Advocating for
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**Via Electronic Submission**

November 23, 2009

Stephen Llewellyn
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE
Suite 4NW08R, Room 6NE03F
Washington, D.C. 20507

***Re: DREDF Comments on EEOC Proposed ADAAA Regulations, FR Doc #E9-22840***

Dear Mr. Llewellyn:

The Disability Rights Education and Defense Fund, Inc. (DREDF) appreciates the opportunity to comment on the Equal Employment Opportunity Commission (EEOC) proposed Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act (ADA), as Amended.

Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. For three decades, DREDF has remained board- and staff-led by members of the disability community, pursuing its mission through education, advocacy and law reform efforts. Nationally recognized for expertise in the interpretation of federal disability civil rights laws, DREDF has been intimately involved in the passage process leading to most of those laws. We have also participated in most of the U.S. Supreme Court decisions interpreting those laws, including participation as party or *amicus* counsel, and have offered comments on previous regulations promulgated by both the EEOC and the U.S. Department of Justice to implement the ADA.

Our comments on the proposed regulations follow. For convenience and to aid review, this submission includes: (1) a table of contents, identifying the page number on which discussion of each identified subject begins; (2) a "bullet point" that summaries DREDF's general position and recommendation as to each identified subject; (3) a more extensive discussion of each identified subject that includes citations to relevant authority; and (4) proposed revised regulatory language, where relevant.

Thank you for your time and attention.

Respectfully submitted,
Disability Rights Education and Defense Fund, Inc. (DREDF)

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## Overall Comments

**BULLET POINT: the proposed EEOC regulations are generally faithful to the congressional goal of broad definitional coverage that does not require extensive analysis, and avoids undue focus on the preliminary question of whether a particular individual has a "disability." The regulations properly direct focus to the critical inquiry of whether discrimination has occurred. In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience**

### The Proposed Regulation Generally Reflect the Clear Congressional Goal to Focus on Discrimination Analysis, Rather Than Preliminary Question of "Disability"

DREDF understands the proposed EEOC regulations[1] to be a strong statement of support for, and generally effective implementation of, the clear Congressional mandate to restore a broad definition of "disability" under the ADA and other federal disability civil rights laws.

As emphasized by the ADAAA[2] itself, the definition must be construed broadly, to the maximum extent permitted by statutory language. The ADAAA clearly invalidates a series of U.S. Supreme Court and lower court decisions that failed to fulfill Congress's original expectation as to definitional interpretation. Specifically, there was an expectation that the 1990 ADA definition of disability would be interpreted consistent with expansive Rehabilitation Act authority that pre-dates the passage of the ADA itself. The proposed EEOC rule is generally faithful to this reaffirmed expectation.

Additionally, the ADAAA requires that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether an individual with a disability has been discriminated against on the basis of disability. With these Amendments, Congress has explicitly confirmed that there should *not* be undue focus on the preliminary question of whether a particular person is an individual with a "disability." Such a threshold preoccupation simply creates yet another access barrier for people with disabilities, eviscerating the primary ADA purpose of ensuring effective disability nondiscrimination. The proposed EEOC rule is generally faithful to this mandate.

The further specific comments offered here use this clear congressional mandate as a touchstone, commending the many instances in which the proposed rule is faithful to this mandate, and identifying instances where adjustments or clarifications are advised to more fully implement congressional intent.

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[1] The EEOC's Notice of Proposed Rulemaking (NPRM) was published at 74 Fed. Reg. 48431-48450 (Sept. 23, 2009). In addition to proposed regulation language, the NPRM includes introductory language offering supplementary information and discussing regulatory procedures at 48431-48439 (hereinafter generally "Introductory Discussion"); and Interpretive Guidance on Title I of the Americans With Disabilities Act, offered as an Appendix to the regulation at 48444-48450 (hereinafter generally "Guidance").

[2] Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553-3559 (2008)(hereinafter generally "ADAAA" or "Amendments").

**DREDF Commends the EEOC's Efforts to Offer Practical Examples and Urges the Commission to Pay Particular Attention To Commenters In Finalizing Examples**

DREDF also commends the EEOC's efforts offer practical examples throughout the regulations to help illustrate appropriate application of definitional analysis to a variety of impairments and situations. In preparing final examples, DREDF urges the Commission to pay particular attention to commenters with relevant expertise and experience as to particular impairments and their affects on life activities.

**Retroactivity**

**BULLET POINT: The ADAAA is directed at *restoring* what Congress understood to be the original broad scope of the ADA definition of disability. Thus, notwithstanding the formal ADAAA effective date of January 1, 2009, the new Amendments can and should play a role in the interpretation of discrimination claims prior to that date.**

It is DREDF's position that the clear Congressional intent expressed in the ADAAA can and should appropriately influence interpretation of claims arising prior to January 1, 2009. We recognize that the ADAAA was enacted with a statutory effective date of January 1, 2009, and that it includes no explicit Congressional statement of retroactively. For this reason, a number of federal circuit courts of appeal have concluded that the Amendments have absolutely no relevance to claims arising prior to 2009.[3] This is also appears to be the position taken by the EEOC.[4] However, the Amendments leave the technical statutory language of the disability definition unchanged, and they are clearly directed at *restoring* what Congress understood to be the original broad scope of that language. For this reason, the Ninth Circuit has correctly recognized that "the ADA sheds light on Congress's original intent when it enacted the ADA". *Rohr v. Salt River Agric. Improvement and Power Dist.*, 555 F.3d 850, 861 (9th Cir. Feb. 13, 2009). Because that original intent is clearly relevant to pending cases, the Amendments should thus play a role in the interpretation of earlier claims, notwithstanding the lack of formal retroactivity.

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[3] See, e.g. *Lytes v. D.C. Water and Sewer Auth.*, 572 F.3d 936, 939-942 (D.C. Cir. Jul. 21, 2009) *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565 (6th Cir. Jul. 2, 2009); *Winsley v. Cook County*, 563 F.3d 598, 600 n.1 (7th Cir. Apr. 22, 2009); and *EEOC v. Agro Distribution*, 555 F.3d 462, 469 n.8 (5th Cir. Jan. 15, 2009).

[4] See EEOC "Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, available at *http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.*

**Further Regulatory Impact Analysis Not Required**

> **BULLET POINT: Economic changes resulting from implementation of the ADAAA will be below the $100 million threshold for "economically significant" regulations. There is sufficient basis to conclude that any additional accommodation costs arising from the ADAAA will not reach this threshold. There are also important cost *savings* resulting from the ADAAA's clarity as to the broad scope of coverage. This clarity will reduce the volume of costly litigation, reduce the costs of litigation that will occur, and facilitate valuable workplace and economic participation by people with disabilities. If it is determined that further analysis is required, such analysis must take into account such economically beneficial effects, as well as the accommodation costs-savings expected over time from ongoing medical and technological advances.**

Given purportedly limited cost-benefit research, the EEOC has asked for public comment on whether economic changes resulting from implementation of the ADAAA will be below the $100 million threshold for "economically significant" regulations. It is DREDF's position that available research addressing costs of reasonable accommodations provides a sufficient basis for concluding that any additional accommodation costs arising from the ADAAA will not reach this threshold.[5] Such a conclusion is particular justified given the *restorative* nature of the Amendments, as the EEOC's promulgation expressly notes. See Introductory Discussion, 74 Fed. Reg. at 48435 (recognizing that while the ADAAA does reject previous judicially imposed interpretations of existing statutory language, "[c]leary this is not likely to be a sweeping change" for purposes of cost analysis). Additionally, over time ongoing medical and technological advances can be reasonably expected to reduce both existing and new accommodation costs associated with the ADA or its Amendments.

Moreover, there will also be important cost *savings* resulting from the ADAAA's clarity as to the broad scope of coverage. This clarity will reduce the volume of costly litigation, reduce the costs of litigation that will occur, and facilitate valuable workplace and economic participation by people with disabilities. Specifically, definitional clarity will (1) encourage employers to focus on eliminating employment barriers, rather than challenging disability status; (2) encourage employers and employees to focus on results-oriented, interactive problem solving as to accommodation issues; and (3) facilitate employment of people with disabilities, with resulting favorable economic impact. To the extent that litigation remains unavoidable, the ADAAA reduces the need for costly experts to address "disability," and streamlines the issues requiring judicial attention. If it is determined that further analysis is required, such analysis must take into account such economically beneficial effects, as well as the accommodation costs-savings expected over time from ongoing medical and technological advances.

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[5] In the final regulatory discussion of such research, DREDF also urges the Commission to pay particular attention to clarifying information submitted by commenter Burton Blatt Institute.

**Express Broad Construction References**

**BULLET POINT: the proposed EEOC regulations appropriately make multiple references to Congress's express mandate that the "disability" definition must be broadly construed and must not demand extensive analysis. The Commission should consider adding additional such express references where relevant.**

ADAAA statutory language is replete with references to the clear congressional mandate that the "disability" definition must be construed broadly, to the maximum extent permitted by the ADA, and must not demand extensive analysis.[6] The proposed EEOC regulations similarly include many such express references. See e.g., 29 C.F.R. § 1630.1(c)(4)*(as to general purpose and construction)*; 29 C.F.R. § 1630.2(j)(2)(i)*(as to "substantially limits")*; 29 C.F.R. § 1630.2(j)(5)(i)*(as to examples of impairments that consistently meet the definition)*; 29 C.F.R. § 1630.2(j)(7)(ii)*(as to major life activity of working)*; and 29 C.F.R. § 1630.2(k)(2)*(as to record of disability)*.[7] These references are an appropriate and important reminder of the fundamental broad construction principles that undergird all proper definition analysis. In light of this, the Commission should consider adding additional such express references in other sections of the regulations, such as those addressing "major life activity," "mitigating measures," "episodic impairments" and "regarded as" coverage.

**Primary Focus on Discrimination, not "Disability" Definition**

**BULLET POINT: the proposed EEOC regulations appropriately follow Congress's express mandate to ensure emphasis on the critical inquiry of whether discrimination has occurred, avoiding undue focus on the on the preliminary question of whether a particular individual has a "disability."**

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[6] See Pub. L. No. 110-325, § 2(a)(1), 122 Stat. at 3553 (in enacting the ADA, "Congress intended that the Act … provide broad coverage"); Pub. L. No. 110-325, § 2(b)(1), 122 Stat. at 3554 (identifying express Congressional purpose of "reinstating a broad scope of protection to be available under the ADA"); Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554 (noting that restrictive post-1990 definitional interpretation by courts "has created an inappropriately high level of limitation necessary to obtain coverage"); and Pub. L. No. 110-325, § 4(a), 122 Stat. at 3555 (amending the ADA statutory definition set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(A) mandating: "The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by this Act.").

[7] For reasons unrelated to the merits of "broad construction" provisions, we do not here commend the similar "broad construction" references contained in the proposed 29 C.F.R. § 1630.2(j)(6). As discussed below, it is DREDF's position that it is unnecessary, and potentially confusing, for the regulations to include a separate category of impairments that "may or may not" meet the definition. We thus urge the elimination of proposed Section 1630.2(j)(6) in its entirety. However, to the extent that this provision — or some version of it — is retained, it should properly include express "broad construction" provisions, such as those currently set out in 29 C.F.R. § 1630.2(j)(6)(i).

