

(ii) § 820.30 of this chapter. Design controls.

(iii) § 820.50 of this chapter.

Purchasing controls.

(iv) § 820.100 of this chapter.

Corrective and preventive action.

(v) § 820.170 of this chapter.

Installation.

(vi) § 820.200 of this chapter.

Servicing.

(2) If the combination product includes a device constituent part and a drug constituent part, and the current good manufacturing practice operating system has been shown to comply with the QS regulation, the following provisions of the drug cGMPs must also be shown to have been satisfied; upon demonstration that these requirements have been satisfied, no additional showing of compliance with respect to the drug cGMPs need be made:

(i) § 211.84 of this chapter. Testing and approval or rejection of components, drug product containers, and closures.

(ii) § 211.103 of this chapter.

Calculation of yield.

(iii) § 211.132 of this chapter. Tamper-evident packaging requirements for over-the-counter (OTC) human drug products.

(iv) § 211.137 of this chapter.

Expiration dating.

(v) § 211.165 of this chapter. Testing and release for distribution.

(vi) § 211.166 of this chapter.

Stability testing.

(vii) § 211.167 of this chapter. Special testing requirements.

(viii) § 211.170 of this chapter.

Reserve samples.

(3) In addition to being shown to comply with the other applicable current good manufacturing practice requirements listed under § 4.3, if the combination product includes a biological product constituent part, the current good manufacturing practice operation system must also be shown to implement and comply with all current good manufacturing practice requirements identified under § 4.3(c) that would apply to that biological product if that constituent part were not part of a combination product.

(4) In addition to being shown to comply with the other applicable current good manufacturing practice requirements listed under § 4.3, if the combination product includes an HCT/P, the current good manufacturing practice operation system must also be shown to implement and comply with all current good manufacturing practice requirements identified under § 4.3(d) that would apply to that HCT/P constituent part if that constituent part were not part of a combination product.

(c) During any period in which the manufacture of a constituent part to be included in a co-packaged or single-entity combination product occurs at a separate facility from the other type(s) of constituent part(s) to be included in that single-entity or co-packaged combination product, the current good manufacturing practice operating system for that constituent part must be demonstrated to comply with all current good manufacturing practice requirements applicable to that type of constituent part.

(d) When two or more types of constituent parts to be included in a single-entity or co-packaged combination product have arrived at the same facility, or the manufacture of these constituent parts is proceeding at the same facility, application of a current good manufacturing process operating system that complies with § 4.4(b) may begin, except with respect to any constituent part that remains or becomes subject to § 4.4(c).

(e) The current good manufacturing practice requirements set forth in this subpart and in parts 210, 211, 600 through 680, 820, and 1271 of this chapter, supplement, and do not supersede, each other unless the regulations explicitly provide otherwise. In the event of a conflict between regulations applicable under this subpart to combination products, including their constituent parts, the regulations most specifically applicable to the constituent part in question shall supersede the more general.

Subpart B [Reserved]

Dated: September 17, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9-22850 Filed 9-22-09; 8:45 am]

BILLING CODE 4160-01-S

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: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission (the Commission or EEOC) proposes to revise its 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, EEOC is expressly granted the authority to amend these regulations, and is expected to do so, in order to conform certain provisions contained in the regulations to the Amendments Act.

DATES: Written comments on this rulemaking must be submitted on or before November 23, 2009.

ADDRESSES: Written comments should be submitted to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE., Suite 4NW08R, Room 6NE03F, Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll-free number.) Only comments of six or fewer pages will be accepted via FAX transmittal to ensure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4070 (voice) or (202) 663-4074 (TTY). (These are not toll-free telephone numbers.) You may also submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments. Copies of comments submitted by the public will be available for review at the Commission's library, 131 M Street, NE., Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5 p.m. or can be reviewed at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Christopher Kuczynski, Assistant Legal Counsel, or Jeanne Goldberg, Senior Attorney Advisor, Office of Legal Counsel, U.S. Equal Employment Opportunity Commission at (202) 663-4638 (voice) or (202) 663-7026 (TTY). These are not toll-free-telephone numbers. This document is also available in the following formats: large print, Braille, audio tape, and electronic file on computer disk. Requests for this document in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663-4191 (voice) or (202) 663-

4494 (TTY) or to the Publications Information Center at 1-800-669-3362.

SUPPLEMENTARY INFORMATION: 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 2008 amendments, 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 EEOC’s ADA regulations. The effect of these changes is to make it easier for an individual seeking 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 (hereinafter 2008 Senate Managers’ Statement); 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) (hereinafter 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) (hereinafter 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 existing 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.

Consistent with the provisions of the Amendments Act and Congress’s expressed expectation therein, the proposed rule:

- Provides that the definition of “disability” shall be interpreted broadly;
- Revises 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 v. Williams*, 534 U.S. 134 (2002) (2008 Senate Managers’ Statement at 6);

- Expands the definition of “major life activities” through two non-exhaustive lists:
 - The first list includes 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 includes 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 have been added by the Commission as further illustrative examples;
- Provides that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a “disability”;
- Provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- Provides that the definition of “regarded as” is changed so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead provides 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;

- The proposed rule provides that actions based on an impairment include actions based on symptoms of an impairment, and the Commission invites public comment on this point;
- Provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation; and,
- Provides 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 proposed rule revises the following sections of 29 CFR part 1630 and the accompanying provisions of the accompanying Appendix:

- § 1630.1 (adds subsections (3) and (4));
- § 1630.2(g)(3) (adds cross-reference to 1630.2(l));
- § 1630.2 (h) (replaces the term “mental retardation” with the term “intellectual disability”);
- § 1630.2(i) (revises definition of “major life activities” and provides examples)
- § 1630.2(j) (revises definition of “substantially limits” and provides examples)
- § 1630.2(k) (provides examples of “record of” a disability)
- § 1630.2(l) (revises definition of “regarded as” having a disability and provides examples)
- § 1630.2(m) (revises terminology)
- § 1630.2(o) (adds subsection (4) stating that reasonable accommodations are not available to individuals who are only “regarded as” individuals with disabilities)
- § 1630.4 (renumbers section and adds subsection (b) regarding “claims of no disability”)
- § 1630.9 (revises terminology in subsection (c) and adds subsection (e) stating that an individual covered only under the “regarded as” definition of disability is not entitled to reasonable accommodation)
- § 1630.10 (revises to add provision on qualification standards and tests related to uncorrected vision)
- § 1630.16(a) (revises terminology).

These regulatory revisions are explained in the revised Part 1630 Appendix containing the interpretive guidance which would be issued and published in the Code of Federal Regulations with the final rule. The Commission originally issued the

interpretive guidance concurrent with the issuance of 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 would continue to represent the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination under the ADA.

Regulatory Procedures

Executive Order 12866

The rule has been drafted and reviewed in accordance with Executive Order 12866, 58 FR 51735 (Sept. 30, 1993), section 1(b), Principles of Regulation. It is considered to be a "significant regulatory action" pursuant to section 3(f)(4) of Executive Order 12866 in that it arises out of the Commission's legal mandate to enforce the ADA, and therefore was circulated to the Office of Management and Budget for review. These revisions are necessary to bring the Commission's regulations into compliance with the ADA Amendments Act of 2008, which became effective January 1, 2009, and explicitly invalidated certain provisions of the regulations. The proposed revisions to the title I regulations and Appendix are intended to add to the predictability and consistency between judicial interpretations and executive enforcement of the ADA as now amended by Congress.

Preliminary Regulatory Impact Analysis

The following preliminary review of existing research highlights the costs and benefits of providing reasonable accommodation under the ADA and suggests that the effect on the economy of the changes to EEOC's regulation as a result of the ADA Amendments Act will very likely be below the \$100 million threshold for "economically significant" regulations. Focusing on the costs of reasonable accommodations required by the regulations implementing the ADA Amendments, this preliminary review considers estimates of the cost of accommodation, the prevalence of accommodation already in the workplace, the number of additional accommodation requests that the ADA Amendments Act would need to generate to reach the \$100 million threshold for a economically significant regulatory impact, and the reported benefits to employers of providing

reasonable accommodations. Since the existing research measuring the relevant costs and benefits is limited, however, the Commission seeks public comment on this issue in order to determine whether further regulatory impact analysis will be required.

Preliminary Discussion of Assumptions

Although this review is based on data regarding how many people will benefit from the changes in the ADA and what the anticipated costs will be, it is important to take note of the following unique factors bearing on any inquiry into the increased costs imposed by the ADA Amendments Act and EEOC's proposed rule:

- The fact that prior to the Amendments Act many plaintiffs lost reasonable accommodation cases in litigation based on coverage does not mean employers denied the underlying accommodation requests because they concluded that individuals did not meet the definition of "disability." Many pre-Amendments Act court decisions, including those cited by Congress in the legislative history of the Amendments Act, held that someone was not an individual with a disability in cases where the employer's denial of accommodation had nothing to do with coverage. Rather, coverage was raised as a legal defense after-the-fact against the asserted violation of the ADA. This suggests that costs associated with the Amendments and implementing regulations are not newly imposed and in many instances have already been expended under the ADA.
- It is incorrect to assume that cancer, epilepsy, diabetes, or other impairments addressed in section 1630.2(j)(5) of the NPRM were not covered, in absolute terms, under the prior definition, but now are. Many people with the types of impairments identified in section (j)(5) that will consistently meet the new definition of disability were already covered under EEOC's prior interpretation of the law and by those employers who voluntarily complied with it.
- Many of the individuals actually brought within the new definition of "disability" are likely to have less severe limitations needing less extensive accommodations. Moreover, those brought within the new "regarded as" definition of "disability" are not entitled to accommodation at all.
- Of those newly covered under the amended definition who do 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 policy, employer short- or long-term disability benefits, employer flexible schedule options guaranteed by a CBA, voluntary transfer programs, "early return to work" programs, etc.), or under another statute (e.g., FMLA, workers' compensation, etc.).

