

must be aware of the requirements of all applicable laws and must comply with these laws and their implementing regulations. Although in many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity, or because of distinctions between the statutes. For example, emotional support animals that do not qualify as service animals under the Department's title III regulations may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct and the ACAA. *See, e.g., Overlook Mutual Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850 (S.D. Ohio 2009). Public accommodations that operate housing facilities must ensure that they apply the reasonable accommodation requirements of the FHAct in determining whether to allow a particular animal needed by a person with a disability into housing and may not use the ADA definition as a justification for reducing their FHAct obligations. In addition, nothing in the ADA prevents a public accommodation subject to one statute from modifying its policies and providing greater access in order to assist individuals with disabilities in achieving access to entities subject to other Federal statutes. For example, a quick service restaurant at an airport is, as a public accommodation, subject to the title III requirements, not to the ACAA requirements. Conversely, an air carrier that flies in and out of the same airport is required to comply with the ACAA, but is not covered by title III of the ADA. If a particular animal is a service animal for purposes of the ACAA and is thus allowed on an airplane, but is not a service animal for purposes of the ADA, nothing in the ADA prohibits an airport restaurant from allowing a ticketed passenger with a disability who is traveling with a service animal that meets the ACAA's definition of a service animal to bring that animal into the facility even though under the ADA's definition of service animal the animal lawfully could be excluded.

Organization of This Rule

Throughout this rule, the original ADA Standards, which are republished as Appendix D to 28 CFR part 36, will be referred to as the "1991 Standards." The original title III regulation, codified at 28 CFR part 36 (2009), will be referred to as the "1991 regulation" or the "1991 title III regulation." ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA

Guidelines, 36 CFR part 1191, app. B and D (2009), will be referred to as the "2004 ADAAG." The Department's Notice of Proposed Rulemaking, 73 FR 34508 (June 17, 2008), will be referred to as the "NPRM." As noted above, the 2004 ADAAG, taken together with the requirements contained in subpart D of 28 CFR part 36 (New Construction and Alterations) of the final rule, will be referred to as the "2010 Standards." The amendments made to the 1991 title III regulation and the adoption of the 2004 ADAAG, taken together, will be referred to as the "final rule."

In performing the required periodic review of its existing regulation, the Department has reviewed the title III regulation section by section, and, as a result, has made several clarifications and amendments in this rule. Appendix A of the final rule, "Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities," codified as Appendix A to 28 CFR part 36, provides the Department's response to comments and its explanations of the changes to the regulation. The section entitled "Section-by-Section Analysis and Response to Comments" in Appendix A provides a detailed discussion of the changes to the title III regulation. The Section-by-Section Analysis follows the order of the 1991 title III regulation, except that regulatory sections that remain unchanged are not referenced. The discussion within each section explains the changes and the reasoning behind them, as well as the Department's response to related public comments. Subject areas that deal with more than one section of the regulation include references to the related sections, where appropriate. The Section-by-Section Analysis also discusses many of the questions asked by the Department for specific public response. The section of Appendix A entitled "Other Issues" discusses public comment on several issues of concern to the Department that were the subject of questions that are not specifically addressed in the Section-by-Section Analysis.

The Department's description of the 2010 Standards, as well as a discussion of the public comments on specific sections of the 2004 ADAAG, is found in Appendix B of this final rule, "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," codified as Appendix B to 28 CFR part 36.

The provisions of this rule generally take effect six months from its publication in the **Federal Register**. The Department has determined, however, that compliance with the requirements

related to new construction and alterations and reservations at a place of lodging shall not be required until 18 months from the publication date of this rule. These exceptions are set forth in §§ 36.406(a) and 36.302(e)(3), respectively, and are discussed in greater detail in Appendix A. *See* discussions in Appendix A entitled "Section 36.406 Standards for New Construction and Alterations" and "Section 36.302(e) Hotel Reservations."

