FROM THE BOARD OF DIRECTORS OF THE OFFICE OF COMPLIANCE:

NOTICE OF ADOPTION OF REGULATIONS AND SUBMISSION FOR APPROVAL.

REGULATIONS EXTENDING RIGHTS AND PROTECTIONS UNDER THE AMERICANS WITH DISABILITIES ACT ("ADA") RELATING TO PUBLIC SERVICES AND ACCOMMODATIONS, NOTICE OF ADOPTION OF REGULATIONS AND SUBMISSION FOR APPROVAL AS REQUIRED BY 2 U.S.C. § 1331, THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, AS AMENDED ("CAA").

Summary:

The Congressional Accountability Act of 1995, PL 104-1 ("CAA"), was enacted into law on January 23, 1995. The CAA, as amended, applies the rights and protections of thirteen federal labor and employment statutes to covered employees and employing offices within the legislative branch of the federal government. Section 210 of the CAA provides that the rights and protections against discrimination in the provision of public services and accommodations established by Titles II and III (sections 201 through 230, 302, 303, and 309) of the Americans With Disabilities Act of 1990, 42 U.S.C. §§12131-12150, 12182, 12183, and 12189 ("ADA") shall apply to legislative branch entities covered by the CAA. The above provisions of section 210 became effective on January 1, 1997. 2 U.S.C. §1331(h).

The Board of Directors, Office of Compliance, after considering comments to its Notice of Proposed Rulemaking ("NPRM") published on September 9, 2014 in the Congressional Record, has adopted, and is submitting for approval by the Congress, final regulations implementing section 210 of the CAA.

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Supplementary Information:

Background and Summary

Section 210(b) of the CAA provides that the rights and protections against discrimination in the provision of public services and accommodations established by the provisions of Titles II and III (sections 201 through 230, 302, 303, and 309) of the Americans With Disabilities Act of 1990, 42 U.S.C. §§12131-12150, 12182, 12183, and 12189 (”ADA”) shall apply to specified legislative branch offices. 2 U.S.C. §1331(b). Title II of the ADA prohibits discrimination on the basis of disability in the provision of services, programs, or activities by any “public entity.” Section 210(b)(2) of the CAA defines the term “public entity” for Title II purposes as any of the listed legislative branch offices that provide public services, programs, or activities. 2 U.S.C. §1331(b)(2). Title III of the ADA prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards.

Section 210(e) of the CAA requires the Board of Directors of the Office of Compliance to issue regulations implementing Section 210. 2 U.S.C. §1331(e). Section 210(e) further states that such regulations “shall be the same as substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement the statutory provisions referred to in subsection (b) of this section except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.” *Id.* Section 210(e) further provides that the regulations shall include a method of identifying, for purposes of this section and for different categories of violations of subsection (b), the entity responsible for correction of a particular violation. 2 U.S.C. §1331(e)(3). On September 9, 2014, the Board published in the Congressional Record a NPRM, 160 Cong. Rec. H7363 & 160 Cong. Rec. S5437 (daily ed., Sept. 9, 2014). In response to the NPRM, the Board received four sets of written comments. After due consideration of the comments received in response to the proposed regulations, the Board has adopted and is submitting these final regulations for approval by Congress.

Summary of Comments and Board's Adopted Rules

A. Request for additional rulemaking proceedings.

One commenter requested that the Board withdraw its proposed regulations and "create" new regulations. The commenter suggested that the Board's authority to adopt regulations does not include the authority to incorporate existing regulations by reference and also suggested that the Board would be adopting future changes to the incorporated regulations unless it specified that the regulations in existence on the adoption date were the ones being incorporated rather than the regulations in existence on the issuance date (which was proposed in the NPRM and occurs after Congress has approved the regulations). The Board has determined that further rulemaking proceedings are not required because the publication requirements of Section 304(b)(1) of the CAA, which requires compliance with 5 U.S.C. § 553(b), is satisfied by incorporating "material readily available to the class of persons affected" by the proposed regulation. See, 5 U.S.C. § 552(a)(1)(E). Nonetheless, in response to this comment, the Board has modified the proposed regulation to incorporate the regulations in existence on the adoption date rather than the issuance date. In addition, to further avoid any confusion, the adopted regulations require that the full text of the incorporated regulations be published on the Office of Compliance website.

B. General comments regarding proposed regulations.

1. Compliance with both Titles II and III of the ADA.

Several commenters questioned whether it was necessary to adopt regulations under both Titles II and Title III when Title II typically applies only to public entities and Title III typically applies only to private entities. Section 210 of the CAA can be confusing because it requires legislative branch offices (which are "public entities") to comply with sections of the ADA that are part of both Title II and Title III. Ordinarily, as the commenters suggested, the major distinction between Title II and Title III of the ADA is that Title II solely applies to public entities while Title III solely applies to private entities that are considered public accommodations. In contrast, under the CAA, the legislative branch offices listed in Section 210(a) must comply with Sections 201 through 230 of Title II of the ADA and Sections 302, 303 and 309 of Title III of the ADA. 42 U.S.C. § 1331(b)(1). For purposes of the application of Title II of the ADA, the term "public entity" means any of these legislative branch offices. 42 U.S.C. § 1331(b)(2). For the purposes of Title III of the ADA, the CAA does not incorporate the definitions contained in Section 301 of Title III, which limits the application of Title III to private entities which own, operate, lease or lease to places of public accommodation. Consequently, since the CAA expressly applies Title III to legislative branch offices that are "public entities," those offices must at all times provide services, programs and activities that are in compliance with Title II of the ADA and, when those services, programs, activities or accommodations are provided directly to the public (as in places of public accommodations), they must also comply with Sections 302, 303 and 309 of Title III of

the ADA. In other words, services, programs and activities that involve constituents and other members of the public must comply with both Titles II and III of the ADA, while those services, programs and activities that are not open or available to the public must only comply with Title II (and Title I when employment practices are involved).

As noted in the NPRM, Congress applied provisions of both Title II and Title III of the ADA to legislative branch offices to ensure that individuals with disabilities are provided the most access to public services, programs, activities and accommodations provided by law. To that end, the NPRM proposed an admittedly simple rule for deciding which regulation applies when there are differences between the applicable Title II and Title III regulations: the regulation providing the most access shall be followed. In response to the concerns expressed by the commenters, the Board has further reviewed the Title II and III regulations and determined that, when the regulations address the same subject, compliance with the applicable Title II regulation will be sufficient to meet the requirements of both Title II and Title III. For this reason, and to eliminate the potential confusion expressed by the commenters, the Board has adopted only the DOJ's Title II regulation when the DOJ's Title II and Title III regulations address the same subject.

2. Providing services, programs, activities or accommodations directly to the public out of a leased space.

Several commenters raised questions regarding how the regulations would be applied when a legislative branch office is leasing space from a private landlord. Under the ADA regulations (both Title II and Title III), the space being leased, the building where it is located, the building site, the parking lots and the interior and exterior walkways are all considered to be "facilities." If the facility is being used to meet with members of the public, under the CAA, the facility is a place of public accommodation operated by a public entity and therefore the office must meet the obligations imposed by those sections of Titles II and III of the ADA applied to legislative branch entities under the CAA. Because the private landlord is leasing a facility to a place of public accommodation, the private landlord will also have to comply with the DOJ's Title III regulations, subject to enforcement by the DOJ or by an individual with a disability through legal action. The private landlord is not covered by the CAA.

