INFORMATIONAL MEMBERSHIP FORUM:
TRIENNIAL REVIEW FINDINGS

TUESDAY, DECEMBER 16, 2014
10:30 A.M. – 1:00 P.M.
Veteran’s Memorial Building
Rotunda Room
4117 Overland Avenue
Culver City, CA  90230

ITEMS TO BE DISCUSSED:

1. GENERAL PUBLIC COMMENT

2. TRIENNIAL REVIEW DISCUSSION: NO SHOW/CANCELLATION POLICY REVISIONS (page 2)

3. TRIENNIAL REVIEW DISCUSSION: ACCESS FARES (page 4)

4. TRIENNIAL REVIEW DISCUSSION: ORIGIN TO DESTINATION (page 9)
During the 2014 Federal Transit Administration (FTA) review process, seven Los Angeles County transit agencies (Torrance Transit, Santa Monica Big Blue Bus, Antelope Valley Transit Authority, Santa Clarita, Culver City Bus, Foothill Transit and Los Angeles Metro) received a finding regarding Access Services’ no show and cancellation policies.

The full text of the FTA finding is as follows:

**Insufficient no-show policy (316)**
Access Services’ written no-show policy does not take into account frequency of travel prior to suspension. Further, the written policy, which calls for suspending passengers for 10 days after the first occurrence, 30 days for a second occurrence, 60 days for a third occurrence and 90 days for a fourth occurrence of no-shows, does not meet the reasonableness requirement of 49 CFR 37.125(h). Additionally, Access Services treats subscription trips canceled after 10:00 p.m. the night before as no-shows; FTA permits cancellations to be regarded as no-shows only if they are made within one to two hours of the pickup time provided to the passenger.

The corrective actions and schedule is as follows:

For the deficiency, insufficient no-show policy (316), by March 3, 2015, submit to the FTA Region IX Civil Rights Officer revised policies and public information materials for no-shows and suspensions, including templates for no-show notification, suspension and appeal letters relating to no-shows, late cancellations, and suspensions.

**Current no show policy**

A customer who has six (6) or more no shows in a 60-day period may be suspended from using Access.

The current policy of notifying a customer after each no show and encouraging them to call staff to discuss will still be in place. The intent of this policy is still to educate customers in order to reduce no shows and conserve scarce regional transit dollars.
Proposed no show policy

Customers who have five (5) or more no-shows or late cancellations during any single month may be subject to suspension if those no shows exceed 10% of their overall scheduled monthly trips. For example, a customer who has 5 no-shows and has scheduled 10 trips during a month (which equates to a 50 percent no show rate) may be suspended from using Access. A customer who has 5 no shows and has scheduled 100 trips in a month (which equates to a 5% no show rate) will not be suspended from Access.

Current suspension policy

Access’ current policy calls for suspending passengers for 10 days after the first occurrence, 30 days for a second occurrence, 60 days for a third occurrence and 90 days for a fourth occurrence of no-shows.

Proposed suspension policy

A 15-day suspension will be given for first offenders followed by a 30-day suspension for every occurrence thereafter.

Current subscription trip cancellation policy

Access Services treats subscription trips canceled after 10:00pm the night before as no-shows.

Proposed subscription trip cancellation policy

Cancellations for subscription trips will be regarded as no-shows when a customer cancels less than two (2) hours from the scheduled pick-up time.

Staff believes that the FTA’s deadline to revise this policy can be met. Based on the feedback from the QSS, CAC, TPAC and the Member Agencies, staff will present a proposed policy to the Access Services Board of Directors for approval at the February 2015 Board meeting. From there the No Show policy would be submitted to the FTA and implemented after receiving their approval.
DECEMBER 8, 2014

FROM: SHELLY VERRINDER, EXECUTIVE DIRECTOR
     ANDRE COLAIACE, DEPUTY EXECUTIVE DIRECTOR, PLANNING AND GOVERNMENTAL AFFAIRS

RE: TRIENNIAL REVIEW DISCUSSION: ACCESS FARES

Every year, the Federal Transit Administration (FTA) conducts Triennial Reviews of certain transit agencies who receive federal funds to ensure they are complying with various federal laws and regulations. During the 2014 Triennial Review cycle, some Access member agencies received an FTA finding that Access Services charges more than twice the fixed route fare for comparable trips on their system.

The options presented to the Access Services Board of Directors in November were as follows:

- Move to a dynamic fare system in which fares for each trip will be calculated using the trip planner on www.metro.net or www.go511.com. The Access fare may be double the lowest fare quoted. Trips that cannot be provided by fixed route services may be denied.
- Given that the Americans with Disabilities Act (ADA) regulations encourage a coordinated paratransit plan but do not address a coordinated paratransit fare, direct staff to seek legislative or regulatory changes to allow for a coordinated fare when operating under a coordinated plan.
- Require all member agencies to have a minimum base fare or adopt a unified fare structure in order to set a compliant regional fare for ADA paratransit service.

On December 2nd, 2014, staff and several Boardmembers, including the Chair, had a meeting with Acting FTA Administrator Therese McMillan and her Executive Staff in Washington, D.C. to discuss this issue. Ms. McMillan indicated that the region must comply with FTA requirements and said it was possible, given advances in technology, for Access to implement a dynamic fare system. In addition, FTA staff did indicate that Access could petition the Department of Transportation for a rulemaking. (The current regulations, while encouraging the development of a coordinated paratransit system, are silent on how a coordinated paratransit fare should be calculated.) FTA leadership also understood that such a system could not be implemented by the original deadline of March 2015 and asked that Access give the FTA an implementation timeline.
There is a direct correlation between transit fares and ridership (and the Access budget) which is often called “fare elasticity.” According to Access Services consulting firm, HDR Engineering, the fare elasticity for the overall Access system is -.26 which means a 1 percent increase in real fare (i.e. fare excluding inflation) is expected to result in a 0.26% decrease in ridership. Conversely, it could be expected that a decrease in the real fare would lead to an increase in ridership. HDR has also found that other variables, such as unemployment and gasoline prices, also affect ridership.

Access Services’ coordinated fare, which has been in place for nearly 20 years, is widely supported by both our customers and those who operate our system because it is simple to understand and easy to implement. On August 1, 2006, Access staff sent a letter to the FTA in response to a similar 2005 Triennial Review finding. Since that time, Access’ fare methodology, which uses a statistical analysis of comparable fixed-route fares, has been reviewed numerous times and no deficiencies have been found.

It should be noted that even after Access’ most recent fare adjustment (which was implemented on July 1, 2014) that Access has some of the lowest paratransit fares in the country, particularly for trips less than 20 miles. The fares result in a cost recovery of approximately 6.2%.

