



**PROVISIONS OF
THE REVISED ADA TITLE III REGULATIONS
(28 C.F.R. Part 36)
SIGNIFICANT FOR FOOD RETAILERS AND WHOLESALERS**

October 19, 2010

On September 15, 2010, the U.S. Department of Justice's ("DOJ") revisions to its regulations implementing Title III of the Americans with Disabilities Act ("ADA"), 28 C.F.R. Part 36, were published in the *Federal Register*, 75 Fed. Reg. 56,236 (2010). In addition to revising certain regulatory provisions, DOJ also adopted updated 2010 Standards for Accessible Design ("2010 Standards"). The 2010 Standards consist of the July 2004 ADA Accessibility Guidelines issued by the U.S. Architectural and Transportation Barriers Compliance Board (a.k.a. U.S. Access Board), plus certain additional requirements applicable only to specific types of facilities and not germane to the supermarkets, grocery stores or other facilities operated by food retailers and wholesalers.

The revised regulation takes effect on March 15, 2011, six months after publication in the *Federal Register*. As discussed in greater detail below, however, **the 2010 Standards do not become mandatory until March 15, 2012**, 18 months after publication.

This document summarizes the key points of the revised regulations that affect the interests of food retailers and wholesalers. It is organized into three distinct parts: 1) provisions regarding operational policies, practices and procedures; 2) general provisions regarding architectural design and barrier removal; and 3) key differences between the 2010 Standards and the original 1991 Standards for Accessible Design ("1991 Standards") as pertain to specific facility elements. If you have any questions please contact Erik Lieberman at elieberman@fmi.org or (202) 220-0614.

I. Provisions Regarding Operational Policies, Practices and Procedures

1. Service Animals:

- a. Definition: The revised regulations set forth a specific definition for "service animal." Service animals are limited to dogs, although places of public accommodation must assess whether a miniature horse can be accommodated as a service animal in their facilities. Accordingly, no other type animal qualifies as a service animal under DOJ's regulations. DOJ declined to impose restrictions regarding the size, weight or breed of dog that can qualify as a service animal, but did indicate that attack dogs are not appropriate service animals. Service animals

must be individually trained to do work for perform tasks for a person with disability. Emotional support or “comfort animals,” are excluded from this definition, but “psychiatric service animals” are included. Psychiatric services animals are distinguished from emotional support or comfort animals in that they perform a task or service for a person with a psychiatric disability, such as reminding the person to take medication.

- b. Miniature Horses: In determining whether a miniature horse can be accommodated as a service animal, a place of public accommodation is required to weigh the following factors: 1) type, size and weight of the horse; 2) the handler’s control of the horse; 3) whether the horse is housebroken; and 4) whether the horse’s presence compromises any legitimate safety requirements.
- c. Rules Regarding Service Animals: Service animals must be permitted in all areas where customers or other invitees are permitted to go and no surcharges for the service animal are permitted. A place of public accommodation may exclude a service animal if it is out of control and the handler does not take effective action to control it. In such case, however, the place of public accommodation still must provide the person with a disability an opportunity to obtain the goods or services offered without the animal on the premises. Generally, a service animal must have a harness, leash or other tether. If the handler is unable to use such device due to the handler’s disability, or if would interfere with the animal’s performance of work or tasks, a harness, leash or other tether is not required.
- d. Inquiries Regarding Service Animals: Unless it is readily apparent that the animal is a service animal, a place of public accommodation may inquire if the animal is required because of a disability and what work or task the animal has been trained to perform. Inquiries about the nature or extent of an individual’s disability are strictly prohibited and places of public accommodation cannot require documentation that the animal is a service animal (*e.g.*, proof certified, trained or licensed).

2. Mobility Aids and Devices:

- a. Wheelchairs and Manual Mobility Aids: Use of wheelchairs (both powered and manual) and manual mobility aids used by individuals with mobility disabilities must be permitted in any area open to pedestrian use. DOJ has defined “wheelchair” as a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability, and indicated that this definition includes motorized scooters.
- b. “Other Power-Driven Mobility Devices”: “Other power-driven mobility device” essentially is defined to include mobility device powered by batteries, fuel or other engines that is used by individuals with disabilities for purposes of locomotion,

irrespective of whether or not such device was designed primarily for use by individuals with disabilities. Examples include the Segway® PT and golf cars. Places of public accommodation must reasonably modify their policies, practices and procedures to permit the use of other power-driven mobility devices unless that particular class of device cannot be operated in accordance with legitimate safety requirements (*e.g.*, gasoline-powered devices are not appropriate for indoor use). Facilities must consider the following factors in making this assessment: 1) type, size, weight, dimensions and speed of the device; 2) the facility's volume of pedestrian traffic; 3) the facility's design and operational characteristics; and 4) whether legitimate safety requirements can be established to permit safe operation.¹

