



The Americans with Disabilities Act (ADA): Final Rule Amending Title II and Title III Regulations

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Summary

The Americans with Disabilities Act (ADA) has as its purpose “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” On July 26, 2010, the 20th anniversary of the passage of the ADA, the Department of Justice (DOJ) issued final rules amending the existing regulations under ADA title II (prohibiting discrimination against individuals with disabilities by state and local governments) and ADA title III (prohibiting discrimination against individuals with disabilities by places of public accommodations). The new regulations for title II and title III are similar. They both adopt accessibility standards consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (Access Board). In addition, the regulations include more detailed standards for service animals and power-driven mobility devices, ticketing, effective communication, and provide for an element-by-element “safe harbor” in certain circumstances. The regulations take effect March 15, 2011, but compliance with the 2010 standards for accessible design is not required until March 15, 2012. These final regulations only address issues that were in the 2008 notice of proposed rulemaking. DOJ has noted that it intends to engage in additional rulemaking in certain areas, including equipment and furniture, next generation 9-1-1, movie captioning and video description, and accessibility of websites operated by public entities or places of public accommodation.

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Introduction

The Americans with Disabilities Act (ADA) has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. As stated in the act, its purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹ On July 26, 2010, the 20th anniversary of the passage of the ADA, the Department of Justice (DOJ) issued final rules amending the existing regulations under ADA title II (prohibiting discrimination against individuals with disabilities by state and local governments) and ADA title III (prohibiting discrimination against individuals with disabilities by places of public accommodations).² The new regulations for title II and title III are similar. They both adopt accessibility standards consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (Access Board). In addition, the regulations include more detailed standards for service animals and power-driven mobility devices, ticketing, and effective communication, and provide for an element-by-element “safe harbor” in certain circumstances. The regulations take effect March 15, 2011, but compliance with the 2010 standards for accessible design is not required until March 15, 2012. These final regulations only address issues that were in the 2008 notice of proposed rulemaking. DOJ has noted that it intends to engage in additional rulemaking in certain areas, including equipment and furniture, movie captioning and video description, next generation 9-1-1, and accessibility of websites operated by public entities or places of public accommodation.³

Background

DOJ originally issued title II and title III regulations for the ADA on July 26, 1991. Appendix A to these regulations contained the ADA standards for accessible design that were based on the guidelines published by the Access Board. After a long process that included extensive involvement by DOJ, the Access Board published new guidelines in 2004. DOJ published an advance notice of proposed rulemaking in 2004,⁴ and a notice of proposed rulemaking in 2008.⁵ Final regulations, adopting the Access Board guidelines and making other changes to the original regulations, were issued on July 26, 2010, and published in the Federal Register on September 15, 2010.⁶ Once the DOJ regulations become effective, the 2004 Access Board guidelines “will have legal effect with respect to the Department’s title II and title III regulations and will cease to be mere guidance for those areas regulated by the Department.”⁷

¹ 42 U.S.C. §12101(b)(1).

² The regulations were published in the Federal Register on September 15, 2010. 75 FED. REG. 56164 (September 15, 2010).

³ *Id.* An advance notice of proposed rulemaking seeking comments on these issues has been published. See <http://www.ada.gov/anprm2010.htm>. For a discussion of the ADA and the internet see CRS Report R40462, *The Americans with Disabilities Act: Application to the Internet*, by (name redacted).

⁴ 69 FED. REG. 58768 (September 30, 2004).

⁵ 73 FED. REG. 34508 (June 17, 2008).

⁶ 75 FED. REG. 56164 (September 15, 2010).

⁷ *Id.* at 56165.

Major Changes to Both the Title II and Title III Regulations

Adoption of Access Board Accessibility Guidelines

The DOJ regulations for titles II and III adopt, with some specific modifications, the Access Board's ADA accessibility guidelines.⁸ Changes from previous guidelines are made regarding public facilities and recreational facilities. With regard to public facilities, there are specific requirements for detention and correctional facilities, judicial facilities, and residential dwelling units. Detention and correctional facilities must make accessible at least one of each type of general holding cells, general housing cells, medical care facilities, and visiting areas, while judicial facilities are required to make each courtroom accessible. Residential dwelling units are required to conform to certain accessibility requirements.

