

**Notice of Proposed Rulemaking to amend 28 CFR Part 35:  
Nondiscrimination on the Basis of Disability in  
State and Local Government Services  
U.S. Department of Justice**

**Service Animals  
Wheelchair and Other Power-Driven Mobility Devices**

On Friday, May 30, 2008, Attorney General Michael B. Mukasey signed proposed regulations to revise the Department's ADA regulations, including its ADA Standards for Accessible Design. On Tuesday, June 17, 2008, the proposed regulations were published in the Federal Register. The proposed regulations consist of a notice of proposed rulemaking to amend the ADA regulation for State and local governments, a notice of proposed rulemaking to amend the ADA regulation for public accommodations and commercial facilities, a Regulatory Impact Analysis, and two supporting appendices.

**US Dept of Justice**

<http://www.ada.gov/NPRM2008/titleii.htm>

**Disability Rights Education and Defense Fund (DREDF)**

[http://www.dredf.org/DOJ\\_NPRM/index.shtml](http://www.dredf.org/DOJ_NPRM/index.shtml)

**Note: all comments must be received by August 18, 2008**

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**SERVICE ANIMALS**

**SUMMARY:** The Department of Justice is proposing to change the ADA "service animal" regulations. The new regulations say that individually trained animals that do work or perform tasks for persons with psychiatric, cognitive, or mental disabilities are clearly covered by the ADA. However, the new regulations will exclude from the definition of "service animal" emotional support or comfort animals. The proposed regulation will also limit "service animals" to any dog or other common domestic animal trained to do work or perform tasks for a person with a disability. The rule will exclude wild animals (including non-human primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig or goat), ferrets, amphibians and rodents. There are additional wording issues noted below. There are two sets of regulations because ADA Title II covers state and local governments and Title III covers public accommodations.

**The following is from: Notice of Proposed Rulemaking to amend 28 CFR Part 35:  
Nondiscrimination on the Basis of Disability in State and Local Government Services**

**Service animals**

The Department wishes to clarify the obligations of public entities to accommodate individuals with disabilities who use service animals. The Department continues to receive a large number of complaints from individuals with service animals. It appears, therefore, that many covered entities are confused about their obligations under the ADA in this area. At the same time, some individuals with impairments--who would not be covered as qualified individuals with disabilities--are claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access to the facilities of public entities. Another trend is the use of wild or exotic animals, many of which are untrained, as service animals. In order to clarify its position and avoid further misapplication of the ADA, the Department is proposing amendments to its regulation with regard to service animals.

**Minimal protection.**

In the Department's ADA Business Brief on Service Animals, which was published in 2002, the Department interpreted the minimal protection language in its definition of service animals within the context of a seizure (i.e., alerting and protecting a person who is having a seizure). Although the Department received comments urging it to eliminate the phrase "providing minimal protection" from its regulation, the Department continues to believe that the language serves the important function of excluding from coverage so-called "attack dogs" that pose a direct threat to others.

**Guidance on permissible service animals.**

The existing regulation implementing title III defines a "service animal" as "any guide dog, signal dog, or other animal." At the time the regulation was promulgated, the Department believed that leaving the species selection up to the discretion of the individual with a disability was the best course of action. Due to the proliferation of animal types that have been used as "service animals," including wild animals, the Department believes that this area needs established parameters. Therefore, the Department is proposing to eliminate certain species from coverage under the ADA even if the other elements of the definition are satisfied.

**Comfort animals vs. psychiatric service animals.**

Under the Department's present regulatory language, some individuals and entities have assumed that the requirement that service animals must be individually trained to do work or carry out tasks excluded all persons with mental disabilities from having service animals. Others have assumed that any person with a psychiatric condition whose pet provided comfort to him or her was covered by the ADA. The Department believes that psychiatric service animals that are trained to do work or perform a task (e.g., reminding its owner to take medicine) for persons whose disability is covered by the ADA are protected by the Department's present regulatory approach.

Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.

The Department is proposing new regulatory text in § 35.104 to formalize its position on emotional support or comfort animals, which is that "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals." The Department wishes to underscore that the exclusion of emotional support animals from ADA coverage does not mean that persons with psychiatric, cognitive, or mental disabilities cannot use service animals. The Department proposes specific regulatory text in § 35.104 to make this clear: "[t]he term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities." This language simply clarifies the Department's longstanding position.

