The Revised ADA Title II and Title III Regulations (Part 1): Impact on Campus Athletic Facilities

This NACUANOTE is the first in a two-part series that will address how the U.S. Department of Justice’s revisions to its regulations implementing the Americans with Disabilities Act (“ADA”) affect campus athletic facilities and services. The first Note will address those provisions of particular importance to design, construction, and barrier removal in campus athletic facilities — including requirements for accessible seating, designated aisle seats, and recreational facilities. The second Note will address the new provisions regarding ticket sales for accessible seating and providing effective communication.

INTRODUCTION:

On September 15, 2010, the U.S. Department of Justice (“DOJ”) issued revisions to its regulations implementing Title II (which applies to state and local government programs) and Title III (which applies to places of public accommodation, including private colleges and universities) of the ADA, 28 C.F.R. Parts 35-36. [1] While affecting a broad array of facilities and building elements, the revised regulations have particular impact on campus athletic facilities, such as arenas, stadiums, and student recreational facilities.


To understand your institution’s obligations under the ADA, you need to understand when each version of the ADA Standards applies and whether a particular facility constitutes new construction, an alteration, or an existing facility. Which version of the ADA Standards applies will depend on the date when certain “triggering events” occur. Additionally, the degree to which either version of the ADA Standards will apply to a facility depends on whether it is new construction, is being altered, or is an existing facility not undergoing modification.

Under both Titles II and III, new construction must comply with the ADA Standards, except in very limited circumstances where unique site constraints make such compliance structurally impracticable. [4] Alterations must comply with the ADA Standards to the “maximum extent feasible.” [5] Existing facilities subject to Title III must remove barriers to access (i.e., elements that do not comply with the ADA Standards) where doing so is “readily achievable.” [6] Under Title II, programs, services, and activities offered in existing facilities must be accessible to individuals with disabilities. This can be accomplished by removing barriers to access or through alternative methods, such as
the purchase of equipment or relocation to accessible facilities. [7]

This Note focuses on the revised requirements under Titles II and III of the ADA, but it is important to remember that institutions receiving federal financial assistance also must comply with the requirements of Section 504 of the Rehabilitation Act of 1973. [8]

DISCUSSION:

When do the revised regulations take effect?

The revised Title II and Title III regulations both took effect on March 15, 2011. [9] Consequently, revised regulatory provisions addressing ticket sales for accessible seating and effective communication (which are addressed in Part II of this NACUANOTE series) already are in effect. While the regulations went into effect in March 2011, use of the 2010 Standards did not become mandatory until March 15, 2012. [10] Thus, all new construction, alterations, and barrier removal undertaken on or after March 15, 2012 are now subject to the 2010 Standards, except for those pertaining to accessible means of entry and exit for existing pools and spas, which the DOJ has postponed until January 31, 2013. [11]

Which Standards Apply?

Whether the 1991 Standards or the 2010 Standards apply will depend on the date of the “triggering event” for a particular project or alteration. For public entities subject to Title II, the triggering event is the start of physical construction or alteration, which does not include ceremonial groundbreaking or razing of structures prior to site preparation. [12] For entities subject to Title III, the triggering event is the date on which the last application for a building permit or permit extension is certified to be complete by a state, county or local government (or in those jurisdictions that do not certify completion of applications, the date on which the last application for a building permit or permit extension is received by the State, county, or local government). Alternatively, if no permit is required, the start of physical construction or alteration (not including ceremonial groundbreaking or razing of structures prior to site preparation) is the triggering event. [13]

The revised regulations establish the following phased approach regarding which version of the ADA Standards applies:

**New Construction, Alterations, and Barrier Removal Prior to September 15, 2010**

The 1991 Standards apply to new construction, alterations, and barrier removal commenced prior to September 15, 2010, but after the effective dates of the new construction and alterations provisions in Titles II and III. [14] Entities covered under Title II also can choose to comply with the Uniform Federal Accessibility Standards (“UFAS”), instead of the 1991 Standards. [15]

**New Construction, Alterations, and Barrier Removal Commenced On or After September 15, 2010, but Before March 15, 2012**

For projects with a triggering event date prior to March 15, 2012, the revised regulations provide covered entities with some flexibility in satisfying their accessibility obligations. Entities subject to Title III can choose to comply with either the 1991 Standards or the 2010 Standards. Entities covered under Title II also can choose to comply with UFAS. This choice applies to new construction, alterations, barrier removal in existing facilities, and correction of non-compliant
elements undertaken on or after September 15, 2010, but before March 15, 2012. [16]

In technical guidance, the DOJ has stated that in selecting a standard, an entity must use that standard for all elements in the entire facility. For example, an entity cannot choose to follow the 1991 Standards for accessible routes and the 2010 Standards for accessible seating. [17] In planning a construction or alteration project for a particular facility, therefore, an entity should apply either the 1991 Standards or the 2010 Standards to the entire project and use the same standard for all projects or barrier removal undertaken at that facility between September 15, 2010, and March 15, 2012.

