PUBLIC ACCOMMODATIONS AND THE ADA AMENDMENTS ACT

By Dennis Steinman, Esq.*

Title III of the ADA covers places of public accommodation, which are, in short, all private businesses or places that are open to the general public. This includes places such as movie theaters, restaurants, malls, doctors' offices, and lawyers' offices. There were changes to the regulations that interpret and enforce the ADA Amendments Act of 2008 as they relate to public accommodations.

The ADA Amendments Act of 2008 changes little in the actual provisions of the ADA relating to Title III, but the Department of Justice (DOJ) regulations overhaul and/or add provisions in 28 C.F.R § 36 regarding: (1) service animals; (2) auxiliary aids and services regarding effective communication; (3) requirements of places of lodging; (4) requirements of public accommodations to provide access to mobility devices; and (5) standards for accessible design.

The following discussion focuses primarily on the amendments to 28 C.F.R. § 36. The amended regulations are detailed and provide express guidance, but due to the lack of case law under these new regulations, a good deal of the discussion below will focus on the DOJ commentary contained in the regulations appendix.

I. Service Animals.

The amendments to 28 C.F.R § 36 add a definition for "service animal" and provide for a more detailed requirement that public accommodations "modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability."[1]

a. Definition of Service Animal.

The amended regulations sought to place limits on what constitutes a "service" animal because "[m]any covered entities indicated that they [were] confused regarding their obligations under the ADA."[2] Also, in addition to the DOJ concern that a number of non-disabled individuals fraudulently or mistakenly claimed their animals were covered under the ADA in order to gain access to public accommodations, disabled individuals were concerned that if untrained or exotic animals were deemed "service animals," then "their own right to use guide or service dogs may become unnecessarily restricted or questioned."[3] Accordingly, § 36.104 now provides that a "service animal" means:

> *[A]ny dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability*, including a physical, sensory, psychiatric, intellectual, or

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* Dennis Steinman is a partner at Kell, Alterman & Runstein, LLP. He received his BA from Temple University and his JD from Lewis and Clark Law School. Mr. Steinman is an adjunct professor at Lewis and Clark Law School and teaches federal litigation. He specializes in the rights of the disabled and is a frequent speaker on the ADA. Mr. Steinman thanks Zachary Walker, the firm's certified law clerk, for his significant contribution to this article.

[1] *See* 28 C.F.R. § 36.104 and § 36.302.

[2] 28 C.F.R. pt 36 Appx A § 36.104

[3] *Id.*

> other mental disability. *Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.* The *work or tasks performed by a service animal must be directly related to the individual's disability.* Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, *providing non-violent protection or rescue work,* pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. *The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.*[4]

The new definition of "service animals" performs four important tasks.

First, it expressly limits the rule's coverage to dogs and excludes "[o]ther species of animals, whether wild or domestic, trained or untrained." Commentators suggested that the limitation of "allowable species would help stop the erosion of the public's trust, which has resulted in reduced access for many individuals with disabilities who used trained service animals that adhere to high behavioral standards."[5] Additionally, the regulation clearly excludes "all wild animals, whether born or bred in captivity or in the wild."[6] The DOJ was specifically concerned with "nonhuman primates" because "of their potential for disease transmission and unpredictable aggressive behavior."[7] However, the DOJ's exclusion of monkeys from the definition of service animals does not affect the allowance of such use under existing federal statutes such as the Fair Housing Act ("FHAct"), which condones the use of animals other than dogs in the home of an individual with a disability if the animal qualifies as a "'reasonable accommodation' that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming the use of the animal does not pose a direct threat."[8] The DOJ also declined to place size, weight, and breed limits on the definition of a "service animal."[9]

Second, the right to such an animal to a disabled individual expressly states a "service animal" is "any dog . . . individually trained to do work or perform tasks," which creates an objective standard. The standard requiring the dog "do work or perform tasks" was criticized on the grounds that some dogs serve as comfort to individuals with some neurological based disabilities and that some "'critical forms of assistance can't be construed as physical tasks.'"[10] The DOJ agreed with this concern, but noted "what the animal is trained to do in response to [a neurological episode is what] distinguishes a service animal from an observant pet or support animal."[11] Ultimately the line between a service dog and a pet is blurred by their ability to

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[4] 28 C.F.R. § 36.104 (emphasis added).
[5] 28 C.F.R. pt 36 Appx A § 36.104
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

recognize the needs of a disabled individual, but what differentiates the two is the dogs individually trained "response" to such needs (e.g., a dog individually trained to respond the needs of a disabled individual qualifies as a service animal where as a dog who merely recognizes the needs of the disabled individual does not).[12] In addition, Appendix A to part 36 reiterates the DOJ policy that "*public accommodations are not required to admit any animal whose use poses a direct threat*."[13]