- Moreover, of those individuals with disabilities who do request accommodation, not all will be entitled to it under the ADA because, for example, they do not need the accommodation requested, there is no reasonable accommodation that can be provided absent undue hardship, or they would not be "qualified" or would pose a "direct threat to safety, even with an accommodation."
- EEOC fully expects to issue a new or revised small business handbook 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>).
- An emphasis on the anticipated "difference" in compliance costs between smaller and larger entities may overlook some offsets to costs incurred by smaller entities. For example, EEOC makes available even more free outreach and training materials than it does paid trainings. Moreover, 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 under-utilization of tax incentives available to encourage employers to provide reasonable accommodation, the lag time in receipt of the offsets, and the fact that the offsets are only partial, do not necessarily support greater costs, since the incentives typically apply to accommodations that would relate to more severe disabilities covered prior to the ADA Amendments Act.

Reasonable Accommodation

We note at the outset that extensive data on the costs of providing reasonable accommodations for applicants and employees with disabilities does not exist, and that much of the data that has been collected was obtained through either limited sample surveys or surveys that collected very little information.

In a broad sense, even the initial passage of the ADA may not have significantly increased the cost of reasonable accommodation. For example, prior to the passage of the ADA, the 1986 survey of employers by the National Organization on Disability (N.O.D.)/Harris Survey found that 51 percent of corporations surveyed had made some accommodations (National Organization on Disability, Survey Program on Participation and Attitudes (1986)). In their 1995 survey, (post ADA) the figure had risen to 81 percent (National Organization on Disability, Survey Program on Participation and Attitudes (1995)). But, also according to the 1995 N.O.D./Harris Survey, 80 percent of executives of large companies reported that the cost of accommodating people with disabilities had increased only a little or not at all.

A recent study (Helen Schartz et al., *Workplace Accommodations: Evidence-Based Outcomes*, 27 Work 345 (2006))

examined the costs and benefits of reasonable accommodations. The authors provide an overview of the past empirical research regarding the costs of accommodation. They point to an examination of costs at a major retailer from 1978 to 1997, which found that the average direct cost of an accommodation was \$45 (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)). A 1996 study (D. L. Dowler, et al., *Outcomes of Reasonable Accommodations in the Workplace*, 5 Tech & Disability 345 (1996)) found that the average cost of accommodations was \$200. An examination of Job Accommodation Network data from 1992 to 1999 showed a median cost of \$250 (Job Accommodation Network, *Accommodation Benefit/Cost Data Tabulated Through July 30, 1999* (1999)).

In examining these studies, questions arise as to the exact measurement of costs and what measures of central tendency are used to capture cost information. Therefore three recent cost studies including Schartz et al are examined here, and efforts were made to obtain more source data and to address the issue of the central tendency measure actually used. In order to accomplish this, primary source information was sometimes necessary.

The Schartz et al. study relied on a JAN survey,¹ and a summary of those results are provided in Table 1. A questionnaire was used to collect the data. Respondents were required to select costs from a range of values that are seen in Table 1. The only exception is that with respect to the last category, “Greater than \$5,000,” the range had to be closed up (\$10,000 was selected) in order to compute a mean.

TABLE 1—SCHARTZ, HENDRICKS & BLANCK

Total sample	705		
Cost	Midpoint	Number	Total
0	0	141	0
1–500	250.5	359.55	90,067.28
501–1,000	750.5	77.55	58,201.28
1,001–1,500	751.5	21.15	15,894.23
1,501–2,000	1,750.5	21.15	37,023.08
2,001–5,000	3,500.5	56.4	197,428.2
5,001–10,000	7,500.5	28.2	211,514.1
.....	705	610,128.2
Mean Cost	865.43
Median Cost	751.5

Assumes 10,000 as the highest cost in the range.

Thus the mean cost of reasonable accommodation, derived from data from the Job Accommodation Network, is \$865.43. Arguably, this is not a representative sample, since employers who use JAN to assist them in developing accommodation solutions might be confronting unique or difficult accommodation issues. If this is true,

the mean costs might be higher than would be found in a broader sample of employers.

An additional study (Lisa Nishii & Susanne Bruyère, Presentation at the 2009 American Psychological Association Convention: Protecting Employees with Disabilities from Discrimination: The Role of Unit

Managers (August 7, 2009)) was based on a sample of approximately 5,000 respondents from a single large Fortune 500 company. Nishii & Bruyère found that half of all accommodations requested by people with disabilities cost the company no money, and 75% of accommodations (with known costs) cost less than \$500.

TABLE 2—BRUYÈRE AND NISHII, 2009 UNPUBLISHED

Total Sample	5000		
Disabled	145		
Cost	Midpoint	Number	Total
0	0	76.85	0
1–100	50	7.25	362.5
101–500	300.5	24.65	7,407.325
1,001–5,000	3,000.5	8.7	26,104.35

¹ Figures derived from personal communication from James Lee Schmeling, Syracuse Law School, 7/13/2009.

TABLE 2—BRUYÈRE AND NISHII, 2009 UNPUBLISHED—Continued

Total Sample	5000		
	Cost	Midpoint	Number
5,001–10,000		7,500.5	2.9
			120.35
Mean Cost			55,625.63
Median Cost			462.1988
			199.5

Assumes 10,000 as the highest cost in the range.

Here the mean cost is estimated at \$462.

Another recent study was produced by JAN itself (Job Accommodation Network, Workplace Accommodations: Low Cost, High Impact (JAN 2007 Data Analysis) (2007)).² The mean cost of reasonable accommodations reported by JAN clients was \$1,434.³ As mentioned above, the JAN sample of their clients may not be representative, as those using JAN may be experiencing some difficulties in identifying a reasonable accommodation solution.

These three studies illustrate a large variance in the estimates of mean cost of reasonable accommodations from a high of \$1,434 in the JAN study to \$865.43 in Schartz et al. (which also uses JAN data), and \$462 in the single case study.

The Schartz et al. and the Bruyère and Nishii studies both find, based on employer input, that the costs of accommodation are out-weighed or significantly ameliorated by benefits. In both studies, respondents were asked to classify their costs within a number of given ranges. The upper range did not have an upper boundary. When data is collected in this manner it is necessary to arbitrarily set an upper bound in order to compute a mean. Therefore the computed mean is sensitive to the arbitrary value used for the highest figure.

An additional confounding factor here is that not all reasonable accommodations are requested by or provided for individuals with disabilities. Nishii & Bruyère report that the percentages of people with and without disabilities that request accommodation are remarkably similar.

² JAN's "Workplace Accommodations: Low Cost, High Impact" research findings were updated as of September 1, 2009. The data cited in this preamble are from the 2007 findings. The Commission will update its analysis based on the new 2009 data when issuing the final rule.

³ Communication between Dr. Ron Edwards and Dr. Beth Loy, Job Accommodation Network. (Original 2005, Updated 2007). Accommodation benefit/cost data (JAN 2007 Data Analysis). Job Accommodation Network: Author.

For example, under federal or state worker compensation laws, there are numerous accommodations extended to injured workers (whose impairments may not be disabilities within the meaning of the ADA) that enable them to return to work safely. Similarly, some individuals who are able to take leave needed for treatment or other disability-related purposes under the Family and Medical Leave Act may not have impairments that would be considered disabilities.

Applicants and Employees With Disabilities

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. Clearly this is not likely to be a sweeping change but one that adjusts the definition with a level of precision that is not captured in commonly-used databases. The number of affected workers is thus a difficult albeit key element to determine in estimating regulatory impact.

Deriving an estimate of the number of affected workers depends upon several key factors including: the survey data used, the defined set of disability measures, the definition of employment, and the age range of the population under study. Below, we briefly discuss and present results from two nationally-representative surveys that are widely-used sources of information regarding the population with disabilities in the United States: the Annual Social and Economic Supplement to the Current Population Survey (CPS–ASEC) and the American Community Survey (ACS).

The Annual Social and Economic Supplement to the Current Population Survey

The CPS–ASEC is the only dataset that, since 1981, has annually interviewed Americans with disabilities

using a consistently-defined disability variable. Therefore, it has an advantage over all other national surveys in depicting lengthy time series information regarding working-age people with disabilities. The CPS–ASEC contains a single indicator of disability to identify individuals with work limitations. The measure is phrased as follows: *Does anyone in this household have a health problem or disability which prevents them from working or which limits the kind or amount of work they can do? [If so.] who is that? Anyone else?*

The American Community Survey

The ACS is an annual survey that contains six questions regarding disability status. While it was first fielded in 2000, a subset of the 2000–2002 disability indicators are known to be problematic due to questionnaire phrasing that affected the interpretation of two of the indicators, the go-outside-home and work limitation questions (Sharon M. Stern, U.S. Census Bureau, Counting People with Disabilities: How Survey Methodology Influences Estimates in the Census 2000 and the Census 2000 Supplementary Survey (2003), www.census.gov/acs/www/Downloads/ACS/finalstern.pdf; Sharon Stern & Matthew Brault, U.S. Census Bureau, Disability Data from the American Community Survey: A Brief Examination of the Effects of a Question Redesign in 2003 (2005), www.census.gov/hhes/www/disability/ACS_disability.pdf; Andrew J. Houtenville et al., *Complex Survey Questions and the Impact of Enumeration Procedures: Census/American Community Survey Disability Questions* (Census Bureau, Working Paper No. CES–WP–09–10, 2009), available at <http://ssrn.com/abstract=1444534>). The phrasing was reworded, and the ACS questions for 2003–2007 became:

Does this person have any of the following long-lasting conditions: a. Blindness, deafness, or a severe vision or hearing impairment? b. A condition

that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying? Because of a physical, mental, or emotional condition lasting 6 months or more, does this person have any difficulty in doing any of the following activities: a. Learning, remembering, or concentrating? b. Dressing, bathing, or getting around inside the home? Because of a physical, mental, or emotional condition lasting 6 months or more, does this person have any difficulty in doing any of the following activities: a. (Answer if this person is 15 YEARS OLD OR OVER.) Going outside the home alone to shop or visit a doctor's office? b. (Answer if this person is 15 YEARS OLD OR OVER.) Working at a job or business?