- c. Inquiries Regarding Other Power-Driven Mobility Devices: The revised regulations permit facilities to request “credible assurance” that an other power-driven mobility device is required because of a disability. A facility is required to accept a verbal representation by the individual that the mobility device is required because of a disability unless that such representation is contradicted by observable fact. A facility also must accept presentation of a valid, State-issued disability parking placard or card, or other State-issued proof of disability. Inquiries about the nature or extent of an individual's disability are strictly prohibited.
3. Auxiliary Aids and Services: Facilities must provide appropriate auxiliary aids and services where necessary to ensure effective communication with an individual with a disability and their companions with disabilities. Such auxiliary aids and services must be provided in an accessible format, in a timely manner and in a way that protects the privacy and independence of the individual with a disability. The revised regulations include definitions for a “qualified reader” and “qualified interpreter.” Such individuals must be able to read/interpret effectively, accurately and impartially using any necessary specialized vocabulary. An example of a “reader” would be an employee assisting a customer who is blind by reading product ingredients. The regulations also limit the circumstances under which a public accommodation can rely on a companion to interpret or facilitate communication to the following: 1) in an emergency involving imminent threat to the safety of welfare of an individual or the public where no interpreter is available (in such circumstances, even a minor child can be relied on to interpret); and 2) if the individual with a disability requests that an adult companion interpret, the companion consents, and such reliance is appropriate under the circumstances.
4. Telecommunications:
 - a. A place of public accommodation must respond to calls from a telephone relay service in the same manner that it responds to other calls.

¹ The assessment includes a fifth factor not applicable to food industry retailers and wholesalers – whether use of the device creates a substantial risk of serious harm to the immediate environment (or natural or cultural resources) or conflict with Federal land management laws.

- b. Automated-attendant systems (such as voicemail, messaging and interactive voice response systems) must provide effective real-time communication with individuals using auxiliary aids and services (TTYs, relay systems etc.).
- c. If customers are offered the opportunity to make outgoing calls on more than an incidental convenience basis, a public accommodation must also provide accessible public telephones, TTYs or other telecommunication products and systems for use by individuals with hearing or speech impairments.

II. General Provisions Regarding Architectural Design and Barrier Removal

5. Effective Date: The 2010 Standards will become mandatory on March 15, 2012, eighteen (18) months after publication in the *Federal Register*. All new construction, alterations and barrier removal undertaken on or after March 15, 2012, will be subject to the 2010 Standards. While Title III's readily achievable barrier removal provision apply only to places of public accommodation, including supermarkets and grocery stores, the design provisions applicable to new construction and alterations apply to both places of public accommodation and "commercial facilities," which essentially are defined as any facility affecting interstate commerce.
6. Interim Period until March 15, 2012: During the interim period until the 2010 Standards become mandatory, facilities essentially can choose to comply with either the 1991 Standards or the 2010 Standards. This choice applies to new construction and alterations, undertaken on or after September 15, 2010, but before March 15, 2012. The choice also applies to barrier removal undertaken before March 15, 2012. New construction and alterations undertaken prior to September 15, 2010, remain subject to the 1991 Standards, although as noted below facilities can "reduce down" to the 2010 Standards where they establish a lesser requirement than the 1991 Standards. Additionally, in remedying facilities or elements that do not comply with the 1991 Standards (whether the non-compliance relates to barrier removal obligations of existing facilities, new construction undertaken for first occupancy after January 26, 1993, or alterations undertaken after January 26, 1992), facilities can choose to make such elements compliant with either the 1991 Standards or the 2010 Standards prior to March 15, 2012, after which such elements must be made compliant with the 2010 Standards.
7. Reductions in the 2010 Standards: 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, a facility can "reduce down" to the 2010 Standards. For example, assembly areas may reduce the number of wheelchair locations and assistive listening devices they provide consistent with the lesser minimum numbers specified in the 2010 Standards.

8. General Safe Harbor: Facility elements that presently comply with the 1991 Standards do not have to be modified to comply with the 2010 Standards, unless they are altered on or after March 15, 2012. 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. Such elements include children’s play areas.
9. “Path of Travel” Safe Harbor: Facility elements that comprise a path of travel and that presently comply with the 1991 Standards do not have to be modified to comply with the 2010 Standards merely because the primary function area the path of travel serves is altered after the effective date of the 2010 Standards. Additionally, modifications 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.
[Note: The Title III regulations provide that when a primary function area is altered, the path of travel serving that altered area also must be made accessible unless the cost of doing so is disproportionate to the cost of the overall alteration. “Disproportionate” is defined as more than 20% of the cost of the alteration to the primary function area. Path of travel includes elements such as restrooms, telephones and drinking fountains serving the altered area.]