The ADAAA requires that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether an individual with a disability has been discriminated against on the basis of disability. With these Amendments, Congress has explicitly confirmed that there should *not* be undue focus on the preliminary question of whether a particular person is an individual with a "disability."[8] The proposed regulations similarly note this clear intent.[9] Such an approach is necessary if discrimination is to be effectively eliminated, ensuring that the threshold definition inquiry does not create yet another access barrier for people with disabilities.

**"On the Basis of" Substituted for "Because of" Disability**

**BULLET POINT: the proposed EEOC regulations appropriately explain that "on the basis of" is substituted for "because of" disability to ensure emphasis on the critical inquiry of whether discrimination has occurred.**

The Guidance to the proposed regulations appropriately notes: "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.'" Guidance Introduction, 74 Fed. Reg. at 48444-48445. See also 29 C.F.R. § 1630.4(a)(1); Pub. L. No. 110-325, § 5(a), 122 Stat. at 2557 (specifying changes to the statutory language of to 42 U.S.C. §§ 12111(8), 12112 and 12114(a) to accomplish these amendments).

The Guidance also offers an appropriate explanation for the congressional intent behind these changes, quoting legislative history: "'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."'" 74 Fed. Reg. at 48445 [*quoting* Statement of the Managers' to Accompany S. 3406, The Americans with Disabilities Amendments Act of 2008 ("Senate Managers' Statement") at 11].

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[8] See Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554 (explicitly identifying "the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis").

[9] See, e.g., 29 C.F.R. § 1630.2(j)(1)(noting that construction of "substantially limits" must be "[c]onsistent with Congress's clear intent in the [ADAAA] that the focus of an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of "disability")(*citing* statutory Section 2(b)(5)).

## No Negative Implication From Omissions

**BULLET POINT: the proposed EEOC regulations appropriately follow Congress's express mandate that various exemplary lists included in the ADAAA are *illustrative*, not *exhaustive.* The regulations are correct in expressly noting that no negative implications should be drawn from omissions of some particulars from such lists.**

DREDF commends the EEOC for multiple express statements that no negative implication should be drawn from the inevitable omission of some relevant particulars from the lists of illustrative examples provided at various points in the proposed regulations. See, e.g., 29 C.F.R. § 1630.2(i)(3)(i)(examples of major life activities in § 1630.2(i)(1) and (2) not exhaustive); 29 C.F.R. §1630.2(i)(3)(ii)(examples of possible affects on major bodily functions in § 1630.2(i)(2) not exhaustive); 29 C.F.R. § 1630.2(j)(5)(ii)(examples major life activities in § 1630.2(j)(5)(i) not exhaustive) 29 C.F.R. § 1630.2(j)(5)(iii)(examples of particular impairments in § 1630.2(j)(5)(i) not exhaustive).[10]

Given the importance of this principle to definitional analysis, it is also appropriate to add similar express "no negative implication" provisions to other key regulatory provisions where examples are clearly specified to be illustrative but not exhaustive. This would include provisions regarding mitigating measures, which are identified as non-exhaustive in statutory language.[11] DREDF thus urges the Commission to include an express "no negative implication" instruction as to mitigating measures, by adding a new sub-section to the current 29 C.F.R. § 1630.2(j)(3), as follows:

> § 1630.2(j)(3)(v) No Negative Implication From Omission of Particular Mitigating Measures
> The examples provided in this section are intended to illustrate some types of mitigating measures. Other measures not specifically identified in this section may also constitute mitigating measures.

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[10] For reasons unrelated to the merits of express "no negative implication" provisions, we do not here commend the similar "no negative implication" references contained in the proposed 29 C.F.R. § 1630.2(j)(6). As discussed below, it is DREDF's position that it is unnecessary, and potentially confusing, for the regulations to include a separate category of impairments that "may or may not" meet the definition. We thus urge the elimination of proposed Section 1630.2(j)(6) in its entirety. However, to the extent that this provision — or some version of it — is retained, it should properly include express "no negative implication" provision, such as that currently set out in 29 C.F.R. §§ 1630.2(j)(6)(ii) and (iii).

[11] See Pub. L. No. 110-325, § 4(a), 122 Stat. at 3556 (amending the ADA statutory definition set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(E)(i) identifying "mitigating measures *such as*")(emphasis added).

**Interpretation Consistent with Pre-1990 Rehabilitation Act Authority**

**BULLET POINT: the proposed EEOC regulations appropriately note that Congress intended the ADA definition of "disability" to draw on pre-1990 case law expansively construing the definition of "handicap" under the Rehabilitation Act.**

The Amendments clearly express Congress's intent to conform interpretation of the ADA "disability" definition to pre-1990 authority construing the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796. As the Amendments properly acknowledge, such authority was generally expansive in nature.[12] The proposed regulations appropriately reference this clear congressional intent.[13]

**Updated Terminology**

**BULLET POINT: the proposed EEOC regulations properly acknowledge that amendments to the ADA "disability" definition reflect current terminology preferences. These amendments are nevertheless intended to track with the former term "handicap" that was used in the Rehabilitation Act, and expansively construed in pre-1990 case law. The proposed regulations also appropriate use the currently preferred "intellectual disability" instead of "mental retardation."**

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[12] See Pub. L. No. 110-325, § 2(a)(3), 122 Stat. at 3553 ("while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled"); and Pub. L. No. 110-325, § 2(b)(3), 122 Stat. at 3554 (identifying Congressional intent "to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973").

[13] See Guidance Introduction, 74 Fed. Reg. at 48444 (referencing the Amendments intent to redress post-1990 developments that "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"); Guidance to 29 C.F.R. § 1630.2(g), 74 Fed. Reg. at 48445 (noting "Congress intended that the relevant case law developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA")(*citing* relevant legislative history); and Guidance to 29 C.F.R. § 1630.2(j)(*Examples-Definition of Disability*), 74 Fed. Reg. at 48447 (explaining that "The legislative history [to the Amendments] 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" and further noting that courts "broadly" interpreted that definition")(*citing* relevant legislative history).

The proposed regulations properly recognize that the ADA use of the term "disabilities" reflects a congressional desire to use currently preferred terminology, and that the term "disabilities" is substantively equivalent to the term "handicaps" that was originally used in the Rehabilitation Act. See Guidance to 29 C.F.R. § 1630.1(a), 74 Fed. Reg. at 48445.[14] This explanation again confirms the congressional intent to restore a broad "disability" definition that is in line with consistently expansive Rehabilitation Act authority that predates the passage of the ADA itself.

The proposed regulations also appropriately reflect even more updated disability terminology preferences, by substituting the term "intellectual disability" for the formerly used "mental retardation." See 29 C.F.R. §§ 1630.2(h)(2) and 1630.2(j)(5)(i).

**Definition of "Major Life Activity"** – 29 C.F.R. § 1630.2(i)

> **BULLET POINT: With respect to identifying "major" life activities, the proposed EEOC regulations properly acknowledge that any appropriate comparison between an individual with an impairment and "most people" should be based on a common-sense approach that does not require an exacting or statistical analysis. As to the propriety of such "most people" comparisons, the regulations further properly acknowledge that disability *can also* be shown (1) 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* (2) in comparison to a particular class of people (e.g., assessment of learning disability may require comparison to others of a certain age or educational level). The proposed regulations properly include an expanded, illustrative, and expressly not exhaustive, list of "major life activities," with accompanying discussion. The proposed regulations properly note that "major life activities" also include "major bodily functions" and properly includes an illustrative, and expressly not exhaustive list of "major bodily functions." In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

The proposed regulations offer an analytical framework for addressing "major life activities" that posit them as "those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty." 29 C.F.R. § 1630.2(i). Such a framework may be useful to assist in understanding of the "major life activity" concept, but *only* if it is understood in light of the cautions and elaborations currently discussed in the Guidance to 29 C.F.R. § 1630.2(j)(*Substantially Limits*), 74 Fed. Reg. at 48446-48448. In particular, any wisdom to be gained by reference to "most people" for any ADAAA purpose must be based "on a common-sense approach that does not require an exacting or statistical analysis." 74 Fed. Reg. at 48446. Additionally, in order to ensure the broad coverage mandated by Congress, it may also be necessary to take intra-individual differences into account, and to use comparisons to or within particular classes of people with disabilities as part of the "major life activities" analysis. *Id.*

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[14] The Guidance to 29 C.F.R. § 1630.1(a) also offers citations to original ADA Committee Reports from 1989 and 1990 that similarly explain the purpose of this terminology change. See 74 Fed. Reg. at 48445.

**Expanded Illustrative, Not Exhaustive, List** – 29 C.F.R. §§ 1630.2(i) and (i)(1)

ADAAA statutory language offers an expanded, illustrative, but expressly not exhaustive, list of "major life activities."[15] As the Guidance to the proposed regulations notes, this expanded list includes activities "referred to in EEOC's 1991 regulations implementing title I of the ADA and in sub-regulatory documents, and by courts." See Guidance to 29 C.F.R. § 1630.2(i), 74 Fed. Reg. 48445 (further noting at 48445-48446 the expressly non-exhaustive nature of the list, based on congressional action and intent).

The proposed EEOC regulations properly reiterate and expand on the statute's illustrative list. See 29 C.F.R. § 1630.2(i)(1). EEOC additions to the activities identified in statute include sitting, reaching and interacting with others, all of which DREDF commends as appropriate, particularly given that the EEOC has previously taken the position that they are major life activities. See Guidance to 29 C.F.R. § 1630.2(i), 74 Fed. Reg. at 48446. However, there are also other activities that may also be appropriately added to the illustrative list included in regulations. In particular, DREDF recommends that the EEOC add writing, typing or keyboarding, traveling and driving. In preparing the final illustrative list, the Commission should also pay particular attention to commenters offering relevant expertise or experience as to potential additional major life activities. Regardless of what is included in the final regulatory list, DREDF concurs in the Commission's expectation that "the courts will have occasion to recognize other examples as presented in a given case." Guidance to 29 C.F.R. § 1630.2(i), 74 Fed. Reg. at 48446.

**Express Reference to "Major Bodily Function"** – 29 C.F.R. §§ 1630.2(i) and (i)(2)

ADAAA statutory language expressly specifies that "major life activities" include "major bodily functions." These functions involve various types of body systems, and the functions often do not involve conscious behavior. The list of functions provided in statute is expressly specified to be illustrative, but not exhaustive.[16]

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[15] See Pub. L. No. 110-325, § 4(a), 122 Stat. at 3555 (amending the ADA statutory definition set out at 42 U.S.C. § 12102 to add a new Section 12102(2)(A) that includes an illustrative, but expressly not exhaustive, list of "major life activities"). The "major life activities" identified in statute "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id.*

[16] See Pub. L. No. 110-325, § 4(a), 122 Stat. at 3555 (amending the ADA statutory definition set out at 42 U.S.C. § 12102 to add a new Section 12102(2)(B) that includes an illustrative, but expressly not exhaustive, list of "major bodily functions"). The illustrative list offered in statute includes "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.*

The proposed EEOC regulations properly reiterate and expand on both the illustrative list and the general analytical framework established by statute. DREDF commends the EEOC for expanding on the statutory list by identifying additional covered functions.[17] However, to ensure that the list offered in regulations is clearly understood to be illustrative, DREDF urges the Commission to make this explicit, so that 29 C.F.R. § 1630.2(i)(2) would read as follows (proposed new language italicized):

(2) The operation of major bodily functions, including *but not limited to* functions of …

DREDF also commends the EEOC for providing helpful examples of specific impairments that affect particular bodily functions,[18] while at the same time expressly and properly noting that the impairments used in the examples "may affect major life activities other than those specifically identified." 29 C.F.R. § 1630.2(i)(3)(ii). Consistent with the congressional goal of avoiding extensive analysis, the Guidance also appropriately notes that "[t]he link between particular impairments and various major bodily functions should not be difficult to identify." Guidance to 29 C.F.R. § 1630.2(i), 74 Fed. Reg. at 48446.

