

ADA Safe Harbor Provisions

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This website is being developed by [Evan Terry Associates](#) to try to answer common questions about the safe harbor provisions in the 2010 ADA regulations. As new technical assistance is released by the Department of Justice on this subject and as questions are answered, we will update this page to reflect the new information. (For your reference, relevant sections of the regulations concerning safe harbors are copied below.) Please sign up for email updates at www.AccessUpdates.com.

The 2010 ADA regulations include a new concept called "safe harbor" that allows existing elements in pre-3/15/2012 facilities that fully complied with the 1991 ADA Standards to remain in place until those elements are altered. The exception applies to elements that might otherwise have to be modified under 1) the program access requirement for public entities, 2) the readily achievable barrier removal requirement for places of public accommodation, or 3) the path of travel requirement for any alteration that affects the usability of a primary function area in any covered facility.

The safe harbor concept is relatively simple. Where the 2010 Standards made incremental improvements to require greater accessibility, elements built or altered to be in compliance with the 1991 Standards do not have to be altered or replaced to comply with the new standard until they are altered or replaced for some other purpose. Where no requirement existed in the 1991 ADA Standards the safe harbor provisions do not apply. So, for example, boat docks, fishing piers, and children's play facilities were not covered in the 1991 Standards so they are not safe harbored.

The questions arise when trying to determine the definition of an "element." So, is the door and all of its hardware one element or a combination of multiple elements? In response to this question, representatives from DOJ have said that the door is the element that may remain unaltered if it complied fully with the 1991 Standards. That is true even if its old vision light (not mentioned in the 1991 standards) would not comply with the new standards and if it does not have the kick plate (smooth surface) that is now required by the 2010 Standards.

Some opinions have stated that the list of non-safe-harbored sections listed in the regulations at 35.150(b)(2) below is an all-inclusive list. Others disagree. Clearly, DOJ has noted that the newly detailed built-in communications requirements for ATMs are not covered by the safe harbor because their purpose is to serve as built-in auxiliary aids and services which are covered in a section of the regulations not subject to the safe harbor exceptions. That makes particular sense in that the communications requirements in the 1991 Standards were more performance-based than prescriptive and because ATMs typically have shorter life expectancies than other built-in elements of a facility.

Other questions involve elements such as windows that are not in the non-safe-harbored list but were

not covered in the 1991 Standards. Another question is whether signage, another communication feature in a building that was not in the non-safe-harbored list, is covered by the safe harbor exceptions. The list goes on...

As we learn DOJ's interpretations of these provisions of their regulations we will fill in the blanks on this website. Check back periodically for updated insights.

References:

35.150(b)(2)

(i) *Safe harbor*. Elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 Standards or in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984) are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

(ii) The safe harbor provided in § 35.150(b)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (*i.e.*, elements for which there are neither technical nor scoping specifications in the 1991 Standards). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows—

(A) *Residential facilities dwelling units*, sections 233 and 809.

(B) *Amusement rides*, sections 234 and 1002; 206.2.9; 216.12.

(C) *Recreational boating facilities*, sections 235 and 1003; 206.2.10.

(D) *Exercise machines and equipment*, sections 236 and 1004; 206.2.13.

(E) *Fishing piers and platforms*, sections 237 and 1005; 206.2.14.

(F) *Golf facilities*, sections 238 and 1006; 206.2.15.

(G) *Miniature golf facilities*, sections 239 and 1007; 206.2.16.

(H) *Play areas*, sections 240 and 1008; 206.2.17.

(I) *Saunas and steam rooms*, sections 241 and 612.

(J) *Swimming pools, wading pools, and spas*, sections 242 and 1009.

(K) *Shooting facilities with firing positions*, sections 243 and 1010.

(L) *Miscellaneous*.

(1) *Team or player seating*, section 221.2.1.4.

(2) *Accessible route to bowling lanes, section. 206.2.11.*

(3) *Accessible route in court sports facilities, section 206.2.12.*

35.151(b)(2)

(2) The path of travel requirements of § 35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.

35.151(b)(4)(ii)(C)

(C) *Safe harbor.* If a public entity has constructed or altered required elements of a path of travel in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standards before March 15, 2012, the public entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

35.151(c)(5)

(5) *Noncomplying new construction and alterations.*

(i) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012, and that do not comply with the 1991 Standards or with UFAS shall before March 15, 2012, be made accessible in accordance with either the 1991 Standards, UFAS, or the 2010 Standards.

(ii) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards or with UFAS shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

Appendix/table at 35.151(c)

Compliance Dates for New Construction and Alterations	Applicable Standards
Before September 15, 2010	1991 Standards or UFAS
On or after September 15, 2010, and before March 15, 2012	1991 Standards, UFAS, or 2010 Standards

On or after March 15, 2012	2010 Standards
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Title III regulations

36.304(d)(2)

(i) *Safe harbor*. Elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

(ii)

(A) Before March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with either the 1991 Standards or the 2010 Standards.

Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

(B) On or after March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified

to the extent readily achievable to comply with the requirements set forth in the 2010 Standards.

Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

(iii) The safe harbor provided in § 36.304(d)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (*i.e.*, elements for which there are neither technical nor scoping specifications in the 1991 Standards), and therefore those elements must be modified to the extent readily achievable to comply with the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows –

(A) *Residential facilities and dwelling units*, sections 233 and 809.

(B) *Amusement rides*, sections 234 and 1002; 206.2.9; 216.12.

(C) *Recreational boating facilities*, sections 235 and 1003; 206.2.10.

(D) *Exercise machines and equipment*, sections 236 and 1004; 206.2.13.

(E) *Fishing piers and platforms*, sections 237 and 1005; 206.2.14.

(F) *Golf facilities*, sections 238 and 1006; 206.2.15.

(G) *Miniature golf facilities*, sections 239 and 1007; 206.2.16.

(H) *Play areas*, sections 240 and 1008; 206.2.17.

(I) *Saunas and steam rooms*, sections 241 and 612.

(J) *Swimming pools, wading pools, and spas*, sections 242 and 1009.

(K) *Shooting facilities with firing positions*, sections 243 and 1010.

(L) *Miscellaneous*.

(1) Team or player seating, section 221.2.1.4.

(2) Accessible route to bowling lanes, section 206.2.11.

(3) Accessible route in court sports facilities, section 206.2.12.

Appendix/table at 36.304(d)(2)

Compliance Dates and Applicable Standards for Barrier Removal and Safe Harbor

Date	Requirement	Applicable Standards
Before March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards must be modified to the extent readily achievable. Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	1991 Standards or 2010 Standards
On or after March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards or that do not comply with the supplemental requirements (<i>i.e.</i>, elements for which there are neither technical nor scoping specifications in the 1991 Standards) must be modified to the extent readily achievable. Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	2010 Standards
Elements not altered after March 15, 2012	Elements that comply with the requirements for those elements in the 1991 Standards do not need to be modified.	Safe Harbor

36.403(a)(2)

(2) If a private entity has constructed or altered required elements of a path of travel at a place of public accommodation or commercial facility in accordance with the specifications in the 1991 Standards, the private entity is not required to retrofit such elements to reflect the incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

36.406(a)(5)

(5) Noncomplying new construction and alterations.

(i) Newly constructed or altered facilities or elements covered by §§ 36.401 or 36.402 that were constructed or altered before March 15, 2012, and that do not comply with the 1991 Standards shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards or the 2010 Standards.

(ii) Newly constructed or altered facilities or elements covered by §§ 36.401 or 36.402 that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.