Third, the definition modifies the examples of task that can be performed by service animals, specifically changing the task of "minimal protection" to "non-violent protection."[14] The 1991 Title III regulation provided that "'minimal protection' was a task that could be performed by an individually trained service animal for the benefit of an individual with a disability.'"[15] Commentators to the amended regulations "urged the removal" of this language because it allowed "dogs trained to be aggressive to qualify as a service animal" merely by "pairing the animal" with a disabled individual, and it allowed "any untrained pet dog to qualify as a service animal, since many consider the mere presence of a dog to be a crime deterrent."[16] Additionally, commentators suggested that "there appears to be a broadly held misconception that aggression-trained animals are appropriate service animals for persons with post traumatic stress disorder (PTSD)."[17] As a policy matter, the DOJ "recognize[d] that an animal individually trained to provide aggressive protection, such as an attack dog, is not . . . a service animal" and amended the regulation to read "non-violent protection" in order to exclude "'attack dogs or dogs with traditional 'protection training' as service animals."[18]

Finally, the DOJ eliminated "emotional support" animals from the definition. The DOJ received some criticism from parties concerned that excluding emotional support animals "will lead to discrimination against and excessive questioning of individuals with non-visible or non-apparent disabilities" and because "emotional support" could constitute "work" the benefits disabled individuals.[19] Critics also allege the DOJ's definition of "service animal" should focus on the "nature of the person's disability" and "not on evaluating the animals involved."[20] However, the DOJ indicates that the new definition does cover animals that provide psychiatric service, so long as the animal is trained to respond as opposed to providing mere comfort to the handler. The DOJ's position is "based on the fact that Title II and Title III regulations govern a

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[12] *See Id.*

[13] *Id.* (emphasis added); *see also* 28 C.F.R. § 36.104 ("Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services, as provided in § 36.208."); *see also* 28 C.F.R. § 36.208(a) (providing that a public accommodation does not have to permit and individual to participate in the benefits provided by the public accommodation if the individual poses a direct threat "to the health or safety of others."); *see also* 28 C.F.R § 36.208(b) ("In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.").

[14] 28 C.F.R. pt 36 Appx A § 36.104

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

wider range of public settings than the housing and transportation setting for which the Department of Housing and Urban Development (HUD) and the DOT regulations allow emotional support animals or comfort animals."[21] The presence of animals in the housing setting provide fewer safety and health risks and the DOJ believes the presence of emotional support animals is "not required in the context of public accommodations, such as restaurants, hospitals, hotels, retail establishments, and assembly areas."[22]

b. Public Accommodations Duty to Accommodate.

The amended regulations provide for the same standard as that of the 1991 regulations but add more specific provisions regarding a public accommodations duty to modify its practices to allow for the use of service animals by disabled individuals. Section 36.302(c) provides:

> (1) *General*. Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.
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> (2) *Exceptions*. A public accommodation 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; or
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> (ii) The animal is not housebroken.
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> (3) *If an animal is properly excluded.* If a public accommodation properly excludes a service animal under § 36.302(c)(2), it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises.
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> (4) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).
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> (5) *Care or supervision*. A public accommodation is not responsible for the care or supervision of a service animal.
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> (6) *Inquiries*. A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

[21] *Id.*
[22] *Id.*

> (7) *Access to areas of a public accommodation*. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go.
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> (8) *Surcharges*. A public accommodation shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.
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> (9) *Miniature horses.*
>
> > (i) A public accommodation shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.
> >
> > (ii) Assessment factors. In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public accommodation shall consider--
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> > > (A) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
> > >
> > > (B) Whether the handler has sufficient control of the miniature horse;
> > >
> > > (C) Whether the miniature horse is housebroken; and
> > >
> > > (D) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.
> >
> > (iii) Other requirements. Sections 36.302(c)(3) through (c)(8), which apply to service animals, shall also apply to miniature horses.[23]

As a general matter, public accommodations are under the duty to modify "policies, practices, or procedures," to allow for the use of service animals by disabled individuals unless such modifications would "fundamentally alter the nature of goods, services, facilities, privileges, advantages, or accommodations."[24] In addition to denying the use of a service animal do to the fundamental alteration of the public accommodations goods or services, it may deny the use of a service animal if it's "out of control" or "not housebroken." Even if a service animal is properly excluded under § 36.302(c)(2), the public accommodation must allow the disabled individual "the opportunity to obtain goods and services" without the presence of the animal.[25]

[23] 28 C.F.R. § 36.302(c) (emphasis in original).
[24] *See Id.* at § 36.302(a).
[25] *See Id.* at § 36.302(c)(3).

