EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1630

RIN 3046–AA85

Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Final Rule.

SUMMARY: The Equal Employment Opportunity Commission (the Commission or the EEOC) issues its final revised Americans with Disabilities Act (ADA) regulations and accompanying interpretive guidance in order to implement the ADA Amendments Act of 2008. The Commission is responsible for enforcement of title I of the ADA, as amended, which prohibits employment discrimination on the basis of disability. Pursuant to the ADA Amendments Act of 2008, the EEOC is expressly granted the authority to amend these regulations, and is expected to do so.

DATES: *Effective Date:* These final regulations will become effective on May 24, 2011.

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SUPPLEMENTARY INFORMATION:

Introduction

The ADA Amendments Act of 2008 (the Amendments Act) was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Pursuant to the Amendments Act, the definition of disability under the ADA, 42 U.S.C. 12101, *et seq.,* shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA as amended, and the determination of whether an individual has a disability should not demand extensive analysis. The Amendments Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of the EEOC's ADA regulations. The effect of these changes is to make it easier for an individual *see*king protection under the ADA to establish that he or she has a disability within the meaning of the ADA. Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008 (2008 Senate Statement of Managers); Committee on Education and Labor Report together with Minority Views (to accompany H.R. 3195), H.R. Rep. No. 110–730 part 1, 110th Cong., 2d Sess. (June 23, 2008) (2008 House Comm. on Educ. and Labor Report); Committee on the Judiciary Report together with Additional Views (to accompany H.R. 3195), H.R. Rep. No. 110–730 part 2, 110th Cong., 2d Sess. (June 23, 2008) (2008 House Judiciary Committee Report).

The Amendments Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways, therefore necessitating revision of the prior regulations and interpretive guidance contained in the accompanying "Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act," which are published at 29 CFR part 1630 (the appendix).

Consistent with the provisions of the Amendments Act and Congress's expressed expectation therein, the Commission drafted a Notice of Proposed Rulemaking (NPRM) that was circulated to the Office of Management and Budget for review (pursuant to Executive Order 12866) and to federal executive branch agencies for comment (pursuant to Executive Order 12067). The NPRM was subsequently published in the **Federal Register** on September 23, 2009 (74 FR 48431), for a sixty-day public comment period. The NPRM sought comment on the proposed regulations, which:

—Provided that the definition of "disability" shall be interpreted broadly;

—Revised that portion of the regulations defining the term "substantially limits" as directed in the Amendments Act by providing that a limitation need not "significantly" or "severely" restrict a major life activity in order to meet the standard, and by deleting reference to the terms "condition, manner, or duration" under which a major life activity is performed, in order to effectuate Congress's clear instruction that "substantially limits" is not to be misconstrued to require the "level of limitation, and the intensity of focus" applied by the Supreme Court in *Toyota Motor Mfg., Ky., Inc.* v. *Williams,* 534 U.S. 184 (2002) (2008 Senate Statement of Managers at 6);

—Expanded the definition of "major life activities" through two non-exhaustive lists:

—The first list included activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working, some of which the EEOC previously identified in regulations and sub-regulatory guidance, and some of which Congress additionally included in the Amendments Act;

—The second list included major bodily functions, such as functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions, many of which were included by Congress in the Amendments Act, and some of which were added by the Commission as further illustrative examples;

—Provided that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a "disability";

—Provided that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;

—Provided that the definition of "regarded as" be changed so that it would no longer require a showing that an employer perceived the individual to be substantially limited in a major life activity, and so that an applicant or employee who is subjected to an action prohibited by the ADA (e.g., failure to hire, denial of promotion, or termination) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is both "transitory and minor";

—Provided that actions based on an impairment include actions based on

symptoms of, or mitigating measures used for, an impairment;
—Provided that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and,
—Provided that qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision shall not be used unless shown to be job related for the position in question and consistent with business necessity.

To effectuate these changes, the NPRM proposed revisions to the following sections of 29 CFR part 1630 and the accompanying provisions of the appendix: § 1630.1 (added (c)(3) and (4)); § 1630.2(g)(3) (added cross-reference to 1630.2(l)); § 1630.2 (h) (replaced the term "mental retardation" with the term "intellectual disability"); § 1630.2(i) (revised definition of "major life activities" and provided examples); § 1630.2(j) (revised definition of "substantially limits" and provided examples); § 1630.2(k) (provided examples of "record of" a disability); § 1630.2(l) (revised definition of "regarded as" having a disability and provided examples); § 1630.2(m) (revised terminology); § 1630.2(o) (added (o)(4) stating that reasonable accommodations are not available to individuals who are only "regarded as" individuals with disabilities); § 1630.4 (renumbered section and added § 1630.4(b) regarding "claims of no disability"); § 1630.9 (revised terminology in § 1630.9(c) and added § 1630.9(e) stating that an individual covered only under the "regarded as" definition of disability is not entitled to reasonable accommodation); § 1630.10 (revised to add provision on qualification standards and tests related to uncorrected vision); and § 1630.16(a) (revised terminology).

These regulatory revisions were explained in the proposed revised part 1630 appendix containing the interpretive guidance. The Commission originally issued the interpretive guidance concurrent with the original part 1630 ADA regulations in order to ensure that individuals with disabilities understand their rights under these regulations and to facilitate and encourage compliance by covered entities. The appendix addresses the major provisions of the regulations and explains the major concepts. The appendix as revised will be issued and published in the *Code of Federal Regulations* with the final regulations. It will continue to represent the Commission's interpretation of the issues discussed in the regulations, and the Commission will be guided by it when resolving charges of employment discrimination under the ADA.

Summary and Response to Comments

The Commission received well over 600 public comments on the NPRM, including, among others: 5 comments from federal agencies that had not previously commented during the inter-agency review process under E.O. 12067 or the Office of Management and Budget review process under E.O. 12866; 61 comments from civil rights groups, disability rights groups, health care provider groups, and attorneys, attorney associations, and law firms on their behalf; 48 comments from employer associations and industry groups, as well as attorneys, attorney associations, and law firms on their behalf; 4 comments from state governments, agencies, or commissions, including one from a state legislator; and 536 comments from individuals, including individuals with disabilities and their family members or other advocates. Each of these comments was reviewed and considered in the preparation of this final rule. The Commission exercised its discretion to consider untimely comments that were received by December 15, 2009, three weeks following the close of the comment period, and these tallies include 8 such comments that were received. The comments from individuals included 454 comments that contained similar or identical content filed by or on behalf of individuals with learning disabilities and/or attention-deficit/hyperactivity disorder (AD/HD), although many of these comments also included an additional discussion of individual experiences.

Consistent with EO 13563, this rule was developed through a process that involved public participation. The proposed regulations, including the preliminary regulatory impact and regulatory flexibility analyses, were available on the Internet for a 60-day public-comment period, and during that time the Commission also held a series of forums in order to promote the open exchange of information. Specifically, the EEOC and the U.S. Department of Justice Civil Rights Division also held four "Town Hall Listening Sessions" in Oakland, California on October 26, 2009; in Philadelphia, Pennsylvania on October 30, 2009, in Chicago, Illinois on November 17, 2009, and in New Orleans, Louisiana on November 20, 2009. During these sessions, Commissioners heard in-person and telephonic comments on the NPRM from members of the public on both a pre-registration and walk-in basis. More than 60 individuals and representatives of the business/employer community and the disability advocacy community from across the country offered comments at these four sessions, a number of whom additionally submitted written comments.

All of the comments on the NPRM received electronically or in hard copy during the public comment period, including comments from the Town Hall Listening Sessions, may be reviewed at the United States Government's electronic docket system, *http://www.regulations.gov,* under docket number EEOC–2009–0012. In most instances, this preamble addresses the comments by issue rather than by referring to specific commenters or comments by name.

In general, informed by questions raised in the public comments, the Commission throughout the final regulations has refined language used in the NPRM to clarify its intended meaning, and has also streamlined the organization of the regulation to make it simpler to understand. As part of these revisions, many examples were moved to the appendix from the regulations, and NPRM language repeatedly stating that no negative implications should be drawn from the citation to particular impairments in the regulations and appendix was deleted as superfluous, given that the language used makes clear that impairments are referenced merely as examples. More significant or specific substantive revisions are reviewed below, by provision.

The Commission declines to make changes requested by some commenters to portions of the regulations and the appendix that we consider to be unaffected by the ADA Amendments Act of 2008, such as to 29 CFR 630.3 (exceptions to definitions), 29 CFR 1630.2(r) (concerning the "direct threat" defense), 29 CFR 1630.8 (association with an individual with a disability), and portions of the appendix that discuss the obligations of employers and individuals during the interactive process following a request for reasonable accommodation. The Commission has also declined to make revisions requested by commenters relating to health insurance, disability and other benefit programs, and the interaction of the ADA, the Family and Medical Leave Act (FMLA), and workers' compensation laws. The Commission believes the proposed regulatory language was clear with respect to any application it may have to these issues.

Terminology

The Commission has made changes to some of the terminology used in the final regulations and the appendix. For example, an organization that represents individuals who have HIV and AIDS asked that the regulations refer to "HIV infection," instead of "HIV and AIDS." An organization representing persons with epilepsy sought deletion or clarification of references to "seizure disorders" and "seizure disorders other than epilepsy," noting that "people who have chronic seizures have epilepsy, unless the seizure is due to [another underlying impairment]." This revision was not necessary since revisions to the regulations resulted in deletion of NPRM § 1630.2(j)(5)(iii) in which the reference to "seizure disorder" appeared. In addition, the Commission made further revisions to conform the regulations and appendix to the statutory deletion of the term "qualified individual with a disability" throughout most of title I of the ADA. The Commission did not make all changes in terminology suggested by commenters, for example declining to substitute the term "challenges" for the terms "disability" and "impairment," because this would have been contrary to the well-established terminology that Congress deliberately used in the ADA Amendments Act.

Section 1630.2(g): Disability

This section of the regulations includes the basic three-part definition of the term "disability" that was preserved but redefined in the ADA Amendments Act. For clarity, the Commission has referred to the first prong as "actual disability," to distinguish it from the second prong ("record of") and the third prong ("regarded as"). The term "actual disability" is used as short-hand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of disability. The terminology selected is for ease of reference and is not intended to suggest that individuals with a disability under the first prong otherwise have any greater rights under the ADA than individuals whose impairments are covered under the "record of" or "regarded as" prongs, other than the restriction created by the Amendments Act that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

Although an individual may be covered under one or more of these three prongs of the definition, it appeared from comments that the NPRM did not make explicit enough that the "regarded as" prong should be the primary means of establishing coverage in ADA cases that do not involve reasonable accommodation, and that consideration of coverage under the first and second prongs will generally not be necessary except in situations where an individual needs a reasonable accommodation. Accordingly, in the final regulations, § 1630.2(g) and (j) and their accompanying interpretive guidance specifically state that cases in which an applicant or employee does not require reasonable accommodation can be evaluated solely under the "regarded as" prong of the definition of "disability."

Section 1630.2(h): Impairment

Some comments pointed out that the list of body systems in the definition of "impairment" in § 1630.2(h) of the NPRM was not consistent with the description of "major bodily functions" in § 1630.2(i)(1)(ii) that was added due to the inclusion in the Amendments Act of "major bodily functions" as major life activities. In response, the Commission has added references to the immune system and the circulatory system to § 1630.2(h), because both are mentioned in the definition of "major bodily functions" in § 1630.2(i)(1)(ii). Other apparent discrepancies between the definition of "impairment" and the list of "major bodily functions" can be accounted for by the fact that major bodily functions are sometimes defined in terms of the operation of an organ within a body system. For example, functions of the brain (identified in § 1630.2(i)) are part of the neurological system and may affect other body systems as well. The bladder, which is part of the genitourinary system, is already referenced in § 1630.2(h). In response to comments, the Commission has also made clear that the list of body systems in § 1630.2(h)(1) is non-exhaustive, just as the list of mental impairments in § 1630.2(h)(2) has always made clear with respect to its examples. The Commission has also amended the final appendix to § 1630.2(h) to conform to these revisions.

The Commission received several comments seeking explanation of whether pregnancy-related impairments may be disabilities. To respond to these inquiries, the final appendix states that although pregnancy itself is not an impairment, and therefore is not a disability, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a "record of" a substantially limiting impairment, or may be covered under the "regarded as" prong if it is the basis for a prohibited employment action and is not "transitory and minor."

Section 1630.2(i): Major Life Activities

A number of comments, mostly on behalf of individuals with disabilities, suggested that the Commission add more examples of major life activities, particularly to the first non-exhaustive list, including but not limited to typing, keyboarding, writing, driving, engaging in sexual relations, and applying fine motor coordination. Other suggestions ranged widely, including everything from squatting and getting around inside the home to activities such as farming, ranching, composting, operating water craft, and maintaining an independent septic tank.

The Commission does not believe that it is necessary to decide whether each of the many other suggested examples is in fact a major life activity, but we emphasize again that the statutory and regulatory examples are non-exhaustive. We also note that some of the activities that commenters asked to be added may be part of listed major life activities, or may be unnecessary to establishing that someone is an individual with a disability in light of other changes to the definition of "disability" resulting from the Amendments Act.

Some employer groups suggested that major life activities other than those specifically listed in the statute be deleted, claiming that the EEOC had exceeded its authority by including additional ones. Specific concerns were raised about the inclusion of "interacting with others" on behalf of employers who believed that recognizing this major life activity would limit the ability to discipline employees for misconduct.

Congress expressly provided that the two lists of examples of major life activities are non-exhaustive, and the Commission is authorized to recognize additional examples of major life activities. The final regulations retain "interacting with others" as an example of a major life activity, consistent with the Commission's long-standing position in existing enforcement guidance.

One disability rights group also asked the Commission to delete the long-standing definition of major life activities as those basic activities that most people in the general population "can perform with little or no difficulty" and substitute a lower standard. Upon consideration, we think that, while the ability of most people to perform the

activity is relevant when evaluating whether an individual is substantially limited, it is not relevant to whether the activity in question is a major life activity. Consequently, the final rule, like the statute itself, simply provides examples of activities that qualify as "major life activities" because of their relative importance.

Finally, some commenters asked that the final rule state explicitly that the standard from *Toyota Motor Mfg., Ky., Inc.* v. *Williams,* 534 U.S. 184 (2002), for determining whether an activity qualifies as a major life activity—that it be of "central importance to most people's daily lives"—no longer applies after the ADA Amendments Act. The Commission agrees and has added language to this effect in the final regulations.

We have provided this clarification in the regulations, and, in the appendix, we explain what this means with respect to, for example, activities such as lifting and performing manual tasks. The final regulations also state that in determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability, and provide that whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

Section 1630.2(j): Substantially Limits

Overview

Although much of § 1630.2(j) of the final regulations is substantively the same as § 1630.2(j) of the NPRM, the structure of the section is somewhat different. Many of the examples that were in the text of the proposed rule have been relocated to the appendix. Section 1630.2(j)(1) in the final regulations lists nine "rules of construction" that are based on the statute itself and are essentially consistent with the content of §§ 1630.2(j)(1) through (4) of the NPRM. Section 1630.2(j)(2) in the final regulations makes clear that the question of whether an individual is substantially limited in a major life activity is not relevant to coverage under the "regarded as" prong. Section 1630.2(j)(3)(ii) in the final regulations notes that some impairments will, given their inherent nature, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward. In addition, § 1630.2(j)(3)(iii) includes examples of impairments that should easily be found to substantially limit a major life activity. These are the same impairments that were included as examples in § 1630.2(j)(5) of the NPRM. In response to comments (discussed below), § 1630.2(j)(4) discusses the concepts of "condition, manner, or duration" that may be useful in evaluating whether an individual is substantially limited in a major life activity in some cases. Section 1630.2(j)(5) in the final regulations offers examples of mitigating measures, and § 1630.2(j)(6) contains the definition of "ordinary eyeglasses or contact lenses." The discussion of how to determine whether someone is substantially limited in working in those rare cases where this may be at issue now appears in the appendix rather than the regulations, and has been revised as explained below. Finally, NPRM § 1630.2(j)(6), describing certain impairments that may or may not meet the definition of "substantially limits," and NPRM § 1630.2(j)(8), describing certain impairments that usually will not meet the definition of "substantially limits," have been deleted in favor of an affirmative statement in both the final regulations and the appendix that not every impairment will constitute a disability within the meaning of § 1630.2(j) (defining "substantially limits").

Meaning of "Substantially Limits"

Many commenters asked that the Commission more affirmatively define "substantially limits." Suggestions for further definitions of "substantial" included, among others, "ample," "considerable," "more than moderately restricts," "discernable degree of difficulty," "makes achievement of the activity difficult," and "causes a material difference from the ordinary processes by which most people in the general population perform the major life activity." The Commission has not added terms to quantify "substantially limits" in the final regulations. We believe this is consistent with Congress's express rejection of such an approach in the statute, which instead simply indicates that "substantially limits" is a lower threshold than "prevents" or "severely or significantly restricts," as prior Supreme Court decisions and the EEOC regulations had defined the term. The Commission ultimately concluded that a new definition would inexorably lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress. Therefore, following Congress's approach, the final regulations provide greater clarity and guidance by providing nine rules of construction that must be applied in determining whether an impairment substantially limits (or substantially limited) a major life activity. These rules are based on the provisions in the Amendments Act, and will guide interpretation of the term "substantially limits."

Comparison to "Most People"

The regulations say that in determining whether an individual has a substantially limiting impairment, the individual's ability to perform a major life activity should be compared to that of "most people in the general population." Both employer groups and organizations writing on behalf of individuals with disabilities said that the concept of "intra-individual" differences (disparities between an individual's aptitude and expected achievement versus the individual's actual achievement) that appears in the discussion of learning disabilities in the NPRM's appendix is inconsistent with the rule that comparison of an individual's limitations is always made by reference to most people. However, the Commission also received some comments from disability groups requesting that, in the assessment of whether an individual is substantially limited, the regulations allow for comparisons between an individual's experiences with and without an impairment, and comparisons between an individual and her peers—in addition to comparisons of the individual to "most people."

The Commission agrees that the reference to "intra-individual" differences, without further explanation, may be misconstrued as at odds with the agency's view that comparisons are always made between an individual and most people. Therefore, the Commission has added language to the discussion of learning disabilities in the appendix, in § 1630.2(j)(1)(v), clarifying that although learning disabilities may be diagnosed in terms of the difference between an individual's aptitude and actual versus expected achievement, a comparison to "most people" can nevertheless be made. Moreover, the appendix provides examples of ameliorative effects of mitigating measures that will be disregarded in making this comparison, and notes legislative history rejecting the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.

Relevance of Duration of an Impairment's Limitations in Assessing "Substantially Limits"

Many commenters expressed their view that the NPRM failed to clarify, or created confusion regarding, how long an impairment's limitation(s) must last in order for the impairment to be considered substantially limiting. Some thought the Commission was saying that impairments that are "transitory and minor" under the third prong can nevertheless be covered under the first or second prong of the definition of "disability." A few comments suggested that the Commission adopt a minimum duration of six months for an impairment to be considered substantially limiting, but more commenters simply wanted the Commission to specify whether, and if so what, duration is necessary to establish a substantial limitation.

In enacting the ADA Amendments Act, Congress statutorily defined "transitory" for purposes of the "transitory and minor" exception to newly-defined "regarded as" coverage as "an impairment with an actual or expected duration of 6 months or less," but did not include that limitation with respect to the first or second prong in the statute. 42 U.S.C. 12102(3)(B). Moreover, prior to the Amendments Act, it had been the Commission's long-standing position that if an impairment substantially limits, is expected to substantially limit, or previously substantially limited a major life activity for at least several months, it could be a disability under § 1630.2(g)(1) or a record of a disability under § 1630.2(g)(2). *See, e.g., EEOC Compliance Manual Section 902,* "*Definition of the Term Disability,*" § 902(4)(d) (originally issued in 1995), *http://www.eeoc.gov/policy/docs/902cm.html; EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (1997), *http://www.eeoc.gov/policy/docs/psych.html.* A six-month durational requirement would represent a more stringent standard than the EEOC had previously required, not the lower standard Congress sought to bring about through enactment of the ADA Amendments Act. Therefore, the Commission declines to provide for a six-month durational minimum for showing disability under the first prong or past history of a disability under the second prong.

Additionally, the Commission has not in the final regulations specified any specific minimum duration that an impairment's effects must last in order to be deemed substantially limiting. This accurately reflects the intent of the ADA Amendments Act, as conveyed in the joint statement submitted by co-sponsors Hoyer and Sensenbrenner. That statement explains that the duration of an impairment is only one factor in determining whether the impairment substantially limits a major life activity, and impairments that last only a short period of time may be covered if sufficiently severe. *See* Joint Hoyer-Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 at 5.

Mitigating Measures

The final regulations retain, as one of the nine rules of construction, the statutory requirement that mitigating measures, other than ordinary eyeglasses or contact lenses, must not be considered in determining whether an individual has a disability. Several organizations representing persons with disabilities suggested adding more examples of mitigating measures, including: job coaches, service animals, personal assistants, psychotherapy and other "human-mediated" treatments, and some specific devices used by persons who have hearing and/or vision impairments.

In the final regulations, the Commission has added psychotherapy, behavioral therapy, and physical therapy. In the appendix, the Commission has explained why other suggested examples were not included, noting first that the list is non-exhaustive. Some suggested additional examples of mitigating measures are also forms of reasonable accommodation, such as the right to use a service animal or job coach in the workplace. The Commission emphasizes that its decision not to list certain mitigating measures does not create any inference that individuals who use these measures would not meet the definition of "disability." For example, as the appendix points out, someone who uses a service animal will still be able to demonstrate a substantial limitation in major life activities such as *see*ing, hearing, walking, or performing manual tasks (depending on the reason the service animal is used).

Several employer groups asked the Commission to identify legal consequences that follow from an individual's failure to use mitigating measures that would alleviate the effects of an impairment. For example, some commenters suggested that such individuals would not be entitled to reasonable accommodation. The Commission has included a statement in the appendix pointing out that the determination of whether or not an individual's impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations imposed by the impairment on the individual, and any negative (non-ameliorative) effects of mitigating measures used, determine whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures in fact used may not be considered in determining if the impairment is substantially limiting. However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and non-ameliorative effects, may be relevant in determining whether the individual is qualified or poses a direct threat to safety.

Commenters also asked for a clear statement regarding whether the non-ameliorative effects of mitigating measures may be considered in determining whether an impairment is substantially limiting. Some also asked for guidance regarding whether the positive and negative effects of mitigating measures can be taken into account when determining whether an individual needs a reasonable accommodation.

The final regulations affirmatively state that non-ameliorative effects may be considered in determining whether an impairment is substantially limiting. The appendix clarifies, however, that in many instances it will not be necessary to consider the non-ameliorative effects of mitigating measures to determine that an impairment is substantially limiting. For example, whether diabetes is substantially limiting will most often be analyzed by considering its effects on endocrine functions in the absence of mitigating measures such as medications or insulin, rather than by considering the measures someone must undertake to keep the condition under control (such as frequent blood sugar and insulin monitoring and rigid adherence to dietary restrictions). Likewise, whether someone with kidney disease has a disability will generally be assessed by considering limitations on kidney and bladder functions that would occur without dialysis rather than by reference to the burdens that dialysis treatment imposes. The

appendix also states that both the ameliorative and non-ameliorative effects of mitigating measures may be relevant in deciding non-coverage issues, such as whether someone is qualified, needs a reasonable accommodation, or poses a direct threat.

