Analysis into the regulatory evaluation. Briefly, we would point out that the additional year's phase-in time provided by statute and the small entity exception to the fleet accessibility

requirement should reduce the burdens of the proposed rule on small operators.

In order to assist the Department's analysis of the costs and benefits of various options for accessible OTRB service at the final rule stage, particularly—though not solely—for small entities, the Department requests that commenters provide information on the following questions:

(1) What is the level of ridership for local fixed route and small intercity operators? For charter/tour operators? What are the average fares for these services?

(2) How much price elasticity is there for bus purchases by small operators? That is, if an accessible bus costs a given amount more than an inaccessible bus, how many fewer buses are small operators likely to acquire?

(3) How much price elasticity is there for small operators with respect to fares? That is, will acquisition of accessible buses cause small operators to raise their fares a given amount? If so, what effect will this have on ridership?

(4) Is there additional information about maintenance and repair costs to small operators for used accessible OTRBs they obtain that the Department should take into account?

(5) Is there information about patronage, load factors, and average fares, as well as information on the number of buses in charter/tour service, for each part of the OTRB industry?

(6) What is the proportion of new vs. used buses acquired by companies in each part of the OTRB industry?

(7) How would the proposed bus pooling arrangements work, either in demand responsive service as this NPRM proposes or in fixed-route service as in Option 3 above? Where would the buses come from? Would small carriers receive buses on reasonable terms and in a timely fashion?

(8) Is the experience of public mass transit service with respect to usage of buses by persons with mobility impairments relevant to projecting stimulated demand for over-the-road bus service, or is the analogy too tenuous to support any inferences from one mode to another? The Federal Transit Administration does not receive reports on bus usage by people with mobility impairments; is it available from other sources?

(9) Is there any data from which it would be possible to draw inferences about the demand that would be stimulated by Option 3 (15 percent of fleets consisting of accessible buses, with 48-hour on-call service) vs. Option 1 (all new fixed route buses accessible)? Stated another way, is there a basis for estimating how much additional demand would be generated under Option 1, compared to Option 3?

We note that the class of small operators (i.e., all who are not Class I carriers) does not directly reference the Small Business Administration (SBA) size standards that include most or all OTRB operators (i.e., major group 41 in the SBA size standards found in 13 CFR Part 121). The standards are substantively very close to one another. The break points between small and large operators for the Class I and the SBA definitions are, respectively, \$5.3 million and \$5 million in annual revenues. The Department seeks comment on these alternative standards.

This NPRM does not contain information collection requirements requiring OMB review under the Paperwork Reduction Act.

List of Subjects in 49 CFR Part 37

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

Issued This 19th day of March 1998, at Washington, DC.

Rodney E. Slater,

Secretary of Transportation.

For the reasons set forth in the preamble, 49 CFR Part 37 is proposed to be amended as follows:

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

1. The authority for Part 37 is proposed to be revised to read as follows:

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

2. Section 37.3 of Part 37 is proposed to be amended by adding the following definition, placed in alphabetical order with the existing definitions, to read as follows:

§ 37.3 Definitions.

* * * * *

Small operator means, in the context of over-the-road buses (OTRBs), a private entity primarily in the business of transporting people that is not a Class I motor carrier (i.e., a carrier having average annual gross transportation operating revenues of \$5.3 million or more from passenger motor carrier operations, as provided in Department of Transportation regulations, 49 CFR 1249.3).

* * * * *

3. Subparts F and G are proposed to be redesignated as subparts G and H.

4. A new Subpart F, consisting of §§ 37.111 through 37.120, is proposed to be added to part 37, to read as follows:

Subpart F—Over-the-Road Buses (OTRBs)

Sec.

37.111 Application.

37.112 Purchase or lease of new OTRBs by private entities primarily in the business of transporting people.

37.113 Fleet accessibility requirement for OTRB fixed route systems.

37.114 Fleet accessibility requirement for OTRB demand-responsive systems.

37.115 Service requirement for OTRB demand-responsive systems.

37.116 Interim service requirements.

37.117 Purchase or lease of OTRBs by private entities not primarily in the business of transporting people.

37.118 Remanufactured OTRBs.

37.119 Intermediate and rest stops.

37.120 Other service requirements.

Subpart F—Over-the-Road Buses (OTRBs)

§ 37.111 Application.

