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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Parts 35 and 36

CRT Docket No. 124; AG Order No. 3410-2014

RIN 1190-AA59

Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is issuing this Notice of Proposed Rulemaking (NPRM) to amend its Americans with Disabilities Act (ADA) regulations in order to incorporate the statutory changes to the ADA set forth in the ADA Amendments Act of 2008 (ADA Amendments Act or the Act), which took effect on January 1, 2009. Congress enacted the ADA Amendments Act in order to revise the ADA definition of “disability” and to ensure that the definition is broadly construed and applied without extensive analysis. In this NPRM, the Department is proposing to add new sections to its title II and title III ADA regulations at 28 CFR parts 35 and 36, respectively, to provide detailed definitions of “disability” and to make consistent changes in other sections of the regulations. The ADA Amendments Act authorizes the Attorney General to issue regulations consistent with the Act that implement the definitions of “disability” in sections 3 and 4 of the Act, including the rules of construction set forth in section 3. The Department invites written comments from members of the public on this proposed rule.

DATES: All comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 1190-AA59 (or Docket ID No. 124), by any one of the following methods:

- Federal eRulemaking portal: *www.regulations.gov*. Follow the website’s instructions for submitting comments.
- Regular U.S. mail: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031-0885.
- Overnight, courier, or hand delivery: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue, N.W., Suite 4039, Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT: Zita Johnson-Betts, Deputy Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY); this is not a toll-free number. Information may also be obtained from the Department’s toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

You may obtain copies of this NPRM in an alternative format by calling the ADA Information Line at (800) 514-0301 (voice) and (800) 514-0383 (TTY). This NPRM is also available on the ADA Home Page at *www.ada.gov*.

SUPPLEMENTARY INFORMATION:

The regulatory definitions of “disability” in the title II and title III regulations are identical, and the preamble will discuss the revisions to both regulations concurrently. Because the ADA Amendments Act’s revisions to the ADA have been codified into the U.S. Code, the NPRM will

reference the revised U.S. Code provisions except in those cases where citation to a specific ADA Amendments Act provision is necessary in order to avoid confusion on the part of the reader.

This NPRM was submitted to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs for review prior to publication in the Federal Register.

Electronic Submission of Comments and Posting of Public Comments

You may submit electronic comments to www.regulations.gov. When submitting comments electronically, you must include "DOJ-CRT 2010-0112" in the subject field and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Submission postings will include any personal identifying information (such as your name, address, etc.) included in the text of your comment. If you include personal identifying information (such as your name, address, etc.) in the text of your comment but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also include all the personal identifying information you want redacted along with this phrase. Similarly, if you submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on www.regulations.gov.

I. Executive Summary

Purpose

This rule is necessary in order to incorporate the ADA Amendments Act's changes to titles II (nondiscrimination in state and local government services) and III (nondiscrimination by public accommodations in commercial facilities) of the ADA into the Department's ADA regulations and to provide additional guidance on how to apply those changes.

Legal Authority

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110-325, sec. 8, 122 Stat. 3553, 2559 (2008). The Act authorizes the Attorney General to issue regulations implementing the definitions of disability in sections 3 and 4 of the Act, including the rules of construction set forth in section 3, consistent with the Act as applied to title II and title III of the ADA. 42 U.S.C. 12205a.

Summary of Key Provisions of the Act and Rule

The ADA Amendments Act made important changes to the ADA's definition of the term "disability," making it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. *See* 42 U.S.C. 12102(1)(A)-(C). The Department proposes several major revisions to the definition of "disability" contained in the title II and title III ADA regulations. All of these revisions are based on specific provisions in the ADA Amendments Act or on specific language in the legislative history. These proposed revisions state that the definition of "disability shall be interpreted broadly. The proposed revisions also make it clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their statutory obligations

and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. In addition, the proposed revisions expand the definition of "major life activities" by providing a non-exhaustive list of major life activities and specifically including the operation of major bodily functions. The revisions also add rules of construction that should be applied when determining whether an impairment substantially limits a major life activity. The rules of construction state the following:

- That the term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA;
- That an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population;
- That the primary issue in a case brought under the ADA should be whether the covered entity has complied with its obligations and whether discrimination has occurred, not the extent to which the individual's impairment substantially limits a major life activity;
- That in making the individualized assessment required by the ADA, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADA Amendments Act;
- That the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence;

- That mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a “disability”;
- That an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
- That an impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

The NPRM also proposes language that states that the definition of “regarded as” does not require the individual to demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity and provides that individuals covered only under the “regarded as” prong are not entitled to reasonable modifications.

The ADA Amendments Act’s revisions to the ADA apply to title I (employment), title II (State and local governments), and title III (public accommodations) of the ADA. Accordingly, consistent with Executive Order 13563’s instruction to agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, the Department is proposing, wherever possible, to adopt regulatory language that is identical to the revisions to the Equal Employment Opportunity Commission’s (EEOC) title I regulations implementing the ADA Amendments Act. *See* 76 FR 16978 (Mar. 25, 2011). This will promote consistency in the application of the ADA and prevent confusion among entities subject to both titles I and II, as well as those subject to both titles I and III.

Summary of Benefits and Costs

This proposed rule would incorporate into the Department’s regulations the changes made by the ADA Amendments Act to titles II and III of the ADA. In accordance with OMB

Circular A-4, the Department estimates the benefits and costs of this proposed rule using a pre-ADA Amendments Act baseline. Thus, the effects that are estimated in this analysis are due to statutory mandates that are not under the Department's discretion.

Congress enacted the ADA Amendments Act to ensure that persons with disabilities who were refused access to programs and services would again be able to rely on the protections of the ADA. As a result, the Department believes that the enactment of the law has nonquantifiable but nonetheless important benefits for many Americans. The Department determined, however, that there was a specific group of individuals with disabilities who would be able to receive quantifiable benefits. With the enactment of the ADA Amendments Act, additional post-secondary students and national examination test takers (e.g., CPA, LSAT, and other professional examinations) with attention deficit disorder (ADD) or learning disabilities are now able to receive additional time to complete tests. Before the enactment of the ADA Amendments Act, some of these students may have had their requests for additional time denied by testing entities because such entities believed the disability in question did not meet the ADA's definition of "disability."

In the first year after this rule goes into effect, our analysis estimates that approximately 142,000 students will take advantage of additional testing accommodations that otherwise would not have been available but for the ADA Amendments Act. Over eleven years, approximately 1.6 million full-time equivalent students would benefit, or, assuming an average 4-year course of study, more than 400,000 individual students.¹ An additional 800,000 national examination test

¹ The number of individual students who would be impacted is a high-level estimate based on the assumption that students would average 4 years of post-secondary study; therefore 4 full-time equivalent enrollees per year is approximately one student, and then rounded to the nearest hundred thousand.

takers would benefit over that same eleven years (assuming that each test taker only takes an exam once). Providing these individuals additional time is consistent with our national values of fairness, equity, and human dignity—values that Executive Order 13563 permits agencies to consider, where appropriate, when analyzing the proposed rule’s costs and benefits. *See* E.O. 13563, 76 FR 3821 (Jan. 18, 2011).

With respect to the costs of the changes under titles II and III made by the ADA Amendments Act, in the first year (the year with the highest costs), we estimate that the total undiscounted costs will range between \$36.2 and \$61.8 million. The changes made by the ADA Amendments Act are expected to cost \$382 million in present value terms over 11 years and discounted at 7 percent. Our cost estimates include the value of time, represented by wages, for proctors to provide additional time to post-secondary students with ADD or learning disabilities to complete tests, and for proctors to provide additional time to individuals with ADD or learning disabilities to complete national examinations.

Summary of Discounted Costs and Benefits, 11 Year Total and Annualized

	Estimates		Units		
	Total Discounted Value	Annualized estimate	Year Dollar	Discount Rate	Period Covered
Benefits	Multiple un-quantified benefits for some unknown portion of those persons with learning disabilities and society as a whole, including: <ul style="list-style-type: none"> - Some persons with learning disabilities will earn a degree faster than they otherwise would have, and some students might even earn a degree or certification who otherwise would not been able to do so; - Some persons with learning disabilities will earn a degree or certification for a higher paying field/job; - Some persons with learning disabilities will experience a positive impact on overall independence and lifetime income; - Some persons with learning disabilities will experience increased sense of personal dignity and self-worth; - Some persons with learning disabilities will experience greater personal satisfaction from ability to pursue a favored career path or educational pursuit; - Some communities may see a decreased direct financial support for persons with disabilities or other programs or services; and - Greater equity in access to education. 				
Costs	\$381.7	\$50.9	2013	7%	2013–2023
	\$451.2	\$48.8	2013	3%	2013–2023

II. Background

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110-325, sec. 8. The ADA Amendments Act made important changes to the ADA’s definition of the term “disability,” making it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. The ADA Amendments Act did this by explicitly rejecting the holdings in several Supreme Court decisions that had significantly limited the definition of “disability.” As amended by the ADA Amendments Act, the definition of “disability” under the ADA, 42 U.S.C. 12101, *et seq.*, is to be construed broadly, to the

maximum extent permitted by the terms of the ADA, and the determination of whether an individual has a disability should not demand extensive analysis. Public Law 110-325, sec. 2(b)(5); *see also* 154 CONG. REC. S8840–44 (daily ed. Sept. 16, 2008) (Statement of the Managers); H.R. REP. NO. 110–730, pt. 1, at 6 (2008); H.R. REP. NO. 110–730, pt. 2, at 5 (2008).