Some commenters also asked for a more precise definition than the statutory definition of the term "ordinary eyeglasses or contact lenses." For example, one commenter proposed that "fully corrected" means visual acuity of 20/20. Another commenter representing human resources professionals from large employers suggested a rule that any glasses that can be obtained from a "walk-in retail eye clinic" would be considered ordinary eyeglasses or contact lenses, including bi-focal and multi-focal lenses. An organization representing individuals who are blind or have vision impairments wanted us to say that glasses that enhance or augment a visual image but that may resemble ordinary eyeglasses should not be considered when determining whether someone is substantially limited in *see*ing.

The final regulations do not adopt any of these approaches. The Commission believes that the NPRM was clear that the distinction between "ordinary eyeglasses or contact lenses" on the one hand and "low vision devices" on the other is how they function, not how they look or where they were purchased. Whether lenses fully correct visual acuity or eliminate refractive error is best determined on the basis of current and objective medical evidence. The Commission emphasizes, however, that even if such evidence indicates that visual acuity is fully corrected or that refractive error is eliminated, this means only that the effect of the eyeglasses or contact lenses shall be considered in determining whether the individual is substantially limited in *see*ing, not that the individual is automatically excluded from the law's protection.

Numerous comments were made on the proposed inclusion of surgical interventions as mitigating measures. Many asked the Commission to delete the reference to surgical interventions entirely; others wanted us to delete the qualification that surgical interventions that permanently eliminate an impairment are not considered mitigating measures. Some comments proposed language that would exclude from mitigating measures those surgical interventions that "substantially correct" an impairment. Some comments endorsed the definition as written, but suggested we provide examples of surgical interventions that would permanently eliminate an impairment.

The Commission has eliminated "surgical interventions, except for those that permanently eliminate an impairment" as an example of a mitigating measure in the regulation, given the confusion evidenced in the comments about how this example would apply. Determinations about whether surgical interventions should be taken into consideration when assessing whether an individual has a disability are better assessed on a case-by-case basis.

Finally, some commenters asked the Commission to address generally what type of evidence would be sufficient to establish whether an impairment would be substantially limiting without the ameliorative effects of a mitigating measure that the individual uses. In response to such comments, the Commission has added to the appendix a statement that such evidence could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types.

Impairments That Are Episodic or in Remission

One commenter suggested that the regulatory provision on impairments that are "episodic or in remission" should be clarified to eliminate from coverage progressive impairments such as Parkinson's Disease on the ground that they would not be disabilities in the "early stages." The Commission declines to make this revision, recognizing that because "major bodily functions" are themselves "major life activities," Parkinson's Disease even in the "early stages" can substantially limit major life activities, such as brain or neurological functions. Some employer groups also asked the Commission to provide further guidance on distinguishing between episodic conditions and those that may, but do not necessarily, become episodic, as indicated by subsequent "flare ups." As the Commission has indicated in the regulations and appendix provisions on mitigating measures, these questions may in some cases be resolved by looking at evidence such as limitations experienced prior to the use of the mitigating measure or the expected course of a disorder absent mitigating measures. However, recognizing that there may be various ways that an impairment may be shown to be episodic, we decline to address such evidentiary issues with any greater specificity in the rulemaking.

Predictable Assessments

Section 1630.2(j)(5) of the NPRM provided examples of impairments that would "consistently meet the definition of disability" in light of the statutory changes to the definition of "substantially limits." Arguing that § 1630.2(j)(5) of the NPRM created a "per se list" of disabilities, many commenters, particularly representatives of employers and employer organizations, asked for the section's deletion, so that all impairments would be subject to the same individualized assessment. Equally strong support for this section was expressed by organizations representing individuals with disabilities, some of whom suggested that impairments such as learning disabilities, AD/HD, panic and anxiety disorder, hearing impairments requiring use of a hearing aid or cochlear implant, mobility impairments requiring the use of canes, crutches, or walkers, and multiple chemical sensitivity be added to the list of examples in NPRM § 1630.2(j)(5). Many of the commenters who expressed support for this section also asked that NPRM § 1630.2(j)(6) (concerning impairments that may be substantially limiting for some individuals but not for others) be deleted, as it *see*med to suggest that these impairments were of lesser significance than those in NPRM § (j)(5).

In response to these concerns, the Commission has revised this portion of the regulations to make clear that the analysis of whether the types of impairments discussed in this section (now § 1630.2(j)(3)) substantially limit a major life activity does not depart from the hallmark individualized assessment. Rather, applying the various principles and rules of construction concerning the definition of disability, the individualized assessment of some types of impairments will, in virtually all cases, result in a finding that the impairment substantially limits a major life activity, and thus the necessary individualized assessment of these types of impairments should be particularly simple and straightforward. The regulations also provide examples of impairments that should easily be found to substantially limit a major life activity.

The Commission has also deleted § 1630.2(j)(6) that appeared in the NPRM. However, the Commission did not agree with those commenters who thought it was necessary to include in § 1630.2(j)(3) of the final regulations all the impairments that were the subject of

examples in NPRM § 1630.2(j)(6), or that other impairments not previously mentioned in either section should be included in (j)(3). The Commission has therefore declined to list additional impairments in § 1630.2(j)(3) of the final regulations. The regulations as written permit courts to conclude that any of the impairments mentioned in § 1630.2(j)(6) of the NPRM or other impairments "substantially limit" a major life activity.

Section 1630.2(j)(8) of the NPRM provided examples of impairments that "are usually not disabilities." Some commenters asked for clarity concerning whether, and under what circumstances, any of the impairments included in the examples might constitute disabilities under the first or second prong, or asked that the section title be revised by replacing "usually" with "consistently." Other commenters asked whether the listed impairments would be considered "transitory and minor" for purposes of the "regarded as" definition, or wanted clarification that the listed impairments were not necessarily "transitory and minor" in all instances. A few organizations recommended deletion of certain impairments from the list of examples, such as a broken bone that is expected to heal completely and a sprained joint. In the final regulations, the Commission deleted this section, again due to the confusion it presented.

Condition, Manner, or Duration

Comments from both employers and groups writing on behalf of individuals with disabilities proposed that the Commission continue to use the terms "condition, manner, or duration," found in the appendix accompanying EEOC's 1991 ADA regulations, as part of the definition of "substantially limits." Many employer groups seemed to think the concepts were relevant in all cases; disability groups generally thought they could be relevant in some cases, but do not need to be considered rigidly in all instances.

In response, the Commission has inserted the terms "condition, manner, or duration" as concepts that may be relevant in certain cases to show how an individual is substantially limited, although the concepts may often be unnecessary to conduct the analysis of whether an impairment "substantially limits" a major life activity. The Commission has also included language to illustrate what these terms mean, borrowing from the examples in § 1630.2(j)(6) of the NPRM, which has been deleted from the final regulations. For example, "condition, manner, or duration" might mean the difficulty or effort required to perform a major life activity, pain experienced when performing a major life activity, the length of time a major life activity can be performed, or the way that an impairment affects the operation of a major bodily function.

Substantially Limited in Working

The proposed rule had replaced the concepts of a "class" or "broad range" of jobs from the 1991 regulations defining substantial limitation in working with the concept of a "type of work." A number of commenters asked the Commission to restore the concepts of a class or broad range of jobs. Many other comments supported the "type of work" approach taken in the NPRM. Some supporters of the "type of work" approach sought additional examples of types of work (e.g., jobs requiring working around chemical fumes and dust, or jobs that require keyboarding or typing), and requested that certain statements in the appendix be moved into the regulations.

In issuing the final regulations, the Commission has moved the discussion of how to analyze the major life activity of working to the appendix, since no other major life activity is singled out in the regulations for elaboration. Rather than attempting to articulate a new "type of work" standard that may cause unnecessary confusion, the Commission has retained the original part 1630 "class or broad range of jobs" formulation in the appendix, although we explain how this standard must be applied differently than it was prior to the Amendments Act. We also provide a more streamlined discussion and examples of the standard to comply with Congress's exhortation in the Amendments Act to favor broad coverage and disfavor extensive analysis (Section 2(b)(5) (Findings and Purposes)).

Section 1630.2(k): Record of a Disability

Some commenters asked the Commission to revise this section to state that a "record" simply means a past history of a substantially limiting impairment, not necessarily that the past history has to be established by a specific document. Although some commenters sought deletion of the statement (in §§ 1630.2(o) and 1630.9) that individuals covered under the "record of" prong may get reasonable accommodations, others agreed that the language of the Amendments Act is consistent with the Commission's long-held position and wanted examples of when someone with a history of a substantially limiting impairment would need accommodation. Some comments recommended that the Commission make the point that a person with cancer (identified in one of the NPRM examples) could also be covered under the first prong.

The final regulations streamline this section by moving the examples of "record of" disabilities to the appendix. The Commission has also added a paragraph to this section to make clear that reasonable accommodations may be required for individuals with a record of an impairment that substantially limits a major life activity, and has provided an example of when a reasonable accommodation may be required. The Commission has not added language to state explicitly that the past history of an impairment need not be reflected in a specific document; we believe that this is clear in current law, and this point is reflected in the appendix.

Section 1630.2(l): Regarded As

Many comments revealed confusion as to both the new statutory and proposed regulatory definition of the "regarded as" prong in general, and the "transitory and minor" exception in particular. Other comments simply requested clarification of the "transitory and minor" exception. The final regulations provide further clarification and explanation of the scope of "regarded as" coverage.

The final regulations and appendix make clear that even if coverage is established under the "regarded as" prong, the individual must still establish the other elements of the claim (e.g., that he or she is qualified) and the employer may raise any available defenses. In other words, a finding of "regarded as" coverage is not itself a finding of liability.

The final regulations and appendix also explain that the fact that the "regarded as" prong requires proof of causation in order to show that a person is covered does not mean that proving a claim based on "regarded as" coverage is complex. As noted in the appendix, while a person must show, both for coverage under the "regarded as" prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, a person proceeding under the "regarded as" prong may demonstrate a violation of the ADA by meeting the burden of proving that: (1) He or she has an impairment or was perceived by a covered entity to have an impairment, and (2) the covered entity discriminated against him or her because of the impairment in violation of the statute. Finally, the final regulations make clear that an employer

may show that an impairment is "transitory and minor" as a defense to "regarded as" coverage. 29 CFR 1630.15(f).

The final regulations and appendix, at § 1630.2(j), also make clear that the concepts of "major life activities" and "substantially limits" (relevant when evaluating coverage under the first or second prong of the definition of "disability") are not relevant in evaluating coverage under the "regarded as" prong. Thus, in order to have regarded an individual as having a disability, a covered entity need not have considered whether a major life activity was substantially limited, and an individual claiming to have been regarded as disabled need not demonstrate that he or she is substantially limited in a major life activity.

Concerning specific issues with which commenters disagreed, some criticized examples of impairments that the Commission said would be considered transitory and minor—specifically, a broken leg that heals normally and a sprained wrist that limits someone's ability to type for three weeks. These commenters claimed that these impairments, though transitory, are not minor. Consistent with its effort to streamline the text of the final rule, the Commission has deleted examples that appeared in the NPRM, illustrating how the "transitory and minor" exception applies. However, the appendix to § 1630.2(l) as well as the defense as set forth in § 1630.15(f) include examples involving an employer that takes a prohibited action against an employee with bipolar disorder that the employer claims it believed was transitory and minor, and an employer that takes a prohibited action against an individual with a transitory and minor hand wound that the employer believes is symptomatic of HIV infection. These examples are intended to illustrate the point that whether an actual or perceived impairment is transitory and minor is to be assessed objectively.

In response to a specific request in the preamble to the NPRM, the Commission received many comments about the position in the proposed rule that actions taken because of an impairment's symptoms or because of the use of mitigating measures constitute actions taken because of an impairment under the "regarded as" prong. Individuals with disabilities and organizations representing them for the most part endorsed the position, noting that the symptoms of, and mitigating measures used for, an impairment are part and parcel of the impairment itself, and that this provision is necessary to prevent employers from evading "regarded as" coverage by asserting that the challenged employment action was taken because of the symptom or medication, not the impairment, even when it knew of the connection between the two. Others asked the Commission to clarify that this interpretation applied even where the employer had no knowledge of the connection between the impairment and the symptom or mitigating measure. However, employers and organizations representing employers asked that this language be deleted in its entirety. They were particularly concerned that an employer could be held liable under the ADA for disciplining an employee for violating a workplace rule, where the violation resulted from an underlying impairment of which the employer was unaware.

In light of the complexity of this issue, the Commission believes that it requires a more comprehensive treatment than is possible in this regulation. Therefore, the final regulations do not explicitly address the issue of discrimination based on symptoms or mitigating measures under the "regarded as" prong. No negative inference concerning the merits of this issue should be drawn from this deletion. The Commission's existing position, as expressed in its policy guidance, court filings, and other regulatory and sub-regulatory documents, remains unchanged.

Finally, because the new law makes clear that an employer regards an individual as disabled if it takes a prohibited action against the individual because of an actual or perceived impairment that was not "transitory and minor," whether or not myths, fears, or stereotypes about disability motivated the employer's decision, the Commission has deleted certain language about myths, fears, and stereotypes from the 1991 version of this section of the appendix that might otherwise be misconstrued when applying the new ADA Amendments Act "regarded as" standard.

Issues Concerning Evidence of Disability

The Commission also received comments from both employer groups and organizations writing on behalf of people with disabilities asking that the regulations address what kind of information an employer may request about the nature of an impairment (e.g., during the interactive process in response to a request for reasonable accommodation), and the amount and type of evidence that would be sufficient in litigation to establish the existence of a disability. Some employer groups, for example, asked the Commission to emphasize that a person requesting a reasonable accommodation must participate in the interactive process by providing appropriate documentation where the disability and need for accommodation are not obvious or already known. Organizations writing on behalf of persons with disabilities asked the Commission to state in the regulations that a diagnosis of one of the impairments in NPRM § 1630.2(j)(5) is sufficient to establish the existence of a disability; that the Commission should emphasize, even more so than in the NPRM, that proving disability is not an onerous burden; that in many instances the question of whether a plaintiff in litigation has a disability should be the subject of stipulation by the parties; and that an impairment's effects on major bodily functions should be considered before its effects on other major life activities in determining whether an impairment substantially limits a major life activity. Both employer groups and organizations submitting comments on behalf of individuals with disabilities asked the Commission to clarify the statement in the NPRM that objective scientific and medical evidence can be used to establish the existence of a disability.

The Commission believes that most of these proposed changes regarding evidentiary matters are either unnecessary or not appropriate to address in the regulations. For example, the Commission has stated repeatedly in numerous policy documents and technical assistance publications that individuals requesting accommodation must provide certain supporting medical information if the employer requests it, and that the employer is permitted to do so if the disability and/or need for accommodation are not obvious or already known. The ADA Amendments Act does not alter this requirement. The Commission also does not think it appropriate to comment in the regulations or the appendix on how ADA litigation should be conducted, such as whether parties should stipulate to certain facts or whether use of certain major life activities by litigants or courts should be preferred.

However, based on the comments received, the Commission has concluded that clarification of language in the NPRM regarding use of scientific and medical evidence is warranted. The final regulations, at § 1630.2(j)(1)(v), state that the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the

general population usually will not require scientific, medical, or statistical analysis. However, the final regulations also state that this provision is not intended to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate. In addition, the appendix discusses evidence that may show that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures.

Section 1630.2(m): Definition of "*Qualified*"

The final regulations and accompanying appendix make slight changes to this section to eliminate use of the term "qualified individual with a disability," consistent with the ADA Amendments Act's elimination of that term throughout most of title I of the ADA.

Section 1630.2(o): Reasonable Accommodation

The Commission has added a new provision (o)(4) in § 1630.2(o) of the final regulations, providing that a covered entity is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (§ 1630.2(g)(1)(iii)). The Commission has also made changes to this section to eliminate use of the term "qualified individual with a disability," consistent with the ADA Amendments Act's elimination of that term throughout most of title I of the ADA.

Section 1630.4: Discrimination Prohibited

The Commission has reorganized § 1630.4 of the final regulations, adding a new provision in § 1630.4(b) to provide, as stated in the Amendments Act, that nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation that was denied to an individual without a disability.

Section 1630.9: Not Making Reasonable Accommodation

The final regulations include a technical revision to § 1630.9(c) to conform citations therein to the amended ADA. In addition, a new § 1630.9(e) has been added stating again that a covered entity is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (§ 1630.2(g)(1)(iii)). In addition, the appendix to § 1630.9 is amended to revise references to the term "qualified individual with a disability" in order to conform to the statutory changes made by the Amendments Act.

Section 1630.10: Qualification Standards, Tests, and Other Selection Criteria.

The final regulations include a new § 1630.10(b) explaining the amended ADA provision regarding qualification standards and tests related to uncorrected vision.

Section 1630.15: Defenses

The final regulations include a new § 1630.15(f), and accompanying appendix section, explaining the "transitory and minor" defense to a charge of discrimination where coverage would be shown solely under the "regarded as" prong of the definition.

Section 1630.16: Specific Activities Permitted

The final regulations include terminology revisions to §§ 1630.16(a) and (f) to conform to the statutory deletion of the term "qualified individual with a disability" in most parts of title I.

Regulatory Procedures

Final Regulatory Impact Analysis

Executive Orders 12866 and 13563

The final rule, which amends 29 CFR Part 1630 and the accompanying interpretive guidance, has been drafted and reviewed in accordance with EO 12866, 58 FR 51735 (Sept. 30, 1993), Principles of Regulations, and EO 13563, 76 FR 3821, (Jan. 21, 2011), Improving Regulation and Regulatory Review. The rule is necessary to bring the Commission's prior regulations into compliance with the ADA Amendments Act of 2008, which became effective January 1, 2009, and explicitly invalidated certain provisions of the prior regulations. The new final regulations and appendix are intended to add to the predictability and consistency of judicial interpretations and executive enforcement of the ADA as now amended by Congress.

The final regulatory impact analysis estimates the annual costs of the rule to be in the range of $60 million to $183 million, and estimates that the benefits will be significant. While those benefits cannot be fully quantified and monetized at this time, the Commission concludes that consistent with EO 13563, the benefits (quantitative and qualitative) will justify the costs. Also consistent with EO 13563, we have attempted to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Commission notes, however, that the rule and the underlying statute create many important benefits that, in the words of EO 13563, stem from "values that are difficult or impossible to quantify." Consistent with EO 13563, in addition to considering the rule's quantitative effects, the Commission has considered the rule's qualitative effects. Some of the benefits of the ADA Amendments Act (ADAAA or Amendments Act) and this final rule are monetary in nature, and likely involve increased productivity, but cannot be quantified at this time.

Other benefits, consistent with the Act, involve values such as (in the words of EO 13563) "equity, human dignity, fairness, and distributive impacts." In its statement of findings in the Act, Congress emphasized that "in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers." One of the stated purposes of the ADA Amendments Act is "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection under the ADA." ADAAA Section 2(a)(1) and 2(b)(1). This rule implements that purpose by establishing standards for eliminating disability-based discrimination in the workplace. It also promotes inclusion and fairness in the workplace; combats second-class citizenship of individuals with disabilities; avoids humiliation and stigma; and promotes human dignity by enabling qualified individuals to participate in the workforce.

Introduction

In enacting the ADA Amendments Act, Congress explicitly stated its expectation that the EEOC would amend its ADA regulations to reflect the changes made by the statute. These changes necessarily extend as well to the Interpretive Guidance (also known as the Appendix) that was published at the same time as the original ADA regulations and that provides further explanation on how the regulations should be interpreted.

The Amendments Act states that its purpose is "to reinstate a broad scope of protection" by expanding the definition of the term "disability." Congress found that persons with many types of impairments—including epilepsy, diabetes, HIV infection, cancer, multiple sclerosis, intellectual disabilities (formerly called mental retardation), major depression, and bipolar disorder—had been unable to bring ADA claims because they were found not to meet the ADA's definition of "disability." Yet, Congress thought that individuals with these and other impairments should be covered and revised the ADA accordingly. Congress explicitly rejected certain Supreme Court interpretations of the term "disability" and a portion of the EEOC regulations that it found had inappropriately narrowed the definition of disability. These amended regulations are necessary to implement fully the requirements of the ADA Amendments Act's broader definition of "disability."

Our assessment of both the costs and benefits of this rule was necessarily limited by the data that currently exists. Point estimates are not possible at this time. For that reason, and consistent with OMB Circular A–4, we have provided a range of estimates in this assessment.

The preliminary regulatory impact analysis ("preliminary analysis") set forth in the NPRM reviewed existing research and attempted to estimate the costs and benefits of the proposed rule. More specifically, the preliminary analysis attempted to estimate the costs employers would incur as the result of providing accommodations to more individuals with disabilities in light of the Amendments Act, the prevalence of accommodation already in the workplace, the cost per accommodation, the number of additional accommodations that the Amendments Act would need to generate to reach $100 million in costs in any given year, the administrative costs for firms with at least 150 employees, and the reported benefits of providing reasonable accommodations.

The preliminary analysis concluded that the costs of the proposed rule would very likely be below $100 million, but did not provide estimates of aggregated monetary benefits. Because existing research measuring the relevant costs and benefits is limited, the Commission's NPRM solicited public comment on its data and analysis.

The Commission's final regulatory impact analysis is based on the preliminary assessment but has changed significantly based on comments received during the public comment period on the NPRM as well as the inter-agency comment period on the final regulations under EO 12866.[1] These changes are consistent with the public participation provisions in EO 13563 and reflect the importance of having engaged and informed public participation. The limitations of the preliminary analysis approach are outlined below, and an alternative approach is provided to illustrate the range of benefits and costs.

These estimates are discussed seriatim in the following sections of this analysis.

I. Estimated Costs

A. Estimate of Increased Number of Individuals Whose Coverage Is Clarified by the ADAAA and the Final Regulations

For those employers that have 15 or more employees and are therefore covered by the proposed regulations, the potential costs of the rule stem from the likelihood that, due to Congress's mandate that the definition of disability be applied in a less restrictive manner, more individuals will qualify for coverage under the portion of the definition of disability that entitles them to request and receive reasonable accommodations.[2] Thus, we first consider the number of individuals whose coverage is clarified by the ADAAA and the final rule as a result of the changes made to the definition of "substantially limits a major life activity."[3] We then consider how many such individuals are likely to be participating in the labor force.

[1] The Commission specifically undertook to provide extensive opportunities for public participation in this rulemaking process. In addition to the more than 600 written comments received during the 60-day public comment period on the NPRM, the EEOC and the U.S. Department of Justice Civil Rights Division during that period also held four "Town Hall Listening Sessions" in Oakland, California on October 26, 2009, in Philadelphia, Pennsylvania on October 30, 2009, in Chicago, Illinois on November 17, 2009, and in New Orleans, Louisiana on November 20, 2009. For each of these sessions, Commissioners offered to be present all day to receive in-person or telephonic comments on any aspect of the NPRM from members of the public on both a pre-registration and walk-in basis. More than 60 individuals and representatives of the business/employer community and the disability advocacy community from across the country offered comments at these four sessions, a number of whom additionally submitted written comments.