Notwithstanding the DOJ’s technical guidance, however, the revised regulations set forth “safe harbor” provisions, discussed infra, that protect facility elements that already comply with the 1991 Standards. Accordingly, an entity’s decision to apply the 2010 Standards to construction or alteration projects commenced on or after September 15, 2010, arguably should not trigger any obligation to upgrade or retrofit other elements or areas not within the scope of the project that otherwise comply with the 1991 Standards (or UFAS for entities subject to Title II). DOJ’s technical guidance also is somewhat at odds with the text of the revised regulations, which provide that where the 2010 Standards reduce either technical requirements or scoping requirements (i.e., the number of required accessible elements) below that required in the 1991 Standards, covered entities may modify elements in accordance with the reduced requirements of the 2010 Standards. [18]

In choosing between the 1991 Standards and the 2010 Standards, entities should take into account accessibility requirements that may exist under their state or local building codes. Several state and local jurisdictions have incorporated accessibility requirements that are similar if not identical to the 2010 Standards, potentially rendering adherence to the 2010 Standards more practical. [19]

New Construction, Alterations, and Barrier Removal On or After March 15, 2012

The 2010 Standards apply to new construction and alterations for which the triggering event occurs on or after March 15, 2012. [20] They also apply to barrier removal undertaken on or after March 15, 2012. [21] For any new construction, alterations, or barrier removal occurring on or after that date, institutions subject to Title II can no longer choose to comply with UFAS.

How do the 2010 Standards impact an institution’s obligations under Section 504 of the Rehabilitation Act?

The U.S. Department of Education’s Section 504 regulations require that facilities must be designed and constructed so as to be readily accessible and usable by people with disabilities. Presently, adherence to the 2010 ADA Standards is not required under Section 504, and new construction that conforms to the UFAS is deemed compliant with Section 504. [22]

On March 14, 2012, the U.S. Department of Education’s Office for Civil Rights (“OCR”) issued a Notice of Interpretation, announcing its intent to adopt the 2010 Standards in lieu of UFAS under Section 504; OCR has not, however, initiated any such rulemaking to date. [23] Until such a rulemaking is completed, OCR is permitting recipients of federal financial assistance to use the 2010 Standards as an alternative to the UFAS for new construction or alterations commenced on or after September 15, 2010, except that the elevator exception for facilities with less than three stories or less than 3,000 square feet per story will not apply. [24] For new construction and alterations commenced prior to March 15, 2012, institutions also are permitted to use the 1991 Standards (except that the corresponding elevator exception does not apply). [25] Thus, for new construction or alterations commenced between September 15, 2010, and March 14, 2012, recipients of federal financial assistance may choose among any of these three accessibility standards for purposes of complying with Section 504. [26]
Although Section 504 presently does not require compliance with the 2010 Standards, educational facilities have an independent obligation to comply with Title II or Title III of the ADA, as applicable. Thus, new construction, alterations, and/or barrier removal undertaken on or after March 15, 2012 must comply with the 2010 Standards. OCR, which pursuant to a delegation by the U.S. Attorney General to the U.S. Department of Education shares in the enforcement of Title II with respect to certain types of public educational entities, has indicated that it will use the 2010 Standards in enforcing Title II with respect to new construction and alterations commenced on or after March 15, 2012. [27]

Must existing athletic facilities be modified to comply with the 2010 Standards?

Existing facilities generally do not have to be modified to comply with the 2010 Standards to the extent that individual building elements within those facilities comply with the applicable requirements of the 1991 Standards (or UFAS, for entities subject to Title II), provided that one of the safe harbors set forth in the revised regulations applies. These two “safe harbors” in the revised regulations mitigate the impact of the 2010 Standards on existing facilities, but they also have limited application and must be construed carefully.