Under the DOJ regulations that are incorporated by the adopted regulations, the obligations imposed by Title II and Title III differ depending upon when the leased facility was constructed. Entities covered by either Title II or Title III of the ADA (or both) must have designed and constructed their facilities in strict compliance with the applicable ADA Standards for Accessible Design (ADA Standards) if they were constructed after January 26, 1992. This means that both landlords and tenants are legally obligated to remove all barriers to access in such leased facilities caused by noncompliance with the applicable ADA Standards. Alterations made after

January 26, 1992 to facilities constructed before January 26, 1992 must also be in compliance with the ADA Standards to the maximum extent feasible, and any alterations made to primary function areas after this date trigger a separate obligation to make the path of travel to those areas accessible to the extent that it can be made so without incurring disproportionate costs. If barriers to access exist in these alterations and in the path of travel to altered primary function areas, both the landlord and the tenant are legally obligated to remove those barriers. The regulations allow consideration of the provisions of the lease to determine who is primarily responsible for performing the barrier removal work;[1] however, because the legal duty is jointly imposed upon both of the parties, legal liability for any violation cannot be avoided by a private contract.[2]

All entities covered by Title III of the ADA who are lessors or lessees of facilities that were both constructed after January 26, 1992, and not altered since that date, must remove access barriers if such removal is "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv), 28 C.F.R. § 36.304. The phrase "readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9); 28 C.F.R. § 36.304(a). Examples of "readily achievable" steps for removal of barriers include: installing ramps; making curb cuts in sidewalks and entrances; repositioning shelves, furniture, vending machines, displays, and telephones; adding raised markings and elevator control buttons; installing visual alarms; widening doors; installing accessible door devices; rearranging toilet partitions to increase maneuvering space; raising toilet seats; and creating designated accessible parking spaces. 28 C.F.R. § 36.304(b).

Because legislative branch offices are "public entities" that must always comply with Title II of the ADA, these offices must also operate each of their services, programs and activities so that the service, program or activity, when viewed in its entirety, is readily accessible to and usable

[1]28 C.F.R. § 36.201(b) reads as follows: "Landlord and tenant responsibilities. Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract."

[2]The DOJ's illustrations and descriptions in its Technical Assistance Manuals regarding compliance with Titles II and Title III by tenants and landlords make this clear. See, U.S. Dept. of Justice, *ADA Title III Technical Assistance Manual* § III.-1.2000 (Nov. 1993) ("The title III regulation permits the landlord and the tenant to allocate responsibility, in the lease, for complying with particular provisions of the regulation. However, any allocation made in a lease or other contract is only effective as between the parties, and both landlord and tenant remain fully liable for compliance with all provisions of the ADA relating to that place of public accommodation."); U.S. Dept. of Justice, *ADA Title II Technical Assistance Manual* § II.-1.3000 (Nov. 1993) (Both manuals are available online at www.ada.gov). Also see, Gabreille P. Whelan, Comment, *The "Public Access" Provisions of Title III of the Americans with Disabilities Act,* 34 Santa Clara L.Rev. 215, 217–18 (1993).

by individuals with disabilities. 28 C.F.R. § 35.150(a). While this requirement does not usually require a public entity to make each of its existing facilities accessible and usable by individuals with disabilities [28 C.F.R. § 35.150(a)(1)], a public entity must "give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate" when choosing a method of providing readily accessible and usable services, programs and activities. While structural changes in existing facilities are not required when the public entity can show that other methods are effective in meeting this access requirement, when a public entity is renting solely one facility in a locality, the only practical method of providing accessibility is to make sure that this leased facility is readily accessible. When a legislative branch office has only one facility in a particular locality and uses that facility to conduct meetings with constituents, it can be difficult, if not impossible, for that office to show that each of its programs, services and activities meet the accessibility requirements of 28 C.F.R. § 35.150 when that facility is not readily accessible. Constituents using wheelchairs who are unable to attend meetings at a local Congressional office because the facility is not readily accessible do not find that each of the office's services, programs or activities, when viewed in its entirety, is readily accessible or usable by them. Offices are usually placed in a locality so that staff can meet personally with constituents who live nearby. Nearby constituents using wheelchairs who find that they cannot personally participate in such meetings upon reaching the facility are effectively being denied the access being provided to other constituents.

Because the adopted regulations adequately explain the rights and responsibilities of the parties involved in leasing facilities to public entities or public accommodations, the adopted regulations contain no changes based upon these comments.

3. Access requirements in rural and urban areas.

One commenter suggested that the Board should recognize that the access requirements in rural areas differ from those in urban areas and should therefore adopt regulations that recognize this distinction. The ADA is a civil rights statute and not a building code, although it is sometimes mistakenly viewed as one. While alterations and construction in rural areas may not be regulated by local building codes, under the ADA, the individuals with disabilities living in those areas are entitled to the same rights and protections as those living in urban areas. This means that public entities and public accommodations must comply with the same applicable ADA access requirements regardless of their location. For this reason, following the DOJ and DOT, the Board has not made any changes in the proposed regulations to reflect distinctions between rural and urban areas.

4. Accessibility requirements for leased facilities.

In the NPRM, the Board proposed adoption of an Access Board regulation based on 36 C.F.R. §

1190.34 (2004)[3] which since July 23, 2004 has been incorporated into the Access Board's Architectural Barriers Act Accessibility Guidelines ("ABAAG").[4] This regulation provides that buildings and facilities leased with federal funds shall contain certain specified accessible features.[5] Buildings or facilities leased for 12 months or less are not required to comply with the regulation as long as the lease cannot be extended or renewed.

The Access Board's leasing regulation implements a key provision of the Architectural Barriers Act ("ABA") which Congress originally passed in 1968 and amended in 1976. The ABA was originally enacted "to insure that all public buildings constructed in the future by or on behalf of the Federal Government or with loans or grants from the Federal Government are designed and constructed in such a way that they will be accessible to and usable by the physically handicapped." S.Rep. No. 538, 90th Cong., 1st Sess., *reprinted in* 1968 U.S.Code Cong. & Admin.News 3214, 3215. Prior to being amended in 1976, the ABA covered only leased facilities that were "to be leased in whole or in part by the United States after [August 12, 1968], after construction or alteration in accordance with plans and specifications of the United States." Pub.L. No. 90-480 § 1, 82 Stat. 718 (1968). In 1975, the GAO issued a report to Congress entitled *Further Action Needed to Make All Buildings Accessible to the Physically Handicapped* which found that "leased buildings were consistently more inaccessible [than federally-owned buildings] and posed the most serious problems to the handicapped" and further found that "[s]ince the Government leases many existing buildings without substantial alteration, the [ABA's] coverage is incomplete to the extent that those buildings are excluded." Comptroller General, *Further Action Needed to Make All Buildings Accessible to the Physically Handicapped* (July 15, 1975) at 25, 28. In response to the GAO Report, Congress amended the ABA by

[3] Several commenters correctly noted that the NPRM contains a technical error because the year (2004) was omitted from the C.F.R. citation, which was a potential source of confusion because the regulation was removed from the C.F.R. in 2004 when the substance of the regulation became part of the ABA Guidelines at § F202.6. Fortunately, all of the commenters were sufficiently able to ascertain the subject matter of the proposed regulation to participate fully in the rulemaking process by providing detailed comments about the proposed regulation, which is all that is required of a NPRM. See *e.g., Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1121 (D.C. Cir. 1980); and *Am. Med. Ass'n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989).

[4] Under § F202.6 of the ABAAG, "Buildings or facilities for which new leases are negotiated by the Federal government after the effective date of the revised standards issued pursuant to the Architectural Barriers Act, including new leases for buildings or facilities previously occupied by the Federal government, shall comply with F202.6." F202.6 then proceeds to describe the requirements for an accessible route to primary function areas, toilet and bathing facilities, parking, and other elements and spaces. The ABAAG became the ABA Accessibility Standards ("ABAAS") on May 17, 2005 when the GSA adopted them as the standards. See 41 C.F.R. § 102-76.65(a) (2005).