This subpart applies to all private entities that operate OTRBs beginning [a date two years after the effective date of this subpart] or, in the case of small

operators, beginning [a date three years after the effective date of this subpart].

§ 37.112 Purchase or lease of new OTRBs by private entities primarily in the business of transporting people.

The following requirements apply to private entities that are primarily in the business of transporting people, whose operations affect commerce, and that operate OTRBs, with respect to buses delivered to them on or after the date on which this subpart applies to them:

(a) *Fixed route systems.* If the entity operates a fixed route system, and purchases or leases a new OTRB, it shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) *Demand responsive systems.* If an entity operates a demand responsive system, and purchases or leases a new OTRB, it shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the system fully meets the requirements of §§ 37.114 and 37.115.

§ 37.113 Fleet accessibility requirement for OTRB fixed route systems.

Each private entity primarily in the business of transporting people, whose operations affect commerce, and that provides fixed-route OTRB service shall ensure that—

(a) By a date 6 years from the date on which this subpart applies to the entity, no less than 50 percent of the buses in its fleet with which it provides fixed route service are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) By a date 12 years from the date on which this subpart applies to the entity, 100 percent of the buses in its fleet with which it provides fixed route service are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) *Exception for small operators:* A small operator that does not purchase enough new OTRBs to replace 50 percent of its fleet by a date 6 years from the date on which this subpart applies to the operator or 100 percent of its fleet by a date 12 years from the date on which this subpart applies to the operator is excused from meeting the requirements of paragraphs (a) and (b), respectively, of this section by those dates.

§ 37.114 Fleet accessibility requirement for OTRB demand-responsive systems.

(a) Each private entity primarily in the business of transporting people, whose

operations affect commerce, and that provides demand-responsive OTRB service shall ensure that, by a date 2 years from the date on which this subpart applies to the entity, no less than 10% of the buses in its fleet with which it provides demand responsive service are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) *Exception for small operators:* A small operator that does not purchase enough new buses to replace 10 percent of its fleet by a date 2 years from the date on which this subpart applies to the operator is excused from meeting the requirements of paragraph (a) of this section by that date.

§ 37.115 Service requirement for OTRB demand-responsive systems

Each private entity primarily in the business of transporting people, whose operations affect commerce, and that provides demand-responsive OTRB service shall ensure that, by a date 2 years from date on which the subpart applies to the entity, any individual with a disability that requests service in an accessible OTRB receives such service. The entity may require up to 48 hours' advance notice to provide this service. If the individual with a disability does not provide the advance notice the entity requires, the entity shall nevertheless provide the service if it can do so by making a reasonable effort.

§ 37.116 Interim service requirements

(a) Until 100 percent of the fleet of an entity providing fixed route service is composed of accessible OTRBs, the entity shall meet the following interim service requirements:

(1) By a date 2 years from the date on which this subpart applies to the entity, ensure any individual with a disability that requests service in an accessible OTRB receives such service. The entity may require up to 48 hours' advance notice to provide this service. If the individual with a disability does not provide the advance notice the entity requires, the entity shall nevertheless provide the service if it can do so by making a reasonable effort. If the trip on which the person with a disability wishes to travel is already provided by an accessible bus, the entity has met this requirement.

(2) Before a date 2 years from the date on which this subpart applies to the entity, an entity which is unable to provide the service specified in paragraph (a) of this section shall continue to comply with the requirements of § 37.169.

(b) Before a date 2 years from the date on which this subpart applies to the entity, an entity providing demand responsive service which is unable to provide the service specified in § 37.115 shall meet the requirements of § 37.169.

§ 37.117 Purchase or lease of OTRBs by private entities not primarily in the business of transporting people.

This section applies to all purchases or leases of vehicles by private entities which are not primarily engaged in the business of transporting people, with respect to buses delivered to them on or after the date on which this subpart begins to apply to them.