III. Key Differences Between the 2010 Standards and the 1991 Standards as Pertain to Specific Facility Elements

1. Construction Tolerance, Section 104.1.1: In the 2010 Standards, where possible, dimensional specifications have been changed from absolute measurements to a range (*e.g.*, toilets which previously had to be positioned with the centerline 18” from a wall may now be 16-18” from the side wall). The 2010 Standards, however, also eliminate the construction tolerance allowance for those dimensions expressed as a range with specific minimum and maximum end points. *Compare* 2010 Standards § 104.1.1 *with* 1991 Standards § 3.2. Essentially, this change serves to better define the variance that is permitted, but could be problematic in areas for which the range permitted is very limited.
2. Check-out Aisles, Sections 227 and 904:
 - a. Minimum Number, Section 227: The 2010 Standards do not alter the general scoping table (Table 227.2) that specifies the number of check-out aisles that must be accessible. The 2010 Standards clarify, however, that where check-out aisles serve different functions (*e.g.*, self-service check-out, express check-out, other full-service check-out), the minimum number required to be accessible must be calculated separately for each function. For example, if a grocery store has 15 check-out aisles, 5 of which are self-service and 10 of which are full-service, the 2010 Standards require that 2 of the self-service checkouts be accessible and 3 of the full-service be accessible for a total of 5 accessible check-outs. By contrast, if only

4 are self-service and 11 are full-service, only one of the self-service check-outs and 3 of the full-service checkouts would have to be accessible, for a total of 4 accessible check-outs. Additionally, if check-out aisles are dispersed to more than one location in a store, the accessible check-outs also must be dispersed among those locations.

- b. Technical Requirements, Section 904: The 2010 Standards set forth the following technical requirements applicable to accessible check-outs: 1) they must be located on an accessible route and the aisle itself must comply with all applicable requirements for an accessible route; 2) the counter surface can be no higher than 38" AFF; and 3) the top of the counter edge protection on the aisle/customer side can be no more than 2" above the top of the counter. These requirements are very similar to the 1991 Standards. The only difference is that the 1991 Standards specify that that counter edge protection can be up to 40" AFF, which allows for a lip greater than 2" if the counter or belt is lower than 38" AFF.
 - c. Check-Writing Surfaces, Section 904.3.3: The 2010 Standards specify that where check writing surfaces are provided, the tops of check-writing surfaces at accessible check-outs must be between 28"-34" AFF. The 1991 Standards did not expressly address check-writing surfaces.
 - d. Point-of Sale Devices: The 2010 Standards do not specifically address point-of-sale devices, however, both DOJ and the U.S. Access Board have initiated rulemakings to establish accessibility requirements for such devices.
3. Sales/Service Counters, Section 904.4: The requirements for sales and service counters in the 2010 Standards differ from the 1991 Standards in the following respects:
- a. Knee and toe clearance must be provided if there is only a forward approach to the counter. 2010 Standards, § 904.4.2. This will be an issue only where there is insufficient clear floor space to provide a parallel approach to a sales or service counter.
 - b. Although the 1991 Standards require that the accessible portion of the counter be at least 36" long, the 2010 Standards establish different minimum lengths depending on whether the approach provided is a forward or parallel approach. If a forward approach is provided, the accessible portion need only be 30" long. 2010 Standards, § 904.4.2. If a parallel approach is provided, the accessible portion must be at least 36" long, except where the overall counter surface is less than 36" long, in which the entire length must be accessible. 2010 Standards, § 904.4.1. The 2010 Standards also provide a limited exception for alterations, which is applicable irrespective of whether a forward or parallel approach is provided. In the context of alterations, if providing an accessible portion of the minimum specified lengths would result in a

reduction in the overall number of existing counters at work stations, the accessible portion is permitted to be only 24” long provided that the required clear floor space for approach to the counter is centered on the accessible length of counter.

