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DEPARTMENT OF JUSTICE

28 CFR Parts 35 and 36

CRT Docket No. 123; A.G. Order No. 3332-2012

RIN 1190-AA69

Amendment of Americans with Disabilities Act Title II and Title III Regulations to Extend Compliance Date for Certain Requirements Related to Existing Pools and Spas Provided by State and Local Governments and by Public Accommodations

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Justice regulations implementing the Americans with Disabilities Act to extend until January 31, 2013, the compliance date for the application of sections 242 and 1009 of the 2010 Americans with Disabilities Act (ADA) Standards for Accessible Design for existing pools and spas.

EFFECTIVE DATE: This rule will take effect on May 21, 2012.

FOR FURTHER INFORMATION CONTACT: Allison Nichol, Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY).

This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

SUPPLEMENTARY INFORMATION:

Background

The Department of Justice published its revised final regulations implementing the Americans with Disabilities Act (ADA) for title II (State and local government services) and title

III (public accommodations and commercial facilities) on September 15, 2010. See 75 FR 56164, 56236 (September 15, 2010). The revised ADA rules were the result of a six-year process to update the Department's ADA regulations. As part of this process, the Department sought public comment, issuing an Advance Notice of Proposed Rulemaking (ANPRM) on September 30, 2004, 69 FR 58768, and two Notices of Proposed Rulemaking (NPRM) on June 17, 2008, 73 FR 34466 (title II) and 73 FR 34508 (title III). The Department also held a public hearing on the NPRMs and received more than 4,435 written public comments. This process culminated with publication of the Department's final rules on September 15, 2010.

As part of this revision, the Department adopted the 2010 ADA Standards for Accessible Design ("2010 Standards"). A copy of the 2010 ADA Standards is available at http://www.ada.gov/2010ADASTANDARDS_index.htm. The 2010 Standards replace the 1991 ADA Standards for Accessible Design and, for the first time, contain specific accessibility requirements for certain types of recreational facilities, including the requirement to provide accessible means of entry and exit to swimming pools, wading pools, and spas. With limited exceptions, the Department's revised ADA title II and title III regulations went into effect on March 15, 2011. The regulations provided that covered entities were not obligated to comply with the 2010 Standards until March 15, 2012 (the compliance date).

The 2010 Standards are based in large part on the 2004 ADA Accessibility Guidelines, which were adopted by the United States Access Board ("Access Board") in 2004 following a decade-long effort to revise the Board's 1991 ADA Accessibility Guidelines. See 69 FR 44084 (July 23, 2004). The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the "minimum guidelines" issued by the Access Board, 42 U.S.C. 12134(c), 12186(c). The

Attorney General has sole responsibility for promulgating accessibility standards that fall within the Department's jurisdiction and enforcing the Department's regulations, which include the accessibility standards.

The 2010 Standards set minimum scoping and technical requirements for accessible means of entry (and exit) for newly constructed and altered swimming pools, wading pools, and spas (collectively, "pools"). The 2010 Standards include requirements for accessible means of entry for large and small pools. These requirements are found at sections 242 and 1009 of the 2010 Standards. Specifically, section 242 provides that large pools (pools with 300 linear feet of pool wall or more) must have two accessible means of entry, one of which must be a pool lift or sloped entry; the other accessible means of entry include a transfer wall, transfer system, or pool stairs. Small pools (pools with less than 300 linear feet of pool wall) must provide at least one accessible means of entry, which must be either a pool lift or a sloped entry.

The 2010 Standards also provide details about what features an accessible means of entry should include. Specifically, section 1009 addresses pool lift requirements such as the location, size of the seat, lifting capacity, and clear floor space, as well as the requirements for sloped entry, transfer wall, transfer system, or pool stairs.

Sections 35.151(d) and 36.406(b) of the respective title II and title III regulations specify that the 2010 Standards only apply to fixed or built-in elements. Sections 35.151(c) and 36.406(a) provide that the 2010 Standards apply to new construction and alterations of covered buildings and facilities.