Recreational facilities have detailed requirements for amusement rides, recreational boating facilities, exercise machines and equipment, fishing piers and platforms, golf facilities (including miniature golf), play areas, swimming pools, wading pools, and spas, saunas, and steam rooms. For example, at least 50% of all holes on a miniature golf course must be accessible, and these accessible holes must be consecutive.

Safe Harbor

The adoption of the Access Board guidelines increases accessibility; however, DOJ expressed concern about the potential effect of these changes on existing structures. To address these concerns, DOJ added controversial "element-by-element safe harbor" provisions for both titles II and III.

For title II, which applies to states and localities, individuals with disabilities must be provided access to programs "when viewed in their entirety."⁹ Unlike title III, then, a public entity under title II is not required to make each of its existing facilities accessible. However, in order to provide "an important measure of clarity and certainty for public entities,"¹⁰ DOJ's title II regulations add a "safe harbor" provision where elements in covered facilities that were built or altered in accordance with the previous 1991 accessibility standards would not be required to be brought into compliance with the new standards until the elements were subject to a planned alteration. DOJ described the safe harbor rule as "a narrow one" but many advocacy groups objected to the proposal, seeing "no basis for 'grandfathering' outdated accessibility standards given the flexibility inherent in the program access standard."¹¹ On the other hand, public entities supported the safe harbor provision, noting that "it would be an ineffective use of public funds to update buildings to retrofit elements that had already been constructed or modified to department-

⁸ For a more detailed overview of the major changes see http://www.ada.gov/regs2010/factsheets/2010_Standards_factsheet.html.

⁹ 28 C.F.R. §35.150(a).

¹⁰ 75 FED. REG. 56207 (September 15, 2010).

¹¹ *Id.* at 56206-56207.

issued and sanctioned specifications.”¹² In addition, safe harbor provisions were adopted regarding the “path of travel” to an altered area. With regard to the path of travel safe harbor, DOJ noted that it is not a blanket exception, and that the provision strikes a balance between the rights of individuals with disabilities and the financial burdens on public entities.¹³

Title III of the ADA, which covers places of public accommodation, requires each covered facility to be accessible but only to the extent that accessibility changes are “readily achievable.”¹⁴ The new regulations for title III, like those for title II, also contain a “safe harbor” provision. However, the title III safe harbor provisions differ from what had been proposed. The notice of proposed rulemaking had included a level of barrier removal expenses at which small businesses would be considered to have met their readily achievable barrier removal obligations. This proposal was not included in the final rule since the business community objected to the use of a safe harbor based on net revenue, and the disability community generally opposed its use as contrary to the intent and language of the ADA.¹⁵ However, an element-by-element safe harbor provision, like that in the title II provisions, was included. The new title III regulations provide that elements in covered facilities that were built or altered in compliance with the 1991 standards would not be required to be modified in order to comply with the new standards until the elements were subject to a planned alteration. A similar safe harbor applies to elements associated with the path of travel to an altered area. Generally, DOJ describes the aim of title III’s architectural barriers provisions as requiring businesses to make their facilities fully accessible during new construction or renovation and to impose a lesser requirement on businesses that are not changing their facilities.¹⁶ DOJ stated that these goals were met by the inclusion in the rule of a general safe harbor provision.¹⁷

Service Animals

In its discussion of the proposed regulations in 2008, DOJ noted that it received a large number of complaints about service animals and that there was a trend toward the use of wild or exotic animals.¹⁸ Generally, the ADA requires reasonable modifications on policies, practices, or procedures when necessary to avoid discrimination on the basis of disability.¹⁹ The new regulations specifically provide that public entities (title II) and places of public accommodation (title III) shall modify policies, practices, or procedures to permit the use of a service animal by a person with a disability.²⁰ However, there are exceptions allowing a service animal to be excluded, including where the animal is out of control or not housebroken.