Under the first “safe harbor” provision, building elements that presently comply with the applicable requirements of the 1991 Standards (or UFAS, for entities subject to Title II) do not have to be modified to comply with the 2010 Standards unless these elements are altered on or after March 15, 2012. [28] This safe harbor does not provide blanket protection or immunity for an overall facility, however, and must be applied on an element-by-element basis. Additionally, it does not extend to certain enumerated elements not addressed in the 1991 Standards, for which the 2010 Standards establish “new” standards. These elements include recreational boating facilities, exercise machines and equipment, fishing piers and platforms, golf facilities, miniature golf facilities, saunas and steam rooms, swimming pools and spas, shooting facilities with firing positions, accessible team or player seating, and certain accessible route requirements in court sport facilities and to bowling lanes. [29] Accordingly, Title III entities have to modify such existing elements to comply with the 2010 Standards, to the extent doing so is readily achievable. Title II entities have to provide an appropriate level of program access to such elements, which may entail modifying these elements or using other methods to provide access (such as the purchase of equipment). [30]

The revised regulations also contain a second “safe harbor” provision, known as the “path of travel” safe harbor. Under Title III and its 1991 regulation, when a primary function area is altered, the path of travel serving that altered area generally also must be made accessible unless the cost of doing so is disproportionate to the cost of the overall alteration. [31] Under the “path of travel” safe harbor, when a primary function area is altered, the facility elements that comprise the path of travel serving that altered area do not have to be modified to comply with the 2010 Standards, provided these elements already comply with the 1991 Standards (or UFAS for Title II entities) and are not otherwise altered on or after March 15, 2012. [32] The path of travel includes elements such as restrooms, telephones, and drinking fountains serving the altered area. [33] “Disproportionate” is defined as more than 20% of the cost of the alteration to the primary function area. [34] Additionally, under the Title III regulations, alterations to a primary function area taken solely to comply with barrier removal obligations will not trigger the obligation to make the path of travel serving that area accessible. [35] These provisions are not affected by the revisions to the Title III regulations.

Although Title II and its 1991 implementing regulation did not contain similar path of travel provisions, the revised Title II regulations expressly incorporate path of travel provisions similar to those set forth in the Title III regulations. [36] The path of travel provisions do not otherwise alter a Title II entity’s obligation to make its programs accessible to persons with disabilities. Accordingly, when making alterations to comply with its program access requirements, a Title II entity may not rely on the disproportionate cost defense for path of travel. When a Title II entity has already
satisfied its program access requirements, and then makes alterations to primary function areas for other reasons, it may rely on the disproportionate cost defense. [37]

For example, if an entity spends $50,000 altering the dining room in one of its campus dining halls on or after March 15, 2012, [38] the alterations to the dining room must comply with the 2010 Standards. If those elements comprising the path of travel (including not only the route and entry, but elements such as restrooms and drinking fountains) already comply with the 1991 Standards (or UFAS for Title II entities) and are not otherwise being altered as part of the dining room alteration, under the “path of travel” safe harbor, none of the path of travel elements would have to be modified to comply with the 2010 Standards. The safe harbor does not apply, however, to any path of travel elements that do not already comply with the 1991 Standards (or UFAS for Title II entities). A Title III entity would have to spend up to $10,000 making such noncompliant path of travel elements comply with the 2010 Standards. The responsibilities of a Title II entity would depend on whether the entity has already satisfied its obligation to provide “program access” to its dining facilities. If it has not, then the Title II entity cannot rely on a disproportionate cost defense in modifying the noncompliant path of travel elements to comply with the 2010 Standards. If the Title II entity has already satisfied its program access requirements (for example, if the entity has multiple dining halls and the same offerings are available at an alternate accessible dining hall), then the Title II entity is not required to spend more than $10,000 making the noncompliant path of travel elements comply with the 2010 Standards.

Caution must be exercised in interpreting and applying these safe harbor provisions. Application of the safe harbor requires an element-by-element assessment and, as illustrated in the scenario above, these assessments are highly fact-specific. Moreover, existing facilities subject to Title III have a continuing obligation to engage in readily achievable barrier removal. Even if a particular element has been modified to the extent readily achievable (e.g., the clear width at a door has been widened to 30 inches, instead of the 32 inches minimum required), the safe harbor will not apply in the event that changed circumstances (such as increased revenue resources, new products or technology) subsequently render full compliance readily achievable.

Institutions also must remember that the ADA does not supersede requirements under state or local laws that provide for greater accessibility than the federal accessibility standards. [39] Covered entities must consider not only applicable federal but also state and local accessibility requirements. [40] Where these requirements differ, covered entities must follow whichever mandate greater accessibility for individuals with disabilities.