[5] These features include at least one accessible route to primary function areas, at least one accessible toilet facility for each sex (or an accessible unisex toilet facility if only one toilet is provided), accessible parking spaces, and, where provided, accessible drinking fountains, fire alarms, public telephones, dining and work surfaces, assembly areas, sales and service counters, vending and change machines, and mail boxes.

deleting the phrase "after construction or alteration in accordance with plans and specifications of the United States" thereby providing coverage for all buildings and facilities "to be leased in whole or in part by the United States after [January 1, 1977]." The House Report accompanying the bill that became law described the purpose of the 1976 Amendments as being to "assure more effective implementation of the congressional policy to eliminate architectural barriers to physically handicapped persons in most federally occupied or sponsored buildings." H.R. Rep. No. 1584—Part I, 94th Cong., 2d Sess. 1 (1976). The hearings on the bill also make it clear that Congress amended the ABA in 1976 to close the loophole through which inaccessible buildings and facilities were leased without alteration. See, *Public Buildings Cooperative Use: Hearings on HR 15134 Before the Subcommittee on Public Buildings and Grounds of the House Committee on Public Works and Transportation,* 94th Cong., 2d Sess. 107 (1976) (statement of Representative Edgar).

Consequently, since 1976, a hallmark of federal policy regarding people with disabilities has been to require accessibility of buildings and facilities constructed or leased using federal funds. Although, in the CAA, Congress required legislative branch compliance with only the public access provisions of the ADA rather than the Rehabilitation Act of 1973 or the ABA, the ADA itself was enacted in 1990 to expand the access rights of individuals with disabilities beyond what was previously provided by the Rehabilitation Act and the ABA. One of the sections of the ADA that Congress incorporated into the CAA is Section 204. Section 204 requires that the regulations promulgated under the ADA with respect to existing facilities "shall be consistent" with the regulations promulgated by the DOJ in 28 C.F.R. Part 39. 42 U.S.C. § 12134(b). Under 28 C.F.R. § 39.150(b), a covered entity is required to meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended, and any regulations implementing it.

As several commenters noted, when the DOJ promulgated its ADA regulations in 1991, it stated in its guidelines that it had intentionally omitted a regulation that required public entities to lease only accessible facilities because to do so "would significantly restrict the options of State and local governments in seeking leased space, which would be particularly burdensome in rural or sparsely populated areas." 29 C.F.R. Pt. 35, App. B § 35.151. In these same guidelines, however, the DOJ also noted that, under the Access Board's regulations, the federal government may not lease facilities unless they meet the minimum accessibility requirements specified in 36 C.F.R. § 1190.34 (2004) (and now in ABAAG § F202.6). This is true even if the facility is located in rural or sparsely populated areas. None of the commenters provided any specific examples of how complying with a regulation regarding leased facilities otherwise applicable to the federal government would be unduly burdensome. Since the supply of accessible facilities has increased during the past twenty-four years through alterations and new construction, the

burdensomeness of this regulation is certainly much less than it was in 1991.

A commenter also noted that under the current House rules a Member may not use representational funds to obtain reimbursement for capital improvements and this might affect the removal of barriers in facilities that are inaccessible. However, the proposed regulation does not require that any Member specifically pay for capital improvements. Instead, prior to entering into a lease with a Member for a facility that is in need of alterations to meet the minimum accessibility requirements, the landlord is obligated to make the needed alterations as a condition of doing business with Congress. While it is likely that the landlord will recover some of the costs associated with these alterations by increasing the rent paid by federal tenants, Congress determined when it amended the ABA to provide coverage for all leased facilities that the increased cost associated with requiring the federal government to lease only accessible facilities would be minimal and well worth the benefit gained by improving accessibility to all federal facilities. H.R.Rep. No. 1584-Part II, 94th Cong., 2d Sess. 9, *reprinted in* 1976 U.S.Code Cong. & Admin.News 5566, 5571-72. In the NPRM, the Board noted that the most common ADA public access complaint received by the OOC General Counsel from constituents relates to the lack of ADA access to spaces being leased by legislative branch offices. Given the frequency of these complaints and the clear Congressional policy embodied in the ABA requiring leasing of only accessible spaces by the United States, the Board found good cause to propose adoption of the Access Board's regulation formerly known as 36 C.F.R. § 1190.34 (2004) and now known as § F202.6 of the ABAAG and the ABAAS. Because, under CAA § 210(e)(2), the OOC Board of Directors ("the Board") is authorized to propose a regulation that does not follow the DOJ regulations when it determines "for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section," the Board has decided to require the leasing of accessible spaces as required in § F202.6 of the ABAAS.

5. Regulations regarding the investigation and prosecution of charges of discrimination and regarding periodic inspections and reporting.

Several commenters suggested that the regulations in Part 2, regarding the investigation and prosecution of charges of discrimination, and in Part 3, regarding periodic inspections and reporting, describe powers of the General Counsel that are beyond what is provided in the CAA. These commenters suggested that, under the CAA, the General Counsel does not have the discretion to determine how to conduct investigations and inspections nor the authority to act upon ADA requests for inspection from persons who request anonymity or persons who do not identify themselves as disabled.

Section 210(d) of the CAA requires the General Counsel to accept and investigate charges of

discrimination filed by qualified individuals with disabilities who allege a violation of Section 210 of the CAA by a covered entity. The CAA provides no details regarding how charges shall be investigated. Similarly, while Section 210(f) of the CAA requires that the General Counsel, on a regular basis, at least once each Congress, inspect the facilities of covered entities to ensure compliance with Section 210 of the CAA and submit a report to Congress containing the results of such periodic inspections, the statute provides no details regarding how the inspections are to be conducted.

"The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974) (cited with approval by *Chevron v. Nat'l Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). When Congress expressly leaves a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate the statute. *Id.* at 844.

The OOC General Counsel has been conducting ADA inspections since January 23, 1995, when the CAA authorized commencement of such inspections. The OOC General Counsel has been investigating charges of discrimination since January 1, 1997, the effective date of Section 210(d). Since the creation of the office, the General Counsel has endeavored to conduct these inspections and investigations in a manner that is not disruptive to the offices involved and has not received complaints or comments indicating that its ADA investigations or inspections have ever been disruptive. The regulations merely propose that the General Counsel conduct investigations and inspections in the manner that they have always been conducted.

Due to the lack of inspection resources, the General Counsel is unable to conduct ADA inspections of all facilities used by the covered entities at least once each Congress. The General Counsel is unable to inspect all of the facilities located in the Washington, D.C. area, much less all of the facilities used by the district and state offices that are also covered by Section 210 of the CAA. In light of the General Counsel's limited resources and the large number of facilities that are covered by the CAA, the General Counsel must prioritize its ADA inspections. The proposed regulations allow the General Counsel to continue its practice of giving priority to inspection of areas that have raised concerns from constituents. By allowing anyone to file a request for inspection and by allowing requestors to remain anonymous to the covered office (the requestor is required to provide his or her identity to the General Counsel), the General Counsel is better able to identify and examine potential access problems and then pass this information on to the covered offices who are in the best position to address these potential issues. The General Counsel has found that, without exception, covered offices have been very responsive to the

access concerns raised by constituents through the request for inspection process and are usually appreciative of information concerning constituent access issues of which they might otherwise be unaware.

Under the proposed regulations, requests for inspection filed anonymously or by persons without disabilities are not considered "charges of discrimination" that could result in a formal complaint being filed by the General Counsel against the covered office. Unlike Section 215 of the CAA, relating to occupational safety and health ("OSH") inspections and investigations, Section 210 of the CAA does not authorize the General Counsel to initiate enforcement proceedings unless a qualified individual with a disability has filed a charge of discrimination. But like Section 215, Section 210 of the CAA does authorize the General Counsel to inspect any facility and report its findings to the covered offices and to Congress. The proposed regulations merely recognize the General Counsel's long standing and common sense approach that concentrates limited inspection resources on the areas of most concern to constituents.