This final rule only addresses issues that were identified in the NPRM as subjects the Department intended to regulate through this rulemaking proceeding. Because the Department indicated in the NPRM that it did not intend to regulate certain areas, including equipment and furniture, accessible golf cars, and movie captioning and video description, as part of this rulemaking proceeding, the Department believes it would be appropriate to solicit more public comment about these areas prior to making them the subject of a rulemaking. The Department intends to engage in additional rulemaking in the near future addressing accessibility in these areas and others, including next generation 9–1–1 and accessibility of Web sites operated by covered public entities and public accommodations.

ADDITIONAL INFORMATION:

Regulatory Process Matters (SBREFA, Regulatory Flexibility Act, and Executive Orders)

The Department must provide two types of assessments as part of its final rule: An analysis of the costs and benefits of adopting the changes contained in this rule, and a periodic review of its existing regulations to consider their impact on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. *See* E.O. 12866, 58 FR 51735, 3 CFR, 1994 Comp., p. 638, as amended; Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 610(a); OMB Circular A–4, available at <http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf> (last visited June 24, 2010); E.O. 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247.

In the NPRM, the Department kept open the possibility that, if warranted by public comments received on an issue raised by the 2004 ADAAG or by the results of the Department's Initial Regulatory Impact Analysis (Initial RIA), available at <http://www.ada.gov/NPRM2008/ria.htm>, showing that the

likely costs of making a particular feature or facility accessible were disproportionate to the benefits (including both monetized and non-monetized benefits) to persons with disabilities, the Attorney General, as a member of the Access Board, could return the issue to the Access Board for further consideration. After careful consideration, the Department has determined that it is unnecessary to return any issues to the Access Board for additional consideration.

Executive Order 12866

This rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Department has evaluated its existing regulations for title II and title III section by section, and many of the provisions in the final rule for both titles reflect its efforts to mitigate any negative effects on small entities. A Final Regulatory Impact Analysis (Final RIA or RIA) was prepared by the Department's contractor, HDR|HLB Decision Economics, Inc. (HDR). In accordance with Executive Order 12866, as amended, and OMB Circular A-4, the Department has reviewed and considered the Final RIA and has accepted the results of this analysis as its assessment of the benefits and costs of the final rules.

Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to "distributive impacts" and "equity," *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. The ADA states, "[i]t is the purpose of this [Act] (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]" 42 U.S.C. 12101(b). Many of the benefits of this rule stem from the provision of such standards, which will promote inclusion, reduce stigma and potential embarrassment, and combat isolation, segregation, and second-class citizenship of individuals with disabilities. Some of these benefits are, in the words of Executive Order 12866, "difficult to quantify, but nevertheless essential to consider." E.O. 12866, section 1(a). The Department has considered such benefits here.

Final Regulatory Impact Analysis

The Final RIA embodies a comprehensive benefit-cost analysis of

the final rules for both title II and title III and assesses the incremental benefits and costs of the 2010 Standards relative to a primary baseline scenario (1991 Standards). In addition, the Department conducted additional research and analyses for requirements having the highest negative net present values under the primary baseline scenario. This approach was taken because, while the 1991 Standards are the only uniform set of accessibility standards that apply to public accommodations, commercial facilities, and State and local government facilities nationwide, it is also understood that many State and local jurisdictions have already adopted IBC/ANSI model code provisions that mirror those in the 2004 ADAAG. The assessments based on this approach assume that covered entities currently implementing codes that mirror the 2004 ADAAG will not need to modify their code requirements once the rules are finalized. They also assume that, even without the final rules, the current level of compliance would be unchanged. The Final RIA contains specific information, including data in chart form, detailing which States have already adopted the accessibility standards for this subset of six requirements. The Department believes that the estimates resulting from this approach represent a reasonable upper and lower measure of the likely effects these requirements will have that the Department was able to quantify and monetize.