With regard to existing facilities, the title II rule published in 2010 provided that, as of March 15, 2012, the 2010 Standards apply whenever public entities choose to meet their title II ADA program accessibility obligations by making structural alterations to their existing

facilities, 28 CFR 35.150(b)(1).¹ The title III rule published in 2010 provided that on or after March 15, 2012, public accommodations must generally use the 2010 Standards as the benchmark for their ongoing obligation to remove architectural barriers in existing facilities to the extent such compliance is readily achievable. 28 CFR 36.304(d).² As discussed below, with respect to the provision of title II program accessibility and title III readily achievable barrier removal, the Department has postponed the compliance date for the specific requirements in the 2010 Standards relating to accessible means of entry for existing pools until May 21, 2012.

Under the ADA, the Department is responsible for providing technical assistance to entities covered by titles II and III to help them understand their obligations under the ADA. 42 U.S.C. 12206(c)(1). Since issuing its revised rule, the Department has developed and published technical assistance documents to assist entities to understand the revised regulations. To help educate pool owners and operators concerning the requirements imposed by the Department's 2010 regulations, the Civil Rights Division published a technical assistance document entitled "ADA 2010 Revised Requirements: Accessible Pools—Means of Entry and Exit" (the "TA Document") on January 31, 2012. Available at http://www.ada.gov/pools_2010.htm. This document provided an overview of the new accessibility requirements for pools and discussed the application of the requirements in the context of the longstanding obligations of covered entities to provide readily achievable barrier removal (title III) and program accessibility (title II).

¹ Section 35.150(b)(1) of the title II regulation, which addresses program accessibility in existing facilities, provides state and local governments with flexibility to use other means such as acquisition or redesign of equipment, or reassignment of programs or services to accessible buildings, in lieu of making structural alterations to facilities when they are providing program accessibility in their existing programs, services, or activities.

² Section 36.304(d)(1) requires covered entities to apply the alterations provisions of the regulations (except the path of travel provisions) when removing barriers, but only to the extent that it is readily achievable to do so. Section 36.304(d)(2)(iii) provides that elements in existing facilities that are subject to the supplemental requirements, including the accessible means of entry requirements for pools and spas, must be modified to the extent readily achievable to comply with the 2010 Standards.

Inquiries received by the Department both prior to the TA Document's publication and in response to the TA Document revealed that there were significant concerns and misunderstandings among a substantial number of pool owners and operators with respect to what was required for title III entities in order to engage in readily achievable barrier removal, or for title II entities to provide program accessibility with respect to their existing pools now that the ADA regulations included minimum scoping and technical requirements for accessible means of entry for pools. Some pool owners and operators believed that taking certain steps would always satisfy their obligations when in fact those steps would not necessarily result in compliance with the ADA regulations. For example, some pool owners and operators believed, incorrectly, that providing non-fixed lifts (lifts that are not attached to the pool deck and often referred to as portable lifts) would in all circumstances achieve compliance with the ADA regulations, even in circumstances where providing a fully compliant lift is readily achievable. Others expressed the view that they would have to close pools due to an inability to provide access, even though the regulations allow pool owners and operators to use non-fixed lifts or no lifts at all in circumstances where the provision of access is not readily achievable. The vast majority of pool owners and operators expressing these concerns were title III entities.

Recognizing the extent of the misunderstandings in determining appropriate compliance when faced with an immediate compliance date, and consistent with Executive Order 13563, "Improving Regulation and Regulatory Review" (with its emphasis on promoting predictability and public participation), the Department determined that it would be impracticable and contrary to the public interest to retain the March 15, 2012, compliance date for application of these requirements to existing pools. 77 FR 16163, 16164 (March 20, 2012). Thus, the Department issued a Final Rule extending the date for compliance with sections 242 and 1009 of the 2010

Standards as they relate to existing pools (pools built before March 15, 2012) from March 15, 2012, to May 21, 2012. 77 FR 16163, 16163 (March 20, 2012).³ The Department's action had no effect on the compliance date for these requirements as they applied to newly constructed pools or pools altered for purposes other than to provide program accessibility or barrier removal (e.g., scheduled alterations or improvements).