The Department's rule is based on the assumption that the title II and title III regulations govern a wider range of public settings than the settings that allow for emotional support animals. The Department recognizes, however, that there are situations not governed exclusively by the title II and title III regulations, particularly in the context of residential settings and employment where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.

Proposed training standards. The Department has always required that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability, but has never imposed any type of formal training requirements or certification process. While some advocacy groups have urged the Department to modify its position, the Department does not believe that such a modification would serve the array of individuals with disabilities who use service animals.

Detailed regulatory text changes and the Department's response to public comments on these issues and others are discussed below in the definitions § 35.104 and in a newly-proposed § 35.136.

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## **WHEELCHAIR AND OTHER POWER-DRIVEN MOBILITY DEVICES**

**SUMMARY:** The Department proposes new definitions for "wheelchair" and "other power-driven mobility device." Other power-driven mobility devices could be restricted by covered entities, based on four factors, and covered entities could inquire if the individual is using such a device due to a disability.

**The following is from: Notice of Proposed Rulemaking to amend 28 CFR Part 35: Nondiscrimination on the Basis of Disability in State and Local Government Services**

## Relationship to Other Laws

*In addition, public entities (including AMTRAK) that provide public transportation services that are subject to subtitle B of title II should be reminded that the Department's regulation, at 28 CFR § 35.102, provides that –*

- (a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.*
- (b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, 42 U.S.C. 12141, they are not subject to the requirements of this part.*

*Nothing in this proposed rule alters that provision. To the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR part 37 and are not covered by this proposed rule. Matters not covered by subtitle B are covered by this rule. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Airports operated by public entities are not subject to DOT's ADA regulation, but they are subject to subpart A of title II and to this rule.*

## Wheelchairs and other power-driven mobility devices.

Since the passage of the ADA, choices of mobility aids available to individuals with disabilities have vastly increased. In addition to devices such as wheelchairs and mobility scooters, individuals with disabilities may use devices that are not designed primarily for use by individuals with disabilities, such as electronic personal assistive mobility devices (EPAMDs). (The only available model known to the Department is the Segway®.) The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices for locomotion in pedestrian areas. These new or adapted mobility aids benefit individuals with disabilities, but also present new challenges for state and local governments.

EPAMDs illustrate some of the challenges posed by new mobility devices. The basic Segway® model is a two-wheeled, gyroscopically stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. The EPAMD can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of 3 to 4 miles per hour and the approximate maximum speed for power-operated wheelchairs of 6 miles per hour. In a study of trail and other nonmotorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of people using EPAMDs ranged from 68¼ inches to 79½ inches. See Federal Highway Administration, Characteristics of Emerging Road and Trail Users and Their Safety (Oct. 2004), available at <http://www.tfsrc.gov/safety/pubs/04103>. Thus,

EPAMDs can operate at much greater speeds than wheelchairs, and the average user is much taller than most wheelchair users.

EPAMDs have been the subject of debate among users, pedestrians, disability advocates, state and local governments, businesses, and bicyclists. The fact that a device is not designed primarily for use by or marketed primarily to individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of whether individuals with disabilities should be allowed to operate them in areas and facilities where other powered devices are not allowed. Those who question the use of EPAMDs in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users. Although the question of EPAMD safety has not been resolved, many states have passed legislation addressing EPAMD operation on sidewalks, bicycle paths, and roads. In addition, some states, such as Iowa and Oregon, have minimum age requirements, or mandatory helmet laws. New Jersey requires helmets for all EPAMD users, while Hawaii and Pennsylvania require helmets for users under a certain age.

While there may be legitimate safety issues for EPAMD users and bystanders, EPAMDs and other nontraditional mobility devices can deliver real benefits to individuals with disabilities. For example, individuals with severe respiratory conditions who can walk limited distances and individuals with multiple sclerosis have reported benefitting significantly from EPAMDs. Such individuals often find that EPAMDs are more comfortable and easier to use than wheelchairs, and assist with balance, circulation, and digestion in ways that wheelchairs do not. See Rachel Metz, *Disabled Embrace Segway*, New York Times, Oct. 14, 2004.