The ADA Amendments Act retains the ADA’s basic definition of “disability” as: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. 12102(1)(A)-(C). However, it provides rules of construction necessary to ensure that the definition is construed broadly and without extensive analysis. *Id.* at 12102(4). The Department, therefore, drafted this rule to more fully align the Department’s title II and title III regulations with the Act.

Congress enacted the ADA Amendments Act in response to a series of Supreme Court decisions in which the Court interpreted the definition of “disability” narrowly, thus eliminating protection for many individuals that Congress intended to protect when it first enacted the ADA. Public Law 110-325, sec. 2. For example, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court ruled that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. *Id.* at 482. In *Sutton*, the Court also adopted a restrictive reading of the meaning of being “regarded as” disabled under the ADA’s definition of disability, holding that the plaintiff could not prevail under this prong of the definition of disability without first demonstrating that the employer believed the plaintiff’s impairment to be substantially limiting. *Id.* at 490. Subsequently, in *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*, 534 U.S. 184 (2002), the Court held that the terms “substantially” and “major” in the definition of disability “need to be interpreted

strictly to create a demanding standard for qualifying as disabled” under the ADA, and that to be substantially limited in performing a major life activity under the ADA, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” *Id.* at 197–98.

As a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities and thus not protected by the ADA. *See* 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers) (“After the Court’s decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual’s impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred.”).

While the vast majority of these court decisions arose in the area of employment, the narrowing of the definition of disability had an adverse impact on individuals seeking the protection of the ADA in circumstances involving entities covered by titles II and III, particularly individuals seeking reasonable modifications for learning disabilities in education programs at colleges and universities and in licensing and testing situations. *See, e.g., Gonzales v. National Board of Medical Examiners*, 60 F. Supp. 2d 703 (E.D. Mich. 1999); and *Wong v. Regents of University of California*, 410 F.3d 1052 (9th Cir. 2005).

Congress concluded that *Sutton*, *Toyota*, and their progeny interpreted the definition of disability more narrowly than what Congress had originally intended. Congress determined that these decisions, coupled with the EEOC’s 1991 ADA regulation, which had defined the term “substantially limits” as meaning “significantly restricted,” unduly precluded many individuals

from being covered under the ADA. *See* Public Law 110-325, sec. 2; *see also* 154 CONG. REC. S8840–41 (daily ed. Sept. 16, 2008) (Statement of the Managers) (“Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court’s narrower standard” and “[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.”). For that reason, Congress passed the ADA Amendments Act of 2008.

III. Summary of the ADA Amendments Act of 2008

The ADA Amendments Act of 2008 restores the broad application of the ADA by revising the ADA’s “Findings and Purposes” section, expanding the statutory language defining disability, providing specific rules of construction for that definition, and expressly rejecting the holdings of the Supreme Court in *Sutton*, *Toyota* and their progeny.

First, the ADA Amendments Act deletes two findings that were in the ADA: (1) that “some 43,000,000 Americans have one or more physical or mental disabilities,” and (2) that “individuals with disabilities are a discrete and insular minority.” 154 CONG. REC. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers); *see also* Public Law 110-325, sec. 3. The 2008 Senate Statement of the Managers stated, “[t]he [Supreme] Court treated these findings as limitations on how it construed other provisions of the ADA. This conclusion had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose. Deleting these findings removes this barrier to construing and applying the definition of disability more generously.” 154 CONG. REC. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers).

Second, the ADA Amendments Act clarifies Congress’s intent that the definition of “disability” “shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” 42 U.S.C. 12102(4)(A). Although the ADA Amendments Act retains the term “substantially limits” from the original ADA definition, the language of the rules of construction and the statement of “Findings and Purposes” contained in the ADA Amendments Act make it clear that this language is required to be interpreted far more broadly than it had been interpreted in *Toyota*. Congress was specifically concerned that the lower courts had applied *Toyota* in a way that “created an inappropriately high level of limitation necessary to obtain coverage under the ADA.” Public Law 110-325, sec. 2(b)(5). Congress sought to convey 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.” *Id.*

Third, the ADA Amendments Act prohibits consideration of mitigating measures such as medication, assistive technology, and reasonable accommodations or modifications when determining whether an impairment constitutes a disability. 42 U.S.C. 12102(4)(E)(i). Congress added this provision and the applicable purpose language in the ADA Amendments Act to ensure that the ADA was interpreted and applied without reliance on the Supreme Court’s holdings that mitigating measures must be considered in determining whether an impairment substantially limits a major life activity. Public Law 110-325, sec. 2(b). The statute also provides that impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active. 42 U.S.C. 12102(4)(D).

Fourth, the ADA Amendments Act provides new instructions on what may constitute “major life activities” within the meaning of the ADA. 42 U.S.C. 12102(2). It provides a non-exhaustive list of major life activities and specifically expands the category of major life activities to include the operation of major bodily functions. *Id.*

Fifth, the ADA Amendments Act makes it clear that, contrary to court decisions interpreting the ADA, the “regarded as” prong of the disability definition does not require the individual to demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity. 42 U.S.C. 12102(3). With this clarifying language, an individual can once again establish coverage under the law by showing that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment. The ADA Amendments Act also provides that entities covered by the ADA will not be required to provide reasonable accommodations or modifications to policies, practices, and procedures for individuals who fall solely under this prong. 42 U.S.C. 12201(h).

Finally, the ADA Amendments Act makes it clear that the Attorney General has explicit authority to issue regulations implementing the definitions of disability contained in sections 3 and 4 (including rules of construction) of the ADA. 42 U.S.C. 12205a.

IV. Relationship of this Regulation to Revisions to the Equal Employment Opportunity Commission’s ADA Title I Regulation Implementing the ADA Amendments Act of 2008.

The Equal Employment Opportunity Commission (EEOC) is responsible for regulations implementing title I of the ADA addressing employment discrimination based upon disability.

On March 25, 2011, the EEOC published its final rule revising its title I regulation to implement the revisions to the ADA contained in the ADA Amendments Act. 76 FR 16978.²

Because the ADA Amendments Act’s revised definition of “disability” applies to title I as well as titles II and III of the ADA, the Department has made every effort to ensure that its proposed revisions to its title II and III regulations are consistent with, if not always identical to, the provisions of the EEOC final rule. Consistency among the title I, title II, and title III rules will ensure consistent application of the requirements of the ADA Amendments Act, regardless of the Federal agency responsible for enforcement, or the ADA title that is enforced. This consistency is also important because most entities subject to either title II or title III are also subject to title I with respect to employment, and should already be familiar with the revisions to the definition of “disability” in the 2-year-old EEOC revised regulation. Differences in language between the title I rules and the Department’s proposed title II and title III rules are generally attributable either to the fact that certain sections of the EEOC rule deal with employment-specific issues or to structural differences between the title I rule and the title II and III rules.

V. Section-by-Section Analysis

Sections 35.101 and 36.101—Purpose and broad coverage.

These sections propose to revise §§ 35.101 and 36.101 to add references to the ADA Amendments Act to §§ 35.101(a) and 36.101(a) and to add new §§ 35.101(b) and 36.101(b), which explain that “[t]he primary purpose of the ADA Amendments Act is to make it easier for

² On September 23, 2009, the EEOC published its NPRM in the Federal Register proposing revisions to the title I definition of disability. *See* 74 FR 48431. The EEOC received and reviewed over 600 public comments in response to its NRPM. In addition, the EEOC and the Department held four joint “Town Hall Listening Sessions” throughout the United States and heard testimony from more than 60 individuals and representatives of the business/employer industry and the disability advocacy community.

people with disabilities to obtain protection under the ADA.” These sections state that “[c]onsistent with the ADA Amendments Act’s purpose of reinstating a broad scope of protection under the ADA, the definition of ‘disability’ in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.”

Sections 35.104 and 36.104—Definitions.

The current title II and title III regulations include the definition of “disability” in regulatory sections that contain all enumerated definitions in alphabetical order. Given the expanded length of the definition of “disability” and the number of additional subsections required in order to give effect to the ADA Amendments Act revisions, the Department is proposing to move the definition of “disability” from the general definitional sections at §§ 35.104 and 36.104 to its own new section in each regulation, §§ 35.108 and 36.105, respectively.

Sections 35.108(a)(1) and 36.105(a)(1) Definition of disability—General.

These sections of the regulations set forth the three-part basic definition of the term “disability” found in the prior version of the ADA that the ADA Amendments Act retained with minor revisions. The current ADA regulations state the following:

Disability means, with respect to an individual,

- a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- a record of such an impairment; or

- being regarded as having such an impairment.

The ADA, as amended by the ADA Amendments Act, limits the application of the “regarded as” prong to impairments that are not “transitory and minor” and defines a transitory impairment as “an impairment with an actual or expected duration of 6 months or less.” 42 U.S.C. 12102(3)(B). To reflect these amendments to the ADA, the Department proposes to modify the “regarded as” prong in the current regulations by adding a sentence at proposed §§ 35.108(a)(1)(iii) and 36.105(a)(1)(iii) that limits the application of the “regarded as” prong and references proposed §§ 35.108(f) and 36.105(f), which define the phrase “regarded as having such an impairment.” Proposed §§ 35.108(f) and 36.105(f) clarify that an individual is “regarded as” having an impairment if he or she has been subject to an action prohibited by the ADA, as amended, because of an actual or perceived impairment that is not both “transitory and minor.” It may be a defense to a charge of discrimination by an individual claiming coverage under this prong if the covered entity demonstrates that the impairment is both “transitory and minor.”

