

TIPS FOR THE TRANSITION TO 2012:

Questions and answers about new construction, alterations, and existing facilities under DOJ's 2010 ADA Regulations

Prepared by Irene Bowen, J.D.



Question 1: How do you choose which standard to follow for new construction and alterations that take place from September 2010 to March 2012 and that are subject to the Americans with Disabilities Act (ADA)?

The regulations say:

- For new construction and alterations beginning on or after March 15, 2012, a covered public or private entity must comply with the 2010 Standards for new construction and alterations. Public entities follow the title II regulations, and private entities (public accommodations and commercial facilities) follow the title III regulations.
- If construction or alterations start before March 15, 2012, you have a choice of following the 1991 or 2010 Standards. (Title II entities, including all state and local governments, can also choose to follow UFAS during that time.)
- During the transition, you can't choose to follow one standard for part of a building and another standard for another part. In other words, all alterations to a building during the transition (from September 15, 2010, through March 14, 2012) must follow the one standard you choose.

One purpose of the 2010 Standards (which adopt the 2004 Americans with Disabilities Act Accessibility Guidelines, or ADAAG) is to harmonize the federal requirements with state requirements. In about half the states, new construction and alterations already have to comply with a state code that is very similar to the 2010 Standards. If you are in a state that has adopted the 2003 or 2006 International Building Code (including the accessibility standards of the American National Standards Institute, A117.1-2003), then when you build to your state requirements, you will be following most of the federal requirements already. But you will also need to follow the additional requirements that DOJ has issued "beyond" 2004 ADAAG. For example, DOJ includes more specific provisions about detention and correction facilities, seating in assembly areas, medical care facilities, housing at a place of education, and the path of travel requirements for alterations.

If construction or alteration might not start before March 15, 2012 (e.g., for a new project that is in the design stage), it will be safest to use the 2010 Standards for that project.

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You should consider the type of building and the types of alterations or construction you contemplate before the compliance date. For example,

- An auditorium or theater with tiered seating would have to follow more stringent requirements under the 2010 Standards (in most respects) than under the 1991 Standards.
- If you alter a single-user toilet room, in many cases the 2010 Standards would require increased floor space compared to the 1991 Standards.
- Both the 1991 and 2010 Standards generally require that when existing elements and spaces of a facility are altered, the alterations must comply with new construction requirements. But the 2010 Standards include a new exception to the scoping requirement for visible alarms in existing facilities: that visible alarms must be installed only when an existing fire alarm system is upgraded or replaced, or a new fire alarm system is installed. (But when making decisions about alarms, keep life safety issues in mind.)
- Consider following the 2010 Standards for elements for which UFAS or the 1991 Standards had no specific provisions (e.g., play areas, pools). Due to the lack of a safe harbor (see answers to questions 2 and 3), you might need to make further alterations after March 14, 2012.

Question 2: What does a title III entity need to know about barrier removal?

DOJ recommends the development of an implementation plan for compliance with the barrier removal provisions, and an ongoing method of assessing compliance. As a matter of good practice, and to the extent your resources allow, the plan should include a list of significant access barriers (created after a survey of the building), a schedule for removing them, and a description of the methods used to identify and prioritize barriers.

An element that does not comply with the alterations provisions of the Standards for that element is considered a "barrier." For example, a typical round knob on a door that should be accessible would be a barrier because it requires tight grasping, pinching, or twisting of the wrist to operate, contrary to the provisions of the Standards. Changes undertaken as part of a barrier-removal effort should comply with the Standards.

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Between September 15, 2010, and March 14, 2012, public accommodations must remove barriers (to the extent readily achievable) so that elements in existing facilities that do not comply with the requirements for those elements in the 1991 Standards meet either the 1991 Standards or the 2010 Standards. Starting March 15, 2012, barrier removal must be done in accordance with the 2010 Standards.

The 2010 Regulations provide a “safe harbor” for elements that comply with the 1991 Standards. Those elements do not have to be modified in order to meet the 2010 Standards, just for barrier removal purposes. You should document compliance before March 15, 2012.

For example, both Standards set maximum reach ranges for controls and operating mechanisms, light switches, electrical outlets, thermostats, fire alarm pull stations, card readers, and keypads, so that the controls can be used and operated by people using wheelchairs or other mobility devices and people of short stature. With some exceptions, the 1991 Standards set the maximum height for controls that can be reached by a side reach at 54 inches above the floor or ground; the 2010 Standards, at section 308.3, lower the maximum height (whether by side or forward approach) to 48 inches. Starting on March 15, 2012, you will have to measure whether something is a barrier or not by the 2010 Standards. Those controls, if they haven't been modified by that time to be at the height called for by the 1991 Standards, would have to then be modified to the 2010 Standards, if doing so is readily achievable.

This probably makes it advisable to lower any such controls to 54” (or less), if reachable from a side approach, before March 15, 2012. If a control remains beyond reach after that date, it will have to be lowered to 48”, according to the 2010 regulations. Controls that are already at 54” and reachable from the side do not have to be lowered to 48” before that date, and they benefit from the safe harbor after that date.

Note that this safe harbor does not apply to elements for which there are no standards in the 1991 Standards, such as residential facilities dwelling units, play areas, and swimming pools. DOJ lists these in the 2010 Regulation at section 36.304(d)(2)(iii).

Remember that you have only until March 14, 2012, to do barrier removal under the 1991 Standards. So you should start now to assess barriers under those Standards, and remove any that are readily achievable to remove.

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Question 3: What does a title II entity need to know about program accessibility?

As of March 15, 2012, program accessibility will be measured by reference to the 2010 Standards. Generally, the principles discussed under Question 2 apply to program accessibility (except that title III requires barrier removal to the extent it is "readily achievable," and title II requires that programs be accessible in their entirety unless that would create an undue burden or fundamental alteration).

This means that **if a facility needs to be accessible for program accessibility purposes, it should be brought up to the Standards by the 2012 compliance date.**

- **Buildings for which there were standards before 2010**

You can take advantage of a safe harbor that is similar to the one described in the answer to Question 2: those buildings can be assessed and altered for program accessibility purposes under those standards (1991 Standards or UFAS), and they don't have to be altered after the compliance date just for the sake of program accessibility. You should document your compliance before March 15, 2012.

- **Buildings for which there were no standards before 2010** (that is, where the 2010 Standards establish specific requirements for the first time)

The safe harbor does not apply to elements for which there are no specific provisions in the 1991 Standards or UFAS, such as play areas and swimming pools. DOJ lists these in the 2010 Regulation at section 35.150(b)(2)(ii). One of your top priorities during the transition to 2012 should be to evaluate those facilities and bring them up to the 2010 Standards by March 15, 2012, if they need to be accessible for program accessibility.

This is a good time to re-assess or update the self-evaluations and transition plans required under title II (as well as section 504 of the Rehabilitation Act of 1973, if you receive federal financial assistance). A self-evaluation lays out your assessment of programs and whether physical changes need to be made to facilities. A transition plan states what buildings or facilities will be modified, how, and when, and names the people responsible for implementing the plan.

These tips highlight certain provisions of DOJ's ADA regulations and do not constitute legal advice. The regulations and other DOJ materials can be found online at www.ada.gov.