Additionally, disabled individuals must have a harness or leash on the service animal while in the public accommodation, unless it interferes with the safe operation of the animal and public accommodations are not responsible for the supervisions of the service animal.[26]

At not time can a public accommodation ask about the "nature extend of the person's disability," but it may ask "two inquiries": (1) whether the animal is "required because of a disability"; and (2) what "work or tasks the animal has been trained to perform."[27] These inquiries are limited to situations when it is not readily apparent that a service animal is trained to do work (e.g. public accommodations "may not" inquire in situations where a "dog is observed guiding an individual who is blind.").[28]

Additionally, public accommodations "shall" allow disabled individuals and their service animals the same access to areas as that provided to the public and customers.[29] Public accommodations are also not allowed to charge disabled individuals with service animal fees; "even if people accompanied by pets are required" do so.[30]

Finally, § 36.302(9) significantly departs from both the limitation of "service animals" to dogs trained to do work by requiring public accommodations to modify its practices to "permit the use of miniature horses by an individual with a disability . . . if the miniature horse has been individually trained to do work."[31] Along with the limitations on the use of service animals described above (subsections (c)(3)-(8)), a public accommodation is also allowed broader leeway with its inquiries as to whether "modifications in policies, practices or procedures can be made." For example, public accommodations may consider: (1) the size and weight of the animal; (2) whether the handler has control over the animal; (3) whether the miniature horse is housebroken; and (4) whether the miniature horse would compromise safety requirements.[32] The DOJ decided to exclude miniature horses from the definition of service animal in § 36.104 and include a special provision in § 36.302 in order to allow the public accommodation more discretion as to whether it must accommodate the animal and its handler.[33] The DOJ was persuaded by comments to the final rule regarding the benefits of miniature horses to disabled individuals of larger stature, but allows the public accommodation more factors in which to base its duty to accommodate because miniature horses often vary in size to a greater extent than dogs.[34][35]

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[26] *Id.* at § 36.302(c)(4) and (5).
[27] *Id*. at § 36.302(c)(6).
[28] *See Id.*
[29] *Id.* at § 36.302(c)(7).
[30] *Id.* at § 36.302(c)(8).
[31] *Id*. at § 36.302(c)(9).
[32] *Id*.
[33] 28 C.F.R. pt 36 Appx C § 36.302
[34] *Id.*
[35] It's interesting to note that the DOJ seems particularly concerned with the safety and health concerns of allowing pets who act as mere comfort animals, but then allow the use of miniature horses, which seemingly would create the same, if not greater, safety and health concerns.

II. Effective Communication.

a. Duty to Provide Auxiliary Aids.

Public accommodations are under the general duty to ensure no disabled individual is "excluded, denied services, segregated, or otherwise treated differently . . . because of the absence of auxiliary aids and services," unless the provision of such services would "fundamentally alter the nature" of the goods and services provided or resulting in and "undue burden, i.e. significant difficulty or expense."[36] Even if a public accommodation is able to show fundamental alteration or undue burden, § 36.303(g) requires a public accommodation provide "alternative auxiliary aid[s] or service[s]" to "the maximum extent possible."[37]

b. Effective Communication.

Along with a detailed provision regarding examples of "auxiliary aids and services,"[38] §36.303 generally requires public accommodations to provide auxiliary aids and services that are "necessary to ensure effective communication" with disabled individuals.[39] The duty to ensure effective communication also extends to "companions who are individuals with disabilities," which are defined as "family member[s], friend[s], or associate[s]" of the non-disabled individual, who along with the non-disabled individual, "is an appropriate person with whom the public accommodation should communicate."[40] The duty to provide effective communication to companions is premised upon:

> [The DOJ's] *longstanding interpretation of the ADA* . . .that public accommodations have effective communication obligations with respect to companions who are individuals with disabilities even where the individual seeking to participate in or benefit from what a public accommodation offers does not have such a disability.[41]

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[36] 28 C.F.R. § 36.303(a).
[37] *Id.* at § 36.303(g).
[38] 28 C.F.R. § 36.303(b):
(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;
(2) Qualified readers; taped texts; audio recordings; Braille materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;
(3) Acquisition or modification of equipment or devices; and
(4) Other similar services and actions.
[39] 28 C.F.R § 36.303(c)(1).
[40] *Id*. at § 36.303(c)(1)(i).
[41] 28 C.F.R. pt 36 App C § 36.303 (emphasis added).