Sections 35.108(a)(2) and 36.105(a)(2)—Rules of construction.

These sections set forth rules of construction that give guidance on how to understand and apply the definition of disability. Proposed §§ 35.108(a)(2)(i) and 36.105(a)(2)(i) provide that an individual may establish coverage under any one or more of the prongs in the definition of disability. *See* §§ 35.108(a)(1)(i)-(iii); 36.105(a)(1)(i)-(iii). To be covered under the ADA, however, an individual is only required to satisfy one prong. The term “actual disability” is used in these rules of construction as short-hand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of disability. *See* §§ 35.108(a)(1)(i); 36.105(a)(1)(i). The terminology selected is for ease of reference. It is not intended to suggest that an individual with a disability who is covered under

the first prong has any greater rights under the ADA than an individual who is covered under the “record of” or “regarded as” prongs, with the exception that the ADA, as amended, expressly states that an individual who meets the definition of disability solely under the “regarded as” prong is not entitled to reasonable modifications of policies, practices, or procedures. *See* 42 U.S.C. 12201(h).

Sections 35.108(a)(2)(ii) and 36.105(a)(2)(ii) are intended to amend the definition of “disability” to incorporate Congress’s expectation that consideration of coverage under the first and second prongs of the definition of “disability” will generally not be necessary except in cases involving requests for reasonable modifications. *See* 154 CONG. REC. H6068 (daily ed. June 25, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner). Accordingly, § 35.108(a)(2)(ii) states that “[w]here an individual is not challenging a public entity’s failure to provide reasonable modifications under § 35.130(b)(7), it is generally unnecessary to proceed under the ‘actual disability’ or ‘record of’ prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the ‘regarded as’ prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the ‘actual disability’ or ‘record of’ prong regardless of whether the individual is challenging a public entity’s failure to provide reasonable modifications.”

Similarly, § 36.105(a)(2)(ii) states “[w]here an individual is not challenging a covered entity’s failure to provide reasonable modifications under § 36.302, it is generally unnecessary to proceed under the ‘actual disability’ or ‘record of’ prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In

these cases, the evaluation of coverage can be made solely under the ‘regarded as’ prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the ‘actual disability’ or ‘record of’ prong regardless of whether the individual is challenging a covered entity’s failure to provide reasonable modifications.”

Sections 35.108(b) and 36.105(b)—Physical or mental impairment.

The ADA Amendments Act does not change the meaning of the term “physical or mental impairment.” Thus, the Department is retaining the general regulatory definitions for this term with only minor modifications. First, the Department is proposing to add examples of two new body systems—the immune system and the circulatory system—that may be affected by a physical impairment. *See* §§ 35.108(b)(1)(i); 36.105(b)(1)(i). In addition, the Department is adding a reference to “dyslexia” to §§35.108(b)(2) and 36.105(b)(2) as an example of a specific learning disability that falls within the meaning of the phrase “physical or mental impairment.” The Department is proposing to add the reference to “dyslexia” (i.e., a specific diagnosable learning disability that causes difficulties in reading and speaking unrelated to intelligence and education) because the Department has become aware that some covered entities mistakenly believe that dyslexia is not a clinically diagnosable impairment. The Department is interested in public comment regarding its proposed inclusion of a reference to dyslexia.

The definition of “disability” does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a “record of” a substantially limiting impairment,

or may be covered under the “regarded as” prong if it is the basis for a prohibited action and is not both “transitory and minor.”

Sections 35.108(c) and 36.105(c)—Major life activities.

Prior to the ADA Amendments Act, the ADA did not define “major life activities,” leaving delineation of illustrative examples to agency regulations. Section 2 of the definition of “disability” in the Department’s current title II and title III regulations states that “[t]he phrase major life activities means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *See* 28 CFR 35.104; *id.* at 36.104

The ADA, as amended, incorporates into the statutory language a non-exhaustive list of major life activities that includes, but is 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.” 42 U.S.C. 12102(2)(A). This list reflects Congress’s concern that courts were interpreting the term “major life activities” more narrowly than Congress intended. *See* 42 U.S.C. 12101(b)(4). In §§ 35.108(c) and 36.105(c), the Department proposes to revise its title II and title III regulatory definitions of disability to incorporate the statutory examples as well as to provide additional examples included in the EEOC title I final regulation—reaching, sitting, and interacting with others, *see* 29 CFR 1630.2(i)(1)(i).

In addition, the ADA, as amended, specifies that a person may meet the definition of “disability” if he or she has a physical or mental impairment that substantially limits the operation of a “major bodily function,” which includes the “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory,

endocrine, and reproductive functions.” 42 U.S.C. 12102(2)(B). The Department is proposing to revise its regulatory definitions of disability at §§ 35.108(c)(1)(ii) and 36.105(c)(1)(ii) to make it clear that the operations of major bodily functions are major life activities, and to include a non-exclusive list of examples of major bodily functions, consistent with the language of the statute. In addition to the examples included in the statute, the Department proposes to include the following additional examples: the functions of the special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems. These six major bodily functions are also specified in the EEOC title I final regulation. 29 CFR 1630.2(i)(1)(i).

The Department cautions that both the lists of major life activities and major bodily functions are illustrative. The absence of a particular life activity or bodily function from the list should not create a negative implication as to whether such activity or function constitutes a major life activity under the statute or the implementing regulation.

Consistent with the ADA, as amended, proposed §§ 35.108(c)(2) and 36.105(c)(2) also state that, “[i]n determining other examples of major life activities, the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability.” Moreover, the proposed regulations provide that “[w]hether an activity is a ‘major life activity’ is not determined by reference to whether the activity is of ‘central importance to daily life.’” *See* §§ 35.108(c)(2), 36.105(c)(2).

Sections 35.108(d) and 36.105(d)—Substantially limits.

Overview. The ADA, as amended, states that the term “substantially limits” is intended to be “interpreted consistently with the findings and purposes of the ADA Amendments Act.” 42 U.S.C. 12102(4)(B). One stated purpose of the Act is to expressly “reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*

. . . that the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled,’ and that to be substantially limited in performing a major life activity under the ADA ‘an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.’” Public Law 110-325, sec. 2(b)(4). The Department proposes to add nine rules of construction at §§ 35.108(d) and 36.105(d) clarifying the meaning of “substantially limits” when determining whether an impairment substantially limits an individual in a major life activity consistent with the mandates of the ADA Amendments Act. These rules of construction are based on the requirements of the statute and the clear mandates of the legislative history and are as follows:

Broad construction—not a demanding standard. Proposed §§ 35.108(d)(1)(i) and 36.105(d)(1)(i) state that “[t]he term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits’ is not meant to be a demanding standard.” *See* 42 U.S.C. 12102(4)(A).

Comparison to most people in the population. Proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) state that “[a]n impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” The Department cautions that this rule of construction addresses how to determine whether the individual’s impairment substantially limits a major life activity and not how the impairment is diagnosed. For example, when a person is diagnosed with the impairment of a learning disability, one accepted method of arriving at that diagnosis is the administration of specific tests to determine whether there is a significant discrepancy between the individual’s intelligence or aptitude and the individual’s academic achievement.

Having established the existence of the impairment (here, a learning disability), the individual must still demonstrate that his or her impairment substantially limits a major life activity as compared to most people in the general population.

Significant or severe restriction not required. Proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) also state “[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.” *See* 154 CONG. REC. S8840–42 (daily ed. Sept. 16, 2008) (Statement of the Managers); H.R. REP. NO. 110–730, pt. 1, at 9–10 (2008). (“While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity in order to qualify as a disability.”) In the findings and purposes of the ADA Amendments Act, Congress expressed concern that courts had required persons with disabilities seeking the protections of the ADA to demonstrate a greater degree of limitation than had been intended by Congress. Public Law 110-325, sec. 2(a)(7). In addition, Congress specifically found that the EEOC’s ADA title I regulation had expressed too high a standard for proving disability by defining the term “substantially limits” as “significantly restricted.” *See* Public Law 110-325, sec. 2(a)(7), (8).

Primary focus of ADA cases. Proposed §§ 35.108(d)(1)(iii) and 36.105(d)(1)(iii) state that “[t]he primary object of attention in cases brought under the [ADA] should be whether [public entities/covered entities] have complied with their obligations and whether discrimination has occurred, not the extent to which an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.” Congress recognized that “clearing the initial [disability] threshold is critical, as individuals who are excluded from the definition ‘never

have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they [are] ‘otherwise qualified.’” H.R. REP. NO. 110–730 pt. 2, at 7 (2008) (internal quotation marks and citation omitted). This rule of construction addresses that concern.