- c. The accessible portion of the counter must extend the same depth as the rest of the counter. 2010 Standards, § 904.4. DOJ has indicated that where the sales or service counter is a “split-top” counter (*i.e.*, the customer side of the counter is at a different height than the employee side), this requirement pertains only to the customer side of the counter.
 - d. The 2010 Standards do not include the express provisions in the 1991 Standards that permitted the use of auxiliary counters or fold-down counters to provide an accessible counter. 1991 Standards, § 7.2(ii)-(iii). While the 2010 Standards do contain a general provision permitting equivalent facilitation, *see* 2010 Standards, § 103, the burden of establishing such equivalency rests with the owner/operator of the facility. It is unclear at this point if DOJ will view such auxiliary or fold-down counters as a permissible form of equivalent facilitation.
4. Employee Work Areas, Section 206.2.8: The 1991 Standards establish only minimal requirements for an accessible route to employee work areas. Section 4.1.1(3) of the 1991 Standards requires only that employees be able to approach, enter and exit work areas. The 2010 Standards expand those requirements and mandate that “common use circulation paths” within employee work areas be accessible. This change will only impact employee work areas, which essentially are those areas where actual work is performed, such as the back-of-counter areas in deli/bakery/meat departments. It does not pertain to employee “common” areas, such as employee restrooms, break rooms *etc.* There are certain limited exceptions to the requirement for accessible common use circulation paths:
- a. Common use circulation paths in work areas with less than 1,000 square feet and defined by permanently installed partitions, counters, casework, or furnishings;
 - b. Common use circulation paths that are an “integral component” of work equipment (for example a walk-in refrigerator or freezer); and
 - c. Common use circulation paths located within exterior work areas that are fully exposed to the weather.
 - d. Additionally, employee work areas (or portions thereof) that are less than 300 square feet and elevated 7” or more above the finish floor or ground, where the elevation is essential to the function of the space are not required to comply with any requirements applicable to work areas, including the requirement that work areas be located on an accessible route. 2010 Standards, Section 203.9.

Finally, Section 215.2 of the 2010 Standards requires that emergency alarm systems in employee work areas be wired so that visible alarms may be added as necessary.

Note: DOJ has taken the position that the obligation to remove barriers to access where readily achievable does not extend to areas used solely by employees as work areas. Accordingly, the revised requirements for employee work areas apply only in the context of new construction and alterations.

5. Accessible Route, Section 206.3: The 2010 Standards require that the accessible route coincide with or be located in the same general area as the general circulation path. The 1991 Standards require this only “to the maximum extent feasible.” 1991 Standards, § 4.3.2(1).
6. Entrances:
 - a. Public Entrances, Section 206.4.1: The 2010 Standards increase the total number of accessible public entrances from to at least 60% of all public entrances, whereas the 1991 Standards only require that 50% of such entrances be accessible. Section § 104.2 of the 2010 Standards also mandates that for scoping purposes, fractions must always be rounded up. For example, for facilities with only two entrances, both would have to be accessible, whereas previously only one was required to be accessible. For facilities with four entrances, three (as opposed to just two) would have to be accessible. Additionally, where direct access is provided from a parking structure, each direct access entrance must be accessible.
 - b. Restricted Entrance, Section 206.4.7: Where restricted entrances are provided, at least one restricted entrance must be accessible. Restricted entrances are defined as non-public, but common-use entrances, such as employee entrances. They do not include services entrances, which are defined as entrances intended primarily for the delivery of goods or services. A service entrance need only be accessible if it is the only entrance to the facility.
7. Automatic Doors, Section 404.3: The 2010 Standards require that automatic or power-assisted doors have back-up power unless the break-out leaf provides 32” clear width or the doors remain open in the power-off position. Back-up power is also required if there is insufficient maneuvering clearance at the door, unless the door remains open in the power-off position.
8. Van Accessible Parking, Section 208.2.4: The 2010 Standards do not alter the overall number of accessible parking spaces that must be provided, however, the proportion of accessible parking spaces that must also be van accessible has been increased from 1:8 to 1:6. *Compare* 2010 Standards § 208.2.4 *with* 1991 Standards § 4.1.2(5)(b). Additionally, angled van accessible spaces now must have the access aisle on the passenger side. 2010 Standards § 502.3.4. Although this effectively precludes angled van accessible spaces from

sharing an access aisle with another van accessible space, they may still share an access aisle with a non-van accessible space.