Contemporaneously with issuing the rule extending the compliance date for existing pools until May 21, 2012, the Department issued an NPRM seeking public comment regarding whether a longer extension of the compliance date would be appropriate to allow pool owners and operators additional time to meet their obligations with regard to providing access into their existing pools. 77 FR 16196 (March 20, 2012). Specifically, the Department requested comment on a proposed extension that would postpone the required compliance date for sections 242 and 1009 of the 2010 Standards until September 17, 2012—a total of just over 180 days from the original March 15, 2012, compliance date specified in the September 2010 final regulations. The NPRM proposed that this extension would “provide pool owners and operators additional time to evaluate and comply with their program accessibility and readily achievable barrier removal obligations with respect to sections 242 and 1009 of the 2010 Standards.” 77 FR at 16198. The Department also anticipated that an extension would serve “the interest of promoting clear and consistent application of the ADA’s requirements to existing facilities.” 77 FR at 16196. The proposed extension would have no impact on the March 15, 2012, compliance date for new construction and alterations of swimming pools and spas. In addition, the NPRM made it clear that, although the Department was considering extending the compliance date for

³ See 77 FR at 16163 (“Effective on March 15, 2012, the compliance date for 28 CFR 35.150(b)(1), (b)(2)(ii), and 28 CFR 36.304(d)(2)(iii) for sections 242 and 1009 of the 2010 Standards is delayed to May 21, 2012.”). The referenced sections in 28 CFR for which the compliance date was delayed apply only to existing facilities, not to new construction or alterations.

the application of the requirements to existing pools, the NPRM was not proposing to change those requirements or modify the ADA regulations in any other way and, thus, the Department was not soliciting comments on the merits of the requirements. 77 FR at 16197.

Discussion of Public Comments

In response to its proposal, the Department received approximately 1,915 public comments from individuals with disabilities, organizations representing individuals with disabilities, pool owners and operators, and other entities covered by the regulations. Approximately 1,420 commenters supported the proposal and approximately 495 commenters opposed it. While the vast majority of commenters were concerned about the impact of the requirements on title III public accommodations, there were some comments from title II entities.

Organizations representing the hotel industry and individual owners and operators of hotels and campgrounds provided the largest number of comments in support of postponing the compliance date. Of these comments, approximately 520 were form comments submitted anonymously. Other commenters who supported the proposal included homeowners associations, pool lift manufacturers, individual owners and operators of pools and spas, and some title II entities. Commenters opposed to the proposed extension included many organizations representing persons with disabilities, including veterans with disabilities, numerous individuals with disabilities, and some title II entities. Many comments illustrated the kinds of misunderstandings and concerns that led to the Department's decision to propose the extension. This final rule will not address specific comments about the merits of the requirements for accessible means of entry for pools, except to the extent that they illustrate these misunderstandings or provide support or opposition for the proposed compliance date

extension.

The Department received numerous comments opposing a further extension of the effective date for the provisions requiring an accessible means of entry for existing pools. Commenters with disabilities and their families, as well as organizations representing individuals with disabilities, urged the Department not to extend the deadline further. These commenters provided a variety of reasons why the deadline should not be extended. Some commenters objected on the grounds that the regulatory process, which included numerous opportunities for public comment, had yielded carefully constructed regulations and accessibility standards. Several commenters noted that entities have had nearly two years to plan for and comply with the revised requirements for access into existing pools and, thus, additional time was unnecessary. One organization representing individuals with disabilities noted that the barrier removal concept has not changed since the ADA was passed in 1990 and that title III entities have had over 20 years and extensive technical assistance on the concept to understand their obligations. The organization believed an additional four months would not yield a better understanding. The same organization felt strongly that the extension was inappropriate for title II entities, which have long been required to address access into their existing pools under the program access requirement.

Many commenters emphasized the negative impact that an extension would have for individuals with disabilities. Commenters stated that an extension would require them to continue to pay full price for a hotel room during the extension period while not having full access to the amenities of the facilities. One commenter took issue with the categorization of pool access as a luxury, stating that access to other amenities, such as restaurants, could similarly be considered luxuries, yet access to such amenities is required for all paying customers.

Some of the most moving comments came from families with individuals with disabilities. Parents of children with disabilities shared their stories of how their children were getting too big for them to carry in and out of the pool safely or with dignity. Several recounted how their older children loved to swim and wanted to partake in family outings to the pool, but then explained that it was difficult to safely transfer a wet and slippery child across a slick pool deck. Parents with disabilities also lamented their inability to join their children in the pool. For these families, an extension of the compliance date for the pool requirements would mean another year of summer vacations without access.