With respect to companions, the duty to provide effective communication is "critical in health care settings" because "miscommunication may lead to misdiagnosis and improper or delayed medical treatment."[42] Examples of this "critical" setting include, but are not limited to:

> [When] a companion may be legally authorized to make health care decision on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. In addition, a companion may be the patient's next of kin or health care surrogate with whom the hospital personnel need to communicate concerning the patient's medical condition. Moreover, a companion could be designated by the patient to communicate with hospital personnel about the patient's symptoms, needs, or medical history . . . .*It has been the [DOJ's] longstanding position that public accommodations are required to provide effective communication to companions when they accompany patients to medical care providers for treatment.*[43]

Section 36.303 prohibits the converse of the above situation, prohibiting a public accommodation from requiring an "individual with a disability to bring another individual to interpret for him or her."[44] Public accommodations also prohibited from "rely[ing] on an adult accompanying an individual with a disability to interpret or facilitate communication," except in emergency situations or where the disabled individual requests the accompanying adult interpret.[45] With respect to reliance on an accompanying child, § 36.303(c)(4) prohibits the same type of reliance but limits the exception only to emergency circumstances.[46]

Section 36.303(f) provides for specific circumstances where the public accommodation provides a qualified interpreter via video remote interpreting (VRI) services. In such a case, the regulation requires a high-speed Internet connection, adequate video display, and audio equipment.[47]

The duty to provide effective communication also extends to telecommunications. A public accommodation that uses "automated-attendant systems" for "receiving and directing telephone calls" must ensure its system includes text telephones (TTYs).[48] For "incidental" operations, a public accommodation may use "relay services in place of direct telephone communications."[49]

Additionally, § 36.301(c) remains unchanged from the 1991 standards, and prohibits a public accommodation from imposing a surcharge to cover the cost of auxiliary ands and services. This includes situations in the medical context where a public accommodation arranges

[42] *Id.*
[43] *Id.* (emphasis added).
[44] 28 C.F.R. § 36.303(c)(2).
[45] *Id.* at § 36.303(c)(3).
[46] *See Id.* at § 36.303(c)(4).
[47] *See* 28 C.F.R. § 36.303(f).
[48] 28 C.F.R. § 36.303(d)(1).
[49] 28 C.F.R. § 36.303(d)(3).

services for an appointment and the disabled party "cancels his or her appointment at the last minute or is a 'no-show.'"[50]

c. Type of Auxiliary Aids Necessary.

Section 36.303(1)(ii) gives a degree of deference to the public accommodation in determining the "type of auxiliary aid or service necessary."[51] In the creation of the new regulation, the DOJ codified its recognition that the provision of effective communication necessarily depends on the "method of communication used" by the disabled individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place."[52] Accordingly, so long as effective communication is provided, the *ultimate decision"* as to what auxiliary aids and services to provide "*rest with the public accommodation*."[53] Despite this, the regulation suggests a public accommodation "should" consult with a disabled individual before the determination on the necessity of auxiliary aids and services.[54] Although seemingly discretionary, a public accommodation that merely provides uniform auxiliary aids and services without assessing the individual needs of the disabled party does so at its own peril, "because the auxiliary aids and services necessary to provide effective communication may fluctuate."[55]

Ultimately, the DOJ comments and some case law suggest that the primary factor in the determination of what type of auxiliary aid is necessary, particularly in the medical context, is the complexity of communication involved.[56] The DOJ suggests that a hospital gift shop may provide written notes to a hearing impaired individual, but during a discussion of diagnosis, procedures, treatment, or proscribed medication, hospital personnel should have a qualified interpreter present.[57]

III. Requirements of Places of Lodging.

The amended regulations to Title III both expand the definition of "place of lodging" and provide for explicit requirements regarding reservations made by disabled individuals.

a. Place of Lodging Definition.

A place of lodging is a "public accommodation" if it's an "inn, hotel, or motel," a facility which provides guest rooms for stays "that are primarily short term in nature" (30 days or less

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[50] 28 C.F.R. pt 36 Appx C § 36.303
[51] 28 C.F.R. § 36.303(1)(ii).
[52] *Id.*
[53] *Id* (emphasis added); *see also* 28 C.F.R. pt 36 Appx C § 36.303 ("[T]he regulation strongly encourages the public accommodation to engage in a dialogue with the individual with a disability to determine what auxiliary aids and services are appropriate under the circumstances.").
[54] 28 C.F.R. § 36.303(1)(ii).
[55] 28 C.F.R. pt 36 Appx C § 36.303.
[56] *See Id.; see also Majocha v. Turner*, 166 F.Supp.2d 316, 322-333 (W.D. Penn. 2001) (Denying a defendant's motion for summary judgment when it was alleged a doctor insisted on written notes would be sufficient to communicate with an infant child's hearing impaired parent. The court reasoned that when considering the adequacy of alternatives, it is the complexity of the information that weights in favor of requiring an interpreter.).
[57] *See* 28 C.F.R. pt 36 Appx C § 36.303.

where the occupant does not have a right to a specific room after the stay), or a facility that provides guest rooms "under conditions and with amenities similar to a hotel, motel, or inn."[58]

In addition its duty to accommodate under §36.302, new construction or alterations at places of lodging are also subject to the 2010 Accessible Design Standards under § 36.406, subject to one major exception. Section 36.406(c)(2) exempts alterations to guest rooms in facilities that have ownership structures that allow for individually owned units. In such a case where guest rooms are not owned by the entity that owns or leases, the overall facility and the interior physical features of the guest rooms are owned and controlled by the individual occupant, alterations are not subject to the 2010 Accessible Design Standards. [59]

b. Duty to Reserve Rooms.