<table>
<thead>
<tr>
<th>AGENCY</th>
<th>MIN. FARE</th>
<th>MAX. FARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York City</td>
<td>$2.50</td>
<td>$2.50</td>
</tr>
<tr>
<td>ACCESS (Los Angeles)</td>
<td>$2.75</td>
<td>$3.50</td>
</tr>
<tr>
<td>Dallas</td>
<td>$3.00</td>
<td>$3.00</td>
</tr>
<tr>
<td>Chicago CTA</td>
<td>$3.00</td>
<td>$3.00</td>
</tr>
<tr>
<td>Boston</td>
<td>$3.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Washington, DC</td>
<td>$3.50</td>
<td>$6.50</td>
</tr>
<tr>
<td>OCTA (Orange County)</td>
<td>$3.60</td>
<td>$3.60</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>$4.00</td>
<td>$4.00</td>
</tr>
<tr>
<td>Denver</td>
<td>$4.50</td>
<td>$4.50</td>
</tr>
</tbody>
</table>

Despite these facts, in a follow-up to the respective Triennial Review Final Reports in 2014, FTA’s Region IX office informed five Access Services member agencies (Torrance Transit, Santa Monica’s Big Blue Bus, Culver City Bus, Foothill Transit, and Metro) that the Federal Transit Administration’s (FTA) Office of Civil Rights determined that the fare structure for Access Services did not meet regulatory requirements. The Access base fare of $2.75 was found to be more than twice the member agency’s fixed route base fare and therefore resulted in a deficiency finding for the ADA review area. The finding for Metro related to fares charged by sub-recipients and was due to their role as the transportation-funding agency for Los Angeles County. As the funding
agency, Metro has responsibilities to ensure that programs funded by Metro are compliant with ADA requirements.

Since 2005, in order to determine what the regional base fare is for Los Angeles County, Access staff has conducted a periodic statistical analysis of fares paid on fixed route service for comparable ADA complementary trips.

For example, in August, 2005, Access conducted a statistically-valid study of 675 randomly selected trips representing the four basin service regions from Access’s trip database. The sample data represents trips originating from the Eastern, Northern, Southern, and West-Central portions of the county. The sampled trips contained date, pick-up time, pick-up and drop-off address. Each sample Access trip was compared to the fixed route using Metro’s Trip Planner to determine the following:

- The number of transfers required on a fixed route trip
- Total fare amount paid on fixed route
- Total travel time
- Total distance (miles)

The results were as follows:

<table>
<thead>
<tr>
<th>Sample Size (Total Trips)</th>
<th>% of Sample Size</th>
<th>Reg. Total Fare (Fixed Route)</th>
<th>2x Reg. Trip Cost</th>
<th>Avg. Travel Time (min)</th>
<th>Avg. Total Distance (miles)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 19.9 miles</td>
<td>82.5%</td>
<td>$1.80</td>
<td>$3.60</td>
<td>42.62</td>
<td>8.0</td>
</tr>
<tr>
<td>Over 20 miles</td>
<td>17.5%</td>
<td>$2.84</td>
<td>$5.68</td>
<td>116.93</td>
<td>28.39</td>
</tr>
</tbody>
</table>

Using this methodology, with an average fixed route fare of $1.80, the maximum potential Access fare could be $3.60 for trips up to 19.9 miles. For trips over 20 miles the average fixed route fare was $2.84 making the maximum potential Access fare no greater than $5.68.

Since then, before staff considered any fare adjustment, a similar study was conducted to determine the regional fare. In November 2012, the following fare structure was approved and implemented:

<table>
<thead>
<tr>
<th>LA Basin</th>
<th>January 1, 2013</th>
<th>July 1, 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 19.9 miles</td>
<td>$2.25</td>
<td>$2.50</td>
</tr>
<tr>
<td>Over 20 miles</td>
<td>$3.00</td>
<td>$3.25</td>
</tr>
</tbody>
</table>

Staff is currently conducting another study in light of Metro’s recent fare change.
Proposed options

Dynamic Fare System

- Move to a dynamic fare system in which fares for each trip will be calculated using the trip planner on www.metro.net or www.go511.com. The Access fare may be double the lowest fare quoted. Trips that cannot be provided by fixed route services may be denied.

During the demonstration phase of Access in the mid-1990s, the Agency attempted to charge the exact fare for a comparable trip. This procedure was discarded because our customers disliked being charged different fares for different trips. In addition, it proved almost impossible to maintain in practice. A simple one-way trip required an additional three to five minutes to schedule, and over half the time the trip planning computer could not find the address, which required manually making a determination that required ten to fifteen additional minutes.

Staff believes that, even with advances in technology, implementing a “dynamic fare process” would slow down the reservations process. Nevertheless, staff has been talking to various software vendors to see what their current capabilities are. Preliminary feedback from the different software vendors that are used by Access’ providers is that a dynamic fare process could be implemented but it would take at least nine months.

Other issues include:

- If Access decided to charge twice the fixed-route fare for each route booked based on the Metro trip planner, most customers, particularly those that booked longer, regional trips, could pay substantially more than the current fares.

- Access customers would be charged different fares even for an identical trip that occurs at a different time.

- Some regional trips cannot even be done on the fixed-route system. Would Access continue to perform these trips? How would the fare be determined?

- If there are no set fares, would Access customers still be able to use coupons or any other alternative means of payment?

Legislative/Regulatory Change

- Given that the Americans with Disabilities Act (ADA) regulations encourage a coordinated paratransit plan but do not address a coordinated paratransit fare, direct staff to seek legislative or regulatory changes to allow for a coordinated fare when operating under a coordinated plan.
The current regulations regarding a coordinated paratransit plan read as follows:

**49 CFR 37.139 [Plan Contents] (for all plans the applicant must show:)**

“(g) Efforts to coordinate service with other entities subject to the complementary paratransit requirements of this part which have overlapping or contiguous service areas or jurisdictions.” (see also 49 CFR 139(h)(4)(iii))

**49 CFR 37.141 Requirements for Joint paratransit plan**

“(a) Two or more entities with overlapping or contiguous service areas or jurisdictions may develop a joint plan providing for coordinated paratransit service. Joint plans shall identify participating entities and indicate their commitment to participate in the plan.”

**49 CFR 37.147 Considerations during FTA review**

“In reviewing each plan, at a minimum FTA will consider the following:

(f) the extent to which efforts were made to coordinate with other public entities with overlapping or contiguous services areas or jurisdictions.”

**49 CFR Part 37, Appendix D Section 37.141**

“The Department believes that, particularly in large, multi-provider regions, a coordinated regional paratransit plan and system are extremely important. Such coordination can do much to ensure that the most comprehensive transportation can be provided with the most efficient use of available resources. We recognize that the effort of putting together such a coordinated system can be a lengthy one. This section is intended to facilitate the process of forming such a coordinated system.”

It is apparent, particularly in Appendix D, that the Department wanted to encourage a coordinated system like Access. However, while the regulations are very specific about the maximum fare that can be charged in an ADA paratransit system, they are silent on how such a fare should be determined in a coordinated system.

A process exists whereby the DOT could be petitioned to make a rule change. Access Services and/or its member agencies could utilize this process. In addition, it is possible to seek a legislative change via Los Angeles County’s congressional delegation.
Every year, the Federal Transit Administration (FTA) conducts Triennial Reviews of certain transit agencies who receive federal funds to ensure they are complying with various federal laws and regulations. During the 2013 and 2014 Triennial Review cycles and, in the case of Access, the 2013 State Management Review cycle, the FTA found that Access did not provide “Origin to Destination” service to its customers. While Access has always operated a curb-to-curb paratransit system and has an FTA approved paratransit plan that incorporates the curb-to-curb service model, the FTA maintains that in some instances service must be provided beyond the curb for passengers whose disabilities may require such assistance in order to reach their destination or leave their point of origin.