The Department has received questions and complaints from individuals with disabilities and covered entities about which mobility aids must be accommodated and under what circumstances. While some individuals with disabilities support the use of unique mobility devices, other individuals with disabilities are concerned about their personal safety when others are using such devices. There is also concern about the impact of such mobility devices on facilities, such as the weight of the device on fragile floor surfaces.

The Department intends to address these issues and proposes to adopt a policy that sets the parameters for when these devices must be accommodated. Toward that end, the Department proposes new definitions of the terms "wheelchair"--which includes manually and power-driven wheelchairs and mobility scooters--and "other power-driven mobility device" and accompanying regulatory text. The proposed definitions are discussed in the section-by-section analysis of § 35.104, and the proposed regulatory text is discussed in the section-by-section analysis of § 35.137.

Much of the debate surrounding mobility aids has centered on appropriate definitions for the terms "wheelchair" and "other power-driven mobility devices." The Department has not defined the term "manually powered mobility aids." Instead, the proposed rule provides a list including wheelchairs, walkers, crutches, canes, braces, or similar devices. The inclusion of the term "similar devices" indicates that the list is not intended to be exhaustive. The Department would like input as to whether addressing "manually powered mobility aids" in this manner (i.e., via examples of such devices) is appropriate. The Department also would like information as to whether there are any other non-powered or manually powered mobility aids that should be added to the list and an explanation of the reasons they should be

included. If an actual definition is preferred, the Department would welcome input with regard to the language that might be used to define "manually powered mobility aids," and an explanation of the reasons this language would better serve the public.

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## **SECTION-BY-SECTION ANALYSIS AND RESPONSE TO COMMENTS**

This section provides a detailed description of the Department's proposed changes to the title II regulation, the reasoning behind the proposals, and responses to public comments received on the topic. The section-by-section analysis follows the order of the current title II regulation, except that if the Department is not proposing a change to a regulation section, the unchanged section is not discussed. In addition, this section includes specific questions for which the Department requests public response. These questions are numbered and italicized in order to make them easier for readers to locate and reference.

### **Subpart A--General**

#### **Section 35.104 Definitions**

##### **"Other Power-Driven Mobility Device"**

The proposed regulation defines the term "other power-driven mobility device" as "any of a large range of devices powered by batteries, fuel, or other engines--whether or not designed solely for use by individuals with mobility impairments--that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs) (e.g., Segway®), or any mobility aid designed to operate in areas without defined pedestrian routes." The definition is designed to be broad and inclusive because the Department recognizes the diverse needs and preferences of individuals with disabilities and does not wish to impede individual choice except when necessary. Power-driven mobility devices are included in this category. Mobility aids that are designed for areas or conditions without defined pedestrian areas, such as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians, are also included in this category.

*Question 8: Please comment on the proposed definition of other power-driven mobility devices. Is the definition overly inclusive of power-driven mobility devices that may be used by individuals with disabilities?*

The Department's proposed regulatory text on accommodating wheelchairs and other power-driven mobility devices is discussed below in § 35.137 of the section-by-section analysis.

The Department's proposed regulatory text on accommodating wheelchairs and other power-driven mobility devices is discussed below in § 35.137 of the section-by-section analysis.

## "Service Animal"

Although there is no specific language in the current title II regulation concerning service animals, title II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary to avoid discrimination on the basis of disability, unless the modifications would fundamentally alter the nature of the service, program, or activity. 28 CFR 35.130(b)(7). In order to qualify for coverage under title II, a person must be a "qualified individual with a disability," which is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 28 CFR 35.104. The Department is proposing to add to the title II regulation the same definition of "service animal" that it will propose for the title III regulation. The title III regulation currently contains a definition of "service animal" in § 36.104.

