

Disability Discrimination Act 2005 - Rail Services

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Title

Consultation on draft Rail Vehicle Accessibility Exemption Order (Parliamentary Procedures) Regulations, Rail Vehicle Accessibility (Determination of Turnover) Regulations & Setting of Penalties: Code of Practice

Executive Summary

1. The Government is committed to comprehensive and enforceable civil rights for disabled people including, with respect to this consultation paper, revising and extending the rail vehicle accessibility regulations (RVAR) regime, to ensure that it continues to meet the needs and legitimate aspirations of disabled people.
2. The Government included provisions in the Disability Discrimination Act 2005 (DDA 2005) to meet that commitment including setting an end date of no later than 1 January 2020 by which time all rail vehicles will be subject to the requirements of RVAR, enabling RVAR to be applied to older rail vehicles when they were refurbished, introducing compliance certification and amending the associated exemption and enforcement regimes.
3. Further consultation on the bulk of these measures will be held in due course but this consultation paper requests your views on draft regulations intended to implement two specific aspects of the DDA 2005 provisions. These are:
 - The Rail Vehicle Accessibility Exemption Order (Parliamentary Procedures) Regulations 2006 (at **Annex A**) set out the way in which the Secretary of State for Transport proposes to decide which Parliamentary procedure should in future be used when an order which will exempt vehicles from provisions in the RVAR is to be made (the parliamentary procedures regulations); and
 - The Rail Vehicle Accessibility (Determination of Turnover) Regulations (at **Annex B**) which set out the definition of "turnover" used in imposing a penalty under the new civil enforcement regime.
4. We have decided to hold a separate consultation exercise on these draft regulations since they must be approved by a resolution of both Houses of Parliament.
5. We would also like your views on the Penalties: Code of Practice (at **Annex C**) which specifies the matters the Secretary of State must take into account when determining the amount of any penalty. The draft Code must also be laid in Parliament which must agree its contents before it can come into force.
6. To assist understanding of the Code, we have also produced some worked examples (at **Annex D**). The examples are not intended to be exhaustive or prescriptive but rather demonstrate how the Code might work in practice in determining the level of penalty which is imposed. Some examples are also given where it may be considered unreasonable for the Secretary of State to impose a fine.
7. We want these provisions to be in place on or before 31 December 2006.
8. More detailed information about our proposals can be found in the appropriate sections of the consultation paper.
9. The paper also explains that European regulations (Technical Specification for Interoperability for Persons with Reduced Mobility) will influence domestic policy in future.
10. We would like your views by no later than **Monday 16 October** (see **Section 5** of the consultation paper for details about how to respond).

1 Introduction

1.1 The Government is committed to comprehensive and enforceable civil rights for disabled people including, with respect to this consultation document, revising and extending the rail vehicle accessibility regime (the regime), to ensure that it continues to meet the needs and legitimate aspirations of disabled people.

1.2 In its report¹ to the Government, the Disability Rights Task Force (DRTF)² made a number of recommendations on transport, including two specifically aimed at improving access to rail services for disabled people:

- the setting of an 'end date' by which time all passenger rail vehicles will be subject to the requirements of rail vehicle accessibility regulations (RVAR); and
- the development of RVAR to apply to refurbishment of existing rolling stock.

1.3 Those recommendations were accepted by the Government in its response³ and initial consultation on proposals for implementation was held in November 2003⁴. That consultation also sought views on other issues which were not recommendations of the DRTF including amendments to the RVAR exemption process and addressing matters such as certification and enforcement. Many of these changes had been requested by the industry in light of experience of operating under the existing regime.

1.4 Measures were subsequently included in the Disability Discrimination Act 2005 (DDA 2005), which received Royal Assent in April 2005, to amend the Disability Discrimination Act 1995 (DDA 1995). During the passage of the Act through Parliament, the Government's proposals on rail received a great deal of scrutiny and were modified to meet concerns expressed by Peers to ensure that an appropriate level of Parliamentary scrutiny, particularly of applications for exemption orders, was maintained.

1.5 This consultation document, which covers England, Scotland and Wales⁵, contains draft regulations designed to implement two aspects of those measures; the basis on which the Secretary of State for Transport will decide which Parliamentary procedures should be used to scrutinise particular orders to exempt vehicles from provisions in RVAR and prescribing what constitutes "turnover" for the purposes of a new civil enforcement regime for contravention of RVAR (the DDA 2005 limits any penalty to a maximum of 10 per cent of an operator's turnover and also requires the setting of a maximum financial limit which will be subject to further consultation).

1.6 The Government has indicated that it wants these provisions to be in place on or before 31 December 2006.

¹ From Exclusion to Inclusion, DRTF, December 1999.

² The DRTF was established in 1997 to consider how best to deliver the Government's manifesto commitment to comprehensive and enforceable civil right for disabled people.

³ Towards Inclusion - Civil Rights for Disabled People, DfEE, March 2001, ISBN 1-84185-480-8.

⁴ Consultation on the Government's proposals to amend the rail provisions in Part 5 of the Disability Discrimination Act 1995, DfT, November 2003. Available from http://www.dft.gov.uk/stellent/groups/dft_control/documents/contentservertemplate/dft_index.hcst?n=10080&l=2.

⁵ Northern Ireland will be consulting separately on their own proposals.

1.7 In future, most heavy rail trains will need to comply with the European Technical Specification for Interoperability for Persons with Reduced Mobility (TSI) rather than RVAR. The TSI is likely to come into force in 2007 and we are currently discussing how derogations from it might be administered, and how the two regimes can be combined. Some of the options which are being considered are outlined in **Section 3.1**. Until the TSI comes into force, the RVAR exemption process will still apply. RVAR will continue to apply to older trains, underground, metro systems and trams.

Section 2 of this document sets out the issues we would like you to consider although we would welcome your comments on any of the detailed proposals.

Section 3 describes the current provisions of the regime and the changes which are proposed. It also covers the provision of guidance for the industry and the proposed timetable for implementation.

Section 4 sets out the Regulatory Impact Assessment which estimates the additional costs that may arise from enacting the proposed legislation in its current form and the benefits that could accrue for disabled people.

Section 5 includes contact details for further information, the procedure for sending responses and the closing date.

1.8 The DDA 2005 also includes other measures on transport including provisions to implement another of the DRTF recommendations to remove the exemption for transport service providers from the provisions of Part 3 of the Disability Discrimination Act 1995 (DDA 1995) which places duties on the providers of goods, facilities and services not to discriminate against disabled people.

1.9 Consultation on draft regulations⁶ covering land-based public transport - rail vehicles (including light rail, underground and trams), buses, coaches, taxis and private hire vehicles - vehicle hire, breakdown services, vehicles used on guided modes of transport and vehicles used on leisure and tourism transport services was completed during the passage of the DDA 2005 through Parliament. The Disability Discrimination (Transport Vehicles) Regulations 2005⁷ have now been laid and will come into force on 4 December 2006.

1.10 The Disability Rights Commission (DRC) has produced a supplement⁸ to its main code of practice on the Part 3 duties to inform the affected sectors' response to the forthcoming duties, which came into effect on 18 April 2006. More information on the provisions of the DDA 2005 and what else we are doing to make public transport more accessible to disabled people can be found on the Department's web site⁹.

1.11 Specifically on rail, the Government has also recently published its Railways for All Strategy¹⁰ which explains how the rail industry will improve the accessibility of all aspects of rail travel in Great Britain. The Strategy also includes £370 million Access for All funding to be spent on improving accessibility at railway stations.

⁶ Consultation on lifting the exemption from Part 3 of the Disability Discrimination Act 1995 for public transport, vehicle hire, breakdown and leisure and tourism transport services, DfT, November 2004. Available from http://www.dft.gov.uk/stellent/groups/dft_control/documents/contentservertemplate/dft_index.hcst?n=12489&l=2.

⁷ SI 2005/3190. Available from http://www.opsi.gov.uk/si/si2005/uksi_20053190_en.pdf.

⁸ Code of Practice: Provision and Use of Transport Vehicles. Available from <http://www.drc.org.uk/library/policy/transport.aspx>.

⁹ <http://www.dft.gov.uk/access>.

¹⁰ Railways for All, DfT, March 2006. Available from http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/divisionhomepage/611396.hcsp.

2 Issues to consider and deadline for responses

2.1 The scope of this consultation is set out in **Section 3**. Within that context we would welcome comments on any aspect of the proposals but we would in particular like you to address the following questions:

Parliamentary Procedures (see paragraphs 3.3.5 to 3.3.51)

- Do you think that the criteria used to decide whether a draft RVAR exemption order merits a resolution to be passed by both Houses of Parliament (the draft affirmative procedure, which will normally involve a debate on the order in both Houses) before it can become law are correct?
- Are there any other instances where a draft RVAR exemption order could be subjected to the draft negative procedure?

2.2 In deciding which Parliamentary procedure to follow, the Department has also considered whether the fact that the exemption is major or minor should also be taken into account. For example, if the impact on the ability of disabled people to use a rail vehicle is relatively minor, then the exemption would be obtained via the negative procedure but if the impact was more significant, then the draft affirmative procedure would be more appropriate.

2.3 However, we have not been able to set down in regulations how minor/major should be defined. Non-compliance with one regulation may have no impact on one group of disabled passengers but could significantly reduce the ability (or willingness) of a group of passengers with a different disability to use that rail service. We would welcome consultees' views on this issue.

- Is a differentiation between minor and major non-compliance possible and, if so, what might it be? If such a distinction can be made, should it be applied alongside the other criteria, or should it stand alone, so that an exemption for a minor non-compliance is always dealt with by the negative procedure, regardless of how it stands on other criteria?

Determination of Turnover (see paragraphs 3.3.52 to 3.3.65)

- Are there any other sources of income that should be included in the definition of "turnover" derived from railway-related activities?
- Are the criteria used to determine turnover where no separate fares are charged sufficient?

Setting of Penalties: Code of Practice & Worked Examples (see paragraphs 3.4.3 to 3.4.7)

- Do you think the proposed criteria under each heading in the Code of Practice are sufficient?
- Are the worked examples and levels of penalty indicated appropriate & reasonable?

2.4 This consultation is carried out in accordance with the Cabinet Office Code of Practice on Written Consultations (the essential criteria are reproduced at **Annex E**).

2.5 A list of the organisations across England, Scotland and Wales to whom this paper has been circulated is set out at **Annex F**.

2.6 The deadline for responses is **Monday 16 October** (see Section 5 for further information and details of how to reply).

3 Current and proposed changes

3.1 European Technical Standard for Interoperability

3.1.1 The UK Interoperability regulations¹¹, which bring the European Interoperability Directive for conventional lines into effect, are now in place. **The Technical Specification for Interoperability for Persons with Reduced Mobility (TSI) will be published shortly. The TSI applies to infrastructure on the Trans-European Network (TENs) routes (about 40 per cent of the national network) and to rolling stock which will run on them, whereas RVAR applies to all rolling stock.**

3.1.2 In future, most heavy rail trains will need to comply with the TSI rather than RVAR. The TSI is likely to come into force in 2007 and we are currently discussing how derogations from it might be administered, and how it can be combined with the RVAR exemption regime.

3.1.3 A number of social, economic and legal factors may influence the way the PRM TSI is implemented in the UK. Potential solutions include:

- Increase RVAR requirements to the level of TSI in areas where the TSI is stricter, but leave RVAR as it is in areas where RVAR is stricter. This would mean that compliance with RVAR would automatically result in compliance with the TSI. However, it remains to be established whether this solution is acceptable under European Law as the application of requirements stricter than those of the TSI may be seen as anti-competitive.
- Harmonise RVAR with the TSI. This would allow the TSI's technical requirements to supersede the relevant technical requirements of RVAR, but leave the RVAR process in place. This would mean that derogations under the TSI would have to be subjected to the RVAR exemptions approval process as well as that under the Interoperability Regulations.
- Disapply RVAR for trains that will run on the 'TENs network' leaving them subject to the TSI and the derogation process under the Interoperability Regulations only. This would be the simplest arrangement for main line railways and would leave RVAR in place for trains to which the TSI does not apply.