Finally, both the safe harbors and an entity’s ability to choose which standards to follow prior to March 15, 2012, magnify the importance of maintaining documentation regarding the date of alteration or construction. In the event of litigation or an administrative enforcement action, such documentation may be critical in successfully claiming the protections afforded by these provisions.

Which provisions in the 2010 Standards specifically impact campus athletic facilities?

The 2010 Standards include numerous changes applicable to common facility elements, such as entrances, accessible routes, drinking fountains, locker rooms, and restrooms, and these changes apply with equal force to athletic facilities. The 2010 Standards also include several provisions that specifically impact features particular to athletic facilities and student recreation facilities -- such as accessible seating for both spectators and players, exercise machines and equipment, fishing piers and platforms, golf facilities, miniature golf facilities, saunas and steam rooms, swimming pools and spas, shooting facilities with firing positions, accessible team or player seating, and certain accessible route requirements in court sport facilities and to bowling lanes. The changes pertinent to these particular features are summarized below.
1. Assembly Areas: Wheelchair Spaces

The revised Title II and Title III regulations and the 2010 Standards make several changes and clarifications to the requirements for wheelchair spaces in assembly areas, such as stadiums, arenas, and grandstands. The key changes include the following:

- The minimum number of wheelchair spaces required in assembly areas that have a seating capacity in excess of 500 has been significantly reduced. The 1991 Standards essentially require wheelchair spaces equal to 1% + 1 of total seating. Under the 2010 Standards, for seating capacities that do not exceed 5,000, the number required is 6 plus 0.75% of the seats in excess of 500. For seating capacities exceeding 5,000, the number required is 36, plus 0.5% of the number of seats in excess of 5,000.

- The 2010 Standards distinguish between luxury boxes, club boxes, and suites on the one hand, and other types of boxes. Consistent with the DOJ’s long-standing interpretation of the 1991 Standards, the 2010 Standards now expressly state that the minimum number of wheelchair spaces required for luxury boxes, club boxes, and suites must be calculated individually for each box or suite. For other types of boxes (e.g., tiered boxes provided for spatial and acoustical purposes in performing arts auditoria), the minimum number of wheelchair spaces required is based on the total number of seats provided in all such boxes, and at least 20% of the boxes must contain wheelchair spaces.

- Wheelchair spaces and companion seating must be provided on all levels of a facility that are located on an accessible route and also include other seating. Wheelchair spaces and companion seating also generally must be dispersed around the field of play or performance area, unless other seating is not so dispersed (for example, seating is provided on only one side of the court or field), or the seating capacity is less than 300.

- Wheelchair spaces and companion seating may not be located on (or obstructed by) temporary platforms or other movable structures, unless located in seating sections where the entire seating section is placed on temporary platforms or movable structures (e.g., retractable seating sections).

- When not needed to accommodate individuals with disabilities, individual removable seats may be placed in unused wheelchair spaces.

- The requirement that each wheelchair space have at least one adjacent companion seat has not changed. As discussed in Part 2 of this NACUANOTE series addressing accessibility in ticket sales, however, a facility must permit individuals with disabilities to purchase the same number of companion seats as other ticket purchasers.

- At least one wheelchair space must be provided in team or player seating areas.
2. Assembly Areas: Designated Aisle Seats

“Designated aisle seats” are seats that have a folding, removable, or no armrest on the aisle side. Such seats accommodate individuals with disabilities who, due to their disability, may have difficulty navigating a row of seats or who wish to transfer from their mobility device to a seat. The 2010 Standards alter the number of such seats required. Whereas the 1991 Standards required that 1% of the total number of seats provided in the assembly area be designated aisle seats, the 2010 Standards require that at least 5% of only the aisle seats be designated aisle seats. This generally will result in fewer designated aisle seats being required. Designated aisle seats are not required to be on an accessible route, but they must be those aisle seats located closest to an accessible route.

3. Assembly Areas: Assistive Listening Systems

An assistive listening system is required in assembly areas where audible communication is integral to the use of the space and audio amplification is provided. The 2010 Standards significantly reduce the minimum number of receivers that larger assembly areas must provide. Whereas the 1991 Standards require receivers equal to 4% of the total seats, the 2010 Standards employ a graduated approach: 4% for the first 500 seats, 3% of seats from 501 to 1000, 2% of seats from 1001 to 2000, and 1% of seats in excess of 2,000. Additionally, at least 25%, but no fewer than two, receivers must be hearing-aid compatible.