However, DREDF recommends that the EEOC add to these examples. In particular, several of the examples now contained in 29 C.F.R. § 1630.2(j)(6)(which Section DREDF proposes to eliminate in entirely) could instead be included in 29 C.F.R. § 1630.2(i)(2). Examples appropriate for such relocation include current (j)(6)(i)(A) *Example 1* (asthma affecting respiratory function); (j)(6)(i)(B) *Example 2* (high blood pressure affecting circulatory function); and (j)(6)(i)(G) *Example 7* (hyperthyroidism affecting endocrine system). There are also other examples that may be appropriately added, such as Multiple Chemical Sensitivity or Environmental Illness, which affects both neurological and respiratory function. In preparing final examples, the Commission should pay particular attention to commenters offering relevant expertise or experience illustrating the affect of specific impairments on specific bodily functions.

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[17] See 29 C.F.R. § 1630.2(i)(2)(specifying that "major life activities" include, but are not limited to "[t]he operations 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."

[18] See 29 C.F.R. § 1630.2(i)(2)("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, lymphadema affects lumphatic functions, and rheumatoid arthritis affects musculoskeletal functions.").

**Definition of "Substantially Limits"** - 29 C.F.R. § 1630.2(j)

> **BULLET POINT: with respect to identifying "substantial" limitation, the proposed EEOC regulations properly acknowledge that any appropriate comparison between an individual with an impairment and "most people" should be based on a common-sense approach that does not require an exacting or statistical analysis. As to the propriety of such "most people" comparisons, the regulations should acknowledge in actual regulatory language that disability *can also* be shown (1) 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* (2) in comparison to a particular class of people (e.g., to others of a certain age, school grade, level of education or aptitude). Reacting to Congress's express instructions, the regulations properly specify that an impairment need not "prevent, or significantly or severely restrict" in order to be "substantially limiting." The proposed regulations appropriately specify that proper focus is on analysis of limitation, not on what an individual can do in spite of impairment. The Commission properly acknowledges that its 1991 regulations directing attention the "condition, manner or duration" under which major life activities are performed were inappropriately understood to create an overly strict standard for "substantially limits." However, it is DREDF's position that "condition, manner or duration" references may nevertheless be a valid part of some substantial limitation analysis. Rather than eliminating all "condition, manner or duration" references, the Commission should be identify "condition, manner or duration" as potentially relevant factors to be considered in relevant circumstances, though they should not be given reference or primacy in all circumstances. In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

**In General** - 29 C.F.R. § 1630.2(j)(1).

The general definition of "substantial limitation" proposes to assess limitation "as compared to most people in the general population." Such a framework may be useful to assist in understanding of the "substantial limitation" concept, but *only* if it is understood in light of three critical cautions and elaborations currently discussed other subsections of the proposed regulations, and in the Guidance to 29 C.F.R. § 1630.2(j). In particular, any wisdom to be gained by reference to "most people" must be based "on a common-sense approach that does not require an exacting or statistical analysis." See 29 C.F.R. § 1630.2(j)(2)(iv) and discussion at 74 Fed. Reg. at 48446. Additionally, in order to ensure the broad coverage mandated by Congress, it may also be necessary to take intra-individual differences into account; and to use comparisons to or within particular classes of people as part of the "substantial limitation" analysis. Guidance at *Id.* Given the importance of these cautions and elaborations, DREDF urges the Commission to include these instructions in the regulations themselves. This includes adding language to proposed 29 C.F.R. § 1630.2(j)(1) so that the first sentence reads as follows (proposed new language italicized):

> (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, *or as compared to a targeted population or by reference to intra-individual differences, as relevant.*

Related references should also be added by adding to the regulatory language of the "Rules of Construction" contained in proposed 29 C.F.R. § 1630.2(j)(2). Further discussion and proposed text is offered below in comments as to that section.

The general definition also specifies that an impairment "need not prevent, or significantly or severely restrict" performance of one more major life activities in order to constitute a disability. This elaboration is appropriate because it is specifically reactive to two prior definitional constructions that Congress has now expressly rejected: (1) the U.S. Supreme Court's narrow definitional interpretation in the *Toyota v. Williams* case;[19] and (2) the EEOC's previous "significantly restricted" analysis.[20] See 29 C.F.R. § 1630.2(j)(1)(second sentence). Because Congress was explicit in its rejection of these "prevent, or significantly or severely restrict" constructions, it is appropriate for these constructions to be also explicitly rejected in the EEOC regulations.[21]

**<u>Rules of Construction</u>** – 29 C.F.R. § 1630.2(j)(2)

As discussed in more detail above, ADAAA statutory language contains numerous express references to Congress's mandate for broad construction of the "disability" definition, and to the congressional goal of ensuring a focus on whether discrimination occurred. Moreover, Congress has explicitly specified application of these principles to "substantial limitation" analysis.[22] The proposed

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[19] Specifically, ADAAA statutory language expressly repudiates high court case law interpreting "substantially limited" to require "an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." See Pub. L. No. 110-325 §§ 2(b)(4), 122 Stat. at 3554 (expressly rejecting *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)). See also Pub. L. No. 110-325, § 2(a)(5) and (7), 122 Stat. at 3553 (similarly explicitly rejecting *Toyota* analysis).

[20] As noted in ADAAA statutory language, "Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, expressing too high a standard." See Pub. L. No. 110-325, § 2(a)(8), 122 Stat. at 3554. See also Pub. L. No. 110-325, § 2(b)(4), 122 Stat. at 3554 (explicitly rejecting "significantly restricts" construction).

[21] See, e.g., Pub. L. No. 110-325, § 2(b)(6), 122 Stat. at 3554 (expressing "Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits' as 'significantly restricted' to be consistent with this Act, including the amendments made by this Act"). See also proposed Guidance to 29 C.F.R. § 1630.2(j)(*In General*), 74 Fed. Reg. 48446, which discusses this statutory mandate.

[22] Pub. L. No. 110-325, § 4(a), 122 Stat. at 3555 (amending the ADA statutory definitions set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(B) mandating: "The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.")

EEOC regulations addressing "substantial limitation" appropriately make express reference to this statutory broad construction mandate and to the congressional goal of ensuring a focus on discrimination — not definitional — analysis. See 29 C.F.R. § 1630.2(j)(2)(i).

The mandate for broad construction and a focus on discrimination, which is relevant to "major life activity" as well as "substantial limitation," also provides ample foundation for the EEOC's proposed 29 C.F.R. § 1630.2(j)(2)(ii). Consistent with statute, this regulatory section provides that demonstration of substantial limitation in *any* major life activity is sufficient, and thus an individual "need not also show that he is unable to perform activities of central importance to daily life." *Id.*[23] This clarification may have relevance to a range of different conditions affecting a range of different life activities, but it is likely to be particularly relevant in the context of working. As further discussed below as to "Type of Work," 29 C.F.R. § 1630.2(j)(7)(iii), various types of work may have qualification standards, or may require performance of tasks (particularly extended or repetitive tasks) that give rise to substantial limitation in the workplace, even though substantial limitation is not evident as to other life activities. The proposed regulatory examples aptly illustrate this point. Someone with a long-term 20 pound lifting restriction, 29 C.F.R. § 1630.2(j)(2)(ii)(A)(*Example 1*), may not experience any substantial limitation outside the workplace, even as to the myriad common daily activities that involves some type of lifting. However, such a restriction would indeed create substantial limitation as to jobs that require constant or heavy lifting. Similarly, someone with monocular vision, 29 C.F.R. § 1630.2(j)(2)(ii)(B)(*Example 2)*, which affects depth perception and field of vision, may not experience any substantial limitation except in a work environment that draws heavily on those capacities.

The EEOC's proposed "substantial limitation" rules of construction also correctly draw on express statutory language in specifying that substantial limitation of just *one* major life activity is sufficient to establish disability. See 29 C.F.R. § 1630.2(j)(2)(iii).[24] This proposed regulatory provision also appropriately disavows prior ADA case law to the contrary, based on congressional

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[23] Specifically, this regulatory language implements Pub. L. No. 110-325, § 2(b)(4), 122 Stat. at 3554 (rejecting *Toyota v. Williams* analysis erroneously requiring that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives").

[24] The first sentence of this proposed regulatory section provides: "An impairment that "substantially limits" one major life activity need not limit other major life activities. In order to be considered a disability." As such, it mirrors ADAAA statutory language set out at Pub. L. No. 110-325, § 4(a), 122 Stat. at 3556 (amending the ADA statutory definitions set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(C) mandating: "An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.").

action and intent in enactment of the ADAAA.[25] The proposed examples seem appropriate to illustrate how the major life activity of "major bodily function" can be affected. See 29 C.F.R. § 1630.2(j)(2)(iii)(A)(*Example 1*, involving affect of diabetes on endocrine system); and 29 C.F.R. § 1630.2(j)(2)(iii)(B)(*Example 2*, involving the affect of cancer on normal cell growth). However, the EEOC should also consider adding additional examples that involve major life activities other than "major bodily functions," with particular attention to commenters offering relevant expertise or experience illustrating the affect of specific impairments on specific bodily functions. But as the Guidance correctly notes — and as the final regulations should emphasize — "examples do not set minimum requirements for establishing substantial limintations." Guidance to 29 C.F.R. § 1630.2(j)(*Examples-Definition of Disability*), 74 Fed. Reg. at 48447.

Consistent with the proposed general "substantial limitation" definition set out at 29 C.F.R. § 1630.2(j)(1), the rules of construction address the framework of comparison between an individual with a disability and "most people in the general population." See 29 C.F.R. § 1630.2(j)(2)(iv). Again, it is DREDF's position that such a framework may be useful, but *only* in light of three critical cautions and elaborations. The first, which is already included in appropriate proposed regulatory text, is that such comparison "often may be made using a common-sense standard, without resorting to scientific or medical evidence." *Id.* (*citing* 2008 Senate Managers' Statement at 7). See also Guidance to 29 C.F.R. § 1630.2(j)(*In General*), 74 Fed. Reg. at 48446. Beyond that, however, DREDF urges the Commission to memorialize two *additional* instructions in actual regulatory language. Thus, a second critical regulatory instruction would address intra-individual differences; and a third critical regulatory instruction would address comparisons to relevant targeted populations (i.e., comparisons to or within particular classes of people).