3.2 Current provisions

3.2.1 Part 5 of the DDA 1995 deals with access to land-based public transport vehicles (rail vehicles, taxis, buses and coaches). It empowers the Secretary of State to make accessibility regulations setting minimum technical requirements to ensure that disabled people, including wheelchair users, can use those vehicles in safety and reasonable comfort.

3.2.2 Within Part 5, section 46 of the DDA 1995 gives the Secretary of State the power to make accessibility regulations in respect of rail vehicles (including light rail, underground and trams) to ensure that they are accessible to disabled people. In 1998, the Government used these powers to introduce the RVAR 1998¹² which came into force on 1 November 1998 and apply to rail vehicles first brought into use after 31 December 1998. Rail vehicles to which RVAR applies are known as "regulated rail vehicles" and that phrase will be used throughout this consultation paper.

¹¹ The Railways (Interoperability) Regulations 2006 [SI 2006/397]. Available from <http://www.opsi.gov.uk/si/si2006/20060397.htm>.

¹² SI 1998/2456.

3.2.3 RVAR set out in considerable detail the technical and design requirements with which regulated rail vehicles must comply. A small number of amendments were subsequently made to the regulations by the Rail Vehicle Accessibility (Amendment) Regulations 2000¹³.

3.2.4 Section 46 also makes it a criminal offence to operate a regulated rail vehicle to provide fare paying passenger services that do not comply with RVAR unless an exemption order under section 47 of the DDA 1995 is in place. The maximum fine for breaching the regulations is set at £2,500. However, no authority with responsibility for enforcing the regulations was specified and there have consequently been no prosecutions for breaches of RVAR.

3.2.5 Section 47 of the DDA 1995 enables the Secretary of State to make orders exempting rail vehicles from some or all of the requirements of RVAR. As of May 2006, 68 exemption orders have been made, 40 of which are still extant. Exemption orders are statutory instruments which, until 30 June 2005 required the approval of Parliament under the negative resolution procedure (see **paragraph 3.3.9** for an explanation). The DDA 1995 requires the Department to consult its statutory advisers on the public passenger transport needs of disabled people, the Disabled Persons Transport Advisory Committee (DPTAC), before making an exemption order.

3.2.6 From receipt of an application, it takes a minimum of around four months for an exemption order to be made although, depending on the scope of the request, it can in practice take significantly longer than this to go through the formal procedures.

3.3 Changes made by the DDA 2005

3.3.1 The DDA 2005 amends the DDA 1995 to enable:

- the setting of an "end date" of no later than 1 January 2020 by which time all rail vehicles must be subject to RVAR;
- RVAR to be applied to rail vehicles when they are refurbished;
- the introduction of compliance certification;
- revisions to enforcement, including decriminalisation of offences;
- revisions to the Parliamentary procedure to be used in making exemptions; and
- production of an annual report on exemption orders.

3.3.2 Although the DDA 2005 made amendments on the face of the DDA 1995 to introduce some of these provisions, many of the changes are effected through powers which allow the Government to make secondary legislation (Statutory Instruments or "regulations") implementing the changes. It is draft versions of some of these regulations on which this consultation paper seeks your comments rather than broader concepts such as the introduction of compliance certification.

3.3.3 The draft regulations (at **Annexes A** and **B**) set out the detail of the criteria through which the Secretary of State will decide whether the making of an RVAR exemption order should require a resolution passed by both Houses of Parliament before becoming law and what will constitute "turnover" for the purposes of applying a financial penalty should a regulated rail vehicle be operated in breach of RVAR respectively. The following paragraphs, which provide cross-references to the relevant draft regulations (where appropriate) outline the proposals in more detail.

3.3.4 We would welcome your comments on any aspect of the proposals but we would in particular also like you to address the specific questions outlined in **Section 2**.

Exemptions

¹³ SI 2000/3215.

3.3.5 The DDA 1995 provides for exemptions to be granted by the Secretary of State by making a Statutory Instrument¹⁴ where it is not possible for regulated rail vehicles to meet the requirements of RVAR. Where granted, exemptions are generally time limited and conditions are often set. A full list of exemption orders which have been issued under the DDA 1995, together with an explanation of the current system for consideration of exemption applications, can be found on the Department's web site¹⁵.

3.3.6 During the passage of the DDA 2005 through Parliament, the procedure for exempting rail vehicles from the requirements of RVAR received a great deal of scrutiny. The Government's initial proposals to make exemption orders by administrative order (in a similar manner to the regime in place for buses and coaches) on which it consulted¹⁶ in 2003 were not accepted by Parliament. Consequently the Government proposed that the existing system should be retained.

3.3.7 Further amendments to that system were then made to meet concerns expressed by Peers. Those amendments were designed to increase the level of Parliamentary scrutiny for certain RVAR exemption orders so that, in particular circumstances, the order would need to be approved by a resolution of both Houses of Parliament before becoming law. Whether this more intensive scrutiny should be required in particular cases will depend on issues such as the age of the vehicle and the length of time for which the exemption was to be granted. The amendments included a power for the Secretary of State to make regulations setting out the basis on which he will decide which of the Parliamentary procedures should be used for individual exemption orders. The amendments also included a requirement for the Secretary of State to produce an annual report on exemption orders.

3.3.8 The Regulations will be made under the power described at **paragraph 3.3.7** and will set out the criteria under which the Secretary of State will decide whether individual RVAR exemption orders should be subject to either the draft affirmative or negative resolution procedures which are explained in **paragraph 3.3.9** below. A draft of the proposed Rail Vehicle Accessibility Exemption Order (Parliamentary Procedures) Regulations is at **Annex A**. The substance of the proposed Regulations is set out below, though it is possible that the layout of the Regulations could be revised if that would be beneficial.

3.3.9 Most Statutory Instruments are subject to Parliamentary control and will follow the procedures laid down in the Statutory Instruments Act 1946. Once these Regulations are in force, the Secretary of State will have the option of two different procedures for RVAR exemption orders:

Negative Resolution Procedure

Since the introduction of the RVAR regime in 1998, all exemption orders have been considered under this procedure. Essentially, once laid in Parliament¹⁷ the instrument will become law on the date specified in the Order. However, it is open to either House to object to the instrument (known as a

¹⁴ Statutory Instruments (SIs) are what is known as delegated or secondary legislation. They are made under powers conferred by an Act of Parliament, in this case on the Secretary of State. They are used to make more detailed legislation, for example in RVAR by setting explicit technical requirements. The Parliamentary procedure is quicker and simpler than an Act of Parliament.

¹⁵ See http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/divisionhomepage/031014.hcsp for further information.

¹⁶ Consultation on the Government's proposals to amend the rail provisions in Part 5 of the Disability Discrimination Act. Available from http://www.dft.gov.uk/stellent/groups/dft_control/documents/contentservertemplate/dft_index.hcst?n=10080&l=2.

¹⁷ For a Statutory Instrument to be laid before the House of Commons a copy of the Instrument must be 'laid on the table of the House'; this actually means placing a copy of the Instrument with the Votes and Proceedings desk in the Journal Office. Most Statutory Instruments are laid in both Houses and a similar procedure applies in the House of Lords.

motion to annul or "prayer" which can be received from any MP or Lord) within 40 days of it being laid. If a prayer is made, the House will then debate the instrument and may vote to annul the Instrument.

Affirmative Resolution Procedure

Instruments considered under this procedure are laid in Parliament in draft. They cannot become law until the draft Instrument has been approved by a resolution of both Houses of Parliament. As part of that process, the draft Instrument may be debated in both the House of Commons and the House of Lords independently. MPs and Peers will then decide whether or not the instrument should become law. These requirements mean that instruments considered under affirmative resolution procedure generally take longer than those considered under negative resolution procedure.

It is important to note that Instruments subject to affirmative resolution cannot, except in extremely rare instances where the parent Act provides otherwise, be amended or adapted by either House. Each House simply expresses its wish for them to be annulled or passed into law, as the case may be and this is how certain RVAR exemption orders will be treated.

3.3.10 More information about these procedures and the method of producing Statutory Instruments can be obtained from the House of Commons Information Office¹⁸.

3.3.11 Until the Rail Vehicle Accessibility Exemption Order (Parliamentary Procedures) Regulations come into force, the DDA 2005 requires all RVAR exemption orders to be considered under draft affirmative resolution procedure.

3.3.12 The Regulations specify clearly the conditions under which the Secretary of State will decide whether an RVAR exemption order should proceed via negative or affirmative resolution procedure. This transparency is required to ensure that both the rail industry and disabled people are able to understand how applications will be treated and particularly under which circumstances the affirmative resolution procedure will be required.

3.3.13 The Regulations include a list of criteria each of which are reproduced below with an explanation of why it has been included. Please note that, other than where certain criteria in respect of preserved networks and heritage excursions are met (see regulations 2(4) and (5)), the criteria for affirmative resolution procedure will take precedence. This means the criteria for the negative resolution procedure are subject to the requirement that none of the criteria for the affirmative resolution procedure must apply to any vehicle exempted by the order.

3.3.14 It should be noted, however, that sections 67(5) and 67A(1) of the DDA 2005 require the Secretary of State to exercise his discretion on the procedure to be used and in particular to consult with the Disabled Persons Transport Advisory Committee (DPTAC) before making an exemption order. Accordingly the draft regulations provide that the Secretary of State, on having regard to DPTAC's representations, may nonetheless choose to use the affirmative procedure where negative procedure would otherwise be indicated, and vice versa. The Secretary of State is not bound by the Committee's recommendations but, as independent experts on the passenger transport needs of disabled people, we recognise that DPTAC is well placed to offer advice on any issues affecting disabled people's access to rail vehicles.

3.3.15 Exemptions under existing orders remain valid but where they have an expiry date which runs past 1 January 2020, the longstop date by which the DDA 2005 requires all vehicles to be regulated, they will be revoked and reassessed under the new Regulations. A full list of all exemption orders which have been granted under the existing regime together with a summary of their end dates can be found on the Department's web site¹⁹.

¹⁸ See <http://www.parliament.uk/documents/upload/L07.pdf>.

¹⁹ See http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/divisionhomepage/035216.hcsp.

3.3.16 It is the Government's policy intention that an exemption application for any new rail vehicle introduced into service after the revised RVAR comes into force, should be expected generally to follow the affirmative resolution procedure. Except in the limited circumstances described in relation to the criteria below, we see no reason to anticipate new rail vehicles being introduced with non-compliances, regardless of the fact that the exemption may end before 2020, and consider that Parliament is best placed to consider the strength of any application for exemption in those circumstances on a case by case basis.

Criteria for negative resolution (see Annex A, regulation 2)

2(3)(a) the exemption order applies to a regulated rail vehicle first brought into use before 1st November 1998, and the exemption order is made in relation to the vehicle because-

- (i) the vehicle has been the subject of a refurbishment programme; and**
- (ii) some or all of the parts of the vehicle which have been replaced or modified as part of that programme do not comply with those provisions of RVAR with which, by virtue of those regulations, they are required to comply;**

3.3.17 The DDA 2005 (see section 6(2) of that Act) amends the definition of "rail vehicle" in the DDA 1995 to remove the 'start date' of 31 December 1998. The inclusion of a start date meant that, for the purposes of RVAR, vehicles brought into use before that date were not 'rail vehicles'. This amendment will enable the Secretary of State to apply RVAR to all rail vehicles, regardless of the date on which they were first brought into use. The proposals for applying RVAR to rail vehicles when they are refurbished will be subject to consultation in due course but the current intention is that all rail vehicles first brought into passenger use prior to 1 November 1998 will be required, when those vehicles are refurbished, to comply with certain parts of RVAR (see **paragraph 3.3.18**).