Comparing CPS-ASEC and ACS Estimates

Key differences exist between the nationally-representative surveys that are largely used to generate statistics covering the population with disabilities. Researchers have noted a positive correlation between the number of disability items on a survey and the prevalence of disability.⁴ In particular, this means that the lengthier list of disability questions (six in the ACS as compared with one in the CPS-ASEC) may capture more people with disabilities. The definition of employment, which defines the population in the labor force, may also differ in these two surveys.

Table 3 below, produced by Dr. Bjelland from Cornell, uses the CPS-ASEC to provide an overview of the number of disabled individuals in the workforce over time. It uses present data from the CPS-ASEC rather than from the ACS because they cover a lengthier time period (1999 onward, as compared with 2003 onward). Additionally, because individuals with employment (or work limitation) disabilities are expected to be most likely to request reasonable accommodation in the workplace, they are the target population of interest.

⁴ Statistics derived using the CPS-ASEC, ACS, National Health Interview Survey (NHIS), and Survey of Income and Program Participation (SIPP) demonstrate this trend well. The number of people who report at least one disability and are employed is lowest in the CPS-ASEC and is highest in the NHIS and SIPP, both of which have over 20 disability indicators. Additional measures may result in the inclusion of individuals with temporary health or functional limitations.

TABLE 3—POPULATION WITH DISABILITIES USING CURRENT POPULATION SURVEY DATA, 1999–2007

Year	Workers with disabilities	Labor force participants with disabilities
1999	3,207,218	3,588,806
2000	3,545,209	3,889,798
2001	3,187,276	3,533,647
2002	3,081,585	3,574,294
2003	2,835,976	3,414,687
2004	3,146,749	3,727,859
2005	3,067,059	3,579,808
2006	3,200,808	3,698,593
2007	3,042,300	3,497,321

Note: Disability is defined using the CPS work limitation variable, "Does anyone in this household have a health problem or disability which prevents them from working or which limits the kind or amount of work they can do? [If so,] who is that? Anyone else?" The sample is comprised of CPS respondents ages 16 and older.

Statistics generated by Cornell University's Employment and Disability Institute on 2009-07-02 and provided by Melissa J. Bjelland, Ph.D.

The counts presented in Table 3 are supported by other sources of information regarding individuals with employment disabilities. While according to data from the ACS, 8,229,000 people ages 21–64 reported one of the six ACS-defined disabilities and were employed in 2007, only 2,263,000 had an employment disability and were employed (Erickson, W., & Lee, C., Rehabilitation Research & Training Center on Disability—Demographics and Statistics, 2007 *Disability Status Reports: United States 25* (2008)). This is fairly consistent with the results from the CPS-ASEC—2,594,000 people ages 21–64 had a work limitation and were employed in 2007 (Melissa J. Bjelland et al., Rehabilitation Research and Training Center on Disability Demographics and Statistics, Disability Statistics from the Current Population Survey (CPS) (2008)).⁵

These figures are reinforced by the 2004 National Organization on Disability N.O.D./Harris Survey, which reports that just over one-third (35 percent) of people ages 18–64 with disabilities are employed compared to more than three-quarters of those without disabilities (National Organization on Disability, Survey Program on Participation and Attitudes (2004)). These figures have not changed

⁵ Note that the sample population used to construct Table 3 covers all people ages 16 and older in the CPS-ASEC, not just the number of people 21–64 as is the case from the results cited from DisabilityStatistics.org, and are therefore slightly larger. All labor force participants are covered by the ADA, not just those who are of traditional working age.

from those reported in the comparable 1986 poll.

The alternative ACS six question definition of disability results in 6,217,000 disabled workers in July 2009. (See <http://www.bls.gov/cps/cpsdisability.htm>, downloaded September 2, 2009).

Certainly an effort to return to what is, in essence, an earlier definition of workers with disabilities is unlikely to increase the number of workers requesting reasonable accommodations.

While this provides an outer boundary estimate of the number of affected workers, it is far too broad to gauge the impact of the ADA Amendments. In some sense the amendments affect those workers that have always been covered by the ADA. Arguably, the amendments may cause an increase in requests for reasonable accommodation, particularly from individuals whom section 1630.2(j)(5) of the proposed rule says will consistently meet the definition of "disability"—that is, individuals with autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis and muscular dystrophy, and individuals with depression, bipolar disorder, obsessive-compulsive disorder, post-traumatic stress disorder, or schizophrenia. But the exact number is difficult to estimate, because it requires an assumption that such individuals now perceive themselves as protected by the law when they previously assumed they were not.

One measure of this type of impact might be an increase in the number of charges filed by workers with these impairments. EEOC charge receipts were tallied for the period of June through December 2008 (pre-amendments) and January through July 2009 (post-amendments) for ADA charges (including those concurrent with other statutes) filed with EEOC. The difference between the numbers of charges for each reported basis was computed and the mean difference per each basis was calculated at 46. The process was just repeated for those bases listed above and the mean difference was 43. Thus, increases in those bases associated with § 1630.2(j)(5) of the proposed rule were less than that of all bases during the period. This suggests that there may not be a perception of increased or modified protection by workers with the impairments mentioned in § 1630.2(j)(5).

A second approach is to estimate the number of workers with these impairments and then determine what percentage would request reasonable accommodation. Again, this data is not readily available. However, the Centers

for Disease Control publishes data regarding the prevalence of most of these disabilities. 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> (Table 1) (last visited September 15, 2009). Not all of the cited disabilities are included here, but the following are: cancer (1 million or 2.2 percent), cerebral palsy (223,000 or 0.5 percent), diabetes (2 million or 4.5 percent), epilepsy (256,000 or 0.6 percent), AIDS or AIDS related condition (90,000 or 0.2 percent), “mental or emotional” impairment (2.2 million 4.9 percent)—a total of 5.8 million people or 13 percent of the civilian non-institutionalized adults. Thus, if we assume that people with these health conditions make up approximately 13 percent of workers

with work limitation disabilities, an estimate of the number of workers who might request reasonable accommodations as the result of the ADA Amendments Act would be 450,000 (3.5 million times 0.13). However, this may be an underestimate given that this accounts for only workers with “work limitation” disabilities based on CPS–ASEC data. Instead, if we assume that 13 percent of 8.2 million employed persons who report a disability (based on ACS data reported above) have these health conditions, approximately 1 million individuals would consistently meet the definition of “disability.”

Requests for Accommodation

As discussed above, one million additional workers represents an upper bound of those who would consistently meet the definition of “disability” under the ADA Amendments Act.⁶ Not all employees with disabilities, however, report that they need a reasonable

accommodation. “Of the 4,937 individuals in our study population, a relatively small proportion (16%) reported needing any of the 17 accommodations [that the authors list] (Craig Zwerling *et al.*, *Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995*, 45 *J. Occupational & Env'tl. Med.* 517 (2003)).” On the other hand, Nishii and Bruyère report that 82 percent of disabled employees in their study request an accommodation.⁷ Certainly, the costs of reasonable accommodation cannot be assumed for all workers with disabilities, but it is not clear how much this factor reduces costs.

If we assume only 16 percent of the “covered” disabled work force request accommodations as Zwerling *et al.* suggest, the number of requested accommodations would drop to 160,000 requests for accommodation. Table 4 shows potential costs based on this projected number of requests.

TABLE 4—ESTIMATED REASONABLE ACCOMODATION COSTS WITH 16 PERCENT REQUEST RATE

Average accommodation cost	Total cost (million)	Accommodations over five years (million)
\$462	\$74	\$15
865	138	28
1,434	229	46

Under this assumption, only if all requests occur in the first year does the estimated cost exceed \$100 million.

As an upper bound estimate, if we assumed that 82 percent of these workers will request an accommodation, the number of requests would be

820,000 requests for accommodation. Table 5 shows potential costs based on the various estimates of reasonable accommodation costs discussed here.

TABLE 5—ESTIMATED REASONABLE ACCOMODATION COSTS WITH 82 PERCENT REQUEST RATE

Average accommodation cost	Total cost (million)	Accommodations over five years (million)
\$462	\$379	\$76
865	709	142
1,434	1,176	235

Here, under this upper bound scenario, even if the requests come over a five year period then annual costs may exceed \$100 million except when the lowest estimate of reasonable accommodation costs is assumed.⁸

Of course these estimates assume that all requests will result in an accommodation. However, Schartz *et al.* report that “[i]n almost 43% (379) of accommodation inquiries by employers [to JAN], the respondents had

implemented, or were in the process of implementing, an accommodation solution.” (Schartz *et al.*, at 347). It is possible then that all of these estimates are at least twice as great as is likely.

⁶ There is no data that enables us to determine whether, or to what extent, the remaining workers with disabilities would request or would be entitled to reasonable accommodation as the result of the ADA Amendments Act. It appears, however, that workers with the kinds of impairments mentioned in section 1630.2(j)(5) would be most likely to request accommodations as a result of the proposed rule, because they would have the greatest assurance that their impairments would “consistently” meet the definition of “disability.”

⁷ Disparities may be accounted for both by the fact that the samples were different, and by the fact that Nishii and Bruyère listed 20 different accommodations. Additionally Nishii and Bruyère also report that 82% of non-disabled employees also requested an accommodation. Across the entire organization, 91% of all accommodation requests were made by people without disabilities, with only 9% of them being made by people with disabilities. Across all 20 of their accommodation types, there was not one for which a larger proportion of the

accommodations made were for people with disabilities (in every case, the majority of that type of accommodation was made for people without disabilities).