The other concern mentioned in the comments is that the proposed regulations define the General Counsel's investigatory authority in a manner that is broader than what Section 210 provides. Section 210 directs the General Counsel to investigate charges of discrimination without specifying how those investigations are to be conducted. To fill this gap, the proposed regulations allow the General Counsel to use modes of inquiry and investigation traditionally employed or useful to execute the investigatory authority provided by the statute which can include conducting inspections, interviewing witnesses, requesting documents and requiring answers to written questions. These methods of investigation are consistent with how other federal agencies investigate charges of discrimination. There is nothing in this proposed regulation that is contrary to the statutory language in Section 210. For this reason, the Board has not made any changes in the adopted regulations in response to these comments.

6. Request to create new regulations relating to safety and security.

One commenter suggested that the Board use these regulations to recognize the Capitol Police Board's statutory authority relating to safety and security and create new regulations defining this authority with respect to Section 210 of the CAA. In response, the Board does not find any statutory language in the CAA which would allow it to define the authority of the Capitol Police Board by regulation and therefore does not find good cause to modify the language of the DOJ or DOT regulations in the manner requested.

7. Comments to specific regulations.

a. Sec. 1.101 – Purpose and Scope. One commenter suggested that, when describing how the CAA incorporates sections of Title II and III of the ADA, the regulation should use the language contained in the incorporated statutory sections. The Board has made this change in the adopted regulations. The same commenter suggested that mediation should be mentioned when describing the charge and complaint process. The Board has also made this change in the adopted regulations.
b. Sec. 1.102 – Definitions. One commenter suggested that the incorporated definition of the "Act" should be reconciled with the definition of "ADA" provided in the proposed definitions. The Board has added "or Americans with Disabilities Act" after "ADA" in the definition section of the adopted regulations. This will clarify that references to the "Americans with Disabilities Act" or the "Act" will refer to only those sections of the ADA that are applied to the legislative branch by the CAA. One commenter suggested that there should be some discussion in this section regarding when a covered entity will be considered to be operating a "place of public accommodation" within the meaning of Title III. The Board has provided additional guidance on this topic in this Notice of Adoption and has added a provision in the adopted regulations providing that the regulations shall be interpreted in a manner consistent with the Notice of Adoption.
c. Sec. 1.103 – Authority of the Board. One commenter suggested that this section be modified in a way that would allow the Board to adopt the Pedestrian Right of Way Accessible Guidelines ("PROWAG") as a standard. Because the PROWAG are only proposed guidelines and they have not been adopted by the DOT as standards by regulation, these are not among the current DOT regulations that the Board can adopt under Section 210(e)(2) of the CAA. For this reason, the Board has not acted upon this suggestion.
d. Sec. 1.104 – Method for identifying entity responsible. A commenter suggested that the term "this section" refers to both the statutory and regulatory language at different times. In response to this suggestion, the Board has changed the first reference to "this section" to "Section 210 of the CAA" in the adopted regulation. A commenter has also suggested that the regulation refers to allocating responsibility between covered entities rather than identifying the entity responsible and notes that there may be instances where access issues arise because a private landlord has failed to comply with the lease with the covered entity and the General Counsel would be unable to "allocate responsibility" between the covered entity and the private landlord. In response, the Board notes that Section 1.104(c) describes how the entities responsible for correcting violations are identified. Section 1.104(d) describes how responsibility is allocated when more than one covered entity is responsible for the correction. Because a private landlord is not a "covered entity" within the meaning of the CAA, Section 1.104(d) would not be applicable when deciding how to allocate responsibility between a private landlord and a

covered legislative branch office. To further clarify this distinction, the Board has added the word "covered" before "entity" in Section 1.104(d) of the adopted regulation. Another commenter requested that this regulation be clarified so that only violations of the sections of the ADA incorporated in the CAA will be considered violations. In response, the Board notes that this has been accomplished by defining the "ADA" as including only those sections incorporated by the CAA. Another comment requested a definition of the term "order" in the last sentence of Section 1.104(d). In response, this word has been deleted in the adopted regulations.

e. Sec. 1.105 – Title II Regulations incorporated by reference. The Architect of the Capitol suggested a slight modification to the definition of "historic property" in Sec. 1.105(a)(4) which would add the word "properties" to the list including "facilities" and "buildings." The Board has made this change in the adopted regulations. Another commenter requested that the definition of "historic" properties be modified to include properties designated as historic by state or local law to cover district offices located in such buildings. In response, the Board notes that the definition contained in Sec. 1.105(a)(4) merely supplements the definition of historic properties contained in Section 35.104, which includes those properties designated as historic under State or local law. To further clarify this, the Board has added the word "also" to the definition in the adopted regulation. Another comment suggested that, rather than providing a general rule of interpretation, all potentially conflicting regulations should be rewritten to reconcile all possible conflicts. In response, as noted earlier in response to the general comments, the Board has adopted only the Title II regulation when both a DOJ Title II and Title III regulation address the same subject.

    1) Section 35.103(a). A comment suggested that this regulation should not be adopted because it references Title V of the Rehabilitation Act which includes employment discrimination issues. In response, the Board notes that Section 35.103(a) is based on Section 204 of the ADA, 42 U.S.C. § 12134, which is incorporated by reference into the CAA; consequently, this provision remains in the adopted regulations.
    2) Section 35.104. A comment suggested that this regulation should be rewritten to delete all terms that are irrelevant, duplicative, or otherwise inapplicable. In response, the Board notes that definitions of terms that are not used in the incorporated regulations are not incorporated by reference, as made clear by the additional language added in §1.105(a); consequently, there is no need to rewrite the regulation.
    3) Section 35.105 (Self-Evaluation) and Section 35.106 (Notice). A comment suggested that these regulations should not be adopted because they might require covered entities to report findings to the OOC or keep and maintain certain records. The Board does not find this reason to be "good cause" for modifying

the existing DOJ regulation. Unlike some of the other statutes incorporated by the CAA, the ADA does not contain a specific section about recordkeeping that Congress declined to apply to legislative branch entities.

4) Section 35.107 (Designation of responsible employee and adoption of grievance procedures). A comment suggested that this regulation should not be adopted because the CAA contains other enforcement provisions. The Board does not find "good cause" for modifying the existing DOJ regulation. The DOJ placed these provisions in the regulations even though the ADA contains enforcement provisions. These regulations provide an opportunity to promptly address access issues by allowing individuals with disabilities to complain directly to the covered entity about an access problem.
5) Section 35.131 (Illegal use of drugs). A comment suggested that this regulation should not be adopted because it may raise Fourth Amendment issues. The Board finds that there is not "good cause" for modifying the existing DOJ regulation. The Fourth Amendment also applies to state and local governments. This regulation exists to make clear that covered entities can legally prohibit participants in government sponsored sport and recreational activities from illegally using drugs.
6) Section 35.133 (Maintenance of accessible features). A comment suggested that this regulation should be modified to exclude offices that have no "direct care and control" over accessible features because only certain offices control the common areas in buildings. In response, the Board finds that there is not "good cause" for modifying the existing DOJ regulation. The entity or entities responsible for correcting violations are identified in accordance with Section 1.104(c) of the Proposed Regulations.
7) Section 35.137 (Mobility Devices). A comment suggested that this regulation should be modified to exclude offices that do not have direct control over the daily operation of legislative branch facilities. In response, the Board has failed to find "good cause" for modifying the existing DOJ regulation. The entity or entities responsible for correcting violations are identified in accordance with Section 1.104(c) of the Proposed Regulations.
8) Section 35.150 (Existing Facilities). A comment suggested that this proposed regulation should be modified so that it requires that only accessible facilities be leased and that Section 35.150(d) be removed because it requires the development of a transition plan which imposes recordkeeping requirements not adopted in the CAA. The Board does not find "good cause" for modifying the existing DOJ regulation. The accessibility requirements of leased facilities are addressed in a separate regulation. Regarding transition plans, as noted earlier, unlike some of

the other statutes incorporated by the CAA, the ADA does not contain a specific section about recordkeeping that Congress declined to apply to legislative branch entities. The transition planning requirement is a key element of the DOJ regulations since it compels public entities to develop a plan for making all of their facilities accessible.