3.3.18 These Regulations will use the definition of "refurbishment programme" which is being developed for the revised RVAR and will be the subject of consultation in due course. However, in order to inform your consideration of these Regulations it is our intention that, when refurbishment occurs, compliance will be assessed on a like-for-like basis known as the "menu approach". A new schedule will be added to RVAR indicating how compliance will be assessed depending on the scope of the work being undertaken. However, since these vehicles were introduced into service before RVAR came into force, many refurbishments are likely to require exemptions. Were these to be made subject to affirmative resolution procedure, a great deal of Parliamentary time would be required which could act as a disincentive for operators to refurbish their rolling stock. In the latter case, this would prevent more accessible vehicles coming into service and result in a worse outcome for disabled people.

3.3.19 Amendments made by the DDA 2005 mean that all rail vehicles will become regulated by no later than 1 January 2020.

2(3)(b) the exemption order applies to a regulated rail vehicle-

- (i) first brought into use on or after 1st November 1998, and**
- (ii) before 1st January 2007 the vehicle was not subject to the requirements of RVAR because-**
 - (aa) it belonged to a class of rail vehicle first brought into use before 1st January 1999;**
 - (bb) no hire or reward at separate fares was charged to passengers for the use of the rail vehicle; or**
 - (cc) it was a rail vehicle used on a prescribed system other than a monorail system, magnetic levitation system or system which is track-based with side guidance.**

3.3.20 When the RVAR were originally introduced the regulations recognised that a small number of operators were mid-way through vehicle construction programmes, the later outputs of which were

due for delivery after 31 December 1998. Whilst the design and initial vehicles incorporated a number of features that made them more accessible to disabled people than the rolling stock they were replacing, they were not fully RVAR compliant, and it was accepted that it would be inappropriate to change the design half-way through a build programme. In other cases, for instance the recent addition of a seventh car to Jubilee Line tube trains, it was technically necessary to procure vehicles after 31 December 1998 that were identical to units that had been built several years before RVAR was introduced. Prior to the DDA 2005, such vehicles were not regulated, as they "belonged to a class of vehicles first brought into use before 1 January 1999²⁰".

3.3.21 The DDA 2005 amends the DDA 1995 to remove this condition and the Department's intention is to regulate them with effect from 1 January 2007. The Department for Transport has been working with the relevant operators to identify where these units do not comply with RVAR and we feel it would be appropriate that any exemptions necessary should be obtained via the negative procedure, given that the designs were completed before RVAR was introduced.

3.3.22 Similarly, a small number of vehicles were in use where no separate fares were charged, and the DDA 1995 stipulated that RVAR would only apply to vehicles used for the carriage of members of the public for hire or reward at separate fares. Amendments made by the DDA 2005 have removed this restriction so the RVAR will, in future, apply for example to transport provided by rail vehicles within airport terminals at no extra charge.

3.3.23 Amendments made by the DDA 2005 bring these vehicles into scope by replacing the definition of "rail vehicle" for the purposes of the DDA 1995 (see **paragraph 3.3.17**). However, since they were not required to be RVAR-compliant when they were first introduced, there are likely to be legitimate engineering reasons why they might not be able to be made fully compliant. For this reason, negative resolution procedure is considered more appropriate (should the exemption order cut across any of the affirmative criteria outlined below, for example the application was for an exemption that ran past 1 January 2020, it would require additional Parliamentary scrutiny).

3.3.24 In a similar manner, RVAR does not apply to any system using a guided mode of transport unless that guidance is a monorail, magnetic levitation or track-based with side guidance. However, when the RVAR are revised, they are likely to prescribe additional guided modes of transport to which the regulations should apply. Consultation on the inclusion of additional guided modes will take place in due course.

3.3.25 1 January 2007 has been used in this criterion as is the Government's preferred date from which the amendments being made to RVAR will come into force. Further consultation on these provisions will be undertaken in due course.

2(3)(c) the exemption order applies to a unique regulated rail vehicle.

3.3.26 Applications for exemption orders for unique vehicles are usually, although not exclusively, related to heritage and tourist railway and tramway operators where it may be impossible to fully comply with the requirements of RVAR due to the nature of the vehicles the operator wishes to bring into service (a recent example is the vehicle used on the branch between Stourbridge Junction and Stourbridge Town stations which was introduced into service in February 2006²¹).

3.3.27 Heritage operators sometimes also build replica vehicles to enhance their existing rolling stock whilst retaining the "heritage" aspect of the experience. It is envisaged that this criterion will also be used in such circumstances.

²⁰ These conditions were specified by section 46 of the Disability Discrimination Act 1995 (c.50).

²¹ See <http://www.parrypeoplemovers.com/index.htm> for further information.

3.3.28 To restrict applications made under this criterion, and to prevent mainline train operating companies from using it to make multiple applications for their entire fleets, the exemption can only be made for a unique vehicle.

2(3)(d) the exemption order amends an exemption order but only if -

- (i) the amendments are limited to the correction of typographical errors;**
- (ii) the amendments are necessary only as the result of the exemption order being drawn to the special attention of both Houses of Parliament by the Joint Committee on Statutory Instruments²² on the grounds that;**
- (iii) there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;**
 - (aa) that there appears to have been unjustifiable delay in sending a notification under the proviso to subsection (1) of section 4 of the Statutory Instruments Act 1946 where an instrument has come into operation before it has been laid before Parliament;**
 - (bb) that for any special reasons its form or purport call for elucidation; or**
 - (cc) that its drafting appears to be defective.**
 - (dd) the amendments are required solely because new or revised RVAR have been made;**
- (iv) the amendments are solely for the purpose of extending exemptions previously granted to specified rail vehicles to additional vehicles which are of an identical type, with the exception of such exemptions contained in an exemption order that was subject to annulment in pursuance of a resolution of either House of Parliament solely by virtue of sub-paragraph (d);**
- (v) the amendments are to an exemption order which was subject to annulment in pursuance of a resolution of either House of Parliament; or**
- (vi) the order is a consolidating instrument which incorporates new exemptions with an existing exemption order, but only if -**
 - (aa) the exemptions are not applied to any rail vehicles additional to those exempted by the original order; and**
 - (bb) each of the additional exemptions meets at least one of the criteria contained in this paragraph.**

3.3.29 This criterion is designed to enable orders to be amended in largely administrative circumstances where typographical errors have been made, an adverse report has - in certain circumstances - been received from the JCSI, new or revised RVAR have been made which could result in certain exemptions no longer being required, an amendment to an existing exemption order to include additional vehicles without changing any of the other details is requested or if the new order is designed to consolidate an existing order incorporating new exemptions.

2(3)(e) the exemption order is granted for a period of time during which -

- (i) the regulated rail vehicle is to be used solely for testing;**
- (ii) no fares are charged to any passenger in the regulated rail vehicle; and**

²² The Joint Committee on Statutory Instruments is a made up of a Select Committee appointed by each of the House of Commons and the House of Lords which operates under prescribed Orders of Reference (see House of Commons Public Business Standing Order No 151(1) and House of Lords Public Business Standing Order 74).

(iii) the regulated rail vehicle is not available for use by members of the general public.

3.3.30 In making these Regulations, we do not wish to stifle innovations which may be of benefit to disabled people. To prevent this occurring, we have included the above criterion to ensure that exemption orders requested for periods of testing should be considered under negative resolution procedure. Manufacturers or operators may wish to test all rail vehicles but particularly those including new design features or which have undergone refurbishment prior to their entering passenger service.

3.3.31 To prevent disabled passengers being disadvantaged in any way during the period of testing, the criterion stipulates that no fares are charged and that the service is not available for use by members of the general public.

2(3)(f) the exemptions to which the exemption order relates are granted for a period not exceeding six months.

3.3.32 The Regulations need to recognise the operating realities of the industry. It is often the case that if a new rail vehicle design or refurbishment proposals which on paper may be compliant with RVAR are modified, mistakes may be made during manufacture or parts might not be available on time due to long supply chains. By their nature, such defects are likely to be extremely minor and, in these circumstances only, we would not wish otherwise compliant rail vehicle/s to be prevented from entering service should the fault/shortage prove impossible to rectify immediately.

3.3.33 Accordingly, as long as an exemption order specifies a period of less than six months and does not cut across any of the affirmative criteria specified below (see **paragraphs 3.2.42 to 3.2.49**) which will take preference, it will be considered under the negative procedure.

2(3)(g) the exemption order is made solely to revoke an existing exemption order.

3.3.34 This criterion has been included to allow the Secretary of State to revoke existing exemption orders. There are a number of exemption orders already in place, particularly for heritage and tourist railways, which will no longer be required since these will now be included in the proposed network exemption order. Given the administrative nature of this requirement, we believe that the Secretary of State should have the power to make revocations by negative resolution procedure.

(4) An exemption order which meets any of the criteria listed in paragraph (5) shall be subject to annulment in pursuance of a resolution of either House of Parliament unless-

(a) insofar as it applies to a regulated rail vehicle to which paragraph (5) applies, any of the criteria listed in regulation 3(2)(b) to (d) are also met, and

(b) insofar as the exemption order applies to any other regulated rail vehicle, any of the criteria listed in regulation 3(2)(a) to (e) are also met.

(5) The criteria are that-

(a) the regulated rail vehicle to which the exemption order applies was first brought into use on or after 1st November 1998 and is used for carriage on a network on which any or all of the regulated rail vehicles brought into use before that date are the subject of a network exemption order;

(b) the regulated rail vehicle to which the exemption order applies is a rail vehicle to which paragraph (a) applies and it is also used for carriage, not exceeding 20 days in any calendar year, on a network on which the regulated rail vehicles brought into use before that date are not the subject of a network exemption order; or

(c) the regulated rail vehicle to which the exemption order applies was first brought into use before 1st November 1998 and is used to provide heritage services on a network on which any or all of the other rail vehicles brought into use before that date are not the subject of a network exemption order.

3.3.35 The DDA 2005 amends the DDA 1995 to extend the ability of the Secretary of State to grant exemptions to all some or all of the vehicles used on named railway networks (see **paragraphs 3.3.46 to 3.3.47** for more information) so as to enable him to exempt heritage and tourist railways and tramways from the requirements of RVAR. Where a network exemption order, which these regulations ensure will always require consideration under affirmative resolution procedure, is in place it is proposed that it will exempt all rail vehicles used on that network which were introduced into service prior to 1 November 1998.

3.3.36 However, it is likely that heritage and tourist operators will, in time, wish to introduce new or replica vehicles onto these networks which may require an exemption in their own right if they do not comply fully with RVAR. Given the nature of the vehicles and services involved, and the fact that Parliament will already have approved an order exempting other vehicles being used on that network, we believe that any exemptions required for rail vehicles used in these circumstances should be considered under negative resolution procedure, even where the criteria set out in regulation 3(2)(a) apply, and regulation 2(5)(a) ensures this.