Currently, Access Services and 10 Access Services member agencies (Gardena Bus Lines, Long Beach Transit, Beach Cities Transit, Torrance Transit, Santa Monica’s Big Blue Bus, Antelope Valley Transit Authority, Santa Clarita Transit, Culver City Bus, Foothill Transit, and Metro) have received an FTA finding that Access is not providing Origin to Destination service.

At its November Board Meeting, the Access Services Board of Directors moved that the following implementation plan be presented to the Access members for review and comment. Access’ intent is to have the new service model in place by July 1, 2015.

The Origin to Destination implementation plan is as follows:

- Create an Ad Hoc Regional Paratransit Working Group comprised of riders, transportation service providers, member agencies, interested stakeholders, and Access staff. The Access Chairperson will make the final determination on the appointment of members to the ad hoc group.

- Direct the ad hoc group to develop policies and procedures on how origin to destination will be implemented throughout Los Angeles County. The results shall be presented to the Access Services Board of Direction for concurrence.

- Once the policies and procedures have been approved, Access will retain HDR Engineering, Inc. to develop cost projections. The cost estimates will
be developed by using the proposed policy and by studying the experiences of other agencies who have implemented origin to destination service. The cost projections will be presented to the Access Board of Directors for approval.

- Submit a request for funding to the Los Angeles County Metropolitan Transportation Authority (Metro) in their role as the regional planning and funding authority for full funding of the implementation of origin to destination service.
- Conduct a thorough public participation process as required by the ADA regulations on the proposed change of adding origin-to-destination service to the existing service model.
- Present an amendment to the Los Angeles County Coordinated Paratransit Plan to the membership of Access Services. If approved, submit to the Federal Transit Administration and begin the process of implementing origin to destination service.

After consulting with other transit agencies around the country, staff believes that previous cost projections as developed by HDR are too speculative and the region would benefit from a more in-depth study of the costs of this service. Given that other transit agencies have made the transition from a pure curb-to-curb system to an “origin to destination” system, there is now enough data to come to a reasonably accurate cost estimate.

The Federal Department of Transportation (DOT) in promulgating paratransit regulations pursuant to the requirements of 42 USC § 12143 intentionally and specifically elected not to define whether a compliant service could be door-to-door or curb-to-curb. (49 CFR Part 37, Appendix D §37.129.) That choice was intentionally left to be determined by the local transit property with the input of the local disability community when their paratransit plans were adopted and submitted to FTA. Some transit properties adopted door-to-door systems and some, like Access Services, adopted a curb-to-curb system as the most comparable to the fixed route.

The fact that a compliant paratransit system did not have to go door-to-door was confirmed by the 2004 5th Circuit in the case of Melton v DART. The DOT sought to non acquiesce in Melton by, September, 2005, issuing its "Origin to Destination Guidance" and later in an NPRM for which a final rule was never adopted seeking to superimpose "reasonable modification" on complementary ADA paratransit. In its origin to destination guidance, the DOT opined that those terms had been used in the regulations to “emphasize the obligation of transit providers to ensure that eligible passengers are actually able to use the paratransit service to get from their point of origin to their point of destination” and that, accordingly, they may have to modify their policies (such as curb-to-curb) in order to do so. Staff believes that the problem with that interpretation is that it is diametrically contrary to the DOT interpretation of the regulations issued concurrently with them and embodied in Appendix D which “is
intended to be used as definitive guidance concerning the meaning and implementation of these provisions.” Further the premise of the origin-to-destination guidance appears to be diametrically opposite to the intent of the regulation in general as expressed in their preamble.

With regard to “origin to destination” Appendix D specifically provides that: “[t]he local planning process should decide whether or in what circumstances, this service is to be provided as door-to-door or curb-to-curb” (Appendix D §37.129, emphasis added). The Preamble to the DOT ADA regulations with regard to origin-to-destination services states: “This is exactly the sort of detailed operational decision best left to the development of paratransit plans at the local level.” Pursuant to that local planning process which included community meetings and public hearings, many paratransit plans adopting curb-to-curb service were submitted to and approved by the FTA under the provisions of 49 C.F.R. § 37.147 as providing “…for paratransit service comparable to the entity’s fixed route service.”

Since 2005, Metro staff has been in general agreement with Access staff that Origin to Destination Service and other so-called “reasonable modifications” are not required under the ADA and its regulations. (See April 28, 2006 letter to the docket on reasonable modification signed by former Metro CEO Roger Snoble.) This agreement continued up until late last year when Access was informed that Metro’s thinking on this issue had changed and that staff was recommending that Access provide Origin to Destination service.

Given this, it is necessary for the region to once again have a dialogue regarding curb-to-curb versus origin-to-destination (or door-to-door) and then follow the public participation process if any changes are to be made. The last time the region discussed significant changes to Access’ service model was in 2002 and 2003 when it was decided to move from a same day service model to a next day service model. At that time, an ad hoc group, similar to the one proposed above, was created and staff believes it was a constructive way for all the stakeholders to come to an agreement on how to make major changes to the Los Angeles County paratransit system.
April 28, 2006

Docket Management Facility
U.S. Department of Transportation
400 Seventh Street, S.W.
Nassif Building, PL-401
Washington, DC 200590-0001

Re: NPRM: Docket No. OST-2006-23985, RIN 2105-AD54
49 C.F.R. Parts 27, 37 and 38, 71 FR No. 38, 9761 et seq. (Feb. 27, 2006) Transportation for Individuals with Disabilities

Dear Docket Clerk:

We are a coalition of public transit agencies that provide accessible fixed route transportation and paratransit pursuant to the requirements of the Americans with Disabilities Act of 1990 (“ADA”). We submit these comments in response to the referenced Notice of Proposed Rulemaking (“NPRM”). The NPRM proposes to further expand ADA obligations on public transportation providers through amendments to the regulations which implement the ADA, currently codified at 49 C.F.R. Parts 37 and Part 38, and §504 of the Rehabilitation Act, currently codified at 49 C.F.R. Part 27. These comments are addressed to the proposals to add a “reasonable modification” requirement to Title II, Subtitle B, of ADA (“Title II.B.”), particularly with respect to paratransit service, to add a “direct threat” definition and exception to the proposed “reasonable modification” rule, and to establish a Disability Law Coordinating Council through a formal rule. We have joined together in submitting these comments because we are convinced that this NPRM’s proposals, if adopted, will have a significant adverse impact on our agencies’ transportation services. We also support the comments prepared by the American Public Transportation Association, of which many of us are members. Many of us intend to submit separate comments addressing additional issues relevant to our particular circumstances.