[2] Individuals who are covered under the first two prongs of the definition of disability are entitled to reasonable accommodations, as well as to challenge hiring, promotion, and termination decisions and discriminatory terms and conditions of employment. Individuals covered solely under the third prong of the definition of disability are not entitled to reasonable accommodations. As we noted in the preliminary regulatory impact analysis, the primary costs are likely to derive from increased numbers of accommodations being provided by employers—assuming an accommodation is needed, an employee is qualified, and the accommodation does not pose an undue hardship. No comments challenged that assessment. Thus, while we discuss proposed increases in litigation costs below (which apply to claims brought by individuals covered under any prong of the definition), we focus our attention in this section on those individuals whose coverage is clarified under the first two prongs of the definition of disability.

[3] Prior to the ADAAA, individuals with impairments such as cancer, diabetes, epilepsy and HIV infection were sometimes found to be covered under the ADA, and sometimes not, depending on how well they functioned with their impairments, taking into account mitigating measures. Thus, it is not appropriate to say that all such individuals are "newly covered" under the ADA. For that reason, we refer to this group throughout this analysis as a group whose "coverage has been clarified" under the ADAAA.

(1) Summary of Preliminary Analysis

The preliminary regulatory impact analysis relied on a variety of demographic surveys conducted by the U.S. government which are designed to estimate the number of people with disabilities in the labor force. The resulting estimates differ somewhat based on the survey design, the sample size, the age range of the population under study, who is actually being surveyed (the household or the individual), the mode of survey administration, the definition of disability used, and the time-frame used to define employment status.

In attempting to estimate the increased number of individuals whose coverage was clarified by the ADAAA and who might need and request accommodation,[4] the Commission's preliminary impact analysis examined data from the following major population-representative Federal surveys that contain information about people with disabilities and their employment status: the Current Population Survey (CPS), the American Community Survey (ACS), the National Health Interview Survey (NHIS), and the Survey of Income and Program Participation (SIPP). Noting the limitations of this data as applied to estimating the number of individuals affected by the amended ADA, we nevertheless estimated that there were 8,229,000 people with disabilities who were working in 2007, and that between 2.2 million and 3.5 million workers reported that they had disabilities that caused difficulty in working.[5]

Both public comments and comments received during the inter-agency review process under EO 12866 highlighted a variety of limitations in our analysis. Indeed, the alternative that we later present indicates that the figure of 8.2 million people with disabilities used in the preliminary analysis significantly underestimated the number of workers with impairments whose coverage under the law will now be clarified.

The indicator of "disability" used by the ACS, CPS, and NIHS depends on a series of six questions that address functionality, including questions about whether an individual has any of the following: a severe vision or hearing impairment; a condition that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying; a physical, mental, or emotional condition lasting 6 months or more that results in difficulty learning, remembering, or concentrating; or a severe disability that results in difficulty dressing, bathing, getting around inside the home, going outside the home alone to shop or visit a doctor's office, or working at a job or business.

This survey definition clearly captures only a subset of the group of people with disabilities who would be covered under the ADA as amended. For example, among other things:

—With respect to both physical and mental impairments, the survey definition does not account for the addition of the operation of major bodily functions as major life activities under the newly amended law, such as functions of the immune system, normal cell growth, and brain, neurological, and endocrine functions. This makes it especially likely that the survey data is under-inclusive as to individuals with impairments such as HIV infection, epilepsy, cancer, diabetes, and mental impairments whose coverage is now clarified under the ADA.

—Even with respect to major life activities other than major bodily functions, the survey definition covers a narrower range of individuals with mental impairments since it is limited to mental or emotional conditions that result in difficulty learning, remembering, concentrating, or a severe disability resulting in difficulty doing specific self-care activities.

—The survey definition overall reflects an attempt to capture individuals with impairments whose limitations are considered "severe"— a degree of limitation which is no longer required in order for an impairment to be considered substantially limiting under the ADA as amended.

—The survey definition expressly excludes many individuals whose impairments last fewer than 6 months, even though such impairments may substantially limit a major life activity under the ADA prior to and after the ADA Amendments.

—The survey definition is limited to impairments that currently substantially limit a major life activity, and therefore does not capture individuals with a record of a substantially limiting impairment who may still need accommodation arising from that past history.

In the preliminary analysis, we used the number of employed individuals who have functional disabilities (as indicated by the six-question set described above) as a surrogate for the number of individuals with any disability who are working. We then tried to determine the subset of those employed individuals with disabilities whose coverage would be newly clarified as a result of the Amendments Act, acknowledging that some people whose coverage would be potentially clarified by the Amendments Act were probably not included in this baseline.

We declined to use the subset of workers with reported employment related disabilities, because we assumed that some of these individuals would have been covered even under the pre-ADAAA definition of "disability." Instead, the preliminary analysis examined the CDC's analysis of the Census/SIPP data on prevalence of certain medical conditions in the population of non-institutionalized individuals ages 18–64. *See* "Main cause of disability among civilian non-institutionalized U.S. adults aged 18 years or older with self reported disabilities, estimated affected population and percentages, by sex—United States, 2005," *http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5816a2.htm* (last visited Mar. 1, 2010). We chose to focus on those impairments in § 1630.2(j)(5) of the NPRM (those impairments that we believed would "consistently" meet the definition of a substantially limiting impairment), since we considered individuals with such impairments to be most likely to request accommodations as a result of the regulations due to a greater degree of certainty that they would be covered. We concluded that this data suggested that 13 percent of civilian non-institutionalized adults with disabilities have the following conditions: Cancer (2.2 percent), cerebral palsy (0.5 percent), diabetes (4.5 percent), epilepsy (0.6 percent), AIDS or AIDS related condition (0.2 percent), "mental or emotional" impairment (4.9 percent).

We assumed in our preliminary analysis that these impairments would occur with the same degree of frequency among employed adults who have functional disabilities as they do among

[4] The preliminary analysis focused on individuals whose coverage would be clarified under the ADAAA and who might need and request an accommodation. For purposes of clarity, our final assessment focuses first on the number of individuals whose coverage will be clarified under the ADAAA and who are participating in the labor force. We then move to a separate analysis of how many of those individuals might need and request accommodations.

[5] From 2003–07, the ACS included the following question on "Employment Disability" asked of persons ages 15 or older: "Because of a physical, mental, or emotional condition lasting six months or more, does this person have any difficulty in doing any of the following activities: (b) working at a job or business?" *See* "Frequently Asked Questions," Cornell University Disability Statistics, Online Resource for U.S. Disability Statistics, *http://www.ilr.cornell.edu/edi/disabilitystatistics faq.cfm.*

the population of persons with disabilities generally, and so multiplied 13% times 8,229,000 workers with reported disabilities. We thus estimated that approximately 1,000,000 workers with disabilities had impairments that were more likely to be covered as the result of the ADAAA and the EEOC's regulations.

(2) Comments on Preliminary Analysis

The Commission received a number of public comments from employer associations arguing that our figures underestimated the increase in the number of individuals who would now be covered under the ADAAA, as people with disabilities. One employer association specifically argued that the Commission's preliminary estimate that 13 percent of the workers with work-limitation disabilities would consistently meet the definition of disability under NPRM § 1630.2(j)(5) left out a number of disabilities listed in that section such as autism, multiple sclerosis, and muscular dystrophy. This comment cited Centers for Disease Control (CDC) data that the prevalence rate for autism spectrum disorder is between 2 and 6 per 1,000 individuals, or 89,000 to 267,000 civilian non-institutionalized adults, as well as National Multiple Sclerosis Society data estimating that 400,000 Americans have multiple sclerosis, and Muscular Dystrophy Association statistics that approximately 250,000 Americans have muscular dystrophy. The commenter argued that adding these estimates to the 5.8 million non-institutionalized adults ages 18–64 who have cancer, cerebral palsy, diabetes, epilepsy, AIDS or AIDS related condition, or a mental or emotional impairment would increase the percentage of workers who would consistently meet the definition of disability under proposed section 1630.2(j)(5) to 15.1 percent. The commenter also noted that data from the Families and Work Institute estimates that 21 percent of workers are currently receiving treatment for high blood pressure, 7 percent have diabetes, and 4 percent are being treated for mental health issues. Finally, this commenter pointed out that a number of impairments similar to those listed in NPRM § 1630.2(j)(5), but not explicitly identified in that section, would presumably also meet the expanded definition of disability. Based on these observations, the commenter noted that the percentage of workers with covered disabilities could be 20 to 40 percent.

In contrast, some advocates for people with disabilities urged the Commission to delete any estimates at all of the numbers of persons who may meet the definition of "disability" as amended by the ADA Amendments Act or who may request reasonable accommodations. These groups noted that the broad purposes of the ADA, as compared to the more limited purposes of most existing data collections and the different definitions of "disability" used in those studies, made those estimates so uncertain, conjectural, and anecdotal as to be unhelpful and potentially detrimental to the goals of the ADAAA.

In addition, these advocates disputed the Commission's willingness in the preliminary analysis to allow that there may be an increase in requests for accommodation as a result of the ADAAA or the regulations, and therefore disagreed with the underlying premise of attempting to estimate the number of individuals with disabilities generally or the increase in the number of individuals whose coverage under the ADA would now be clarified. Their argument proceeded as follows: Employers and employees alike have generally been aware since title I of the ADA took effect in 1992 that requested accommodations needed by individuals with disabilities must be provided absent undue hardship, and that notwithstanding court rulings to the contrary, most employers and employees have continued to believe that disabilities include impairments such as those examples set forth in § 1630.2(j)(5) of the NPRM, e.g., epilepsy, depression, post traumatic stress disorder, multiple sclerosis, HIV infection, cerebral palsy, intellectual disabilities, bipolar disorder, missing limbs, and cancer. Therefore, these advocates argued, it is unlikely that individuals with such impairments have been refraining from requesting accommodations up until now, or that their requests for accommodation have been denied because they did not meet the legal definition of disability. This was the practical reality, even if improper denials by employers would have been difficult to remedy in the courts, given the pre-Amendments Act interpretation of the definition of disability.[6]

[6] These groups also noted that some individuals with covered disabilities will not seek work. Finally, they disputed the utility of the attempt to estimate the number of affected workers on the grounds the ADAAA simply restores the original interpretation of the definition of "disability," and there is no evidence that state or local laws with equivalent or broader definitions of disability have experienced a significant economic impact.

(3) Revised Analysis

(a) Number of Individuals Whose Coverage Is Clarified and Who Are Participating in the Labor Force

The Commission agrees with the comments made by both employer groups and advocates for people with disabilities that the referenced survey data regarding the numbers of workers with disabilities or with specific impairments—which, as noted in the preliminary analysis, researchers collected for other purposes—has limited relevance to determining the number of workers whose coverage has been clarified by the ADAAA. This conclusion qualifies any use of that data in the preliminary analysis, as well as in this final regulatory impact analysis.

In light of these limitations, we believe the Commission's preliminary analysis significantly underestimated the number of workers with disabilities whose coverage is clarified as a result of the ADAAA and the final regulations. First, we did not account for several impairments actually listed in § 1630.2(j)(3)(iii) of the final regulations, such as autism, multiple sclerosis, and muscular dystrophy. Second, as was pointed out during inter-agency review of the final regulations prior to publication, because the CDC analysis of the Census Data on the number of workers with self-reported disabilities was not derived in the same way as the ACS data, it would be incorrect to assume that CDC data on the prevalence of the impairments in § 1630.2(j)(3)(iii) reflects the frequency of those impairments among the 8,229,000 non-institutionalized workers with disabilities aged 18–64 found by the ACS. Moreover, as discussed below, the figures in the CDC analysis of the Census Data are obviously far lower than reported data on the incidence of these impairments in the population overall.

Therefore, for purposes of this final analysis, informed by both the public comments and comments received during the inter-agency review process under EO 12866, we conclude that the figure of 8.2 million people with disabilities used in the preliminary analysis, and the calculations made with it, significantly underestimated the number of workers with impairments that will now be covered as having a substantially limiting impairment or record thereof under the ADAAA and the final regulations.

Our revised analysis proceeds as follows. In analyzing the available data, we are mindful of the fact that the Amendments Act was designed to make it easier to meet the definition of

disability under the ADA and to expand the universe of people considered to have disabilities. Prior to the Amendments Act, the Supreme Court in *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471 (1999), used the ADA's finding that approximately 43 million Americans had disabilities as part of its reason for concluding that the benefits of mitigating measures (e.g., medication, corrective devices) an individual used had to be taken into account when determining whether a person had a substantially limiting impairment. The Amendments Act rejected this restrictive definition of disability and explicitly removed this finding from the law. It also provided that the ameliorative effects of mitigating measures (except ordinary eyeglasses or contact lenses) were not to be taken into account in determining whether a person's impairment substantially limited a major life activity.

Thus, based on the Amendments Act's rejection of *Sutton* alone—apart from the many other changes it made to the definition of a substantial limitation in a major life activity—we know that the number of people now covered under the ADA as having a substantially limiting impairment or a record thereof should be significantly more than 43 million. (The Court surmised that the 43 million number was derived from a National Council on Disability report, *Toward Independence* (Feb. 1986), available at *http://www.ncd.gov/newsroom/publications/1986/toward.htm*, which in turn was based on Census Bureau data and other studies that used "functional limitation" analyses of whether individuals were limited in performing selected basic activities.)

Under the ADA as amended, the definition of an impairment that substantially limits a major life activity will obviously be broader than captured by prior measures, since "substantial" no longer means "severe" or "significantly restricted," major life activities now include "major bodily functions," the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) are disregarded, and conditions that are episodic or in remission are substantially limiting if they would be when active. Based on the available data, it is impossible to determine with precision how many individuals have impairments that will meet the current definition of substantially limiting a major life activity or a record thereof. We do know, however, that, at a minimum, this group should easily be concluded to include individuals with the conditions listed in § 1630.2(j)(3)(iii) of the final regulations—including autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, and a variety of mental impairments.

While it is true that, prior to the Amendments Act, many of these individuals were assumed to be covered under the law by their employers, the reality was that large numbers of individuals with these conditions were considered by the courts not to have disabilities, based on an individualized assessment of how well the individuals were managing with their impairments, taking into account mitigating measures. Thus, for purposes of this regulatory assessment, we consider individuals with all of these impairments to be individuals whose coverage has now been clarified by the Amendments Act.

By contrast, we are not counting individuals with certain conditions also listed in § 1630.2(j)(3)(iii) of the final regulations—mobility impairments requiring use of a wheelchair, blindness, deafness, and intellectual disabilities—as individuals whose coverage has now been clarified by the Amendments Act since, notwithstanding some exceptions, courts consistently found such individuals to be covered under the ADA even prior to the Amendments Act.

Thus, we use as a starting point the data reported by government agencies and various organizations on the number of individuals in the United States with autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, and a variety of mental impairments.[7] Adding these admittedly disparate and potentially overlapping numbers (and acknowledging that some of these estimates include children and are not restricted by employment status), we can assume a rough estimate of the number of individuals with these impairments who would be found substantially limited in a major life activity as a result of the Amendments Act, as follows:

—Autism—Approximately 1.5 million individuals in the United States are affected by autism.[8]

—Multiple Sclerosis—Approximately 400,000 Americans have multiple sclerosis according to the National Multiple Sclerosis Society.[9]

—Muscular Dystrophy—Approximately 250,000 Americans have muscular dystrophy according to the Muscular Dystrophy Association.[10]

—Cancer—In 2007, approximately 11,714,000 individuals were living with cancer in the United States.[11]

—Diabetes—An estimated 18.8 million adults in the United States have diabetes according to the CDC.[12]

—Epilepsy—Approximately 3 million Americans [13] (or subtracting approximately 326,000 schoolchildren under 15, about 2.6 million people 15 or over) have epilepsy, according to the Epilepsy Foundation website, and an estimated 2 million people have epilepsy, according to the CDC.

—Cerebral Palsy—Between 1.5 and 2 million children and adults have cerebral palsy in the United States according to the United Cerebral Palsy Research and Educational Foundation.[14]

—HIV Infection—The CDC estimates that more than 1.1 million Americans are living with HIV infection.[15]

—Mental Disabilities—Approximately 21 million individuals (6% or 1 in 17 Americans) have a serious mental illness according to the National Alliance on Mental Illness website (citing National Institute of Mental Health reports).[16]

Thus, based on this data, the number of individuals with the impairments cited in § 1630.2(j)(3(iii) could be at least 60 million. In addition, we know that people with many other

[7] We note that this approach was used by one of the comments submitted by an employer association.

[8] *See* "What is Autism?" *http://www.autismspeaks.org/whatisit/index.php* (last visited Mar. 1, 2011); *see also* Centers for Disease Control, "Prevalence of the Autism Spectrum Disorders (ASDs) in Multiple Areas of the United States, 2000 and 2002," available at *http://www.cdc.gov/ncbddd/autism/documents/AutismCommunityReport.pdf* (various studies regarding prevalence in children).

[9] *See* "Who Gets MS?" *http://www.nationalmssociety.org/about-multiple-sclerosis/what-we-know-about-ms/who-gets-ms/index.aspx* (last visited Mar. 1, 2011).

[10] *See* "Answers to Frequently Asked Questions," *http://www.mda.org/news/080804telethon_basic_info.html* (last visited Mar. 1, 2011).

[11] *See* "Cancer Prevalence: How Many People Have Cancer?" *http://www.cancer.org/cancer/cancerbasics/cancer-prevalence* (last visited Mar. 1, 2011).

[12] *See* "2011 National Diabetes Fact Sheet" (released Jan. 26, 2011), *http://www.diabetes.org/diabetes-basics/diabetes-statistics/* (last visited Mar. 1, 2011).

[13] *See* "Epilepsy and Seizure Statistics," *http://www.epilepsyfoundation.org/about/statistics.cfm* (last visited Mar. 1, 2011); CDC, Epilepsy "Data and Statistics," *http://www.cdc.gov/Epilepsy/.*

[14] *See* "Cerebral Palsy Fact Sheet," *http://www.ucp.org/uploads/cp_fact_sheet.pdf* (last visited Mar. 1, 2011).

[15] *See* "HIV in the United States," *http://www.cdc.gov/hiv/topics/surveillance/resources/factsheets/us_overview.htm* (last visited Mar. 1, 2011).

[16] "What is Mental Illness: Mental Illness Facts," *http://www.nami.org/template.cfm?section=About_Mental_Illness* (last visited Mar. 1, 2011).

impairments will virtually always be covered under the amended ADA definition of an impairment that substantially limits a major life activity or record thereof.

We recognize that the above figures on the prevalence of § 1630.2(j)(3)(iii) impairments are over-inclusive as a measure of the potential number of workforce participants with these impairments, since in some instances they include people of all ages and those who are not in the labor force. Therefore, we must also identify how many of these individuals are currently participating in the labor force.

Again, we are faced with significant limitations in the data available to us. The newest data released in January 2011 by the Bureau of Labor Statistics (BLS) estimates that 20 percent of people with disabilities age 16 and older participate in the labor force and, of those, 13.6 percent are considered to be unemployed.[17] But the BLS uses a functional limitation analysis to determine who has a disability which, as we have explained above, is significantly different from the definition of disability under the ADA as amended. Hence, we must assume this percentage is extremely under-inclusive. The BLS data estimates that the labor force participation rate for all civilian non-institutionalized people 16 and older (including people with and without disabilities) is 64 percent. We can thus assume that somewhere between 20 and 64 percent of individuals with impairments identified in § 1630.2(j)(3)(iii) will be participating in the labor force.

Using the 60 million figure, if we assume 20% of individuals with impairments identified in § 1630.2(j)(3)(iii) of the final regulations are participating in the labor force, then, considering those impairments alone, approximately 12 million individuals whose coverage is now clarified under the ADA are in the labor force (20% times 60 million). If we assume 64% of individuals with these disabilities are in the labor force, then the number of labor force participants whose coverage is clarified under the ADA is approximately 38.4 million.

[17] Participants in the labor force include individuals who currently have a job or are actively looking for one. U.S. Department of Labor, Office of Disability Employment Policy, Disability Employment Statistics Q&A, *http://www.dol.gov/odep/categories/research/bls.htm.*

B. Estimated Increase in Reasonable Accommodation Requests and Costs Attributable to the ADAAA and the Final Regulations

(1) Summary of Preliminary Analysis

As noted above, our preliminary analysis had concluded there would be an additional one million people with disabilities covered under the ADA, as amended. The preliminary analysis then attempted to estimate the subset of these million workers who would actually need reasonable accommodations, relying on a study by Craig Zwerling *et al., Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995,* 45 J. Occupational & Envtl. Med. 517 (2003). According to the Zwerling et. al study, 16% of employees with impairments or functional limitations surveyed said they need one of 17 listed accommodations. We assumed, therefore, using the 16% taken from the Zwerling study, that 16% of the one million workers whom we identified would also need accommodations, and that the resulting 160,000 requests would occur over a period of five years.

With regard to the potential costs of accommodations, the preliminary analysis set forth a review of the data from a series of studies providing a wide range of estimates of the mean and median costs of reasonable accommodation. The means cited in the data ranged from as low as $45 to as high as $1,434, based on a variety of studies done by academic and private researchers as well as the Job Accommodation Network (JAN). The $45 mean direct cost of accommodation was reported in a study (Helen Schartz *et al., Workplace Accommodations: Evidence-Based Outcomes* 27 Work 345 (2006)) examining the costs and benefits of providing reasonable accommodations, using data from an examination of costs at a major retailer from 1978 to 1997 (P. D. Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations,* 46 *DePaul L. Rev.* 877 (1997)). The $1,434 mean cost of accommodation cited in the preliminary analysis was derived from data reviewed in JAN's January 2009 issue of its periodically updated study entitled "Workplace Accommodations: Low Cost, High Impact," which used 2008 data. The most recent JAN study, issued September 1, 2010, reported a mean accommodation cost of $1,183, based on 2009 data.

Using estimates of both the mean and median cost of accommodations, the preliminary analysis estimated that the ADA Amendments Act and these regulations would result in increased costs of reasonable accommodation of from $19,000,000 to $38,000,000 annually.

(2) Comments on Preliminary Analysis

The Commission received a number of public comments from employer associations arguing that because we had underestimated the incremental increase in the number of individuals with disabilities, we had also necessarily underestimated the number of additional requests for accommodation that could be attributable to the Amendments Act and the final regulations. Thus, one commenter recommended using a figure of 20% rather than 13% to represent the number of individuals with just those impairments identified in NPRM § 1630.2(j)(5) and then assumed that the percentage of those individuals who would request an accommodation would be 49%. That commenter thus concluded that a total of 576,000 individuals covered under § 1630.2(j)(5) would request a reasonable accommodation. This commenter also noted that even this figure would likely be too low because workers may move from job to job and renew accommodation requests, or a worker might need more than one accommodation.