3.3.37 In recognition of the fact that these rail vehicles are sometimes used for excursions on other networks, including the main railway network, which might not be covered by a network exemption order, regulation 2(5)(b) has been included to allow them to do so for a maximum of 20 days in any calendar year. This is consistent with the provisions in place for older buses and coaches under the Public Service Vehicles Accessibility Regulations 2000²³. Again, even where such exemptions contain no expiry date or will extend beyond the end of 2019, the order will be subject to the negative resolution procedure. Should a heritage or tourist operator wish to operate a rail vehicle on a non-exempt network beyond this 20 day period, they would be required to apply for a separate exemption.

3.3.38 Regulation 2(5)(c) applies to rail vehicles which are used to provide "heritage services" operated on networks which are not subject to a network exemption order. What will constitute a "heritage service" is defined in regulation 1 and includes services designed to re-create or simulate railway services of the past or used to demonstrate or operate historic or special types of railway service. There are a number of companies which operate this type of service providing enthusiasts with the opportunity to travel on a rail vehicle pulled by a particular locomotive such as a steam engine or older type of diesel or electric locomotive not normally used for public passenger services. Such services also offer the ability to travel on routes not normally used by public passenger services (such as freight-only routes), travelling for long distances without the requirement to change trains or perhaps special catering provisions.

3.3.39 Where such services are operated using rail vehicles introduced into service before 1 November 1998 (and therefore prior to the introduction of RVAR), we believe that any exemptions required for rail vehicles used in these circumstances should be considered under negative resolution procedure, even where such exemptions may have either no end date, or extend beyond the end of 2019. Were existing vehicles to be refurbished they would, by virtue of regulation 2(3)(a) (see **paragraphs 3.3.17 to 3.3.19**), be considered under negative resolution procedure. However, new or replica vehicles introduced onto these services will be considered in the same manner as other new passenger service vehicles and will be required to comply with RVAR or seek an exemption (if that exemption had either no expiry date or an expiry date which ran past 1 January 2020, it would be considered under affirmative resolution procedure in the normal manner).

3.3.40 Therefore, in the circumstances outlined in **paragraph 3.3.39** only, we propose that draft exemption orders should be considered by negative resolution procedure even if they have no end date or will apply beyond 1 January 2020 (and would otherwise have to be considered by affirmative resolution procedure). It is important to note that should any of the other affirmative resolution criterion be met, such as the Disabled Persons Transport Advisory Committee recommending that an

²³ SI 2000/1970 (as amended). Available from <http://www.opsi.gov.uk/si/si2000/20001970.htm> (see regulation 4(f) for further information).

exemption should not be granted (see **paragraphs 3.3.42 to 3.3.49**), the regulations ensure that a draft exemption order must be considered under affirmative resolution procedure.

(6) Notwithstanding anything in this regulation, the Secretary of State may determine, having regard to representations by the Disabled Persons Transport Advisory Committee in accordance with consultation under section 67A(1) of the Act, that a particular exemption order shall not be made unless a draft of the statutory instrument containing the order has been laid before, and approved by, a resolution of each House of Parliament.

3.3.41 As explained in **paragraph 3.3.14** above, the DDA 2005 requires the Secretary of State to exercise his discretion as to which Parliamentary procedure an individual exemption order will be considered under. When making that decision, he must consult and have regard to the views of DPTAC. This provision allows him to take DPTAC's views into account and decide to use the affirmative procedure instead of the negative resolution procedure as would be indicated by the negative criteria above. A similar provision has been included at regulation 3(3) in relation to affirmative procedure criteria (see **paragraph 3.3.49** for more information).

Criteria for affirmative resolution (see Annex A, regulation 3)

3.3.42 The following criteria ensure that any orders which fall into these categories must be considered by affirmative resolution procedure (see paragraph 3.3.9 for information about what this entails). The regulations ensure that the affirmative resolution criteria take precedence over those for negative resolution, except in the circumstances relating to preserved and heritage vehicles described in **paragraphs 3.3.35 to 3.3.40**, and the Secretary of State must consider these first when exercising his discretion.

3(2)(a) except where regulation 2(4) and (5) apply, the exemption order contains -

(i) no expiry date; or

(ii) an expiry date later than 31st December 2019.

3.3.43 Except in the specific circumstances outlined at **paragraphs 3.3.35 to 3.3.40** above, all applications for an exemption order which either has no specified expiry date or which it is proposed should continue to apply after 31 December 2019 (the amendments introduced by the DDA 2005 mean that all rail vehicles be regulated no later than 1 January 2020) will be subjected to the affirmative resolution procedure. Existing exemptions which run past this date will also need to be re-assessed under the new procedures to ensure consistency although it is noted that many extant exemption orders which do so relate to heritage and tourist railways and tramways and are likely to be covered by a network exemption order in future (see **paragraphs 3.3.46 to 3.3.47** for further information about how we intend to treat the operators of these vehicles).

3(2)(b) other than where the sole purpose is to amend an error, the exemption order amends an extant exemption order by extending the period of time for which the exemption applies.

3.3.44 Exemption orders often include certain conditions, for example the specification of a time-limit for any non-compliances to be rectified. Where an application to extend the time limit on an existing order, regardless of the nature of the issue for which that extension is sought (even if the initial exemption order was issued under negative resolution procedure), the reasoning behind the application will need to be passed by a resolution of both Houses of Parliament.

3.3.45 The Government believes it is important that train operators understand that there will be consequences for missing deadlines and that granting an exemption order is not a licence to continue operating non-compliant rolling stock indefinitely.

3(2)(c) the exemption order is a network exemption order.

3.3.46 The DDA 2005 extends the power the Secretary of State has to grant exemptions to the use of vehicles of a specified or unspecified description in specified circumstances. In essence, this will

enable the Secretary of State to exempt all rail vehicles first brought into use before 1 November 1998, and which are now used on particular networks, such as a heritage or tourist railway or tramway, to be exempt from some or all of the requirements of RVAR.

3.3.47 Although it is not the Government's intention, this provision could be used to exempt, for example, all trains operated by a mainline train operating company on a particular route. Accordingly, a commitment was made during the passage of the DDA 2005 through Parliament to ensure that any application for a network exemption would be subject to affirmative resolution procedure.

3(2)(d) the exemption order applies in relation to a regulated rail vehicle which does not meet any of the criteria specified in regulation 2(3) and (5) (see paragraphs 3.3.14 to 3.3.39).

3.3.48 This criterion has been included in the interests of future proofing to ensure that any application for an RVAR exemption order received by the Department which is not covered by the negative resolution criteria described above will automatically be subject to the affirmative resolution procedure. It would be impossible to predict all future improvements in the rail industry and this wording is designed to ensure that developments can be accommodated without the necessity of revising the regulations (note that, as with all regulations, these will be kept under review and any necessary alterations will be made in light of experience. Were any alterations required, the revised regulations will be subject to public consultation).

(3) Notwithstanding paragraph (1), the Secretary of State may determine, having regard to representations by the Disabled Persons Transport Advisory Committee in accordance with consultation under section 67A(1) of the Act, that the parliamentary procedure in relation to making a particular exemption order shall be that it shall be subject to annulment in pursuance of a resolution of either House of Parliament.

3.3.49 As explained in **paragraph 3.3.14** above, the DDA 2005 requires the Secretary of State to exercise his discretion as to which Parliamentary procedure an individual exemption order will be considered under. When making that decision, he must consult and have regard to the views of DPTAC. This provision allows him to take DPTAC's views into account and decide to use the negative procedure instead of the affirmative resolution procedure as would be indicated by the affirmative procedure criteria. A similar provision is included at regulation 2(6) in relation to negative resolution procedure (see **paragraph 3.3.41** for more information).

3.3.50 It is important to note that the statutory requirement for the Secretary of State to consult DPTAC on all applications for an RVAR exemption order will not change and that the DDA 2005 imposes a further duty to consult the Committee (and other such persons as he considers appropriate) on these regulations. The regulations themselves will also be considered under affirmative resolution procedure and will therefore be subject to a vote in both Houses of Parliament before they can come into force.

3.3.51 In summary, the Rail Vehicle Accessibility Exemption Order (Parliamentary Procedures) Regulations 2006 (at **Annex A**):

- set out the criteria the Secretary of State must take into account when deciding which Parliamentary procedure should be used for particular exemption orders;
- require consultation with DPTAC and such other persons as the Secretary of State considers appropriate; and
- will themselves be subject to the affirmative resolution procedure.

Enforcement (Annexes B to D)

3.3.52 The DDA 2005 replaces the existing criminal sanctions (explained in **paragraph 3.2.4**) for non-compliance with RVAR with a civil enforcement regime comprising warning notices and penalties. The new regime enables the Secretary of State to issue an operator with an improvement

notice which sets a deadline for the non-compliance to be rectified. Should the non-compliance continue after this deadline has passed, a final notice can be issued. Should the deadline in the final notice also be ignored, a penalty can be imposed. In circumstances where a regulated rail vehicle is operated without a valid compliance certificate only, the Secretary of State is empowered to impose an immediate fine. If a penalty is imposed, it must be paid within a set period which will be prescribed in regulations and will be the subject of consultation in due course.

3.3.53 The minimum deadlines for improvement and final notices will be subject to a separate consultation exercise but the penalty is limited by the Act to a maximum of 10 per cent of an operator's turnover. An additional limit, in the form of a maximum financial penalty, will be subject to a separate consultation exercise in due course.

3.3.54 The 10 per cent figure was chosen since it replicates the enforcement regime already in place under the Railways Act 1993²⁴. This ceiling was introduced in the Transport Act 2000 (by amendment to the 1993 Act) to bring the railways into line in this regard with the regimes of regulated utilities and penalties under the Competition Act 1998. Using the same maximum figure for RVAR gives regulatory clarity between enforcement regimes.

3.3.55 The Rail Vehicle Accessibility (Determination of Turnover) Regulations (at **Annex B**) set out the criteria which will be taken into account by the Secretary of State when determining what constitutes a person's turnover. The definition²⁵ includes:

- aid granted to the operator by a public service operator, if the aid facilitates the operator's railway business activities;
- fares paid in respect of railway passenger services;
- fees paid in respect of services for the carriage of goods by railway;
- catering services provided at stations or on rail vehicles;
- car parking facilities at stations;
- the sale of land forming part of a station; and
- leases and licences granted in respect of land forming part of a station.

3.3.56 The amounts derived from these activities would be taken from the published accounts of the operator for the business year preceding the date on which the Secretary of State notifies that operator of his liability to a penalty. Where no preceding business year exists, turnover will be calculated from the amounts derived from these activities in the year in which the penalty is imposed. Where an operator has been in business for less than a year, no certified accounts would be available making it impossible for the Secretary of State to determine turnover. In these limited circumstances only, we would intent to send a formal letter to the operator informing him that a penalty may be imposed at a later date once it became possible to determine turnover.

3.3.57 The definition is similar in scope to the definition under the Railways Act 1993²⁶, to which train operating companies are already exposed, ensuring that penalties under the DDA 1995 are commensurate with those of other regulatory regimes already in place in much of the industry.

²⁴ See the Railways Act 1993 (Determination of Turnover) Order 2005 [SI 2005/2185]. Available from <http://www.opsi.gov.uk/si/si2005/20052185.htm>.

²⁵ Definitions of "railway passenger services" and the other terms, or references to the parent Acts from which they are taken, are included in regulation 2(2)(3) - see **Annex B**.

²⁶ See the Railways Act 1993 (Determination of Turnover) Order 2005 [SI 2005/2185]. Available from <http://www.opsi.gov.uk/si/si2005/20052185.htm>.

However, as RVAR is considerably wider in scope than the Railways Act 1993, it has been necessary to include an additional criterion to ensure that services where no separate fares are charged (such as the people movers in use at some airports) are also caught by these regulations.