The Final RIA estimates the benefits and costs for all new (referred to as "supplemental") requirements and revised requirements across all types of newly constructed and existing facilities. The Final RIA also incorporates a sophisticated risk analysis process that quantifies the inherent uncertainties in estimating costs and benefits and then assesses (through computer simulations) the relative impact of these factors when varied simultaneously. A copy of the Final RIA will be made available online for public review on the Department's ADA Home Page (<http://www.ada.gov>).

From an economic perspective (as specified in OMB Circular A-B4), the results of the Final RIA demonstrate that the Department's final rules increase social resources and thus represent a public good because monetized benefits exceed monetized costs—that is, the regulations have a positive net present value (NPV). Indeed, under every scenario assessed in the Final RIA, the final rules have a positive NPV. The Final RIA's first scenario examines the incremental impact of the final rules using the "main" set of assumptions (*i.e.*,

assuming a primary baseline (1991 Standards), that the safe harbor applies, and that for title III entities barrier removal is readily achievable for 50 percent of elements subject to supplemental requirements).

EXPECTED IMPACT OF THE RULES ² [In billions]

Discount rate	Expected NPV	Total expected PV (benefits)	Total expected PV (costs)
3%	\$40.4	\$66.2	\$25.8
7	9.3	22.0	12.8

Under this set of assumptions, the final rules have an expected NPV of \$9.3 billion (7 percent discount rate) and \$40.4 billion (3 percent discount rate). *See* Final RIA, table ES-1 & figure ES-2.

Water Closet Clearances

The Department gave careful consideration to the costs and benefits of its adoption of the standards relating to water closet clearances in single-user toilet rooms. The primary effect of the Department's proposed final rules governing water closet clearances in single-user toilet rooms with in-swinging and out-swinging doors is to allow sufficient room for "side" or "parallel" methods of transferring from a wheelchair to a toilet. Under the current 1991 Standards, the requisite clearance space in single-user toilet rooms between and around the toilet and the lavatory does not permit these methods of transfer. Side or parallel transfers are used by large numbers of persons who use wheelchairs and are regularly taught in rehabilitation and occupational therapy. Currently, persons who use side or parallel transfer methods from their wheelchairs are faced with a stark choice at establishments with single-user toilet rooms—*i.e.*, patronize the establishment but run the risk of needing assistance when using the restroom, travel with someone who would be able to provide assistance in toileting, or forgo the visit entirely. The revised water closet clearance regulations would make single-user toilet rooms accessible to all persons

² The analysis assumes these regulations will be in force for 15 years. Incremental costs and benefits are calculated for all construction, alterations, and barrier removal that is expected to occur during these 15 years. The analysis also assumes that any new or revised ADA rules enacted 15 years from now will include a safe harbor provision. Thus, any facilities constructed in year 14 of the final rules are assumed to continue to generate benefits to users, and to incur any operating or replacement costs for the life of these buildings, which is assumed to be 40 years.

who use wheelchairs, not just those with the physical strength, balance, and dexterity and the training to use a front-transfer method. Single-user toilet rooms are located in a wide variety of public and private facilities, including restaurants, fast-food establishments, schools, retail stores, parks, sports stadiums, and hospitals. Final promulgation of these requirements might thus, for example, enable a person who uses a side or parallel transfer method to use the restroom (or use the restroom independently) at his or her local coffee shop for the first time.

Because of the complex nature of its cost-benefit analysis, the Department is providing “plain language” descriptions of the benefits calculations for the two revised requirements with the highest estimated total costs: Water closet clearance in single-user toilet rooms with out-swinging doors (RIA Req. #28) (section 604.3 of the 2010 Standards) and water closet clearance in single-user toilet rooms with in-swinging doors (RIA Req. #32) (sections 604.3 and 603.2.3 Exception 2 of the 2010 Standards). Since many of the concepts and calculations in the Final RIA are highly technical, it is hoped that, by providing “lay” descriptions of how benefits are monetized for an illustrative set of requirements, the Final RIA will be more transparent and afford readers a more complete understanding of the benefits model generally. Because of the widespread adoption of the water closet clearance standards in existing State and local building codes, the following calculations use the IBC/ANSI baseline.