We support the concept of accessibility of public transit and voluntarily modify our practices and procedures when it is safe and practical to do so. However, we oppose the NPRM’s “reasonable modification” rule because it would impose a legal obligation to modify service on passenger demand without regard to passenger safety, potential costs, effects on reliability, operational and administrative complexities and local community needs. The “reasonable modification” rule, if adopted as proposed would produce severe adverse impacts on our fixed route transit and paratransit systems, is not redeemed by a proposed “direct threat” exception, and its promulgation would exceed the scope of the powers delegated to the Department of Transportation (“DOT”) in the ADA statute.
DOT does not explain the purpose of its rulemaking proposal relating to the Disability Law Coordinating Council ("DLCC"). Further, establishment of such a Council is a wholly internal administrative process that is not subject to the Administrative Procedures Act's rulemaking requirements. Our concern is that the Council not be used to insulate decision makers from the industry they regulate or the constituent agencies of the DOT from the Administrative Procedures Act and SAFETEA-LU obligations when issuing "binding obligation" pronouncements.

We urge DOT to rescind these proposals in their entirety.

A. THE COALITION

The coalition submitting this comment consists of 40 transit agencies and other interested parties, identified at the end of these comments. Together we deliver more than 3.5 billion fixed route and more than 13.5 million paratransit rides per year and expend a combined amount in excess of $6.8 billion in doing so.

B. COMPLEMENTARY ADA PARATRANSIT AND ITS COSTS

The purpose of Title II.B of the ADA (Public Transportation Provided by Public Entities) was to assure that persons with disabilities would have the same right to public transportation as the general public. The principal means the statute adopted of assuring transportation access for the disabled was to require that public entities make their fixed route systems accessible to persons with disabilities.

For those individuals with disabilities who are prevented from using accessible fixed route transportation, public entities were required to create and maintain paratransit at service levels "comparable" (or in the case of response time, "comparable to the extent practicable") to the transit operator's fixed route system. 42 U.S.C. 12143(a).

As DOT noted in the Preamble to its ADA regulations when issued in 1991 (56 FR 45584, 45601):

The ADA is a civil rights statute, not a transportation or social service program statute. ....Under the ADA, complementary paratransit is not intended to be a comprehensive system of transportation for individuals with disabilities.

The Secretary of Transportation explained that it was DOT's intent, in adopting the regulations, to exercise its discretion "...conservatively, to minimize the
addition of costs to public and private entities beyond what the statute itself imposes." 56 FR 45620.

Despite the Secretary's conservative intent in developing the initial ADA transportation regulations (49 C.F.R. Parts 37 and 38), the annual cost of complementary ADA paratransit in the United States now exceeds $1.9 billion dollars\(^1\) - a number many times more than the official estimates made at the time the regulations were adopted. This is due to two factors: first, the inherent differences in paratransit and fixed route make paratransit preferable to more disabled riders than had been anticipated by federal estimates (and claims by disability advocates). Experience shows that many persons with disabilities, given a choice (i.e., able to ride accessible fixed route transit), will elect to ride complementary ADA paratransit despite the fact that it can cost the rider up to four times as much to do so.\(^2\) Many agencies even offer riders free fare not only for the disabled passenger but also for his or her personal care attendant as an incentive to use fixed route service. Yet, any positive effects of those policies, in terms of reduced paratransit demand, have been negligible at best. The second is that the studies on which the original government estimates were based assumed a substantial denial rate. However, beginning in 1998, DOT through the Federal Transit Administration ("FTA") began to interpret the ADA as requiring a zero denial rate.

The ADA emphasized the obligation to make fixed route transit accessible to persons with disabilities as the primary method of achieving its accessible transportation goals, not only as a means to give persons with disabilities the most independence in travel and the most integrated mode of transportation, but also to promote the most efficient means of achieving the access goal. Public transit in general is a highly subsidized system utilizing some combination of local, state and federal funding. The fare revenue does not cover the actual cost of the ride and the difference is funded by taxpayer dollars. However, on fixed route transit (bus and non-commuter rail), the fare subsidy is far less. For example, a 10-mile bus ride might cost $2.00, of which the rider pays $1.25, for a subsidized cost of $.75, a 38% subsidy. Moreover, as ridership on the bus system increases, the amount of subsidy needed, all other things being equal, diminishes. In comparison, paratransit, utilizing ADA-required service parameters, is a highly inefficient means of public transit. The same 10-mile ride on paratransit will cost $30.00. The rider cannot be charged more than $2.50, thus requiring a subsidy of $27.50, or a 92% subsidy that must be provided by taxpayers. Thus, for the same ride, the subsidy for paratransit is more than 36 times that of the bus ride. In addition, increased paratransit ridership does not diminish costs per trip but in many circumstances will increase it.

\(^2\) The individual is likely eligible for half-fare on fixed route transit and may be charged up to double the full fixed route transit fare for paratransit.
C. PROPOSED REGULATION: REASONABLE MODIFICATION OF
POLICIES, PRACTICES AND PROCEDURES

DOT proposes to amend its ADA and 504 regulations to impose a
requirement of “reasonable modification” of policies, practices and procedures on
public transportation under Title II B. It asserts that this is a mere clarification of
existing law and that it is supported by prior regulatory interpretations and case
law. It contends that for this reason the proposal does not represent a significant
departure from existing regulations and policy and is not expected to have
“noteworthy cost impacts”. All of these contentions are unsupported. If DOT
intends to pursue this proposal, it must comply with the “significant” rulemaking
requirements of Executive Order 12866, and its own Regulatory Policies and
Procedures applicable to significant rulemakings, as well as with Executive Order
13132 (“Federalism”), requiring consultation with state and local governments.

We demonstrate below that this proposed regulation is contrary to existing
case law and 15 years of operating experience. Neither DOT nor FTA had, prior
to last year, indicated that transit properties had any transportation obligations
beyond those incorporated in the regulations, and, for paratransit, what was
incorporated in their FTA-approved paratransit plans. If adopted, this regulation
will have a powerful negative impact on the already-low productivity rate of this
inefficient means of public transportation and significantly increase the cost of
meeting ADA regulations. Moreover, as we also show, it is beyond the statutory
mandate and therefore if adopted would exceed DOT’s authority to promulgate
ADA regulations.

1. Analysis of the “Reasonable Modification” Rule and Title II
Shows that the Proposed Rule is Outside the Scope of Title II.B.

Title II.A precludes public entities from discriminating against persons with
disabilities by excluding them “by reason of such disability” from participating in
public services. 42 U.S.C.§12132. Regulations by the Department of Justice
(“DOJ”) (28 C.F.R. Part 35) flesh out what discrimination means in the context of
general public services provided by a public entity. Historically, government
programs and activities intended for the general public had been designed
without regard to whether those programs and activities were accessible to
disabled persons. DOJ regulations therefore necessarily established a
“reasonable modification” requirement because there are such a wide variety of
general public services that developing specific non-discrimination regulations
with respect to each of them would be impossible. However, DOJ regulations, 28
CFR 35.102(b), specifically exempt public transit because it is the one public
service singled out for specific statutory treatment in Title II.B (42 U.S.C. §12141
et seq.) and regulations promulgated thereunder by the DOT at 49 C.F.R. Parts
37 and 38. DOT regulations as originally promulgated did not have a “reasonable modification” requirement for public entities and logically so.

Public transit is the only public service specifically and separately addressed by the ADA (under Title II.B). The goal of Title II.B is to assure equal access to public transit by persons with disabilities. For those who cannot ride an agency’s accessible fixed route service, complementary ADA paratransit comparable to it is required to be offered.