The current definition of "service animal" in § 36.104 is, "any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." The Department would modify that current definition, and add the same definition, as modified, to the title II regulation at § 35.104. The changes that would be made to the title III definition, and that would be incorporated in the title II definition are as follows:

1. Remove "guide" or "signal" as descriptions of types of service dogs, add "other common domestic" animal, and add "qualified" to "individual" in the Department's current definition;
2. Remove "individuals with impaired vision" and replace it with "individuals who are blind or have low vision;"
3. Change "individuals with impaired hearing" to "individuals who are deaf or hard of hearing;"
4. Replace the term "intruders" with the phrase "the presence of people" in the section on alerting individuals who are deaf or hard of hearing;
5. Add the following to the list of work and task examples: Assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support to assist with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation;
6. Add that "service animal" includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, or mental disabilities;
7. Add that "service animal" does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, pony, miniature horse, pig, and goat), ferrets, amphibians, and rodents; and
8. Add that animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.

The Department is proposing these changes in response to concerns expressed by commenters regarding the Department's ANPRM. Issues raised by the commenters include:

**"Minimal protection."**

There were many comments by service dog users urging the Department to remove from the definition the phrase "providing minimal protection." The commenters set forth the following reasons for why the phrase should be deleted: 1) The current phrase can be interpreted to apply coverage under the ADA to "protection dogs" that are trained to be aggressive and protective, so long as they are paired with a person with a disability; and 2) since some view the minimal protection language to mean that a dog's very presence can act as a crime deterrent, the language may be interpreted to allow any untrained pet dog to provide minimal protection by its mere presence. These interpretations were not contemplated by the ADA.

*Question 9: Should the Department clarify the phrase "providing minimal protection" in the definition or remove it? Are there any circumstances where a service animal providing "minimal protection" would be appropriate or expected?*

**"Alerting to intruders."**

Some commenters expressed a similar concern regarding the phrase "alerting . . . to intruders" in the current text as the concern expressed by commenters regarding the phrase "providing minimal protection." Commenters indicated that "alerting to intruders" has been misinterpreted by some individuals to apply to a special line of protection dogs that are trained to be aggressive. People have asserted, incorrectly, that use of such animals is protected under the ADA. The Department reiterates that public entities are not required to admit any animal that poses a direct threat to the health or safety of others. The Department has proposed removing "intruders" and replacing it with "the presence of people."

**"Task" emphasis.**

Many commenters followed the lead of an umbrella service dog organization and suggested that the phrase "performing tasks" should form the basis of the service animal definition, that "do work" should be eliminated from the definition, and that "physical" should be added to describe tasks. Tasks by their nature are physical, so the Department does not believe that such a change is warranted. In contrast, the existing phrase "do work" is slightly broader than "perform tasks," and adds meaning to the definition. For example, a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place. As one service dog user stated, in some cases, "critical forms of assistance can't be construed as physical tasks," noting that the manifestations of "brain-based disabilities," such as psychiatric disorders and autism, are as varied as their physical counterparts. One commenter stated that the current definition works for everyone (i.e., those with physical and mental disabilities) and urged the Department to keep it. The Department has evaluated this issue and believes that the crux of the current definition (individual training to do work or perform tasks) is inclusive of the varied services provided by working animals on behalf of individuals with all types of disabilities and proposes that this portion of the definition remain the same.

## **Define "task."**

One commenter suggested defining the term "task," presumably so that there would be a better understanding of what type of service performed by an animal would qualify for coverage. The Department feels that the common definition of task is sufficiently clear and that it is not necessary to add the term to the definitions section; however, the Department has proposed additional examples of work or tasks to help illustrate this requirement in the definition of service animal.

## **Define "animal" or what qualifies certain species as "service animals."**

When the regulation was promulgated in 1991, the Department did not define the parameters of acceptable animal species, and few anticipated the variety of animals that would be used in the future, ranging from pigs and miniature horses to snakes and iguanas. One commenter suggested defining "animal" (in the context of service animals) or the parameters of acceptable species to reduce the confusion over whether a particular service animal is covered. One service dog organization commented that other species would be acceptable if those animals could meet the behavioral standards of trained service dogs. Other commenters asserted that there are certain animals (e.g., reptiles) that cannot be trained to do work or perform tasks, so these animals would not be covered. The Department has followed closely this particular issue (i.e., how many unusual animals are now claimed as service animals) and believes that this aspect of the regulation needs clarification.