9) Section 35.160 (Communications – General) A comment suggested modifying this regulation so that it is consistent with Section 36.303(c) (Effective communication). In response, the Board notes that the adopted regulations do not include Section 36.303(c) so there is no longer a reason for modifying the existing DOJ Title II regulation.

10) Section 35.163 (Information and Signage). A comment suggested excluding offices that do not have direct control over signage in common areas from this regulation. In response, the Board does not find "good cause" for modifying the existing DOJ regulation. The entity or entities responsible for correcting violations are identified in accordance with Section 1.104(c) of the adopted regulations.

11) Appendices to Part 35 Regulations. A commenter suggested correcting the titles of the Appendices to Parts 35 and 36. The titles have been corrected in the adopted regulations.

f. Sec. 1.105 – Title III Regulations incorporated by reference.

1) Section 36.101 (Purpose). A comment suggested that this regulation be modified to state that only those sections of Title III incorporated by the CAA are being implemented. The Board finds that this change is not necessary because the adopted regulations define the term "Americans with Disabilities Act" as including only those sections of the ADA incorporated by the CAA.

2) Section 36.103 (Relationship with other Laws). A comment suggested deleting this regulation because it references Title V of the Rehabilitation Act. In response, the Board notes that Section 36.103 is based in part on Section 204 of the ADA, 42 U.S.C. § 12134, which is incorporated by reference into the CAA, and therefore finds no cause for deleting this regulation.

3) Section 36.104 (Definitions). Several comments suggested that this regulation be modified to remove all definitions that are irrelevant, duplicative, or otherwise inapplicable. The Board notes that definitions of terms that are not used in the incorporated regulations are not incorporated by reference and therefore finds no cause for altering the regulation. As noted earlier, because the Notice of Adoption will be included as an appendix to the regulations, the notice will serve as guidance for interpreting the regulations.

4) Section 36.209 (Illegal use of drugs). The Board has not responded to comments regarding this regulation because it has not been incorporated into the adopted regulations.
5) Section 36.211 (Maintenance of accessible features). The Board has not responded to comments regarding this regulation because it has not been incorporated into the adopted regulations.
6) Section 36.303 (Effective communication). The Board has not responded to comments regarding this regulation because it has not been incorporated into the adopted regulations.
7) Section 36.304 (Removal of Barriers). A comment suggested modifying this regulation to acknowledge that the General Counsel has no authority over private landlords. The Board does not find good cause for modifying this regulation. As noted earlier, there is nothing in the regulations suggesting that the CAA applies to private landlords. In many cases, barrier removal is the responsibility of both the landlord and the tenant. If the tenant has a lease provision that places this responsibility on the landlord, it is up to the tenant to take appropriate action to enforce this provision.
8) Sections 36.402 (Alterations), 36.403 (Alterations: Path of travel), 36.404 (Alterations: Elevator exemption), 36.405 (Alterations: Historic preservation) and 36.406 (Standards for new construction and alterations). A comment suggested modifying these regulations to consider the limited control that some offices have over capital improvement and alterations to buildings and to modify the historic preservation definition to include buildings designated as historic by state and local governments. The Board does not find good cause for modifying the existing DOJ regulations. The entity or entities responsible for correcting violations are identified in accordance with Section 1.104(c) of the adopted regulations. As noted earlier, the definition contained in Sec. 1.105(a)(4) merely supplements the definition of historic properties contained in Section 36.405(a), which includes those properties designated as historic under State or local law.
9) Appendices to Part 36 Regulations. A commenter suggested correcting the titles of the Appendices to Parts 35 and 36. The titles have been corrected in the adopted regulations.

g. Section 1.105(e) – 36 C.F.R. Part 1190 (2004) & ABAAG § F202.6
1) Several commenters suggested that 36 C.F.R. Part 1190 (2004) should not be adopted because it is no longer in the Code of Federal Regulations. The Board does not find good cause to reconsider its decision to adopt this regulation. As noted earlier, although the regulation was removed from the C.F.R. in 2004 when

the substance of the regulation became part of the ABA Accessibility Guidelines ("ABAAG") at § F202.6, it is still an enforceable standard applied to the United States Government. Since 1976, when Congress amended the ABA, it has been a hallmark of federal policy regarding people with disabilities to require accessibility of buildings and facilities constructed or leased using federal funds.

h. Part 2 – Matters Pertaining to Investigation and Prosecution of Charges of Discrimination

1) Section 2.101 (Purpose and Scope). Several commenters suggested that this regulation explain in more detail how the General Counsel will exercise statutory authority by procedural rule or policy. In response, the Board has deleted this sentence from the adopted regulation.
2) Section 2.102(b). A comment suggested that this regulation be modified to further clarify what "other means" can be used to "file a charge" other than those listed in the regulation. In response, the Board has deleted the reference to "other means."
3) Section 2.102(c). Commenters suggested that this regulation should be modified because subpart (2) of the definition of "the occurrence of the alleged violation" is currently phrased in a way that seems to assume that a violation has occurred and is too broad because it might allow a charge to be filed beyond 180 days of the date of the alleged discrimination. In response to these comments, the adopted regulations retain only the definition of occurrence in subpart (1).
4) Section 2.103. Commenters suggested modifying this regulation because it appears to expand the General Counsel's authority beyond what the CAA provides. For the reasons stated earlier in the response to the general comments, the Board disagrees with this assessment and therefore this section has not been changed in the adopted regulations.
5) Section 2.107(a)(2). Commenters suggested removing this regulation because they believe that the CAA does not provide compensatory damages as a remedy for violations of Section 210. After due consideration of these comments, the Board has decided that the issue of what constitutes an appropriate remedy should be decided on a case-by-case basis through the statutory hearing and appeals process rather than by regulation. It should be noted, however, that the analysis in *Lane v. Pena*, 518 U.S. 187 (1996) may not be applicable to ADA cases under the CAA by virtue of the language in Section 210(b)(2) which defines "public entity" as including any of the covered entities listed in Section 210(a) and the language in Section 210(c) which provides for "such remedy as would be appropriate if awarded under section 203 or 308(a) of the American with Disabilities Act of 1990." These provisions, when read together, may very well constitute an express

waiver of sovereign immunity for all damages that can be appropriately awarded against a public entity, which would include compensatory damages.

i. Part 3 – Matters Pertaining to Periodic Inspections and Reporting

1) Section 3.101 (Purpose and Scope). Several commenters suggested that this regulation explain in more detail how the General Counsel will exercise statutory authority by procedural rule or policy. In response, the Board has deleted this sentence from the adopted regulation.

2) Section 3.102 (Definitions). A commenter suggested that the definition of "facilities of a covered entity" be narrowed so that the General Counsel would only inspect spaces occupied solely by a legislative branch office and would not inspect common spaces, entrances or accessible pathways used to access the solely occupied spaces. The Board finds that such a narrow definition of "facilities of a covered entity" would be inconsistent with the DOJ regulations and the purpose of the statutory mandate to inspect facilities for compliance with Titles II and III of the ADA; therefore, it has not modified this definition in the adopted regulations.