The Commission also received comments from employers on the estimated costs of accommodations attributable to the Amendments Act and the regulations, primarily contending:

—The specific data on accommodation costs cited by the Commission in the preliminary analysis was too low (one employer association asserted that the cost will be at least $305.7 million for the first year, with administrative costs likely to exceed $101.9 million per year on a recurring basis; a state government entity commented that the Commission should take into account additional administrative costs employers may bear in order to comply, but did not attempt to estimate these additional costs);
—Each additional accommodation request will affect an employer's ability to cope with the overall number of requests; and
—The undue hardship defense is insufficient to address the financial concerns of small employers.

By contrast, disability rights groups asserted that even if the Commission's estimate of 160,000 additional workers who would request accommodations as a result of the ADA Amendments Act

provided an outer estimate of the number of affected workers, it was too high of a number to gauge the impact of the Amendments Act, in part because the Amendments Act affected those workers whom Congress had always intended to be covered by the ADA and because many employers were treating them as covered.

With regard to the costs of accommodations, a number of comments from academics and disability and civil rights organizations concurred with our preliminary conclusion that the cost would be below $100 million and that no economic impact analysis was required or feasible, and/or argued that the Commission's preliminary analysis had overstated the potential economic impact. Specifically, they argued that the Commission's rough estimates of the number and cost of accommodation requests were speculative and were unnecessary to conclude that the Act's costs are less than $100 million, since available research overwhelmingly demonstrates that accommodation costs are modest, and because neither the Amendments Act nor the proposed regulations change the basic structure of the original ADA. They also argued that the Commission's method of interpreting certain reasonable accommodation data resulted in overestimation of costs; that many accommodations for specific types of impairments have no or very little cost; and that over time, ongoing medical and technological advances can be reasonably expected to reduce both existing and new accommodation costs associated with the ADA or the Amendments Act.

Professor Peter Blanck of the Burton Blatt Institute at Syracuse University, a co-author of the 2006 "*Workplace Accommodations: Evidence-Based Outcomes*" study, filed public comments offering a number of clarifications specifically regarding citation to his study's data, and arguing that the Commission had overstated the cost of accommodations, because the preliminary analysis used a "mean" (or average, calculated by adding all values in a dataset and dividing by the number of points in the dataset), rather than a "median" (the middle point in a dataset).

Professor Blanck considered the median a better measure of the cost of accommodations because so many accommodations have no cost. He pointed out that based on his research, 49.4% of accommodations had zero direct costs. For the 50.6% of accommodations with a cost greater than zero, the median cost in the first calendar year was $600. Professor Blanck further found that for all accommodations, including those with a zero cost, the median cost of accommodations was found to be $25.

Of key importance, no public comments contradicted the Commission's observation in the preliminary analysis that there is a paucity of data on the costs of providing reasonable accommodation, and that much of the existing data is obtained either through limited sample surveys or through surveys that collect limited information. While some employer groups disputed the Commission's cost estimates, none cited any research or studies on actual accommodation costs.

(3) Revised Analysis

Our revised analysis of potential costs for additional accommodations begins with a revised estimate of the number of new accommodation requests, based on the upward adjustment of the number of people with disabilities whose coverage is clarified under the Amendments Act. As we note above, that range is 12 million to 38.4 million people.

(a) Estimated Number of New Accommodation Requests

Estimating the increase in expected requests for reasonable accommodations attributable to the Amendments Act and the final rule is difficult because it requires assuming that some number of individuals with disabilities will now perceive themselves as protected by the law and hence ask for accommodation, but had not previously assumed they were covered and therefore had not asked for accommodations. In reality, individuals with disabilities such as epilepsy, diabetes, cancer, and HIV infection may have considered themselves, and may have been treated by their employers as, individuals who could ask for accommodations such as flexible scheduling or time off. Moreover, in many cases, such accommodations may have been requested and provided without anyone in the process even considering such workplace changes as being required reasonable accommodations under the ADA.

Recognizing that it is impossible to determine with precision the number of individuals in the labor force whose coverage is now clarified under the law and who are likely to request and require reasonable accommodations as a result of that increased clarity, we have tried to determine the number of such individuals by taking the estimated number of labor force participants whose coverage has been clarified and multiplying it by the percentage of employees who report needing accommodations.

According to the Zwerling *et al.* study cited in our preliminary analysis, 16% of employees with impairments or functional limitations surveyed said they needed one of 17 listed accommodations. *Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995,* 45 J. Occupational & Envtl. Med. 517 (2003)). This 16% figure may be an overestimate of the percentage of those employees whose coverage has been clarified by the Amendments Act who will actually need accommodations, since of the 17 accommodations listed in the study, a number of them would more likely have been needed by individuals whose coverage was not questioned prior to the Amendments Act. For example, these accommodations include accessible restrooms, automatic doors, installation of a ramp or other means of physical access, and the provision of sign language interpreters or readers. These are types of accommodations that would apply specifically to individuals who were clearly covered under the ADA, even prior to the Amendments Act. Only 10.2% of the employees surveyed asked for accommodations such as break times, reduced hours, or job redesign, which are the more likely accommodations to be requested by those individuals whose coverage has now been clarified. Nevertheless, because the Zwerling study surveyed a limited range of people with disabilities, we will use the full 16% figure.

Applying the 16% figure to represent the percentage of individuals whose coverage has been clarified and who would need reasonable accommodations, the resulting increase in reasonable accommodations requested and required as a result of the Amendments Act could range from approximately 2 million (assuming 12 million labor force participants) to 6.1 million (assuming 38.4 million labor force participants).

(b) Factors Bearing on Reasonable Accommodation Costs

After fully considering the preliminary analysis and the public comments, and after further consideration of the issues, the Commission is persuaded of the following facts concerning the costs of accommodations:

—Of those reasonable accommodations requested and required, only a subset will have any costs associated with them. The studies show that about half of accommodations have zero or no cost, and had findings regarding

the mean cost ranging from $45 and $1,183. But most, if not all, of these studies have included accommodations for people who use wheelchairs, who are deaf, or who are blind. These tend to be the most expensive accommodations (e.g., physical access changes such as ramps, automatic doors, or accessible bathrooms; sign language interpreters and readers; Braille and/or computer technology for reading). Passage of the Amendments Act and promulgation of these regulations do not affect these individuals or render employers newly responsible for providing such accommodations, since there was never any dispute, even prior to enactment of the Amendments Act, that people with these kinds of impairments met the definition of disability. Therefore, any estimate of newly imposed costs of accommodations should generally exclude these types of higher-cost accommodations.

—To the extent the calculation of any mean accommodation cost is derived from data that includes accommodations that are purchased for a one-time cost but will be used over a period of years once owned by the employer (either for that employee's tenure or for future employees), the annual cost is actually much lower than the one-time cost. For example, physical renovations and accessibility measures, equipment, furniture, or technology, among other accommodations, may be used over a period of many years at no additional cost to the employer.

—A small percentage of people whose coverage has been clarified may need some physical modifications to their workspace—e.g., the person with mild cerebral palsy who might need voice recognition software for difficulty with keyboarding, or the person whose multiple sclerosis affects vision who needs a large computer screen.

—Most of the people who will benefit from the amended law and regulations are people with conditions like epilepsy, diabetes, cancer, HIV infection, and a range of mental disabilities. The types of accommodation these individuals will most commonly need are changes in schedule (arrival/departure times or break times), swapping of marginal functions, the ability to telework, policy modifications (e.g., altering for an individual with a disability when or how a task is performed, or making other types of exceptions to generally-applicable workplace procedures), reassignment to a vacant position for which the individual is qualified, time off for treatment or recuperation, or other similar accommodations.

—Many of these accommodations will not require significant financial outlays. Some accommodations, such as revising start and end times, allowing employees to make up hours missed from work, and creating compressed workweek schedules, may result in administrative or other indirect costs. However, they may also result in cost savings through increased retention, engagement, and productivity. Other accommodations, such as providing special equipment needed to work from home, will have costs, but might also result in cost savings (e.g., reduced transportation costs, environmental benefits, etc.).

—Time off, both intermittent and extended, may have attendant costs, such as temporary replacement costs and potential lost productivity. But these, too, may be offset by increased retention and decreased training costs for new employees.

—With respect to those individuals whose coverage has been clarified and who both request and need accommodation, employers will sometimes provide whatever is requested based on existing employer policies and procedures (e.g., use of accrued annual or sick leave or employer unpaid leave policies, employer short- or long-term disability benefits, employer flexible schedule options guaranteed by a collective bargaining agreement, voluntary transfer programs, or "early return to work" programs), or under another statute (e.g., the Family and Medical Leave Act or workers' compensation laws).

(c) Calculation of Mean Costs of Accommodations Derived From Studies

We disagree with Professor Blanck's observation that the median cost is the appropriate value for this analysis because this analysis seeks to estimate the total cost of new accommodations across the entire economy resulting from the Amendments Act and final rule. Using the median value in this case would not capture the total cost to the nation's economy.

For that reason, we will rely on the range of mean costs of accommodations derived from various studies and will attempt to make a reasonable estimation of the likely mean cost of accommodation for those employees whose coverage has been clarified as a result of the Amendments Act. In so doing, we again recognize that references to this data must be qualified by (1) the fact that high cost outlier accommodations are not ones likely to be requested by those whose coverage has been clarified by the Amendments Act and the final rule, and (2) the fact that reasonable accommodations are not needed, requested by, or provided for all individuals with disabilities.

The Job Accommodation Network (JAN) conducts an ongoing evaluation of employers that includes accommodation costs, using a questionnaire to collect data from employers who have consulted JAN for advice on providing reasonable accommodation. As noted above, the most recent JAN study (Workplace Accommodations: Low Cost, High Impact (JAN 2009 Data Analysis) (Sept. 1, 2010)) found that the median cost of reasonable accommodations that had more than a zero cost reported by JAN clients was $600, and the mean cost was $1,183.[18] JAN's cumulative data from 2004–2009 shows that employers in their ongoing study report that a high percentage (56%) of accommodations cost nothing to provide.

According to JAN,[19] its calculation of the $1,183 mean cost of accommodation was derived from a survey of 424 employers. Two of those employers reported outlying costs of $100,000 each, in both cases for the design and purchase of information system databases for proprietary information that would be accessible to employees with vision impairments. Such employees would have likely been covered by the ADA prior to the Amendments Act, and the type of higher-cost technological accommodation at issue is not the type of accommodation that will likely be needed by most of those whose coverage has been clarified by virtue of the Amendments Act and final regulations. Moreover, in each case, the database was being developed for business reasons, and not specifically as an accommodation.[20]

According to JAN, if these two outlier accommodations are deleted from the

[18] Information provided to the EEOC by Beth Loy, Ph.D., Job Accommodation Network.

[19] *Id.*

[20] *Id.* The survey data received by JAN did not indicate whether the $100,000 reported cost was the total cost of the database or the added cost of accessibility. Significantly, one of these employers is a federal agency that was required to purchase an accessible database under section 508 of the Rehabilitation Act of 1973, as amended, so would have had to do so anyway. Therefore, it is not clear that it would be appropriate to consider this a cost of accommodating a single employee under section 501 of the Rehabilitation Act, as amended. The other employer was a federal contractor, and may therefore have had obligations under its contract and/or section 503 of the Rehabilitation Act, as amended, to include accessible features. *Id.*

data set, the mean cost of accommodation based on the remaining 422 reported accommodations in the survey drops to $715.[21] Even this figure may overestimate the mean cost of accommodations needed for those whose coverage has been clarified by the Amendments Act, most of which we believe will have less significant costs. Nonetheless, we will use $715 as a starting point for calculating the annual mean cost of accommodations attributable to the changes in the definition of a substantially limiting impairment.

The mean cost of $715 represents the average one-time cost of providing a reasonable accommodation. However, JAN reports that many of these accommodations reported in the study involved ones that are then used by the employee (or additional employees) on an ongoing basis, in many cases presumably for a period of years. These included items such as software, chairs, desks, stools, headsets, keyboards, computer mice, sound absorption panels, lifting devices, and carts.[22] Given the nature of these items, their useful life, and ever-advancing technology, we assume for purposes of this analysis a useful life of five years for these items. If those accommodations that can be used on an ongoing basis are used for five years, this would reduce the mean annual cost to one-fifth of $715 (or $143, which we will round to $150 for purposes of this analysis) with respect to those accommodations. In addition, the mean of $715 includes one-time costs of more expensive accommodations such as equipment, technology, and physical workplace accessibility for individuals who were already covered, whereas we believe the cost of the majority of accommodations associated with those whose coverage is clarified by the Amendments Act will be lower. Therefore, any estimate of the mean cost of accommodations overall may exaggerate the cost of accommodations for such individuals. Thus, for purposes of considering the annual impact pursuant to EO 12866, we believe it is appropriate to use the estimated lower mean of $150.

(d) Accommodation Cost Scenarios

Using our estimates above regarding the possible range of the number of individuals whose coverage is clarified under the definition of a substantially limiting impairment or record thereof and who are likely to request and require accommodation, we can project the following estimates of the likely incremental cost of providing reasonable accommodation attributable to the Amendments Act and the final rule, using a $150 mean annual cost of accommodation. Since we would not expect all of these new accommodation requests to be made in a single year, we will assume they will be made over a period of five years, with estimated costs as follows, using the above-discussed estimate of the incremental increase in reasonable accommodations requested and required as a result of the Amendments as ranging from 2 million to 6.1 million:

400,000 new accommodations annually (2 million over 5 years) × $150 = $60 million annually

1.2 million new accommodations annually (6.1 million over 5 years) × $150 = $183 million annually

Thus, the lower-bound estimated cost of the incremental increase in accommodations attributable to the Amendments Act and the final regulations would be $60 million annually, and the higher-bound estimated cost would be $183 million. The Commission recognizes that the range of cost estimates is quite large. However, given the lack of available data and the limitations in existing data, the resultant high level of uncertainty about the number of individuals whose coverage is clarified under the Amendments Act, the uncertainty about the number of such individuals who would be newly asking for accommodations, and the uncertainty about the actual mean cost of the accommodations that might be requested by these individuals, we are not able to provide more precise estimates of the costs of new accommodations attributable to the ADA Amendments Act and the final rule.

C. Estimated Increase in Administrative and Legal Costs Attributable to the ADAAA and the Final Regulations

(1) Summary of Preliminary Analysis

In the preliminary analysis, the Commission posited that administrative costs of complying with the ADA Amendments Act might be estimated at $681 in a human resource manager's time,[23] plus the fees, if any, charged for any training course attended.

With respect to training costs, we noted that the EEOC provides a large number of free outreach presentations for employers, human resource managers, and their counsel, as well as fee-based training sessions offered at approximately $350. Therefore, the preliminary analysis offered a rough estimate of these administrative costs, even if fee-based training were sought, of $1,031. The preliminary analysis assumed that these figures will underestimate costs at large firms but will overestimate costs at small firms and at firms that do not have to alter their policies. This would have resulted in a one time cost of approximately $70 million, although the Commission was unable to identify empirical research to support these very rough estimates. This figure assumed firms with fewer than 150 employees would incur no administrative costs from this rule. The preliminary analysis further assumed that smaller entities are less likely to have detailed reasonable accommodation procedures containing information relating to the definition of disability that must be revised or deleted. We posited in our preliminary analysis that larger firms, such as the 18,000 firms with more than 500 employees, would be more likely to have formal procedures that may need to be revised.[24]

The preliminary analysis also found that while there may be additional costs associated with processing and adjudicating additional requests for accommodation, these costs may be offset in part by the fact that application of the revised definition of "disability" will decrease the time spent processing accommodation requests generally. There were no findings or assumptions regarding increased or decreased litigation costs in the preliminary analysis.

(2) Comments on Preliminary Analysis

Various employer groups commented that the definitional changes will cause confusion and litigation, with associated costs, and that the Commission's preliminary estimate of training and related costs was not based on sufficient research. Specifically, they commented that the Commission had under-estimated the costs that have been or will be incurred by employers to update internal policies and procedures to reflect the broader definition of disability and to train personnel to ensure appropriate compliance with the ADAAA and the final regulations, and that the Commission should have taken into account not just salaries but also benefits paid to such individuals to represent the cost of time spent on such training. They also asserted that there

[21] *Id.*

[22] *Id.*

[23] Occupational Outlook Handbook, 2008–09 Edition, *http://stats.bls.gov/OCO/OCOS021.htm* (downloaded September 2, 2009).

[24] *http://www.sba.gov/advo/research/us_06ss.pdf* (downloaded Sept. 2, 2009).

would be recurring costs of one-third of first year costs (which they estimated would be more than $305 million for all employers).

By contrast, other commenters asserted that the Commission's preliminary analysis overestimated administrative costs because it failed to account for administrative benefits. They argued that costs associated with needed updates to employer policies and procedures will also have the benefit of simplifying and streamlining those policies and procedures and the coverage determination part of the interactive process.

(3) Revised Analysis of Administrative Costs

The Commission concludes that it inappropriately assessed the additional training costs that would be incurred by employers with 150 or more employees. Employers of this size are likely to receive training on both the ADAAA and the final regulations as part of fee-based or free periodic update training on EEO topics that they otherwise regularly attend. Our preliminary analysis did not account for this fact, but rather assumed that most or all such employers would attend a training on the regulations, at a cost of $350.00, that they would not otherwise have attended.

Even if some larger employers decide to attend an EEO training in a particular year because of the issuance of the final regulations (when they otherwise would not have attended such a training), information about the final regulations is likely to account for only a fraction of the training (typically the EEOC's one- and two-day training sessions involve multiple topics). Therefore, only a fraction of the $350.00 we assumed an employer would spend on training can be said to be a cost resulting from the ADAAA or the final regulations.

The Commission also concludes that it should have accounted for administrative costs borne by employers with 15 to 149 employees. These costs are limited, however, by the fact that such businesses generally tend to lack formal reasonable accommodation policies and usually avail themselves of free resources (e.g., guidance and technical assistance documents on the EEOC's Web site) in response to particular issues that arise, rather than receiving formal training on a regular basis. Additionally, smaller employers are called upon to process far fewer reasonable accommodation requests and may more easily be able to establish undue hardship, even where an accommodation is requested by someone whose coverage has been clarified under the ADAAA.

We also note that emphasizing the anticipated "difference" in compliance costs between smaller and larger entities may overlook some specific benefits incurred by smaller entities. For example, the EEOC makes available more free outreach and training materials to employers than it does paid trainings. Moreover, as noted above, smaller entities are less likely to have detailed reasonable accommodation procedures containing information relating to the definition of disability that must be revised or deleted. The EEOC expects to issue new or revised materials for small businesses as part of revisions made to all of our ADA publications, which include dozens of enforcement guidances and technical assistance documents, some of which are specifically geared toward small business (e.g., "The ADA: A Primer for Small Business," *http://www.eeoc.gov/ada/adahandbook.html*).

Notwithstanding the one-time costs to some employers associated with making and implementing those revisions to their internal procedures, the Commission notes that there will be significant time savings that will be achieved on an ongoing basis once employers begin utilizing their newly simplified procedures. Additionally, after initial revision, subsequent updates will not be needed more frequently than they were prior to the ADAAA and final regulations, and there is no reason to anticipate recurring costs of any significance.

(4) Analysis of Legal Costs

It is difficult to predict either the increase or decrease in legal costs as a result of the Amendments Act and the final rule.

We anticipate that the legal fees and litigation costs regarding whether an individual is a person with a disability within the meaning of the ADA will significantly decrease in light of the ADAAA and its mandate that coverage be construed broadly. However, in those cases where courts would previously have declined to reach the merits of ADA claims based on a determination that a plaintiff did not have a disability, legal fees and litigation costs regarding the merits of the case—e.g., whether an individual was subject to discrimination on the basis of his or her disability, whether an individual with a disability is "otherwise qualified," whether an accommodation constitutes an "undue hardship," etc.—might increase as a result of more cases proceeding to the merits.

In addition, we anticipate that in light of the ADAAA, including the expanded "regarded as" definition of disability contained in the ADAAA, there will be an increase in the number of EEOC charges and lawsuits filed. In particular, we anticipate that more individuals with disabilities might file charges with the Commission. Moreover, we anticipate that plaintiffs' lawyers, who previously might not have filed an ADA lawsuit because they believed that an employee would not be covered under the Supreme Court's cramped reading of the term "disability," will now be more inclined to file lawsuits in cases where the lawyers believe that discrimination on the basis of disability—broadly defined—has occurred. As a result, we believe that there may be additional legal fees and litigation costs associated with bringing and defending these claims, but we have no basis on which to estimate what those costs might be.

There will be costs to the Commission primarily for increased charge workload. The Congressional Budget Office (CBO) estimated these costs based on H.R. 3195, a prior version of the legislation that became the ADAAA. The CBO found that the bill would increase this workload by no more than 10 percent in most years, or roughly 2,000 charges annually. Based on the EEOC staffing levels needed to handle the agency's current caseload, CBO expected that implementing H.R. 3195 would require 50 to 60 additional employees. CBO estimated that the costs to hire those new employees would reach $5 million by fiscal year 2010, subject to appropriation of the necessary amounts. (H.R. 3195, ADA Amendments Act of 2008, Congressional Budget Office, June 23, 2008, at 2.) Nevertheless, we note that although charge data indicate an increase in ADA charges over the period of time since the Amendments Act became effective, this increase may be attributable to factors unrelated to the change in the ADA definition of disability. For example, government research has found a higher incidence of termination of individuals with disabilities than those without disabilities during economic downturns. Kaye, H. Steven, "The Impact of the 2007–09 Recession on Workers with Disabilities," Monthly Labor Review Online (U.S. Dept. of Labor Bureau of Labor Statistics, Oct. 2010, Vol. 133, No. 10), *http://www.bls.gov/opub/mlr/2010/10/art2exc.htm* (last visited Mar. 1, 2010). We also note that ADA charges were steadily rising over a period of years even prior to enactment of the ADA Amendments Act. To the extent that factors other than the Amendments

Act explain or partially explain the increase in ADA charges since the Act took effect, the increase in charges would not be attributable to the Amendments Act or the final regulations.

In sum, while there might be a potential increase in legal fees attributable to the ADAAA or the final regulations, we are unable to attach any dollar figure to what that increase might be.

II. Estimated Benefits Attributable to the ADAAA and the Final Regulations

A. Benefits of Accommodations Attributable to the ADAAA and the Final Regulations

(1) Summary of Preliminary Analysis

While the preliminary impact analysis made reference to various benefits of the rule in the discussion of assumptions and its review of various projected costs, it did not separately itemize, review, or quantify these benefits.

(2) Comments on Preliminary Analysis

Commenters said that the EEOC did not adequately account for the benefits of reasonable accommodation. In particular, Professor Peter Blanck submitted seven of his studies and argued that "research shows accommodations yield measurable benefits with economic value that should be deducted from the cited costs to yield a net value." [25]

Professor Blanck states that "research shows employees who receive accommodations are more productive and valued members of their organizations." He asserts that the contributions of accommodated employees with disabilities show measurable economic value for organizations, and that the analysis of economic impact must therefore take into account both direct benefits and indirect benefits as a potential offset to any potential accommodation costs reviewed in the preliminary analysis or cited by the employer groups. Examples of direct benefits reported by employers in these research studies include the ability to retain, hire, and promote qualified personnel; increased employee attendance (productivity); avoidance of costs associated with underperformance, injury, and turnover; benefits from savings in workers' compensation and related insurance; and increased diversity. The authors also note a number of indirect benefits: Improved interactions with co-workers; increased company morale, productivity, and profitability; improved interactions with customers; increased workplace safety; better overall company attendance; and increased customer base.