To establish a practical and reasonable species parameter, the Department proposes to narrow the definition of acceptable animal species to "dog or other common domestic animal" by excluding the following animals: Wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents. Many commenters asserted that limiting the number of allowable species would help stop erosion of the public's trust, which results in reduced access for many individuals with disabilities, despite the fact that they use trained service animals that adhere to high behavioral standards. The Department is compelled to take into account practical considerations of certain animals and contemplate their suitability in a variety of public contexts, such as libraries or courtrooms.

In addition, the Department believes that it is necessary to eliminate from coverage all wild animals, whether born or bred in captivity or the wild. Some animals, such as nonhuman primates, pose a direct threat to safety based on behavior that can be aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement against the use of monkeys as service animals, stating, "[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, the potential for serious injury, and zoonotic [animal-to-human disease transmission] risks." See the AVMA 2005 position statement, Nonhuman Primates as Assistance Animals, available at [http://www.avma.org/issues/policy/nonhuman\\_primates.asp](http://www.avma.org/issues/policy/nonhuman_primates.asp). The potential for nonhuman primates to transmit dangerous diseases to humans has been documented in scientific journals.

Although unusual species make up a very small percentage of service animals as a collective group, their use has engendered broad public debate and, therefore, the Department seeks comment on this issue.

*Question 10: Should the Department eliminate certain species from the definition of "service animal"? If so, please provide comment on the Department's use of the phrase "common domestic animal" and on its choice of which types of animals to exclude.*

*Question 11: Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the "common domestic animal" prong of the proposed definition?*

### **Comfort animals.**

It is important to address the concept of comfort animals or emotional support animals, which have become increasingly popular. The increased use of comfort animals is primarily by individuals with mental or psychiatric impairments, many of which do not rise to the level of disability. Comfort animals are also used by individuals without any type of impairment who claim the need for such an animal in order to bring their pets into facilities of public entities.

The difference between an emotional support animal and a psychiatric service animal is the service that is provided, i.e., the actual work or task performed by the service animal. Another critical factor rests on the severity of the individual's impairment. For example, only individuals with conditions that substantially limit them in a major life activity qualify for coverage under the ADA, and only those individuals' use of a service animal will be covered under the ADA. See definition of disability, 42 U.S.C. 12102(2) and 28 CFR 35.104. Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Many Americans have some type of physical or mental impairment (e.g., arthritis, anxiety, back pain, imperfect vision, etc.), but establishing a physical or mental disability also requires a substantial limitation of a major life activity. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulations were promulgated, service animals have been trained to assist individuals with different types of disabilities. As a result, individuals with minor impairments may mistakenly conclude that any type of impairment qualifies them for ADA coverage.

### **Change "service animal" to "assistance animal."**

Some commenters asserted that "assistance animal" is a term of art and should replace "service animal." While some agencies, like the Department of Housing and Urban Development (HUD), use the term "assistance animal," that term is used to denote a broader category of animals than is covered by the ADA. The Department believes that changing the term used under the ADA would create confusion, particularly in view of the broader parameters for coverage under the Fair Housing Act (FHA) (cf., HUD Handbook No. 4350.3 Rev-1, Chg-2, Occupancy Requirements of Subsidized Multifamily Housing Programs (June 2007), available at <http://www.hudclips.org>.) Moreover, the Department's proposal to change the definition of "service animal" under the ADA is not intended to affect the rights of people with disabilities who use assistance animals in their homes under the FHA.

In addition, the term "psychiatric service animal" describes a service animal that does work or performs a task for the benefit of an individual with a psychiatric disability. This contrasts with "emotional support" animals that are covered under the Air Carrier Access Act, 49 U.S.C. 41705 et seq., and its implementing regulations, 14 CFR 382.7, see also 68 FR 24874, 24877 (May 9, 2003) (guidance on accommodation of service animals and emotional support animals on air transportation) and qualify as "assistance animals" under the FHA, but do not qualify as "service animals" under the ADA.

## "Wheelchair"

The Department proposes the following definition of "wheelchair" in § 35.104: "Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven."