Subsection (e) is a new addition to §36.302 and sets out specific requirements for places of lodging taking reservations made by "telephone, in-person, or through a third party."[60] As a general matter, places of lodging modify their practices and procedures to ensure disabled parties can reserve "accessible guest rooms" in the "same manner as individuals who do not need accessible rooms."[61] In addition, the reservation service of places of lodging must be able to describe the accessible features in guest rooms, places of lodging must not provide accessible rooms to non-disabled individuals until they are the only type remaining, and must allow third-party, non-disabled individuals to rent guest and hotel rooms for disabled individuals.[62]

IV. Mobility Devices.

With respect the mobility devices, the amended regulations serve three functions. First, it adds two definitions for "other-power driven mobility devices" and "wheelchair[s]."[63] Second, it provides for a new section requiring public accommodations to modify its practices in order to accommodate individuals requiring the use of mobility devices.[64] Finally, it expressly limits the type of inquiries that can be made about an individual's disability and their use of a mobility device.[65]

a. Definitions of Power-Driven Mobility Devices and Wheelchairs.

Title III regulations now provide that "[o]ther power-driven mobility device[s]" mean:

> *[A]ny mobility device powered by batteries, fuel, or other engines--whether or not designed primarily for use by individuals with mobility disabilities--that is used by individuals with mobility disabilities for the purpose of locomotion,* including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined

[58] 28 C.F.R. § 36.104.
[59] *Id* at § 36.406(c)(2).
[60] *Id*. at § 36.302(e).
[61] *Id.*
[62] *Id.*
[63] *See* 28 C.F.R. § 36.104.
[64] *See* 28 C.F.R. § 36.311(a)-(b).
[65] *See* 28 C.F.R. § 36.311(c).

> pedestrian routes, but that is not a wheelchair within the meaning of this section. *This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).*[66]

The DOJ received comments criticizing the allowance of mobility devices powered by "fuel," as these commentators believed "power-driven mobility devices must be assessed, particularly as to their environmental impact."[67] The DOJ specifically declined to exclude fuel power devices because it did "not want the definition to be so narrow that it would foreclose the inclusion of new technological developments," believing that at some point "technological developments may result in the production of safe-fuel powered mobility devices."[68] Until that time, the DOJ believes that the ability of a public accommodation to claim a fundamental alteration or assert legitimate safety requirements "will likely prevent the use of fuel and combustion engine-driven devices indoors."[69] Also, the definition specifically excludes application the Federal wilderness areas, which governs the use of wheelchairs under 42 U.S.C. § 12207(c)(2) (wheelchair means "device [for the mobility impaired] . . . that is suitable for use in an indoor pedestrian area.).[70]

The amended title III regulations also add a definition for "wheelchair," which means "a manually operated or power-driven device [used by the mobility impaired] . . . for the main purpose of indoor or both indoor and outdoor locomotion."[71] Similar to "other-power driven mobility devices," the definition of "wheelchair" does not apply to Federal wilderness areas.[72]

(1) Public Accommodation's Duty to Accommodate Mobility Devices.

Section 36.311 creates a two tiered approach, differentiating a public accommodations duty as it pertains to "wheelchairs" and "other power-driven mobility devices."[73] Additionally, section 36.311 limits the types of inquires that can be made when public accommodations desire assurance that an individuals mobility limitations are legitimate.[74]

A. Two-tiered approach.

Sections 36.311(a) and (b) create the two-tiered approach, which respectively requires public accommodations admit all disabled individuals using wheelchairs (manually or power driven) and requires public accommodations to admit "other-power driven mobility devices," unless they "cannot be operated in accordance with legitimate safety requirements."[75]

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[66] 28 C.F.R. § 36.104 (emphasis added).
[67] *See* 28 C.F.R. pt 36 Appx A § 36.104.
[68] *Id*.
[69] *Id*.
[70] 28 C.F.R. § 36.104; *see also* 42 U.S.C. § 12207(c)(1) (Nothing in the Wilderness Act, 16 U.S.C. § 1131 *et seq*., prohibits the use of wheelchairs, but "no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify an conditions of lands within a wilderness area in order to facilitate such use."); *see also* 42 U.S.C. § 12207(c)(2) (wheelchair means "device suitable for an indoor pedestrian area").
[71] 28 C.F.R. § 36.104.
[72] *Id*.
[73] *See* 28 C.F.R. § 36.311(a), (b).
[74] *See* 28 C.F.R. § 36.311 (c)(1)-(2).
[75] *See* 28 C.F.R. § 36.311(a); (b).