Professor Blanck's statement is that based on the studies he has reviewed and submitted, the quantified net benefits of providing accommodations are a significant offset to any cost incurred and, indeed, result in a net value. For example, he summarized the specific accommodation benefit data found in the 2006 "Workplace Accommodations: Evidence-Based Outcomes" study, as follows:

—Monetary estimates of direct benefits were provided by 95 respondents and are a median of $1,000 total when zero benefit estimates are included. When zero benefit estimates are excluded, the median benefit is $5,500 (based on 62 respondents). Some respondents were unable to provide exact estimates, but they could provide estimates within ranges (of 75 respondents, 66.4% reported direct benefits greater than $1,000, 16.1% reported direct benefits between $500 and $1,000, 10.2% reported direct benefits between $100 and $500, and the remaining 7.3% reported direct benefits less than $100).

—Respondents were asked to estimate the value of indirect benefits (e.g., improved interactions at work, improved morale, and increased company productivity, safety, attendance, and profitability, etc.). Out of 77 respondents who were able to do so, 57.1% reported no indirect benefits, but 33 respondents did report indirect benefits greater than zero, at a median value of $1,000. An additional 58 respondents were able to estimate the value of indirect benefits categorically in ranges. When combined with the 33 who reported exact estimates, 48.4% reported indirect benefits greater than $1,000, 18.7% reported a value between $500 and $1,000, 19.8% reported a value between $100 and $500, and the remaining 13.2% reported a value less than $100.

—This study reports conservative estimates of the Calendar Year Net Benefit by obtaining the difference between the First Calendar Year Direct Cost and the Direct Benefit estimates. This comparison was made for 87 respondents; the mean benefit was $11,335 and the median was $1,000. For 59.8% the direct benefits associated with providing the accommodation more than offset the direct costs, and for 21.8% benefits and costs equaled each other (the remaining 18.4% reported costs that were greater than benefits).

(3) Conclusions Regarding Benefits of Accommodations Attributable to the ADAAA and the Final Regulations

We agree with the commenters who noted the existence of surveys documenting both tangible and intangible benefits through the provision of reasonable accommodations. For example, in its most recent survey of employers, the Job Accommodation Network found that the following percentage of respondents reported the following benefits from accommodations they had provided to employees with disabilities:

	Percent
Direct benefits:	
Company retained a valued employee	89
Increased the employee's productivity	71

[25] Blanck, P.D. (1994), *Communicating the Americans with Disabilities Act: Transcending Compliance—A case report on Sears Roebuck & Co.,* The Annenberg Washington Program. (also in J. Burns (Ed.), *Driving Down Health Care Costs,* at 209–241, New York, Panel Publishers; Blanck, P.D. (1996); *Communicating the Americans with Disabilities Act: Transcending Compliance—1996: Follow-up report on Sears, Roebuck & Co.* Washington, D.C.: The Annenberg Washington Program. (also published as: Blanck, P.D. (1996), *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck & Co.,* Mental & Physical Disability Law Reporter, 20(2), 278–86) (mean cost was $45.20 on 71 accommodations made at Sears between 1993–1995)); Blanck, P.D. & Steele, P. (1998), *The Emerging Role of the Staffing Industry in the Employment of Persons with Disabilities—A Case Report on Manpower Inc.* Iowa City, IA: Iowa CEO and Law, Health Policy and Disability Center (data from 10 no-cost case studies of accommodation by Manpower); Hendricks, D.J., Batiste, L., Hirsh, A., Dowler, D. Schartz, H., & Blanck, P. (Fall 2005), *Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study.* Disability Studies Quarterly, Part I, 25(4); Schartz, H., Schartz, K., Hendricks, D.J., & Blanck, P. (2006), *Workplace Accommodations: Empirical Study of Current Employees,* Mississippi Law Journal, 75, 917–43 (for those employers providing monetary estimates of benefits of accommodation, 81.3% reported benefits that offset the costs; 61.3% reported benefits outweighing the cost, 20% reported benefits that equaled the costs, and the remaining 18.7% reported costs exceeding benefits); Schartz, H., Hendricks, D.J., & Blanck, P. (2006), *Workplace Accommodations: Evidence-Based Outcomes,* Work, 27, 345–354 (addressing "disability-related direct cost," the amount of direct cost that is more than the employer would have paid for an employee in same position without a disability); Schur, L., Kruse, D. Blasi, J, & Blanck, P. (2009), *Is Disability Disabling In All Workplaces?: Disability, Workplace Disparities, and Corporate Culture,* Industrial Relations, 48(3), 381–410, July (finding disability is linked to lower average pay, job security, training, and participation in decisions, and to more negative attitudes toward the job and company, but finding no disability "attitude gaps" in workplaces rated highly by all employees for fairness and responsiveness).

	Percent
Eliminated costs associated with training a new employee	60
Increased the employee's attendance	52
Increased diversity of the company	43
Saved workers' compensation or other insurance costs	39
Company hired a qualified person with a disability	14
Company promoted an employee	11
Indirect benefits:	
Improved interactions with co-workers	68
Increased overall company morale	62
Increased overall company productivity	59
Improved interactions with customers	47
Increased workplace safety	44
Increased overall company attendance	38
Increased profitability	32
Increased customer base	18

Job Accommodation Network (Original 2005, Updated 2007, Updated 2009, Updated 2010). *Workplace Accommodations: Low Cost, High Impact, http://AskJAN.org/media/LowCostHighImpact.doc* (last visited Mar. 1, 2011).

The JAN study did not attempt to attach numerical figures to the direct benefits noted in the survey. However, taking one of those benefits—increased retention of workers—the Commission notes that employers should experience cost savings by retaining rather than replacing a worker. According to data from the Society for Human Resource Management (SHRM), the average cost-per-hire for all industries in 2009 was $1,978. Society for Human Resource Management, *SHRM 2010 Customized Human Capital Benchmarking Report* (All Industries Survey) at 13 (2010). Such costs increase for knowledge based industries, such as high-tech where the cost-per-hire was $3,045. Id.; Society for Human Resource Management, *SHRM 2010 Customized Human Capital Benchmarking Report* (High Tech Industries Survey) at 13 (2010). In addition, the time-to-fill for positions in all industries was an average of 27 days, but time to fill for high-tech positions increased to an average of 35 days. Id.; All Industries Survey at 13.

In addition, although limited, the existing data shows that providing flexible work arrangements such as flexible scheduling and telecommuting reduces absenteeism, lowers turnover, improves the health of workers, and increases productivity. *See* Council of Economic Advisors, Work-Life Balance and the Economics of Workplace Flexibility (March 2010) (available at *http://www.whitehouse.gov/blog/2010/03/31/economics-workplace-flexibility*).

The Commission does not feel there is sufficient data to state unequivocally, as Professor Blank does, that there is always a net value to providing accommodations. However, it is apparent from surveys conducted of both employers and employees that there are significant direct and indirect benefits to providing accommodations that may potentially be commensurate with the costs.

The Commission also concludes that there are potential additional benefits regarding the provision of accommodations made by the ADAAA. Specifically:

—The changes made by the Amendments Act and the clarity regarding coverage provided by the Act and the final regulations should make the reasonable accommodation process simpler for employers. For example, to the extent employers may have spent time before reviewing medical records to determine whether a particular individual's diabetes or epilepsy satisfied the legal definition of a substantially limiting impairment, there may be a cost savings in terms of reduced time spent by front-line supervisors, managers, human resources staff, and even employees who request reasonable accommodation.

—The Amendments Act reverses at least three courts of appeals decisions that previously permitted individuals who were merely "regarded as" individuals with disabilities to be potentially entitled to reasonable accommodation. The Amendments Act and the regulations clearly provide that individuals covered only under the "regarded as" prong of the definition of disability will not be entitled to reasonable accommodation. This change benefits employers by both clarifying and limiting who is entitled to reasonable accommodations under the ADA.

B. Other Benefits Attributable to the ADAAA and the Final Regulations

Apart from specific benefits regarding the provision of accommodations, the Commission notes that a number of monetary and non-monetary benefits may result from the ADAAA and the final regulations, including but not limited to specifically the following:

(1) Efficiencies in Litigation

—The Amendments Act and final regulations will make it clearer to employers and employees what their rights and responsibilities are under the statute, thus decreasing the need for litigation regarding the definition of disability.

—To the extent that litigation remains unavoidable in certain circumstances, the Amendments Act and the final regulations reduce the need for costly experts to address "disability" and streamline the issues requiring judicial attention.

(2) Fuller Employment

—Fuller employment of individuals with disabilities will provide savings to the federal government and to employers by potentially moving individuals with disabilities into the workforce who otherwise are or would be collecting Social Security Disability Insurance (SSDI) from the government, or collecting short- or long-term disability payments through employer-sponsored insurance plans.

—Fuller employment of individuals with disabilities will stimulate the economy to the extent those individuals will have greater disposable income and enhance the number of taxpayers and resulting government revenue.

The Commission has not undertaken to quantify these benefits in monetary terms. However, we assume for purposes of our analysis that the sum total of these benefits will be significant.

(3) Non-discrimination and Other Intrinsic Benefits

The Commission also concludes that a wide range of qualitative, dignitary, and related intrinsic benefits must be considered. These benefits include the values identified in EO 13563, such as equity, human dignity, and fairness. Specifically, the qualitative benefits attributable to the ADA Amendments Act and the final rule include but are not limited to the following:

—Provision of reasonable accommodation to workers who would otherwise have been denied it benefits workers and potential workers with disabilities by diminishing discrimination against qualified individuals and by enabling them to reach their full potential. This protection against discrimination promotes human dignity and equity by enabling qualified workers to participate in the workforce.

—Provision of reasonable accommodation to workers who would otherwise have been denied it

reduces stigma, exclusion, and humiliation, and promotes self-respect.

—Interpreting and applying the ADA as amended will further integrate and promote contact with individuals with disabilities, yielding third-party benefits that include both (1) diminishing stereotypes often held by individuals without disabilities and (2) promoting design, availability, and awareness of accommodations that can have general usage benefits and also attitudinal benefits. *See* Elizabeth Emens, *Accommodating Integration,* 156 U. Pa. L. Rev. 839, 850–59 (2008) (explaining a wide range of potential third-party benefits that may arise from workplace accommodations).

—Provision of reasonable accommodation to workers who would otherwise have been denied it benefits both employers and coworkers in ways that may not be subject to monetary quantification, including increasing diversity, understanding, and fairness in the workplace.

—Provision of reasonable accommodation to workers who would otherwise have been denied it benefits workers in general and society at large by creating less discriminatory work environments.

Conclusion

In the foregoing final regulatory impact analysis, the Commission concludes that the approximate costs of reasonable accommodations attributable to the ADA Amendments Act and these regulations will range greatly and in some instances would exceed $100 million annually, depending on assumptions made about the number of individuals in the labor force whose coverage has been clarified under the ADAAA and the number of such individuals who will receive reasonable accommodation. We estimate that the lower bound annual incremental cost of accommodations would be approximately $60 million, assuming that 16% of 12 million individuals whose coverage has been clarified request reasonable accommodations over five years at a mean cost of $150. We also estimate that the upper bound annual incremental cost of accommodations would be approximately $183 million, assuming that 16% of 38.4 million individuals whose coverage has been clarified request reasonable accommodations over five years at a mean cost of $150. We do not believe that administrative costs will add significantly to the annual costs resulting from the final regulations, and we believe it is not possible to accurately estimate any decrease or increase in legal costs.

The Commission further concludes that the Amendments Act and the final regulations will have extensive quantitative and qualitative benefits for employers, government entities, and individuals with and without disabilities. Regardless of the number of accommodations provided to additional applicants or employees as a result of the Amendments Act and these regulations, the Commission believes that the resulting benefits will be significant and could be in excess of $100 million annually. Therefore, the rule will have a significant economic impact within the meaning of EO 12866. Consistent with Executive Order 13563, the Commission concludes that the benefits (quantitative and qualitative) of the rule justify the costs.

Unfunded Mandates Reform Act

The Commission notes that by its terms the Unfunded Mandates Reform Act does not apply to legislative or regulatory provisions that establish or enforce any "statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability." 2 U.S.C. 658a. Accordingly, it does not apply to this rulemaking.

Regulatory Flexibility Act

Title I of the ADA applies to all employers with 15 or more employees, approximately 822,000 of which are small firms (entities with 15–500 employees) according to data provided by the Small Business Administration Office of Advocacy. *See* Firm Size Data at *http://sba.gov/advo/research/data.html#us.* The rule is expected to apply uniformly to all such small businesses.

The Commission certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities because it imposes no reporting burdens and because of the no-cost and low-cost nature of the types of accommodations that most likely will be requested and required by those whose coverage has been clarified under the amended ADA's definition of an impairment that substantially limits a major life activity.[26]

In the public comments on the preliminary assessment, one employer organization submitted alternative estimates of the number of individuals who will be affected by the regulations, arguing that a final regulatory flexibility analysis is warranted, including alternatives to reduce costs. The organization estimated that 576,000 individuals will newly request reasonable accommodations due to the Amendments Act. Another employer organization suggested that the preliminary regulatory impact analysis use of the CPS–ASEC might have underestimated the number of people that would be considered to have a disability under these implementing regulations. For the reasons explained in the final regulatory impact analysis, the Commission has significantly revised upward its preliminary estimates of the number of individuals whose coverage has been clarified under the ADAAA and who may request and require accommodations, accounting for alternative sources of data cited by commenters and identified through the inter-agency review process under EO 12866. However, the Commission has also set forth in the final regulatory impact analysis its rationale for concluding that this incremental increase in reasonable accommodations will primarily entail accommodations with no or little costs.

No comments suggested regulatory alternatives that would be more suitable for small businesses. As described above, portions of the Commission's ADA regulations were rendered invalid by the changes Congress made to the ADA in enacting the Amendments Act, and the Commission therefore had no alternative but to conform its regulations to the changes Congress made in the statute to the definition of disability. Therefore, the rationale for this regulatory action is legislative direction. However, even absent this direction, the adopted course of action is the most appropriate one, and it is the Commission's conclusion that the title I

[26] This conclusion is consistent with the Commission's finding in the final regulatory impact analysis that the costs imposed by the Amendments Act and the final regulations may, depending on the data used, impose a cost in excess of $100 million annually for purposes of EO 12866. Unlike 12866, the Regulatory Flexibility Act requires a determination of whether a rule will have a "significant economic impact on a substantial number of small entities," which is not defined by a specific dollar threshold for purposes of the Regulatory Flexibility Act. Rather, the Small Business Administration (SBA) advises that agencies tailor the level, scope, and complexity of their analysis to the regulated small entity community at issue in each rule. The SBA advises that agencies should consider both adverse impacts and beneficial impacts under the Regulatory Flexibility Act, and can minimize an adverse impact by including beneficial impacts in the analysis, consistent with the legislative history of the Act that provided examples of significant impact to include adverse costs impact that is greater than the value of the regulatory good. As set forth in our final regulatory impact analysis, the Commission believes the estimated benefits of the Amendments Act and these final regulations will be significant.

regulations are likely to have benefits far exceeding costs.

In issuing these final regulations, the Commission has considered and complied with the provisions of the new EO 13563, in particular emphasizing public participation and inter-agency coordination. The Commission's regulations explain and implement Congress's amendments to the statute, but do not impinge on employer freedom of choice regarding matters of compliance. To the extent the final regulations and appendix provide clear explication of the new rules of construction for the definition of disability and examples of their application, the regulations provide information to the public in a form that is clear and intelligible, and promote informed decisionmaking.

Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

The rule does not include reporting requirements and imposes no new recordkeeping requirements. Compliance costs are expected to stem primarily from the costs of providing reasonable accommodation for individuals with substantially limiting impairments who would request and require accommodations. For all the reasons stated in the foregoing regulatory impact analysis, it is difficult to quantify how many additional requests for reasonable accommodation might result from the ADA Amendments Act and the final regulations. We estimate that the lower bound annual incremental cost of accommodations would be approximately $60 million, assuming that 16% of 12 million individuals whose coverage has been clarified request reasonable accommodations over five years at a mean cost of $150. We also estimate that the upper bound annual incremental cost of accommodations would be approximately $183 million, assuming that 16% of 38.4 million individuals whose coverage has been clarified request reasonable accommodations over five years at a mean cost of $150.

As explained in the final regulatory impact analysis, these cost figures are over-estimations for a multitude of reasons. In particular, the figures are based on a mean accommodation cost, whereas almost half of all accommodations impose no costs and the types of accommodations most likely needed by individuals whose coverage has been clarified as a result of the Amendments Act would most likely be low and no-cost accommodations.

We do not believe that administrative costs will add significantly to the annual costs resulting from the final regulations. We recognize that covered employers may in some cases need to revise internal policies and procedures to reflect the broader definition of disability under the Amendments Act and train personnel to ensure appropriate compliance with the ADAAA and the revised regulations. In addition, there will be costs associated with reviewing and analyzing the final regulations or publications describing their effects and recommended compliance practices.

Although these types of administrative costs may be particularly difficult for small businesses that operate with a smaller margin, the Commission will continue to take steps to reduce that burden. The Commission is issuing along with the final regulations a user-friendly question-and-answer guide intended to educate and promote compliance. The Commission also expects to prepare a small business handbook and to revise all of its ADA publications, which include dozens of enforcement guidances and technical assistance documents, some of which are specifically geared toward small business. Moreover, the Commission also intends to continue the provision of technical assistance to small business in its outreach efforts. In fiscal year 2009 alone, compliance with ADA standards was the main topic at 570 no-cost EEOC outreach events, reaching more than 35,000 people, many of whom were from small businesses.

Finally, any estimates of costs do not take into account the offsetting benefits noted by the research studies submitted by commenters and reviewed above in the final regulatory impact analysis. The Commission believes the estimated benefits of the Amendments Act and these final regulations are significant.

For the foregoing reasons, the Commission concludes that the regulations will not have a significant economic impact on a substantial number of small entities.

Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

The Commission is unaware of any duplicative, overlapping, or conflicting federal rules.

Paperwork Reduction Act

These regulations contain no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act. *See* 44 U.S.C. 3501, *et seq.*

Congressional Review Act

To the extent this rule is subject to the Congressional Review Act, the Commission has complied with its requirements by submitting this final rule to Congress prior to publication in the **Federal Register**.

List of Subjects in 29 CFR Part 1630

Equal employment opportunity, Individuals with disabilities.

Dated: March 10, 2011.

For the commission.

Jacqueline A. Berrien,

Chair.

Accordingly, for the reasons set forth in the preamble, the EEOC amends 29 CFR part 1630 as follows:

PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

■ 1. Revise the authority citation for 29 CFR part 1630 to read as follows:

Authority: 42 U.S.C. 12116 and 12205a of the Americans with Disabilities Act, as amended.

■ 2. Revise § 1630.1 to read as follows:

§ 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12101, *et seq.,* requiring equal employment opportunities for individuals with disabilities. The ADA as amended, and these regulations, are intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent, enforceable standards addressing discrimination.

(b) *Applicability.* This part applies to "covered entities" as defined at § 1630.2(b).

(c) *Construction*—(1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790–794a, as amended), or the regulations issued by Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or

jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than is afforded by this part.

(3) *State workers' compensation laws and disability benefit programs.* Nothing in this part alters the standards for determining eligibility for benefits under State workers' compensation laws or under State and Federal disability benefit programs.

(4) *Broad coverage.* The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

■ 3. Amend § 1630.2 as follows:

■ a. Revise paragraphs (g) through (m).

■ b. In paragraph (o)(1)(ii), remove the words "a qualified individual with a disability" and add, in their place, "an individual with a disability who is qualified".

■ c. In paragraph (o)(3), remove the words "the qualified individual with a disability" and add, in their place, "the individual with a disability".

■ d. Add paragraph (o)(4).

The revisions and additions read as follows:

§ 1630.2 Definitions.

* * * * *

(g) *Definition of* "*disability.*"

(1) *In general. Disability* means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

(2) An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the "actual disability" prong), (g)(1)(ii) (the "record of" prong), and/or (g)(1)(iii) (the "regarded as" prong) of this section.

(3) Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the "regarded as" prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

Note to paragraph (g): *See* § 1630.3 for exceptions to this definition.

(h) *Physical or mental impairment* means—

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major life activities*—(1) *In general.* Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. ADAAA Section 2(b)(4) (Findings and Purposes). Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

(j) *Substantially limits*—

(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in § 1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

(2) *Non-applicability to the "regarded as" prong.* Whether an individual's impairment "substantially limits" a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the "regarded as" prong) of this section.

(3) *Predictable assessments*—(i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

(ii) Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

(4) *Condition, manner, or duration*—

(i) At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(5) *Examples of mitigating measures*—Mitigating measures include, but are not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(6) *Ordinary eyeglasses or contact lenses—defined.* Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(k) *Has a record of such an impairment*—

(1) *In general.* An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed

broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (j) of this section apply.

(3) *Reasonable accommodation.* An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments with a health care provider.

(l) "*Is regarded as having such an impairment.*" The following principles apply under the "regarded as" prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

(2) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

(m) The term "*qualified,*" with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. *See* § 1630.3 for exceptions to this definition.

(o) * * *

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (g)(1)(i) of this section), or "record of" prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (g)(1)(iii) of this section).

* * * * *

■ 4. Revise § 1630.4 to read as follows:

§ 1630.4 Discrimination prohibited.

(a) *In general*—(1) It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual in regard to:

(i) Recruitment, advertising, and job application procedures;

(ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(iii) Rates of pay or any other form of compensation and changes in compensation;

(iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(v) Leaves of absence, sick leave, or any other leave;

(vi) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(vii) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(viii) Activities sponsored by a covered entity, including social and recreational programs; and

(ix) Any other term, condition, or privilege of employment.

(2) The term discrimination includes, but is not limited to, the acts described in §§ 1630.4 through 1630.13 of this part.

(b) *Claims of no disability.* Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation that was denied to an individual without a disability.

■ 5. Amend § 1630.9 as follows:

■ a. Revise paragraph (c).

■ b. In paragraph (d), in the first sentence, remove the words "A qualified individual with a disability" and add, in their place, the words "An individual with a disability".

■ c. In paragraph (d), in the last sentence, remove the words "a qualified individual with a disability" and add, in their place, the word "qualified".

■ d. Add paragraph (e).

The revisions and additions read as follows:

§ 1630.9 Not making reasonable accommodation.

* * * * *

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 507 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

* * * * *

(e) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (§ 1630.2(g)(1)(i)), or "record of" prong (§ 1630.2(g)(1)(ii)), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (§ 1630.2(g)(1)(iii)).

■ 6. Revise § 1630.10 to read as follows:

§ 1630.10 Qualification standards, tests, and other selection criteria.

(a) *In general.* It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.