3.3.58 Many such services are operated by companies which have no other rail interests and would therefore not be subject to the same level of penalty as those where fares are charged. In these circumstances only, it has been necessary to define turnover as being derived from:

"the sale of products and the provision of services falling within the operator's ordinary activities to businesses or consumers in Great Britain."

3.3.59 This definition is derived from the Enterprise Act 2002²⁷ which outlines the fees which are payable in connection with the exercise by the Secretary of State, the Office of Fair Trading and the Competition Commission of their functions relating to completed and anticipated mergers. In using a similar definition, operators of services where no fares are charged would not be put under greater risk than they, and indeed all other operators of rail vehicles already are, under that Act. The maximum of 10 per cent of turnover and financial limit would still be in place offering assurances that any penalty would not present a threat to financial viability. It should also be noted that only a small number of services will be affected by these provisions.

3.3.60 In common with other enforcement regimes, "turnover" will be calculated after the deduction of trade discounts, value added tax and other taxes directly related to turnover.

3.3.61 It is envisaged that the threat of a financial penalty will ensure that most non-compliance issues will be resolved at the improvement or final notice stages.

3.3.62 The amendments made by the DDA 2005 require the Secretary of State to have regard to a statutory Code of Practice when deciding on the level of penalty to set. More information about that Code can be found in **paragraphs 3.4.3 to 3.4.7** below and the draft Code is at **Annex C**.

Objections to the imposition or amount of a penalty

3.3.63 The amendments made by the DDA 2005 set out the procedures which must be followed by the Secretary of State when imposing a penalty, including the ability of the person on whom it is served to object to its imposition. The objection can be in the form of a written notice to the Secretary of State or direct to the courts (the county court in England and Wales or the sheriff in Scotland) on the grounds that a person is either not liable to the penalty or the amount of the penalty is too high.

3.3.64 Objections to the Secretary of State must be made within a set period, as must his decision on the outcome of that appeal. Both of these periods will be prescribed in regulations and will be subject to consultation in due course.

3.3.65 More information on the options considered during the development of this package of draft regulations can be found in **Section 4** of this document.

3.4 Guidance

General

3.4.1 The overall package of measures stemming from the amendments made by the DDA 2005 will make significant changes to the current RVAR regime and we propose to update the existing guidance document²⁸ to reflect those changes.

²⁷ The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 [SI 2002/1370] as amended by SI 2004/3204.

²⁸ The Rail Vehicle Accessibility Regulations - Guidance, Department for Transport, May 2002. Available from http://www.dft.gov.uk/stellent/groups/dft_control/documents/contentservertemplate/dft_index.hcst?n=16397&l=5

3.4.2 Before issuing any new or revised RVAR guidance, a further consultation exercise will be undertaken.

Imposition of penalties

3.4.3 In making a decision on the level of penalty to impose, the Secretary of State is required to have regard to a statutory Code of Practice (the Code) which specifies the matters to be taken into account in determining the amount of any penalty. A draft of the Code can be found at **Annex C**. As with the regulations at **Annexes A and B**, the Code must also be laid in draft before Parliament which must agree its contents before it can come into force.

3.4.4 The Code includes criteria for the determination of the level of penalty in the following instances where regulated rail vehicles are operated:

- without a valid compliance certificate;
- in non-conformity with the constructional requirements of RVAR;
- in non-conformity with the operating requirements of RVAR;

and also in circumstances where:

- an authorised person is obstructed in the exercise of his powers; and
- there is failure to provide information.

3.4.5 The amendments made by the DDA 2005 ensure that, should any revisions be made to the Code, such as modifications in light of experience, the revised Code will also need to be laid before Parliament for consideration.

3.4.6 In order to assist understanding of the Code, an accompanying set of worked examples has also been produced (see **Annex D**). The examples are not intended to be exhaustive or prescriptive but rather demonstrate how the Code might work in practice in determining the level of penalty which is imposed. Some examples are also given where it may be considered unreasonable for the Secretary of State to impose a fine.

3.4.7 Please note that these examples are not statutory and do not form part of the Code itself and each case will be considered on its own merits.

3.5 Timetable for implementation

3.5.1 It is the Government's intention that the transport provisions of the DDA 2005, including those outlined in this consultation paper, will be implemented on or before **31 December 2006**.

3.5.2 Many of the proposed changes, such as the introduction of a certification regime, have been called for by the industry and we believe there is no reason not to introduce them as soon as practicable whilst giving train operating companies and other affected businesses sufficient time to adjust to the new procedures.

4 Regulatory Impact Assessment

4.1 A Regulatory Impact Assessment (RIA) is a policy tool to assess the impact, in terms of costs and benefits, of any proposals that affect business, charities, the voluntary or public sectors. This section also explains how the proposals fit in with relevant Government policies.

4.2 Since the Rail Vehicle Accessibility Exemption Order (Parliamentary Procedures) Regulations (see **Annex A**) do not have any direct cost impact on any of these sectors, the production of a full RIA is not considered appropriate for these regulations. They may result in a potential lengthening of the time taken for those exemption orders which are subject to draft affirmative resolution (ie requiring a resolution of both Houses of Parliament) which might result in a delay in the introduction of those vehicles into service when compared with the current system (see **paragraphs 3.2.5 to 3.2.6**).

4.3 However, in ensuring that these regulations are as clear as possible about the criteria under which exemption orders will be considered, it is envisaged that those who are considering an application for exemption will be able, in discussion with the Department, to incorporate sufficient time in their project planning process to prevent any cost implications arising.

4.4 Accordingly, the following RIA only considers issues relating to the Rail Vehicle Accessibility (Determination of Turnover) Regulations (see **Annex B**).

4.1 Issues and Objectives

4.1.1 The Government is committed to establishing comprehensive and enforceable civil rights for disabled people. Achieving an accessible public transport system is an important element in that policy including, in respect of this RIA, ensuring that disabled people can be confident that RVAR is enforceable and that prospective penalties under the regime act as a deterrent to breaches or failures by operators to comply with the relevant obligations.

4.1.2 The application of the turnover definition must also be fair and reasonable and ensure that the potential size of the resulting penalties does not represent an undue risk to operators whilst giving them certainty about the maximum amount of the financial penalty to which they could be liable.

4.1.3 These measures apply to England, Scotland and Wales. Northern Ireland will be consulting separately on its own proposals.

4.2 Risk assessment

4.2.1 The lack of an effective RVAR enforcement regime has resulted in disabled people continuing to face discrimination when travelling on regulated rail vehicles that other members of society do not face. For example where they are unable to access a vehicle which is otherwise accessible to them because a passenger information system is not in working order or a ramp is unavailable.

4.2.2 There is a risk in not making these regulations that disabled people will continue to be discriminated against since it would maintain the current situation whereby no prosecutions for non-compliance with RVAR would be brought. This provides no incentive for operators of rail vehicles to ensure that facilities to assist disabled people are available, in working order and regularly maintained.

4.2.3 There is also a risk that not making the regulations would expose operators to uncertainty about the potential size of any financial penalty arising from a breach of RVAR as the turnover that should be taken into account when determining a penalty would remain undefined.

4.2.4 These regulations, in conjunction with the specification of a maximum financial limit (which will be subject to further consultation in due course), enable operators to be certain about the

maximum level of penalty, and therefore financial risk, to which they will be exposed under this regime. The Code of Practice (at **Annex C**) is designed to ensure that any penalty is reasonable and appropriate in the circumstances. In addition, the amendments made to the DDA 1995 by the DDA 2005 ensure that there is an appeals procedure either to the Secretary of State or direct to the courts against either the imposition of a penalty or its amount.

4.3 Options

Option 1 - Do nothing

4.3.1 The amendments made by the DDA 2005 limit the maximum penalty to which an operator would be liable to 10 percent of turnover. In doing nothing, ie in not making regulations defining what "turnover" should constitute, operators would be exposed to uncertainty about the potential size of that penalty as turnover would remain undefined.

4.3.2 Not making the regulations would also restrict the ability of the Government to impose penalties where breaches of RVAR occurred. This would result in a continuation of the current criminal enforcement regime which, since no enforcement body was specified in the DDA 1995, prevents disabled people's complaints being pursued effectively and would not meet the Government's stated aim of providing comprehensive and enforceable civil rights for disabled people.

Option 2 - Self-regulation

4.3.3 Whilst the majority of train and tram operators attempt to rectify non-compliance issues as quickly as possible the existing regime, under which enforcement has not been possible, has resulted in a situation where there is no mechanism to punish operators whose rail vehicles become non-compliant whilst in service. If self-regulation were perpetuated, it would not provide disabled people with confidence in the rail network as a whole and give them no legal form of redress. In common with Option 1, it would also not deliver against the Government's stated commitments.

Option 3 - Legislate to define turnover

4.3.4 The Government proposes that the best course of action to ensure that both industry and disabled people are protected is to produce regulations defining what should constitute turnover. This will provide regulatory clarity (the Secretary of State is unable to impose a penalty without a prescribed maximum amount and definition of turnover being in place) and ensure that disabled people know that any complaints can be pursued effectively. This RIA is based on pursuit of this option.

4.4 Benefits

4.4.1 The revisions to the enforcement regime, of which these regulations are a part, replace the criminal sanctions under the existing procedures (and for which there is no enforcement body) with a system which allows operators time to rectify non-compliances and financial penalties if this is not done.

4.4.2 The revisions also formalise responsibility for enforcement (to rest with the Department for Transport) so that disabled people's complaints can be properly dealt with and introduce a system which will mean that effective action can be taken quickly against the operators of non-compliant vehicles.

4.5 Business sectors affected

4.5.1 These regulations will mainly affect the 22 operators of scheduled services on the national rail network, London Underground Limited and other operators of metro and tram services. Many of the operating companies are subsidiaries of large groups such as National Express, which currently owns six trains operating companies.

4.5.2 The regulations will also apply to smaller operators, such as those who run heritage and tourist railways and tramways. Previously the Secretary of State had only been able to exempt rail vehicles themselves from the requirements of RVAR but the amendments made by the DDA 2005 to the DDA 1995 extend this ability to whole railway "networks", such as an entire heritage railway. The Government has stated its intention to use these provisions to exempt all rail vehicles introduced into service prior to 1 November 1998 which are used on heritage and tourist railways and tramways (the nature of these services means that there are often legitimate engineering reasons why such rail vehicles cannot be made compliant with RVAR). Where a network exemption order is in place, the operators of those vehicles will not be exposed to the imposition of a penalty.

4.6 Costs

4.6.1 These regulations are unlikely to involve additional costs on the industry unless an operator is fined. Fines are only likely to be levied in cases of serial breaches of RVAR (operators will have to ignore deadlines in both improvement and final notices before a fine can be imposed) or deliberate defiance of the law (in the case of operating a regulated rail vehicle without a compliance certificate).

4.6.2 It is envisaged that the threat of financial penalties will ensure that the vast majority of non-compliances will be rectified within the improvement or final notice periods.

4.7 Issues of equality and fairness

4.7.1 The Government is committed to establishing comprehensive and enforceable civil rights for disabled people. The Government is also committed to ensuring that disabled people have equality of opportunity. In the context of this RIA, these commitments mean enabling disabled people to use rail services with the same level of safety, comfort and ease that non-disabled people have. It is also Government policy to encourage more use of rail services; ensuring that disabled people can do so is an important aspect of this.

4.7.2 However, the Government is also mindful of not placing excessive burdens on the rail industry. For this reason, it has been decided to base the definition of turnover on existing regimes stemming from the Railways Act 1993 and the Enterprise Act 2002, one or both of which operators are already exposed to. In particular, the 10 per cent ceiling was first included in the Competition Act 1998 and was subsequently used in the Postal Services Act 2000 and Utilities Act 2000. It was added to the Railways Act 1993 to ensure consistency and give the rail industry the same degree of protection from excessive penalties.