9. Reach Range, Section 308: While the 1991 Standards set different requirements depending on whether the reach to an object/item is a forward reach or a side reach, the 2010 Standards establish a uniform reach range for unobstructed forward and side reaches. The maximum side unobstructed reach range has been lowered from 54" to 48" AFF, and the minimum side unobstructed reach range increased from 9" to 15" AFF. (The requirements for obstructed reaches, *i.e.*, a reach over an object, are unchanged). *Compare* 2010 Standards § 308.3.1 *with* 1991 Standards § 4.2.6 & Fig. 6(b). This change potentially affects a wide range of features, including public telephones, bathroom dispensers, vending machines, ATMS, etc. [Note: Self-service shelving, such as grocery store shelving, is exempt from these reach range requirements. 2010 Standards, § 225.2.2. DOJ has indicated that it will interpret this exemption broadly to apply to all types of shelves, racks, hooks and similar self-service merchandising fittings.]
10. Toilet Rooms, Section 603.2.3: For single user toilet rooms, the 2010 Standards permit entry doors to swing into the clear floor space required at fixtures if clear floor space 30" x 48" is provided outside the area of the door swing.
11. Enlarged Clear Floor Space at Water Closets, Section 604.3.2: Figure 38 of the 1991 Standards currently permits a lavatory to be positioned next to the water closet, as long as the leading edge of the lavatory is at least 36" from the side wall adjacent to the water closet. Section 604.3.2 of the 2010 Standards requires clear floor space at the water closet which is at least 60" minimum from the side wall. Additionally, the water closet must be positioned with its centerline 16"-18" from the side wall. The 1991 Standards required that the centerline be positioned at 18" from the side wall.
12. Lavatory, Section 213.3.4: Like the 1991 Standards, the 2010 Standards require that at least one accessible lavatory be provided in each restroom. The 2010 Standards clarify that the accessible lavatory cannot be located in a toilet stall or compartment. Some state and local jurisdictions require that an accessible lavatory be provided in an accessible toilet stall. In those cases, an accessible lavatory also must be provided outside the stall.
13. Urinals, Section 213.3.3: The 1991 Standards require that when urinals are provided in a restroom, at least one must be accessible. The 2010 Standards require an accessible urinal only if more than one urinal is provided. The 2010 Standards also specify that the rim of the accessible urinal must extend at least 13.5" from the rear wall.
14. Stairs, Section 210: The 1991 Standards established accessibility requirements only for stairs serving levels not served by an accessible means of vertical access. 1991 Standards, § 4.1.3(4). The 2010 Standards extend these requirements to all stairs that are part of a means of egress.

15. Drinking Fountains, Section 211: If drinking fountains are provided, 50% of the fountains must be accessible to persons using wheelchairs and 50% accessible to standing persons (*i.e.*, spout between 38” and 43” AFF). 2010 Standards, §§ 211.2, 602.7. The 1991 Standards require only that at least 50% of drinking fountains be accessible to persons using wheelchairs. 1991 Standards, § 4.1.3(10)(b). Additionally, the 2010 Standards mandate a forward approach with knee and toe clearance at all wheelchair accessible drinking fountains, whereas the 1991 Standards permits a parallel approach to free-standing or built-in drinking fountains. *Compare* 2010 Standards § 602.2 *with* ADAAG § 4.15.5 & Fig. 27.
16. Signs, Sections 216 and 703: The 2010 Standards contains numerous changes with respect to signs. Overall, the 2010 Standards establish new and more specific technical accessibility criteria for signs, *e.g.*, character spacing, line spacing, positioning of Braille characters and revised character proportion and stroke height-to-width requirements. The 2010 Standards also revise the mounting height for signs designating permanent rooms and spaces (*e.g.*, tactile signs). The 1991 Standards requires that they be mounted 60” AFF, as measured to the centerline of the sign. 1991 Standards § 4.30.6. The 2010 Standards permit such signs to be positioned between 48” AFF measured to the baseline of the lowest tactile character and 60” AFF measured to the baseline of the highest tactile character. 2010 Standards § 703.4.1.
17. Dining Tables/Spaces, Section 226: The 1991 Standards require that 5% of dining *tables* be accessible. The 2010 Standards require that at least 5% of *seating spaces* and *standing spaces* at dining surfaces be accessible, and that such spaces be dispersed throughout the dining area/facility. *See* 2010 Standards §§ 226.1 and 226.2. Additionally, whereas the 1991 Standards do not require that a bar/counter be made accessible if service is provided at nearby accessible tables, this provision has been omitted form the 2010 Standards.
18. Fire Alarm Systems, Sections 7215 and 702: Whereas the 1991 Standards set forth technical accessibility requirements for fire alarm systems, the 2010 Standards permit facilities to comply with either the 1999 or 2002 editions of NFPA 72.
19. Detectable Warnings at Curb Ramps: The 2010 Standards no longer require detectable warnings at curb ramps (except at transportation facilities) or hazardous vehicular areas. This issue will be revisited in future rulemaking to address public rights of way.