As to the issue of intra-individual differences, DREDF commends the EEOC for noting that disability can be shown "where an impairment is diagnosed, or its limitations evidenced, by a reference to intra-individual differences (i.e., a disparity between an individual's aptitude and actual versus expected achievement)." See Guidance to 29 C.F.R. § 1630.2(j)(*In General*), 74 Fed. Reg. at 48446. This is relevant, for example, to diagnosing or assessing learning disabilities (though it may also be relevant to assessing other impairments). In preparing final regulations, DREDF urges the EEOC to pay particular attention to commenters offering relevant expertise or experiences as to disabilities commonly diagnosed or assessed based on intra-individual differences.

As to the issue of comparisons to or within particular classes of people, DREDF commends the EEOC for noting that disability can be shown "in comparison to a *particular* class of people rather than how the impairment manifests itself in reference to the *general* population." See Guidance to 29 C.F.R. § 1630.2(j)*(In General)*, 74 Fed. Reg. at 48446 (emphasis added). As the Guidance explains, such more targeted comparisons might involve reference to "others of a certain age, school grade, level

[25] See 29 C.F.R. § 1630.2(j)(2)(iii)(specifying that substantial limitation of one major life activity is sufficient, and then specifying: "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.")

of education or aptitude." *Id.* Again, this analysis is relevant to learning disability (though it may also be relevant to assessing other impairments). It also may have particular relevance to assessing limitation in the life activity of working. Beyond that, such targeted comparisons may also be relevant to communities with characteristics that distinguish them from other parts of America. For example, in farming and ranching communities, tending livestock and operating farm equipment can be a major life activity. Operating water craft may be integral to life in isolated river or lake communities, or on small islands. Gardening, composting, hunting and maintaining independent septic, well or water systems may be crucial to rural life. Moreover, some of the activities relevant to life in such communities (e.g., saddling and riding a horse) may require unique combinations of reaching and bending, manual dexterity, balance and endurance. Such life activities, and the potentially substantially limiting impact of impairments on them, must be subject to ADAAA analysis in order to ensure the intended breadth of coverage.

Given DREDF's position that intra-individual differences and targeted comparisons are a critical part of an appropriate "most people" framework, DREDF urges the Commission to include explicit regulatory instructions on these points, in addition to emphasizing the importance of a common-sense standard. Each of these three points should be illustrated by relevant examples, potentially including the epilepsy (expanded perhaps to seizure disorders generally) and diabetes examples currently offered as proposed 29 C.F.R. § 1630.2(j)(2)(iv)(A) and (B), but crafted in light of expertise and experience offered by commenters with relevant expertise and experience. Thus, DREDF recommends that proposed 29 C.F.R. § 1630.2(j)(2)(iv) be changed to read, as follows:

> (iv) The following considerations are relevant when undertaking the comparative assessment of an individual's limitation, including but not limited to comparison to the ability of most people in the general population:
>
> (1) Such comparison often may be made using a common-sense standard, without resorting to scientific or medical evidence. 2008 Senate Mangers' Statement at 7.
> *[with relevant examples]*
>
> (2) In addition to comparison to most people in the general population, disability can also be shown where an impairment is diagnosed, or its limitations evidenced, by a reference to intra-individual differences (i.e., a disparity between an individual's aptitude and actual versus expected achievement).
> *[with relevant examples]*
>
> (3) In addition to comparison to most people in the general population, disability can also be shown in comparison to targeted populations (i.e., a particular class of people, involving reference to others of a certain age, school grade, level of education or aptitude, among other potentially relevant characteristics).
> *[with relevant examples]*
>
> (4) Consistent with the ADAAA's broad construction mandate, analysis of intra-individual differences or comparisons to targeted populations in lieu of comparisons to most people cannot be used to limit coverage, only to expand it.
>
> (5) All assessment of an individual's limitations (whether based on comparisons to most people, comparisons to targeted populations, or reference to intra-individual

differences) must be consistent with the ADAAA's mandate to avoid extensive definitional analysis.

The mandate for broad construction and a focus on discrimination also provides ample foundation for the EEOC's currently proposed 29 C.F.R. § 1630.2(j)(2)(vi), which specifies: "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." This section currently makes reference to proposed 29 C.F.R. § 1630.2(j)(6)(i)(C). It is DREDF's position that this cross-referenced section provides additional appropriate explanation and illustration of the importance of considering both targeted comparisons, and intra-individual differences in assessing limitation.[26] However, because DREDF urges the Commission to eliminate the (j)(6) category, we correspondingly urge the Commission to relocate this particular explanation and illustration to other appropriate parts of the regulations. For example, information submitted by commenters with relevant expertise and experience will offer a basis for the EEOC to include learning disabilities in the (j)(5) category. The example currently contained in (j)(6)(i)(C) can also be used as an example in the revised 29 C.F.R. §1630.2(j)(2)(iv) proposed by DREDF.

Finally, DREDF recommends the addition of two new regulatory subsections to be included in the current 29 C.F.R. § 1630.2(j)(2) "Rules of Construction": (1) a subsection addressing multiple impairments that combine to create substantial limitation; and (2) a subsection addressing "condition, manner and duration."

The possibility of multiple impairments is currently addressed in Guidance to 29 C.F.R. § 1630.2(j)(*In General*), 74 Fed. Reg. at 48446, which notes: "Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability." Given the widespread relevance and importance of this observation, DREDF urges the Commission to include it in actual regulatory language, through the addition of a new subsection 29 C.F.R. § 1630.2(j)(2)(vii) that reads as follows. This new subsection should also include examples crafted with attention to information provided by commenters with expertise or experience as to the impact of multiple impairments.

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[26] Specifically, the proposed regulations offer the following illustration of a condition that the EEOC currently posits "may be disabling": "*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." 29 C.F.R. § 1630.2(j)(6)(i)(C).

(vii) Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

*[with relevant examples]*

DREDF understands that there is legitimate concern about including reference to the "condition, manner, or duration" under which a major life activity is performed as part of the "substantially limits" analysis. The Commission properly acknowledges that its 1991 regulations directing attention to these factors were inappropriately understood to create an overly strict standard for "substantially limits." Consequently, in its new proposed regulations, 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*." Guidance to 29 C.F.R. § 1630.2(j)(*In General*), 74 Fed. Reg. at 48446. The Commission also correctly 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." *Id.*

However, it DREDF's position that "condition, manner or duration" references may nevertheless be a valid part of some substantial limitation analysis. Though such references have been misconstrued in the past, they can also contribute to an appropriate understanding of "substantial limitation" to the extent that they are understood and applied in light of general ADAAA principles, including requirements for broad construction, and instructions to avoid extensive analysis and undue focus on the preliminary question of whether a particular individual has a "disability." In particular, such references may be useful in instances where an impairment is diagnosed, or its limitations evidenced, by a reference to intra-individual differences. Such references may also be useful in assessing limitations in working, especially as to jobs that involve activities not commonly undertaken in other aspects of life (e.g., extended or repetitive standing, bending, lifting or manual work that may expose limitations not apparent in brief or intermittent performance of such tasks). The expected need for such workplace analysis makes thus makes "condition, manner or duration" uniquely relevant to the EEOC Title I regulations.[27]

Rather than eliminating all "condition, manner or duration" references, DREDF urges the Commission to identify them as potentially relevant factors to be considered in relevant circumstances, though they should not be given reference or primacy in all circumstances. To accomplish this revision in actual regulatory language, DREDF recommends that a new subsection 29 C.F.R. § 1630.2(j)(2)(viii) be added to the Rules of Construction for "substantially limits," reading as follows.

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[27] As the Guidance to 29 C.F.R. § 1630.2(j)(*In General*) recognizes, the Senate Managers' Statement accompanying the ADAAA made reference to "condition, manner or duration." 74 Fed. Reg. at 48446. Specifically, the Statement notes the relevance of these factors in both of the circumstances identified here: (1) in assessment of intra-individual differences, and (2) in assessment of tasks performed on an extended or repetitive basis.

This new subsection should also include examples crafted with attention to information provided by commenters with expertise or experience as to disabilities or contexts in which such factors are particularly relevant.

> (viii) Reference to the "condition, manner or duration" under which a major life activity may be performed can be an appropriate part of "substantial limitation" analysis in relevant circumstances, though such factors should not be given reference or primacy in all circumstances.
>
> *[with relevant examples]*

**Mitigating Measures** – 29 C.F.R. § 1630.2(j)(3)

**BULLET POINT: the proposed EEOC regulations properly follow Congress's express mandate that assessment of limitation must be made *without regard to* ameliorative measures. Consistent with the ADAAA, the regulations include an expanded, illustrative, but not exhaustive list of such measures, with accompanying discussion. Surgical interventions are properly identified as mitigating measures, though the currently identified exception for interventions that "permanently eliminate impairment" should be discarded. In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

**Ameliorative Effects Not Considered** – 29 C.F.R. § 1630.2(j)(3)(i)

ADAAA statutory language expressly and clearly repudiated judicial misconstruction of the role of "mitigating measures" in definitional analysis, confirming the congressional intent that the ameliorative effects of such measures should not be considered in assessing limitation.[28] The proposed EEOC regulations are generally faithful to this mandate, stating the rule and mirroring Congress's disavowal of contrary case law. 29 C.F.R. § 1630.2(j)(3)(i).

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[28] See Pub. L. No. 110-325, § 2(a)(4), 122 Stat. at 3553 ("the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect"); Pub. L. No. 110-325, § 2(b)(2), 122 Stat. at 3554 (identifying express Congressional purpose "to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures"); and Pub. L. No. 110-325, § 4(a), 122 Stat. at 3556 (amending the ADA statutory definitions set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(E), which mandates assessment of limitation without regard to ameliorative measures).

**Illustrative, Not Exhaustive, Examples** – 29 C.F.R. § 1630.2(j)(3)(ii)

The new statutory provision expressly mandating assessment of limitation without regard to ameliorative measures includes an expanded, illustrative, but not exhaustive, list of such measures.[29] Such measures are grouped into several different categories contained in discrete statutory subsections now codified at 42 U.S.C. § 12102(4)(E)(i). These include (I) examples of medications, supplies and equipment; (II) "use of assistive technology"; (III) "reasonable accommodations or auxiliary aids or services"; *or* (IV) "learned behavioral or adaptive neurological modifications." Again, the proposed EEOC regulations are generally faithful to this mandate. See 29 C.F.R. § 1630.2(j)(3)(ii)(A)-(D).

**Surgical Intervention** – 29 C.F.R. § 1630.2(j)(3)(ii)(E)

In addition to reproducing the illustrative but not exhaustive categories of mitigating measures set out in statute, the proposed EEOC regulations identify another category not specified in statute: "Surgical interventions, except for those that permanently eliminate an impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(E). The Guidance notes that this addition is "consistent with a statement in the 2008 House Education and Labor Report at 15," and further explains: "In the Commission's view, a 'surgical intervention' may constitute a mitigating measure, except when it permanently eliminates an impairment." Guidance to 29 C.F.R. § 1630.2(j)(*Mitigating Measures*), 74 Fed. Reg. at 48447. This provision is consistent with congressional action and intent to the extent that it specifies that "mitigating measures" may indeed include surgical interventions. However, there does not appear to be any statutory or legislative history basis for the differential treatment of surgical interventions "that permanently eliminate an impairment." Various types of mitigating measures may function not only to *ameliorate*, but to *eliminate* impairment, depending on the nature of the measure, the nature of the impairment, and the experience of the particular individual. Under the ADAAA, the congressional mandate is to assess limitation without regard to mitigating measures (comfortably including surgical interventions), and without further qualification. DREDF thus urges the Commission to omit the qualifying language in the current proposed 29 C.F.R. § 1630.2(j)(3)(ii)(E), and simply specify that mitigating measures include "Surgical interventions."