(a) *Fixed route systems.* If the entity operates a fixed route system and purchases or leases an OTRB for use on the system, it shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) *Demand responsive systems.* If the entity operates a demand responsive system, and purchases or leases an OTRB for use on the system, it shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the system, when viewed in its entirety, meets the standard for equivalent service of § 37.105.

§ 37.118 Remanufactured OTRBs.

(a) This section applies to any private entity operating OTRBs which takes one of the following actions:

(1) On or after the date on which this subpart applies to the entity, it remanufactures an OTRB so as to extend its useful life for five years or more or makes a solicitation for such remanufacturing; or

(2) Purchases or leases an OTRB which has been remanufactured so as to extend its useful life for five years or more, where the purchase or lease occurs after the date on which this subpart applies to the entity and during the period in which the useful life of the vehicle is extended.

(b) Vehicles acquired through the actions listed in paragraph (a) of this section shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) For purposes of this section, it shall be considered feasible to remanufacture an OTRB so as to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis

demonstrates that including accessibility features required by this part would have a significant adverse effect on the structural integrity of the vehicle.

§ 37.119 Intermediate and rest stops.

(a) Whenever an accessible OTRB makes an intermediate or rest stop, a passenger with a disability, including an individual using a wheelchair, shall be permitted to leave and return to the bus on the same basis as other passengers. The driver shall operate the lift and provide assistance with securement as needed.

(b) Whenever an inaccessible OTRB makes an intermediate or rest stop, a passenger with a disability, including an individual using a wheelchair, shall be permitted to leave and return to the bus on the same basis as other passengers to the extent feasible. The driver or other operator personnel shall provide the assistance specified in § 37.116(a)(2). The entity is not required to unreasonably delay the bus in order to provide this service.

§ 37.120 Other service requirements.

(a) OTRB operators shall comply with the requirements of §§ 37.161, 37.165–37.167, and 37.173.

(b) The following additional requirements apply to the maintenance of lifts on OTRBs:

(1) The entity shall establish a system of regular and frequent maintenance checks of lifts sufficient to determine if they are operative.

(2) The entity shall ensure that vehicle operators report to the entity, by the most immediate means available, any failure of a lift to operate in service.

(3) Except as provided in paragraph (c) of this section, when a lift is discovered to be inoperative, the entity shall take the vehicle out of service before the beginning of the vehicle's next trip and ensure that the lift is repaired before the vehicle returns to service.

(c) If there is no other vehicle available to take the place of an OTRB with an inoperable lift, such that taking the vehicle out of service before its next trip will reduce the transportation service the entity is able to provide, the entity may keep the vehicle in service with an inoperable lift for no more than five days from the day on which the lift is discovered to be inoperative.

5. A new paragraph (g) is proposed to be added to § 37.169, to read as follows:

§ 37.169 Interim requirements for over-the-road bus service operated by private entities.

* * * * *

(g) This section shall cease to apply to small operators of over-the-road buses, as defined in § 37.3, on [a date five years from the effective date of this paragraph], and shall cease to apply to other operators of over-the-road buses on [a date four years from the effective date of this paragraph]

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ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1192

[Docket No. 98-1]

RIN 3014-AA23

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 38

Americans With Disabilities Act Accessibility Guidelines for Transportation Vehicles; Over-the-Road Buses

AGENCIES: Architectural and Transportation Barriers Compliance Board and Department of Transportation.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Architectural and Transportation Barriers Compliance Board and the Department of Transportation propose to amend the accessibility guidelines and standards for over-the-road buses (OTRBs) to include technical specifications for lifts, ramps, wheelchair securement devices, and accessible restrooms, under the Americans with Disabilities Act. Revisions to the specifications for doors, steps, and lighting are also proposed. The specifications describe the design features that an OTRB must have to be readily accessible to and usable by persons who use wheelchairs or other mobility aids. The Department of Transportation has published a separate notice of proposed rulemaking elsewhere in today's **Federal Register** which addresses when OTRB operators are required to comply with the specifications.