(b) *Qualification standards and tests related to uncorrected vision.* Notwithstanding § 1630.2(j)(1)(vi) of this part, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other

selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability, but must be adversely affected by the application of the standard, test, or other criterion.

■ 7. Amend § 1630.15 by redesignating paragraph (f) as paragraph (g), and adding new paragraph (f) to read as follows:

§ 1630.15 Defenses.

* * * * *

(f) *Claims based on transitory and minor impairments under the "regarded as" prong.* It may be a defense to a charge of discrimination by an individual claiming coverage under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) "transitory and minor." To establish this defense, a covered entity must demonstrate that the impairment is both "transitory" and "minor." Whether the impairment at issue is or would be "transitory and minor" is to be determined objectively. A covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. For purposes of this section, "transitory" is defined as lasting or expected to last six months or less.

* * * * *

■ 8. Amend § 1630.16(a) by removing from the last sentence the word "because" and adding, in its place, the words "on the basis".

* * * * *

■ 9. Amend the Appendix to Part 1630 as follows:

■ A. Remove the "Background."

■ B. Revise the "Introduction."

■ C. Add "Note on Certain Terminology Used" after the "Introduction."

■ D. Revise § 1630.1.

■ E. Revise Sections 1630.2(a) through (f).

■ F. Revise § 1630.2(g).

■ G. Revise § 1630.2(h).

■ H. Revise § 1630.2(i).

■ I. Revise § 1630.2(j).

■ J. Add § 1630.2(j)(1), 1630.2(j)(3), 1630.2(j)(4), and 1630.2(j)(5) and (6).

■ K. Revise § 1630.2(k).

■ L. Revise § 1630.2(l).

■ M. Amend § 1630.2(m) by revising the heading and first sentence.

■ N. Amend § 1630.2(o) as follows:

■ i. Remove the first paragraph and add, in its place, three new paragraphs.

■ ii. Remove the words "a qualified individual with a disability" wherever they appear and add, in their place, "an individual with a disability".

■ iii. Remove the words "the qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disability".

■ O. Revise § 1630.4.

■ P. Amend § 1630.5 by revising the first paragraph.

■ Q. Amend § 1630.9 as follows:

■ i. Remove the words "a qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disability".

■ ii. Remove the words "the qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disability".

■ iii. Add new § 1630.9(e) after existing § 1630.9(d).

■ R. Revise § 1630.10.

■ S. Amend § 1630.15 by adding new § 1630.15(f) after existing § 1630.15(e).

■ T. Amend § 1630.16(a) by removing, in the last sentence, the words "qualified individuals with disabilities" and adding, in their place, "individuals with disabilities who are qualified and".

■ U. Amend § 1630.16(f) by removing, in the last paragraph, the words "a qualified individual with a disability" and adding, in their place, "an individual with a disability who is qualified".

The revisions and additions read as follows:

Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act

Introduction

The Americans with Disabilities Act (ADA) is a landmark piece of civil rights legislation signed into law on July 26, 1990, and amended effective January 1, 2009. *See* 42 U.S.C. 12101 *et seq.,* as amended. In passing the ADA, Congress recognized that "discrimination against individuals with disabilities continues to be a serious and pervasive social problem" and that the "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. 12101(a)(2), (8). Discrimination on the basis of disability persists in critical areas such as housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, access to public services, and employment. 42 U.S.C. 12101(a)(3). Accordingly, the ADA prohibits discrimination in a wide range of areas, including employment, public services, and public accommodations.

Title I of the ADA prohibits disability-based discrimination in employment. The Equal Employment Opportunity Commission (the Commission or the EEOC) is responsible for enforcement of title I (and parts of title V) of the ADA. Pursuant to the ADA as amended, the EEOC is expressly granted the authority and is expected to amend these regulations. 42 U.S.C. 12205a. Under title I of the ADA, covered entities may not discriminate against qualified individuals on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. 42 U.S.C. 12112(a). For these purposes, "discriminate" includes (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicants or employees to discrimination; (3) utilizing standards, criteria, or other methods of administration that have the effect of discrimination on the basis of disability; (4) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity; (5) denying employment opportunities to a job applicant or employee who is otherwise qualified, if such denial is based on the need to make reasonable accommodation; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criterion is shown to be job related for the position in question and is consistent with business necessity; and (7) subjecting applicants or employees to prohibited medical inquiries or examinations. *See* 42 U.S.C. 12112(b), (d).

As with other civil rights laws, individuals seeking protection under these anti-discrimination provisions of the ADA generally must allege and prove that they are members of the "protected class." [1] Under the

[1] Claims of improper disability-related inquiries or medical examinations, improper disclosure of confidential medical information, or retaliation may be brought by any applicant or employee, not just individuals with disabilities. *See,* e.g., *Cossette* v. *Minnesota Power & Light,* 188 F.3d 964, 969–70 (8th Cir. 1999); *Fredenburg* v. *Contra Costa County Dep't of Health Servs.,* 172 F.3d 1176, 1182 (9th Cir. 1999); *Griffin* v. *Steeltek, Inc.,* 160 F.3d 591, 594 (10th Cir. 1998). Likewise, a nondisabled applicant or employee may challenge an employment action that is based on the disability of an individual with

Continued

ADA, this typically means they have to show that they meet the statutory definition of "disability." 2008 House Judiciary Committee Report at 5. However, "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage." Id.

In the original ADA, Congress defined "disability" as (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. 12202(2). Congress patterned these three parts of the definition of disability—the "actual," "record of," and "regarded as" prongs—after the definition of "handicap" found in the Rehabilitation Act of 1973. 2008 House Judiciary Committee Report at 6. By doing so, Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term "disability" as used in the ADA. H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 27 (1990) (1990 House Judiciary Report or House Judiciary Report); *see* also S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) (1989 Senate Report or Senate Report); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 50 (1990) (1990 House Labor Report or House Labor Report). Congress expected that the definition of disability and related terms, such as "substantially limits" and "major life activity," would be interpreted under the ADA "consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act"—i.e., expansively and in favor of broad coverage. ADA Amendments Act of 2008 (ADAAA or Amendments Act) at Section 2(a)(1)–(8) and (b)(1)–(6) (Findings and Purposes); *see also* Senate Statement of the Managers to Accompany S. 3406 (2008 Senate Statement of Managers) at 3 ("When Congress passed the ADA in 1990, it adopted the functional definition of disability from section 504 of the Rehabilitation Act of 1973, in part, because after 17 years of development through case law the requirements of the definition were well understood. Within this framework, with its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred."); 2008 House Judiciary Committee Report at 6 & n.6 (noting that courts had interpreted this Rehabilitation Act definition "broadly to include persons with a wide range of physical and mental impairments").

That expectation was not fulfilled. ADAAA Section 2(a)(3). The holdings of several Supreme Court cases sharply narrowed the broad scope of protection Congress originally intended under the ADA, thus eliminating protection for many individuals whom Congress intended to protect. Id. For example, in *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471 (1999), the Court ruled that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. In *Sutton,* the Court also adopted a restrictive reading of the meaning of being "regarded as" disabled under the ADA's definition of disability. Subsequently, in *Toyota Motor Mfg., Ky., Inc.* v. *Williams,* 534 U.S. 184 (2002), the Court held that the terms "substantially" and "major" in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled" under the ADA, and that to be substantially limited in performing a major life activity under the ADA, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

As a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities, and thus not protected by the ADA. *See* 2008 Senate Statement of Managers at 3 ("After the Court's decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred."). Congress concluded that these rulings imposed a greater degree of limitation and expressed a higher standard than it had originally intended, and coupled with the EEOC's 1991 ADA regulations which had defined the term "substantially limits" as "significantly restricted," unduly precluded many individuals from being covered under the ADA. Id._("[t]hus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard" and "[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA").

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009. This legislation is the product of extensive bipartisan efforts, and the culmination of collaboration and coordination between legislators and stakeholders, including representatives of the disability, business, and education communities. *See* Statement of Representatives Hoyer and Sensenbrenner, 154 Cong. Rec. H8294–96 (daily ed. Sept. 17, 2008) (Hoyer-Sensenbrenner Congressional Record Statement); Senate Statement of Managers at 1. The express purposes of the ADAAA are, among other things:

(1) To carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection under the ADA;

(2) To reject the requirement enunciated in *Sutton* and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) To reject the Supreme Court's reasoning in *Sutton* with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987), which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) To reject the standards enunciated by the Supreme Court in *Toyota* that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) To convey congressional intent that the standard created by the Supreme Court in *Toyota* for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA;

(6) To convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(7) To express Congress' expectation that the EEOC will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with the ADA as amended.

ADAAA Section 2(b). The findings and purposes of the ADAAA "give[] clear guidance to the courts and * * * [are] intend[ed] to be applied appropriately and consistently." 2008 Senate Statement of Managers at 5.

The EEOC has amended its regulations to reflect the ADAAA's findings and purposes. The Commission believes that it is essential also to amend its appendix to the original regulations at the same time, and to reissue this interpretive guidance as amended concurrently with the issuance of the amended regulations. This will help to ensure that individuals with disabilities understand their rights, and to facilitate and encourage compliance by covered entities under this part.

Accordingly, this amended appendix addresses the major provisions of this part and explains the major concepts related to disability-based employment discrimination. This appendix represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by this

whom the applicant or employee is known to have a relationship or association. *See* 42 U.S.C. 12112(b)(4).

appendix when resolving charges of employment discrimination.

Note on Certain Terminology Used

The ADA, the EEOC's ADA regulations, and this appendix use the term "disabilities" rather than the term "handicaps" which was originally used in the Rehabilitation Act of 1973, 29 U.S.C. 701–796. Substantively, these terms are equivalent. As originally noted by the House Committee on the Judiciary, "[t]he use of the term 'disabilities' instead of the term 'handicaps' reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than 'handicapped' as used in previous laws, such as the Rehabilitation Act of 1973 * * *." 1990 House Judiciary Report at 26–27; *see* also 1989 Senate Report at 21; 1990 House Labor Report at 50–51.

In addition, consistent with the Amendments Act, revisions have been made to the regulations and this Appendix to refer to "individual with a disability" and "qualified individual" as separate terms, and to change the prohibition on discrimination to "on the basis of disability" instead of prohibiting discrimination against a qualified individual "with a disability because of the disability of such individual." "This ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'" 2008 Senate Statement of Managers at 11.

The use of the term "Americans" in the title of the ADA, in the EEOC's regulations, or in this Appendix as amended is not intended to imply that the ADA only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality, from discrimination by a covered entity.

Finally, the terms "employer" and "employer or other covered entity" are used interchangeably throughout this Appendix to refer to all covered entities subject to the employment provisions of the ADA.

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The express purposes of the ADA as amended are to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; to ensure that the Federal Government plays a central role in enforcing the standards articulated in the ADA on behalf of individuals with disabilities; and to invoke the sweep of congressional authority to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. 12101(b). The EEOC's ADA regulations are intended to implement these Congressional purposes in simple and straightforward terms.

Section 1630.1(b) Applicability

The EEOC's ADA regulations as amended apply to all "covered entities" as defined at § 1630.2(b). The ADA defines "covered entities" to mean an employer, employment agency, labor organization, or joint labor-management committee. 42 U.S.C. 12111(2). All covered entities are subject to the ADA's rules prohibiting discrimination. 42 U.S.C. 12112.

Section 1630.1(c) Construction

The ADA must be construed as amended. The primary purpose of the Amendments Act was to make it easier for people with disabilities to obtain protection under the ADA. *See* Joint Hoyer-Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 (reviewing provisions of H.R. 3195 as revised following negotiations between representatives of the disability and business communities) (Joint Hoyer-Sensenbrenner Statement) at 2. Accordingly, under the ADA as amended and the EEOC's regulations, the definition of "disability" "shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]." 42 U.S.C. 12102(4)(A); *see* also 2008 Senate Statement of Managers at 3 ("The ADA Amendments Act * * * reiterates that Congress intends that the scope of the [ADA] be broad and inclusive."). This construction is also intended to reinforce the general rule that civil rights statutes must be broadly construed to achieve their remedial purpose. Id. at 2; *see* also 2008 House Judiciary Committee Report at 19 (this rule of construction "directs courts to construe the definition of 'disability' broadly to advance the ADA's remedial purposes" and thus "brings treatment of the ADA's definition of disability in line with treatment of other civil rights laws, which should be construed broadly to effectuate their remedial purposes").

The ADAAA and the EEOC's regulations also make clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, not_whether the individual meets the definition of disability. ADAAA Section 2(b)(5). This means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a "reasonable accommodation" to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation "interactive process." *See also* 2008 Senate Statement of Managers at 4 ("[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory."); 2008 House Judiciary Committee Report at 6 ("An individual who does not qualify as disabled * * * does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to attempt to prove his or her claim of discriminatory treatment.").

Further, the question of whether an individual has a disability under this part "should not demand extensive analysis." ADAAA Section 2(b)(5). *See* also House Education and Labor Committee Report at 9 ("The Committee intends that the establishment of coverage under the ADA should not be overly complex nor difficult. * * *").

In addition, unless expressly stated otherwise, the standards applied in the ADA are intended to provide at least as much protection as the standards applied under the Rehabilitation Act of 1973.

The ADA does not preempt any Federal law, or any State or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense to failing to prepare and maintain an affirmative action program under section 503 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA. *See* 1990 House Labor Report at 135; 1990 House Judiciary Report at 69–70.

This also means that an individual with a disability could choose to pursue claims under a State discrimination or tort law that does not confer greater substantive rights, or even confers fewer substantive rights, if the potential available remedies would be greater than those available under the ADA and this part. The ADA does not restrict an individual with a disability from pursuing such claims in addition to charges brought under this part. 1990 House Judiciary Report at 69–70.

The ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. It does not preempt State, county, or local laws, ordinances or regulations that are consistent with this part and designed to protect the public health from individuals who pose a direct threat to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation. However, the ADA does preempt inconsistent requirements established by State or local law for safety or security sensitive positions. *See* 1989 Senate Report at 27; 1990 House Labor Report at 57.

An employer allegedly in violation of this part cannot successfully defend its actions by relying on the obligation to comply with the requirements of any State or local law that imposes prohibitions or limitations on the eligibility of individuals with disabilities who are qualified to practice any occupation or profession. For example, suppose a municipality has an ordinance that prohibits individuals with tuberculosis from teaching school children. If an individual with dormant tuberculosis challenges a private school's refusal to hire him or her on the basis of the tuberculosis, the private school

would not be able to rely on the city ordinance as a defense under the ADA.

Paragraph (c)(3) is consistent with language added to section 501 of the ADA by the ADA Amendments Act. It makes clear that nothing in this part is intended to alter the determination of eligibility for benefits under state workers' compensation laws or Federal and State disability benefit programs. State workers' compensation laws and Federal disability benefit programs, such as programs that provide payments to veterans with service-connected disabilities and the Social Security Disability Insurance program, have fundamentally different purposes than title I of the ADA.

Section 1630.2 Definitions

Sections 1630.2(a)–(f) Commission, Covered Entity, etc.

The definitions section of part 1630 includes several terms that are identical, or almost identical, to the terms found in title VII of the Civil Rights Act of 1964. Among these terms are "Commission," "Person," "State," and "Employer." These terms are to be given the same meaning under the ADA that they are given under title VII. In general, the term "employee" has the same meaning that it is given under title VII. However, the ADA's definition of "employee" does not contain an exception, as does title VII, for elected officials and their personal staffs. It should further be noted that all State and local governments are covered by title II of the ADA whether or not they are also covered by this part. Title II, which is enforced by the Department of Justice, became effective on January 26, 1992. *See* 28 CFR part 35.

The term "covered entity" is not found in title VII. However, the title VII definitions of the entities included in the term "covered entity" (e.g., employer, employment agency, labor organization, etc.) are applicable to the ADA.

Section 1630.2(g) Disability

In addition to the term "covered entity," there are several other terms that are unique to the ADA as amended. The first of these is the term "disability." "This definition is of critical importance because as a threshold issue it determines whether an individual is covered by the ADA." 2008 Senate Statement of Managers at 6.

In the original ADA, "Congress sought to protect anyone who experiences discrimination because of a current, past, or perceived disability." 2008 Senate Statement of Managers at 6. Accordingly, the definition of the term "disability" is divided into three prongs: An individual is considered to have a "disability" if that individual (1) has a physical or mental impairment that substantially limits one or more of that person's major life activities (the "actual disability" prong); (2) has a record of such an impairment (the "record of" prong); or (3) is regarded by the covered entity as an individual with a disability as defined in § 1630.2(l) (the "regarded as" prong). The ADAAA retained the basic structure and terms of the original definition of disability. However, the Amendments Act altered the interpretation and application of this critical statutory term in fundamental ways. *See* 2008 Senate Statement of Managers at 1 ("The bill maintains the ADA's inherently functional definition of disability" but "clarifies and expands the definition's meaning and application.").

As noted above, the primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. *See* Joint Hoyer-Sensenbrenner Statement at 2. Accordingly, the ADAAA provides rules of construction regarding the definition of disability. Consistent with the congressional intent to reinstate a broad scope of protection under the ADA, the ADAAA's rules of construction require that the definition of "disability" "shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]." 42 U.S.C. 12102(4)(A). The legislative history of the ADAAA is replete with references emphasizing this principle. *See* Joint Hoyer-Sensenbrenner Statement at 2 ("[The bill] establishes that the definition of disability must be interpreted broadly to achieve the remedial purposes of the ADA"); 2008 Senate Statement of Managers at 1 (the ADAAA's purpose is to "enhance the protections of the [ADA]" by "expanding the definition, and by rejecting several opinions of the United States Supreme Court that have had the effect of restricting the meaning and application of the definition of disability"); *id.* (stressing the importance of removing barriers "to construing and applying the definition of disability more generously"); *id.* at 4 ("The managers have introduced the [ADAAA] to restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA."); *id.* ("It is our expectation that because the bill makes the definition of disability more generous, some people who were not covered before will now be covered."); *id.* (warning that "the definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections"); *id.* (this principle "sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently"); 2008 House Judiciary Committee Report at 5 ("The purpose of the bill is to restore protection for the broad range of individuals with disabilities as originally envisioned by Congress by responding to the Supreme Court's narrow interpretation of the definition of disability.").

Further, as the purposes section of the ADAAA explicitly cautions, the "primary object of attention" in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations. As noted above, this means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a "reasonable accommodation" to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation "interactive process." ADAAA Section 2(b)(5); *see* also 2008 Senate Statement of Managers at 4 ("[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory."); 2008 House Judiciary Committee Report (criticizing pre-ADAAA court decisions which "prevented individuals that Congress unquestionably intended to cover from ever getting a chance to prove their case"). Accordingly, the threshold coverage question of whether an individual's impairment is a disability under the ADA "should not demand extensive analysis." ADAAA Section 2(b)(5).

Section 1630.2(g)(2) provides that an individual may establish coverage under any one or more (or all three) of the prongs in the definition of disability. However, to be an individual with a disability, an individual is only required to satisfy one prong.

As § 1630.2(g)(3) indicates, in many cases it may be unnecessary for an individual to resort to coverage under the "actual disability" or "record of" prongs. Where the need for a reasonable accommodation is not at issue—for example, where there is no question that the individual is "qualified" without a reasonable accommodation and is not seeking or has not sought a reasonable accommodation—it would not be necessary to determine whether the individual is substantially limited in a major life activity (under the actual disability prong) or has a record of a substantially limiting impairment (under the record of prong). Such claims could be evaluated solely under the "regarded as" prong of the definition. In fact, Congress expected the first and second prongs of the definition of disability "to be used only by people who are affirmatively seeking reasonable accommodations * * *" and that "[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation * * *—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 4. An individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodation or requires a reasonable accommodation.

To fully understand the meaning of the term "disability," it is also necessary to understand what is meant by the terms "physical or mental impairment," "major life activity," "substantially limits," "record of," and "regarded as." Each of these terms is discussed below.

Section 1630.2(h) Physical or Mental Impairment

Neither the original ADA nor the ADAAA provides a definition for the terms "physical or mental impairment." However, the legislative history of the Amendments Act notes that Congress "expect[s] that the current regulatory definition of these terms,

as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change." 2008 Senate Statement of Managers at 6. The definition of "physical or mental impairment" in the EEOC's regulations remains based on the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. However, the definition in EEOC's regulations adds additional body systems to those provided in the section 504 regulations and makes clear that the list is non-exhaustive.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a "record of" a substantially limiting impairment," or may be covered under the "regarded as" prong if it is the basis for a prohibited employment action and is not "transitory and minor."

The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. *See* 1989 Senate Report at 22–23; 1990 House Labor Report at 51–52; 1990 House Judiciary Report at 28–29.

Section 1630.2(i) Major Life Activities

The ADAAA provided significant new guidance and clarification on the subject of "major life activities." As the legislative history of the Amendments Act explains, Congress anticipated that protection under the ADA would now extend to a wider range of cases, in part as a result of the expansion of the category of major life activities. *See* 2008 Senate Statement of Managers at 8 n.17.

For purposes of clarity, the Amendments Act provides an illustrative list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADA Amendments expressly made this statutory list of examples of major life activities non-exhaustive, and the regulations include sitting, reaching, and interacting with others as additional examples. Many of these major life activities listed in the ADA Amendments Act and the regulations already had been included in the EEOC's 1991 now-superseded regulations implementing title I of the ADA and in sub-regulatory documents, and already were recognized by the courts.

The ADA as amended also explicitly defines "major life activities" to include the operation of "major bodily functions." This was an important addition to the statute. This clarification was needed to ensure that the impact of an impairment on the operation of a major bodily function would not be overlooked or wrongly dismissed as falling outside the definition of "major life activities" under the ADA. 2008 House Judiciary Committee Report at 16; *see also* 2008 Senate Statement of Managers at 8 ("for the first time [in the ADAAA], the category of 'major life activities' is defined to include the operation of major bodily functions, thus better addressing chronic impairments that can be substantially limiting").

The regulations include all of those major bodily functions identified in the ADA Amendments Act's non-exhaustive list of examples and add a number of others that are consistent with the body systems listed in the regulations' definition of "impairment" (at § 1630.2(h)) and with the U.S. Department of Labor's nondiscrimination and equal employment opportunity regulations implementing section 188 of the Workforce Investment Act of 1998, 29 U.S.C. 2801, *et seq.* Thus, special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions are major bodily functions not included in the statutory list of examples but included in § 1630.2(i)(1)(ii). The Commission has added these examples to further illustrate the non-exhaustive list of major life activities, including major bodily functions, and to emphasize that the concept of major life activities is to be interpreted broadly consistent with the Amendments Act. The regulations also provide that the operation of a major bodily function may include the operation of an individual organ within a body system. This would include, for example, the operation of the kidney, liver, pancreas, or other organs.

The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual's normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.