⁸ Using the count of disabled workers provided in Table 3 as a lower bound, the mean costs of reasonable accommodation would range from \$6.7 million to \$104.3 million.

Administrative Costs

There are some additional potential costs. Covered employers that changed their internal policies and procedures, in response to the Supreme Court decisions that the ADA Amendments Act has overturned, will need to update their existing internal policies and procedures to reflect the broader definition of disability and train personnel to ensure appropriate compliance with the revised regulation. As previously discussed, 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. However, larger firms such as the 18,000 firms with more than 500 employees, are more likely to have formal procedures that may need to be revised.⁹ More universal will be costs required to review and analyze the final regulation. In addition, to the extent that the revised regulation increases the number of requests for accommodation, there may be additional costs associated with processing and adjudicating the requests, though 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.

A rough estimate of administrative costs might be based on days of human resource managers time estimated at \$681¹⁰ plus some training costs for that manager. EEOC provides such outreach sessions at approximately \$350. So a rough estimate of these administrative costs might be \$1,031. These figures will underestimate costs at large firms but will overestimate costs at small firms and at firms who either do not have to alter their policies. This level of costs seems appropriate for large firms of at least 150 employees (approximately 68,306 firms based on the SBA data cited below). This would result in a one time cost of approximately \$70 million. However, the Commission was unable to identify empirical research to

demonstrate such costs; therefore, this is considered to be a very rough estimate.

Finally there will be costs to the Commission primarily for increased charge workload. The Congressional Budget Office estimated these costs.

H.R. 3195 would increase this workload by no more than 10 percent in most years, or roughly 2,000 cases annually. Based on EEOC staffing levels necessary to handle the agency’s current caseload, we expect that implementing H.R. 3195 would require 50 to 60 additional employees. CBO estimates 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.

In conclusion, it appears very unlikely that the promulgation of regulations to implement the ADA Amendments Act would create annual costs exceeding \$100 million per year. However, the data available is not prevalent or ideal, so these estimates are volatile. Additionally, there might be other regulatory costs that are not anticipated at this time. For these reasons, the Commission seeks public comment on such costs.

Regulatory Flexibility Act and Unfunded Mandates Act

The Commission additionally seeks comment from the public during the comment period regarding whether, under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96–354), these regulations will have a significant economic impact on a substantial number of small entities, which will determine whether a regulatory flexibility analysis is required. This information will also determine whether the proposed rule imposes a burden that requires additional scrutiny under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, *et seq.*, concerning the burden imposed on state, local, or tribal governments.

The Commission’s preliminary review suggests that the regulations will not have a significant economic impact on a substantial number of small entities.

Thirty-five percent of employment covered by the ADA Amendments is expected to occur at firms that would be classified as working for small businesses (those with less than 500 employees). “Employer Firms, Establishments, Employment, and Annual Payroll Small Firm Size Classes, 2006.”¹¹ This represents 1,277,383 (22.5 percent) of establishments, or 844,842 (14 percent) of all firms. The rule is expected to apply to all of these small establishment firms uniformly.

Description of the Projected Reporting, Recordkeeping, and other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities that Will Be Subject to the Requirement and the Long-Term and Short-Term Compliance Costs

The proposed 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. The Amendments and proposed rule clarify the definition of a disability in response to a limited number of court cases, so it is not clear that the Amendments will cause additional requests for reasonable accommodation. Therefore it can be argued that no new compliance costs will be created. However, the Initial Regulatory Impact Analysis provides cost estimates based on two important criteria (1) mean reasonable accommodation costs and (2) percent of disabled workers requesting reasonable accommodation. Mean reasonable accommodation cost used here were \$462, (Nishii & Bruyère (2009)) \$865 (Schartz et al. (2006)) and \$1,434 (Job Accommodation Network (2007)). Estimates of percent of workers with disabilities requesting reasonable accommodation varied a great deal from a high of 82 percent to a lower estimate of 16 percent ((Zwerling et al. (2003); Nishii & Bruyère (2009)). Table 1 below indicates the cost for small businesses when the 82 percent estimate of reasonable accommodation costs are used.

TABLE 1—IMPACT ON SMALL BUSINESSES BASED ON 82 PERCENT REQUEST RATE

Accommodations over five years, all firms	Small business accommodations over five years	Firms from 15 to 499 employees	Cost per firm
75,768,000.00	26,518,800.00	844,842	31.39
141,930,520.00	49,675,682.00	844,842	58.80
235,176,000.00	82,311,600.00	844,842	97.43

⁹ http://www.sba.gov/advo/research/us_06ss.pdf.

¹⁰ Occupational Outlook Handbook, 2008–09 Edition <http://stats.bls.gov/OCO/OCOS021.HTM>, downloaded September 2, 2009.

¹¹ Source: U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, Statistics of U.S. Businesses.

Under this scenario, costs to small businesses based on an 82 percent

request rate range from \$26.5.7 million to \$82.3 million.

all workers with disabilities requesting reasonable accommodations.

Table 2 provides estimates based on the lower request rate of 16 percent of

TABLE 2—IMPACT ON SMALL BUSINESSES BASED ON 16 PERCENT REQUEST RATE

Accommodations over five years, all firms	Small business accommodations	Establishments from 15 to 499 employees	Cost per establishment
14,784,000.00	5,174,400.00	844,842	6.12
27,693,760.00	9,692,816.00	844,842	11.47
45,888,000.00	16,060,800.00	844,842	19.01

With the lower estimated request rate, costs to small business range from \$5.1 million to \$16.1 million.

A characteristic of small businesses warrants some attention. Compared to establishments with 500 or more employers the number of establishments is high. The high volume of establishments when applied to the expected cost of reasonable accommodation results in a very low chance that a small business firm will be asked to make an accommodation. The Preliminary Regulatory Impact Analysis uses an upper bound estimate that one million workers with disabilities may consider themselves to be newly covered, roughly based on the percentages of individuals in the population of workers with disabilities who have the types of impairments identified in section 1630.2(j)(5) of the proposed rule as consistently meeting the definition of “disability.” If 82 percent of these request reasonable accommodations, then there would be 820,000 requests. With 35 percent of workers employed in small businesses, it can be anticipated that small businesses would receive 287,000 reasonable accommodation requests. If these requests occur over a five year period there would be 57,400 per year. When the number of small business firms (844,842) is divided by the number of reasonable accommodation requests made annually to small businesses, only seven firms out of 100 would receive a request. The same calculations based on a 13 percent request rate would result in just one in 100 small business firms receiving a reasonable accommodation request. An effective method for minimizing the impact of this concentration of costs among a more limited number of small businesses is the Amendments Act’s and the new rule’s retention of the “undue hardship” defense as “significant difficulty or expense.”

There are some additional potential costs. Covered employers that changed their internal policies and procedures in response to the Supreme Court

decisions that the ADA Amendments Act has overturned will need to update their existing internal policies and procedures to reflect the broader definition of disability and train personnel to ensure appropriate compliance with the revised regulation. More universal will be costs required to review and analyze the final regulation. These types of administrative costs may be particularly difficult for small businesses that operate with a smaller margin.

The following steps, however, are expected to assist in reducing the burden on small businesses. The Commission 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 (e.g. “The ADA: A Primer for Small Business”).

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. The Commission seeks comments and information about any such 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 (44 U.S.C. 3501, *et seq.*).

List of Subjects in 29 CFR Part 1630

Equal employment opportunity, Individuals with disabilities.

For the Commission.

Dated: September 16, 2009.

Stuart J. Ishimaru,
Acting Chairman.

Accordingly, for the reasons set forth in the preamble, EEOC proposes to amend 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 (42 U.S.C. 12101, *et seq.*, as amended) (ADA), requiring equal employment opportunities for qualified individuals with disabilities.

(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 are 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) The definition of disability in this part shall be construed broadly, to the maximum extent permitted by the terms of the ADA.

3. Amend § 1630.2 by revising paragraphs (g) through (m) and adding paragraph (o)(4), to read as follows:

§ 1630.2 Definitions.

* * * * *

(g) *Disability* means, with respect to an individual—

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

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment (as described in section (l)).

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 of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and 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* are those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty. Major life activities include, but are not limited to:

(1) 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

(2) The operation of major bodily functions, 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. For example, kidney disease affects bladder function; cancer affects normal cell growth; diabetes affects functions of the endocrine system (e.g., production of insulin); epilepsy affects neurological functions or functions of the brain; and Human Immunodeficiency Virus (HIV) and AIDS affect functions of the immune system and reproductive functions. Likewise, sickle cell disease affects functions of the hemic system, lymphedema affects lymphatic

functions, and rheumatoid arthritis affects musculoskeletal functions.

(3) *No Negative Implication From Omission of Particular Major Life Activities or Impairments.*

(i) The list of examples of major life activities in paragraphs (i)(1) and (2) of this section is not exhaustive.

(ii) The list of examples in paragraph (i)(2) of this section is intended to illustrate some of the types of major bodily functions that may be affected by some types of impairments. The impairments listed may affect major life activities other than those specifically identified.

(j) *Substantially Limits*—(1) *In general.* 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 a disability.

(2) *Rules of Construction.*

(i) Consistent with Congress’s clearly expressed intent in the ADA Amendments Act that the focus of an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of “disability,” (Section 2(b)(5) (“Findings and Purposes”), the term “substantially limits,” including the application of that term to the major life activity of working, shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis.

(ii) An individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability.

(A) *Example 1:* Someone with a 20-pound lifting restriction that is not of short-term duration is substantially limited in 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.

(B) *Example 2:* 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 seeing in order to be substantially limited in seeing.

(iii) An impairment that “substantially limits” one major life activity need not limit other major life activities in order to be considered a disability. To the extent cases pre-dating the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. 2008 House Judiciary Committee Report at 19.

