# Applying the ADA Concepts Part Two:

Technically Infeasible, Safe Harbor, and Movable Elements

(Part One included Equivalent Facilitation, Program Access, Readily Achievable, Historic Exceptions, Structurally Impracticable, Q&A)

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## Technically Infeasible (ADA)

- **Technically Infeasible:** With respect to an alteration of a building or a facility, something that has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member that is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features that are in full and strict compliance with the minimum requirements.

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## Technically Infeasible

- Although **T.I.** may look like an exception for high cost modifications to existing structures, it is not an exception for cost. It has its own definition and it is related to technical difficulty, not cost.
- "The fact that adding accessibility features during an alteration may increase costs does not mean compliance is technically infeasible. Cost is not to be considered."*

*From DOJ's Title III Technical Assistance Manual

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## Technically Infeasible Examples

- Removing or altering a load-bearing member that is an essential part of the structural frame such as a beam, column, foundation, or shear wall (altering load-bearing stud and masonry walls are not usually TI.)
- Expanding or relocating an elevator shaft
- Violating an applicable building or Life Safety code
- Relocating the primary electrical service to the building
- Relocating a vertical plumbing chase or primary air supply or return duct with lots of branch ducts
- Rerouting significant underground utilities

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## Technically Infeasible (ADA)

- **202.3 Alterations.** Where existing *elements* or *spaces* or common areas [36.402(b)(2)] are *altered*, each *altered element* or *space* or area shall comply with the applicable requirements of Chapter 2.

  **EXCEPTIONS: 2.** In *alterations*, **where compliance with applicable requirements is *technically infeasible*, the *alteration* shall comply with the requirements to the maximum extent feasible.**

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## Technically Infeasible (CBC)

- **11B-202.3 Alterations.**

  **EXCEPTIONS: 2.** In alterations, **where *the enforcing authority determines* compliance with applicable requirements is technically infeasible, the alteration shall *provide equivalent facilitation or* comply with the requirements to the maximum extent feasible. *The details of the finding that full compliance with the requirements is technically infeasible shall be recorded and entered into the files of the enforcing agency.***

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## Technically Infeasible (CBC)

A key difference between CBC and ADA is that matters of judgment, such as technical infeasibility, equivalent facilitation, and compliance to the maximum extent feasible are subject to the opinions of the Authority Having Jurisdiction with regard to CBC, while there is no such governing authority for ADA. Instead, these matters are subject to being tested through the legal system.

Risk is minimized when there is clear evidence that proactive measures have been taken to enable individuals with varying types of disabilities to acquire goods and services independently, or to receive the same benefits of participation or employment as anyone else.

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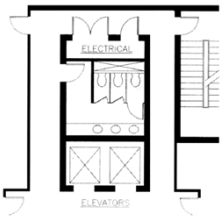
## Technically Infeasible Examples

- Would you have to make this toilet room ADA compliant when you renovate all of the offices on this floor or might it be technically infeasible?
- Would you have to do anything else?

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## Safe Harbor (ADA)

- Elements that were built or altered under the applicable prior ADA standard (1991 ADA Standards or UFAS for certain public entity facilities) and that fully complied with that prior standard on March 15, 2012, generally do not have to be modified until altered.

If you're an access specialist attempting to determine whether the 1991 ADA Standards or UFAS should be the basis for SH, look for clues like the facility type, handrail heights, braille signs, and van parking.

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## Safe Harbor (ADA)

- The base standard for Safe Harbor must be the same throughout the entire facility. You can't pick UFAS for some elements and 1991 ADA for others.
- The Safe Harbor exception applies only to elements where the requirements in the 2010 ADA Standards or regulations became incrementally stricter.
- It does not apply to supplemental changes in the 2010 ADA Standards or regulations.

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## Safe Harbor (ADA)

- Applies in existing Title **II** facilities under:
  - 35.150(b) Existing Facilities; (Program Access) Methods
  - 35.151(b)(4)(ii) Path of Travel
- Applies in existing Title **III** facilities under:
  - 36.304 Removal of Barriers
  - 36.403 Alterations: Path of travel
- "Not safe harbored" section for Title **III** facilities built or altered out of compliance
  - 36.406(a)(5) Standards for new construction and alterations
  - Before 3/15/2012

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## What Is An Element? (undefined)

**Element:** An architectural or mechanical component of a building, facility, space, or site.

1. Light switch, thermostat, or electrical receptacle
2. Door
   1. Door knob
   2. Lever handle
   3. Deadbolt
   4. Vision light
   5. Kick plate (Smooth surface near the floor)
3. Urinal
4. Water closet clear floor space
5. Toilet compartment
   1. Toilet paper dispenser
   2. Stall door hardware
6. Building entrance (scoping)

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## When Is An Element Altered?