4.7.3 These proposals have been assessed in accordance with the duties contained in the Race Relations (Amendment) Act 2000. It is not anticipated that they will have any adverse effects on minority ethnic communities.

4.8 Impact on small businesses

4.8.1 The regulations only affect operators of rail vehicles. It is not possible to complete the public services threshold test as the costs involved will only impact in the form of a penalty.

4.9 Competition assessment

4.9.1 The regulations only affect operators of rail vehicles and will not have a substantial differential effect on different operators, provided they comply.

4.10 Enforcement and Sanctions

4.10.1 The Department for Transport will be responsible for enforcing these provisions. Penalties, which are only likely to be levied in cases of serial breaches (following the serving of improvement and final notices) or deliberate defiance of the law (in the case of operating a regulated rail vehicle

without a compliance certificate), will be served administratively by the Secretary of State and be enforceable through the Courts.

4.10.2 The Secretary of State, subject to statutory guidance setting out the factors to be taken into account (see **Annex C**) and a prescribed statutory maximum, would have discretion in the amount of the fine imposed. The fine cannot exceed either the statutory maximum, as stipulated in legislation, or 10 per cent of turnover as defined in these regulations.

4.10.3 Any operator on which a penalty was imposed would have the right to give a notice of objection to the Secretary of State which he is under an obligation to consider and respond. The DDA 2005 also provides a right of appeal against the imposition of a penalty on the grounds that the operators are not liable or that the amount imposed is too high. There is a similar right of appeal direct to the courts.

4.11 Monitoring & Review

4.11.1 The effectiveness of the regulations in practice will be kept under review and revisions made from time to time if necessary. Should substantive changes be required, these would be subject to consultation with stakeholders and subsequent approval by Parliament.

4.11.2 It is envisaged that the Disability Rights Commission (and, in future, the Commission for Equality and Human Rights²⁹), as part of its overall duty to monitor the Disability Discrimination Act, will also keep the legislative framework under review as will the Disabled Persons Transport Advisory Committee, as the Government's statutory advisers on the public passenger transport needs of disabled people.

4.12 Consultation

4.12.1 Within Government

4.12.1.1 Consultation on the proposal has taken place with other government departments with a policy interest.

4.12.2 Public Consultation

4.12.2.1 The Government highlighted this issue in its initial consultation on policy proposals held in 2003³⁰. This indicated that the penalty could take the form of a "percentage of the turnover of the undertaking which would be limited to...a maximum of 10 per cent."

4.12.2.2 Few responses were received on this issue although, in general, disability organisations indicated that they were content with a maximum of 10 per cent of turnover with industry (through the Association of Train Operating Companies) arguing that this figure could be considered excessive.

4.13 Summary of Benefits and Costs

4.13.1 Although the turnover regulations are only part of the wider civil enforcement regime (see **paragraph 3.3.52**), they will enable industry to be certain about the maximum size of any penalty, and therefore financial risk, they will be exposed to under the RVAR enforcement regime. It will also enable disabled people to be confident that effective enforcement action can be taken against any operators which run a regulated rail vehicle in non-conformity with RVAR.

²⁹ For more information about the CEHR, please see www.cehr.org.uk.

³⁰ Consultation on the Government's proposals to amend the rail provisions in Part 5 of the Disability Discrimination Act 1995, DfT, November 2003. Available from http://www.dft.gov.uk/stellent/groups/dft_control/documents/contentservertemplate/dft_index.hcst?n=10080&l=2.

4.13.2 The regulations are unlikely to involve any additional costs on the industry unless an operator is fined.

5 Replying to the consultation and further information

5.1 This consultation is carried out in accordance with the Cabinet Office Code of Practice on Written Consultations³¹ (the essential criteria are reproduced at Annex E). If you have any complaints or comments about the consultation process, please contact this Department's consultation co-ordinator: Andrew Price, Room 9/09, Southside, 105 Victoria Street, London SW1E 6DT (e-mail andrewd.price@dft.gsi.gov.uk).

5.2 Twelve weeks have been allowed for consideration of this consultation which began on Monday 24 July and has been sent to the list of consultees at **Annex F**. If you have any suggestions of others who may wish to be involved in this process, please contact us at the address below.

5.3 We are inviting comments by **Monday 16 October**.

by post:

Mobility & Inclusion Unit (Parliamentary Procedures & Turnover Consultation)
Department for Transport
Zone 4/23
76 Marsham Street
London SW1P 4DR

by fax:

020 7944 6102

by e-mail:

miu@dft.gsi.gov.uk (please include "Parliamentary Procedures & Turnover Consultation" in the subject heading)

5.4 When responding please state whether you are doing so as an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the views of its members were assembled.

5.5 The information you send us may need to be passed on to colleagues within the Department for Transport and published in a summary of responses. We will assume that you are content for us to do this and that, if you are replying by e-mail, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system unless you specifically include a request to the contrary in the main text of your submission to us.

5.6 Copies of the consultation paper in audio and easy read versions can be obtained from the Mobility and Inclusion Unit at the above address or by telephone on 020 7944 8021; Minicom 020 7944 3277. The paper is also posted on the Department's web site (at www.dft.gov.uk/access).

Freedom of Information

5.7 According to the requirements of the Freedom of Information Act 2000, all information contained in your response to this consultation may be subject to publication or disclosure. This may include personal information such as your name and address. If you want your response *or your name and address* to remain confidential, you should explain why confidentiality is necessary. Your request will be granted only if it is consistent with Freedom of Information obligations. An automatic

³¹ For the full text of the Code, please see http://www.cabinetoffice.gov.uk/regulation/consultation/consultation_guidance/index.asp.

confidentiality disclaimer generated by your e-mail system will not be regarded as binding on the Department.

5.8 In accordance with the Department for Transport's publication scheme, a summary of responses to this consultation will be posted on our web site within 3 months of the closing date.

Annex A: Draft Statutory Instrument

Disabled persons:

[The Rail Vehicle Accessibility Exemption Order \(Parliamentary Procedures\) Regulations 2006](#) (PDF, 67KB)

Annex B: Draft Statutory Instrument

Disabled persons: Transport

[The Rail Vehicle Accessibility \(Determination of Turnover\) Regulations 2006](#) (PDF, 36KB)

Annex C: Penalties - Code of Practice

Civil Penalty

The Disability Discrimination Act 1995 (as amended)

Non-compliance with

Rail Vehicle Accessibility Regulations

Setting of Penalty: Code of Practice

Issued in accordance with section 47J of the Disability Discrimination Act 1995 (as amended)

Introduction and background

This code of practice deals with the setting of financial penalties for contravention of accessibility regulations³² made under section 46 of the Disability Discrimination Act 1995 (DDA 1995) (RVAR). It will be of interest to anyone who operates regulated rail vehicles.

Section 46 of the DDA included powers to make regulations to ensure that all new trains, trams and vehicles used on other track-based systems are accessible to disabled people, including wheelchair users. The Government used these powers to make the Rail Vehicle Accessibility Regulations 1998 which came into force on 1 November 1998.

Section 46 also made it a criminal offence for an operator to use a regulated rail vehicle to provide fare paying passenger services that did not comply with RVAR unless an order exempting that rail vehicle was in force.

Following consultation on proposed changes to the DDA 1995, provisions were included in the Disability Discrimination Act 2005 (DDA 2005) allowing the Government to decriminalise those offences and replace them with civil sanctions. This system is more responsive and ensures that the sanctions are appropriate to the circumstances of the case.

Civil sanctions enable the Secretary of State to issue an operator with an 'improvement notice' which sets a deadline³³ for non-compliance with either the technical or operational regulations of RVAR to be rectified. If the non-compliance continues after the improvement deadline has passed, a 'final notice' can be issued. Should this further deadline be missed, the Secretary of State is then able to impose a financial penalty. Under section 47J(2) of the DDA the amount must not exceed 10% of the turnover of the operator or a maximum financial limit, which must be determined in accordance with regulations made under section 47J(3)³⁴. There is an associated appeals procedure under section 47L.

This code of practice specifies the matters the Secretary of State must take into account when determining the amount of a penalty. A series of worked examples illustrating how the powers might

³² The regulations currently in force are the Rail Vehicle Accessibility Regulations 1998, SI 1998/2456, amended by SI 2000/3215.

³³ Minimum periods for these notices will be specified in the Rail Vehicle Accessibility (Enforcement) Regulations 2006 which will be subject to consultation in due course.

³⁴ The Rail Vehicle Accessibility Regulations (Determination of Turnover) Regulations 2006 and the Rail Vehicle Accessibility (Enforcement) Regulations 2006 respectively. The latter regulations will be subject to consultation in due course.

actually be applied has also been produced and should be read in conjunction with this code of practice.

This code of practice has been laid in draft before Parliament which has agreed its contents. If any amendments are made to this document in future, the revised code will also need to be laid before Parliament for consideration.

Powers to impose a penalty

1. The Disability Discrimination Act 2005 (DDA 2005) amended the DDA 1995 (the Act) to replace the criminal sanctions provided by the Act with a new civil enforcement regime. Consequently, under sections 47D to 47H of the Act, the Secretary of State may require a rail operator to pay a penalty:

- (a) if he uses a regulated rail vehicle that does not have a valid accessibility compliance certificate issued under section 47A;
- (b) if he operates a regulated rail vehicle which does not comply with those construction requirements of accessibility regulations made under section 46 of the Act (RVAR) to which that vehicle is required to comply, and has failed to take the action required by the improvement and final notices that have been served upon him by the Secretary of State under section 47E;
- (c) if he operates a regulated rail vehicle in a way which does not comply with those operational, rather than technical, requirements of RVAR with which the use of that vehicle is required to conform, and has failed to take the action required by the improvement and final notices that have been served upon him by the Secretary of State under section 47E;
- (d) if a person authorised by the Secretary of State to examine or test a regulated rail vehicle for compliance with the RVAR, is obstructed in the exercise of his powers; or
- (e) if an operator fails to provide by the specified deadline the information requested of him, in certain circumstances, by the Secretary of State.

2. In accordance with section 47J(12) of the Act, the Secretary of State must have regard to the Level of Penalty: Code of Practice, issued under the Act, in addition to any other matters he thinks relevant:

- when imposing a penalty; and
- when considering under section 47K(6) a notice of objection under section 47K(4).

3. The amount of a penalty -

- must not exceed the maximum prescribed in regulations; and
- must not exceed 10 per cent of the turnover (as determined by regulations) of the operator on whom it is imposed.

4. Also, in accordance with section 47L of the Act, a court must have regard to the Level of Penalty: Code of Practice, issued under the Act, in addition to any other matters the court thinks relevant (which may include matters of which the Secretary of State was unaware) when deciding whether to:

- allow an appeal and cancel the penalty;
- allow an appeal and reduce the penalty; or
- dismiss an appeal.

The terms used in this Code of Practice have the same meaning as those given in the Act.

1. Operating a regulated rail vehicle without a valid compliance certificate

The following matters will be considered by the Secretary of State in determining the amount of penalty he may require to be paid under section 47D:

- (a) Whether this is the first time that the operator has operated a regulated rail vehicle;
- (b) Whether this is the first time the operator has operated a regulated rail vehicle without a valid compliance certificate;
- (c) The number of times that the operator has operated a regulated rail vehicle without a valid compliance certificate;
- (d) Whether there is any evidence of advice to the operator, from the Department or a third party, that the vehicle will require a compliance certificate, prior to that vehicle being put into (or returned to) service;
- (e) Evidence of the efforts made by the operator to comply with the regulation(s) non-compliance with which has/have prevented a compliance certificate being issued; and
- (f) Whether an application for an exemption from the Regulation is being prepared by the operator or is being considered by the Secretary of State, in respect of the non-compliance which has prevented a compliance certificate from being issued.