The first tier (subsection (a)) takes away all public accommodation discretion with respect to the admittance of wheelchairs (*see* 28 C.F.R. § 36.104; wheelchair means manually or power driven device for indoor or outdoor mobility) and "other manually-powered mobility aids" in areas "open to pedestrian use."[76] Business commentators criticized this rule because of the fear that "individuals with mobility disabilities would make [other power-driven mobility devices] akin to wheelchairs," which would require the public accommodation to change their faculties to accommodate such use.[77] The DOJ responded, calling this fear "misplaced" because facilities need only comply with the 1991 or the 2010 Accessible Design Standards. Also, the Title III regulations contain a "safe harbor" pertaining to alterations and paths of travel which provides that public accommodations that are built or altered in compliance with the 1991 Accessible Design Standards, need not be brought into compliance with the 2010 Accessible Design Standards unless the facility is subject to planned alteration.[78] Additionally, efforts to remove barriers in existing faculties do not trigger the paths of travel requires of § 36.403 (regarding paths of travel to primary function areas).[79]

The second tier (subsection (b)) requires public accommodations:

> [To] make reasonable modifications . . . . to permit the use of other power-driven mobility devices . . . unless [the power-driven mobility device is the type that] . . . cannot be operated in accordance with legitimate safety requirements . . . pursuant to § 36.301(b) [safety requirements must be based on actual risk].[80]

In determining whether a public accommodation must reasonably accommodate for an "other power-driven mobility device," it "shall consider":

> (i) The type, size, weight, dimensions, and speed of the device;
> (ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);
> (iii) The facility's design and operational characteristics (e.g., whether its business is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);
> (iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and
> (v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.[81]

The DOJ commentary provides that the default rule is that public accommodations are to allow the use of "other power-driven mobility devices" and it is the burden of the public

[76] 28 C.F.R. § 36.311(a).
[77] 28 C.F.R. pt 36 Appx C § 36.311.
[78] *See* 28 C.F.R. § 36.304(d)(1)-(2).
[79] *See Id.*
[80] 28 C.F.R. § 36.311(b); *see also* 28 C.F.R. § 36.301(b) ("A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risk and not mere speculation, stereotypes, or generalizations about individuals with disabilities.").
[81] 28 C.F.R. § 36.311(b)(2)(i)-(v).

accommodation to "prove the existence of a valid exception."[82] Additionally, it is important to note that the analysis regarding the aforementioned factors "*must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.*"[83]

(2) Limitation on Inquires Made by a Public Accommodation.

The amended regulations are again split into a two-tiered approach with respect to inquiries made by a public accommodation. In sum, § 36.311(c)(1)-(2) prohibits any inquiry into the nature and extend of any individuals disability, regardless of the mobility device used, but allows inquiries asking for "credible assurance" that an "other power-drive mobility device" is needed because of an individual's disability.[84]

First, at no time may a public accommodation "ask an individual using a wheelchair or other-power driven mobility device questions about the nature and extent of the individual's disability."[85]

Second, a public accommodation "may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability."[86] Forms of credible assurance that are presumptively valid include: (1) a "valid, State-issued disability parking placard or card" that is "presented by the individual to whom it was issued";[87] or (2) "State-issued proof of disability."[88] The DOJ suggests that although these forms are presumptively valid, a public accommodation cannot limit credible assurance to only these two forms because "not all persons with mobility disabilities have such means of proof."[89] Accordingly, in lieu of the aforementioned forms, a public accommodation "*shall accept . . . a verbal representation, not contradicted by observable fact*, that the other power-driven mobility device is being used for a mobility disability."[90]

V. Accessible Design Standards.

The 2010 Accessible Design Standards ("2010 Standards") are far too long and detailed to be summarized for the purposes of this article. However, it is important for public accommodations to understand when the requirements of the 2010 Standards are triggered. As set forth below, the compliance dates and safe harbor provisions are discussed along with the types of alterations to paths of travel that will trigger the requirements of the 2010 Standards.

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[82] *See* 28 C.F.R. pt 36 Appx C § 36.311 ("[P]ublic accommodations are by default required to permit the use of other power-driven mobility devices; the burden is on them to prove the existence of a valid exception.").
[83] 28 C.F.R. pt 36 Appx C § 36.311 (emphasis added).
[84] *See* 28 C.F.R. § 36.311(c)(1)-(2).
[85] 28 C.F.R. § 36.311(c)(1).
[86] 28 C.F.R. § 36.311(c)(2).
[87] *Id.*
[88] *Id.*
[89] 28 C.F.R. pt 36 Appx. C § 36.311.
[90] 28 C.F.R. § 36.311(c)(2) (emphasis added).

a. Compliance Dates.