The eligibility, design and the “comparable” operating parameters for paratransit are specified in the original and detailed DOT regulations. Fixed route operators designed their paratransit systems accordingly and, as required by the ADA statute and the DOT regulations, submitted a plan as to how this specialized service would be provided. 42 U.S.C. § 12143(c)(7). FTA approved the plan when “…viewed in its entirety” it provides for service “comparable to the entity’s fixed route service” and is therefore compliant with the antidiscrimination provisions of 42 U.S.C. § 12143. 49 C.F.R. 37.147(d).

The Department’s proposed rule would superimpose on the modifications of the fixed route system imposed by Title II.B, including complementary ADA paratransit, a requirement to further modify in response to rider demand on a case-by-case basis. We believe that this proposal is unnecessary, unworkable and contrary to the intent of the ADA.


There are no “reasonable modification” requirements in the original DOT regulations. Further, DOJ regulations that do have such a provision are inapplicable to public transportation. 28 CFR 35.102(b). The only appellate court to directly address the issue determined that “reasonable modification” was not required for activities covered under Title II.B. Melton v. Dart, 391 F.3d 669 (5th Cir. 2004); cert. denied, 125 S.Ct. 2273 (2005). Melton involved a plaintiff who sought to compel the paratransit agency to modify its curb-to-curb policy and pick up the plaintiff in an alleyway as opposed to the curb in front of his house. The court determined that the concept of “reasonable modification” did not apply to paratransit:

Because paratransit service is meant to act as the disability complement to established fixed route transportation services, this comprehensive regulatory scheme signals that no interim extra-plan modification is statutorily or otherwise required by a public entity when the public entity is properly operating under a FTA-approved plan. The FTA-approved plan is itself the accommodation to the disabled by the public transportation entity. It is the violation of the plan itself that
constitutes the prohibited discrimination under title II, not the failure to modify the plan to address particularized complaints. (391 F.3d at 675.)

In Disabled in Action of Pennsylvania, et. al. v. National Passenger Railroad Corporation (“Amtrak”), WL 1459338 (E.D.Pa. 2005), 16 A.D. Cases 1596, the setting was fixed route transportation and the court, persuaded by the reasoning in Melton, determined that “reasonable modification” was not required for matters covered under Title II.B.

DOT’s assertion that Burkhart v. Washington Area Metropolitan Transit Authority, 112 F.3d 1207 (1997), appeared “to share the Department’s assumption about the relationship between the DOT and the DOJ requirements” (71 Fed. Reg. 9762) is misplaced. As pointed out in Melton, the Burkhart court did not decide whether or not the transit authority was exempt from the DOJ regulations on “reasonable modification” because that issue had not been raised in the court below (Melton, at 674 n.6; Burkhart, 112 F.3d at: 1210 n. 1).

For more than 15 years prior to the issuance in September of 2005 of its unusual guidance regarding origin-to-destination paratransit service DOT’s own actions demonstrated that “reasonable modification” was not a concept applicable to Title II.B. Since FTA approved our paratransit plans, none of which contained a policy to provide modifications of service on rider request, there has been no indication that anything beyond complying with the paratransit service criteria was required.

Nor can DOT bolster its argument that “reasonable modification” is a mere “clarification” of an existing rule by pointing to its own unprecedented act of issuing in 2005 its first written guidance on paratransit (interpreting the “origin-to-destination” requirement). In that interpretation DOT, for the first time, contended that the “origin-to-destination” language of the regulations meant that the transit operator had to “reasonably modify” its service model of curb-to-curb service on request of any rider. Such an interpretation is contradicted by years of contrary interpretation by FTA officials relied upon by transit agencies. For example, on June 14, 2003 at the Community Transportation Association of America annual conference in Seattle, Michael Winter, Chief of FTA’s Office of Civil Rights, sought to persuade transit operators to address mobility needs of the disabled by providing service beyond that required by ADA. He conceded that the paratransit regulations require no better than curb-to-curb service and that whether to go beyond that and provide door-to-door service for ADA eligible riders is left to local decision-making processes. This was consistent with other FTA written pronouncements indicating that the origin-to-destination language of 49 C.F.R.

---

§37.129 means that, "[t]he exact location of pick-up and drop-off sites are an operational issue not governed by the regulations."

DOT's view of the requirements of §504 of the Rehabilitation Act has changed as well. Before the ADA was passed, the author of the current NPRM expressly stated that “special accommodations” (the equivalent of “reasonable modification”) for persons with mental, visual or hearing impairments were not required under 504 as interpreted by DOT regulations and concluded that to impose such a requirement would require an amendment to the regulations. 52 FR 30803 (DOT Docket 45162) (1987). We are unaware of any such amendment ever being made.

3. The Proposed Rule is Unnecessary.

Specific regulations already establish requirements for accessible fixed route and paratransit service. 49 C.F.R. Parts 37 and 38. These regulations provide the accommodation or “reasonable modification” of the fixed route transportation (a general public service) for persons with disabilities and have been the basis for the design and operation of accessible fixed route and paratransit systems for more than 15 years.

On a practical level, the rule is unnecessary because transit agencies do make best efforts to provide modifications requested by their riders. It is essential, however, for the good and safety of all of the passengers, (as well as to contain the costs of this service, which was intended to be a limited service for a limited group of people), that these decisions remain within the discretion of the accountable parties, the transit operators. There are no data in the NPRM to indicate that there is a problem needing correction. A few complaints or lawsuits, given the number of paratransit trips given each year (83,000,000 in 2004) and the billions of bus and subway rides annually, suggests overwhelmingly, that riders’ needs in this regard are being met. Under these circumstances, it is inexplicable why the DOT would promulgate a regulation on this subject at all, and especially one that imposes a burdensome administrative process not only to make each such determination but also to document compliance.

4. The Proposed Rule is improper.

The ADA, at 42 U.S.C. §12143(c) (3), authorizes DOT to set forth the levels of service necessary for ADA paratransit systems to be deemed comparable to the applicable fixed route and therefore nondiscriminatory. Similarly, the ADA, at 42 U.S.C. §§12142, 12147 and 12148 specify the requirements for accessible fixed route transportation vehicles and facilities.

---

\(^1\) FTA January 1, 2001 Response to Complaint No. 00-0263; FTA April 3, 2001 Response to Complaint No. 00-0269.

\(^2\) Note 1, supra.
DOT's proposal to superimpose on these requirements a condition that will be defined only by rider request on a trip-by-trip basis exceeds its statutory authority because it fails to define or otherwise exceeds what is comparable to the applicable fixed route.

The proposed regulation also is procedurally improper because, as previously stated, the DOT has not complied with the conditions imposed by Executive Orders 12866 and 13132.

5. As to Complementary ADA Paratransit, the Proposed Rule Makes No Sense.

Complementary ADA paratransit is not a service for the general public that needs to be adapted or modified to meet the special needs of persons with disabilities. It is designed from the ground up as a modification of and alternative to fixed route service to accommodate a subset of persons with disabilities who cannot use accessible fixed route service. There is no rationale for superimposing on the specific regulations regarding eligibility, design and operations of a compliant system the obligation to customize each ride upon request.

There is no discussion in the NPRM of what consideration, if any, was given to the effect on paratransit riders if the service were no longer to be clearly defined by regulations that are universally applicable and consistent. Currently, wherever the rider may be when traveling around the country, or even if living in one paratransit jurisdiction while working in another and using both systems on a regular basis, the rider knows what the service must provide.