4. Court Sports and Bowling Lanes: Accessible Route

For facilities housing court sports (e.g., basketball, tennis), the 2010 Standards require that at least one accessible route directly connect both sides of the court. At least five percent (5%), but no less than one, of bowling lanes must be located on an accessible route.

5. Pools and Spas

The 2010 Standards establish requirements for accessible means of entry into pools and spas. For swimming pools with less than 300 linear feet of pool wall, only one accessible means of entry is required, but it must be either a pool lift or a sloped entry (i.e., ramp). Pools with more than 300 linear feet must provide at least two accessible means of entry, one of which must be either a pool lift or sloped entry. Options for the other accessible means of entry include transfer walls, transfer systems and pool stairs. In addition to requiring compliance with the specific technical requirements set forth in Section 1009.2 of the 2010 Standards, the DOJ interprets the 2010 Standards as requiring that a pool lift be built-in or “fixed,” i.e., affixed in some manner to the pool deck or apron while the lift is in use. For example, a pool lift that attaches to the pool deck via an anchor or sleeve satisfies this requirement, even if the lift is removed and stored away from the pool when the pool is closed, such as during winter months or periods of inclement weather. While pools newly constructed or altered after March 15, 2012, must comply with these requirements, existing pools and spas are not required to comply until January 31, 2013. For entities subject to Title II, the requirement of “program accessibility” applies to existing pools. Title II entities can satisfy this requirement by making structural modifications, purchasing equipment such as portable pool lifts that otherwise comply with the 2010 Standards, or relocating programs to accessible pools. For Title II entities with multiple pools, not all pools must be made accessible, provided the requirement for “program accessibility” is satisfied. Factors to consider in choosing which pool(s) to make accessible include (i) providing an integrated setting, (ii) the programs and amenities offered at each pool, (iii) the respective locations of the pools, and (iv) their convenience to any available public/mass transportation. For entities subject to Title III, existing pools must be modified or a fixed pool lift installed to provide an accessible means of entry, to the extent doing so is readily achievable. Where doing so is not readily achievable, other alternatives, such as use of
a portable pool lift that otherwise meets the requirements of the 2010 Standards is permitted. For Title III entities with multiple pools, each must be made accessible unless not readily achievable to do so. Sharing pool lifts between multiple pools is not permitted, unless providing lifts at each pool creates an undue burden; moreover, lifts must be available and in place during all times that the pool is open. Given the initial confusion over the DOJ’s interpretation that pool lifts be fixed, the DOJ has indicated that under Title III, those who purchased portable lifts before March 15, 2012, may continue to use those lifts provided they otherwise comply with the requirements of the 2010 Standards and are kept in position and operational during all times that the pool is open.

At least one accessible means of entry must be provided for spas, which must be either a pool lift, a transfer wall, or a transfer system. Where multiple spas are clustered in one location, five percent (5%), but no less than one, of the spas must be made accessible using one of these mechanisms.

6. Saunas and Steam Rooms

A turning space (60 inch diameter or T-shape space) must be provided in saunas and steam rooms. A readily removable bench can be installed in this turning space when the sauna or steam room is not being used by an individual with a disability. If seating is provided in a sauna or steam room, at least one bench must be accessible. Where multiple saunas or steam rooms are clustered in one location, five percent (5%), but no less than one, are required to comply with these requirements.

7. Exercise Machines and Equipment

At least one of each type of exercise machine and equipment must be located on an accessible route and have an adjacent, level, clear floor space to accommodate transfer or use by an individual using a wheelchair. The clear floor space generally must be at least 30 inches by 48 inches, and larger dimensions may be required for spaces located in an alcove or otherwise obstructed on one or more sides. A clear floor space can be shared between two pieces of equipment and the clear floor spaces at separate machines can overlap. Compliance generally can be achieved by rearranging equipment and ensuring that at least one of each type machine is located on an accessible level of the facility.

8. Boating Facilities

For boating facilities, the 2010 Standards require that a percentage of (but never fewer than one) boat slips and boarding piers be accessible. Boat slips and boarding piers required to be accessible must be located on an accessible route, but the 2010 Standards contain several modified requirements and exceptions pertaining to accessible routes that serve these areas. Clear pier space at least 60 inches wide generally must be provided along the length of the accessible boat slip, as well as along the full length of accessible boarding piers. Within each 10 feet of linear pier edge, there must be at least one continuous, clear opening that is at least 60 inches wide. Edge protection may be provided at such openings, provided that such protection is no more than four inches high and two inches wide.