The relevant date for public accommodations governed by Title III of the ADA who make alterations to existing construction is January 26, 1992.[91] Neither the 1991 Accessible Design Standards ("1991 Standards") nor the 2010 Standards apply if there has not been an "alteration" on or after January 26, 1992, and the public accommodation is merely responsible for barrier removal.[92] If an alteration does occur, compliance dates regarding the various standards are set forth in the table below:[93]

Compliance Dates for New Construction and Alterations	**Applicable Standards**
On or after January 26, 1993, and before September 15, 2010	**1991 Standards**
On or after September 15, 2010, and before March 15, 2012	**1991 or 2010 Standards**
On or after March 15, 2012	**2010 Standards**

[94]

Compliance dates are determined by the date in which the state or county receives the last application for a building permit, or if no permit is required, the date physical construction or alteration occurs.[95] Additionally, the new regulations provide for a "safe harbor" whereby elements that were built or altered in compliance with the 1991 Standards do not have to comply with the 2010 Standards, unless and until those elements are subject to a planned alteration (relevant dates for compliance regarding alterations are set forth above).[96] As a general matter, public accommodations must ensure alterations result in the "maximum physical accessibility feasible."[97]

b. Standards Regarding Paths of Travel.

Whether or not alterations at a public accommodation will be subject to standards governing paths of travel will depend on whether the planned alteration affects or could affect a "primary function." If alterations are to a "primary function," the public accommodation must comply with the standards governing paths of travel up to 20 percent of the total cost of its

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[91] *See Alford v. City of Cannon Beach*, 2000 WL 33200554 (Jan. 17, 2000); *see also* 28 C.F.R. 36.402(a).
[92] *See Id*; *see also* 28 C.F.R. § 36.304.
[93] *Compliance Date*: When the ADA was first enacted, the compliance dates for various provisions were delayed to allow covered entities to become familiar with the new regulations. Therefore, title II and title III of the ADA became effective on January 26, 1992, six months after the regulations were published. For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993 – 18 months after the 1991 Standards were published by the Department of Justice. *See* 28 C.F.R. pt 36 Appx D § 36.406.
[94] *See* 28 C.F.R. § 36.406.
[95] *See id.*
[96] *See* 28 C.F.R. 36.304(d)(2)
[97] 28 C.F.R. § 36.402

planned alterations. On the other hand, if the alteration does not affect a "primary function," the public accommodation is only subject to the requirements of § 36.304 regarding barrier removal that is readily achievable.

(1) Definition of "Primary Function" Alterations.

A primary function is "*a major activity for which the facility is intended*."[98] The regulations further provide:

> Areas that contain a primary function include, but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, and restrooms are not areas containing a primary function.[99]

Additionally, alterations that affect the "usability of or access to" areas containing a primary function include, but are not limited to:

> (i) Remodeling merchandise display areas or employee work areas in a department store;
> (ii) Replacing an inaccessible floor surface in the customer service or employee work areas of a bank;
> (iii) Redesigning the assembly line area of a factory; or
> (iv) Installing a computer center in an accounting firm.
> (2) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.[100]

(2) Alterations Affecting a "Primary Function."

An alteration that affects or could affect access to a faculty's primary function:

> *[S]hall* be made so as to ensure, to the maximum extent feasible, the path of travel to the altered area . . . are readily accessible [to individuals with disabilities] . . . *unless the cost and scope of such alteration is disproportionate to the cost of the overall alteration.*[101]

Any alteration that "affects or could affect" a primary function must comply either with the 1991 Standards or the 2010 Standards according to the table set forth in Section V(1).

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[98] 28 C.F.R. § 36.403(b)
[99] 28 C.F.R. § 36.403(b).
[100] 28 C.F.R. § 36.403(c).
[101] 28 C.F.R § 36.403(a) (emphasis added).

Essentially, if alterations affect access to a primary function, the public accommodation must expend money altering the paths of travel (according to either the 1991 Standards or 2010 Standards, depending on the date of construction), unless "the cost and scope of such alterations is disproportionate to the cost of the overall alteration."[102] Alterations to paths of travel are presumptively "disproportionate" when "the cost [to alter paths of travel] *exceeds 20% of the cost of the alteration to the primary function area*."[103][104]

c. Alterations Not Affecting a "Primary Function."