The Department also heard from organizations representing veterans with disabilities who indicated that, after a decade of war, a significant number of service members have returned with injuries and are reintegrating into their communities by participating in adaptive sports and that these individuals should have access to pools and spas in their communities without further delay. One veteran with a disability stated that he had very few methods of exercise that he could use to stay in shape and expressed frustration about having to travel long distances to a pool with a compliant lift for his weekly swim. Many other commenters also stated that swimming was one of the few exercises available to many individuals with disabilities and that the extension would further delay pool access that has been long sought.

Several state-level advisory organizations on disability issues provided comments opposing the extension. These organizations stated that they believed that there had been ample time for title II and title III entities to comply and that delaying implementation further would constitute a roll-back of the ADA. These organizations were especially concerned about the resistance of public accommodations in their states to implement the new requirements and the impact this would have on residents and visitors with disabilities.

The Department also received numerous comments supporting a further extension of the effective date for the provisions requiring an accessible means of entry for existing pools, primarily as they apply to the obligations of title III entities to engage in barrier removal. Many of these commenters supported a longer extension for the compliance period, for a minimum of six additional months. These commenters believed that an extension of the compliance date was necessary in order to give public accommodations sufficient time to fully understand and implement the pool access requirements and to arrange for installation of fixed lifts (lifts that are attached to the pool deck), given that many pool owners and operators had previously believed that portable lifts were permissible even when it was readily achievable to provide a fixed lift.

Two other categories of comments, primarily provided by owners and operators of pools at public accommodations who supported the Department's proposal to extend the compliance date, further underscored the misunderstandings and concerns that have arisen about the pool accessibility requirements adopted in the 2010 Standards. First, some commenters suggested that the requirement that the pool lift be fixed was not part of the title III regulation published by the Department in September 2010, but was, instead, an interpretation the Department later developed outside of the rulemaking process. However, the Department has had a longstanding position that the ADA Standards apply to fixed and built-in elements. See, e.g., Department of Justice, Americans with Disabilities Act, ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities (Supp. 1994), III-5.3000, available at <http://www.ada.gov/taman3up.html>, (providing that “[o]nly equipment that is fixed or built in to the facility, is covered by the accessibility standards”). The Department codified that position in both the revised title II and title III regulations, see 28 CFR 35.151(d) and 36.406(b). Throughout the six-year process of revising the ADA regulations, the Department

stated that the ADA Standards did not apply to freestanding (e.g., non-fixed, moveable, or portable) equipment. For example, the 2004 ANPRM included a section entitled, “Application of ADA Standards and ADA to Free-Standing Equipment,” in which the Department stated that the ADA Standards do not apply to portable equipment. See 69 FR 58768, 58775 (Sept. 30, 2004) (providing that “the revised ADA Standards will apply directly only to fixed equipment—as described above, equipment that becomes built into the structure of a facility—and not to free-standing equipment”). The 2008 title III NPRM and the 2010 Final Rules reiterated this point. See 73 FR 34508, 34543 (June 17, 2008) (“The Department is proposing a new § 36.406(b) that would clarify that the requirements established by this section, including those contained in the proposed standards (and the 2004 [ADA Accessibility Guidelines]) prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to people with disabilities.”); 75 FR 56236, 56303 (Sept. 15, 2010) (“The final [title III] rule contains a new § 36.406(b) that clarifies that the requirements established by this section, including those contained in the 2004 [ADA Accessibility Guidelines], prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to individuals with disabilities.”).⁴

Section 36.304(d) of the title III regulation specifies that measures taken to comply with the readily achievable barrier removal requirement must comply with the applicable requirements for alterations as set forth in § 36.402 and §§ 36.404 through 36.406, which

⁴ Moreover, the Regulatory Impact Analysis (RIA) for the final rule looked at the costs with respect to fixed and built-in elements when analyzing the provisions of the 2010 Standards. With respect to pools, the RIA included both the cost of purchasing a lift as well as the cost of installing the lift for barrier removal in existing pools. See Final RIA at pp. 59-60, 283 (July 23, 2010), available at http://www.ada.gov/regs2010/RIA_2010regs/DOJ%20ADA%20Final%20RIA.pdf.

reference the 2010 Standards. Given that the ADA Standards apply only to fixed or built-in elements, the title III regulation requires the use of fixed elements when removing barriers in existing facilities unless it is not readily achievable to do so. Thus, it follows that public accommodations engaged in barrier removal must provide a fixed or built-in lift in existing pools as long as it is readily achievable.