3) Section 3.103 (Inspection Authority). Commenters suggested that the General Counsel not be allowed to conduct an inspection or investigation initiated by someone who wishes to remain anonymous. For the reasons stated earlier in response to the general comments, the Board rejects this suggestion and has therefore not changed this section in the adopted regulations. The Architect of the Capitol suggested that, in the interest of simplicity and timeliness, Section 3.103(d) be shortened to: "The Office of the Architect of the Capitol shall, within one year from the effective date of these regulations, develop a process with the General Counsel to identify potential barriers to access prior to the completion of alteration and construction projects." Because the language used in the NPRM more thoroughly describes what this preconstruction process should entail, the Board does not find good cause to modify this regulation in the manner suggested.

Adopted Regulations:

PART 1----MATTERS OF GENERAL APPLICABILITY TO ALL REGULATIONS PROMULGATED UNDER SECTION 210 OF THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

§1.101 PURPOSE AND SCOPE

§1.102 DEFINITIONS

§1.103 AUTHORITY OF THE BOARD

§1.104 METHOD FOR IDENTIFYING THE ENTITY RESPONSIBLE FOR CORRECTING VIOLATIONS OF SECTION 210

§1.105 REGULATIONS INCORPORATED BY REFERENCE

§1.101 Purpose and scope.

(a) **CAA.** Enacted into law on January 23, 1995, the Congressional Accountability Act ("CAA") in Section 210(b) provides that the rights and protections against discrimination in the provision of public services and accommodations established by sections 201 through 230, 302, 303, and 309 of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12150, 12182, 12183, and 12189 ("ADA"), shall apply to the following entities:

(1) each office of the Senate, including each office of a Senator and each committee;

(2) each office of the House of Representatives, including each office of a Member of the House of Representatives and each committee;

(3) each joint committee of the Congress;

(4) the Office of Congressional Accessibility Services;

(5) the United States Capitol Police;

(6) the Congressional Budget Office;

(7) the Office of the Architect of the Capitol (including the Botanic Garden);

(8) the Office of the Attending Physician; and

(9) the Office of Compliance;

Title II of the ADA prohibits discrimination on the basis of disability in the provision of public services, programs, activities by any "public entity." Section 210(b)(2) of the CAA provides that

for the purpose of applying Title II of the ADA the term "public entity" means any entity listed above that provides public services, programs, or activities. Title III of the ADA prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with accessibility standards. Section 225(f) of the CAA provides that, "[e]xcept where inconsistent with definitions and exemptions provided in [this Act], the definitions and exemptions of the [ADA] shall apply under [this Act.]" 2 U.S.C. §1361(f)(1).

Section 210(d) of the CAA requires that the General Counsel of the Office of Compliance accept and investigate charges of discrimination filed by qualified individuals with disabilities who allege a violation of Title II or Title III of the ADA by a covered entity. If the General Counsel believes that a violation may have occurred, the General Counsel may request, but not participate in, mediation under Section 403 of the CAA and may file with the Office a complaint under Section 405 of the CAA against any entity responsible for correcting the violation. 2 U.S.C. §1331(d).

Section 210(f) of the CAA requires that the General Counsel of the Office of Compliance on a regular basis, and at least once each Congress, conduct periodic inspections of all covered facilities and to report to Congress on compliance with disability access standards under Section 210. 2 U.S.C. §1331(f).

(b) **Purpose and scope of regulations.** The regulations set forth herein (Parts 1, 2, and 3) are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated pursuant to Section 210(e) of the CAA. Part 1 contains the general provisions applicable to all regulations under Section 210, the method of identifying entities responsible for correcting a violation of Section 210, and the list of executive branch regulations incorporated by reference which define and clarify the prohibition against discrimination on the basis of disability in the provision of public services and accommodations. Part 2 contains the provisions pertaining to investigation and prosecution of charges of discrimination. Part 3 contains the provisions regarding the periodic inspections and reports to Congress on compliance with the disability access standards.

§1.102 Definitions.

Except as otherwise specifically provided in these regulations, as used in these regulations:

(a) ***Act*** or ***CAA*** means the Congressional Accountability Act of 1995 (Pub. L. 104-1, 109 Stat. 3, 2 U.S.C. §§1301-1438).

(b) ***ADA*** or ***Americans with Disabilities Act*** means those sections of the Americans with Disabilities Act of 1990 incorporated by reference into the CAA in Section 210: 42 U.S.C. §§12131-12150, 12182, 12183, and 12189.

(c) ***Covered entity and public entity*** include any of the entities listed in §1.101(a) that provide public services, programs, or activities, or operates a place of public accommodation within the meaning of Section 210 of the CAA. In the regulations implementing Title III, ***private entity*** includes ***covered entities.***

(d) ***Board*** means the Board of Directors of the Office of Compliance.

(e) ***Office*** means the Office of Compliance.

(f) ***General Counsel*** means the General Counsel of the Office of Compliance.

§1.103 Authority of the Board.

Pursuant to Sections 210 and 304 of the CAA, the Board is authorized to issue regulations to implement the rights and protections against discrimination on the basis of disability in the provision of public services and accommodations under the ADA. Section 210(e) of the CAA directs the Board to promulgate regulations implementing Section 210 that are "the same as substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement the statutory provisions referred to in subsection (b) except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section." 2 U.S.C. §1331(e). Specifically, it is the Board's considered judgment, based on the information available to it at the time of promulgation of these regulations, that, with the exception of the regulations adopted and set forth herein, there are no other "substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement the statutory provisions referred to in subsection (b) [of Section 210 of the CAA]" that need be adopted.

In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Attorney General and the Secretary of Transportation. Such changes are intended to make the provisions adopted accord more naturally to situations in the Legislative Branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Attorney General

and/or the Secretary of Transportation from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulations or of the statutory provisions of the CAA upon which they are based.

§1.104 Method for identifying the entity responsible for correction of violations of section 210.

(a) **Purpose and scope.** Section 210(e)(3) of the CAA provides that regulations under Section 210(e) include a method of identifying, for purposes of Section 210 of the CAA and for categories of violations of Section 210(b), the entity responsible for correcting a particular violation. This section sets forth the method for identifying responsible entities for the purpose of allocating responsibility for correcting violations of Section 210(b).

(b) **Violations.** A covered entity may violate Section 210(b) if it discriminates against a qualified individual with a disability within the meaning of Title II or Title III of the ADA.

(c) **Entities Responsible for Correcting Violations.** Correction of a violation of the rights and protections against discrimination is the responsibility of the entities listed in subsection (a) of Section 210 of the CAA that provide the specific public service, program, activity, or accommodation that forms the basis for the particular violation of Title II or Title III rights and protections and, when the violation involves a physical access barrier, the entities responsible for designing, maintaining, managing, altering or constructing the facility in which the specific public service program, activity or accommodation is conducted or provided.

(d) **Allocation of Responsibility for Correction of Title II and/or Title III Violations.** Where more than one covered entity is found to be an entity responsible for correction of a violation of Title II and/or Title III rights and protections under the method set forth in this section, as between those parties, allocation of responsibility for correcting the violations of Title II or Title III of the ADA may be determined by statute, contract, or other enforceable arrangement or relationship.

§1.105 Regulations incorporated by reference.

(a) **Technical and Nomenclature Changes to Regulations Incorporated by Reference.** The definitions in the regulations incorporated by reference ("incorporated regulations") shall be used to interpret these regulations except: (1) when they differ from the definitions in §1.102 or the modifications listed below, in which case the definition in §1.102 or the modification listed

below shall be used; or (2) when they define terms that are not used in the incorporated regulations. The incorporated regulations are hereby modified as follows:

(1) When the incorporated regulations refer to "**Assistant Attorney General**," "**Department of Justice**," "**FTA Administrator**," "**FTA regional office**," "**Administrator**," "**Secretary**," or any other executive branch office or officer, "**General Counsel**" is hereby substituted.