9. Golf Facilities and Miniature Golf Facilities

With respect to golf facilities, the 2010 Standards essentially require that at least one teeing ground at each hole be designed and constructed so that a golf car can enter and exit the teeing ground. If two teeing grounds are provided for a hole, this requirement applies to the forward teeing ground. If more than three teeing grounds are provided for a hole, at least two teeing grounds (including the forward teeing ground) must comply with this requirement. In existing golf courses where the terrain precludes making the forward teeing ground compliant, it is not required to be one of the compliant
teeing grounds. Putting greens and weather shelters also must be designed and constructed so that golf cars can enter and exit them. Additionally, all the accessible spaces and elements must be connected by an accessible route.

For miniature golf facilities, at least 50% of the holes must be accessible. To be accessible, the hole must be on an accessible route; a level, clear floor or ground space at least 48 inches by 60 inches must be provided at the start of play; and all areas within the hole where golf balls may come to rest must be within 36 inches of a clear floor or ground space that can accommodate an individual using a wheelchair (i.e., within the golf club reach range of an individual using a wheelchair). The miniature golf course must be configured so that the accessible holes are consecutive (one break in sequence is permitted if the last hole in the sequence is the last hole on the course). The course also must provide an accessible route from the last accessible hole to the course entrance or exit that does not require travel through other holes on the course.

10. Shooting Facilities with Firing Positions

In shooting facilities, five percent (5%), but no fewer than one, of each type of firing position must provide a level, circular turning space at least 60 inches in diameter.

CONCLUSION:

The DOJ's revised Title II and Title III regulations significantly impact the physical accessibility, design, and construction of campus athletic facilities, as well as the manner in which such facilities are operated. College and university officials should proactively assess their existing athletic facilities to determine whether the elements within those facilities are protected by the safe harbor provisions set forth in the revised regulations, or whether modifications are necessary in order to provide access for individuals with disabilities. Because pools, spas, and other types of recreational elements are not protected by the safe harbor provisions, institutions must carefully assess methods for making such elements accessible.

Operations and facilities personnel, legal personnel, and personnel involved in coordinating compliance with the ADA and/or Section 504 of the Rehabilitation Act should work together and communicate closely in any such review and assessment. Any outside consultants retained to assist in the process should be qualified in ADA accessibility analysis and, in particular, knowledgeable about the manner in which the various accessibility standards, including the 2010 Standards, apply to new and existing athletic facilities. Moreover, to the extent institutions utilize athletic or recreational facilities owned or operated by third parties, institutions also should consider the accessibility of such facilities and address any concerns with the owner or operator.

Taking such measures will ensure that an institution is as accessible as possible for the diverse community that it serves, and compliant with federal laws and regulations.

FOOTNOTES:


FN2.

**FN3.**

**FN4.**
28 C.F.R. §§ 35.151(a), 36.401(a)-(c).

**FN5.**
Id. §§ 35.151(b), 36.402(a).

**FN6.**
Id. § 36.304(a). “Readily achievable” is defined as “easily accomplishable and able to be carried out without much difficulty or expense.”

**FN7.**
Id. § 35.150(a)-(b).

**FN8.**
A full analysis of the interaction between Section 504 and the ADA is beyond the scope of this NACUANOTE. In short, Title II’s requirement for “program accessibility” with respect to existing facilities was patterned on the “program accessibility” requirement under Section 504. 42 U.S.C. § 12134(b) (2010). Accordingly, the analytical framework under Title II and Section 504 is similar. Title II and Section 504, however, define new construction and alterations differently. Whereas Title II’s requirements for new construction and alterations apply to those undertaken after January 26, 1992, Section 504’s requirements for new construction and alterations apply to those undertaken after June 3, 1977. 34 C.F.R. § 104.23 (2011); 42 Fed. Reg. 22,676 (May 4, 1977). Effective January 18, 1991, conformance with the Uniform Federal Accessibility Standards (“UFAS”) is deemed to be compliance with Section 504, although entities may depart from specific UFAS requirements as long as substantially equivalent or greater access to and usability of the building is provided. 34 C.F.R. § 104.23(c). Under Title II, entities may choose to comply with either the 1991 Standards or with the UFAS (prior to March 15, 2012). The 1991 Standards were based in part on the UFAS, so while there are many similarities between the two standards, there also are several differences. Title III of the ADA does not contain a “program accessibility” requirement. Rather, Title III entities must remove barriers to access in existing facilities where doing so is readily achievable. Title III’s requirements for new construction apply to facilities constructed for first occupancy after January 26, 1993; its requirements for alterations apply to those undertaken after January 26, 1992. Compliance with the UFAS is not an option under Title III.