“Substantially limits” shall be interpreted to require a lesser degree of functional limitation than that provided prior to the ADA Amendments Act. Proposed §§ 35.108(d)(1)(iv) and 36.105(d)(1)(iv) state that “[t]he determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ‘substantially limits’ shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.” This rule of construction reflects Congress’s concern that prior to the adoption of the ADA Amendments Act, courts were using too high a standard to determine whether an impairment substantially limited a major life activity. *See* Public Law No. 110–325, sec. 2(b)(4), (5).

Scientific, medical, or statistical evidence. Proposed §§ 35.108(d)(1)(v) and 36.105(d)(1)(v) state that “[t]he comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph is intended, however, to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.”

Determination made without regard to mitigating measures. The ADA, as amended, expressly prohibits any consideration of the ameliorative effects of mitigating measures when determining whether an individual’s impairment substantially limits a major life activity, save

for the ameliorative effects of ordinary eyeglasses or contact lenses. 42 U.S.C. 12102(4)(E). Section 12102(4)(E)(i) provides an illustrative, but non-exhaustive, list of different types of mitigating measures that must be considered in determining whether an individual has a covered disability. *Id.*

Proposed §§ 35.108(d)(1)(vi) and 36.105(d)(1)(vi) track the revised statutory language prohibiting consideration of mitigating measures (with one identified exception). Proposed §§ 35.108(d)(4) and 36.105(d)(4), discussed below, set forth examples of mitigating measures.

Impairments that are episodic or in remission. Proposed §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) state that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” *See* 42 U.S.C. 12102(4)(D). For example, a person with multiple sclerosis (MS) who is substantially limited in a major life activity when her MS is active, would be considered a person with a disability even when her condition is in remission. Similarly, a person who has a seizure disorder that manifests with episodic seizures that substantially limit a major life activity would be a person with a disability even though he is not substantially limited in a major life activity when his seizure disorder is not active.

Impairment need not substantially limit more than one major life activity. Proposed §§ 35.108(d)(1)(viii) and 36.105(d)(1)(viii) state that “[a]n impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.” *See* 42 U.S.C. 12102(4)(C). This language reflects the statutory intent to reject court decisions that had required individuals to show that an impairment substantially limits more than one major life activity. *See* 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). It is also intended to clarify that the

ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA. For example, even if a person could engage in the manual activity of brushing his teeth or washing his face, he could still be a person with a disability if he were limited in the ability to perform other manual tasks.

Transitory and minor exception. The ADA, as amended, provides that the “regarded as” prong of the definition of “disability” does “not apply to impairments that are [both] transitory and minor.” 42 U.S.C. 12102(3)(B). “[T]ransitory impairment” is defined as “an impairment with an actual or expected duration of six months or less.” *See id.* As discussed below, §§ 35.108(f) and 36.105(f) incorporate this exception into the determination of disability under the “regarded as” prong. Whether an impairment is both transitory and minor is a question of fact that is dependent upon individual circumstances; however, it is likely that an uncomplicated sprained ankle with an expected recovery time of three months, for example, would be an impairment that is both transitory and minor.

The proposed rules of construction at §§ 35.108(d)(1)(ix) and 36.105(d)(1)(ix) further clarify that an impairment that lasts or is expected to last less than six months and that substantially limits a major life activity can be a disability under the first two prongs of the definition of “disability.” *See* 154 CONG. REC. H6067 (daily ed. June 25, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner) (“[T]here is no need for the transitory and minor exception under the first two prongs because it is clear from the statute and the legislative history that a person can only bring a claim if the impairment substantially limits one or more major life activities or the individual has a record of an impairment that substantially limits one or more major life activities.”)

Sections 35.108(d)(2) and 36.105(d)(2)—Predictable assessments.

Although there are no “per se” disabilities, the Department believes that the inherent nature of certain impairments will in virtually all cases give rise to a substantial limitation of a major life activity. Proposed §§ 35.108(d)(2) and 36.105(d)(2) provide examples of impairments that should easily be found to substantially limit a major life activity. *Cf. Heiko v. Columbo Savings Bank, F.S.B.*, 434 F.3d 249, 256 (4th Cir. 2006) (stating, even pre-ADA Amendments Act, that “certain impairments are by their very nature substantially limiting: the major life activity of seeing, for example, is always substantially limited by blindness”). The analysis of whether the types of impairments referenced in these sections substantially limit a major life activity does not depart from the hallmark individualized assessment required by the ADA. These sections recognize that applying the various principles and rules of construction concerning the definition of “disability,” the individualized assessment of some types of impairments will, in virtually all cases, result in the conclusion that the impairment substantially limits a major life activity, and thus the necessary individualized assessment of these types of impairments should be particularly simple and straightforward.

For example, and as provided in proposed §§ 35.108(d)(2) and 36.105(d)(2), applying the rules of construction set forth in §§ 35.108(d)(1) and 36.105(d)(1), it should easily be concluded that the following non-exhaustive examples of types of impairments will, at a minimum, substantially limit the major life activities indicated: deafness substantially limits hearing and auditory function; blindness substantially limits visual function; an intellectual disability³ substantially limits reading, learning, and problem solving; partially or completely missing limbs

³ This term is intended to replace the term “mental retardation,” which is a term that is no longer used.

or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits learning, social interaction, and communication; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy, muscular dystrophy, and multiple sclerosis substantially limit neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

Of course, the impairments listed in §§ 35.108(d)(2) and 36.105(d)(2) may substantially limit a variety of other major life activities in addition to those listed in the regulation. For example, diabetes may substantially limit major life activities such as eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting. Autism may substantially impair the major life activity of caring for oneself.

Sections 35.108(d)(3) and 36.105(d)(3)—Condition, manner, and duration.

The preambles to the Department’s original title II and title III regulations noted that a person is considered an individual with a disability for purposes of the first prong of the definition when one or more of the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. 56 FR 35694, 35699 (July 26, 1991). In the 2008 Senate Statement of the Managers, Congress reiterated what it had said at the time of the original ADA: “A person is considered an individual with a disability for purposes of the first prong of the definition when [one or more of]

the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.” 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008)) (citing S. REP. NO. 101–116, at 23 (1989)). Congress also stated the following:

We particularly believe that this test, which articulated an analysis that considered whether a person’s activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.

Id.

The Department has included this standard in proposed §§ 35.108(d)(3) and 36.105(d)(3), which provide that, taking into account the rules of construction in §§ 35.108(d)(1) and 36.105(d)(1), “in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.”

An impairment may substantially limit the “condition” or “manner” under which a major life activity can be performed in a number of different ways. For example, the condition or manner under which a major life activity can be performed may refer to how an individual performs a major life activity; e.g., the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that someone with two hands would perform the same tasks.

Condition or manner may also describe how performance of a major life activity affects the individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. Similarly, condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. In some cases, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment “causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion.” *See* H.R. REP. NO. 110–730, pt. 2, at 17 (2008). For example, the endocrine system of a person with type I diabetes does not produce sufficient insulin.

“Duration” refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, because most people can stand for more than two hours without significant pain. However, “[a] person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.” *See* 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) (citing S. REP. NO. 101–116, at 23 (1989)).

Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, §§ 35.108(d)(3)(iii) and 36.105(d)(3)(iii) include language that says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity.

For example, someone with a learning disability may achieve a high level of academic success, but may, nevertheless, be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, speak, write, or learn compared to most people in the general population. As Congress emphasized in passing the ADA Amendments Act, “[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.” 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The House Education and Labor Committee Report noted that:

In particular, some courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to “most people.” When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in *Price v. National Board of Medical Examiners*, *Gonzales v. National Board of Medical Examiners*, and *Wong v. Regents of University of California*.

The Committee believes that the comparison of individuals with specific learning disabilities to “most people” is not problematic unto itself, but requires a careful analysis of

the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act.

H.R. REP. NO. 110-730 pt. 1, at 10-11 (2008).

The proposed regulations provide that the non-ameliorative effects of mitigating measures may be considered in assessing substantial limitation and considering facts such as condition, manner, or duration. *See* §§ 35.108(d)(3)(ii) and 36.105(d)(3)(ii). Such “non-ameliorative effects” could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. Of course, in many instances, it will not be necessary to assess the negative side effects of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, someone with end-stage renal disease is substantially limited in kidney function, and thus, it is not necessary to consider the burdens that dialysis treatment imposes.

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

At the same time, individuals seeking coverage under the first or second prong of the definition of “disability” should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. *See* 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). Of course, covered entities may defeat a showing of substantial limitation by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows that an impairment does not impose a substantial limitation on a major life activity.

The Department also notes that although in general the comparison to “most people” means a comparison to most people in the general population, there are a few circumstances where it is only appropriate to make this comparison in reference to a particular population. For example, it would be inappropriate to evaluate whether a young child with a learning disability that affected her or his ability to read was substantially limited in reading compared to most people in the general population, because clinical assessments of such an impairment (e.g., dyslexia), are always performed in the context of similarly-aged children or a given academic year (e.g., sixth grade), and not in comparison to the population at large.

Sections 35.108(d)(4) and 36.105(d)(4) —Examples of mitigating measures.

Proposed §§ 35.108(d)(4) and 36.105(d)(4) provide examples of mitigating measures that must not be considered in determining whether an individual has a disability that substantially limits a major life activity. Mitigating measures include but are not limited to medication, prosthetics, assistive technology, reasonable modifications and auxiliary aids or services, and learned behavioral or adaptive neurological modifications.