By going to a "modification-by-demand" standard, DOT will force transit agencies to change aspects of service across-the-board when enough riders request the same or similar modification, because the rule as proposed leaves the agencies with no clear basis for denying specific types of requests. This is so because the logistics involved in responding on a person-by-person, day-to-day basis, as suggested by DOT, would have an adverse impact on service reliability, as explained below at ¶C.6, and could add even greater costs and productivity losses than by changing the service across-the-board. However, this means that in any given jurisdiction, paratransit service is going to mean something different. When riders need to use more than one paratransit system (not unusual for those working or attending school in metropolitan areas but living in suburban areas, or the reverse), they will not have the certainty of knowing what to expect with regard to each of the service parameters set out in 49 CFR §37.131.

Moreover, if agencies change the service to attempt to contain the exorbitant costs of this proposed mandate, they will simply have set themselves
up for demands by some riders to change the system back to the way it was, on a case-by-case basis, to meet their asserted needs.

ADA mandated accessible mass transit and mass paratransit, albeit in a necessarily modified way, for the disabled. DOT, by expanding service requirements enunciated in the original regulations through its 2005 formal “interpretations” and this proposed rule, will effectively mandate individualized transportation service for each disabled person. If such a radical departure from ADA’s intent is necessary and appropriate, it clearly requires legislative, not regulatory, action.


If a transit agency must modify each trip as requested to do so by the rider, it is easy to envision a service in which many or most trips are customized. It is not possible to predict all of the circumstances in which modifications might be sought and therefore accurately forecast its total potential cost. However, DOT’s positions on at least three such instances are either discussed in the NPRM or in other Department pronouncements. These are door-to-door paratransit service (71 FR 9763), allowing wheelchair users to ride sideways (November 8, 2005 FTA Letter to Santa Cruz MTD) and the case-by-case abandonment of designated bus stops on fixed route service (71 FR 9764). In suggesting that these examples are “reasonable modifications,” DOT makes it clear that it does not consider them to be “fundamental alterations” of service. We disagree.

(a) Modification of Paratransit Service. The safety and productivity costs of on-demand door-to-door service are well known by transit agencies. For those systems currently using a curb-to-curb service model, these costs include increased dwell time, risk to other passengers and the vehicle when left unattended, and decreased system capacity because of lower efficiency, resulting in increased operating costs and the necessity of renegotiating many millions of dollars in third party provider contracts.\(^7\)

Dwell time is increased because the driver is helping the rider to the door and returning to the vehicle. Assuming that an additional four minutes is needed at each end of the trip (pick-up and drop-off) to provide door-to-door service, and that one-half of all rides will eventually request door-to-door service, we estimate that paratransit variable costs will increase by 10.29% (employee compensation and maintenance running costs would actually increase by more than 10%) and

\(^7\)When drivers have voluntarily assisted riders to their doors, there have been incidents of the vehicle being stolen with another rider in it. In one case, the driver was shot by a relative of the rider believing him to be a burglar. Thus, among the operating costs that will increase with this proposal are the costs of workers’ compensation and liability insurance. Recruitment of drivers may also become increasingly difficult.
fixed costs would increase by 5.44%. We estimate that just a single requirement to provide door-to-door service on demand will increase the costs of transit agencies currently providing curb-to-curb by at least 8.18%. Given current predominance of curb-to-curb service models, this translates to an estimated nationwide cost in excess of $100,000,000.8

Despite the extraordinary cost that could be incurred nationally (and for each agency that does not currently offer door-to-door service) by just this one service modification, the proposed regulation would not stop there, but would mandate a host of other customized ride requests, each of which have a similar propensity for escalating the cost and reducing the reliability of a paratransit ride while reducing the capacity of the system. Moreover, there is no meaningful procedure through which an agency could verify that any modification requests are in fact compelled by the person’s disability rather than mere preferences for convenience (of the individual or his/her family).

The following are examples of other than door-to-door modification requests that this coalition’s members have received, and, except for a very few in which riders may not be able to identify a disability-related need, it is readily apparent that a claim can be made that the request is disability-related, whether true or not:

(1) **Demands that preclude shared ride or reduce capacity:**

- Claustrophobia combined with other disabilities
- Desire to transport bulky packages/equipment as part of tools of the trade of the rider
- Service animal allergies and phobias
- Allergies to perfumes, other common chemicals
- Refusal to ride with others based on race or gender, physical attributes, such as odors, behavior of others, such as use of obscenities, racist remarks
- Intermediate stops where driver would be required to wait
- Demand for non-stop ride due to physical debilitation before/after medical treatment (dialysis, chemotherapy, etc.)
- Ride with wheelchair or scooter facing sideways
- Space for additional mobility aide to be transported with rider using a different mobility aide
- Space for cart carrying six oxygen tanks
- Specific route (smoother roads, less bumpy ride)

---

8 We estimate that approximately 62% of paratransit rides are currently provided under a curb-to-curb service model. See, Transit Research Board, "Practices in No-Show and Late Cancellation Policies for ADA Paratransit" (2005). It bears repeating that the cost estimate is based on dwell time alone. As demand for door-to-door grows, paratransit operators may have to provide more non-shared rides where unusual pick-ups or drop-offs would be required, or hire vehicle attendants for passengers (such as those with severe cognitive impairments) who could not be left unattended, even briefly, on the vehicle.
• Specified vehicle temperature
• Will not ride with a specific other passenger; must ride with a specific other passenger

(2) **Demands for Specific Equipment or Seating Location:**

• Must have van
• Must have sedan
• Must have front seat of sedan
• Must have specific seating location in van or sedan
• Must have reclining front seat
• Must have unmarked sedan ("stigmatized" by name of service on vehicle)
• Must have mini-van
• Must have vehicle with "less-stiff" suspension
• Must have vehicle with no boarding lights or alarms, because they cause seizures
• Vehicle too small or enclosed
• Vehicle must be equipped with outside handles to aid sight-impaired but ambulatory rider to board the vehicle
• Combined weight of rider and mobility device exceeds 600 lbs.
• Oversized mobility device
• Transport rider with fully-reclined wheelchair
• Must have two seats due to size

(3) **Demands for specific driver or specific gender of driver:**

• Fear of minorities due to racial/ethnic bias of rider
• Fear of molestation
• Non-smoking driver (even though driver doesn’t smoke on bus, he/she "smells of smoke")
• Drivers with specific second language skills
• Drivers with security clearances for specific pick-ups/drop-offs in security area

(4) **Demands for unsafe travel:**

• Refusal to allow mobility device to be secured
• Refusal of ambulatory passengers to buckle seatbelts or unbuckling them during travel
• Refusal of passenger who uses wheelchair to buckle seat/shoulder harnesses at wheelchair locations
• Unsafe pick-up or drop-off points
• Drop off at different location than scheduled
Driver to leave vehicle unattended and out of sight due to rider need for escort to door or through-door
Refusal to travel with PCA where individual cannot travel alone, requiring extraordinary assistance of driver or resulting in danger to individual, driver or other passengers

(5) Demands that exceed paratransit service parameters:

- Pick-up or drop-off times to accommodate intermodal transportation connection outside hours of paratransit service
- Cannot arrive not earlier than a certain time outside hours of paratransit service
- Provide final destination transportation where intermodal transportation connection is missed
- Provide at-door pick-up which is outside ¾ mile service corridor
- “Rescue” trips to pick-up passenger within or outside service hours because person’s disability precluded his/her keeping proper track of time and he/she was a “no show” at scheduled pick-up time
- Driver to wait excessive periods of time with rider because no caregiver is at the location and rider needs PCA but does not travel with one
- On-board requests to drop off guest or PCA at different location than rider’s scheduled destination
- Paratransit service to provide an escort for a rider
- Drivers to call rider on telephone upon arrival or as approaching arrival
- Failure/refusal to pay full paratransit fare
- Needs more no-show allowances
- Point of service requests: add guest, change destination, make intermediate stop, wait for return trip, etc.
- Day of service request for vehicle with available wheelchair space (or the reverse), that had not been reserved when the trip was reserved (due to changing physical condition, weather)
- Pick-up/drop-off at door requires carrying passenger using mobility device up or down steps
- Fixed pick-up or fixed drop-off time(s)
- At point of service, passenger arrives with a guest for which no reservation had been made
- Service available during weekdays but passenger also wants the service on weekends where reduced fixed route service have concomitant reduced paratransit service area
- Real time request for earlier pick-up because less time was needed than planned and passenger cannot wait for scheduled pick-up
- Request that vehicle wait beyond established waiting time for passenger to arrive for pick-up

In short, the effects on paratransit of legally compelled ad hoc service modifications would be to create a system far removed from that complementary with and comparable to the fixed route as envisioned by the ADA. On a practical level, to require a system that was never designed or intended to meet all of the transportation needs of disabled persons to customize each ride to meet the rider’s claimed needs would result in substantial reduction in capacity due to increased inefficiency (i.e. fewer passenger miles per vehicle due to increased dwell times and increase in non-shared rides) thereby substantially increasing both operating and capital costs.

(b) Fixed Route Transportation. It is patently unacceptable to leave pick up and drop off locations to individual bus operator’s discretion based on passenger requests when the decision may result in a civil rights violation. Further, there is an inherent risk of increased vehicle accidents, passenger injuries and deaths, together with the degradation of on-time performance. In any event, any individual with a disability who cannot use accessible fixed route service as it is operated by the transit agency is by statutory definition eligible for paratransit. 42 U.S.C. §12143(c)(1)(A)(i); 49 C.F.R. §37.123. This alone demonstrates that “reasonable modifications” are not required by current regulations and cannot be required through new regulations. The statute clearly leaves to transit agency discretion a decision whether to modify its fixed route service beyond ADA requirements to make it available to a larger class of people with disabilities or to provide those persons with paratransit service.

The following are examples of fixed route modification requests that this coalition’s members have received and, like the requests on paratransit, a claim can easily be made that these requests are disability-related:

- Pick-ups/drop-offs at other than designated bus stops
- Specific bus type to be dispatched because of securement type/location
- Specific bus type to be dispatched because of lift/ramp types, ride quality or other amenities on the bus.
- Assistance with packages or luggage on boarding
- Operator to assist rider across nearby intersection
- Operator or crew member to take charge of a service animal during boarding or exiting
- Operator or crew member to act as a PCA for the rider who needs one but insists on riding without one.

---

9 The driver cannot reasonably be expected to be able to limit boarding and alighting at non-designated stops to only those stops requested by people with disabilities, even if s/he could determine whether a particular person requesting that modification had a “ADA disability”.
(c) Administrative Problems. The Department envisions that the local transit agency will make the individual case-by-case determinations as to whether a request for modification is related to the rider's disability and if so involves a "direct threat", "fundamental alteration" or "undue burden." If not, the request must be granted. If the request is denied, there is the further obligation to seek another means of achieving the goal of the requested modification. All this is further subject to the Department's right of review (71 FR 9762-63). This time-consuming process cannot work in the real world of mass transit. Most requests will occur at the point of reservation or in the field, at the point of travel. DOT's proposed rule seems to expect public agencies to entrust to their drivers or reservationists the task of making complex decisions that could expose an agency to civil rights violations and tort liability for injuries, deaths and vehicle damage. Because such determinations will, under the proposed rule, carry potentially significant legal and operational consequences to the transit agency, it is unlikely that any agency would entrust such determinations to anyone below an executive level. Accordingly, responsible implementation of the proposed rule is operationally impractical. Assume an average paratransit service that books more than 1000 rides per day and assuming only 10% of those request a service modification, an executive of the agency could not possibly have time to consider and rule on the propriety of 100 requests daily or to complete the paperwork to support each denial and devise an alternative as required by the proposed rule.

Finally, this proposal is likely to result in unreliable service. A service that changes daily to meet the specialized needs of that particular day's constellation of passengers will decrease the reliability of the service. It simply cannot be expected that drivers can reliably master and keep track of the different services to be made available to each customer. Consequently, entirely understandable human failures in this regard by the drivers will result in failed pick-ups, or longer dwell times and consequent late drop-offs.

7. The Proposed "Direct Threat" Exception\textsuperscript{10} Definition Ignores Rider Safety and Will Not, in Any Event, Ameliorate the Defects in this Proposed Rule

DOT proposes to incorporate in Title II.B the same definition of "direct threat" that exists in Title II.A as a basis (in addition to "undue burden" and "fundamental service alteration") upon which transit agencies can deny a disabled rider's service modification request relating to fixed route or paratransit service. 71 FR at 9763-64. However, when the service at issue is transportation, rather than all of the other types of government services afforded under and in accordance with Title II.A, the definition is inappropriate because it does not

\textsuperscript{10} Although the Commentary indicates that "direct threat" would be an exception to a "reasonable modification" obligation, 71 FR 9763-64, and a definition is proposed, 71 FR 9768, the availability of the exception does not appear in the proposed rules.
permit a decision to deny the modification request based on one of the very likely reasons why it should be denied; namely, that if granted it would be a danger to the disabled person making the request.

By common law, common carriers have an enhanced duty of care to provide safe transportation to their passengers. Nothing in the legislative history of the ADA suggests an intention by Congress to abrogate this duty, especially where it involves the safety of persons with disabilities, a group the statute seeks to specifically benefit. Under DOT's proposed approach, a transportation agency would be considered to be discriminating against a disabled person by refusing to engage in conduct that was unsafe for that disabled person. This would certainly be a unique application of civil rights law. Moreover, nondisabled persons do not have a right to demand and receive unsafe transportation for themselves. It cannot be seriously argued that ADA created such a right for disabled persons.

Transportation agencies must continue to provide safe passage for their passengers. If a disabled person believes that a request has been denied on a pretextual basis, then he or she can file a complaint with FTA or litigate directly whether the request was denied for discriminatory reasons, rather than on the basis of safety or other non-discriminatory reasons. This is in keeping with traditional civil rights law; disabled persons do not need a new ADA regulation to press such a claim. Under DOT's proposal, the regulation presumes that a denial of a modification request because it would constitute a direct threat to the safety of the disabled person is discriminatory per se. A transportation agency should not be forced to intentionally engage in conduct known to it to be unsafe for its passengers or face litigation. This Hobson's Choice is untenable.