The proposed definition of "wheelchair" is informed by several existing definitions of "wheelchair." Section 507 of the ADA defines wheelchair in the context of whether to allow wheelchairs in federal wilderness areas: "the term 'wheelchair' means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area." 42 U.S.C. 12207(c)(2). The Department believes that while this definition is appropriate in the limited context of federal wilderness areas, it is not specific enough to provide clear guidance in the array of settings covered by title II.

***The other existing federal definition of "wheelchair" that the Department reviewed is in the Department of Transportation regulation implementing the transportation provisions under title II and title III of the ADA. The Department of Transportation's definition of "wheelchair" is "a mobility aid belonging to any class of three or four-wheeled devices, usable indoors, designed for and used by individuals with mobility impairments, whether operated manually or powered."*** 49 CFR 37.3. The Department has adopted much of the language from this definition. Under the proposed definition, wheelchairs include manually operated and power-driven wheelchairs and mobility scooters. Mobility devices such as golf cars, bicycles, and electronic personal assistance mobility devices (EPAMDs) are inherently excluded from the proposed definition. Typically, the devices covered under the proposed definition are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas. However, it could include a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. "Typical indoor and outdoor pedestrian areas" refer to locations and surfaces used by and intended for pedestrians, including sidewalks, paved paths, floors of buildings, elevators, and other circulation routes, but would not include such areas as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians.

The Department does not propose to define specific dimensions that qualify a device as a wheelchair. ***The Department of Transportation's definition includes a subpart defining "common wheelchair" to provide guidance for public transit authorities on which devices must be transported.*** A "common wheelchair" is a wheelchair that "does not exceed 30 inches in width and 48 inches in length measured two inches above the ground,

and does not weigh more than 600 pounds when occupied." 49 CFR 37.3. The narrower definition of "common wheelchair" was developed with reference to the requirements for lifts to establish parameters for the size and weight a lift can safely accommodate. See 49 CFR part 37, App. D (2002). The Department does not believe it is necessary to adopt stringent size and weight requirements for wheelchairs.

The Department requests public input on the proposed definition for "wheelchair."

*Question 12: As explained above, the definition of "wheelchair" is intended to be tailored so that it includes many styles of traditional wheeled mobility devices (e.g., wheelchairs and mobility scooters). Does the definition appear to exclude some types of wheelchairs, mobility scooters, or other traditional wheeled mobility devices? Please cite specific examples if possible.*

*Question 13: Should the Department expand its definition of "wheelchair" to include Segways®?*

*Question 14: Are there better ways to define different classes of mobility devices, such as the weight and size of the device that is used by the Department of Transportation in the definition of "common wheelchair"?*

*Question 15: Should the Department maintain the non-exhaustive list of examples as the definitional approach to the term "manually powered mobility aids"? If so, please indicate whether there are any other non-powered or manually powered mobility devices that should be considered for specific inclusion in the definition, a description of those devices, and an explanation of the reasons they should be included.*

*Question 16: Should the Department adopt a definition of the term "manually powered mobility aids"? If so, please provide suggested language and an explanation of the reasons such a definition would better serve the public.*

The proposed regulation regarding mobility devices, including wheelchairs, is discussed below in the section-by-section analysis for § 35.137.

## **Subpart B--General Requirements**

### **Section 35.136 Service Animals**

The Department's title II regulation now states that, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR 35.130(b)(7). In the proposed title II language, the Department intends to provide the broadest feasible access to individuals with disabilities who use service animals, unless a public entity can demonstrate that making the modifications would fundamentally alter the nature of the public entity's service, program, or activity.

The proposed section regarding service animals would incorporate the Department's policy interpretations as outlined in its published technical assistance Commonly Asked Questions

about Service Animals (1996) (available at <http://www.ada.gov/qasrvc.htm>), and ADA Business Brief: Service Animals (2002) (available at <http://www.ada.gov/svcanimb.htm>), as well as make changes based on public comment. Proposed § 35.136 would:

1. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance and add that a public entity may ask an individual with a disability to remove a service animal from the premises if: (i) The animal is out of control and the animal's handler does not take effective action to control it; (ii) the animal is not housebroken; (iii) the animal's presence or behavior fundamentally alters the nature of the service the public entity provides (e.g., repeated barking); or (iv) the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications in § 35.136(b);
2. Add in § 35.136(c) that if a public entity properly excludes a service animal, the public entity must give the individual with a disability the opportunity to participate in or benefit from the services, programs, or activities without having the service animal on the premises;
3. Add in § 35.136(d) requirements that the work or tasks performed by a service animal must be directly related to the handler's disability; that a service animal that accompanies an individual with a disability into a public entity's facility must be individually trained to do work or perform a task, be housebroken, and be under the control of its owner; and that a service animal must have a harness, leash, or other tether;
4. Add in § 35.136(e) specific language clarifying that "[a] public entity is not responsible for caring for or supervising a service animal." This proposed language does not require that the person with a disability care for his or her service animal if care can be provided by a family member, friend, attendant, volunteer, or anyone acting on behalf of the person with a disability. This provision is a variation on the existing title III language in § 36.302(c)(2), which states, "[n]othing in this part requires a public accommodation to supervise or care for a service animal." The Department is proposing similar modifications to the title III requirements on service animals in the NPRM for title III, published concurrently with this NPRM.
5. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance that a public entity must not ask what the person's disability is or about the nature of the person's disability, nor require proof of service animal certification or licensing, but that a public entity may ask (i) if the animal is required because of a disability; and (ii) what work or tasks the animal has been trained to perform in § 35.136(f);
6. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance and add that a public entity must not require an individual with a disability to pay a fee or surcharge or post a deposit as a condition of permitting a service animal to accompany its handler in a public entity's facility, even if such deposits are required for pets, and that if a public entity normally charges its citizens for damage that they cause, a citizen with a disability may be charged for damage caused by his or her service animal in § 35.136(h).

These changes will respond to the following concerns raised by individuals and organizations that commented in response to the ANPRM.

### **Proposed behavior or training standards.**

Some commenters proposed behavior or training standards for the Department to adopt in its revised regulation, not only to remain in keeping with the requirement for individual training, but also on the basis that without training standards the public has no way to differentiate between untrained pets and service animals. Because of the variety of individual training that a service animal can receive--from formal licensing at an academy to individual training on how to respond to the onset of medical conditions, such as seizures--the Department is not inclined to establish a standard that all service animals must meet. Some of the behavioral standards that the Department is proposing actually relate to suitability for public access, such as being housebroken and under the control of its handler.

### **Section 35.137 Mobility Devices**

Proposed § 35.137 has been added to provide additional guidance to public entities about the circumstances in which power-driven mobility devices must be accommodated.

As discussed earlier in this NPRM, this proposal is in response to growing confusion about what types of mobility devices must be accommodated. The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized for locomotion purposes riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices that are not designed for use or exclusively used by people with disabilities. Indeed, there has been litigation about whether the ADA requires covered entities to allow people with disabilities to use their EPAMDs like users of traditional wheelchairs. Individuals with disabilities have sued several shopping malls in which businesses refused to allow a person with a disability to use an EPAMD. See, e.g., Sarah Antonacci, *White Oaks Faces Lawsuit over Segway*, *State Journal-Register*, Oct. 9, 2007, available at <http://www.sj-r.com/news/stories/17784.asp>; Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, *WATE 6 News*, July 26, 2005, available at <http://www.wate.com/Global/story.asp?s=3643674>. The Department believes clarification on what the ADA requires is necessary at this juncture.

Section 35.137(a) reiterates the general rule that public entities shall permit individuals using wheelchairs, scooters, and manually powered mobility aids, including walkers, crutches, canes, braces, and similar devices, in any areas open to pedestrians. The regulation underscores this general proposition because the great majority of mobility scooters and wheelchairs must be accommodated under nearly all circumstances in which title II applies.

Section 35.137(b) adopts the general requirement in the ADA that public entities must make reasonable modifications to their policies, practices, and procedures when necessary to enable an individual with a disability to use a power-driven mobility device to participate in its services, programs, or activities unless doing so would result in a fundamental alteration of their services, programs, or activities.