(2) When the incorporated regulations refer to the date "**January 26, 1992**," the date "**January 1, 1997**" is hereby substituted.

(3) When the incorporated regulations otherwise specify a date by which some action must be completed, the date that is three years from the effective date of these regulations is hereby substituted.

(4) When the incorporated regulations contain an exception for an "**historic**" property, building, or facility, that exception shall also apply to properties, buildings, or facilities designated as an **historic** or **heritage asset** by the Office of the Architect of the Capitol in accordance with its preservation policy and standards and where, in accordance with its preservation policy and standards, the Office of the Architect of the Capitol determines that compliance with the requirements for accessible routes, entrances, or toilet facilities (as defined in 28 C.F.R. Parts 35 and 36) would threaten or destroy the historic significance of the property, building or facility, the exceptions for alterations to qualified historic property, buildings or facilities for that element shall be permitted to apply.

(b) **Rules of Interpretation.** When regulations in (c) conflict, the regulation providing the most access shall apply. The Board's Notice of Adoption shall be used to interpret these regulations and shall be made part of these Regulations as Appendix A.

(c) **Incorporated Regulations from 28 C.F.R. Parts 35 and 36.** The Office shall publish on its website the full text of all regulations incorporated by reference. The following regulations from 28 C.F.R. Parts 35 and 36 that are published in the Code of Federal Regulations on the date of the Board's adoption of these regulations are hereby incorporated by reference as though stated in detail herein:

§35.101 Purpose.
§35.102 Application.
§35.103 Relationship to other laws.
§35.104 Definitions.

§36.210 Smoking.
§36.213 Relationship of subpart B to subparts C and D of this part.
§36.301 Eligibility criteria.
§36.302 Modifications in policies, practices, or procedures.
§36.304 Removal of barriers.
§36.305 Alternatives to barrier removal.
§36.307 Accessible or special goods.
§36.308 Seating in assembly areas.
§36.309 Examinations and courses.
§36.310 Transportation provided by public accommodations.
§36.402 Alterations.
§36.403 Alterations: Path of travel.
§36.404 Alterations: Elevator exemption.
§36.405 Alterations: Historic preservation.
§36.406 Standards for new construction and alterations.
Appendix A to Part 36 -- Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities.
Appendix B to Part 36 -- Analysis and Commentary on the 2010 ADA Standards for Accessible Design.

(d) **Incorporated Regulations from 49 C.F.R. Parts 37 and 38.** The following regulations from 49 C.F.R. Parts 37 and 38 that are published in the Code of Federal Regulations on the effective date of these regulations are hereby incorporated by reference as though stated in detail herein:

§37.1 Purpose.
§37.3 Definitions.
§37.5 Nondiscrimination.
§37.7 Standards for accessible vehicles.
§37.9 Standards for accessible transportation facilities.
§37.13 Effective date for certain vehicle specifications.
§37.21 Applicability: General.
§37.23 Service under contract.
§37.27 Transportation for elementary and secondary education systems.
§37.31 Vanpools.
§37.37 Other applications.
§37.41 Construction of transportation facilities by public entities.

§37.43 Alteration of transportation facilities by public entities.
§37.45 Construction and alteration of transportation facilities by private entities.
§37.47 Key stations in light and rapid rail systems.
§37.61 Public transportation programs and activities in existing facilities.
§37.71 Purchase or lease of new non-rail vehicles by public entities operating fixed route systems.
§37.73 Purchase or lease of used non-rail vehicles by public entities operating fixed route systems.
§37.75 Remanufacture of non-rail vehicles and purchase or lease of remanufactured non-rail vehicles by public entities operating fixed route systems.
§37.77 Purchase or lease of new non-rail vehicles by public entities operating a demand responsive system for the general public.
§37.79 Purchase or lease of new rail vehicles by public entities operating rapid or light rail systems.
§37.81 Purchase or lease of used rail vehicles by public entities operating rapid or light rail systems.
§37.83 Remanufacture of rail vehicles and purchase or lease of remanufactured rail vehicles by public entities operating rapid or light rail systems.
§37.101 Purchase or lease of vehicles by private entities not primarily engaged in the business of transporting people.
§37.105 Equivalent service standard.
§37.121 Requirement for comparable complementary paratransit service.
§37.123 ADA paratransit eligibility: Standards.
§37.125 ADA paratransit eligibility: Process.
§37.127 Complementary paratransit service for visitors.
§37.129 Types of service.
§37.131 Service criteria for complementary paratransit.
§37.133 Subscription service.
§37.135 Submission of paratransit plan.
§37.137 Paratransit plan development.
§37.139 Plan contents.
§37.141 Requirements for a joint paratransit plan.
§37.143 Paratransit plan implementation.
§37.147 Considerations during FTA review.
§37.149 Disapproved plans.
§37.151 Waiver for undue financial burden.
§37.153 FTA waiver determination.
§37.155 Factors in decision to grant an undue financial burden waiver.

§37.161 Maintenance of accessible features: General.
§37.163 Keeping vehicle lifts in operative condition: Public entities.
§37.165 Lift and securement use.
§37.167 Other service requirements.
§37.171 Equivalency requirement for demand responsive service operated by private entities not primarily engaged in the business of transporting people.
§37.173 Training requirements.
Appendix A to Part 37--Modifications to Standards for Accessible Transportation Facilities.
Appendix D to Part 37--Construction and Interpretation of Provisions of 49 CFR Part 37.
§38.1 Purpose.
§38.2 Equivalent facilitation.
§38.3 Definitions.
§38.4 Miscellaneous instructions.
§38.21 General.
§38.23 Mobility aid accessibility.
§38.25 Doors, steps and thresholds.
§38.27 Priority seating signs.
§38.29 Interior circulation, handrails and stanchions.
§38.31 Lighting.
§38.33 Fare box.
§38.35 Public information system.
§38.37 Stop request.
§38.39 Destination and route signs.
§38.51 General.
§38.53 Doorways.
§38.55 Priority seating signs.
§38.57 Interior circulation, handrails and stanchions.
§38.59 Floor surfaces.
§38.61 Public information system.
§38.63 Between-car barriers.
§38.71 General.
§38.73 Doorways.
§38.75 Priority seating signs.
§38.77 Interior circulation, handrails and stanchions.
§38.79 Floors, steps and thresholds.
§38.81 Lighting.

§38.83 Mobility aid accessibility.
§38.85 Between-car barriers.
§38.87 Public information system.
§38.171 General.
§38.173 Automated guideway transit vehicles and systems.
§38.179 Trams, and similar vehicles, and systems.
Figures to Part 38.
Appendix to Part 38—Guidance Material.

(e) **Incorporated Standard from the Architectural Barriers Act Accessibility Standards ("ABAAS") (May 17, 2005).** The following standard from the ABAAS is adopted as a standard and hereby incorporated as a regulation by reference as though stated in detail herein:

§F202.6 Leases.

PART 2----MATTERS PERTAINING TO INVESTIGATION AND PROSECUTION OF CHARGES OF DISCRIMINATION.

§2.101 PURPOSE AND SCOPE

§2.102 DEFINITIONS

§2.103 INVESTIGATORY AUTHORITY

§2.104 MEDIATION

§2.105 COMPLAINT

§2.106 INTERVENTION BY CHARGING INDIVIDUAL

§2.107 REMEDIES AND COMPLIANCE

§2.108 JUDICIAL REVIEW

§2.101 Purpose and scope.

Section 210(d) of the CAA requires that the General Counsel accept and investigate charges of discrimination filed by qualified individuals with disabilities who allege a violation of Title II or

Title III of the ADA by a covered entity. Part 2 of these regulations contains the provisions pertaining to investigation and prosecution of charges of discrimination.