**Analysis When Mitigating Measures Are Used** – 29 C.F.R. § 1630.2(j)(3)(iii)

The proposed regulations appropriately acknowledge a common reality: that there are many individuals who routinely and consistently use mitigating measures, thus making the assessment of their individual limitations *without* regard to those measures a theoretical, rather a practical exercise. See 29 C.F.R. § 1630.2(j)(3)(iii). DREDF commends the EEOC for explicitly acknowledging this

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[29] See Pub. L. No. 110-325, § 4(a), 122 Stat. at 3556 (amending the ADA statutory definition set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(E)(i), identifying "mitigating measures *such as*")(emphasis added).

real-world circumstance. However, DREDF urges the Commission to offer additional practical guidance in the final regulation as to how proper assessment is best accomplished in this circumstance. The currently proposed regulatory language offers no insight into the mechanics of such assessment, and the Guidance simply notes that a statutory disability will exist "where there is evidence that in the absence of an effective mitigating measure the individual's impairment would be substantially limiting." Guidance to 29 C.F.R. § 1630.2(j)(*Mitigating Measures*), 74 Fed. Reg. at 48447. In crafting additional analysis on this point — potentially including identification of appropriate types of evidence — the Commission should pay particular attention to commenters offering relevant expertise or experience as to disabilities that are routinely and consistently mitigated.

**Episodic Impairments or Remission** – 29 C.F.R. § 1630.2(j)(4)

**BULLET POINT: the proposed EEOC regulations properly follow Congress's express mandate to include episodic impairments or those in remission if such impairments would substantially limit a major life activity when active. In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

ADAAA statutory language expressly provides for coverage of impairments that are episodic or in remission, if such impairments would substantially limit a major life activity when active.[30] The proposed EEOC regulation is faithful to this mandate, reproducing exact statutory language in the first sentence of 29 C.F.R. § 1630.2(j)(4). The proposed regulations then appropriately proceed to a second sentence that appears to offer an appropriately illustrative, but not exhaustive, list of relevant conditions: "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." *Id.*[31] However, the epilepsy reference should perhaps be expanded to encompass seizure disorders generally, and other additional illustrations may also be appropriate. In preparing examples for the final regulations, DREDF urges the Commission to pay particular attention

[30] See Pub. L. No. 110-325, § 4(a), 122 Stat. at 3556 (amending the ADA statutory definitions set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(D), which mandates: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.").

[31] The proposed Guidance offers further illustration and explanation, with citation to relevant ADAAA legislative history: "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 Report at 19-20. Cancer is an example of an impairment that may be in remission." See Guidance to 29 C.F.R. §1630.2(j)(*Impairments That Are Episodic or in Remission*), 74 Fed. Reg. at 48447.

to information provided by commenters with expertise or experience as to impairments that are commonly episodic, or that that may involve remission.

**Illustrative, Not Exhaustive, Examples of Impairments That Consistently Meet Definition** – 29 C.F.R. § 1630.2(j)(5)

**BULLET POINT: The EEOC regulations appropriately include a provision providing illustrative, but not exhaustive, examples of impairments that will consistently meet the definition of "disability." This is not the type of per se list that was rejected by Congress. Rather, it is a useful recognition that some impairments have associated characteristics that enable individualized assessment to be quickly conducted, consistently revealing substantial limitations of major life activities, including major bodily functions. However, the Commission should include several more impairments in this category, with particular attention to commenters with relevant expertise or experience.**

As discussed above, the ADAAA embodies congressional action and intent to restore and ensure a broad construction of the disability definition, one that will not require extensive analysis, and that will put focus on the critical inquiry of whether discrimination has occurred. This expansive mandate provides an ample foundation for the Commission's proposal to indentify illustrative, but not exhaustive, examples of impairments that will consistently meet the definition of "disability." 29 C.F.R. § 1630.2(j)(5). As the EEOC itself notes, this is not the type of per se list that was rejected by Congress.[32] Rather, it is a useful recognition that some impairments have associated characteristics that enable individualized assessment to be quickly conducted, consistently revealing substantial limitations of major life activities, including major bodily functions. It also builds on the clearly expressed congressional intent to model the ADA disability definition on the definition contained in the Rehabilitation Act, returning courts to the way they had construed that earlier statute. See Guidance to 29 C.F.R. § 1630.2(j)(*Examples-Definition of Disability*), 74 Fed. Reg. 48447.

As currently proposed, the EEOC regulations acknowledge a number of traditionally identified impairments,[33] as well as eight illustrations of conditions or categories of conditions expected to consistently meet the ADAAA definition of "disability."[34] The examples offered appear appropriate to

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[32] See Guidance to 29 C.F.R. § 1630.2(j)(*Examples-Definition of Disability),* 74 Fed. Reg. 48447: "The ADA and this part, like the Rehabilitation Act of 1973, do not attempt an exhaustive 'laundry list' of impairments that are disabilities.").

[33] Listed in 29 C.F.R. § 1630.2(j)(5)(i), these additional exemplary impairments include "deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely missing limbs, and mobility impairments requiring the use of a wheelchair".

[34] Identified and discussed in lettered subsections to 29 C.F.R. § 1630.2(j)(5)(i), these exemplary impairments include (A) autism: (B) cancer; (C) cerebral palsy; (D) diabetes; (E) epilepsy; (F) HIV or AIDS; (G) multiple sclerosis and muscular dystrophy; and (H) various mental health impairments including depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder or schizophrenia.

this section. However, some of the existing categories should be expanded, and additional conditions or categories should be added. For example, the subsection addressing epilepsy should perhaps be expanded to encompass seizure disorders generally. See 29 C.F.R. § 1630.2(j)(5)(i)(E). The subsection addressing mental health conditions should similarly be expanded to encompass additional impairments, such as those currently erroneously addressed as conditions that "may be disabling."[35] Additionally, there are other conditions and categories, such as learning disabilities and Attention Deficit/Hyperactivity Disorder (AD/HD), that also merit inclusion in the "consistently meet the definition" section.[36] In preparing final examples of conditions and categories that "consistently meet the definition" of disability, DREDF urges the Commission to pay particular attention to information provided by commenters with expertise or experience as to particular impairments.

**Illustrative, Not Exhaustive, Examples of Impairments that May Be Disabling**
– 29 C.F.R. § 1630.2(j)(6)

**BULLET POINT: DREDF urges the Commission to eliminate this provision from the final regulations. Other parts of the regulations properly identify categories of impairments that, because of their associated characteristics, will consistently meet the definition, or will consistently fail to meet the definition, following individualized assessment. Impairments that do not fall into either of these two categories are simply subject to the general rules of analysis set out in the ADAAA itself, and in the remainder of the regulations. There is thus no need for a specific category of impairments that "may or may not" be disabling, as that would logically include *every* impairment that is outside the consistently included or excluded categories. However, if the Commission does retain this provision, it should continue to expressly note that impairments identified in this "may or may not" category are (1) subject to all general ADAAA rules of analysis, (2) are illustrative and not exhaustive, and (3) that no negative implications should be drawn from either inclusions or omissions of certain impairments from this category.**

DREDF commends the EEOC's efforts throughout the proposed regulations to offer practical examples to help illustrate appropriate application of definitional analysis to a variety of impairments and contexts. DREDF understands that the proposed 29 C.F.R. § 1630.2(j)(6), addressing impairments the Commission deems "may be disabling," is intended to further the laudable goal of providing real world insights. However, it is DREDF's position that a separate category that purports to address "may be disabling" impairments is likely generate unnecessary confusion and complexity, rather than useful guidance.

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[35] Specifically, current proposed 29 C.F.R. § 1630.2(j)(6)(i)(E) identifies psychiatric impairments such as panic disorder and anxiety disorder as conditions that "may be disabling." However, these conditions properly belong on the list of those that "consistently meet the definition," and should be included along with the other mental health impairments identified in 29 C.F.R. § 1630.2(j)(5)(i)(E).

[36] As is the case with panic disorder and anxiety disorder, learning disability is currently erroneously included in proposed 29 C.F.R. § 1630.2(j)(6) as a category of impairment that "may be disabling." AD/HD is not currently addressed in the proposed regulations, but should be identified as a condition that "consistently meets the definition."

It is DREDF's view that only two categories of conditions really benefit from separate discussion: (1) conditions that *consistently meet* the definition" (which the EEOC properly proposes to address in the 29 C.F.R. § 1630.2(j)(5) provisions); and (2) conditions that *consistently fail to meet* the definition (which the EEOC properly proposes to address in the 29 C.F.R. § 1630.2(j)(2)(v) "transitory and minor" and 29 C.F.R. § 1630.2(j)(8) "impairments that are usually not disabilities" provisions).

In contrast, discussion of conditions that "may be disabling" simply illustrate general ADAAA principles (such as analysis related to "major life activity," "substantial limitation," or "type of work"). Regardless of what disclaimers are offered, DREDF is concerned that singling out certain conditions for treatment in a discrete "may be disabling" section will suggest that such conditions are not subject to general principles of analysis. Additionally, some of the conditions currently identified as "may be disabling" more properly belong in the "consistently meet the definition" category. By integrating discussion of all seven of the current (j)(6) examples into other relevant regulatory sections, the EEOC can eliminate the potentially confusing "may be disabling" category, while also retaining valuable exemplary insights and bolstering understanding of general ADAAA principles.[37] In determining appropriate final regulatory placements for erstwhile (j)(6) examples, DREDF urges the Commission to pay particular attention to information provided by commenters with relevant expertise or experience.

**"Working" as a Major Life Activity** – 29 C.F.R. § 1630.2(j)(7)

> **BULLET POINT: The proposed EEOC regulations addressing "working" as a major life activity are generally faithful to Congress's ADAAA instructions and intent. While it is true that most individuals will be able to establish "disability" based on other major life activities, Congress has identified "working" as an equally valid basis for assessment in appropriate circumstances. Assessment of "working" is particularly relevant to jobs that involve activities not commonly undertaken in other aspects of life. The final regulations should fully clarify and confirm this co-equal status. The proposed regulatory provisions addressing "type of work" are appropriate to the extent that they are understood and applied in light of general ADAAA rules of analysis, including requirements for broad construction, and instructions to avoid extensive analysis and undue focus on the preliminary question of whether a particular individual has a "disability." The proposed regulations appropriately specify that evidence of ability to obtain other**

[37] Specifically, current (j)(6)(i)(A) *Example 1* (asthma affecting respiratory function); (j)(6)(i)(B) *Example 2* (high blood pressure affecting circulatory function); and (j)(6)(i)(G) *Example 7* (hyperthyroidism affecting endocrine system) could instead be included in 29 C.F.R. § 1630.2(i)(2)(addressing "major bodily function"). Examples more properly moved to 29 C.F.R. § 1630.2(j)(5)(addressing conditions that "consistently meet the definition") include current (j)(6)(i)(C) *Example 3* (learning disabilities) and (j)(6)(i)(E) *Example 5* (psychiatric impairments). Finally, current (j)(6)(i)(D) *Example 4* (back or leg impairment) and (j)(6)(i)(F) *Example 6* (carpal tunnel) can instead be consolidated with similar examples currently contained at 29 C.F.R. § 1630.2(j)(7)(iii)(C), and used to illustrate appropriate "type of work" analysis.