However, even if the safety of the requesting rider were included in the definition of "direct threat", its addition to the "undue burden" and "fundamental service alteration" limitations of the proposed rule could not and will not resolve the fundamental flaws in the "reasonable modification" proposal which we have brought to DOT's attention in these Comments.

**D. PROPOSED RULE: DISABILITY LAW COORDINATING COUNCIL**

The DOT does not explain why it seeks to promulgate by regulation an internal administrative process that the Administrative Procedure Act ("APA") clearly exempts because it is a rule of "agency organization, procedure or practice." 5 U.S.C. §553(b)(3)(A). Moreover, DOT states that the Council "is in place and functioning effectively." 71 FR at 9765. If a regulation were required, it would have to have been promulgated in advance of the Council issuing binding guidances, thus raising the question whether those issued to date are valid. A stated need to have all of DOT's constituent administrations issue consistent interpretations is an inappropriate goal given that the statutory provisions and
regulations for the different transportation modes under the jurisdiction of FRA, FTA and FAA are different. Proper interpretations would reflect those differences not eliminate them.

While DOT can continue this process with or without a regulation, we do not agree that the Council is functioning effectively with respect to agencies subject to FTA. To date, the Council’s actions seem to be focused on overturning all of the settled expectations concerning the ADA, which had been based, appropriately, on guidance provided over all these years by FTA and FTA-approved paratransit plans.

Moreover, the process by which prior interpretations are “overruled” by the Council is poorly designed. Up to now, there has been no attempt to determine if the complaints received by DOT are true; no survey of how widespread the issue may be; no request made for information from public transit in order to fully understand the issue or the potential ramifications of imposing a new “guidance”; no survey of riders done to determine whether what the complainant seeks is reasonable (and whether if granted would interfere with other riders’ service quality).

Consequently, if the Council is to continue, its legitimacy will depend not on how it was established but by the integrity of its process. Council processes should require sufficient and objective fact-finding and comment from all stakeholders before interpretations are issued, and the Council should limit its pronouncements to reasonable interpretations of promulgated regulations and not attempt to create new rules without rulemaking (such as the origin-to-destination and Segway guidance issued by the Council in September 2005).

Given no express or apparent necessary basis for the creation of the Council by regulation, we are concerned that its establishment by this process not result in circumventing the APA and the recent amendment to §5334 of the Federal Transit Act in §3032(l) of SAFETEA-LU enacted in August 2005. Section 3032(1) requires that the rulemaking procedures under the APA be followed before any FTA statement or guidance is issued that imposes a “binding obligation” on transit properties and those similarly situated. The purpose is to require transparency and obtain input from all affected parties before these determinations are made. The establishment of the Council by regulation should not be used to insulate DOT or FTA from this requirement. Because the Council already exists and it is apparently unnecessary to validate it by rulemaking, the proposed rule should be withdrawn.

For 15 years under the ADA the DOT delegated to FTA the duty to monitor compliance by transit properties with Title II B including the approval of paratransit plans, conducting capacity assessments, engaging in complaint review and providing guidance to transit agencies. This choice was appropriate as FTA funds many such agencies and has a greater specific experience with

\[11\] See, e.g. 49 C.F.R. §37.147
respect to the practical aspects of public mass transit delivery. We are concerned that the new regimen of using the interagency Council will, by minimizing the role of the FTA in this process, result in determinations that are ill conceived or impractical to implement.\textsuperscript{12}

E. CONCLUSION

The thrust of our comments should not be misunderstood. They do not address the propriety of modifications made every day by transit agencies as a matter of voluntary customer service, which currently take into account available resources, safety, practicality and service impacts. What is here addressed is the notion that the law should require individualized, customized modifications of rides on a public transit system where the law already defines what is required for such a system not to be discriminatory. To superimpose such a requirement would create a system that is not comparable to the service provided to passengers on fixed route transportation and thus is beyond the mandate of the ADA. Imposition of legally compelled modifications will likely result in a public transit system that provides poorer, not better service to the vast majority of persons with disabilities.

Respectfully submitted,

Mark R. Aesch, Chief Executive Officer
Rochester Genesee Regional Transportation Authority
1372 E. Main Street
Rochester, NY 14609

Roger Snoble, Chief Executive Officer
Los Angeles MTA
One Gateway Plaza
Los Angeles, CA 90012

Randy Floyd, Executive Director
Antelope Valley Transit Authority
42210 6th Street West
Lancaster, CA 93534

Raymond Friem, Senior Vice President
Bi-State Development Agency
(dba Metro St. Louis)
707 N. 1st Street
St. Louis, MO 63102

Rick Ramacier, General Manager
Central Conta Costa Transit Authority
2477 Arnold Industrial Way
Concord, CA 94520

John Andoh, Transit Service Manager
City of Benicia, Finance Department,
Transit Department
250 East L Street
Benicia, CA 94510

\textsuperscript{12} We would argue that the Council’s 2005 guidances on Segways and “Origin-to-Destination” service are examples of such a result.
Amy Ho, Transportation Manager
City of Monterey Park, Spirit Bus
320 West Newmark Avenue
Monterey, CA 91754

Joyce Olson, Chief Executive Officer
Community Transit
7100 Hardeson Road
Everett, WA 98203

Tammy Haenfling, Assistant Vice President, Paratransit Management
Dallas Area Rapid Transit
1401 Pacific Avenue, P.O. Box 660163
Dallas, TX 75266

David Rishel, Principal
Delta Services Group, Inc.
P.O. Box 449
Newton, PA 18940

Doran J. Barnes, Executive Director
Foothill Transit
100 No. Barranca Avenue, Suite 100
West Covina, CA 91791

Celia Kupersmith, General Manager
Golden Gate Bridge, Highway and Transportation District
P.O. Box 9000, Presidio State
San Francisco, CA 94129

Joseph A. Calabrese, General Manager
Greater Cleveland Regional Transit Authority
1240 West 6th Street
Cleveland, OH 44113

Mark Wall, General Manager
Lake Transit Authority
881 Eleventh Street, PMB 707
Lakeport, CA 954453

Richard DeRock, General Manager
Link Transit (Chelan-Douglas Public Transportation Benefit Area)
2700 Euclid Avenue
Wenatchee, WA 98801

Barbara Duffy, General Manager
Livermore Amador Valley Transit Authority
1362 Rutan Drive, Suite 100
Livermore, CA 94551

Shelly Lyons-Verrinder, Executive Director
Access Services Inc.
PO Box 71684
Los Angeles, CA 90071

Larry Shankland, Transportation Manager
Merced County Transit
880 Thornton Road
Merced, CA 95340

James Laughlin, Director, Transportation Programs
Metropolitan Transit Authority (Houston)
P.O. Box 61429
Houston, TX 77208

Carl Sedoryk, General Manager, CEO
Monterey Salina Transit
One Ryan Ranch Road
Monterey, CA 93940

Neil S. Yellin, President
MTA Long Island Bus
700 Commercial Avenue
Garden City, NY 11530

Lawrence G. Reuter, President
MTA New York City Transit
2 Broadway
New York, NY 10004