¹² *Id.* at 56207.

¹³ *Id.* at 56212.

¹⁴ 42 U.S.C. §12182(b)(2)(A)(iv).

¹⁵ 75 FED. REG. 56288 - 56289 (September 15, 2010).

¹⁶ *Id.* at 56289.

¹⁷ *Id.*

¹⁸ 73 FED. REG. 34473, 34516 (June 17, 2008).

¹⁹ 42 U.S.C. §12131(2) (title II); 42 U.S.C. §12182(b)(2)(A)(ii) (title III).

²⁰ New 28 C.F.R. §35.136(a) (title II); New 28 C.F.R. §36.302 (title III). For a more detailed discussion of the requirements regarding service animals see CRS Report R41468, *The Americans with Disabilities Act (ADA) and Service Animals*, by (name redacted).

Both the title II and title III regulations define service animal as “any **dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.”²¹ However, public entities (title II) and public accommodations (title III) are required to make reasonable modifications to policies, practices, or procedures to permit the use of a miniature horse if the horse has been individually trained to do work or perform tasks. Previously, service animal had been defined under title III as “any guide dog, signal dog, or **other animal** individually trained to do work or perform tasks for the benefit of an individual with a disability.”²² A public entity or place of public accommodation may not ask about the nature or extent of an individual’s disability but may ask two questions to determine if the animal is a service animal when it is not readily apparent. These questions are, if the animal is required because of a disability, and what work or task the animal is trained to do.²³

The new regulations note that the tasks performed by the animal must be directly related to the disability, and the regulations provide examples of the types of work or tasks included. These examples include assisting individuals who are blind or have low vision, assisting an individual during a seizure, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. Emotional support or crime deterrence are not considered work or tasks. The exclusion of animals used for emotional support was controversial, especially regarding the use of emotional support animals by current or former members of the military.²⁴ However, DOJ noted that such animals may be allowed in residential settings or in transportation, stating, “there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities.”²⁵

Wheelchairs and Other Power-Driven Mobility Devices

Since 1990 when the ADA was enacted, the choices of mobility aids for individuals with disabilities have increased dramatically. Individuals with disabilities have used not only the traditional wheelchair but also large wheelchairs with rubber tracks, riding lawn mowers, golf carts, gasoline-powered two-wheeled scooters, all-terrain vehicles, and Segways. DOJ indicated in the notice of proposed rulemaking that it had received inquiries concerning whether these devices need to be accommodated, the impact of these devices on facilities, and personal safety issues.

The final regulations under both titles II and III include sections on mobility devices and take a two-tiered approach. Wheelchairs must be permitted in all areas open to pedestrian use, while power-driven mobility devices are generally permitted subject to certain limitations. The regulations require a public entity under title II or a public accommodation under title III to

²¹ New 28 C.F.R. §35.104 (title II)(emphasis added); New 28 C.F.R. §36.104 (title III)(emphasis added).

²² 28 C.F.R. §36.104 (2009)(emphasis added).

²³ 35 C.F.R. §35.136(f) 75 FED. REG. 56178 (September 15, 2010) (title II); 36 C.F.R. §36.302(c)(6), 75 FED. REG. 56251 (September 15, 2010) (title III).

²⁴ 75 FED. REG. 56194-56195 (September 15, 2010) (title II); 75 FED. REG. 56269 (September 15, 2010) (title III).