**employment is not dispositive. In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

The EEOC's proposed regulation addressing "working" as a major life activity are generally faithful to congressional action and intent to restore and ensure a broad construction of the disability definition, one that will not require extensive analysis, and that will put focus on the critical inquiry of whether discrimination has occurred.

**Relationship to Other Major Life Activities** – 29 C.F.R. § 1630.2(j)(7)(i)

The proposed EEOC regulations appropriately note that "[a]n 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." 29 C.F.R. § 1630.2(j)(7)(i). But it is nevertheless also true that assessment of limitation in working has a critical role to play in ensuring full implementation of Congress's mandate for disability nondiscrimination in employment. Such assessment is particularly relevant as to jobs that involve activities not commonly undertaken in other aspects of life (e.g., extended or repetitive standing, bending, lifting or manual work that may expose limitations not apparent in brief or intermittent performance of such tasks). The examples currently included in related subsections of the proposed regulations seem appropriate to illustrate this principle.[38] There are also other examples that may be appropriately added in actual regulatory language, such as those currently discussed only in Guidance,[39] or examples involving asthma, or Multiple Chemical Sensitivity or Environmental Illness, which for some individuals may have substantially limiting affects only in reference particular work environments. In preparing final

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[38] See e.g.,, 29 C.F.R. § 1630.2(j)(7)(iii)(C)(1)(*Example 1:* carpal tunnel substantially limiting as to repetitive manual tasks in employment context); 29 C.F.R. § 1630.2(j)(7)(iii)(C)(2)(*Example 2:* impairment affecting ability to stand substantially limiting as to jobs that require extended standing (e.g., jobs in the retail industry); 29 C.F.R. § 1630.2(j)(7)(iii)(C)(3)(*Example 3* impairment affecting ability to lift substantially limiting as to jobs requiring frequent heavy lifting); and 29 C.F.R. § 1630.2(j)(7)(iii)(C)(4)(*Example 4:* permanent knee impairment substantially limiting as to jobs that require walking long distances).

However, as to Example 3, it should be noted that "heavy" lifting may not necessarily be required to establish substantial limitation — some individuals may be substantially limited as to *light* lifting in employment, particularly in workplaces that require repetitive or extended periods of such lifting. Additionally, in memorializing final illustrations for the "working" analysis, the Commission should consolidate the existing (j)(7)(iii)(C) examples with those currently contained at 29 C.F.R. § 1630.2(j)(6)(i)(D) *Example 4* (back or leg impairment) and (j)(6)(i)(F) *Example 6* (carpal tunnel).

[39] See Guidance to 29 C.F.R. § 1630.2(j)(*Substantially Limited in Working*), 74 Fed. Reg. at 48447 (addressing "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.").

examples, the Commission should pay particular attention to commenters offering relevant expertise or experience as to the interaction between particular impairments and work environments.

**Type of Work** – 29 C.F.R. § 1630.2(j)(7)(iii)

DREDF generally commends the EEOC's proposal as to "type of work" analysis, particularly to the extent that it is actually understood by people with disabilities, employers, and courts as "more straightforward and easier to understand" than the erstwhile "class of jobs" and "broad range of jobs in various classes" analysis that it replaces. See Guidance to 29 C.F.R. § 1630.2(j)(*Substantially Limited in Working*), 74 Fed. Reg. at 48447.[40] In any event, any analytical approach used to aid in assessment of limitation in working is valid *only* to the extent that its use is consistent with the ADAAA's broad construction mandate.

In addressing "type of work," the proposed regulations first specify: "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." 29 C.F.R. § 1630.2(j)(7)(iii)(A). DREDF commends this language for illustrating several distinct "type of work" categories that may be relevant in any given case. However, consistent with the ADAAA's broad construction mandate, DREDF urges the Commission to revise this language to make it clear that the identified categories are illustrative, not exhaustive.

DREDF also urges the Commission to replace the phase "job-related requirements" with the unmodified term "requirements." This change recognizes that "job-related" is a term of art in employment law, which suggests that the validity of a particular requirement has been established. In some instances, however, an employer may impose a requirement that is not demonstrably "job-related," but that nevertheless serves to exclude an individual with a disability from a job that he or she is fully qualified to perform. For example, an employer may require that all employees have a valid driver's license, even for jobs that involve no driving at all. In such a circumstance, the driver's license mandate would be a requirement for the non-driving jobs, but not a properly "job-related" requirement. DREDF thus urges the Commission to change the actual regulatory language of 29 C.F.R. § 1630.2(j)(7)(iii)(A) to read as follows (proposed new language italicized):

> (A) The type of work at issue includes *but is not limited to* the job the individual has been performing, or for which the individual is applying, or jobs with similar qualifications *or*

[40] DREDF also agrees with the Commission's assessment that "[m]any of the examples of types of work, and many of the examples of job-related work requirements characteristic of a type of work, would … make up either a class or broad range of jobs under the prior standard." *Id.* However, the prior standard was so badly misconstrued and narrowed by courts — up to, including, and after the *Sutton* trilogy — that is seems advisable to inaugurate use of new terminology in implementing the ADAAA, in furtherance of Congress's broad construction mandate.

> *requirements* which the individual would be substantially limited in performing because of the impairment.

The proposed "type of work" regulations next specify: "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." 29 C.F.R. § 1630.2(j)(7)(iii)(B). DREDF commends this language for acknowledging that comparisons to targeted populations have an appropriate role in ADAAA analysis. However, this regulatory provision should also acknowledge the potential propriety of analysis in light of intra-individual differences. For example, individuals with learning disabilities may have limitations in types of work involving production of written materials under time pressure, or performance of specific mathematical, authorial or transcription functions, as evidenced by disparity between the individual's aptitude and actual versus expected achievement. DREDF thus urges the Commission to change the first sentence of the actual regulatory language of 29 C.F.R. § 1630.2(j)(7)(iii)(B) to read as follows (proposed new language italicized):

> (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, *or by reference to intra-individual differences.*

The currently proposed regulatory provision 29 C.F.R. § 1630.2(j)(7)(iii)(B) then proceeds to elaborate: "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." DREDF commends the EEOC for offering examples to help illustrate the concept addressed in this provision. However, it may be more appropriate to expand the reference to "commercial truck driving" to "commercial driving" more generally. There may also be other examples that should be added. In preparing final examples, DREDF urges the Commission to pay particular attention to information provided by commenters with relevant expertise or experience.

Finally, the proposed "type of work" regulations specify: "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." 29 C.F.R. § 1630.2(j)(7)(iii)(C). As with the immediately preceding "type of work" provisions, DREDF urges the Commission to *avoid* reference to "job-related," and to *include* reference to intra-individual differences here, so that the revised first sentence of the actual regulatory language of 29 C.F.R. § 1630.2(j)(7)(iii)(C) reads as follows (proposed new language italicized):

> (C) The type of work at issue may also be determined by reference to *job requirements* that an individual is substantially limited in meeting because of an impairment as compared to most people performing those jobs, *or by reference to intra-individual difference.*

The currently proposed regulatory provision 29 C.F.R. § 1630.2(j)(7)(iii)(C) then proceeds to elaborate, offering "Examples of job-related requirements that are characteristic of types of work."[41] Again, DREDF urges the Commission to replace the reference to "job-related" requirements with a reference to "job requirements" in final regulations. Beyond that, DREDF commends the EEOC for offering examples, and in preparing final examples urges the Commission to pay particular attention to information provided by commenters with relevant expertise or experience.

**Evidence of Ability to Obtain Other Employment Not Dispositive**
– 29 C.F.R. § 1630.2(j)(7)(iv)

Consistent with the ADAAA's focus on addressing and redressing discrimination, the proposed EEOC regulations properly confirm: "The fact that an individual has obtained employment elsewhere is not dispositive of whether an individual is substantially limited in working." 29 C.F.R. § 1630.2(j)(7)(iv). This is confirmed in the Guidance, which also offers an additional related instruction: "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." See Guidance to 29 C.F.R. § 1630.2(j)(*Substantially Limited in Working*), 74 Fed. Reg. at 48448. DREDF urges the Commission to include this additional instruction in actual regulatory language, changing 29 C.F.R. § 1630.2(j)(7)(iv) to read as follows:

> (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. 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.

[41] The examples provided in regulatory language "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." 29 C.F.R. § 1630.2(j)(7)(iii)(C). As already noted above in connection with discussion of 29 C.F.R. § 1630.2(j)(7)(i), four detailed illustrations are offered as to particular impairments. These examples should have a place in the final regulations, subject to the discussion above at n.38.

**Record of Impairment** – 29 C.F.R. § 1630.2(k)

**BULLET POINT: The proposed EEOC regulations addressing "record" of impairment are generally faithful to Congress's ADAAA instructions and intent, including requirements for broad construction, and instructions to avoid extensive analysis and undue focus on the preliminary question of whether a particular individual has a "disability." In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

ADA statutory language continues to specify that nondiscrimination protections are extended to any individual with a "record of" a substantially limiting impairment. See 42 U.S.C. § 12102(1)(B). But in enacting the ADAAA, Congress has clarified and confirmed that this protection is subject to the law's broad construction mandate and general purposes, including the instruction for interpretation consistent with pre-1990 Rehabilitation Act authority. The EEOC's proposed Guidance correctly notes the relevance of general ADAAA principles,[42] directed at achieving the congressional goal "to ensure that people are not discriminated against because of a history of disability." Guidance to 29 C.F.R. § 1630.2(k), 74 Fed. Reg. at 48448.

The proposed EEOC regulations are generally faithful to statute, specifying: "An individual has a record of a disability if the 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." 29 C.F.R. § 1630.2(k)(1). The proposed regulatory language also includes two examples that appear appropriate to this section.[43] However, in preparing final examples, DREDF urges the Commission to pay particular attention to information provided by commenters with relevant expertise or experience.

In addition to setting out the general "record of" definition and offering examples, the proposed regulations appropriately confirm the applicable broad construction mandate in actual regulatory language. See 29 C.F.R. § 1630.2(k)(2), which currently reads in entirety:

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[42] Specifically, the Guidance to 29 C.F.R. § 1630.2(k) notes: "The term 'substantially limits' under the second prong of the definition of disability [42 U.S.C. § 12102(1)(B)] is to be construed in accordance with the same principles applicable under the first prong [42 U.S.C. § 12102(1)(A)]. In other words, the term is to be construed broadly to the maximum extent permitted under the ADA and should not require extensive analysis." 74 Fed. Reg. at 48448.

[43] Specifically, regulatory language includes examples of medically eradicated cancer, and temporary reaction to medication misdiagnosed as bipolar disorder. See 29 C.F.R. §§ 1630.2(k)(1)(i)(*Example 1*) and (ii)(*Example 2*). The Guidance to 29 C.F.R. § 1630.2(k) similarly elaborates on coverage of cured and misclassified impairments (e.g, cancer, and erroneous identification of learning disabilities). See 74 Fed. Reg. at 48448.

> (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.