(A) *Example 1:* An individual whose endocrine system is substantially limited due to diabetes need not also show that he is substantially limited in eating or any other major life activity.

(B) *Example 2:* An individual whose normal cell growth is substantially limited due to cancer need not also show that he is substantially limited in working or any other major life activity.

(iv) The comparison of an individual’s limitation to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific or medical evidence. 2008 Senate Managers’ Statement at 7.

(A) *Example 1:* An individual with epilepsy will meet the definition of disability because he is substantially limited in major life activities such as functions of the brain or, during a seizure, functions such as seeing, hearing, speaking, walking, or thinking;

(B) *Example 2:* An individual with diabetes will meet the definition of disability because he is substantially limited in functions of the endocrine system. (See paragraph (j)(5) of this section.)

(v) The “transitory and minor” exception in § 1630.2(l) of this part (the “regarded as” prong of the definition of “disability”) does not establish a durational minimum for the definition of “disability” under § 1630.2(g)(1) (actual disability) or § 1630.2(g)(2) (record of a disability). An impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.

(vi) In determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment. (See, e.g., paragraph (j)(6)(i)(C) of this section.)

(3) *Ameliorative Effects of Mitigating Measures Not Considered*—

(i) The ameliorative effects of mitigating measures shall not be considered in determining whether an impairment substantially limits a major life activity. 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 20–21 (citing, e.g., *McClure v. General Motors*

Corp., 75 Fed. Appx. 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); *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)).

(ii) Mitigating measures include, but are not limited to:

(A) 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 aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(B) Use of assistive technology;

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

(D) Learned behavioral or adaptive neurological modifications; or

(E) Surgical interventions, except for those that permanently eliminate an impairment.

(iii) An individual who, because of use of medication or another mitigating measure, has experienced no limitations, or only minor limitations, related to an impairment nevertheless has a disability if the impairment would be substantially limiting without the mitigating measure.

(A) *Example 1*: An individual who is taking a psychiatric medication for depression, or insulin for diabetes, or anti-seizure medication for a seizure disorder has a disability if there is evidence that the mental impairment, the diabetes, or the seizure disorder, if left untreated, would substantially limit a major life activity.

(B) *Example 2*: An individual who uses hearing aids, a cochlear implant, or a telephone audio device due to a hearing impairment is an individual with a disability where, without the benefit of the mitigating measure, he would be substantially limited in the

major life activity of hearing or any other major life activity.

(iv) The ameliorative effects of ordinary eyeglasses or contact lenses shall be considered when determining whether an impairment substantially limits a major life activity. The term “ordinary eyeglasses or contact lenses” is defined in the ADA as amended as lenses that are “intended to fully correct visual acuity or to eliminate refractive error.”

(A) *Example 1*: An individual with severe myopia whose visual acuity is fully corrected, is not substantially limited in seeing, because the ameliorative effects of the lenses must be considered in determining whether the individual is substantially limited in seeing.

(B) *Example 2*: 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.

(C) *Example 3*: Eyeglasses or contact lenses that are the wrong prescription or an outdated prescription may nevertheless be “ordinary” eyeglasses or contact lenses, if there is evidence that a proper prescription would fully correct visual acuity or eliminate refractive error.

(4) *Impairments that are Episodic or in Remission*. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Examples may include, but are not limited to, impairments such as epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder.

(5) *Examples of Impairments that Will Consistently Meet the Definition of Disability*—(i) Interpreting the definition of disability broadly and without extensive analysis as required under the ADA Amendments Act, some types of impairments will consistently meet the definition of disability. Because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity. In addition to examples such as deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely

missing limbs, and mobility impairments requiring the use of a wheelchair, other examples of impairments that will consistently meet the definition include, but are not limited to—

(A) Autism, which substantially limits major life activities such as communicating, interacting with others, or learning;

(B) Cancer, which substantially limits major life activities such as normal cell growth;

(C) Cerebral palsy, which substantially limits major life activities such as walking, performing manual tasks, speaking, or functions of the brain;

(D) Diabetes, which substantially limits major life activities such as functions of the endocrine system (e.g., the production of insulin, see 2008 House Judiciary Committee Report at 17);

(E) Epilepsy, which substantially limits major life activities such as functions of the brain or, during a seizure, seeing, hearing, speaking, walking, or thinking;

(F) HIV or AIDS, which substantially limit functions of the immune system;

(G) Multiple sclerosis and muscular dystrophy, which substantially limit major life activities including neurological functions, walking, performing manual tasks, seeing, speaking, or thinking;

(H) Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia, which substantially limit major life activities including functions of the brain, thinking, concentrating, interacting with others, sleeping, or caring for oneself.

(ii) *No Negative Implication From Omission of Particular Major Life Activities*. An individual with one of the impairments listed in paragraph (j)(5)(i) of this section may be substantially limited in one or more of the major life activities identified, and/or may be substantially limited in other major life activities.

(iii) *No Negative Implication From Omission of Particular Impairments*. The list of examples in paragraph (j)(5)(i) of this section is merely intended to illustrate some of the types of impairments that are consistently substantially limiting. Other types of impairments not specifically identified in the examples included in paragraph (j)(5)(i) of this section may also consistently be substantially limiting, such as some forms of depression other than major depression and seizure disorders other than epilepsy.

(6) *Examples of Impairments that May Be Disabling for Some Individuals But Not For Others*—(i) In addition to the examples in paragraph (j)(5) of this section of types of impairments that will consistently meet the definition of disability, other types of impairments may be disabling for some individuals but not for others, and therefore may require more analysis in order to determine whether or not they substantially limit an individual in performing a major life activity. The standards for determining whether such an impairment has been shown to be a disability are intended to be construed in favor of broad coverage, and should not demand an extensive analysis. The following examples illustrate some of the ways in which such impairments may (with or without the use of mitigating measures) substantially limit a major life activity.

(A) *Example 1*: An individual with asthma who is substantially limited in respiratory functions and breathing compared to most people, as indicated by the effects experienced when exposed to substances such as cleaning products, perfumes, and cigarette smoke, is an individual with a disability.

(B) *Example 2*: An individual with high blood pressure who is substantially limited in the functions of the circulatory system compared to most people, as indicated by the decrease in blood circulation caused by narrowing of the blood vessels, is an individual with a disability.

(C) *Example 3*: An individual with a learning disability who is substantially limited in reading, learning, thinking, or concentrating compared to most people, as indicated by the speed or ease with which he can read, the time and effort required for him to learn, or the difficulty he experiences in concentrating or thinking, is an individual with a disability, even if he has achieved a high level of academic success, such as graduating from college. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment.

(D) *Example 4*: An individual with a back or leg impairment who is substantially limited compared to most people in the length of time she can stand, the distance she can walk, or the weight she can lift, is an individual with a disability (such as where the individual has a back impairment resulting in a 20-pound lifting restriction that is expected to last for several months or more).

(E) *Example 5*: An individual with a psychiatric impairment (such as panic

disorder, anxiety disorder, or some forms of depression other than major depression), who is substantially limited compared to most people, as indicated by the time and effort required to think or concentrate, the diminished capacity to effectively interact with others, the length or quality of sleep the individual gets, the individual's eating patterns or appetite, or the effect on other major life activities, is an individual with a disability.

(F) *Example 6*: An individual with carpal tunnel syndrome who is substantially limited in performing manual tasks compared to most people, as indicated by the amount of pain experienced when writing or using a computer keyboard or the length of time for which such manual tasks can be performed, is an individual with a disability.

(G) *Example 7*: An individual with hyperthyroidism who is substantially limited in the functioning of the endocrine system compared to most people, as indicated by overproduction of a hormone that controls metabolism, is an individual with a disability, because a major bodily function may be substantially limited when an impairment "causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion." (2008 House Judiciary Committee Report at 17).

(ii) *No Negative Implication From Omission of Particular Major Life Activities*. An individual with one of the impairments listed in paragraph (j)(6)(i) of this section may be substantially limited in one or more of the major life activities identified, and/or in other major life activities.

(iii) *No Negative Implication From Omission of Particular Impairments*. The list of examples in paragraph (j)(6)(i) of this section is merely intended to illustrate some of the types of impairments that may be substantially limiting. Impairments other than those specifically listed in paragraph (j)(6)(i) of this section may also substantially limit major life activities.

(7) With respect to the major life activity of *working*—

(i) An individual with a disability will usually be substantially limited in another major life activity, therefore generally making it unnecessary to consider whether the individual is substantially limited in working.

(ii) An impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the type of work at issue. Whether an impairment

substantially limits the major life activity of working must be construed broadly to the maximum extent permitted under the ADA and should not demand extensive analysis.

(iii) *Type of Work*

(A) The type of work at issue includes the job the individual has been performing, or for which the individual is applying, and jobs with similar qualifications or job-related requirements which the individual would be substantially limited in performing because of the impairment.

(B) The type of work at issue may often be determined by reference to the nature of the work an individual is substantially limited in performing because of an impairment as compared to most people having comparable training, skills, and abilities. Examples of types of work include, but are not limited to: Commercial truck driving (*i.e.*, driving those types of trucks specifically regulated by the U.S. Department of Transportation as commercial motor vehicles), assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs.

(C) The type of work at issue may also be determined by reference to job-related requirements that an individual is substantially limited in meeting because of an impairment as compared to most people performing those jobs. Examples of job-related requirements that are characteristic of types of work include, but are not limited to, jobs requiring: Repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress; or working rotating, irregular, or excessively long shifts.

(1) *Example 1*: Carpal tunnel syndrome that does not substantially limit a machine operator in the major life activity of performing manual tasks when compared with most people in the general population nevertheless substantially limits her in the major life activity of working if the impairment substantially limits her ability to perform her job and other jobs requiring similar repetitive manual tasks.

(2) *Example 2*: An impairment that does not substantially limit an individual's ability to stand as compared to most people in the general population nevertheless substantially limits an individual in working if it substantially limits his ability to perform his job and other jobs that require standing for extended periods of time (*e.g.*, jobs in the retail industry).