Alterations that do not affect a "primary function" are governed by § 36.402 and the barrier removal requirements of § 36.304. In sum, if alterations do not affect a primary function, the public accommodation must, "to the maximum extent feasible," ensure "the altered portions of the facility are readily accessible" to individuals with disabilities.[105] Even if there have been no alterations after January 26, 1992/93, barriers within a public accommodations facilities are still considered "existing" and must be removed to the extent "readily achievable."[106]

"Readily achievable" means "*easily accomplishable and able to be carried out without much difficulty or expense*."[107] Additionally, public accommodations need not fear that barrier removal will subject them to the paths of travel requirements contained in § 36.403 because such requirements are not triggered by "measures taken solely to comply with . . . barrier removal requirements"[108] In determining whether a barrier removal is "readily achievable," courts are to consider:

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[102] *See* 28 C.F.R. § 36.403(a).
[103] 28 C.F.R. § 46.403(f)(1) (emphasis added).
[104] Additionally, if an alteration affects a "primary function," of a public accommodation operating an outdoor developed area, the US Access Board suggests that public accommodations can seek guidance from the *2009 Draft Final Guidelines for Federal Outdoor Developed Areas* ("Federal Guidelines") (attached to memo). These guidelines are not yet law, but are recommended as best practices and the US Access Board provides that further guidelines will be forthcoming for public entities (Title II) and public accommodations (Title III). *See* http://www.access-board.gov/outdoor/draft-final.htm (last visited April 12, 2011).
[105] 28 C.F.R. § 36.402(a).
[106] *See* 28 C.F.R. § 36.304; *see also* 42 U.S.C. § 12181(9). Barrier removal is a continuing obligation. An "existing facility" is: "a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered." 28 C.F.R. § 36.104. Essentially, what this means is that even a newly constructed facility is an "existing facility" subject to the continuing obligation to remove barriers when readily achievable. New facilities must comply with standards applicable (either the 1991 Standards or the 2010 Standards, depending on the date of construction). *See* 28 C.F.R. § 36.104 Appx. A. Any facility built prior to 1992/1993 is only subject to the obligation to remove existing barriers when readily achievable, where as facilities built after 1993 are subject to either the 1991 Standards or the 2010 Standards and subject to the continuing requirement to remove barriers when readily achievable.
[107] 28 C.F.R. § 36.304(a) (emphasis added); *see also* 28 C.F.R. § 36.304(b) (The regulations provide for a series of examples regarding readily achievable barrier removals, which include, but are not limited to: (i) installing ramps, (ii) making curb cuts in sidewalks and entrances, (iii) widening doors, (eliminating a turnstile or providing an alterative accessible path, (iv) creating accessible parking spaces, etc).
[108] *See* 28 C.F.R. § 36.304(d).

> (A) the nature and cost of the action needed under this chapter;
> (B) the overall financial resources of the facility . . . the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
> (C) the overall financial resources of the covered entity . . .the overall size of the business . . . with respect to the number of its employees; the number, type, and location of its facilities; and
> (D) the type of operation . . . including the . . . function of the workforce . . . [the] administrative or fiscal relationship of the facility or the facilities in question to the covered entity.[109]

It should also be noted that even if barrier removal is not "readily achievable," the ADA can still be violated by the "failure to make such goods, services, facilities . . . or accommodations available through alterative methods if such methods are readily achievable."[110] In essence, the ADA requires public accommodations to develop alternative methods for serving disabled individuals, but again allows the public accommodation to escape such an obligation if it's not "readily achievable."[111]

Finally, § 36.304(d) requires facilities that have not been altered (i.e.. not altered since January 26, 1992) must comply with the regulations to the extent "readily achievable," which again is determined by whether compliance can be achieved at low or moderate costs.[112] The standards that noncompliant public accommodation must follow, to the extent readily achievable are:

- Facilities or elements not in compliance before March 15, 2012, can comply, to the extent readily achievable with the 1991 Standards or the 2010 Standards. Public accommodations compliant with the 1991 Standards to the extent readily achievable prior to March 15, 2012, will be covered by the safe harbor rule of § 36.304(d)(2)(i).
- Facilities or elements not in compliance on or after March 15, 2012, must comply to the extent readily achievable with the 2010 Standards.[113]

VI. Conclusion.

The changes to Title III of the ADA Amendments Act and the corresponding regulations will have significant impact on the manner in which private businesses and groups interact with the disabled community. Many of the changes in the regulations came about due to case law and consent decrees from the past two decades. These new regulations now provide explicit guidance on handling a number of situations that may not have previously been clear.

[109] 42 U.S.C. § 12181(9)(A)-(D).
[110] 42 U.S.C. § 12182(b)(2)(A)(v).
[111] *Id*.
[112] 28 C.F.R. § 36.304(d).
[113] *See* 28 C.F.R § 36.304(d)(2)(ii)(A) and (B).