While the regulatory language reference to broad construction should be retained, DREDF urges the Commission to eliminate the second sentence of this provision. It dilutes the apparently intended broad construction emphasis, and appears to be unnecessary, as the "record of" definition is already set out in 29 C.F.R. § 1630.2(k)(1), and further accomplished through the obvious cross-reference to all of the first prong analysis addressed in prior sections of the regulation. DREDF thus recommends that 29 C.F.R. § 1630.2(k)(2) be shortened to read as follows:

> (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.

If the second sentence is retained, it should be revised to be consistent with DREDF's proposed revision to 29 C.F.R. § 1630.2(j)(2)(iv), confirming that in addition to comparisons to "most people in the general population," it may also be relevant to address intra-individual differences, or comparisons to or within particular classes of people when assessing limitation.

The final EEOC regulations should also confirm that individuals with a "record of" disability are entitled to reasonable accommodation. This may be relevant, for example, to individuals with a history of alcoholism or drug addiction. Such individuals may need time off, or altered or specific work shifts in order to attend meetings relevant to maintaining sobriety. Accommodation in the form of stable schedules, or avoidance of particular environments or stress triggers may also be relevant to such individuals, as well as to individuals whose impairments have been medically eradicated, but are subject to recurrence. DREDF urges the Commission to include confirmation of accommodation entitlements in final regulatory language, accompanied by examples crafted with particular attention to information offered by commenters with relevant expertise and experience.

Consistent with Congress's instruction to focus on a common-sense approach that avoids extensive or exacting analysis, the Guidance to 29 C.F.R. § 1630.2(k) correctly explains that "[t]here are many types of records that could potentially contain this information, including but not limited to, education, medical or employment records." 74 Fed. Reg. at 48448. However, given the importance and value of this instruction, the Commission should (1) *expand* the identified examples (e.g., to include other types of disability records, such as disabled veterans and disability retirement documentation); (2) clarify that *no particular type* of evidence is required in a given case; (3) clarify that *redundant* evidence is not required once there is credible basis for concluding that the definition is satisfied; and (4) include such instructions and examples in actual regulatory language, either in the

specific "record of" provision, or in connection with more general instructions regarding evidentiary issues. See further discussion below at *Expert-Medical-Scientific Evidence*.

Given the congressional goal to avoid inappropriate focus on definitional analysis, the proposed regulations also properly clarify that whether or not an employer "relied on" a record of disability is irrelevant to establishing disability, and properly belongs only in merits analysis.[44]

Finally, the Guidance to 29 C.F.R. § 1630.2(k) correctly notes that the ADAAA "record of" definition must be assessed on its own terms. The fact that an individual has a history of meeting *another* definition (e.g., record of being a disabled veteran, or of disability retirement) is not dispositive, because "[o]ther statutes, regulations and programs may have a definition of 'disability' that is not the same as the definition set forth in the ADA." 74 Fed. Reg. at 48448. However, documentation of meeting another definition may provide evidence relevant to determining ADA disability, particularly given the broad range of evidence that might properly be used to demonstrate a "record of" substantially limiting impairment. The evidentiary value of other types of "disability" records is implied in the Guidance, but not expressly acknowledged.[45] The Commission should consider making this more explicit in the final regulations, either in the specific "record of" provision, or in connection with more general instructions regarding evidentiary issues. See further discussion below at *Expert-Medical-Scientific Evidence*.

**<u>Regarded As Having Impairment</u>** – 29 C.F.R. § 1630.2(*l*)

> **<u>BULLET POINT</u>: The proposed EEOC regulations addressing "regarded as" impairment are generally faithful to Congress's ADAAA instructions and intent, including requirements for broad construction, and instructions to avoid extensive analysis and undue focus on the preliminary question of whether a particular individual has a "disability." The regulations appropriately acknowledge that proof of a prohibited employment action based on an actual or**

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[44] Specifically, the Guidance to 29 C.F.R. § 1630.2(k) explains: "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." 74 Fed. Reg. at 48448.

[45] Specifically, the Guidance to 29 C.F.R. § 1630.2(k) notes: "in order for an individual who has been classified in a record as 'disabled' for some other purposes 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." 74 Fed. Reg. at 48448 (emphasis added). The italicized language suggests that other disability records may be referenced as evidence in ADA definitional analysis.

**perceived impairment is sufficient to establish "regarded as" coverage, *regardless* of whether the impairment limits or is perceived to limit a major life activity. In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

ADA statutory language continues to specify that nondiscrimination protections are extended to any individual "regarded as having" a substantially limiting impairment. See 42 U.S.C. § 12102(1)(C). But in enacting the ADAAA, Congress has also including a new statutory section elaborating on this definition.[46] As properly acknowledged by the proposed EEOC regulations, the ADAAA clarified and confirmed that the "regarded as" protection is subject to the Amendment's broad construction mandate and general purposes, including the instruction for interpretation consistent with pre-1990 Rehabilitation Act authority.[47]

Consistent with this restored breadth of protection, the EEOC's proposed regulations correctly confirm that proof of an adverse employment action is sufficient to establish "regarded as" coverage.[48] It is not additionally necessary to establish *either* (1) that the employer believed there was substantial

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[46] See Pub. L. No. 110-325, § 4(a), 122 Stat. at 3555 (amending the ADA statutory definition set out at 42 U.S.C. § 12102 to include a new Section 12102(3) that provides: "(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.").

[47] In particular, Congress was committed to restoring the expansive interpretation of "regarded as" articulated by the federal high court in the *Arline* case. See Pub. L. No. 110-325, § 2(b)(3), 122 Stat. at 3554 (identifying Congressional intent "to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973"). The EEOC's proposed Guidance correctly notes this intended *Arline* restoration. See Guidance Introduction, 74 Fed. Reg. at 48444.

[48] Specifically, 29 C.F.R. § 1630.2(*l*)(1) provides:
*In General.* An individual is 'regarded as' having a disability if the individual is subject 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 [at 29 C.F.R. § 1630.2(*l*)(3)] 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.

limitation of major life activity,[49] *or* (2) any specific malign employer motivation.[50] However, the proposed Guidance also correctly notes that evidence of employer prejudice can be relevant (though not required) evidence.[51]

**Actions Taken Based on Symptoms or Use of Mitigating Measures** – 29 C.F.R. § 1630.2(*l*)(2)

Consistent with the ADAAA's general principles of broad construction and focus on addressing and redressing discrimination, the proposed EEOC regulations appropriately specify: "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." 29 C.F.R. § 1630.2(*l*)(2). This provision includes two examples that appear to be appropriate to this section.[52] While the examples illustrate that definitional coverage is available *regardless* of whether the employer was aware of (or correct about) the existence of an underlying

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[49] This point is confirmed and illustrated in the proposed Guidance to 29 C.F.R. § 1630.2(*l*), 74 Fed. Reg. at 48448-48449 ("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 the 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.")

[50] The lack of need for specific employer motivation is confirmed in the proposed Guidance to 29 C.F.R. § 1630.2(*l*). See e.g., 74 Fed. Reg. at 48448 ("coverage can be established whether or not the employer was motivated by myths, fears or stereotypes"); and 74 Fed. Reg. at 49449 ("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.")

[51] See Guidance to 29 C.F.R. § 1630.2(l), 74 Fed. Reg. at 48449 ("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.")

[52] Specifically, regulatory language includes examples of an individual not hired for a driving job because he takes anti-seizure medication, and an individual denied employment because of a facial associated with Tourette's Syndrome. See 29 C.F.R. §§ 1630.2(*l*)(2)(i)(*Example 1*) and (ii)(*Example 2*). See also Guidance to 29 C.F.R. § 1630.2(*l*), 74 Fed. Reg. at 48449.

impairment, this point is important enough to be included as a general instruction. DREDF thus urges the Commission to revise 29 C.F.R. § 1630.2(*l*)(2) to read as follows. In preparing final examples, DREDF urges the Commission to pay particular attention to information provided by commenters with relevant expertise or experience (proposed new language italicized).

> (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. *Evidence that the employer was aware of (or correct about) the existence of an actual underlying impairment is not required.*
> *[with relevant examples]*

**Impairments That Fail To Meet Definition**

**BULLET POINT: The proposed EEOC regulations appropriately address the ADAAA exclusion of temporary, non-chronic impairments of short duration with little or no residual effect. The proposed EEOC regulations also provide that an impairment must be *both* "transitory" *and* "minor" to come within the "transitory and minor" exception to "regarded as" coverage. The proposed regulations also appropriately provide that this exception does *not* establish a durational minimum for "actual" and "record of" disabilities. However, "transitory and minor" examples included in the final regulations should be revised or reworded to more accurately illustrate such conditions. In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

**Impairments That Are Usually Not Disabilities** – 29 C.F.R. § 1630.2(j)(8)

In addressing the category of impairments that fail to meet the ADAAA definition, the proposed EEOC regulations address "[t]emporary, non-chronic impairments of short duration with little or no residual effects". 29 C.F.R. § 1630.2(j)(7). This regulatory provision further specifies that such conditions "*usually* will not substantially limit a major life activity." *Id.* (emphasis added). This is an important qualification, as it appropriately recognizes that in some instances the conditions themselves or their residual effects may indeed result in a statutory disability.

DREDF commends the EEOC for offering examples to help illustrate this concept. The examples currently provided in regulatory language include "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." *Id.* Additional examples provided in Guidance include appendicitis, or "episodic conditions that impose only minor limitations" (such as seasonal allergies that do not create substantial limitation even when active). See Guidance to 29 C.F.R. § 1630.2(j)(7), 74 Fed. Reg. at 48448; see also Guidance to 29 C.F.R. § 1630.2(j)(*In General*), 74 Fed. Reg. at 48446 (identifying "the common cold or flu" as possible excluded conditions). However, some of these conditions may be of long enough duration, or may create sufficient limitation, to meet the ADAAA definition of disability. A timely illustration is H1N1 influenza, which can result in substantial limitation, or substantially

limiting residual effects. Sprains and broken bones can also result give rise to "substantial limitation" within the meaning of the ADAAA. See further discussion below at *Transitory and Minor.* In preparing final examples of "impairments that are usually not disabilities," DREDF urges the Commission to pay particular attention to information provided by commenters with relevant expertise or experience.

**Transitory and Minor** – 29 C.F.R. §§ 1630.2(j)(2)(v) and 1630.2(*l*)(3)

Consistent with the ADAAA's broad construction mandate and general purposes, the proposed regulations appropriately provide that the "transitory and minor" exception set out in the "regarded as" Section 1630.2(*l*) definition "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)."[53] Consequently, "[a]n impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months." 29 C.F.R. § 1630.2(j)(2)(v).

Consistent with statutory language,[54] the proposed Section 1630.2(*l*)(3) correctly notes that the "regarded as" coverage exception is *only* applicable when the impairment at issue is *both* transitory *and* minor. Because *both* conditions ("transitory" *and* "minor") must be met, the first two examples provided in the proposed regulations are not the best illustrations, and should be revised or replaced.