Learned behavioral or adaptive neurological modifications include those strategies developed by an individual to lessen the impact of an impairment. Reasonable modifications

include informal or undocumented accommodations and modifications as well as those provided through a formal process.

Self-mitigating measures or undocumented modifications or accommodations for students with impairments that affect learning, reading, or concentrating, may include measures such as devoting a far larger portion of the day, weekends, and holidays to study than students without disabilities; teaching oneself strategies to facilitate reading connected text or mnemonics to remember facts; receiving extra time to complete tests; receiving modified homework assignments; or being permitted to take exams in a different format or in a less stressful or anxiety-provoking setting. Each of these mitigating measures, whether formal or informal, documented or undocumented, can lessen the impact of, and improve the academic function of a student having to deal with a substantial limitation in a major life activity such as concentrating, reading, speaking, learning, or writing. Nevertheless, these are only temporary supports; the individual still has a substantial limitation in a major life activity and would be a person with a disability under the ADA. *See also* discussion of §§ 35.108(d)(1) and 36.105(d)(1), above.

The ADA, as amended, specifies one exception to the rule on mitigating measures, stating that the ameliorative effects of ordinary eyeglasses and contact lenses shall be considered in determining whether a person has an impairment that substantially limits a major life activity and thereby is a person with a disability. 42 U.S.C. 12102(4)(E)(ii). Proposed §§ 35.108(d)(4)(i) and 36.105(d)(4)(i) incorporate this exception by excluding ordinary eyeglasses and contact lenses from the definition of “low-vision devices,” which are mitigating measures that may not be considered in determining whether an impairment is a substantial limitation.

Sections 35.108(e) and 36.105(e)—Has a record of such an impairment.

Section (3) of the definition of “disability” in the title II and title III regulations states the following: “The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” The NPRM proposes to keep the language of section (3) in both the title II and title III regulations (with minor editorial changes) but renumbers it as §§ 35.108(e)(1) and 36.105(e)(1).

In addition, the NPRM proposes adding a new paragraph (2), which states that “[w]hether 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 fall within this prong of the definition of disability if the individual has a history of an impairment that substantially limited one or more major life activities or was misclassified as having had such an impairment.”

The NPRM also proposes adding paragraph (3), which provides that “[a]n individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.” For example, a high school student with an impairment that previously substantially limited, but no longer substantially limits, a major life activity may need permission to miss a class or have a schedule change to permit him or her to attend follow-up or monitoring appointments from a health care provider.

Sections 35.108(f) and 36.105(f)—Is regarded as having such an impairment.”

The “regarded as having such an impairment” prong of the definition of “disability” was included in the ADA specifically to protect individuals who might not meet the first two prongs of the definition, but who were subject to adverse decisions by covered entities based upon

unfounded concerns, mistaken beliefs, fears, myths, or prejudices about persons with disabilities. See 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The rationale for the “regarded as” part of the definition of “disability” was articulated by the Supreme Court in the context of Section 504 of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In *Arline*, the Court noted that, although an individual may have an impairment that does not diminish his or her physical or mental capabilities, it could “nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.” *Id.* at 283. Thus, until the *Sutton* decision, individuals seeking the protection of the ADA under this prong only had to show that a covered entity took some action prohibited by the statute because of an actual or perceived impairment. There was no requirement that the individual demonstrate that he or she, in fact, had an impairment that substantially limited a major life activity. See 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). For example, if a day care center refused to admit a child with burn scars because of the presence of the scars, then the day care center regarded the child as an individual with a disability, regardless of whether the child’s scars substantially limited a major life activity.

In the *Sutton* decision, the Supreme Court significantly narrowed the application of this prong, holding that individuals who asserted coverage under the “regarded as having such an impairment” prong had to establish either that the covered entity mistakenly believed that the individual had a physical or mental impairment that substantially limited a major life activity, or that the covered entity mistakenly believed that “an actual, nonlimiting impairment substantially limit[ed]” a major life activity, when in fact the impairment was not so limiting. 527 U.S. at 489. Congress expressly rejected this holding in the ADA Amendments Act by adding language

clarifying that it is sufficient for an individual to establish that the covered entity regarded him or her as having an impairment, regardless of whether the individual actually has the impairment or whether the impairment constitutes a disability under the Act. 42 U.S.C. 12102(3)(A). This provision restores Congress's intent to allow individuals to establish coverage under the "regarded as" prong by showing that they were treated adversely because of an impairment without having to establish the covered entity's beliefs concerning the severity of the impairment. *See* H.R. REP. NO. 110-730, pt. 2, at 18 (2008).

Thus, under the ADA Amendments Act, it is not necessary, as it was prior to the Act and following the Supreme Court's decision in *Sutton*, for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the "regarded as" prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be "regarded as having such an impairment." In short, to be covered under the "regarded as" prong, an individual is not subject to any functional test. *See* 154 CONG. REC. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers) ("The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong."); H.R. REP. NO. 110-730, pt. 2, at 17 (2008) ("[T]he individual is not required to show that the perceived impairment limits performance of a major life activity."). The concepts of "major life activities" and "substantial limitation" simply are not relevant in evaluating whether an individual is "regarded as having such an impairment."

Proposed §§ 35.108(f)(1) and 36.105(f)(1) restore the meaning of the "regarded as" prong of the definition of "disability" by adding language that incorporates the statutory provision and

states: “An individual is ‘regarded as having such an impairment’ if the individual is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor.” The sections also incorporate the statutory definition of transitory impairment, and state that a “transitory impairment is an impairment with an actual or expected duration of six months or less.”

Proposed §§ 35.108(f)(2) and 36.105(f)(2) provide that “[a]n individual is ‘regarded as having such an impairment’ any time a [public entity/covered entity] takes a prohibited action against the individual because of an actual or perceived impairment, even if the [entity] asserts, or may or does ultimately establish, a defense to such action.”

Proposed §§ 35.108(f)(3) and 36.105(f)(3) provide that establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established under either title II or III of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of the ADA. Thus, in order to establish liability, an individual must establish coverage as a person with a disability, as well as establish that he or she has been subjected to an action prohibited by the ADA.

Sections 35.108(g) and 36.105(g)—Exclusions.

Sections 35.108(g) and 36.105(g) of the Department’s proposed definition of “disability” renumber the exclusions contained in paragraph (5) of the definition of “disability” in the title II and title III regulations.

Section 35.130(b)(7)(i)—Claims of no disability and section 36.302(g)—Modifications in policies, practices, or procedures

The ADA, as amended, states that a public entity under title II and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, “need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability” solely on the basis of being regarded as having an impairment. 42 U.S.C. 12201(h). Proposed §§ 35.130(b)(7)(i) and 36.302(g) reflect this concept and provide that a public entity/covered entity “is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the ‘regarded as’ prong of the definition of disability,” found in § 35.108(a)(1)(iii) and § 36.105(a)(1)(iii). Thus, proposed §§ 35.130(b)(7)(i) and 36.302(g) make it clear that the duty to provide reasonable modifications arises only when the individual establishes coverage under the first or second prong of the definition of “disability.” These sections are not intended to diminish the existing obligations to provide reasonable modifications under title II and title III of the ADA.

The Department notes that the ADA Amendments Act revised the rules of construction in title V of the ADA by including a provision affirming that nothing in the Act changed the ADA requirement that covered entities provide reasonable modifications in policies, practices, or procedures, unless the entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of goods, services, facilities, privileges, advantages, or accommodations involved. *See* 42 U.S.C. 12201(f). Congress noted that the reference to “academic requirements in postsecondary education” was included “solely to provide assurances that the bill does not alter current law with regard to the obligations of academic institutions under the ADA, which we believe is already demonstrated in case law on this topic.

Specifically, the reference to academic standards in post-secondary education is unrelated to the purpose of this legislation and should be given no meaning in interpreting the definition of disability.” 154 CONG. REC. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers).

Given that Congress did not intend there to be any change to the law in this area, the Department has made no changes to its regulatory requirements in response to this provision of the ADA Amendments Act.

Sections 35.130(i) and 36.201(c)—Claims of no disability.

The NPRM proposes adding §§ 35.130(i) and 36.201(c) to the title II and title III regulations, respectively, to reflect the language of the ADA, as amended, which states that “[n]othing 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.” 42 U.S.C. 12201(g). This provision, and the proposed rules incorporating its language, clarify that persons without disabilities do not have an actionable claim under the ADA on the basis of not having a disability.

Regulatory Process Matters

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

This NPRM has been drafted in accordance with Executive Order 13563, 76 FR 3821 (Jan. 18, 2011), Improving Regulation and Regulatory Review, and Executive Order 12866, 58 FR 51735 (Sept. 30, 1993), Regulatory Planning and Review. Executive Order 13563 directs agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order

13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Department has determined that this proposed rule is a “significant regulatory action” as defined by Executive Order 12866, section 3(f). The Department has determined, however, that this proposed rule is not an economically significant regulatory action, as it will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This NPRM has been reviewed by the Office of Management and Budget (OMB) pursuant to Executive Orders 12866 and 13563.

1. Necessity for this rulemaking.

This rule is necessary to incorporate into the Department’s current regulations the ADA Amendments Act of 2008, which became effective on January 1, 2009. The proposed regulations are intended to promote consistency of judicial interpretations and predictability of executive enforcement of the ADA, as now amended by Congress.