2. Operating a regulated rail vehicle which does not comply with the construction requirements of RVAR

The Secretary of State may only require a penalty under section 47E to be paid if, having served both an improvement notice and final notice, the operator in question has failed to make good the constructional non-compliance(s) with the RVAR and the deadlines imposed by the notices have passed. The following matters will be considered by the Secretary of State in determining the amount of penalty he may require to be paid under section 47E:

- (a) Whether this is the first time that the operator has operated a regulated rail vehicle;
- (b) Whether this is the first time the operator has operated a regulated rail vehicle that does not comply with any construction requirements of the RVAR with which the vehicle is required to comply;
- (c) The number of times that the operator has operated a regulated rail vehicle that does not comply with any construction requirements of the RVAR with which the vehicle is required to comply;
- (d) Whether the same or similar non-compliance has previously arisen in relation to another regulated vehicle of the same or different class operated by him;
- (e) Whether there is any evidence of advice to the operator, from a third party (but particularly from an Appointed Assessor), that the vehicle did not comply with any construction requirements of the RVAR with which the vehicle is required to comply before the non-compliance was identified by the Department for Transport;
- (f) The extent to which the non-compliance affects the ability of disabled persons to get on to and off that vehicle in safety and without unreasonable difficulty;
- (g) The extent to which the non-compliance affects the ability of disabled people to use that vehicle in safety and reasonable comfort; and
- (h) Any evidence of the efforts made by the operator to resolve the non-compliance(s) during the periods of the improvement and final notices, including the level of liaison with the Department for Transport.

3. Operating a regulated rail vehicle otherwise than in conformity with the operating requirements of RVAR

The Secretary of State may only require a penalty under section 47F to be paid if having served both an improvement notice and final notice, the operator in question has failed to make good the operational non-compliance(s) with the RVAR and the deadlines imposed by the notices have passed. The following matters will be considered by the Secretary of State in determining the amount of penalty he may require to be paid under section 47F:

- (a) Whether this is the first time that the operator has operated a regulated rail vehicle;
- (b) Whether this is the first time the operator has operated a regulated rail vehicle otherwise in conformity with the RVAR;
- (c) The number of times that the operator has operated a regulated rail vehicle other than in conformity with any requirements of the RVAR with which the use of that vehicle is required to comply;
- (d) Whether this is the first time the operator has operated a non-compliant regulated rail vehicle of a different class to one that he has operated in the past which also did not conform with requirements of the RVAR with which the use of that vehicle was required to comply;
- (e) Whether there is any evidence of advice to the operator, from a third party, that the operation did not conform with any requirements of the RVAR with which the use of that vehicle was required to comply before the non-compliance was identified by the Department for Transport;
- (f) The extent to which the non-compliance affects the ability of disabled persons to get on to and off that vehicle in safety and without unreasonable difficulty;
- (g) The extent to which the non-compliance affects the ability of disabled people to use that vehicle in safety and reasonable comfort;
- (h) Any evidence of the efforts made by the operator to resolve the non-compliant issues during the periods of the improvement and final notices, including the level of liaison with the Department for Transport;
- (i) The existence and quality of staff training which, if it had been applied as instructed, would have meant that the vehicle conformed with those requirements of the RVAR which were the subject of the notices; and
- (j) The internal disciplinary regime that the operator had established, and followed, when dealing with suitably trained staff who had caused the breach in the regulations to occur through their negligence.

4. Obstructing an authorised person in the exercise of his powers

Where the Secretary of State has reasonable grounds for suspecting that a regulated rail vehicle may not conform with any requirement of the RVAR with which that vehicle is required to conform, he may authorise a person to inspect or test that vehicle. Also, having served an improvement or final notice under section 47E, he may authorise a person to inspect the vehicle for conformity with the regulations. A person so authorised by the Secretary of State may enter premises if he has reasonable grounds for suspecting the vehicle to be at those premises, and may enter the vehicle. The operator is required to grant that authorised person access to those premises where the vehicle is stored and to afford all reasonable facilities and assistance to enable him to carry out his duties.

Where the operator obstructs an authorised person seeking to inspect conformity with the regulations, after a final notice made under section 47E(4), then the following matters will be considered by the Secretary of State in determining the amount of penalty he may require to be paid under section 47G:

- (a) Whether this is the first time the operator has obstructed an authorised person;
- (b) The number of times that the operator has obstructed an authorised person;
- (c) The manner in which the authorised person was obstructed;

- (d) Whether an authorised person was obstructed on a repeat visit for the same purpose;
- (e) The existence and quality of staff training, including the provision of periodic reminders, which, if it had been applied as instructed, would have meant that the authorised person would not have been obstructed; and
- (f) The internal disciplinary regime that the operator had established, and followed, when dealing with (suitably trained) staff who have obstructed an authorised person.

5. Failure to provide information

Where an operator fails to supply the vehicle number or other identifier of a rail vehicle as required by a notice given by the Secretary of State, by the time specified in that notice, then the following matters will be considered by him in determining the amount of penalty he may require to be paid under section 47H(3):

- (a) Whether this is the first time the operator has failed to provide information when required to do so; and
- (b) The number of times that the operator has failed to provide information when required to do so.

Annex D: Penalties - Worked Examples

Civil Penalty

Non-compliance with

Rail Vehicle Accessibility Regulations

Worked Examples

Practical examples to show how the

Setting of Penalty: Code of Practice may work in practice

Under sections 47D to 47H of the Disability Discrimination Act 1995 (as amended) (the Act), the Secretary of State may require a rail operator to pay a penalty:

- (a) if he uses a regulated rail vehicle, that does not have a valid accessibility compliance certificate issued under section 47A, to carry passengers;
- (b) if he operates a regulated rail vehicle which does not comply with those construction requirements of accessibility regulations made under section 46 of the Act ("RVAR") and has failed to take the action required by the improvement and final notices that have been served upon him;
- (c) if he operates a regulated rail vehicle in a way which does not comply with any operational, rather than technical, requirements of RVAR with which the use of that vehicle is required to comply;
- (d) if a person authorised by the Secretary of State to examine or test a regulated rail vehicle for compliance with the Act, is obstructed in the exercise of his powers; or
- (e) if an operator fails to provide the information requested of him, in certain circumstances, by the Secretary of State, by the specified deadline.

In accordance with section 47J(12) of the Act, the Secretary of State must have regard to the Disability Discrimination Act 1995 (as amended) Level of Penalty: Code of Practice in addition to any other matters he thinks relevant:

- (a) when imposing a penalty; and
- (b) when considering under section 47K(6) a notice of objection under section 47K(4)

The amount of a penalty -

- (a) must not exceed the maximum prescribed by regulations; and
- (b) must not exceed 10 per cent of the turnover (as determined by regulations) of the operator on whom it is imposed.

The following examples are designed to demonstrate how the Level of Penalty: Code of Practice may work in practice in determining the amount of penalty to be imposed on a rail operator under sections 47D to 47H of the Disability Discrimination Act 1995 (as amended).

These examples are not exhaustive and are not intended to be prescriptive. Notwithstanding the examples below, each case will be looked at on its merits taking into account all the relevant factors including any that may be contained in the Code of Practice.

Some examples have also been given where it may be considered unreasonable for the Secretary of State to impose a fine.

Any reference made to the probability that the level of penalty imposed will fall within a particular range has the following meaning:

- **"lower range"**: the penalty per offence will be no more than 3.3 per cent of the turnover (as determined by regulations) or the maximum prescribed, whichever is the lesser;
- **"middle range"**: the penalty per offence will be between 3.3 and 6.7 per cent of turnover) or the maximum prescribed, whichever is the lesser;
- **"upper range"**: the penalty per offence will be between 6.7 and 10 per cent of turnover) or the maximum prescribed, whichever is the lesser;
- **"maximum penalty"**: the penalty per offence will be 10 per cent of turnover) or the maximum prescribed, whichever is the lesser.

Example Penalties

1. Operating a rail vehicle without a valid accessibility compliance certificate

Example A

- The operator of a heritage tramway purchases a modern, regulated tram and begins to operate a public transport service.
- The regulated tram does not possess a compliance certificate.
- The operator is aware of the RVAR insofar as he has been notified that his heritage services are exempt.
- That notification stated that vehicles provided for a public transport service would not be exempt.
- In this case it is probable that a penalty towards the lower range of the scale will be imposed as it may be reasonable to assume that the operator had not given the point about vehicles in public transport service due regard at the time, as he did not then operate one.

Example B

- The operator of a public tram system using pre-RVAR vehicles (which are not regulated) purchases new units of a different design for its route extension.
- Despite being advised by the manufacturer that compliance certificates will be required, the operator takes no steps to gain them, nor to employ an Appointed Assessor.
- The vehicles are placed into public service.
- In this case a penalty towards the upper range of the scale may be imposed as the operator had ignored advice to obtain compliance certificates but this may be due to his unfamiliarity with this requirement.

Example C

- A franchised national rail operator, using certificated stock, purchases new units.
- Despite being advised by the manufacturer that compliance certificates will be required, the operator takes no steps to obtain them, nor does he employ an Appointed Assessor.
- The vehicles are placed into public service.
- This is the second time this operator has operated vehicles without a compliance certificate.
- In this case a maximum penalty may be imposed because the operator cannot claim to be unaware of the requirement to obtain a compliance certificate before a regulated vehicle is brought into service.

Example D

- A franchised national rail operator that operates pre-RVAR trains sends an older unit for refurbishment.

[Consultation Note - Refurbishment of pre-RVAR stock will be subject to RVAR, under regulations to be consulted upon later in 2006]

- An Appointed Assessor has been appointed and involved at all stages.
- Only towards the end of the work is it appreciated that the unit cannot be made fully compliant in all the prescribed areas. The non-compliance(s) could not have been anticipated from previous refurbishment projects.
- The unit needs to return to public service on time, in order to prevent disruption to that service
- The operator applies for an exemption but returns the unit to service before this has been approved, and before a compliance certificate has been issued.
- In this case it may be unreasonable for the Department to impose a fine as the need for an exemption could not have been foreseen, nor the time allowed for one to be applied for, and it would have been to the disbenefit of all passengers to have prevented these refurbished units from re-entering service.

2. Operating a regulated rail vehicle which does not comply with construction requirements of the RVAR

Example A

- Individual vehicles within a fleet of rail vehicles that have been refurbished are found to be non-compliant, as some of the internal door control panels have been fitted incorrectly. This is despite an Appointed Assessor having been appointed and the compliance certificates having been granted in good faith.
- The operator was unaware of the non-compliance until notified of it by the Department for Transport, which had only learned of the problem itself when officials travelled on one of the non-compliant units.
- The operator does not consider compliance to be a priority and has failed to meet the deadlines for compliance given in the improvement and final notices.
- Disabled passengers continue to be able to use the rail vehicle, as the "Open" button is compliant. It is only the "Close" button that is non-compliant, and this is rarely used by any passengers as the doors are normally closed by the crew of the vehicle.
- In this case a penalty towards the middle range of the scale may be imposed as the operator has wilfully ignored enforcement procedures but the impact on disabled travellers is small.

Example B

- A national rail operator introduces a fleet of new, regulated trains into service, with the required compliance certificates.
- The contrasting strip on the external step of the train rapidly becomes heavily soiled through passenger use.
- The Department for Transport is contacted by a number of visually impaired passengers, who all state that they have become increasingly wary of boarding these units in service because of the difficulty in judging where to safely place their feet.