1. Remove and replace (definitely)
   1. Light switch
   2. Floor mounted toilet fixture
   3. Wall mounted toilet fixture
2. Resurfacing and repainting parking space striping (definitely)
3. Repainting parking space striping (on top of existing stripes) (Some may argue, but according to DOJ, this **is** an alteration)

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## Incremental vs Supplemental

(Generally Safe Harbored) (Generally NOT Safe Harbored)

**Incremental Changes:**

"…revisions to technical or scoping specifications for certain elements that were addressed in the 1991 Standards, *i.e.*, elements for which there already were technical and scoping specifications…"

**Supplemental Changes:**

"…technical and scoping specifications for a number of elements that were not addressed specifically in the 1991 Standards…"

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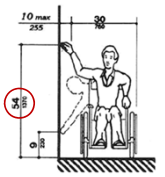
## Incremental Example

**1991 ADA Standards:**

**4.2.6* Side Reach.** If the clear floor space allows parallel approach by a person in a wheelchair, the maximum high side reach allowed shall be 54 in (1370 mm) and the low side reach shall be no less than 9 in (230 mm) above the floor (Fig. 6(a) and (b)). If the side reach is over an obstruction, the reach and clearances shall be as shown in Fig 6(c).




**2010 ADA Standards:**

This dimension is now 48" maximum.

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## Supplemental Requirements

35.150(b)(2)(ii) & 36.304(d)(2)(iii)
The safe harbor provided in 35.150(b)(2)(i) and 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). (36…) Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows:

Note that this list is based on comparing the 1991 ADA Standards with the 2010 ADA Standards and does not attempt to catalog differences between UFAS and the 2010 ADA Standards.

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## Supplemental Requirements List

- (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.

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## Supplemental Requirements List

- (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.

Some opinions have stated that this list of non-safe-harbored sections is an all-inclusive list. Others disagree.

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## Questions in Application

**Incremental vs Supplemental seems simple enough, what else is there to know?**

There are at least twelve more general questions that need to be answered and understood to properly apply the Safe Harbor provisions throughout the variety of existing facilities.

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## 1. The Supplemental List

**Is 36.304(d)(2)(iii) intended to be an all-inclusive list of "supplemental" requirements that are not subject to the safe harbor provisions, i.e., new technical or scoping requirements that were not addressed in the 1991 Standards?**

DOJ has said that the element types on this list are not subject to the safe harbor exception. They have not said that the list is all-inclusive.

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## 2. Not Listed But Mentioned

**Additional new requirements that are specifically listed in the regulations or guidance or mentioned by DOJ officials and that are reportedly not covered by the safe harbor provisions.**

1. Communication-related elements of ATMs (not listed as a supplemental requirement in (iii) but specifically listed as auxiliary aids and services in the regulatory guidance and therefore not subject to the safe harbor provisions [707.5]) *Not safe harbored.* Follow the Regulatory Guidance.
2. Children's facilities These are subject to scoping options so compliance is somewhat flexible. *Judgment call.*

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## 3. Newly Covered Elements

**Are these examples of <u>newly covered elements</u> [not listed in 36.304(d)(2)(iii) protected by the safe harbor provision?**

1. Operable windows in transient lodging guest rooms [reserved in 1991 at 4.12, covered at 229.1 in the 2010 Standards.] *Maybe*
2. Washing machines and clothes dryers [214 and 611] *Probably*
3. Two-way communication systems [230 and 708] *Probably not*
4. Arguably new coverage for change machines, mail boxes, and fuel dispensers [228] *Maybe*

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## 4.a Newly Scoped Aspects

**Are these examples of <u>newly scoped aspects or characteristics of a space or element</u> covered by the safe harbor provision?**

1. Handrails, treads, risers, nosings, and slip resistant surfaces for a stair [210.1] when that stair serves a level connected by another accessible route [The stair was exempt under the 1991 Standards at 4.1.3(4).] *Probably*
2. Access aisles marked to discourage parking in them [502.3.3] Change was a clarification only. Fig.9 showed marking. *Not safe harbored* Repainting the stripes is an alteration that would probably limit its application anyway

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## 4.b Newly Scoped Aspects

*Continued* - Are these examples of <u>newly scoped aspects or characteristics of a space or element</u> covered by the safe harbor provision?