2. Relationship to EEOC’s ADA regulation under Title I.

The ADA Amendments Act’s changes to the ADA apply to title I of the ADA, which is enforced by the Equal Employment Opportunity Commission (EEOC), and titles II and III of the

ADA, which are enforced by the Department.⁴ In keeping with the mandates of Executive Order 13563, and in order to promote consistency in the interpretation of the ADA Amendments Act, the Department and the EEOC held four joint public hearings prior to the publication of the EEOC's final title I ADA Amendments Act rule. *See* 76 FR 16978. In addition, the Department is proposing to revise its ADA title II and title III regulations in such a manner that, wherever possible, the regulatory language is the same as the language adopted by the EEOC in its final rule. This consistency will also ensure greater certainty for the public and businesses subject to the ADA.

As discussed earlier, Congress enacted the ADA Amendments Act in response to a growing number of ADA title I employment discrimination cases in which, contrary to the intent of Congress, persons with disabilities were unable to establish that they had disabilities as defined under the ADA. The EEOC's Regulatory Impact Analysis (RIA) published with its final title I rule discussed the effect of the ADA Amendments Act in terms of benefits to individuals with disabilities and costs to covered entities subject to title I. The EEOC RIA identifies a broad range of individuals with disabilities who, prior to the passage of the ADA Amendments Act, could not establish coverage under the ADA's definition of "disability" and, thus, were not entitled to reasonable accommodations in the workplace. The EEOC RIA focuses on the cost of the additional accommodations that could be required because the ADA Amendments Act results in a larger group of individuals who have disabilities under the ADA. The EEOC RIA concluded that, with respect to the revisions to the title I ADA regulation, the qualitative and

⁴ The title II regulation also designates eight federal agencies to investigate complaints with respect to the programs, services, and activities for certain public entities. *See* 28 CFR Subparts F, G.

quantitative benefits of the rule justified the estimated annual costs of \$60 million to \$183 million. 76 FR 16978, 16998 (March 25, 2011).

In contrast to the effects of the ADA Amendments Act on entities subject to title I, the Department believes that the statutory changes that the proposed title II and title III regulations incorporate will impact individuals and covered entities differently and will result in significantly less cost than \$100 million in any given year. The Department has concluded this for several reasons. First, although the ADA Amendments Act was expected to have an impact on a broad range of individuals with disabilities who were seeking reasonable accommodations in employment under title I, its impact on individuals challenging discrimination under titles II or III was expected to be substantially less. The legislative history only identifies individuals with learning disabilities who require testing accommodations from higher education institutions and testing entities as likely to be affected by the Act. *See* H.R. REP. NO. 110-730 pt. 1, at 10-11 (2008). Congress was concerned about the number of individuals with learning disabilities who were denied testing accommodations (usually extra time) because covered entities claimed that those individuals did not have disabilities covered by the ADA. *Id.*

Second, the case law and the Department's enforcement experience in the years since the Supreme Court's decision in *Sutton* suggest that determining whether a plaintiff was an individual with a disability under the ADA's definition of "disability" was rarely a central issue in title II and title III cases, except with respect to testing accommodations. In addition, the Department's research has not identified any entities outside of higher education and testing entities that purport to be affected by the changes to titles II and III of the ADA made by the ADA Amendments Act.

Third, although the ADA Amendments Act has been in effect for nearly four years, the Department's research has not identified information or data in the literature or on trade association websites suggesting that higher education institutions and testing entities have in fact borne significant additional costs attributable to the implementation of the statutory requirements of the ADA Amendments Act.

Fourth, the Department does not believe that there are significant additional costs for providing extended time for testing for students in kindergarten through grade 12 as the result of the ADA Amendments Act. The vast majority of these students are already receiving a range of classroom program modifications, including extended time for testing, pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400, *et seq.* To the extent that there are non-IDEA students in kindergarten through grade 12 who will receive additional classroom modifications (e.g., extended time for testing) as a result of the Department's implementing the ADA Amendments Act by amending its title II regulations, the Department believes that schools will not incur significant additional costs because the extra time will be supervised by the student's teachers or other existing school personnel. The Department is interested in any data that school districts can provide with respect to costs they will incur related to the ADA Amendments Act.

Finally, the Department's preliminary assessment of the costs associated with the anticipated increase in the number of testing accommodation requests that would be granted in testing and licensing situations as a result of the revised ADA definition of "disability" clearly supports the Department's view that the proposed changes will cost significantly less than \$100 million in any given year.

3. *Cost assessment.*

Robust data are not readily available on the actual numbers of persons who would be covered by the ADA due to the clarifications from the ADA Amendments Act, and the actual *additional* costs of accommodations. Nevertheless, some general cost estimates can be made using existing data and assumptions. The Department estimates that the total cost of the revisions required by the ADA Amendments Act and the proposed regulations will range between \$36.2 and \$61.8 million in the first year (the year with the highest costs) for providing testing accommodations to students with learning disabilities and students with Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder (collectively, “ADD”), who would request and receive testing accommodations and would not have received accommodations but for implementation of the ADA Amendments Act and the proposed regulations.

Research has found that, prior to the enactment of the ADA Amendments Act, a little more than half—51 percent—of students with learning disabilities or ADD were receiving testing accommodations in post-secondary schools or on national examinations.⁵ To account for uncertainty regarding the remaining students who were not receiving accommodations but would be eligible to receive them now because of the ADA Amendments Act and the proposed regulations, we estimate the incremental effect of the revisions using a low (50 percent), medium (70 percent), and high (90 percent) range. The Department’s research indicates that in the vast majority of cases, the accommodation requested by students with learning disabilities or ADD involves extra test-taking time. The estimate of costs of additional testing accommodations needed as a result of the ADA Amendments Act and the proposed regulations is developed from

⁵ “National examinations” refers to those examinations administered by a private entity related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes. *Cf.* 28 C.F.R. 36.309(a).

current data on the number of post-secondary students (undergraduate and graduate), the portion of students with learning disabilities, the portion of students with ADD, the number of students participating in online learning, the average hourly wage of teaching assistants and test proctors, and reasonable estimates of average test time, average course load, and average number of tests per course.⁶

Summary of Total Estimated Costs In First Year (\$millions)			
Testing in Classes/Courses of Study in Post-Secondary Institutions	LOW	MED	HIGH
ANNUAL Total Cost for Coursework Tests and Examinations	\$30.5	\$42.7	\$54.9
ONE TIME Cost for Additional Training at Institutions	\$3.5	\$3.5	\$3.5
National Examination Testing			
ANNUAL Total Cost for National Examinations	\$1.5	\$2.1	\$2.7
ONE TIME Cost for Additional Training at Institutions	\$0.7	\$0.7	\$0.7

⁶ Our data was derived from several sources. In addition to some basic internet resources, we relied on the following: (1) U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-33, HIGHER EDUCATION AND DISABILITY - EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS (2009); (2) U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 12-40, HIGHER EDUCATION AND DISABILITY - IMPROVED FEDERAL ENFORCEMENT NEEDED TO BETTER PROTECT STUDENTS' RIGHTS TO TESTING ACCOMMODATIONS (2011); (3) data from the U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library*, Table 77, available at <http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8530>; (4) Lindsey Jasinski and John Ranssen, *Malingered ADHD Evaluations: A Further Complication for Accommodation Reviews*, THE BAR EXAMINER, December 2011; (5) U.S. Department of Education, THE CONDITION OF EDUCATION 160 (2003), available at <http://nces.ed.gov/pubs2003/2003067.pdf>; (6) Melana Zyla Vickers, Pope Center for Higher Education Policy, *Accommodating College Students with Learning Disabilities: ADD, ADHD, and Dyslexia* (March 2010), available at <http://www.popecenter.org/acrobat/Vickers-mar2010.pdf>; (7) Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Teacher Assistants, available at <http://www.bls.gov/ooh/education-training-and-library/teacher-assistants.htm>; (8) data from the U.S. Census Bureau, *American FactFinder*, Table ECO761A1, available at http://factfinder2.census.gov/faces/tables/services/jsf/pages/productview.xhtml?pid=ECN_2007_US_61A1&prodType = ;.

TOTAL	\$36.2	\$49.0	\$61.8
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a. *Post-secondary institutions.*

The National Center for Education Statistics (NCES) reports that, as of 2010, there were an estimated 17.8 million post-secondary students,⁷ including both undergraduate and graduate students. This figure represents full-time student equivalents. The NCES also reports that approximately 3.7 percent of those 17.8 million students are enrolled in online learning and that approximately 20.4 percent of students were taking online learning course(s).⁸ The 3.7 percent is an estimate of the percent of all post-secondary students who are taking all their courses online. We removed these students from our cost estimate because if their entire program is online, the Department believes it is unlikely they will have timed tests at a physical location. We did not remove from our cost estimate the students who are taking only some online courses. Instead, we treat these students the same for purposes of our analysis as we treat students taking all courses in physical classrooms, which likely overestimates the number of courses with timed tests at a physical location that we use in our estimate. The Department requests public comment on whether our assumption is correct that those in a post-secondary program where all classes are taken online do not take their tests in a physical location. We also request any information the public might have regarding whether online-only post-secondary programs will incur any

⁷ U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library*, Table 77, available at <http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8530>.

⁸ U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library*, Table 4, available at <http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8155>.

costs that we have not accounted for as a result of incorporating the ADA Amendments Act’s revised definition of “disability.”