(3) *Example 3*: An impairment that does not substantially limit an individual's ability to lift as compared to most people in the general population nevertheless substantially limits the individual in working if it substantially limits his ability to perform his job and other jobs requiring frequent heavy lifting.

(4) *Example 4*: A permanent knee impairment that does not substantially limit an individual's ability to walk as compared to most people in the general population nevertheless substantially limits the individual in working if it substantially limits her in performing the job for which she is applying and other jobs that require walking long distances.

(iv) *Evidence of Ability to Obtain Employment Elsewhere*. The fact that an individual has obtained employment elsewhere is not dispositive of whether an individual is substantially limited in working.

(A) *Example 1*: Someone who, because of an impairment, cannot perform work that requires repetitive bending or heavy lifting is substantially limited in working, even if he also has skills that would qualify him to perform jobs that do not include these requirements.

(B) *Example 2*: An individual whose impairment substantially limits the ability to do repetitive tasks associated with certain manufacturing positions and who is denied a reasonable accommodation for a manufacturing job by his employer could be substantially limited in working, even if the individual performed similar work for another employer who provided an accommodation for this limitation.

(8) *Impairments That Are Usually Not Disabilities*. Temporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity.

(k) *Has a record of such an impairment*—(1) 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.

(i) *Example 1*: An applicant who in the past was diagnosed with prostate cancer that was treated, and whose doctor says he no longer has cancer, nevertheless has a "record of" a substantially limiting impairment.

(ii) *Example 2*: 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.

(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.

(l) *"Is regarded as having such an impairment"*—(1) *In General*. An individual is "regarded as" having a disability if the individual is subjected to an action prohibited by this part, including non-selection, demotion, termination, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. Proof that the individual was subjected to a prohibited employment action, e.g., excluded from one job, because of an impairment (other than an impairment that is transitory and minor, as discussed below) is sufficient to establish coverage under the "regarded as" definition. 2008 House Committee on Educ. and Labor Report at 12–14; 2008 Senate Managers' Statement at 9–10. Evidence that the employer believed the individual was substantially limited in any major life activity is not required.

(2) *Actions Taken Based on Symptoms of an Impairment or Based on Use of Mitigating Measures*. A prohibited action based on an actual or perceived impairment includes, but is not limited to, an action based on a symptom of such an impairment, or based on medication or any other mitigating measure used for such an impairment.

(i) *Example 1*: An individual who is not hired for a driving job because he takes anti-seizure medication is regarded as having a disability, even if the employer is unaware of the reason the employee is taking the medication.

(ii) *Example 2*: An employer that refuses to hire someone with a facial tic regards the individual as having a disability, even if the employer does not know that the facial tic is caused by Tourette's Syndrome.

(3) *Impairments That Are Transitory and Minor*. An individual may not establish coverage under this prong where the impairment that is the basis for the covered entity's action is both transitory (lasting or expected to last for six months or less) and minor.

(i) *Example 1*: An individual who is not hired for a data entry position because he will be unable to type for three weeks due to a sprained wrist is not regarded as disabled, because a sprained wrist is transitory and minor.

(ii) *Example 2*: An individual who is placed on involuntary leave because of a broken leg that is expected to heal normally is not regarded as disabled, because the broken leg is transitory and minor.

(iii) *Example 3*: An individual who is not hired for an assembly line job by an employer who believes she has carpal tunnel syndrome would be regarded as disabled, because carpal tunnel syndrome is not transitory and minor.

(iv) *Example 4*: An individual who is fired from a food service job because the employer believes he has Hepatitis C is regarded as disabled, because Hepatitis C is not transitory and minor.

(v) *Example 5*: An individual who is terminated because an employer believes that symptoms attributable to a mild intestinal virus are actually symptoms of heart disease is regarded as disabled, because heart disease—the impairment the employer believes the individual has—is not transitory and minor.

(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 who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition.)

* * * * *

(o) * * *

(4) An employer is required, absent undue hardship, to provide reasonable accommodation to a qualified individual with a substantially limiting impairment or a "record of" such an impairment, but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong.

* * * * *

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 by revising paragraph (c) and adding paragraph (e) to 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) The reasonable accommodation requirements set forth in this part apply to an individual with a substantially limiting impairment or a record of a substantially limiting impairment. A covered entity is not required to provide a reasonable accommodation to an individual who is only “regarded as”

disabled within the meaning of § 1630.2(l) of this part.

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 paragraph (j)(3)(iv) of § 1630.2 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 criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

7. Amend § 1630.16(a) by removing “because” and adding “on the basis” in its place in the last sentence.

* * * * *

8. Amend the Appendix to Part 1630 as follows:

- A. Revise the “Introduction.”
- B. Revise Section 1630.1.
- C. Revise Sections 1630.2(a) through (f).
- D. Revise Section 1630.2(g).
- E. Revise Section 1630.2(i).
- F. Revise Section 1630.2(j).
- G. Revise Section 1630.2(k).
- H. Revise Section 1630.2(l).

I. Amend Section 1630.2(m) and Section 1630.2(n) by removing the term “qualified” individual with a disability” and adding in its place “qualified individual” and by removing the term “qualified individuals with disabilities” and adding in its place “qualified individuals.”

J. Amend Section 1630.2(o) by revising the first paragraph.

K. Revise Section 1630.4.

L. Revise the first paragraph in Section 1630.5.

M. Amend Section 1630.9(a) through (d) to replace the term “qualified individual with a disability” with the term “qualified individual.”

N. Add Section 1630.9(e).

O. Revise Section 1630.10.

P. Amend Section 1630.16(a) by removing “because” and adding “on the basis” in its place in the last sentence.

The revisions and additions read as follows:

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

* * * * *

Introduction

The Equal Employment Opportunity Commission (the Commission or EEOC) is responsible for enforcement of title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, as amended, which prohibits employment discrimination on the basis of disability. Pursuant to the ADA Amendments Act of 2008, EEOC is expressly granted the authority and is expected to amend these regulations. The Commission believes that it is essential to issue interpretive guidance concurrently with the issuance of this part in order to ensure that qualified individuals with disabilities understand their rights under this part, and to facilitate and encourage compliance by covered entities. This appendix represents the Commission’s interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination. The appendix addresses the major provisions of this part and explains the major concepts of disability rights. As revised effective _____, this appendix and the accompanying regulations reflect the findings and purposes of the ADA Amendments Act of 2008, which states, among other things, that the prior EEOC regulations defining the term “substantially limits” as “significantly restricted” set too high a standard, and that the holdings in a series of U.S. Supreme Court and lower court decisions had failed to fulfill Congress’s expectation that the definition of disability under the ADA would be interpreted consistently with the broad interpretation of the term “handicapped” under section 504 of the Rehabilitation Act of 1973 and with the broad view of the “regarded as” prong of the definition of “disability, as first enunciated by the Supreme Court in *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987). Pursuant to the 2008 amendments, the definition of disability in this part shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA, and the determination of whether an individual has a disability should not demand extensive analysis. Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008 (hereinafter 2008 Senate Managers’ Statement); 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) (hereinafter 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) (hereinafter 2008 House Judiciary Committee Report).

The terms “employer” or “employer or other covered entity” are used interchangeably throughout the appendix to refer to all covered entities subject to the employment provisions of the ADA. 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 Managers' Statement at 11.

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The Americans with Disabilities Act (ADA) was signed into law on July 26, 1990, and amended effective January 1, 2009. The ADA was amended by the Americans with Disabilities Act Amendments Act of 2008, which was signed into law on September 25, 2008, and became effective on January 1, 2009. The ADA is an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity based on the fact that the individual has a disability. The purpose of title I of the ADA and this part is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of disability.

The ADA uses 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 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 * * *." H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 26-27 (1990) (hereinafter House Judiciary Report); see also S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) (hereinafter Senate Report); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 50-51 (1990) (hereinafter House Labor Report).

The use of the term "Americans" in the title of the ADA is not intended to imply that the Act 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.

Section 1630.1(b) and (c) Applicability and Construction

Unless expressly stated otherwise, the standards applied in the ADA are not intended to be lesser than 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 House Labor Report at 135; 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. House Judiciary 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 are 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 Senate Report at 27; 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 qualified individuals with disabilities 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.

Subparagraph (c)(3) is consistent with language added to section 501 of the ADA by the ADA Amendments Act of 2008. 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 from title I of the ADA.

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 be further 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, 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. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant case law developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27. The definition of the term "disability" is divided into three parts. An individual must satisfy only one of these parts in order to be considered an individual with a disability for purposes of this part. However, an individual may satisfy more than one of the three "parts" of the definition of disability. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or (3) is regarded by the covered entity as having such an impairment. To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits," "record of," and "regarded as." Each of these terms is discussed below.

* * * * *

Section 1630.2(i) Major Life Activities

"Major life activities" are those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty. The inclusion of "major bodily functions" in the definition of "major life activities" is consistent with the plain language of the ADA Amendments Act.

Many of the major life activities listed in the ADA Amendments Act and section 1630.2(i)(1) have been referred to in EEOC's 1991 regulations implementing title I of the ADA and in sub-regulatory documents, and by courts. The ADA Amendments expressly made the list of major life activities in the

statute non-exhaustive. Thus, the fact that a major life activity that has previously been identified by EEOC or the courts is not in the statute “does not create any negative implication as to whether such activity * * * constitutes a ‘major life activity’ under the statute.” 2008 Senate Managers’ Statement at 8. The list is intended to be merely illustrative. 2008 House Committee on Educ. and Labor Report at 11. For example, EEOC has previously taken the position that major life activities also include sitting, reaching, and interacting with others, and the regulations include those major life activities. Similarly, 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 section 1630.2(i)(2) to provide further illustrations. Some of these additional examples reflect examples of bodily systems already included in the definition of physical impairment in section 1630.2(h), and some are from the U.S. Department of Labor’s nondiscrimination and equal employment opportunity regulations implementing section 188 of the Workforce Investment Act of 1998. 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 Commission expects that courts will have occasion to recognize other examples as presented in a given case.