If a public entity restricts the use of power-driven mobility devices by people without disabilities, then it must develop policies addressing which devices and under what circumstances individuals with disabilities may use power-driven mobility devices for the purpose of mobility. Under the Department's proposed regulation in § 35.137(c), public entities must adopt policies and procedures regarding the accommodation of power-driven mobility devices other than wheelchairs and scooters that are designed to assess whether allowing an individual with a disability to use a power-driven mobility device is reasonable and does not result in a fundamental alteration to its programs, services, or activities. Public entities may establish policies and procedures that address and distinguish among types of mobility devices.

For example, a city may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the city may address its concerns about factors such as space limitations by disallowing EPAMDs by members of the general public.

Section 35.137(c) lists permissible factors that a public entity may consider in determining whether the use of different types of power-driven mobility devices by individuals with disabilities may be permitted. In developing policies, public entities should group power-driven mobility devices by type (e.g., EPAMDs, golf cars, gasoline-powered vehicles, wheelchairs designed for outdoor use, and other devices). A blanket exclusion of all devices that fall under the definition of other power-driven mobility devices in all locations would likely violate the proposed regulation.

The factors listed in § 35.137(c)(1)-(3) may be used in order to develop policies regarding the use of other power-driven mobility devices by people with disabilities. The dimensions, weight, and other characteristics of the mobility device in relation to a wheelchair or scooter, as well as the device's maneuverability and speed, may be considered. Another permissible factor is the risk of potential harm to others. The use of gas-powered golf cars by people with disabilities inside a building may be prohibited, for example, because the exhaust may be harmful to others. A mobility device that is unsafe to others would not be reasonable under the proposed regulation. Additionally, the risk of harm to the environment or natural or cultural resources or conflicts with federal land management laws and regulations are also to be considered. The final consideration is the ability of the public entity to stow the mobility device when not in use, if requested by the user.

While a public entity may inquire into whether the individual is using the device due to a disability, the entity may not inquire about the nature and extent of the disability, as provided in § 35.137(d).

The Department anticipates that, in many circumstances, allowing the use of unique mobility devices by individuals with disabilities will be reasonable to provide access to a public entity's services, programs, and activities, and that in many cases it will not fundamentally alter the public entity's operations and services. On the other hand, the use of mobility devices that are unsafe to others, or unusually unwieldy or disruptive, is unlikely to be reasonable and may constitute a fundamental alteration.

Consider the following examples:

Example 1: Although people who do not have mobility impairments are prohibited from operating EPAMDs at the fairgrounds, the county has developed a policy allowing people with disabilities to use EPAMDs as their mobility device on the fairgrounds. The county's policy states that EPAMDs are allowed in all areas of the fairgrounds that are open to pedestrians as a reasonable modification to its general policy on EPAMDs. The county determined that the venue provides adequate space for a larger device such as an EPAMD and that it does not fundamentally alter the nature of the fair's activities and services. The county's policies do, however, require that EPAMDs be operated at a safe speed limit. A county employee may inquire at the ticket gate whether the device is needed due to the user's disability and also inform an individual with a disability using an EPAMD that the county policy requires that it be operated at or below the designated speed limit.

Example 2: The city has developed a policy specific to city hall regarding the use of EPAMDs (i.e., users who do not need the devices due to disability are required to leave the devices outside the building). While most of city hall is spacious, the city has determined that it is not reasonable to allow people with disabilities to bring their EPAMDs into the recorder of deeds office, which is quite small, and the device's dimensions make it unsafe and unwieldy in this situation. If it is not possible for the individual with a disability to park the mobility device and walk into the recorder of deeds office, the city government would still be required to provide services to the person through program access by meeting the individual in an adjacent, more spacious office, allowing him or her to obtain services over the phone, sending an employee to the individual's home, or through other means.

The Department is seeking public comment on the proposed definitions and policy concerning wheelchairs and other mobility devices.

*Question 17: Are there types of personal mobility devices that must be accommodated under nearly all circumstances? Conversely, are there types of mobility devices that almost always will require an assessment to determine whether they should be accommodated? Please provide examples of devices and circumstances in your responses.*

*Question 18: Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?*

*Question 19: Should personal mobility devices used by individuals with disabilities be categorized by intended purpose or function, by indoor or outdoor use, or by some other factor? Why or why not?*