A second group of commenters who owned or operated public accommodations and who supported the extension mistakenly believed that if they could not comply with the pool access requirements of the 2010 Standards (because compliant pool lifts were unavailable or they could not afford to provide a lift, for example), they would be forced to close their pools. This is also a misunderstanding of the ADA regulations. Compliance with the 2010 Standards is only required to the extent that it is “readily achievable”—a term that means “easily accomplishable and able to be carried out without much difficulty or expense.” See 28 CFR 36.104. Thus, title III of the ADA does not require that a public accommodation close its pool facility if, for example, compliant pool lifts are not available or if the facility cannot afford such a lift. In such circumstances, a public accommodation can achieve compliance with its ADA obligations without installing a fully compliant pool lift, because that measure would not be “easily accomplishable” or “able to be carried out without much difficulty or expense.” Id. The revised 2010 title III regulation, like the 1991 regulation that preceded it, implements the “readily achievable” definition established by Congress in the statute and maintains unchanged the definition of “readily achievable” incorporated in the 1991 regulation.

To determine whether providing an accessible means of entry to an existing pool is readily achievable, businesses must use the same general barrier removal analysis that has always applied to other covered elements in existing facilities. Both the ADA statute, which

Congress passed in 1990, and the Department's ADA title III regulation, which was originally published in 1991, set out a case-by-case analysis to be used in determining whether removing certain barriers is readily achievable. Specifically, the regulations provide at § 36.104 that in determining whether an action is readily achievable, the factors to be considered include:

- (1) The nature and cost of the action;
- (2) The overall financial resources of the site or sites involved, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements necessary for safe operation, including crime prevention measures, and any other impact of the action on the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity, the overall size of the parent corporation or entity with respect to the number of its employees, and the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.⁵

Under this standard, which has applied to places of public accommodation since 1991,

⁵ Since the title III regulation first took effect, the Department has provided extensive technical assistance regarding the readily achievable barrier requirement for existing facilities. The technical assistance material provided by the Department contains examples of the application of this requirement. Pool owners and operators can access information on barrier removal on the Department's ADA website, www.ada.gov. Publications that address barrier removal include, but are not limited to, the 1993 ADA Title III Technical Assistance Manual (Section III-4.4200), available at <http://www.ada.gov/taman3.html>, the 1996 ADA Guide for Small Businesses (revised and reissued in 1999), which was published in conjunction with the Small Business Administration ("SBA"), available at <http://www.ada.gov/smbusgd.pdf>, and a 2005 online course entitled "Reaching Out to Customers With Disabilities," which is available at <http://www.ada.gov/reachingout/intro1.htm>.

hotels and other public accommodations will not be required to close their existing pools if compliance with the applicable ADA Accessibility Standards is not easily accomplishable or able to be carried out without much difficulty or expense. Similarly, the inability of a public accommodation to install a lift due to insufficient space at the side of the pool deck would be addressed by using the barrier removal analysis, which does not require entities to undertake changes that cannot be accomplished without much difficulty or expense.

Several commenters, including a pool lift manufacturer, supported an extension on the basis that there is currently a significant backlog in availability of compliant lifts. They were concerned that if the pool access requirements took effect, pool owners and operators who could not acquire a lift because of a manufacturing backlog would be in violation of the ADA. However, the lack of availability of a compliant lift because of limitations in manufacturing capacity would demonstrate that it is not readily achievable to comply with the requirements, until such time as a lift becomes available.

The Department received a small number of comments from title II entities, the majority of which were from small local governments. Most of these commenters favored the proposed extension. A number of them believed a moveable lift was appropriate to comply with the revised ADA requirements and had not accounted for the costs associated with a fixed pool lift in their yearly budgets. As a result, these entities supported the extension in order to secure additional funding. However, the title II program accessibility requirements allow the use of equipment as an alternative to making structural changes to an existing facility; thus these entities would not necessarily have to provide a fixed lift in order to satisfy their program accessibility obligation.⁶

⁶ Section 35.150 requires that title II entities operate each service, program or activity, so that when viewed in its entirety, the service, program or activity is readily accessible to and usable by individuals with disabilities.

Some title II entities stated that they would have to close down community pools rather than incur the expense of complying with the regulation. To the contrary the title II program accessibility regulation does not require title II entities to make changes to their programs, services, or activities if the changes would constitute a fundamental alteration or would impose an undue financial and administrative burden. Title II does not require a facility to close when compliance with the program accessibility requirements poses an undue financial and administrative burden. This is the case whether the title II facility in question is a public office, a school, or a swimming pool.