In 2008, approximately 10.8 percent of post-secondary students reported having a disability.⁹ Out of those 10.8 percent of students with a disability, 8.9 percent of those students reported having a “specific learning disability” and 19.1 percent reported having ADD.¹⁰ Thus, out of the 10.8 percent of students with a disability, 28 percent of those students have a specific learning disability or ADD. Some research suggests that this percentage may overestimate the proportion of students who self-identify as having ADD and actually require accommodations due to a disability.¹¹ To account for the possible overestimate, the Department reduced its estimate of the percentage of students with ADD (as a primary disability) by 30 percent, from 19.1 to 13.37 percent of students with a disability. Therefore, the Department estimates that out of the 10.8 percent of students with a disability, 22.3 percent of those students have a specific learning disability or ADD.

Research suggests that prior to the enactment of the ADA Amendments Act, 51 percent of college students with a learning disability or ADD were already receiving accommodations.¹² To calculate the incremental costs of this proposed rule, the percentage of remaining students

⁹ GAO 10-33, HIGHER EDUCATION AND DISABILITY - EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS 37 (2009).

¹⁰ *Id.* at 38.

¹¹ Researchers have estimated that nearly 25%-50% of students self-identifying as ADD may not necessarily meet the clinical definition of the disorder and thus would still not qualify for an accommodation under the revised definition of disability. Jasinski and Ranseen, *Malingered ADHD Evaluations: A Further Complication for Accommodation Reviews*, THE BAR EXAMINER, December 2011, at 10.

¹² U.S. Department of Education, THE CONDITION OF EDUCATION 160 (2003), available at <http://nces.ed.gov/pubs2003/2003067.pdf>; see also Vickers, Pope Center for Higher Education Policy, *Accommodating College Students with Learning Disabilities: ADD, ADHD, and Dyslexia* 6 (March 2010), available at <http://www.popecenter.org/acrobat/Vickers-mar2010.pdf>.

with a learning disability or ADD (49 percent) who had not sought or received accommodations and who would now both seek and receive them was used as a baseline.

Based on the 49 percent baseline, the Department used a range to estimate the incremental change in the percentage of students with learning disabilities and ADD who would now request and receive accommodations involving extra test-taking time after the enactment of the ADA Amendments Act and the proposed regulations. These calculations proceeded with a low, medium, and high possible value for this unknown portion of students: 50.0 percent, 70.0 percent and 90.0 percent, respectively. The Department used a range because not all postsecondary students with learning disabilities or ADD who are eligible to receive testing accommodations actually request them. Some students may not want to identify themselves as having a disability or needing an accommodation. Other students may not have documentation of their disability at the time they request the accommodation, and they cannot afford to obtain the specific documentation requested by the testing entity. In addition, other students may have a disability, but not need that particular accommodation. Finally, despite the changes made by the ADA Amendments Act, not all students in the affected population are necessarily eligible to receive testing accommodations. The Department is interested in comment on whether the ranges it is using are appropriate or whether it has overestimated the number of additional students who will now request testing accommodations.

We thus estimate that between 101,227 and 182,209 more post-secondary students will request and receive testing accommodations as a result of the revisions to the definition of “disability.” That figure was calculated by multiplying 17.8 million post-secondary students by the percentage of students with disabilities (10.8 percent), multiplied by the percentage of students with disabilities who have a learning disability and 70 percent of students with ADD

(22.3 percent), reduced by the 51 percent already receiving accommodations and the 3.7 percent of students taking courses fully online, and adjusting for the fact that either 50 percent, 70 percent, or 90 percent of those impacted students would actually request testing accommodations.

Our research indicated that 59 percent of testing accommodation requests were for 50 percent additional time and another 15 percent were for more than 50 percent additional time.¹³ We thus conservatively assumed an average of 75 percent more time would accurately estimate the additional testing accommodation time requested for examinations in post-secondary institutions.¹⁴ A brief review of the academic schedules for post-secondary schools found that most undergraduate courses meet twice a week for an hour and fifteen minutes or an hour and a half. Based on this information, we assumed that the average test time would be the length of the average class session—1.5 hours. Thus, we estimate 1.13 additional hours per test for each accommodation request—1.5 hours (average test time) multiplied by 75 percent (average additional testing time requested).

Little to no data were found on the average number of exams/tests taken per post-secondary student. In this estimation, we assumed that the average full-time equivalent student takes a full-time load of eight classes per year, with an average of 3 tests/quizzes per class (which includes some classes with no exams and some classes with several). Thus, we estimated that students will take approximately 24 exams/tests per year, on average, calculated as follows: 8 classes per

¹³ GAO 12-40, HIGHER EDUCATION AND DISABILITY - IMPROVED FEDERAL ENFORCEMENT NEEDED TO BETTER PROTECT STUDENTS' RIGHTS TO TESTING ACCOMMODATIONS 8 (2011)

¹⁴ If 59% of takers requested 50% more time, and 15% of test takers requested 100% more time (double the time of other test takers), the average amount of time requested, on a per test taker basis, would be 60% more time. Thus, we believe that an estimate of 75% more time, on average, more than covers the likely net additional time requested.

year multiplied by 3 tests per class. Multiplying 24 exams/tests per student per year by the average (estimated above) of 1.13 additional hours per testing accommodation request, yields an estimate of 27 additional hours of test taking and proctor time needed per student per year, on average. The Department seeks public comment on the reasonableness of these assumptions.

Multiplying the estimated number of students who as a result of the revisions to the definition of “disability” would now request and be granted testing accommodations (between 101,227 and 182,209), by the average additional time for testing accommodations per student per year (27 hours), by the average hourly wage of teaching assistants (\$11.16¹⁵) yields an annual cost of testing accommodations in the post-secondary education setting ranging between a low of \$30.5 million and a high of \$54.9 million.

Our methodology likely overestimates the actual costs for a variety of reasons. For example, because there will sometimes be more than one student needing additional testing time during the administration of a given test, only one proctor would likely be needed per class. Because of the inherent difficulties in accurately estimating when this will occur, we have calculated the costs to account for additional proctor time for each individual student, regardless of whether more than one student needing additional time would be taking the same test.

The Department believes institutions will experience some one-time costs due to the institution’s disability services center (or its equivalent) needing to update its policies and procedures to bring them in line with the changes made by the ADA Amendments Act and explaining those changes to the employees responsible for evaluating testing accommodation

¹⁵ The \$11.16 per hour was estimated from the median annual wage for teaching assistants of \$23,220. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Teacher Assistants, available at <http://www.bls.gov/ooh/education-training-and-library/teacher-assistants.htm>. We distributed the annual wage over 52 weeks (40 hours) to translate it into an hourly comparable.

requests. We estimate that one-time costs to adapt training and procedures will total \$3.5 million, which is the result of multiplying the number of institutions affected (7,021¹⁶), by \$500 (assumed not to be higher than the cost of 5 hours of management time, valued at \$100 an hour). We were not able to find estimates for the incremental costs resulting from training employees within post-secondary institutions who are responsible for assessing accommodation requests. We therefore used an estimate of 5 hours at \$100 per hour to calculate a very high-level estimate of this cost, and are seeking public comment on these assumptions.

b. *National examinations.*

Using the same data as noted above, the calculation of the estimate of additional requests for testing accommodations in national examinations was made as follows: 9,287,619 total annual test takers of national exams,¹⁷ multiplied by the percentage of post-secondary students with disabilities (10.8 percent¹⁸), multiplied by the percentage of students with disabilities who

¹⁶ U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library*, Table 2, available at <http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8460>.

¹⁷ The figure of 9.2 million test takers is a summation from the following sources: *2011 Statistics*, THE BAR EXAMINER, March 2012, available at http://www.ncbex.org/assets/media_files/Statistics/2011Statistics.pdf; National Council of Architectural Registration Boards, *ARE Pass Rates by Division*, available at <http://www.ncarb.org/ARE/ARE-Pass-Rates/DivisionPR.aspx>; Teresa R. Metinko & Dahli Gray, *Decrease in the Number of People Taking the CPA Exam Not Due to the 150-Hour Requirement*, AMERICAN JOURNAL OF BUSINESS EDUCATION, Nov. 2010, available at <http://journals.cluteonline.com/index.php/AJBE/article/view/437>; National Association of Boards of Pharmacy, *NAPLEX Passing Rates for First-Time Candidates per Pharmacy School from 2007 to 2011*, available at <http://www.nabp.net/programs/assets/NAPLEX%20passing%20rates.pdf>; National Society of Professional Engineers, *The 80% Myth in the Engineering Profession* (Sept. 13, 2010), available at <http://community.nspe.org/blogs/licensing/archive/2010/09/13/the-80-myth-in-the-engineering-profession.aspx>; American Speech-Language-Hearing Association, Surveys and Information Unit, *National Summary Report: Descriptive Statistics of PRAXIS Examination Scores for the Speech-Language Pathology Specialty Test for Test Administration Years 2000-2001 through 2010-2011*, available at <http://www.asha.org/uploadedFiles/PraxisScoresSLP.pdf>; National Council of State Boards of Nursing, *Number of Candidates Taking NCLEX Examination and Percent Passing* (2011), available at https://www.ncsbn.org/Table_of_Pass_Rates_2011.pdf.