General description of monetized benefits for water closet clearance in single-user toilet rooms—out-swinging doors (Req. #28). In order to assess monetized benefits for the requirement covering water closet clearances in single-user toilet rooms with out-swinging doors, a determination needed to be made concerning the population of users with disabilities who would likely benefit from this revised standard. Based on input received from a panel of experts jointly convened by HDR and the Department to discuss benefits-related estimates and assumptions used in the RIA model, it was assumed that accessibility changes brought about by this requirement would benefit persons with any type of ambulatory (*i.e.*, mobility-related) disability, such as persons who use wheelchairs, walkers, or braces. Recent census figures estimate that about 11.9 percent of Americans ages 15 and older have an ambulatory disability, or about 35 million people. This expert panel also estimated that single-user toilet rooms with out-swinging doors would be used slightly

less than once every other visit to a facility with such toilet rooms covered by the final rules (or, viewed another way, about once every two hours spent at a covered facility assumed to have one or more single-user toilet rooms with out-swinging doors) by an individual with an ambulatory disability. The expert panel further estimated that, for such individuals, the revised requirement would result in an average time savings of about five and a half minutes when using the restroom. This time savings is due to the revised water closet clearance standard, which permits, among other things, greater flexibility in terms of access to the toilet by parallel or side transfer, thereby perhaps reducing the wait for another person to assist with toileting and the need to twist or struggle to access the toilet independently. Based on average hourly wage rates compiled by the U.S. Department of Labor, the time savings for Req. #28 is valued at just under \$10 per hour.

For public and private facilities covered by the final rules, it is estimated that there are currently about 11 million single-user toilet rooms with out-swinging doors. The majority of these types of single-user toilet rooms, nearly 7 million, are assumed to be located at “Indoor Service Establishments,” a broad facility group that encompasses various types of indoor retail stores such as bakeries, grocery stores, clothing stores, and hardware stores. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with out-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. #28, it is further understood that about half of all existing facilities assumed to have single-user toilet rooms with out-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

With respect to new construction, it is assumed that each single-user toilet room with an out-swinging door will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the

building (*i.e.*, a period of time between 1 and 39 years).

Summing up monetized benefits to users with disabilities across all types of public and private facilities covered by the final rules, and assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, it is expected that the revised requirement for water closet clearance in single-user toilet rooms with out-swinging doors will result in net benefits of approximately \$900 million over the life of these regulations.

General description of monetized benefits for water closet clearance in single-user toilet rooms—in-swinging doors (Req. #32). For the water closet clearance in single-user toilet rooms with the in-swinging door requirement (Req. #32), the expert panel determined that the primary beneficiaries would be persons who use wheelchairs. As compared to single-user toilet rooms with out-swinging doors, those with in-swinging doors tend to be larger (in terms of square footage) in order to accommodate clearance for the in-swinging door and, thus, are already likely to have adequate clear floor space for persons with disabilities who use other types of mobility aids such as walkers and crutches.

The expert benefits panel estimated that single-user toilet rooms with in-swinging doors are used less frequently on average—about once every 20 visits to a facility with such a toilet room by a person who uses a wheelchair—than their counterpart toilet rooms with out-swinging doors. This panel also determined that, on average, each user would realize a time savings of about 9 minutes as a result of the enhanced clearances required by this revised standard.

The RIA estimates that there are about 4 million single-user toilet rooms with in-swinging doors in existing facilities. About half of the single-user toilet rooms with in-swinging doors are assumed to be located in single-level stores, and about a quarter of them are assumed to be located in restaurants. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with in-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. #32, it is further understood that slightly more than 70 percent of all