**FN9.**

**FN10.**

**FN11.**
See infra p. 11 and note 61.
FN12.
Id. § 35.151(c).

FN13.
Id. § 36.406(a).

FN14.

FN15.
Id. § 35.151(c).

FN16.
Id. §§ 35.151(c)(2), 36.406(a)(2).

FN17.
See U.S. Dep’t of Justice, ADA 2010 Revised Requirements: Effective Date and Compliance Date at 2, 4 (Feb. 16, 2011).

FN18.
28 C.F.R. §§ 35.133, 36.211.

FN19.
Many states, for example, have incorporated the International Building Code ("IBC") and/or the ANSI A117.1 standard for accessible and usable buildings and facilities into their respective building codes. The 2003 editions of the IBC and ANSI A117.1 were harmonized in many respects with 2004 ADAAG (which the DOJ adopted as the 2010 Standards).

FN20.

FN21.

FN22.
34 C.F.R. § 104.23(c) (2011).

FN23.
77 Fed. Reg. 14,972 (March 14, 2012). Specifically, OCR indicated that it intends to harmonize its Section 504 regulations with the 2010 Standards, as defined in DOJ’s Title II regulations. While both the Title II and Title III regulations adopt the 2010 Standards, the elevator exception set forth in Exception 1 to Section 206.2.3 of the 2010 Standards does not apply under Title II. Except for limited types of facilities, this exception generally does not require an elevator in private facilities that have fewer than three stories or less than 3,000 square feet per story.

FN24.
77 Fed. Reg. at 14,975.

FN25.
Id.
Privately-owned institutions also must comply with the requirements of Title III, which provides for a choice only as between the 2010 Standards and the 1991 Standards.

77 Fed. Reg. at 14,974-14,975.

Id. §§ 35.150(b)(2), 36.304(d)(2).

Id. §§ 35.150(b)(2)(i), 36.304(d)(2)(iii).

Entities covered under Title III are required to remove barriers to access in their existing facilities where such removal is “readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(iv). “Readily achievable” means easy to accomplish without much difficulty or expense. 28 C.F.R. §§ 36.104, 36.304(a). This is an individualized assessment based on factors such as an entity’s resources and whether there are any structural or other impediments to removing the barrier. Public entities covered under Title II are required to make their programs accessible to individuals with disabilities. 42 U.S.C. § 12132; 28 C.F.R. pt. 35, subpt. D. With respect to existing facilities, this can be achieved through structural modifications to the facility or through alternate methods, such as purchase of equipment or relocation of the program to an accessible location. 28 C.F.R. § 35.150(b).


Id. §§ 35.151(b)(4)(ii)(C), 36.403(a)(2).


28 C.F.R. § 36.403(f).

Id. § 36.304(d)(1).

Id. § 35.151(b).


For purposes of this example, the dining room alteration is being undertaken for purposes other than for readily achievable barrier removal under Title III or to satisfy program accessibility requirements under Title II. Alterations undertaken solely to satisfy such requirements do not trigger “path of travel” requirements for alterations to a primary function area. 28 C.F.R. §§ 35.151(b)(2), 36.403(f). Even if the “path of travel” provisions do not apply, however, the obligation for readily achievable barrier removal under Title III and program accessibility under Title II may independently require modification of “path of travel” elements that do not comply with the 1991 Standards (or UFAS for Title II entities).

FN40. Some jurisdictions have harmonized their accessibility standards with the 1991 Standards. Several jurisdictions have adopted, in whole or in part, the IBC and/or the ANSI A117.1 standard. Although IBC 2003 and ANSI A117.1 - 2003 were harmonized in many respects with 2004 ADAAG, the IBC is routinely revised on a three-year cycle, and the ANSI A117.1 standard also is periodically revised (most recently in 2009). Furthermore jurisdictions can, and many do, adopt amendments to the model codes.


FN42. 2010 Standards, § 221.2.1.

FN43. Id. § 221.2.1.2.

FN44. Id. § 221.2.1.3.