3. Vanity counter top comparable space requirement where 1991 Standard had only the lavatory requirement.
    1. If the lavatory was inset into a vanity counter that did not contain comparable space, is the incomparable size safe harbored? *Maybe not*
    2. The new comparable vanity does not have to contain the lavatory, only to be in proximity to the lavatory. Where a wall-hung lavatory was installed in compliance with the 1991 Standards without a comparable vanity counter top in close proximity, is the absence of that comparable vanity counter top safe harbored or must a new adjacent one be installed if readily achievable? [806.2.4.1] *Probably not. Add a vanity unit if space is available without compromising required clearances.*

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## 5.a New Requirements for Previously Covered Elements

**Are these examples of <u>new requirements for previously covered "elements"</u> subject to safe harbor provisions?**

1. Smooth surface along the bottom of a door. (Is the door or the "smooth surface" the "element" that would be safe harbored? It's usually quite easy to add a kickplate to an existing door.) [404.2.10] *The door is probably the element*
2. Vision light in a door (Is the door or the vision light the "element" that would be safe harbored? (It's not usually easy to add a vision light to an existing door; adding it would usually require replacement of the entire door.) [404.2.11] *The whole door assembly is probably the safe harbored element*

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## 5.b New Requirements for Previously Covered Elements

*Continued* - Are these examples of <u>new requirements for previously covered "elements"</u> subject to safe harbor provisions?

1. Low bottom or full length mirrors where not mounted over lavatories in toilet rooms [4.19.6 and 603.3] *Maybe, but…*
2. A handwash sink in an exam room that has only a side approach where a forward approach is now required (not scoped in the 1991 standards except loosely for clear floor space which could have been a side approach), reach to controls, and operating mechanisms vs. full coverage in 2010 under [212.3 and 606.1] *Probably*

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## 5.c New Requirements for Previously Covered Elements

*Continued* - Are these examples of <u>new requirements for previously covered "elements"</u> subject to safe harbor provisions?

1. New forward approach requirement for a sink in a transient lodging kitchenette [212.3 and 606.2 vs. 9.2.2(7) which specifically allows a parallel approach] *Safe Harbored*
2. Dressing room bench with parallel approach vs. new end approach requirement [4.35.4 vs. 903.2] *Safe Harbored*

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## 5.d New Requirements for Previously Covered Elements

*Continued* - Are these examples of new requirements for previously covered "elements" subject to safe harbor provisions?

1. Changes in level not permitted in the clear floor space of an element (this is especially important where the clear floor spaces as constructed under the 1991 Standard were not clearly required to be level such as at a pay telephone.) [305.2] *Probably*

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## 6. Prior Equivalent Facilitation

**Would these examples of new requirements for elements that had a defined equivalent facilitation option be covered under safe harbor?**

1. Bar must have a lower section to accommodate 5% of its total seating capacity [226.1]. The 1991 Standard allowed an accessible table in the same area to be used in lieu of the lower section of the bar [5.2]. *Probably (but be prepared to prove it has been provided since before 3/15/12)*
2. Accessible hotel check-in counter where the nearby concierge desk was formerly used for check-in. [7.2(2)(iii) vs. 227.3 and 904.4] *Probably (but be prepared to prove it has been provided since before 3/15/12)*

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## 7. New Sections Mentioned by DOJ Staff as Covered

**Is this new section covered by the safe harbor provisions (as has been mentioned by DOJ staff)?**

1. Correctional facilities - Is there any explanation as to why or how these are covered when there are new requirements? *Probably under UFAS which had requirements for these facilities*
2. Does this include holding cells in courthouses? *Probably under UFAS which had requirements for these facilities*

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## 8. Clearly Incremental

**These examples of <u>incremental, stricter, or different requirements</u> seem to be clearly covered by the safe harbor provisions.**

1. Side reach maximum reduced from 54" to 48" *Definitely covered*
2. 36"w clear floor space at water closet with adjacent lavatory enlarged to 60" minimum width clear floor space in 2010 Standards *Definitely covered BUT there is disagreement about whether the entire toilet area (including every dimension and all accessories) or just the width of the clear floor space itself is the safe harbored "element"* (See also Question #11c)
3. Drinking fountain clear floor space positioned for forward approach only and centered on the unit *Definitely covered (but be prepared to prove that it has not been replaced since 3/15/12)*

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## 9. Public Entity Differences?