The link between particular impairments and various major bodily functions should not be difficult to identify. For example, cancer affects an individual’s major bodily function of “normal cell growth”; diabetes affects the major bodily function of insulin production, a function of the endocrine system; and the Human Immunodeficiency Virus (HIV) affects functioning of the immune system. Cf. *Heiko v. Columbo Savings Bank*, F.S.B., 434 F.3d 249 (4th Cir. 2005) (in case brought by individual with polycystic kidney disease requiring dialysis treatment, court held that eliminating waste is a major life activity). Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.

The list of examples in section 1630.2(i) of some impairments and some of the major bodily functions they affect is intended to assist in understanding possible links between some impairments and some of the major life activities they may implicate. Section 1630.2(j) also gives examples of impairments and major life activities they affect, but the purpose of the examples in that section is to demonstrate how impairments may substantially limit major life activities. The impairments listed in both 1630.2(i) and (j) may affect other major life activities not specifically identified. Additionally, the fact that a particular impairment is not offered as an example creates no negative implication concerning whether that impairment is or may be a disability.

Section 1630.2(j) Substantially Limits

In General

The Commission has revised its original standard for determining whether an impairment substantially limits a major life activity. Congress stated in the ADA Amendments Act of 2008 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), as amended. One such stated purpose in the Amendments Act is 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 an extensive analysis.” Section 2(b)(5) (“Findings and Purposes”).

In keeping with this instruction, the Commission concludes that its prior formulation may suggest a more extensive analysis than Congress intended. 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, deletes the language to which Congress objected, and provides numerous practical examples to reflect Congressional intent and to illustrate some of the ways in which impairments may substantially limit a major life activity. 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 Managers’ Statement at 7 (stating 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 [Motor Mfg., Ky v. Williams]*, 534 U.S. 134 (2002)—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications”). Although the Senate Managers’ Statement, citing the original ADA legislative history, also made reference to the terms “condition, manner, or duration” under which a major life activity is performed, the Commission has deleted that specific language from the expression of the standard itself to effectuate Congress’s clear instruction in the Amendments Act 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*. 2008 Senate Managers’ Statement at 6. Moreover, the Commission notes that the

U.S. Department of Justice has never included the terms “condition, manner, or duration” in its regulations promulgated under titles II and III of the ADA. See 29 CFR part 35 (title II regulation) and 28 CFR part 36 (title III regulation).

Not all impairments affect an individual in a major life activity such that they are substantially limiting. An individual with a disability is someone who due to an impairment is substantially limited in performing 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 to be considered a disability. See 2008 Senate Managers’ Statement at 6–7 & 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.”) 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, yet must be more than a temporary, non-chronic impairment of short duration with little or no residual effects (e.g., the common cold or flu). Multiple impairments that combine to substantially limit one or more of an individual’s major life activities also constitute a disability.

The term “average person in the general population,” as the basis 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 2008 Amendments Act, and to emphasize that the comparison between the individual and “most people” should be based on a common-sense approach that does not require an exacting or statistical analysis. The comparison to 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. However, this does not mean that disability cannot be shown where an impairment is diagnosed, or its limitations evidenced, by reference to intra-individual differences (i.e., a disparity between an individual’s aptitude and actual versus expected achievement), or in comparison to a particular class of people rather than how the impairment manifests itself in reference to the general population. For example, an individual with dyslexia may be substantially limited in reading and/or learning as evidenced by information about how the impairment affected his learning as compared to what would otherwise be expected of the individual or others of a certain age, school grade, level of education, or aptitude.

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,” that appears only in the “regarded as” definition of “disability” as an exception to coverage, does not establish a requirement that an impairment last for more than six months in order to be considered substantially limiting under the “actual” or “record of” parts of the definition of disability. Impairments causing limitations that last, or are expected to last, for six or fewer months may still be substantially limiting.

Mitigating Measures

The ameliorative effects of mitigating measures shall not be considered in determining whether an impairment substantially limits a major life activity, with the exception of ordinary eyeglasses or contact lenses (defined as lenses “that are intended to fully correct visual acuity or eliminate refractive error”). “The ADA Amendments Act provides a non-comprehensive list of the types of mitigating measures that are not to be considered.” 2008 Senate Managers’ Statement at 9. The regulations include 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). Additionally, consistent with a statement in the 2008 House Education and Labor Report at 15, the Commission has also included “surgical intervention” as an example of a mitigating measure. In the Commission’s view, a “surgical intervention” may constitute a mitigating measure, except when it permanently eliminates an impairment. The regulations also make clear that even an individual who, because of the use of medication or another 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.

Impairments That Are Episodic or in Remission

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Examples of impairments that may be episodic include, but are not limited to, epilepsy, multiple sclerosis, hypertension, diabetes, asthma, major depression, bipolar disorder, and schizophrenia. Individuals with these impairments can experience flare-ups that may substantially limit major life activities such as sleeping, breathing, caring for oneself, thinking, or concentrating. See 2008 House Judiciary Committee Report at 19–20. Cancer is an example of an impairment that may be in remission.

Examples—Definition of Disability

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt an exhaustive “laundry list” of impairments that are “disabilities.” Rather, disability is determined based on an individualized assessment. However, § 1630.2(j)(5) of the

regulations recognizes, and offers examples to illustrate, that characteristics associated with some types of impairments allow an individualized assessment to be conducted quickly and easily, and will consistently render those impairments disabilities. This result is the consequence of considering the combined effect of the statutory changes to the definition of disability contained in the ADA Amendments Act, including the lower standard for “substantially limits”, the rule that major life activities include major bodily functions, the new rule for impairments that are episodic or in remission, and the principle 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 ADA Amendments Act’s legislative history lends support to the view that impairments like those in section (j)(5) consistently will meet the definition of “disability.” 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. 2008 House Judiciary Committee Report at 6. Describing this goal, the Committee report 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 lessened their impact.” *Id.*

Section 1630.2(j)(6), on the other hand, offers examples of impairments that may be disabling for some individuals but not for others, depending on the stage of the impairment, the presence of other impairments that combine to make the impairment disabling, or any number of other factors. The types of impairment described in section (j)(6) will require somewhat more analysis than those in section (j)(5) in order to determine whether they substantially limit an individual’s major life activities, although the Commission notes that the level of analysis required for these types of impairments still should be less than that required prior to the ADA Amendments Act. The examples do not set minimum requirements for establishing substantial limitations. The regulations also make clear that no negative implication should be drawn from the fact that a particular impairment does not appear on the lists of examples in §§ 1630.2(j)(5) and (6). The standards for determining whether an impairment has been shown to be a disability are intended to be construed in favor of broad coverage of individuals, and should not demand an extensive analysis.

It is important to remember that the limitation on the performance of a major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age by itself, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual’s ability to perform a major life activity, this

limitation will not constitute a disability. Thus, if someone could sleep only three hours per night because he had a newborn child living in his home, or because he lived along a noisy street, his limitation would not constitute a disability. An individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is substantially limited in reading because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

Substantially Limited in Working

In most instances, an individual with a disability will be able to establish coverage by showing that a major life activity other than working is substantially limited, therefore generally making it unnecessary to consider whether the individual is substantially limited in working. An individual need not demonstrate that he is substantially limited in working if he can demonstrate a substantial limitation in another major life activity.

However, working may be the only major life activity at issue in some cases, for example where an impairment limits only the ability to satisfy certain job-related requirements of the position the individual was performing or for which the individual is applying. Some of these requirements may involve performance of major life activities in ways that are characteristic of the workplace, such as requirements to stand, sit, bend, lift, or perform manual tasks frequently, for a prolonged period of time, or repetitively.

Consistent with Congress’s exhortation in the Amendments Act to favor broad coverage and disfavor extensive analysis (Section 2(b)(5) (“Findings and Purposes”)), the Commission has adopted a more straightforward articulation of the standard for substantial limitation in the major life activity of working. The regulations provide that an individual who, because of an impairment, is substantially limited in performing a type of work will be considered substantially limited in working. The terms “class of jobs” and “broad range of jobs in various classes” and specific criteria for applying those terms have been eliminated, and replaced with “type of work.” “Type of work” is more straightforward and easier to understand. Many of the examples of types of work, and many of the examples of job-related requirements characteristic of a type of work, would in the Commission’s view make up either a class or broad range of jobs under the prior standard.

A type of work includes the job the individual has been performing or for which he is applying, and jobs that have qualifications or job-related requirements which the individual would be substantially limited in performing as a result of the impairment. A type of work may be identified by the nature of the work as to which the individual is substantially limited when compared to most people having similar training, skills, and abilities, for instance, commercial truck driving (*i.e.*, driving those types of trucks specifically regulated by the U.S. Department of

Transportation as commercial motor vehicles), assembly line jobs, food service jobs, clerical jobs, and law enforcement jobs. A type of work may also be identified by reference to job-related requirements that an individual is substantially limited in meeting because of an impairment, as compared to most people performing those jobs. The regulations provide examples of job-related requirements that may be characteristic of a type of work, such as repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; the ability to work under certain conditions (such as in workplaces characterized by high temperatures, high noise levels, or high stress); or the ability to work rotating, irregular, or excessively long shifts.