FN45. 28 C.F.R. §§ 35.151(g)(1)-(2), 36.406(f)(1)-(2); 2010 Standards, §§ 221.2.3.1, 221.2.3.2.


FN47. 28 C.F.R. §§ 35.151(g)(3), 36.406(f)(3).

FN48. 2010 Standards, § 221.3.

FN49. Id. § 221.2.1.4. This requirement constitutes a “new” standard not protected by the safe harbor provisions.


FN51. 2010 Standards, § 221.4.

FN52. Id. § 219.2.


FN54. 2010 Standards, § 219.3.

FN55.
Id. § 206.2.12.

FN56.
Id. § 206.2.11.

FN57.
Id. § 242.

FN58.
Id. § 242.2 Exception 1.

FN59.
Id. § 242.2. Specific technical criteria for pool lifts, sloped entries, transfer walls, transfer systems and pool stairs are set forth in Section 1009 of the 2010 Standards.

FN60.
See Letter from Allison Nichol, Chief Disability Rights Section, DOJ, to Fred Schwartz, President, Asian American Hotel Owners Association (Feb. 24, 2012); Letter from Allison Nichol, Chief Disability Rights Section, DOJ, to Kevin J. Maher, Senior Vice President for Governmental Affairs, American Hotel and Lodging Association (Feb. 21, 2012) [hereinafter collectively DOJ Letters].

FN61.
Although the 2010 Standards regarding pools and spas were originally set to take effect on March 15, 2012, on March 20, 2012, the DOJ extended until May 21, 2012, the effective date of the requirement for accessible means of entry into existing pools and spas. 77 Fed. Reg. 16,163 (Mar. 20, 2012). Then, on May 21, 2012, the DOJ further extended the effective date of these requirements until January 31, 2013, for existing pools and spas. 77 Fed. Reg. 30,174 (May 21, 2012). This extension does not apply to pools and spas newly constructed or altered on or after March 15, 2012.

FN62.

FN63.
Id. at 3.

FN64.
U.S. Dep’t of Justice, Questions and Answers: Accessibility Requirements for Existing Swimming Pools at Hotels and Other Public Accommodation, at 5 (May 24, 2012), [hereinafter Pool Q&A].

FN65.
Accessible Pools, at 3; DOJ Letters, supra note 45.

FN66.

FN67.
2010 Standards, § 242.4.

FN68.
Id. §§ 241, 612. Technical requirements for an accessible bench are set forth in Section 903 of the 2010 Standards.

FN69.
Id. § 241.

FN70.
Id. §§ 206.2.13, 236, 305, 1004.

FN71.
Id. §§ 235.2, 235.3.

FN72.
Id. §§ 1003.2.1, 1003.2.2.

FN73.
Id. §§ 1003.3.1, 1003.3.2.

FN74.
Id. § 238.2.1.

FN75.
Id. §§ 238.2.2, 238.2.3. Clear floor or ground space at least 60 inches by 96 inches also must be provided within weather shelters.

FN76.
Id. § 206.2.15.

FN77.
Id. §§ 239, 1007.3.

FN78.
2010 Standards, § 243.1, 1010.1.

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RESOURCES:

- NACUA Resource Page on ADA Facilities Access
- U.S. Department of Justice’s Americans with Disabilities Act Web site (text of regulations, technical assistance materials, useful checklists and settlements)
● U.S. Dep’t of Justice, ADA 2010 Revised Requirements: Effective Date and Compliance Date (Feb. 16, 2011)

● U.S. Dep’t of Justice, ADA 2010 Revised Requirements: Accessible Pools — Means of Entry and Exit (May 24, 2012)

● U.S. Dep’t of Justice, Questions and Answers: Accessibility Requirements for Existing Swimming Pools at Hotels and Other Public Accommodation (May 24, 2012)

● ADA National Network links. The ADA National Network consists of ten federally funded Regional ADA National Network Centers (formerly known as Disability and Business Technical Assistance Centers) located throughout the United States that provide information, guidance and training on the ADA.

● AccessibilityOnline: www.accessibilityonline.org. A collaborative training program between the ADA National Network and the U.S. Access Board, which is hosted by the Great Lakes ADA Center. The program includes a series of free webinars and audio conferences on different topics of accessibility. Sessions are held on a monthly basis and cover a variety of topics concerning accessibility to the built environment, information and communication technologies, and transportation. The website includes an archive of prior webinars and audio conferences.