**Are there any significant differences in the way the answers would apply to public entities besides the obvious program access vs. barrier removal responsibilities?**

Remember that the program access obligations are not limited by the minimum requirements in the Standards. For example, a heavy, high-effort exterior door at the courthouse entrance may limit program access and require an automatic opener or some other accommodation. Although the limitations at 35.150(b)(2)(i) apply to alterations of existing facilities, program access obligations, when identified, may create additional responsibilities.

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## 10. Housing at a Place of Education

**It is rumored that housing at a place of education is not covered by the safe harbor provisions. Is that true?**

*They are Safe Harbored to the extent that anything else is covered. For example, compliant transient lodging dorms are safe harbored. Exercise machines (anywhere) and play areas in married student housing are not.*

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## 11.a Partial Safe Harbor?

**When an entity is doing readily achievable barrier removal or is removing physical barriers to program access, and an element is partially safe harbored, how far must the entity go towards meeting the full 2010 ADA Standards?**

It's definitely not clear so it depends…

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## 11.b Partial Safe Harbor?

An old 48" by 48" elevator car has a totally non-compliant control panel/operating system. Are the hoistway, the car, and the panel at least three separate elements or is the elevator one element? If the obligation to fix it is triggered by a readily achievable barrier removal project (assuming that it's not technically infeasible to fix everything) could the panel and controls be replaced without triggering a cab replacement and hoistway expansion project? *There are probably at least three separate elements there so the safe harbor probably applies to each separately.*

If it is triggered by the path of travel obligation, would it be any different? *Probably no different*

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## 11.c Partial Safe Harbor?

The rectangular clear floor space inside a toilet compartment is compliant with the 1991 Standards for width but not depth. Replacing the full height end panel with a compartment panel that has compliant toe space will provide stall depth that complies with the 2010 Standards. Let's say that work would be readily achievable and it would have provided program access under 1991. But since the width and depth of the clear floor space did not both meet the 1991 Standards, does the entity have an obligation to also bring the clear floor space into compliance with the 2010 Standards for width by also relocating at least one wall and one fixture with all of the associated grab bars and accessories? *It depends…*

*The compartment is almost certainly not safe harbored so the analysis falls back to whatever triggered the work. Is it technically feasible? Is it readily achievable? Is it required for program access? As part of a path of travel obligation, is it disproportionate to the cost of the alteration?*

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## 12. CBC "Safe Harbor"

The term "Safe Harbor" does not appear in CBC, but a similar provision is included in Exception 2 at Section 11B-202.4, excerpted here:

- ***11B-202.4 Path of travel requirements in alterations, additions and structural repairs.*** *When alterations or additions are made to existing buildings or facilities, an accessible path of travel to the specific area of alteration or addition shall be provided. The primary accessible path of travel shall include:*
- *1. A primary entrance to the building or facility,*
- *2. Toilet and bathing facilities serving the area,*
- *3. Drinking fountains serving the area,*
- *4. Public telephones serving the area, and*
- *5. Signs.*
- ***Exceptions…***

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- *4. Public telephones serving the area, and*
- *5. Signs.*
- ***Exceptions…***

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## 12. CBC "Safe Harbor"

- ***Exceptions:***
- *1. …*
- *2. If the following elements of a path of travel have been constructed or altered in compliance with the accessibility requirements of the immediately preceding edition of the California Building Code, it shall not be required to retrofit such elements to reflect the incremental changes in this code solely because of an alteration to an area served by those elements of the path of travel:*
- *1. A primary entrance to the building or facility,*
- *2. Toilet and bathing facilities serving the area,*
- *3. Drinking fountains serving the area,*
- *4. Public telephones serving the area, and*
- *5. Signs.*
- *3-10. …*

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## 12. CBC "Safe Harbor"

- The scope of this "Safe Harbor" provision is far more limited than that of 2010 ADA Standards, and it is important to note that, "*the immediately preceding edition of the California Building Code*" refers only to the 2016 CBC.
- The California Building Code changes frequently, so "*the immediately preceding edition of the California Building Code*" is subject to interpretation. ETA has consulted with DSA-AC on this matter, learning that their interpretation is that this refers to *any version* of the preceding edition. Some Building Officials or other Authorities Having Jurisdiction may apply a different interpretation.