DATES: Comments should be received by May 26, 1998. Late comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to the Office of Technical and Information Services, Architectural and Transportation Barriers Compliance

Board, 1331 F Street NW., suite 1000, Washington, DC 20004-1111. Comments will be available for inspection at the above address from 9:00 a.m. to 5:30 p.m. on regular business days. The Access Board will provide copies of all comments received to the Department of Transportation.

FOR FURTHER INFORMATION CONTACT:
Access Board: Dennis Cannon, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW., suite 1000, Washington, DC 20004-1111. Telephone number (202) 272-5434 extension 35 (voice); (202) 272-5449 (TTY). Electronic mail address: cannon@access-board.gov.

Department of Transportation: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street SW., room 10424, Washington, DC 20590. Telephone (202) 366-9306 (voice) or (202) 755-7687 (TTY).

The telephone numbers listed above are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Availability of Copies and Electronic Access

Single copies of this publication may be obtained at no cost by calling the Access Board's automated publications order line (202) 272-5434, by pressing 1 on the telephone keypad, then 1 again, and requesting publication S-21 (Over-the-Road Buses Proposed Rule). Persons using a TTY should call (202) 272-5449. Please record a name, address, telephone number and request publication S-21. This document is available in alternate formats upon request. Persons who want a copy in an alternate format should specify the type of format (cassette tape, Braille, large print, or computer disk). This document is also available on the Board's Internet site (<http://www.access-board.gov/rules/otrbnprm.htm>).

Background

Under the Americans with Disabilities Act of 1990 (ADA), the Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for developing guidelines to ensure that the various kinds of transportation vehicles covered by the law are readily accessible to and usable by individuals with disabilities.¹ 42 U.S.C. 12204. The

¹The Access Board is an independent Federal agency established by section 502 of the Rehabilitation Act of 1973, as amended, whose primary mission is to promote accessibility for individuals with disabilities. The Access Board consists of 25 members. Thirteen are appointed by the President from among the public, a majority of

Department of Transportation (DOT), which is responsible for issuing regulations to implement the transportation provisions of the ADA, is required to include in its regulations accessibility standards for vehicles that are consistent with the Access Board's guidelines. 42 U.S.C. 12186.

For purposes of the ADA, an over-the-road bus is "a bus characterized by an elevated passenger deck located over a baggage compartment." 42 U.S.C. 12181(5). The ADA provides for rulemaking to establish accessibility requirements for OTRBs operated by private entities to be conducted in two stages: interim requirements and final requirements. 42 U.S.C. 12186.²

The interim requirements were established in 1991 and do not require any structural changes to OTRBs. The Access Board issued accessibility guidelines for OTRBs that provide technical specifications for non-structural design features such as floor surfaces, lighting, and handrails and stanchions. 36 CFR 1192.151 to 1192.157. The DOT adopted these guidelines as its standards and also established interim requirements for providing boarding assistance and accommodating wheelchairs and other mobility aids. 49 CFR 37.169 and 49 CFR 38.151 to 38.157.

Prior to establishing the final requirements, the Office of Technology Assessment was to study issues related to OTRB accessibility. 42 U.S.C. 12185. The Office of Technology Assessment published its study on May 16, 1993. Requirements for accessibility were to have taken effect by July 26, 1996, for large transportation providers, and one year later for small entities. 42 U.S.C. 12186. The National Highway System Designation Act of 1995 (Pub. L. 104-59), amended section 306(a)(2)(B)(iii) of the ADA by removing the specific compliance dates and instead requiring large transportation providers to comply two years after the issuance of the DOT regulation, and small providers to comply three years after issuance.

As a preliminary step to issuing requirements, the Access Board and the DOT held a workshop in Washington,

whom are required to be individuals with disabilities. The other twelve are heads of the following Federal agencies or their designees whose positions are Executive Level IV or above: The Departments of Health and Human Services, Education, Transportation, Housing and Urban Development, Labor, Interior, Defense, Justice, Veterans Affairs, and Commerce; General Services Administration; and United States Postal Service.

²OTRBs purchased by public entities or by a contractor to a public entity must currently meet the same accessibility requirements as do other buses, including requirements for lifts or ramps and wheelchair securement devices. 49 CFR 37.7(c).