Some of the comments the Department received reflected misconceptions about the abilities of persons with disabilities to participate in the same activities that are afforded persons without disabilities. The ADA was intended, in part, to address these misconceptions.

Without the pool access requirement of the regulations, it is clear that many individuals with disabilities would not be able to avail themselves of pool amenities offered by covered entities. As noted by many commenters opposed to the proposed extension, individuals with disabilities have long awaited the ADA Accessibility Standards that address access to recreational facilities, such as pools. These comments illustrate the significant impact that a further extension would have on many individuals with disabilities and their families during yet another summer pool season. On the other hand, as stated above and in the Department's NPRM, it is clear to the Department that a significant number of pool owners and operators may continue to have misunderstandings and concerns about their obligations with regard to providing access to existing pools. These misunderstandings have affected pool operators and owners in at least three ways that are relevant to the Department's proposal. First, it appears that some places of public accommodation initially proceeded on the misunderstanding that a

portable pool lift would in all circumstances satisfy the pool accessibility requirements of the 2010 Standards. Those pool operators and owners will need time to undertake a fact-specific analysis about whether the installation of a fully compliant pool lift is “readily achievable,” and to implement their compliance plan. Second, the comments suggested that at least some pool owners and operators who generally speaking would find installation of a compliant pool lift to be “readily achievable” currently are having difficulty locating compliant pool lifts that are available for purchase. The Department believes that this circumstance provides an additional reason to postpone the compliance date, thereby allowing a greater number of covered entities to purchase and install compliant pool lifts. Third, comments received by the Department also raise concerns that, absent an extension, some covered entities might respond to the compliance date by taking steps that the law does not require and that would actually undermine the goal of ensuring that individuals with disabilities obtain the benefits that the regulations sought to ensure—safe and compliant pool access to existing pools when it is readily achievable to provide it. For example, if pool owners and operators close pools because they incorrectly believe that the 2010 Standards require that a fully compliant pool lift must be installed in all cases, those closures will reduce access to pools for everyone, including individuals with disabilities. Similarly, if pool owners and operators are unable to obtain compliant lifts because of the lack of availability, they may unwittingly purchase non-compliant lifts that will not provide safe and independent pool access to persons with disabilities.

After carefully considering all of these factors, including the unique burdens that an additional postponement would impose on individuals with disabilities, the Department has concluded that a further extension of the compliance date is warranted. Although the Department originally proposed a four-month extension until September 17, 2012, based on the

breadth of the concerns and the misunderstandings about the requirements expressed in the comments the Department received, the Department has decided to extend the compliance date for sections 242 and 1009 of the 2010 Standards for existing pools subject to title III barrier removal and to title II program access until January 31, 2013. That date is one year from the date that the Department issued its initial guidance clarifying that the ADA regulations required fixed pool lifts, and is still well in advance of next year's swim season. The Department emphasizes that this extension is consistent with Executive Order 13563, which emphasizes the importance of promoting predictability and reducing uncertainty, and which also stresses the value of public participation and an "open exchange of information and perspectives."

This longer extension will provide additional time for the Department to continue to educate covered entities about their obligations under the 2010 Standards with regard to providing access into their existing pools, to respond to relevant concerns, and to address misunderstandings that could lead covered entities to take unnecessary and counterproductive steps, thereby allowing all stakeholders to have the same understanding of what is required by the ADA and promoting broader compliance with the rule. The Department also believes that the additional time will allow covered entities to complete the fact-specific evaluation required by the "readily achievable" standard, and to implement their compliance plans, including by taking the steps necessary to comply with the pool accessibility requirements of the 2010 Standards.

Section-By-Section Analysis

Section 35.150(b)(1)

Currently, § 35.150(b)(1) specifies that if a public entity chooses to make structural alterations to existing buildings in order to meet its program accessibility obligations, it shall comply with the accessibility requirements set forth in § 35.151. The current title II regulation specifies, at § 35.151(c)(3), that all facilities that are newly constructed or altered on or after March 15, 2012 must comply with the 2010 Standards.⁷ The final rule postpones the compliance date, as applied to the requirements for accessible means of entry for existing pools, by adding a new paragraph (b)(4) to § 35.150. The new paragraph reads: “The requirements set forth in sections 242 and 1009 of the 2010 Standards shall not apply until January 31, 2013, if a public entity chooses to make structural changes to existing swimming pools, wading pools, or spas built before March 15, 2012, for the sole purpose of complying with the program accessibility requirements set forth in this section.