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## Movable Elements Under the ADA+

- What is "fixed" vs movable?
- Examples
  - Elements in required accessible routes, clear floor spaces, turning spaces, door maneuvering clearances, etc.
  - Furniture
    - Tables, seating, benches, etc.
    - Display racks
  - Equipment
    - ATMs, cash machines, POS devices, and fare vending machines
    - Information Technology - Kiosks, ITMs, ICT, EIT
    - Vending machines
    - Medical diagnostic equipment
    - Other "machines" (exercise, vending, voting, laundry, lottery, etc.)
- What makes a non-fixed element "accessible"?
- Legal foundations for coverage

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## Movable Elements Under the ADA+

What is a "fixed" element in a facility? (my divisions)

1. Attached to the facility
2. Moving requires disassembly
3. Moving requires special equipment
4. Crew or team-movable
5. Portable
6. Movable on request by available staff
7. Movable by the public with less than 5# of force
8. Self-moving

Contrast with mobile and temporary facilities

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## Movable Elements Under the ADA+

What makes a movable element accessible?

- "To the extent that ADA standards apply requirements for fixed equipment and furniture, the Department will look to those standards for guidance on accessibility standards for equipment and furniture that are not fixed."
- "With regard to making electronic or information technology equipment and furniture accessible to individuals with disabilities, including individuals who are blind or have low vision, Section 508 of the Rehabilitation Act of 1973, which applies to federal agencies, provides guidance for the public on how to make electronic and information technology accessible. See, e.g., 29 U.S.C. 794d."
- Where no directly-applicable standard is available, look to the applicable standards and regulations for clues

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## Movable Elements Under the ADA+

Legal foundations for coverage under the ADA

- General prohibitions against discrimination
- Program access
- Readily achievable barrier removal
- Maintenance of accessible features
- Modification of policies, practices, and procedures
- Effective communication
- Definition of "Facility" (real or personal property, equipment)

For the legal foundation section, see www.movablefurniture.com
For DOJ's entire ANPRM on Equipment and Furniture, see www.equipmentandfurniture.com. (This was withdrawn from DOJ's website.)

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## Movable Elements Under the ADA+

Legal foundations for coverage under other laws and standards

- Rehab. Act Sections 504 & 508
- Architectural Barriers Act
- Air Carrier Access Act
- Regulations, notices, administrative orders, etc. from various federal agencies such as HHS, DOT, and FAA

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# Questions?

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# SELECTED ADDITIONAL REGULATORY REFERENCES

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## Safe Harbor For ADA Title II Facilities

**35.150(b) Existing Facilities;** (Program Access) **Methods**

(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 .

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## Safe Harbor For ADA Title II Facilities

**35.151(b)(4)(ii) Path of Travel…**

(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.

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## Safe Harbor For Title III Facilities

**36.304 Removal of Barriers…**

(d) Relationship to Alterations Requirements of Subpart D of this Part…

(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...

(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).

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## Safe Harbor For Title III Facilities

**36.403 Alterations: Path of travel.**

(a) *General.*

(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.

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## Safe Harbor For Title III Facilities

**36.406 Standards for new construction and alterations.**

(a) *Accessibility standards and compliance date*.

(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.

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## DOJ Regulatory Guidance and Section-by-Section Analysis

The element-by-element safe harbor adopted in this final rule is a narrow one. The Department recognizes that this safe harbor will delay, in some cases, the increased accessibility that the incremental changes would provide and that for some individuals with disabilities the impact may be significant. This safe harbor, however, is not a blanket exemption for every element in existing facilities. Compliance with the 1991 Standards is determined on an element-by-element basis in each existing facility…

Section 36.304(d)(2)(iii) also identifies the elements in the 2010 Standards that are not eligible for the element-by-element safe harbor.

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