Consistent with Congress's clearly expressed intent in the ADA Amendments Act that the focus of an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of "disability" (Section 2(b)(5) ("Findings and Purposes")), the statistical analysis previously required by some courts will not be needed in order to establish that an individual is substantially limited in working. See, e.g., *Duncan v. WMATA*, 240 F.3d 1110 (DC Cir. 2001); *Taylor v. Federal Express*, 429 F.3d 461 (4th Cir. 2005). For this same reason, the specific factors in the prior regulation that guided determination of whether the limitation in working was "substantial" have been eliminated, including the geographical area to which the individual has reasonable access, the job from which the individual has been disqualified and the number and types of jobs using (and the number and type not using) similar training, knowledge, skills, or abilities within that geographical area from which the individual is also disqualified because of the impairment. Rather, using the "type of work" standard, evidence from the individual regarding his educational and vocational background and the limitations resulting from his impairment may be sufficient for the court to conclude from the nature of the jobs implicated that he is substantially limited in performing a type of work. Expert testimony concerning the types of jobs in which the individual is substantially limited will generally not be needed.

The regulations also make clear that an individual's ability to obtain similar employment with another employer is not dispositive of whether an individual is substantially limited in working. Similarly, someone who, due to an impairment, is substantially limited in the ability to perform a type of work will be substantially limited in working even if the individual possesses skills that would qualify him or her for another type of work.

The conclusion that an individual is substantially limited in working is consistent with the conclusion that the individual is qualified pursuant to section 1630.2(m) for the employment position the individual holds or desires. First, disability is determined without reference to accommodation, which is a mitigating measure, whereas whether an individual is

qualified has always been, and is still, determined with the benefit of any accommodation to which the individual is legally entitled. Moreover, in cases where an employee claims denial of reasonable accommodation based on an employer's failure to offer reassignment to a vacant position as the accommodation of last resort prior to termination, an individual who is no longer able to perform his current position and is substantially limited in performing that type of work may nevertheless be qualified for the vacant position(s) to which he could have been reassigned as an accommodation.

Finally, not every limitation on the ability to perform a job that results from an impairment will constitute a substantial limitation in working. This is the case, for example, where the limitation results from an impairment that is temporary, non-chronic, and short-term.

Impairments That Are Usually Not Disabilities

Certain types of impairments usually will not constitute disabilities. For example, temporary non-chronic impairments of short duration that result in little or no residual effects will usually not meet the definition of disability. Such impairments may include, but are not limited to, broken limbs that heal normally, sprained joints, appendicitis, and seasonal or common influenza. Moreover, episodic conditions that impose only minor limitations are not disabilities. These conditions may include seasonal allergies that do not substantially limit a person's major life activities even when active. The fact that an impairment is of long duration, chronic, or even permanent, does not necessarily establish that it is substantially limiting.

Section 1630.2(k) Record of a Substantially Limiting Impairment

The second part of the definition of the term "individual with a disability" provides that an individual with a record of an impairment that substantially limits 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 previously treated for cancer but who is now deemed by a doctor to be free of cancer, from discrimination based on his or her 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 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.

This part of the definition is satisfied where evidence establishes that the individual has or 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.

The Commission has deleted language from the interpretive guidance accompanying the title I regulations issued in 1991 which implied that evidence that an employer "relied on" a record of disability is necessary to establish coverage under this definition of "disability." Only evidence that an individual has a past history of a substantially limiting impairment is necessary to establish a record of a disability. Whether the employer relied on the record of a disability when making an employment decision is relevant to the merits, *i.e.*, whether the employer discriminated on the basis of disability.

The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disability" under part 1630. Other statutes, regulations and programs may have a definition of "disability" that is not the same as the definition set forth in the ADA and contained in part 1630. Accordingly, in order for an individual who has been classified in a record as "disabled" for some other purpose to be considered an individual with a disability for purposes of part 1630, the impairment indicated in the record must be a physical or mental impairment that substantially limits one or more of the individual's major life activities. The term "substantially limits" under the second prong of the definition of "disability" is to be construed in accordance with the same principles applicable under the first prong. In other words, the term is to be construed broadly to the maximum extent permitted under the ADA and should not require extensive analysis.

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

The third way that an individual may be an "individual with a disability" under the definition is if the individual is "regarded as" an individual with a disability. As newly defined under the statute, "regarded as" coverage can be established whether or not the employer was motivated by myths, fears, or stereotypes. Under the ADA as amended, an individual is regarded as disabled when a covered entity takes some action prohibited by the ADA (e.g., refusal to hire, termination, or demotion) because of an actual or perceived impairment. Proof that the individual was subjected to a prohibited employment action, e.g., excluded from one job, because of an impairment (other than an impairment that is transitory and minor, as discussed below) is sufficient to establish coverage under the "regarded as" definition. 2008 House Committee on Educ. and Labor Report at 12-14; 2008 Senate Managers' Statement at 9-10. Evidence that the employer believed the individual was substantially limited in any major life activity is not required. For example, 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

terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability. It is not necessary, as it was prior to enactment of 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.

The regulations explain that an employer that takes a prohibited action against an individual because of symptoms related to an impairment or because of mitigating measures, such as medication that an individual uses because of an impairment, may also regard the individual as disabled, even if the employer is unaware of the underlying impairment. The regulations offer two examples to illustrate this point—one involving an employer who refuses to hire someone with a facial tic associated with Tourette's Syndrome and the second describing an employer that refuses to hire someone for a driving job because he takes anti-seizure medication.

Nevertheless, as with establishing disability under any of the three prongs of the definition, the individual must still establish the other elements of a claim and the employer may raise any available defenses. For example, an employer who withdraws a conditional offer of employment because the post-offer pre-employment medical examination reveals that the applicant takes anti-seizure medication has regarded the applicant as an individual with a disability. However, the applicant would still need to establish that he is otherwise qualified for the position, and the employer could still raise any applicable defenses under § 1630.15, for example that the applicant posed a direct threat to health or safety based on the best available objective medical evidence and an individualized assessment of the risk, if any, posed by the particular applicant, or that excluding individuals who take anti-seizure medication from the position at issue is *required* by another federal law. Similarly, if a claim is brought alleging that an employer's qualification standard screened out or tended to screen out an individual on the basis of disability, the applicant would still need to establish that he is otherwise qualified for the position, and the employer could still show that the qualification standard at issue is job-related and consistent with business necessity, that a safety-based exclusion satisfied the direct threat standard, or any other applicable defenses under § 1630.15.

As prescribed in the ADA Amendments Act, the regulations provide a restriction on 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 relevant inquiry is whether the impairment on which the employer's action was based is transitory and minor, not whether the individual actually has or had that impairment. The regulations provide several examples to illustrate the exception. An additional example would include a situation in which an employer terminated an employee with a transitory and minor wound on his hand, believing the wound to be symptomatic of HIV infection.

The employer will have "regarded" the employee as an individual with a disability, because it took a prohibited employment action based on a perceived impairment (HIV infection) that is not transitory and minor. Under the Amendments Act, an individual need not establish that an employer was motivated by myths, fears, and stereotypes about an actual or perceived impairment to establish coverage under the "regarded as" prong. As long as the employer bases an employment action on an actual or perceived impairment that was 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. For this reason, the Commission has deleted certain language about myths, fears, and stereotypes from the original version of this section of the appendix that might otherwise be misconstrued. Of course, evidence that an employer harbored myths, fears, and stereotypes related to an impairment may be relevant in establishing that the employer took a prohibited action based on the impairment.

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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 a 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.

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Section 1630.4 Discrimination Prohibited

Subparagraph (a) of this provision prohibits discrimination against a qualified individual with a disability 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.

Subparagraph (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. 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. At the same time, 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 job-related criteria to select qualified

employees, and can continue to hire employees who can perform the essential functions of the job.

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 "individual with a disability," the individual is entitled to reasonable accommodation assuming the other requirements of the ADA are met.

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 to 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, most often resolved by reasonable accommodation. It is therefore anticipated that challenges to selection criteria brought under this part will generally be resolved in a like manner.

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 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 section 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. Because the statute does not limit the provision on uncorrected vision standards to individuals with disabilities, a person does not need to be an individual with a disability in order to challenge such qualification standards. Nevertheless, the Commission 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 them out on the basis 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(J); Appendix to § 1630.2(I)).

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.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2005–TX–0025; FRL–8958–8]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Modification of Existing Qualified Facilities Program and General Definitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing disapproval of revisions to the SIP submitted by the State of Texas that relate to the Modification of Existing Qualified Facilities (the Texas Qualified Facilities State Program or the Program). EPA proposes disapproval of the Texas Qualified Facilities State Program because it does not meet the Minor NSR SIP requirements nor does it meet the NSR SIP requirements for a substitute Major NSR SIP revision.

EPA also proposes to take action on revisions to the SIP submitted by Texas for definitions severable from the definitions in the Qualified Facilities submittals. EPA proposes to take action on some of the submitted severable definitions (General Definitions). We propose to approve three definitions, grandfathered facility, maximum allowable emission rate table (MAERT), and new facility. We propose to disapprove the definition for best available control technology (BACT) and two subparagraphs, A and B, and paragraph G under the definition for modification of existing facility. We propose to make an administrative correction to the SIP-approved definition of facility, and take no action on the addition to the SIP-approved definition of federally enforceable because it relates to a Federal program that is implemented separately from the SIP. Third, EPA is proposing to take no action on a provision not in the Texas SIP that includes, among other things, a trading provision containing a cross-reference that no longer is in Texas' rules; EPA will act upon all of it in a separate notice.

We are proposing action under section 110, part C, and part D of the Federal Clean Air Act (the Act or CAA). EPA is taking comments on this proposal and intends to take a final action.

DATES: Comments must be received on or before November 23, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2005–TX–0025, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *U.S. EPA Region 6 “Contact Us” Web site:* <http://epa.gov/region6/r6comment.htm>. Please click on “6PD” (Multimedia) and select “Air” before submitting comments.

- *E-mail:* Mr. Stanley M. Spruiell at spruiell.stanley@epa.gov.

- *Fax:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), at fax number 214–665–7263.

- *Mail:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

- *Hand or Courier Delivery:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8:00 a.m. and 4:00 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2005–TX–0025. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of