Specifically, *Example 1* posits a "sprained wrist" that precludes typing for "three weeks." While "three weeks" is likely transitory, a "sprained wrist" may well *not* be minor (e.g., it may result in a need for immobilization or restricted manual activity, particularly of a dominant hand; it may also affect personal care activities such as bathing). See 29 C.F.R. § 1630.2(*l*)(3)(i). *Example 2* posits "a broken leg that is expected to heal normally." See 29 C.F.R. § 1630.2(*l*)(3)(ii). A broken leg, which almost invariably requires either a cast, or immobilization, or both, seems by common sense to be inevitably *not* "minor." Additionally, in contrast to *Example 1*, no time frame is provided in *Example 2*. Even a broken leg that is "expected to heal normally" often requires an extended healing period of weeks or months, and thus is not a good example of a "transitory" condition, unless the time frame for complete healing is explicitly specified to be of extremely short duration.

The proposed regulations do offer appropriate examples of circumstances that would *not* fall within this "transitory and minor" coverage exception. See 29 C.F.R. § 1630.2(*l*)(3)(iii) (*Example 3* - carpal tunnel assumed to preclude assembly line work); 29 C.F.R. § 1630.2(*l*)(3)(iv) *(Example 4* - assumed Hepatitis C condition); and 29 C.F.R. § 1630.2(*l*)(3)(v)(*Example 5* - assumed heart disease,

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[53] See 29 C.F.R. § 1630.2(j)(2)(v); see also Guidance to 29 C.F.R. § 1630.2(j)(*In General*), 74 Fed. Reg. at 48446-48447.

[54] See Pub. L. No. 110-325, § 4(a), 122 Stat. at 3555 (amending the ADA statutory definition set out at 42 U.S.C. § 12102 to include a new Section 12102(3)(B) that articulates the "transitory and minor" exception to "regarded as" coverage).

even though reality is a mild intestinal virus). The additional example offered in the Guidance is similarly an appropriate illustration of circumstances that would *not* fall within the exception. See Guidance to 29 C.F.R. § 1630.2(*l*), 74 Fed. Reg. at 48449 (minor hand wound assumed to be symptomatic of HIV infection).

In preparing final examples of "impairments that are usually not disabilities," DREDF urges the Commission to pay particular attention to information provided by commenters with relevant expertise or experience.

**Expert-Medical-Scientific Evidence**

> **BULLET POINT: the proposed EEOC regulations appropriately note that definitional analysis should be based on a common-sense approach that does not require an exacting or statistical analysis. The EEOC has appropriately eliminated previous regulatory references that contributed to overly stringent evidentiary standards. However, the final regulations should offer more alternative evidentiary guidance relevant to implementing the ADAAA's expansive coverage mandate, including guidance as to the role of expert, medical and scientific evidence.**

The ADAAA reflects Congress's clearly expressed intent to address and redress discrimination, avoiding undue focus on the preliminary question of whether an individual has a "disability," and using a common-sense approach to this threshold determination that does not require an exacting assessment. This intent is memorialized in an explicit statutory instruction, which specifies "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[55]

Consistent with this purpose, the EEOC's proposed Guidance correctly notes that Congress has rejected the onerous evidentiary requirements that came to characterize previous ADA case law and analysis.[56] Similarly, the Guidance appropriately justifies the elimination of previous regulatory

[55] See Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554.

[56] See Guidance Introduction, 74 Fed. Reg. at 48444 (explaining that "[p]ursuant to the 2008 amendments … the determination of whether an individual has a disability should not demand extensive analysis" and offering relevant citations to legislative history). See also Guidance to 29 C.F.R. § 1630.2(j)(*In General*), 74 Fed. Reg. at 48446 (substantial limitation analysis "should be based on a common-sense approach that does not require an exacting or statistical analysis); Guidance to 29 C.F.R. § 1630.2(j)(*Substantially Limited in Working*), 74 Fed. Reg. at 48448 ("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).").

instructions now deemed incompatible with mandated ADAAA analysis in specific circumstances, such as assessment of limitations in working.[57]

The proposed EEOC regulations also address some evidentiary issues of relevance to ADAAA analysis. For example, the Guidance contemplates that evidence provided by an individual with a disability can provide sufficient basis for assessment of limitation in working, eliminating the need for expert testimony in most cases.[58] The Guidance also identifies some illustrative types of evidence that can be used to establish "record of" disability.[59]

However, given the importance of evidentiary issues to individuals with disabilities, employers and courts, DREDF urges the Commission to offer more alternative evidentiary guidance relevant to implementing the ADAAA's expansive coverage mandate. In particular, the final regulations should emphasize the broad range of types of evidence (both documentary and testimonial) that can be used to establish disability. Certainly this can include expert and scientific testimony, and disclosure of medical records. However, those types of evidence tend to be among the most expensive, and the most invasive of privacy. Employers and courts should thus not be permitted to *require* this type of evidence when other credible evidence is available. The final regulations should specify that there must be a case-by-case inquiry to determine if such extraordinary evidence is truly needed to establish the existence of a "disability."

Alternative less expensive and invasive types of evidence to be identified and discussed in final regulations might include, for example: (1) declarations or testimony of the individual with a disability; (2) declarations or testimony of lay witnesses (family, friends, neighbors, etc.) with information relevant to definitional analysis; (3) summary statements from qualified health care or

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[57] See Guidance to 29 C.F.R. § 1630.2(j)(*Substantially Limited in Working*), 74 Fed. Reg. at 48448 ("the specific factors in the prior regulation that guided determination of whether the limitation in working was 'substantial' have been eliminated, including the geographic area to which the individual had 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.").

[58] See Guidance to 29 C.F.R. § 1630.2(j)*(Substantially Limited in Working)*, 74 Fed. Reg. at 48448 ("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 a 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.").

[59] See Guidance to 29 C.F.R. § 1630.2(k), 74 Fed. Reg. at 48448 ("There are many types of records that could potentially contain this information [documenting record of impairment], including but not limited to, education, medical or employment records.").

service providers offering information relevant to definitional analysis (e.g., confirmation of impairment and related limitations memorialized on provider letterhead, or offered by declaration or testimony); non-medical records containing information relevant to definitional analysis (e.g., other types of disability records — such as veterans or retirement records — or certificate or licensure records that confirm impairment and related limitations).

In addition to expanding the range of evidentiary examples, DREDF also urges the Commission to clarify that *no particular type* of evidence is required in a given case, and that *redundant* evidence is not required once there is credible basis for concluding that the definition is satisfied. Evidentiary examples and instructions should be included not only in Guidance, but in actual regulatory language where particularly relevant.

## Analysis Relevant to Vision Impairments

> **BULLET POINT: the final EEOC regulations should duplicate exact statutory language as to the narrow "ordinary eyeglasses and contact lenses" exception to the new statutory mandate regarding ameliorative measures analysis. The final EEOC regulations should also include an additional provision explicitly confirming that a person need not be an individual with a "disability" in order to challenge vision qualification standards. In finalizing examples, the EEOC should pay particular attention to commenters with relevant expertise and experience.**

### Narrow "Ordinary Eyeglasses or Contact Lenses" Exception

- 29 C.F.R. § 1630.2(j)(3)(ii)(A) and 29 C.F.R. §§ 1630.2(j)(3)(iv)

The proposed regulations appropriately address a new statutory provision that creates a narrow "ordinary eyeglasses or contact lenses" exception to the general rule requiring assessment of limitation without regard to ameliorative measures.[60] The proposed regulation is an almost verbatim reproduction of this new statutory language, but omits the express reference to the fact that ordinary eyeglasses and contacts are mitigating measures, and currently uses the phrase "*when* determining" in place of the statutory phrase "*in* determining." See 29 C.F.R. § 1630.2(j)(iv). To ensure complete conformity to statutory language, DREDF urges the Commission to change the first sentence of this regulatory provision to duplicate exact statutory language, reading as follows:

> (iv) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. …

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[60] Specifically, the ADA statutory definitions set out at 42 U.S.C. § 12102 have been amended to add a new Section 12102(4)(E)(ii), which provides: "The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity." Pub. L. 110-325 § 4(a), 122 Stat. at 3556.

The second sentence of this proposed regulatory provision is an appropriate summary of the new statutory language defining "ordinary eyeglasses or contact lenses." See 29 C.F.R. § 1630.2(j)(3)(iv).[61] The proposed regulations are also correctly note that the "ordinary eyeglasses and contact lenses" exception does *not* include "low-vision devices," which are expressly defined in new statutory language as "devices that magnify, enhance, or otherwise augment a visual image." See 29 C.F.R. § 1630.2 (j)(3)(ii)(A)(noting in discussion of general ameliorative measures analysis that "low-vision devices" are mitigating measures that are *not* subject to the "ordinary lenses" exception).[62]

In crafting final examples related to these regulatory provisions, DREDF urges the Commission to pay particular attention to information offered by commenters with expertise and experience as to vision impairments.

**Broad Standing to Challenge Uncorrected Vision Standards** - 29 C.F.R. § 1630.10

The proposed regulations appropriately duplicate statutory language specifying that "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." See 29 C.F.R. § 1630.10(b); and Pub. L. No. 110-325, § 5(b), 122 Stat. at 3557 (specifying changes to the statutory language of 42 U.S.C. §§ 12111(8) and 12113 to accomplish these amendments) .

This statutory language clearly puts the entire focus of this provision on the actions of the covered entity. This formulation establishes *not only* that it is the covered entity's burden of proof to establish the propriety of any uncorrected vision standards, but *also* that such standards are subject to challenge by any person, not just individuals who meet the ADAAA definition of disability. This is made explicit in the Guidance, which explains: "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." 74 Fed. Reg. 48450. DREDF urges the Commission to also include this instruction in the regulation itself, by adding language and renumbering the proposed provision as follows (proposed new language italicized):

> § 1630.10 Qualification standards, tests, and other selection criteria.
> …
> (b)(i) 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

[61] Specifically, the newly added statutory provision now codified at 42 U.S.C. § 12102(4)(E)(iii)(I) defines such glasses or lenses as those that are "intended to fully correct visual acuity or eliminate refractive error." See Pub. L. 110-325 § 4(a), 122 Stat. at 3556.

[62] This is again based on statute. See Pub. L. 110-325 § 4(a), 122 Stat. at 3556 (amending the ADA statutory definitions set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(E)(iii)(II)).

> 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.
> *(ii) A person does not need to be an individual with a disability as defined by this part in order to challenge such qualification standards.*

However, regardless of whether such an explicit regulatory subsection is included, there is a clear statutory mandate permitting challenges to visions standards by persons who do not meet the ADAAA definition of "disability."

**Claims of No Disability** – 29 C.F.R. § 1630.4(b)

> **BULLET POINT: the proposed EEOC regulations appropriately address the express ADAAA invalidation of "claims of no disability."**

The proposed regulations appropriately address a new statutory provision that specifies: "Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability." See Pub. L. 110-325, § 6(a), 122 Stat. 3557-3558 (amending the ADA provisions set out at 42 U.S.C. § 12201 to add a new Section 12201(g)). The proposed regulations appropriately confirm that this amendment invalidates, among other "no disability" claims, any claim "that an individual with a disability was granted an accommodation that was denied to an individual without a disability." 29 C.F.R. § 1630.4(b)

**Conclusion**

We commend the Commission for acting on the clear congressional mandate for a broad definition of disability, no need for extensive analysis, and primary focus on the critical question of whether discrimination has occurred. Consistent with Congress's instructions and intent, the Commission's regulations will help ensure full and vigorous implementation and enforcement of federal disability civil rights laws.