- Having assessed a number of units in service, and seen the extent of the problem, officials from the Department contact the train operator informally to draw this problem to the company's attention.
- Whilst the train operator claims that regular, scheduled visits to the automatic train washing facility should be keeping the contrasting strips clean, this is clearly ineffective. Therefore, the Secretary of State serves the operator with an improvement notice, with one deadline for introducing an additional cleaning regime for the steps and another for so treating the whole fleet of vehicles.
- The operator persists with only the original cleaning regime, past the deadline within the improvement notice. Further official visits, and additional complaints from the public, show that the situation has not improved. Therefore a final notice is served upon the train operator.
- Despite being advised of an effective, and simple, solution being used by another train operator on similar units, the offending operator allows the new deadlines to expire without taking action.
- In this case a maximum penalty may be imposed. This is because the operator had ample opportunity to introduce a suitable cleaning regime but failed to do so. Thus, by failing to respond to the Department's stepped enforcement regime, the operator allowed a situation to persist that seriously reduced the confidence of passengers with impaired vision when boarding their services.

Example C

- Officials from the Department for Transport learn that a train operating company has ordered, and taken delivery of, a consignment of on-board wheelchair ramps that do not comply with the RVAR.
- The operator was informed by the ramp manufacturer at the time of the order that the ramps would not be compliant.
- The operator has failed to respond to either the improvement or final notices.
- The ramps cannot be fixed to the rail vehicle when they are in use - making them less safe for wheelchair users.
- In this case a maximum penalty may be imposed. This is because the operator had an opportunity to procure compliant ramps but wilfully purchased equipment that could seriously impact on a disabled person's ability - and willingness - to travel.

Example D

- An operator of trams introduced before 1999 has one vehicle re-liveried with advertising vinyls that do not comply with the RVAR.

[Consultation Note - Refurbishment (including application of new liveries) of pre-RVAR stock will be subject to RVAR, under regulations to be consulted upon later in 2006]

- The non-compliance was only identified when officials from the Department for Transport saw a picture of the tram in a trade publication.
- The Department consults with the operator, and a compliant design and deadline for application is agreed. This is set out in an improvement notice. The operator also instructs tram crews to take extra care to ensure that all passengers have boarded the tram safely before moving off.
- Due to mechanical defects on other trams, that reduce the fleet available for service, the non-compliant vehicle remains in service past the deadline given in the improvement notice;
- The Secretary of State serves a final notice. However, due to continuing fleet availability problems, the non-compliant vehicle remains in service beyond the deadline given in that notice.

- In this case it may be unreasonable for the Department to impose a fine. It was necessary for the non-compliant vehicle to remain in service in order to reduce the impact on all passengers of documented problems with fleet availability. And the operator had taken some compensatory measures to reduce the impact of the non-compliance on passengers with impaired vision. However, if this scenario was repeated in the future a penalty may be imposed as the operator would now be aware that compliant advertising vinyls must be applied.

3. Operating a regulated rail vehicle otherwise in conformity with the RVAR

Example A

- Train crew belonging to a national rail operator persistently fail to programme the automated Passenger Information System (PIS) correctly before each journey.
- This is taking place on two classes of rail vehicle, made by different manufacturers, so an equipment failure is unlikely to be the cause.
- Non-compliances continue to be reported through the period of the improvement and final notices.
- The uncertainty about the train's destination and route is reducing the willingness of passengers with sensory impairments to use the services.
- The operator demonstrates that new and existing train crew have undergone training that includes staff responsibilities with regard to the PIS.
- A number of staff have been disciplined due to their failure to carry out their duties correctly.
- In this case a penalty towards the middle range of the scale may be imposed. This is due to the fact that, whilst the operator is making an effort to improve the situation, this is clearly insufficient as cases continue to be reported and some disabled passengers are unwilling to travel when the provision of information is so uncertain.

Example B

- The Department for Transport receives a report that a tourist railway using a vehicle with wheelchair accommodation fails to provide staff to operate a boarding device at one end of the route.
- A wheelchair user is unable to alight from the train and is forced to wait on board until the return journey.
- Upon being contacted by the Department for Transport, the operator claims to have resolved the problem but complaints continue to be made during the period of the improvement and final notices.
- Once the deadline for the final notice has passed, authorised persons from the Department for Transport carry out a test of procedures with the help of a volunteer wheelchair user. As in previous cases, staff fail to operate the boarding device at one end of the route.
- Speaking off the record, staff claim that no new instructions on operating the boarding device have been received.
- The operator is unable to provide evidence that it had indeed briefed staff on compliant procedures.
- In this case a penalty towards the upper range of the scale may be imposed as the non-compliance severely limits a wheelchair user's ability to enjoy the service provided, and the operator had attempted to mis-lead the Department for Transport.

4. Obstructing an authorised person in the exercise of his powers

Example A

- The operator of a tramway claims to have modified the PIS on a vehicle so that it now complies with the RVAR.
- This is after the deadline of an improvement notice, and after having had a final notice served upon him.
- An authorised member of the Department for Transport attempts to inspect the vehicle but is prevented from doing so by a member of depot staff - without a valid reason.
- Having advised the operator of the obstruction, the Department has been assured that all depot staff had now been briefed to assist authorised persons, and subsequently an authorised member of the Department obtains access to the vehicle.
- However, staff members then refuse to power up the vehicle to enable the authorised person to inspect the PIS. This is not for any valid operational nor safety reason.
- In this case a penalty towards the middle range of the scale may be imposed, as the operator should have already briefed its staff to allow access and afford assistance to authorised personnel before the first visit took place. Even after the first incident, it would appear that the briefing was inadequate.

Example B

- A member of the public claims that the operator of an airside mass transit system at an airport is operating a vehicle in non-compliance with RVAR.
- The operator has failed to satisfy the Department for Transport that the vehicle is now compliant during the period of an improvement notice.
- Having served a final notice upon the operator, two authorised members of the Department request access to the vehicle. This is necessary as the vehicle is within the security Restricted Zone of the airport.
- The operator refuses to arrange access and gives no valid reason for refusing to do so.
- This is the second occasion that this operator has refused access, although the previous case was at a different airport operated by the same company.
- By virtue of Section 47G(6) of the DDA 2005, the Secretary of State may assume that the non-compliance remains and can impose a penalty, even though the deadline within the final notice may not yet have passed.
- In this case a penalty towards the upper range of the scale may be imposed, as the operator is wilfully abusing security considerations to obstruct an authorised person in the exercise of his powers.

5. Failure to provide information

Example A

- A member of the public reports a technical breach of the RVAR and knows the time and route of the journey on which the vehicle was being used but not the vehicle's fleet number.
- The Secretary of State asks the operator for the vehicle number.
- The operator fails to supply this information in the time period specified.
- This is the third time the operator has failed to supply information of this kind.

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- In this case a penalty towards the middle range of the scale may be imposed, as there is unlikely to be any valid reason why the information cannot have been supplied by the deadline - and without it the Department is unable to proceed with enforcement procedures.

Annex E: Cabinet Office - Key Criterial for Consultation

The Cabinet Office Code of Practice on Consultation³⁵ sets out the basic minimum principles for conducting effective Government consultations. It aims to standardise consultation practice across Government and to set a benchmark for best practice, so that all respondents would know what to expect from a national, public Government consultation.

It is centred around six key consultation criteria which are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your Department's effectiveness at consultation, including through the use of a designated Consultation Co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced with all consultation documents.

Consultation policy, the Code of Practice on Consultation and the Consultation Guidance are the responsibility of the Better Regulation Executive³⁶ at the Cabinet Office.

³⁵ For the full text of the Code, please see http://www.cabinetoffice.gov.uk/regulation/consultation/consultation_guidance/index.asp.

³⁶ The Executive had its own web site at <http://www.cabinetoffice.gov.uk/regulation>.

Annex F: Summary list of organisations that have been consulted

Access Association

Access Committee for Wales

Advanced Transportation Systems Ltd

AEA Technology

Age Concern

Alstom Transportation Ltd

Angel Trains Ltd

Arriva

Arthritis Care

Assistance Dogs UK

Associated Society of Locomotive Steam Enginemen and Firemen (ASLEF)

Association of Community Rail Partnerships

Association of Train Operating Companies

Association of Transport Co-ordinating Officers

AST Rail

Atkins Rail

BAA plc (British Airports Authority)

Balfour Beatty Rail Maintenance

Birmingham International Airport Ltd

Blackpool Transport Services Ltd

Bombardier Transportation Ltd

British Council of Disabled People

British Deaf Association

British Transport Police

Capability Scotland

Centrac Ltd

CHANGE

Commission for Racial Equality

Compass Tours

Confederation of Passenger Transport UK

DeafBlind UK

Department for Regional Development Northern Ireland

Disability Action Northern Ireland

Disability Charities Consortium

Disability Direct

Disability Rights Commission

Disability Wales

Disabled Persons Transport Advisory Committee

Docklands Light Railway

Dopplemayr Cable Car Ltd

Employers' Forum on Disability

English, Welsh and Scottish Railway Ltd

Equality Commission Northern Ireland

Equal Opportunities Commission

Eurostar

FirstGroup plc

Freightliner Ltd

GB Railfright Ltd

Glasgow Underground

Go-Ahead Group plc

Greater London Action on Disability

Great Railway Maintenance Ltd

Green Express Railtours

Health & Safety Executive

Heartland Rail

Heathrow Express

Her Majesty's Railway Inspectorate

Heritage Railway Association

Hertfordshire Rail Tours

Hitachi Rail

HSBC

Hull Trains

Interfleet Technology Ltd

Institute of Highways & Transportation

Jarvis Fastline

Joint Committee on Mobility for Blind and Partially Sighted People

Joint Committee on Mobility for Disabled People

JMU Access Partnership

Kingfisher Railtours

Leonard Cheshire Foundation

Light Rail Transit Association

Lloyds Register

London Travelwatch

London Underground Limited

ME Association

MENCAP

Metronet

Midland Metro

MIND

Mobility & Access Committee Scotland

Mott MacDonald

National Assembly for Wales

National Council for Voluntary Organisations

National Express Group plc

National Federation of the Blind

National League of the Blind and Disabled

National Union of Rail, Maritime and Transport Workers

Nenta Train Tours

Network Rail

Nottingham Express Transit

Office of Rail Regulation

Orient Express

Passenger Focus (formerly the Rail Passengers Council)

Passenger Transport Executives

Pathfinder Tours (2006) Ltd

Past-Time Rail Ltd

People First

Phab

Portaramp

Porterbrook Leasing Company Ltd
Rail Industry Association UK
Rail Safety & Standards Board
Railway Heritage Committee
Railway Industry Association
Royal Association for Disability and Rehabilitation (RADAR)
Royal National Institute of the Blind (RNIB)
Royal National Institute for the Deaf (RNID)
Royal Mail Group plc
Scope
Scottish Accessible Transport Alliance
Scottish Disability Equality Forum
Scottish Executive
SENSE
Serco Metrolink
Siemens Transportation Systems
Small Business Service
South Yorkshire Supertram
Stagecoach Holdings plc
Train Operating Companies
Tramlink Croydon Ltd
TRAM Power Ltd
Transdev Edinburgh Tram Ltd
Transport 2000
Transport Research Laboratory
Transport Scotland
Transport Advisory Committee (Northern Ireland)
Transport & General Workers Union
Transport for London
Transport Salaried Staffs' Association
Transport Scotland
Tube Lines Ltd
Tyne & Wear Metro
Women's National Commission

Disability Discrimination Act 2005 - Rail Services

UK Disability Forum

UK Older People's Advisory Group

UK Youth Parliament