Section 36.304

Section 36.304(d) currently specifies that on or after March 15, 2012, public accommodations must generally use the 2010 Standards as the benchmark for their ongoing obligation to remove architectural barriers in existing facilities to the extent such compliance is readily achievable. The final rule extends the compliance date for applying the barrier removal requirements for accessible means of entry for pools, by adding paragraph (g)(5), which states the following: “The application of this requirement to facilities built before March 15, 2012, for accessible means of entry for swimming pools, wading pools, and spas as set forth in sections 242 and 1009 of the 2010 Standards shall not apply until January 31, 2013.”

The final rule also modifies the Appendix to § 36.304(d) to reflect the extension of the compliance date.

⁷ As discussed earlier, the Department issued a Final Rule extending the date for compliance with sections 242 and 1009 of the 2010 Standards as they relate to existing pools (pools built as of March 15, 2012), until May 21, 2012. *See* 77 FR at 16163. However, the regulatory text was not revised.

Regulatory Certifications

Administrative Procedure Act

The Department finds good cause to make this regulation effective without a 30-day delay in the effective date, pursuant to 5 U.S.C. 553(d), as it relieves a restriction by extending the compliance dates for the title II program accessibility requirements pursuant to 28 CFR 35.150 and the title III barrier removal obligations pursuant to 28 CFR 36.304 as they relate to accessible means of entry into existing swimming pools, wading pools, and spas, from May 21, 2012, until January 31, 2013.

Executive Order 13563 and Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 13563, “Improving Regulation and Regulatory Review,” and Executive Order 12866, “Regulatory Planning and Review” section 1(b), The Principles of Regulation. The Department of Justice has determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is

determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation, and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. This rule merely extends the compliance dates for the title II program accessibility requirements pursuant to 28 CFR 35.150 and the title III barrier removal obligations pursuant to 28 CFR 36.304 as they relate to accessible means of entry into existing swimming pools, wading pools, and spas. The extension provides regulated entities additional time to evaluate and comply with their program accessibility and readily achievable barrier removal obligations.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex,

national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

Paperwork Reduction Act of 1995

This rule does not contain any information collection requirements that require approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects for 28 CFR Parts 35 and 36

Administrative practice and procedure, Buildings and facilities, Civil rights, Communications, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments, Business and industry.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and sections 204 and 306 of the Americans with Disabilities Act of 1990, Public Law 101–336 (42 U.S.C. 12134 and 12186), chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

1. The authority citation for Part 35 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

2. In § 35.150, paragraph (b)(4) is added to read as follows:

§ 35.150 Existing facilities.

* * * * *

(b) * * *

(4) Swimming pools, wading pools, and spas. The requirements set forth in sections 242 and 1009 of the 2010 Standards shall not apply until January 31, 2013, if a public entity

chooses to make structural changes to existing swimming pools, wading pools, or spas built before March 15, 2012, for the sole purpose of complying with the program accessibility requirements set forth in this section.

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PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES

3. The authority citation for part 36 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b).

4. Amend § 36.304 as follows:

a. Revise the Appendix to §36.304(d), and

b. Add paragraph (g)(5), to read as follows:

§ 36.304 Removal of barriers.

* * * * *

(d) * * *

Appendix to § 36.304(d)

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. There is an exception for existing pools, wading	2010 Standards

	pools, and spas built before March 15, 2012 [See § 36.304(g)(5)]. Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	
On or after January 31, 2013	For existing pools, wading pools, and spas built before March 15, 2012, elements that do not comply with the supplemental requirements for entry to pools, wading pools, and spas must be modified to the extent readily achievable [See § 36.304(g)(5)].	Sections 242 and 1009 of the 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

* * * * *

(g) * * *

(5) With respect to facilities built before March 15, 2012, the requirements in this section for accessible means of entry for swimming pools, wading pools, and spas, as set forth in sections 242 and 1009 of the 2010 Standards, shall not apply until January 31, 2013.

* * * * *

May 17, 2012 _____
Date

James M. Cole
Acting Attorney General