²⁵ 75 FED. REG. 56195 (September 15, 2010) (title II); 75 FED. REG. 56269 (September 15, 2010) (title III).

permit individuals with mobility impairments to use wheelchairs, scooters, walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility impairments in areas open to pedestrian use.²⁶ A public entity under title II or a public accommodation under title III must make reasonable modifications in its policies and procedures to permit the use of other power-driven mobility devices by individuals with disabilities unless it can be demonstrated that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements, or would create a direct threat, or fundamentally alter the entity's programs.²⁷ Determining whether a power-driven mobility device is allowed depends on various factors including the following:

- the type, size, weight, dimensions, and speed of the device;
- the facility's volume of pedestrian traffic;
- the facility's design and operational characteristics;
- whether legitimate safety requirements can be established to permit the safe operation of the mobility device; and
- whether the use of the device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources.²⁸

A public entity under title II or public accommodation under title III may ask a person using a power-driven mobility device if the mobility device is required because of the person's disability, but may not ask questions about the person's disability.

Ticketing

The new regulations contain detailed requirements in both titles II and III regarding the sale of tickets for accessible seating. Although the ADA's general prohibitions against discrimination would cover ticketing procedures, DOJ noted violations of the ADA and determined that explicit guidance was necessary.²⁹ Generally, the regulations require modifications in policies, practices or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating in the same manner as individuals without disabilities.³⁰ DOJ also includes a provision intended to prevent the fraudulent purchase of tickets for accessible seating, although proof of a disability may not be required.³¹

Effective Communication

Public entities (title II) and public accommodations (title III) are required to ensure that communications with individuals with disabilities are as effective as communication with individuals who do not have disabilities.³² This requirement includes an obligation to provide

²⁶ New 28 C.F.R. §35.137 (title II); New 28 C.F.R. §36.311 (title III).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 75 FED. REG. 56201 (September 15, 2010) (title II); 75 FED. REG. 56275 (September 15, 2010) (title III).

³⁰ New 28 C.F.R. §35.138 (title II); New 28 C.F.R. §36.302(f) (title III).

³¹ New 28 C.F.R. §35.138(h)(title II); New 28 C.F.R. §36.302(f)(8) (title III).

³² New 28 C.F.R. §35.160(a)(1)(title II); New 28 C.F.R. §36.303 (title III).

effective communication to companions who are individuals with disabilities.³³ The new regulations also specifically provide that video remote interpreting (VRI) may be used to provide effective communication and provide performance standards to ensure that VRI is effective.³⁴ VRI is a fee based service that uses videoconferencing to allow an individual who is hearing impaired to view and sign to a live interpreter who is in another location. These regulatory provisions are particularly significant in the hospital setting.³⁵

Major Changes Specific to the Title II Regulations

The new regulations for title II contain several provisions specific to title II. These include accessibility requirements for certain residential dwelling units,³⁶ as well as accessibility requirements for correctional facilities.³⁷

Major Changes Specific to the Title III Regulations

Public accommodations under title III have several new requirements concerning places of lodging. There are specific procedures regarding reservations for places of lodging to ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms.³⁸ In addition, the definition of “place of public accommodation” is amended to include facilities that operate like hotels.³⁹ These may include timeshares and condominium properties.⁴⁰ In addition, when considering requests for accommodations in examinations or courses, “considerable weight” must be given to the documentation of past modifications in similar situations or the services provided in response to an individualized education plan (IEP) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq.⁴¹

³³ *Id.*

³⁴ New 28 C.F.R. §35.160(d)(title II); New 28 C.F.R. §36.303(b) (title III).

³⁵ For a more detailed discussion of these regulations in the hospital context see CRS Report 97-826, *Americans with Disabilities Act (ADA) Requirements Concerning the Provision of Interpreters by Hospitals and Doctors*, by (name redacted).

³⁶ New 28 C.F.R. §35.151(e).

³⁷ New 28 C.F.R. §35.152.

³⁸ New 28 C.F.R. §36.302(e).

³⁹ New 28 C.F.R. §36.104.

⁴⁰ 75 FED. REG. 56304 (September 15, 2010).

⁴¹ New 28 C.F.R. §36.309(b). For a more detailed discussion of IDEA, see CRS Report R40690, *The Individuals with Disabilities Education Act (IDEA): Statutory Provisions and Recent Legal Issues*, by (name redacted).

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