In the legislative history of the ADAAA, Congress expressed its expectation that the statutory expansion of "major life activities" to include major bodily functions (along with other statutory changes) would lead to more expansive coverage. *See* 2008 Senate Statement of Managers at 8 n.17 (indicating that these changes will make it easier for individuals to show that they are eligible for the ADA's protections under the first prong of the definition of disability). The House Education and Labor Committee explained that the inclusion of major bodily functions would "affect cases such as *U.S.* v. *Happy Time Day Care Ctr.* in which the courts struggled to analyze whether the impact of HIV infection substantially limits various major life activities of a five-year-old child, and recognizing, among other things, that 'there is something inherently illogical about inquiring whether' a five-year-old's ability to procreate is substantially limited by his HIV infection; *Furnish* v. *SVI Sys., Inc,* in which the court found that an individual with cirrhosis of the liver caused by Hepatitis B is not disabled because liver function—unlike eating, working, or reproducing—'is not integral to one's daily existence;' and *Pimental* v. *Dartmouth-Hitchcock Clinic,* in which the court concluded that the plaintiff's stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate. The Committee expects that the plaintiffs in each of these cases could establish a [substantial limitation] on major bodily functions that would qualify them for protection under the ADA." 2008 House Education and Labor Committee Report at 12.

The examples of major life activities (including major bodily functions) in the ADAAA and the EEOC's regulations are illustrative and non-exhaustive, and the absence of a particular life activity or bodily function from the examples does not create a negative implication as to whether an omitted activity or function constitutes a major life activity under the statute. *See* 2008 Senate Statement of Managers at 8; *see* also 2008 House Committee on Educ. and Labor Report at 11; 2008 House Judiciary Committee Report at 17.

The Commission anticipates that courts will recognize other major life activities, consistent with the ADA Amendments Act's mandate to construe the definition of disability broadly. As a result of the ADA Amendments Act's rejection of the holding in *Toyota Motor Mfg., Ky., Inc.* v. *Williams,* 534 U.S. 184 (2002), whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life." *See Toyota,* 534 U.S. at 197 (defining "major life activities" as activities that are of "central importance to most people's daily lives"). Indeed, this holding was at odds with the earlier Supreme Court decision of *Bragdon* v. *Abbott,* 524 U.S. 624 (1998), which held that a major life activity (in that case, reproduction) does not have to have a "public, economic or daily aspect." *Id.* at 639.

Accordingly, the regulations provide that in determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. Cf. 2008 Senate Statement of Managers at 7 (indicating that a person is considered an individual with a disability for purposes of the first prong when one or more of the individual's

"important life activities" are restricted) (citing 1989 Senate Report at 23). The regulations also reject the notion that to be substantially limited in performing a major life activity, an individual must have an impairment that prevents or severely restricts the individual from doing "activities that are of central importance to most people's daily lives." *Id.; see* also 2008 Senate Statement of Managers at 5 n.12.

Thus, for example, lifting is a major life activity regardless of whether an individual who claims to be substantially limited in lifting actually performs activities of central importance to daily life that require lifting. Similarly, the Commission anticipates that the major life activity of performing manual tasks (which was at issue in *Toyota*) could have many different manifestations, such as performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure. Such tasks need not constitute activities of central importance to most people's daily lives, nor must an individual show that he or she is substantially limited in performing all manual tasks.

Section 1630.2(j) Substantially Limits

In any case involving coverage solely under the "regarded as" prong of the definition of "disability" (e.g., cases where reasonable accommodation is not at issue), it is not necessary to determine whether an individual is "substantially limited" in any major life activity. *See* 2008 Senate Statement of Managers at 10; id. at 13 ("The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong."). Indeed, Congress anticipated that the first and second prongs of the definition of disability would "be used only by people who are affirmatively seeking reasonable accommodations * * *" and that "[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation * * *—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 4. Of course, an individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation. The concept of "substantially limits" is only relevant in cases involving coverage under the "actual disability" or "record of" prong of the definition of disability. Thus, the information below pertains to these cases only.

Section 1630.2(j)(1) Rules of Construction

It is clear in the text and legislative history of the ADAAA that Congress concluded the courts had incorrectly construed "substantially limits," and disapproved of the EEOC's now-superseded 1991 regulation defining the term to mean "significantly restricts." *See* 2008 Senate Statement of Managers at 6 ("We do not believe that the courts have correctly instituted the level of coverage we intended to establish with the term 'substantially limits' in the ADA" and "we believe that the level of limitation, and the intensity of focus, applied by the Supreme Court in *Toyota* goes beyond what we believe is the appropriate standard to create coverage under this law."). Congress extensively deliberated over whether a new term other than "substantially limits" should be adopted to denote the appropriate functional limitation necessary under the first and second prongs of the definition of disability. *See* 2008 Senate Statement of Managers at 6–7. Ultimately, Congress affirmatively opted to retain this term in the Amendments Act, rather than replace it. It concluded that "adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act." *Id.* Instead, Congress determined "a better way * * * to express [its] disapproval of *Sutton* and *Toyota* (along with the current EEOC regulation) is to retain the words 'substantially limits,' but clarify that it is not meant to be a demanding standard." *Id.* at 7. To achieve that goal, Congress set forth detailed findings and purposes and "rules of construction" to govern the interpretation and application of this concept going forward. *See* ADAAA Sections 2–4; 42 U.S.C. 12102(4).

The Commission similarly considered whether to provide a new definition of "substantially limits" in the regulation. Following Congress's lead, however, the Commission ultimately concluded that a new definition would inexorably lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress. Therefore, the regulations simply provide rules of construction that must be applied in determining whether an impairment substantially limits (or substantially limited) a major life activity. These are each discussed in greater detail below.

Section 1630.2(j)(1)(i): Broad Construction; not a Demanding Standard

Section 1630.2(j)(1)(i) states: "The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."

Congress stated in the ADA Amendments Act that the definition of disability "shall be construed in favor of broad coverage," and that "the term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." 42 U.S.C. 12101(4)(A)–(B), as amended. "This is a textual provision that will legally guide the agencies and courts in properly interpreting the term 'substantially limits.'" Hoyer-Sensenbrenner Congressional Record Statement at H8295. As Congress noted in the legislative history of the ADAAA, "[t]o be clear, the purposes section conveys our intent to clarify not only that 'substantially limits' should be measured by a lower standard than that used in *Toyota,* but also that the definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections." 2008 Senate Statement of Managers at 5 (also stating that "[t]his rule of construction, together with the rule of construction providing that the definition of disability shall be construed in favor of broad coverage of individuals sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently"). Put most succinctly, "substantially limits" "is not meant to be a demanding standard." 2008 Senate Statement of Managers at 7.

Section 1630.2(j)(1)(ii): Significant or Severe Restriction Not Required; Nonetheless, Not Every Impairment Is Substantially Limiting

Section 1630.2(j)(1)(ii) states: "An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a 'disability' within the meaning of this section."

In keeping with the instruction that the term "substantially limits" is not meant to be a demanding standard, the regulations provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. However, to be substantially limited in performing a major life activity an individual need not have an impairment that prevents or significantly or severely restricts the individual from performing a major life activity. *See* 2008 Senate Statement of Managers at 2, 6–8 & n.14; 2008 House Committee on Educ. and Labor Report at 9–10 ("While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity to qualify as a disability."); 2008 House Judiciary Committee Report at 16 (similarly requiring an "important" limitation). The level of limitation required is "substantial" as compared to most people in the general population, which does not require a significant or severe restriction. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability. Nonetheless, not every impairment will constitute a "disability" within the meaning of this section. *See* 2008 Senate Statement of Managers at 4 ("We reaffirm that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA.")

Section 1630.2(j)(1)(iii): Substantial Limitation Should Not Be Primary Object of Attention; Extensive Analysis Not Needed

Section 1630.2(j)(1)(iii) states: "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis."

Congress retained the term "substantially limits" in part because it was concerned that adoption of a new phrase—and the resulting need for further judicial scrutiny and construction—would not "help move the focus from the threshold issue of disability to the primary issue of discrimination." 2008 Senate Statement of Managers at 7.

This was the primary problem Congress sought to solve in enacting the ADAAA. It recognized that "clearing the initial [disability] threshold is critical, as individuals who are excluded from the definition 'never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they [are] 'otherwise qualified.' '" 2008 House Judiciary Committee Report at 7; *see also* id. (expressing concern that "[a]n individual who does not qualify as disabled does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to attempt to prove his or her claim of discriminatory treatment"); 2008 Senate Statement of Managers at 4 (criticizing pre-ADAAA lower court cases that "too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory").

Accordingly, the Amendments Act and the amended regulations make plain that the emphasis in ADA cases now should be squarely on the merits and not on the initial coverage question. The revised regulations therefore provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population and deletes the language to which Congress objected. The Commission believes that this provides a useful framework in which to analyze whether an impairment satisfies the definition of disability. Further, this framework better reflects Congress's expressed intent in the ADA Amendments Act that the definition of the term "disability" shall be construed broadly, and is consistent with statements in the Amendments Act's legislative history. *See* 2008 Senate Statement of Managers at 7 (stating that "adopting a new, undefined term" and the "resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination," and finding that "'substantially limits' as construed consistently with the findings and purposes of this legislation establishes an appropriate functionality test of determining whether an individual has a disability" and that "using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications").

Consequently, this rule of construction makes clear that the question of whether an impairment substantially limits a major life activity should not demand extensive analysis. As the legislative history explains, "[w]e expect that courts interpreting [the ADA] will not demand such an extensive analysis over whether a person's physical or mental impairment constitutes a disability." Hoyer-Sensenbrenner Congressional Record Statement at H8295; *see id.* ("Our goal throughout this process has been to simplify that analysis.")

Section 1630.2(j)(1)(iv): Individualized Assessment Required, But With Lower Standard Than Previously Applied

Section 1630.2(j)(1)(iv) states: "The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA."

By retaining the essential elements of the definition of disability including the key term "substantially limits," Congress reaffirmed that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. *See* 2008 Senate Statement of Managers at 4. To be covered under the first prong of the definition, an individual must establish that an impairment substantially limits a major life activity. That has not changed—nor will the necessity of making this determination on an individual basis. Id. However, what the ADAAA changed is the standard required for making this determination. Id. at 4–5.

The Amendments Act and the EEOC's regulations explicitly reject the standard enunciated by the Supreme Court in *Toyota Motor Mfg., Ky., Inc.* v. *Williams,* 534 U.S. 184 (2002), and applied in the lower courts in numerous cases. *See* ADAAA Section 2(b)(4). That previous standard created "an inappropriately high level of limitation necessary to obtain coverage under the ADA." Id. at Section 2(b)(5). The Amendments Act and the EEOC's regulations reject the notion that "substantially limits" should be interpreted strictly to create a demanding standard for qualifying as disabled. Id. at Section 2(b)(4). Instead, the ADAAA and these regulations establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress originally intended. 2008 Senate Statement of Managers at 7. This will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking to prove discrimination under the ADA. *Id.*

Section 1630.2(j)(1)(v): Scientific, Medical, or Statistical Analysis Not Required, But Permissible When Appropriate

Section 1630.2(j)(1)(v) states: "The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate."

The term "average person in the general population," as the basis of comparison for determining whether an individual's impairment substantially limits a major life activity, has been changed to "most people in the general population." This revision is not a substantive change in the concept, but rather is intended to conform the language to the simpler and more straightforward terminology used in the legislative history to the Amendments Act. The comparison between the individual and "most people" need not be exacting, and usually will not require scientific, medical, or statistical analysis. Nothing in this subparagraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

The comparison to most people in the general population continues to mean a comparison to other people in the general population, not a comparison to those similarly situated. For example, the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other amputees. This does not mean that disability cannot be shown where an impairment, such as a learning disability, is clinically diagnosed based in part on a disparity between an individual's aptitude and that individual's actual versus expected achievement, taking into account the person's chronological age, measured intelligence, and age-appropriate education. Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.

Section 1630.2(j)(1)(vi): Mitigating Measures

Section 1630.2(j)(1)(vi) states: "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."

The ameliorative effects of mitigating measures shall not be considered in determining whether an impairment substantially limits a major life activity. Thus, "[w]ith the exception of ordinary eyeglasses and contact lenses, impairments must be examined in their unmitigated state." *See* 2008 Senate Statement of Managers at 5.

This provision in the ADAAA and the EEOC's regulations "is intended to eliminate the catch-22 that exist[ed] * * * where individuals who are subjected to discrimination on the basis of their disabilities [we]re frequently unable to

invoke the ADA's protections because they [we]re not considered people with disabilities when the effects of their medication, medical supplies, behavioral adaptations, or other interventions [we]re considered." Joint Hoyer-Sensenbrenner Statement at 2; *see also* 2008 Senate Statement of Managers at 9 ("This provision is intended to eliminate the situation created under [prior] law in which impairments that are mitigated [did] not constitute disabilities but [were the basis for discrimination]."). To the extent cases pre-dating the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. *See* 2008 House Judiciary Committee Report at 9 & nn.25, 20–21 (citing, e.g., *McClure* v. *General Motors Corp.,* 75 F. App'x 983 (5th Cir. 2003) (court held that individual with muscular dystrophy who, with the mitigating measure of "adapting" how he performed manual tasks, had successfully learned to live and work with his disability was therefore not an individual with a disability); *Orr* v. *Wal-Mart Stores, Inc.,* 297 F.3d 720 (8th Cir. 2002) (court held that *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471 (1999), required consideration of the ameliorative effects of plaintiff's careful regimen of medicine, exercise and diet, and declined to consider impact of uncontrolled diabetes on plaintiff's ability to see, speak, read, and walk); *Gonzales* v. *National Bd. of Med. Examiners,* 225 F.3d 620 (6th Cir. 2000) (where the court found that an individual with a diagnosed learning disability was not substantially limited after considering the impact of self-accommodations that allowed him to read and achieve academic success); *McMullin* v. *Ashcroft,* 337 F. Supp. 2d 1281 (D. Wyo. 2004) (individual fired because of clinical depression not protected because of the successful management of the condition with medication for fifteen years); *Eckhaus* v. *Consol. Rail Corp.,* 2003 WL 23205042 (D.N.J. Dec. 24, 2003) (individual fired because of a hearing impairment was not protected because a hearing aid helped correct that impairment); *Todd* v. *Academy Corp.,* 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (court held that because medication reduced the frequency and intensity of plaintiff's seizures, he was not disabled)).

An individual who, because of the use of a mitigating measure, has experienced no limitations, or only minor limitations, related to the impairment may still be an individual with a disability, where there is evidence that in the absence of an effective mitigating measure the individual's impairment would be substantially limiting. For example, someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be an individual with a disability if, without the medication, he or she would now be substantially limited in functions of the cardiovascular or circulatory system.

Evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types. However, we expect that consistent with the Amendments Act's command (and the related rules of construction in the regulations) that the definition of disability "should not demand extensive analysis," covered entities and courts will in many instances be able to conclude that a substantial limitation has been shown without resort to such evidence.

The Amendments Act provides an "illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered." *See* 2008 Senate Statement of Managers at 9. Section 1630.2(j)(5) of the regulations includes all of those mitigating measures listed in the ADA Amendments Act's illustrative list of mitigating measures, including reasonable accommodations (as applied under title I) or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1) and applied under titles II and III).

Since it would be impossible to guarantee comprehensiveness in a finite list, the list of examples of mitigating measures provided in the ADA and the regulations is non-exhaustive. *See* 2008 House Judiciary Committee Report at 20. The absence of any particular mitigating measure from the list in the regulations should not convey a negative implication as to whether the measure is a mitigating measure under the ADA. *See* 2008 Senate Statement of Managers at 9.

For example, the fact that mitigating measures include "reasonable accommodations" generally makes it unnecessary to mention specific kinds of accommodations. Nevertheless, the use of a service animal, job coach, or personal assistant on the job would certainly be considered types of mitigating measures, as would the use of any device that could be considered assistive technology, and whether individuals who use these measures have disabilities would be determined without reference to their ameliorative effects. *See* 2008 House Judiciary Committee Report at 20; 2008 House Educ. & Labor Rep. at 15. Similarly, adaptive strategies that might mitigate, or even allow an individual to otherwise avoid performing particular major life activities, are mitigating measures and also would not be considered in determining whether an impairment is substantially limiting. *Id.*

The determination of whether or not an individual's impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including for example medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations posed by the impairment on the individual and any negative (non-ameliorative) effects of mitigating measures used determine whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures in fact used may not be considered in determining if the impairment is substantially limiting. However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and non-ameliorative effects, may be relevant in determining whether the individual is qualified or poses a direct threat to safety.

The ADA Amendments Act and the regulations state that "ordinary eyeglasses or contact lenses" *shall* be considered in determining whether someone has a disability. This is an exception to the rule that the ameliorative effects of mitigating measures are not to be taken into account. "The rationale behind this exclusion is that the use of ordinary eyeglasses or contact lenses, without more, is not significant enough to warrant protection under the ADA." Joint Hoyer-Sensenbrenner Statement at 2. Nevertheless, as discussed in greater detail below at § 1630.10(b), if an applicant or employee is faced with a qualification standard that requires uncorrected vision (as the plaintiffs in the *Sutton* case were), and the applicant or employee who is adversely affected by the standard brings a challenge under the ADA, an employer will be required to demonstrate that the qualification standard is job related and consistent with business necessity. 2008 Senate Statement of Managers at 9.

The ADAAA and the EEOC's regulations both define the term "ordinary eyeglasses or contact lenses" as lenses that are "intended to fully correct visual acuity or eliminate refractive error." So, if an individual with severe myopia uses eyeglasses or contact lenses that are intended to fully correct visual acuity or eliminate refractive error, they are ordinary eyeglasses or contact lenses, and therefore any inquiry into whether such individual is substantially limited in seeing or reading would be based on how the individual sees or reads with the benefit of the eyeglasses or contact lenses. Likewise, if the only visual loss an individual experiences affects the ability to see well enough to read, and the individual's ordinary reading glasses are intended to completely correct for this visual loss, the ameliorative effects of using the reading glasses must be considered in determining whether the individual is substantially limited in seeing. Additionally, eyeglasses or contact lenses that are the wrong prescription or an outdated prescription may nevertheless be "ordinary" eyeglasses or contact lenses, if a proper prescription would fully correct visual acuity or eliminate refractive error.

Both the statute and the regulations distinguish "ordinary eyeglasses or contact lenses" from "low vision devices," which function by magnifying, enhancing, or otherwise augmenting a visual image, and which are not considered when determining whether someone has a disability. The regulations do not establish a specific level of visual acuity (e.g., 20/20) as the basis for determining whether eyeglasses or contact lenses should be considered "ordinary" eyeglasses or contact lenses. Whether lenses fully correct visual acuity or eliminate refractive error is best determined on a case-by-case basis, in light of current and objective medical evidence. Moreover, someone who uses ordinary eyeglasses or contact lenses is not automatically considered to be outside

the ADA's protection. Such an individual may demonstrate that, even with the use of ordinary eyeglasses or contact lenses, his vision is still substantially limited when compared to most people.

Section 1630.2(j)(1)(vii): Impairments That Are Episodic or in Remission

Section 1630.2(j)(1)(vii) states: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity in its active state. "This provision is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent." Joint Hoyer-Sensenbrenner Statement at 2–3. The legislative history provides: "This * * * rule of construction thus rejects the reasoning of the courts in cases like *Todd* v. *Academy Corp.* [57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff's epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically. It similarly rejects the results reached in cases [such as *Pimental* v. *Dartmouth-Hitchock Clinic,* 236 F. Supp. 2d 177, 182–83 (D.N.H. 2002)] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity." 2008 House Judiciary Committee Report at 19–20.

Other examples of impairments that may be episodic include, but are not limited to, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. *See* 2008 House Judiciary Committee Report at 19–20. The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.

Section 1630.2(j)(1)(viii): Substantial Limitation in Only One Major Life Activity Required

Section 1630.2(j)(1)(viii) states: "An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment."

The ADAAA explicitly states that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. *See* ADAAA Section 4(a); 42 U.S.C. 12102(4)(C). "This responds to and corrects those courts that have required individuals to show that an impairment substantially limits more than one life activity." 2008 Senate Statement of Managers at 8. In addition, this rule of construction is "intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA." *Id.* To the extent cases pre-dating the applicability of the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. Id. (citing *Holt* v. *Grand Lake Mental Health Ctr., Inc.,* 443 F. 3d 762 (10th Cir. 2006) (holding an individual with cerebral palsy who could not independently perform certain specified manual tasks was not substantially limited in her ability to perform a "broad range" of manual tasks)); *see* also 2008 House Judiciary Committee Report at 19 & n.52 (this legislatively corrects court decisions that, with regard to the major life activity of performing manual tasks, "have offset substantial limitation in the performance of some tasks with the ability to perform others" (citing *Holt*)).

For example, an individual with diabetes is substantially limited in endocrine function and thus an individual with a disability under the first prong of the definition. He need not also show that he is substantially limited in eating to qualify for coverage under the first prong. An individual whose normal cell growth is substantially limited due to lung cancer need not also show that she is substantially limited in breathing or respiratory function. And an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with a disability without regard to whether his or her HIV infection substantially limits him or her in reproduction.

In addition, an individual whose impairment substantially limits a major life activity need not additionally demonstrate a resulting limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability under § 1630.2(g)(1)(i) or § 1630.2(g)(1)(ii), as cases relying on the Supreme Court's decision in *Toyota Motor Mfg., Ky., Inc.* v. *Williams,* 534 U.S. 184 (2002), had held prior to the ADA Amendments Act.

Thus, for example, someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting. Similarly, someone with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory strategies the individual may have developed, need not also show that he is unable to perform activities of central importance to daily life that require *see*ing in order to be substantially limited in seeing.

Section 1630.2(j)(1)(ix): Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting

Section 1630.2(j)(1)(ix) states: "The six-month 'transitory' part of the 'transitory and minor' exception to 'regarded as' coverage in § 1630.2(l) does not apply to the definition of 'disability' under § 1630.2(g)(1)(i) or § 1630.2(g)(1)(ii). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."

The regulations include a clear statement that the definition of an impairment as transitory, that is, "lasting or expected to last for six months or less," only applies to the "regarded as" (third) prong of the definition of "disability" as part of the "transitory and minor" defense to "regarded as" coverage. It does not apply to the first or second prong of the definition of disability. *See* Joint Hoyer-Sensenbrenner Statement at 3 ("[T]here is no need for the transitory and minor exception under the first two prongs because it is clear from the statute and the legislative history that a person can only bring a claim if the impairment substantially limits one or more major life activities or the individual has a record of an impairment that substantially limits one or more major life activities.").

Therefore, an impairment does not have to last for more than six months in order to be considered substantially limiting under the first or the second prong of the definition of disability. For example, as noted above, if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability. At the same time, "[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe." Joint Hoyer-Sensenbrenner Statement at 5.

Section 1630.2(j)(3) Predictable Assessments

As the regulations point out, disability is determined based on an individualized assessment. There is no "per se" disability. However, as recognized in the regulations, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability. The inherent nature of these types of medical conditions will in virtually all cases give rise to a substantial limitation of a major life activity. Cf. *Heiko* v. *Columbo Savings Bank, F.S.B.,* 434 F.3d 249, 256 (4th Cir. 2006) (stating, even pre-ADAAA, that "certain impairments are by their very nature substantially limiting: the major life activity of seeing, for example, is always substantially limited by blindness"). Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

This result is the consequence of the combined effect of the statutory changes to the definition of disability contained in the

Amendments Act and flows from application of the rules of construction set forth in §§ 1630.2(j)(1)(i)–(ix) (including the lower standard for "substantially limits"; the rule that major life activities include major bodily functions; the principle that impairments that are episodic or in remission are disabilities if they would be substantially limiting when active; and the requirement that the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) must be disregarded in assessing whether an individual has a disability).