§2.102 Definitions.

(a) ***Charge*** means any written document from a qualified individual with a disability or that individual's designated representative which suggests or alleges that a covered entity denied that individual the rights and protections against discrimination in the provision of public services and accommodations provided in Section 210(b)(1) of the CAA.

(b) ***File a charge*** means providing a charge to the General Counsel in person, by mail, or by electronic transmission. Charges shall be filed within 180 days of the occurrence of the alleged violation.

(c) ***The occurrence of the alleged violation*** means the date on which the charging individual was allegedly discriminated against.

(d) ***The rights and protections against discrimination in the provision of public services and accommodations*** means all of the rights and protections provided by Section 210(b)(1) of the CAA through incorporation of Sections 201 through 230, 302, 303, and 309 of the ADA and by the regulations issued by the Board to implement Section 210 of the CAA.

§2.103 Investigatory Authority.

(a) **Investigatory Methods.** When investigating charges of discrimination and conducting inspections, the General Counsel is authorized to use all the modes of inquiry and investigation traditionally employed or useful to execute this investigatory authority. The authorized methods of investigation include, but are not limited to, the following: (1) requiring the parties to provide or produce ready access to: all physical areas subject to an inspection or investigation, individuals with relevant knowledge concerning the inspection or investigation who can be interviewed or questioned, and documents pertinent to the investigation; and (2) requiring the parties to provide written answers to questions, statements of position, and any other information relating to a potential violation or demonstrating compliance.

(b) **Duty to Cooperate with Investigations.** Charging individuals and covered entities shall cooperate with investigations conducted by the General Counsel. Cooperation includes providing timely responses to reasonable requests for information and documents (including the making and retention of copies of records and documents), allowing the General Counsel to

review documents and interview relevant witnesses confidentially and without managerial interference or influence, and granting the General Counsel ready access to all facilities where covered services, programs and activities are being provided and all places of public accommodation.

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§2.104 Mediation.

(a) **Belief that violation may have occurred.** If, after investigation, the General Counsel believes that a violation of the ADA may have occurred and that mediation may be helpful in resolving the dispute, prior to filing a complaint, the General Counsel may request, but not participate in, mediation under subsections (b) through (d) of Section 403 of the CAA between the charging individual and any entity responsible for correcting the alleged violation.

(b) **Settlement.** If, prior to the filing of a complaint, the charging individual and the entity responsible for correcting the violation reach a settlement agreement that fully resolves the dispute, the General Counsel shall close the investigation of the charge without taking further action.

(c) **Mediation Unsuccessful.** If mediation under (a) has not succeeded in resolving the dispute, and if the General Counsel believes that a violation of the ADA may have occurred, the General Counsel may file with the Office a complaint against any entity responsible for correcting the violation.

§2.105 Complaint.

The complaint filed by the General Counsel shall be submitted to a hearing officer for decision pursuant to subsections (b) through (h) of Section 405 of the CAA. The decision of the hearing officer shall be subject to review by the Board pursuant to Section 406 of the CAA.

§2.106 Intervention by Charging Individual.

Any person who has filed a charge may intervene as of right, with the full rights of a party, whenever a complaint is filed by the General Counsel.

§2.107 Remedies and Compliance.

(a) **Remedy.** The remedy for a violation of Section 210 of the CAA shall be such remedy as would be appropriate if awarded under Section 203 or 308(a) of the ADA.

(b) **Compliance Date.** Compliance shall take place as soon as possible, but no later than the fiscal year following the end of the fiscal year in which the order requiring correction becomes final and not subject to further review.

§2.108 Judicial Review.

A charging individual who has intervened or any respondent to the complaint, if aggrieved by a final decision of the Board, may file a petition for review in the United States Court of Appeals for the Federal Circuit, pursuant to Section 407 of the CAA.

PART 3----MATTERS PERTAINING TO PERIODIC INSPECTIONS AND REPORTING.

§3.101 PURPOSE AND SCOPE

§3.102 DEFINITIONS

§3.103 INSPECTION AUTHORITY

§3.104 REPORTING, ESTIMATED COST & TIME, AND COMPLIANCE DATE

§3.101 Purpose and scope.

Section 210(f) of the CAA requires that the General Counsel, on a regular basis, at least once each Congress, inspect the facilities of covered entities to ensure compliance with the Titles II and III of the ADA and to prepare and submit a report to Congress containing the results of the periodic inspections, describing any violations, assessing any limitations in accessibility, and providing the estimated cost and time needed for abatement. Part 3 of these regulations contains the provisions pertaining to these inspection and reporting duties.

§3.102 Definitions.

(a) ***The facilities of covered entities*** means all facilities used to provide public programs, activities, services or accommodations that are designed, maintained, altered or constructed by a covered entity and all facilities where covered entities provide public programs, activities, services or accommodations.

(b) ***Violation*** means any barrier to access caused by noncompliance with the applicable standards.

(c) ***Estimated cost and time needed for abatement*** means cost and time estimates that can be reported as falling within a range of dollar amounts and dates.

§3.103 Inspection authority.

(a) **General scope of authority.** On a regular basis, at least once each Congress, the General Counsel shall inspect the facilities of covered entities to ensure compliance with Titles II and III of the ADA. When conducting these inspections, the General Counsel has the discretion to decide which facilities will be inspected and how inspections will be conducted. The General Counsel may receive requests for ADA inspections, including anonymous requests, and conduct inspections for compliance with Titles II and III of the ADA in the same manner that the General Counsel receives and investigates requests for inspections under Section 215(c)(1) of the CAA.

(b) **Review of information and documents.** When conducting inspections under Section 210(f) of the CAA, the General Counsel may request, obtain, and review any and all information or documents deemed by the General Counsel to be relevant to a determination of whether the covered entity is in compliance with Section 210 of the CAA.

(c) **Duty to cooperate.** Covered entities shall cooperate with any inspection conducted by the General Counsel in the manner provided by §2.103(b).

(d) **Pre-construction review of alteration and construction projects.** Any project involving alteration or new construction of facilities of covered entities are subject to inspection by the General Counsel for compliance with Titles II and III of the ADA during the design, pre-construction, construction, and post construction phases of the project. The Office of the Architect of the Capitol shall, within one year from the effective date of these regulations, develop a process with the General Counsel to identify potential barriers to access prior to the completion of alteration and construction projects that may include the following provisions:

(1) Design review or approval;

(2) Inspections of ongoing alteration and construction projects;

(3) Training on the applicable ADA standards;

(4) Final inspections of completed projects for compliance; and

(5) Any other provision that would likely reduce the number of ADA barriers in alterations and new construction and the costs associated with correcting them.

§3.104 Reporting, estimating cost & time, and compliance date.

(a) **Reporting duty.** On a regular basis, at least once each Congress, the General Counsel shall prepare and submit a report to Congress containing the results of the periodic inspections conducted under §3.103(a), describing any violations, assessing any limitations in accessibility, and providing the estimated cost and time needed for abatement.

(b) **Estimated cost & time.** Covered entities shall cooperate with the General Counsel by providing information needed to provide the estimated cost and time needed for abatement in the manner provided by §2.103(b).

(c) **Compliance date.** All barriers to access identified by the General Counsel in its periodic reports shall be removed or otherwise corrected as soon as possible, but no later than the fiscal year following the end of the fiscal year in which the report describing the barrier to access was issued by the General Counsel.

Recommended Method of Approval:

The Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, and therefore recommends that the adopted regulations be approved by concurrent resolution of the Congress.

Signed at Washington, D.C., on this 3rd day of February, 2016.

BARBARA L. CAMENS,
Chair of the Board, Office of Compliance