The regulations at § 1630.2(j)(3)(iii) provide examples of the types of impairments that should easily be found to substantially limit a major life activity. The legislative history states that Congress modeled the ADA definition of disability on the definition contained in the Rehabilitation Act, and said it wished to return courts to the way they had construed that definition. *See* 2008 House Judiciary Committee Report at 6. Describing this goal, the legislative history states that courts had interpreted the Rehabilitation Act definition "broadly to include persons with a wide range of physical and mental impairments such as epilepsy, diabetes, multiple sclerosis, and intellectual and developmental disabilities * * * even where a mitigating measure—like medication or a hearing aid—might lessen their impact on the individual." Id.; *see* also id. at 9 (referring to individuals with disabilities that had been covered under the Rehabilitation Act and that Congress intended to include under the ADA—"people with serious health conditions like epilepsy, diabetes, cancer, cerebral palsy, multiple sclerosis, intellectual and developmental disabilities"); id. at n.6 (citing cases also finding that cerebral palsy, hearing impairments, mental retardation, heart disease, and vision in only one eye were disabilities under the Rehabilitation Act); id. at 10 (citing testimony from Rep. Steny H. Hoyer, one of the original lead sponsors of the ADA in 1990, stating that "we could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disability"); 2008 Senate Statement of Managers at 3 (explaining that "we [we]re faced with a situation in which physical or mental impairments that would previously [under the Rehabilitation Act] have been found to constitute disabilities [we]re not considered disabilities" and citing individuals with impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer as examples).

Of course, the impairments listed in subparagraph 1630.2(j)(3)(iii) may substantially limit a variety of other major life activities in addition to those listed in the regulation. For example, mobility impairments requiring the use of a wheelchair substantially limit the major life activity of walking. Diabetes may substantially limit major life activities such as eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting.

By using the term "brain function" to describe the system affected by various mental impairments, the Commission is expressing no view on the debate concerning whether mental illnesses are caused by environmental or biological factors, but rather intends the term to capture functions such as the ability of the brain to regulate thought processes and emotions.

Section 1630.2(j)(4) Condition, Manner, or Duration

The regulations provide that facts such as the "condition, manner, or duration" of an individual's performance of a major life activity may be useful in determining whether an impairment results in a substantial limitation. In the legislative history of the ADAAA, Congress reiterated what it had said at the time of the original ADA: "A person is considered an individual with a disability for purposes of the first prong of the definition when [one or more of] the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 2008 Senate Statement of Managers at 7 (citing 1989 Senate Report at 23). According to Congress: "We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations * * *. At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting." 2008 Senate Statement of Managers at 7.

Consistent with the legislative history, an impairment may substantially limit the "condition" or "manner" under which a major life activity can be performed in a number of ways. For example, the condition or manner under which a major life activity can be performed may refer to the way an individual performs a major life activity. Thus, the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that someone with two hands would perform the same tasks.

Condition or manner may also describe how performance of a major life activity affects the individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limiting if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. Similarly, condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. For example, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment "causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion." *See* 2008 House Judiciary Committee Report at 17.

"Duration" refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, since most people can stand for more than two hours without significant pain. However, a person who can walk for ten miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort. *See* 2008 Senate Statement of Managers at 7 (citing 1989 Senate Report at 23).

The regulations provide that in assessing substantial limitation and considering facts such as condition, manner, or duration, the non-ameliorative effects of mitigating measures may be considered. Such "non-ameliorative effects" could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. Of course, in many instances, it will not be necessary to assess the negative impact of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, someone with end-stage renal disease is substantially limited in kidney function, and it thus is not necessary to consider the burdens that dialysis treatment imposes.

Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity.

Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population. As Congress emphasized in passing the Amendments Act, "[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be

substantially limited in activities such as learning, reading, writing, thinking, or speaking." 2008 Senate Statement of Managers at 8. Congress noted that: "In particular, some courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to 'most people.' When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in *Price* v. *National Board of Medical Examiners, Gonzales* v. *National Board of Medical Examiners,* and *Wong* v. *Regents of University of California*. The Committee believes that the comparison of individuals with specific learning disabilities to 'most people' is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act." 2008 House Educ. & Labor Rep. at 10–11.

It bears emphasizing that while it may be useful in appropriate cases to consider facts such as condition, manner, or duration, it is always necessary to consider and apply the rules of construction in § 1630.2(j)(1)(i)–(ix) that set forth the elements of broad coverage enacted by Congress. 2008 Senate Statement of Managers at 6. Accordingly, while the Commission's regulations retain the concept of "condition, manner, or duration," they no longer include the additional list of "substantial limitation" factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment).

Finally, "condition, manner, or duration" are not intended to be used as a rigid three-part standard that must be met to establish a substantial limitation. "Condition, manner, or duration" are not required "factors" that must be considered as a talismanic test. Rather, in referring to "condition, manner, *or* duration," the regulations make clear that these are merely the types of facts that may be considered in appropriate cases. To the extent such aspects of limitation may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these facts may not be necessary to establish coverage.

At the same time, individuals seeking coverage under the first or second prong of the definition of disability should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. *See* 2008 Senate Statement of Managers at 7. Of course, covered entities may defeat a showing of "substantial limitation" by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows an impairment does not impose a substantial limitation on a major life activity. However, a showing of substantial limitation is not defeated by facts related to "condition, manner, or duration" that are not pertinent to the substantial limitation the individual has proffered.

Sections 1630.2(j)(5) and (6) Examples of Mitigating Measures; Ordinary Eyeglasses or Contact Lenses

These provisions of the regulations provide numerous examples of mitigating measures and the definition of "ordinary eyeglasses or contact lenses." These definitions have been more fully discussed in the portions of this interpretive guidance concerning the rules of construction in § 1630.2(j)(1).

Substantially Limited in Working

The Commission has removed from the text of the regulations a discussion of the major life activity of working. This is consistent with the fact that no other major life activity receives special attention in the regulation, and with the fact that, in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations.

In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. This will be particularly true in light of the changes made by the ADA Amendments Act. *See, e.g., Corley* v. *Dep't of Veterans Affairs ex rel Principi,* 218 F. App'x. 727, 738 (10th Cir. 2007) (employee with seizure disorder was not substantially limited in working because he was not foreclosed from jobs involving driving, operating machinery, childcare, military service, and other jobs; employee would now be substantially limited in neurological function); *Olds* v. *United Parcel Serv., Inc.,* 127 F. App'x. 779, 782 (6th Cir. 2005) (employee with bone marrow cancer was not substantially limited in working due to lifting restrictions caused by his cancer; employee would now be substantially limited in normal cell growth); *Williams* v. *Philadelphia Hous. Auth. Police Dep't,* 380 F.3d 751, 763–64 (3d Cir. 2004) (issue of material fact concerning whether police officer's major depression substantially limited him in performing a class of jobs due to restrictions on his ability to carry a firearm; officer would now be substantially limited in brain function).[2]

In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. In keeping with the findings and purposes of the Amendments Act, the determination of coverage under the law should not require extensive and elaborate assessment, and the EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits a major life activity, including the major life activity of working, than they applied prior to the Amendments Act. The Commission believes that the courts, in applying an overly strict standard with regard to "substantially limits" generally, have reached conclusions with regard to what is necessary to demonstrate a substantial limitation in the major life activity of working that would be inconsistent with the changes now made by the Amendments Act. Accordingly, as used in this section the terms "class of jobs" and "broad range of jobs in various classes" will be applied in a more straightforward and simple manner than they were applied by the courts prior to the Amendments Act.[3]

Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that

[2] In addition, many cases previously analyzed in terms of whether the plaintiff was "substantially limited in working" will now be analyzed under the "regarded as" prong of the definition of disability as revised by the Amendments Act. *See,* e.g., *Cannon* v. *Levi Strauss & Co.,* 29 F. App'x. 331 (6th Cir. 2002) (factory worker laid off due to her carpal tunnel syndrome not regarded as substantially limited in working because her job of sewing machine operator was not a "broad class of jobs"; she would now be protected under the third prong because she was fired because of her impairment, carpal tunnel syndrome); *Bridges* v. *City of Bossier,* 92 F.3d 329 (5th Cir. 1996) (applicant not hired for firefighting job because of his mild hemophilia not regarded as substantially limited in working; applicant would now be protected under the third prong because he was not hired because of his impairment, hemophilia).

[3] In analyzing working as a major life activity in the past, some courts have imposed a complex and onerous standard that would be inappropriate under the Amendments Act. *See,* e.g., *Duncan* v. *WMATA,* 240 F.3d 1110, 1115 (DC Cir. 2001) (manual laborer whose back injury prevented him from lifting more than 20 pounds was not substantially limited in working because he did not present evidence of the number and types of jobs available to him in the Washington area; testimony concerning his inquiries and applications for truck driving jobs that all required heavy lifting was insufficient); *Taylor* v. *Federal Express Corp.,* 429 F.3d 461, 463–64 (4th Cir. 2005) (employee's impairment did not substantially limit him in working because, even though evidence showed that employee's injury disqualified him from working in numerous jobs in his geographic region, it also showed that he remained qualified for many other jobs). Under the Amendments Act, the determination of whether a person is substantially limited in working is more straightforward and simple than it was prior to the Act.

a person is substantially limited in the major life activity of working.

A class of jobs may be determined by reference to the nature of the work that an individual is limited in performing (such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs) or by reference to job-related requirements that an individual is limited in meeting (for example, jobs requiring repetitive bending, reaching, or manual tasks, jobs requiring repetitive or heavy lifting, prolonged sitting or standing, extensive walking, driving, or working under conditions such as high temperatures or noise levels).

For example, if a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or she is substantially limited in performing the class of jobs that require heavy lifting.

Section 1630.2(k) Record of a Substantially Limiting Impairment

The second prong of the definition of "disability" provides that an individual with a record of an impairment that substantially limits or limited a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, the "record of" provision would protect an individual who was treated for cancer ten years ago but who is now deemed by a doctor to be free of cancer, from discrimination based on that prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as having learning disabilities or intellectual disabilities (formerly termed "mental retardation") are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52–53; House Judiciary Report at 29; 2008 House Judiciary Report at 7–8 & n.14. Similarly, an employee who in the past was misdiagnosed with bipolar disorder and hospitalized as the result of a temporary reaction to medication she was taking has a record of a substantially limiting impairment, even though she did not actually have bipolar disorder.

This part of the definition is satisfied where evidence establishes that an individual has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

Such evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong. An individual may have a "record of" a substantially limiting impairment—and thus be protected under the "record of" prong of the statute—even if a covered entity does not specifically know about the relevant record. Of course, for the covered entity to be liable for discrimination under title I of the ADA, the individual with a "record of" a substantially limiting impairment must prove that the covered entity discriminated on the basis of the record of the disability.

The terms "substantially limits" and "major life activity" under the second prong of the definition of "disability" are to be construed in accordance with the same principles applicable under the "actual disability" prong, as set forth in § 1630.2(j).

Individuals who are covered under the "record of" prong will often be covered under the first prong of the definition of disability as well. This is a consequence of the rule of construction in the ADAAA and the regulations providing that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. *See* 42 U.S.C. 12102(4)(D); § 1630.2(j)(1)(vii). Thus, an individual who has cancer that is currently in remission is an individual with a disability under the "actual disability" prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the "record of" prong based on his history of having had an impairment that substantially limited normal cell growth.

Finally, this section of the EEOC's regulations makes it clear that an individual with a record of a disability is entitled to a reasonable accommodation currently needed for limitations resulting from or relating to the past substantially limiting impairment. This conclusion, which has been the Commission's long-standing position, is confirmed by language in the ADA Amendments Act stating that individuals covered only under the "regarded as" prong of the definition of disability are not entitled to reasonable accommodation. *See* 42 U.S.C. 12201(h). By implication, this means that individuals covered under the first or second prongs are otherwise eligible for reasonable accommodations. *See* 2008 House Judiciary Committee Report at 22 ("This makes clear that the duty to accommodate . . . arises only when an individual establishes coverage under the first or second prong of the definition."). Thus, as the regulations explain, an employee with an impairment that previously substantially limited but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments from a health care provider.

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

Coverage under the "regarded as" prong of the definition of disability should not be difficult to establish. *See* 2008 House Judiciary Committee Report at 17 (explaining that Congress never expected or intended it would be a difficult standard to meet). Under the third prong of the definition of disability, an individual is "regarded as having such an impairment" if the individual is subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not "transitory and minor."

This third prong of the definition of disability was originally intended to express Congress's understanding that "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and [its] corresponding desire to prohibit discrimination founded on such perceptions." 2008 Senate Statement of Managers at 9; 2008 House Judiciary Committee Report at 17 (same). In passing the original ADA, Congress relied extensively on the reasoning of *School Board of Nassau County* v. *Arline*[4] "that the negative reactions of others are just as disabling as the actual impact of an impairment." 2008 Senate Statement of Managers at 9. The ADAAA reiterates Congress's reliance on the broad views enunciated in that decision, and Congress "believe[s] that courts should continue to rely on this standard." Id.

Accordingly, the ADA Amendments Act broadened the application of the "regarded as" prong of the definition of disability. 2008 Senate Statement of Managers at 9–10. In doing so, Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress's intent to allow individuals to establish coverage under the "regarded as" prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment. Joint Hoyer-Sensenbrenner Statement at 3.

Thus it is not necessary, as it was prior to the ADA Amendments Act, for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the "regarded as" prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be "regarded as having such an impairment." In short, to qualify for coverage under the "regarded as" prong, an individual is not subject to any functional test. *See* 2008 Senate Statement of Managers at 13 ("The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong."); 2008 House Judiciary Committee Report at 17 (that is, "the individual is not required to show that the perceived impairment limits performance of a major life activity"). The concepts of "major life activities" and "substantial limitation" simply are not relevant in evaluating whether an individual is "regarded as having such an impairment."

To illustrate how straightforward application of the "regarded as" prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer

[4] 480 U.S. at 282–83.

terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.

A "prohibited action" under the "regarded as" prong refers to an action of the type that would be unlawful under the ADA (but for any defenses to liability). Such prohibited actions include, but are not limited to, refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

Where an employer bases a prohibited employment action on an actual or perceived impairment that is not "transitory and minor," the employer regards the individual as disabled, whether or not myths, fears, or stereotypes about disability motivated the employer's decision. Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established only if an individual meets the burden of proving that the covered entity discriminated unlawfully within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

Whether a covered entity can ultimately establish a defense to liability is an inquiry separate from, and follows after, a determination that an individual was regarded as having a disability. Thus, for example, an employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or others if he were suddenly to lose consciousness, has regarded the individual as disabled. Whether the employer has a defense (e.g., that the employee posed a direct threat to himself or coworkers) is a separate inquiry.

The fact that the "regarded as" prong requires proof of causation in order to show that a person is covered does not mean that proving a "regarded as" claim is complex. While a person must show, for both coverage under the "regarded as" prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, evidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense.

As prescribed in the ADA Amendments Act, the regulations provide an exception to coverage under the "regarded as" prong where the impairment on which a prohibited action is based is both transitory (having an actual or expected duration of six months or less) and minor. The regulations make clear (at § 1630.2(l)(2) and § 1630.15(f)) that this exception is a defense to a claim of discrimination. "Providing this exception responds to concerns raised by employer organizations and is reasonable under the 'regarded as' prong of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition." 2008 Senate Statement of Managers at 10; *see* also 2008 House Judiciary Committee Report at 18 (explaining that "absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu, and this exception responds to concerns raised by members of the business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time"). However, as an exception to the general rule for broad coverage under the "regarded as" prong, this limitation on coverage should be construed narrowly. 2008 House Judiciary Committee Report at 18.

The relevant inquiry is whether the actual or perceived impairment on which the employer's action was based is objectively "transitory and minor," not whether the employer claims it subjectively believed the impairment was transitory and minor. For example, an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was transitory and minor, since bipolar disorder is not objectively transitory and minor. At the same time, an employer that terminated an employee with an objectively "transitory and minor" hand wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have "regarded" the employee as an individual with a disability, since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not "transitory and minor."

An individual covered only under the "regarded as" prong is not entitled to reasonable accommodation. 42 U.S.C. 12201(h). Thus, in cases where reasonable accommodation is not at issue, the third prong provides a more straightforward framework for analyzing whether discrimination occurred. As Congress observed in enacting the ADAAA: "[W]e expect [the first] prong of the definition to be used only by people who are affirmatively seeking reasonable accommodations or modifications. Any individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation or modification—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 6.

Section 1630.2(m) Qualified Individual

The ADA prohibits discrimination on the basis of disability against a qualified individual." * * *

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Section 1630.2(o) Reasonable Accommodation

An individual with a disability is considered "qualified" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. A covered entity is required, absent undue hardship, to provide reasonable accommodation to an otherwise qualified individual with a substantially limiting impairment or a "record of" such an impairment. However, a covered entity is not required to provide an accommodation to an individual who meets the definition of disability solely under the "regarded as" prong.

The legislative history of the ADAAA makes clear that Congress included this provision in response to various court decisions that had held (pre-Amendments Act) that individuals who were covered solely under the "regarded as" prong were eligible for reasonable accommodations. In those cases, the plaintiffs had been found not to be covered under the first prong of the definition of disability "because of the overly stringent manner in which the courts had been interpreting that prong." 2008 Senate Statement of Managers at 11. The legislative history goes on to explain that "[b]ecause of [Congress's] strong belief that accommodating individuals with disabilities is a key goal of the ADA, some members [of Congress] continue to have reservations about this provision." Id. However, Congress ultimately concluded that clarifying that individuals covered solely under the "regarded as" prong are not entitled to reasonable accommodations "is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition [of disability], properly applied"). Further, individuals covered only under the third prong still may bring discrimination claims (other than failure-to-accommodate claims) under title I of the ADA. 2008 Senate Statement of Managers at 9–10.

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. It should be noted that nothing in this part prohibits employers or other covered entities from providing accommodations beyond those required by this part.

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Section 1630.4 Discrimination Prohibited

Paragraph (a) of this provision prohibits discrimination on the basis of disability against a qualified individual in all aspects of the employment relationship. The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing section 504 of the Rehabilitation Act of 1973.

Paragraph (b) makes it clear that the language "on the basis of disability" is not intended to create a cause of action for an individual without a disability who claims that someone with a disability was treated more favorably (disparate treatment), or was

provided a reasonable accommodation that an individual without a disability was not provided. *See* 2008 House Judiciary Committee Report at 21 (this provision "prohibits reverse discrimination claims by disallowing claims based on the lack of disability"). Additionally, the ADA and this part do not affect laws that may require the affirmative recruitment or hiring of individuals with disabilities, or any voluntary affirmative action employers may undertake on behalf of individuals with disabilities. However, part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use criteria that are job related and consistent with business necessity to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

The Amendments Act modified title I's nondiscrimination provision to replace the prohibition on discrimination "against a qualified individual with a disability because of the disability of such individual" with a prohibition on discrimination "against a qualified individual on the basis of disability." As the legislative history of the ADAAA explains: "[T]he bill modifies the ADA to conform to the structure of Title VII and other civil rights laws by requiring an individual to demonstrate discrimination 'on the basis of disability' rather than discrimination 'against an individual with a disability' because of the individual's disability. We hope this will be an important signal to both lawyers and courts to spend less time and energy on the minutia of an individual's impairment, and more time and energy on the merits of the case—including whether discrimination occurred because of the disability, whether an individual was qualified for a job or eligible for a service, and whether a reasonable accommodation or modification was called for under the law." Joint Hoyer-Sensenbrenner Statement at 4; *see also* 2008 House Judiciary Report at 21 ("This change harmonizes the ADA with other civil rights laws by focusing on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists.").

Section 1630.5 Limiting, Segregating and Classifying

This provision and the several provisions that follow describe various specific forms of discrimination that are included within the general prohibition of § 1630.4. The capabilities of qualified individuals must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees into separate work areas or into separate lines of advancement on the basis of their disabilities.

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Section 1630.9: Not Making Reasonable Accommodation

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Section 1630.9(e)

The purpose of this provision is to incorporate the clarification made in the ADA Amendments Act of 2008 that an individual is not entitled to reasonable accommodation under the ADA if the individual is only covered under the "regarded as" prong of the definition of "individual with a disability." However, if the individual is covered under both the "regarded as" prong and one or both of the other two prongs of the definition of disability, the ordinary rules concerning the provision of reasonable accommodation apply.

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

Section 1630.10(a)—In General

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that those criteria, as used by the employer, are job related for the position to which they are being applied and are consistent with business necessity. The concept of "business necessity" has the same meaning as the concept of "business necessity" under section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation. Experience under a similar provision of the regulations implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, often resolved by reasonable accommodation.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. *See* 1989 Senate Report at 37–39; House Labor Report at 70–72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer's business judgment with regard to production standards. *See* § 1630.2(n) (Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

Section 1630.10(b)—Qualification Standards and Tests Related to Uncorrected Vision

This provision allows challenges to qualification standards based on uncorrected vision, even where the person excluded by a standard has fully corrected vision with ordinary eyeglasses or contact lenses. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability. In order to have standing to challenge such a standard, test, or criterion, however, a person must be adversely affected by such standard, test or criterion. The Commission also believes that such individuals will usually be covered under the "regarded as" prong of the definition of disability. Someone who wears eyeglasses or contact lenses to correct vision will still have an impairment, and a qualification standard that screens the individual out because of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. (*See* § 1630.2(l); Appendix to § 1630.2(l).)

In either case, a covered entity may still defend a qualification standard requiring a certain level of uncorrected vision by showing that it is job related and consistent with business necessity. For example, an applicant or employee with uncorrected vision of 20/100 who wears glasses that fully correct his vision may challenge a police department's qualification standard that requires all officers to have uncorrected vision of no less than 20/40 in one eye and 20/100 in the other, and visual acuity of 20/20 in both eyes with correction. The department would then have to establish that the standard is job related and consistent with business necessity.

Section 1630.15 Defenses

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Section 1630.15(f) Claims Based on Transitory and Minor Impairments Under the "Regarded As" Prong

It may be a defense to a charge of discrimination where coverage would be shown solely under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. Section 1630.15(f)(1) explains that an individual cannot be "regarded as having such an impairment" if the impairment is both transitory (defined by the ADAAA as lasting or expected to last less than six months) and minor. Section 1630.15(f)(2) explains that the determination of "transitory and minor" is made objectively. For example, an individual who is denied a promotion because he has a minor back injury would be "regarded as" an individual with a disability if the back impairment lasted or was expected to last more than six months. Although minor, the impairment is not transitory. Similarly, if an employer discriminates against an employee based on the employee's bipolar disorder (an impairment that is not transitory and minor), the employee is "regarded as" having a

disability even if the employer subjectively believes that the employee's disorder is transitory and minor.

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