¹⁸ GAO 10-33, HIGHER EDUCATION AND DISABILITY - EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS 37 (2009).

have learning disabilities and 70 percent of students with ADD (22.3 percent¹⁹), reduced by the 51 percent likely already receiving accommodations yields approximately 109,457 students previously not receiving testing accommodations who now could. As calculated above, a low, medium, and high range was used (50 percent, 70 percent, 90 percent) to represent the likely percentage of these additional students who, as a result of the ADA Amendments Act and proposed regulations, would actually ask for and now receive a testing accommodation. This calculation leads to an estimate of between 54,729 to 98,512 additional requests that would be granted for testing accommodations during national examinations as a result of the revisions to the definition of “disability.” The Department has not found data detailing the distribution of persons with disabilities who take national exams, and therefore has used the data on post-secondary students with disabilities as a proxy for the assumption that the populations are similar (both are adults seeking additional education and degrees/certification). The Department is interested in any comments on the appropriateness of using this data and any alternative sources of information that can be used.

Our research noted that 59 percent of testing accommodation requests are for 50 percent additional time and another 15 percent are for more than 50 percent additional time.²⁰ We thus assumed an average of 75 percent more time would accurately estimate the additional testing

¹⁹ Calculated from data in Table 7 of GAO 10-33, HIGHER EDUCATION AND DISABILITY - EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS 38 (2009).

²⁰ GAO 12-40, HIGHER EDUCATION AND DISABILITY - IMPROVED FEDERAL ENFORCEMENT NEEDED TO BETTER PROTECT STUDENTS' RIGHTS TO TESTING ACCOMMODATIONS 8 (2011)

accommodation time requested for national examinations.²¹ Data from licensing administrators and the Department's independent research suggest that these national examinations last anywhere from two to eight hours. Averaging these test lengths, weighted by the number of takers for each test, results in a weighted average test length of 3.54 hours.²² The estimate of additional testing accommodation requests was multiplied by the average test length of 3.54 hours, and multiplied by 75 percent (average additional testing time needed), and in turn multiplied by \$10.38,²³ resulting in a range of annual costs between a low of \$1.5 million and a high of \$2.7 million.

Because our estimation of national exams and licensing tests is based on those which we could actively identify, it underestimates the likely number of actual test takers.²⁴ We ask the public to provide any information that would help us refine our estimates on the number of national examination test takers.

Although our analysis likely underestimates the number of test takers for national exams and licensing tests, we likely overestimate the actual costs per test taker for the specific national examinations included in the analysis. As stated above, only one proctor would likely be needed

²¹ If 59% of takers requested 50% more time, and 15% of test takers requested 100% more time (double the time of other test takers), the average amount of time requested, on a per test taker basis, would be 60% more time. Thus, we believe that an estimate of 75% more time, on average, more than covers the likely net additional time requested.

²² Because test length was not found for all types of national tests, this estimate of length may over- or underestimate the actual time.

²³ This dollar figure represents the average hourly wage for test proctors based on internet searches conducted in June 2013 from the following Web sites: Utah State University job websites; data from Jobs.gov; College of Southern Idaho; job web sites from Miami Dade College; Weber University; Davenport University; California State University; Delaware County Community College.

²⁴ We conducted sensitivity tests estimating what the incremental number of impacted test takers would be if the total number of persons sitting for all national examinations is actually 50% or 100% higher than the number we identified. The resulting ranges in annual costs increased to between \$2.3 and \$4.1 million (50% higher number of persons sitting for national exams) and between \$3.0 and \$5.4 million (double the number of persons sitting for national exams).

at one location, even though in some instances more than one student may be receiving additional time. With respect to national examinations, we know many persons with learning disabilities or ADD were already requesting and receiving extra time as a testing accommodation. Thus, the companies that administer national examinations already employ and pay for additional testing proctors to proctor the examinations of those receiving additional time. The increase in the number of test-takers who would now request and be granted additional test-taking time will likely be placed in the same room or location where the proctors were already monitoring students receiving additional time prior to the ADA Amendments Act. Yet, we have calculated the costs to account for additional proctor time for each individual test taker, regardless of whether an additional proctor is needed because one is already provided to students previously requesting and receiving additional time.

One-time costs to adapt training and procedures were estimated to total \$698,500, which is the result of multiplying the number of testing entities affected (1,397²⁵), by \$500 (assumed not to be higher than the cost of 5 hours management time, valued at \$100 an hour).²⁶ Again, because the Department was unable to find any data on the costs associated with training, we invite public comment on the accuracy of our assumptions.

4. *Benefits.*

²⁵ Census Bureau data for educational test development and evaluation services was used as a proxy. See U.S. Census Bureau, *American Factfinder*, Table ECO761A1, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_61A1&prodType=table

²⁶ The Department believes that this one-time cost per testing entity reflects the costs for the testing entity to update its policies and procedures for evaluating testing accommodation requests to bring them in line with the changes made by the ADA Amendments Act and explaining those changes to the employees responsible for evaluating testing accommodation requests.

Congress enacted the ADA Amendments Act to ensure that persons with disabilities who were refused access to programs and services would again be able to rely on the protections of the ADA. As a result, the Department believes that the enactment of the law benefits millions of Americans and the benefits to these individuals are nonquantifiable but nonetheless significant. The Department determined, however, that there was a specific group of individuals with disabilities who would be able to receive quantifiable benefits. With enactment of the ADA Amendments Act, certain post-secondary students and national examination test takers (e.g., Certified Public Accountant Examination, Law School Admission Test, and other professional examinations) with ADD or learning disabilities are now able to receive additional time to complete tests, whereas before the Act some of these students may have had their requests for additional time denied by testing entities because such entities believed the disability in question did not meet the ADA's definition of "disability."

In the first year, our analysis estimates that approximately 142,000 students will take advantage of additional testing accommodations that otherwise would not have occurred but for this rule. Over ten years, approximately 1.6 million full-time equivalent enrollees would benefit, or, assuming an average 4-year course of study, more than 400,000 individual students. An additional 800,000 national examination test takers would benefit over that same 10 years (assuming that people take an exam one time only). The Department is interested in comment on whether it is underestimating or overestimating the number of people who will benefit from this rule.

A number of these individuals could be expected to earn a degree or license that they otherwise would not have earned. We were unable to find robust data to estimate the number of students with learning disabilities or ADD who would receive a post-secondary degree or

professional license due to the ADA Amendments Act, but note that extensive research has shown notably higher earnings for those with college degrees over those who do not have one. Estimates of lifetime earnings differential vary, with some studies estimating an earning differential ranging from approximately \$300,000 to \$1 million.²⁷ In addition, some number of students may be able to earn a degree in a higher paying field than otherwise and yet other students would still get the same degree, but be able to finish faster or more successfully (i.e., higher grades) than otherwise would be the case. All of these students would be expected to earn greater lifetime income and be more productive than they otherwise would if the ADA Amendments Act was not enacted into law.

In addition to these benefits, the ADA Amendments Act has significant non-quantifiable benefits to individuals with disabilities who, prior to the passage of the ADA Amendments Act, were denied the opportunity for equal access to an education or to become licensed in their chosen profession because of their inability to receive needed testing accommodations. As with all other improvements in access for individuals with disabilities, the ADA Amendments Act is expected to generate psychological benefits for covered individuals, including an increased sense of personal dignity and self-worth, as more individuals with disabilities are able to successfully complete tests and exams and more accurately demonstrate their academic skills and abilities.

²⁷ See Mark Schneider, *How Much Is That Bachelor's Degree Really Worth? The Million Dollar Misunderstanding*, AEI Online, May 2009, available at <http://www.aei.org/article/education/higher-education/how-much-is-that-bachelors-degree-really-worth/>; U.S. Census Bureau, *Work-Life earnings by Field of Degree and Occupation for People with a Bachelor's Degree: 2011*, Oct. 2012, available at <http://www.census.gov/prod/2012pubs/acsbr11-04.pdf>; Anthony P. Carnevale, et. al, *The College Payoff—Education, Occupations Lifetime Earnings*, The Georgetown University Center on Education and the Workforce 2011, available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2011/collegipayoff.pdf>.

Some individuals will now be more likely to pursue a favored career path or educational pursuit, which will in turn lead to greater personal satisfaction.

There are additional benefits to society that arise from improved testing accessibility. For instance, if some persons with disabilities are able to increase their earnings, they may need less public support—either direct financial support or other programs or services. This, in turn, would lead to resource savings from reduced social service agency outlays. Others, such as family members, may also benefit from less financial and psychological pressure due to the greater independence and earnings of the family member whose disability is now covered by the ADA under the revised definition of “disability.”

The Department believes (as did Congress when it enacted the ADA) that there is inherent value for all Americans which results from greater accessibility. Economists use the term “existence value” to refer to the benefit that individuals get from the plain existence of a good, service, or resource—in this case, the increased accessibility to post-secondary degrees and specialized licenses that would arise from greater access to testing accommodations or the increased accessibility to covered entities’ facilities, programs, services, or activities as a result of the ADA Amendments Act. This can also be described as the value that people both with and without disabilities derive from the guarantees of equal protection and non-discrimination. In other words, people value living in a country that affords protections to persons with disabilities, whether or not they themselves are directly or indirectly affected. There can be numerous reasons why individuals might value accessibility even if they do not require it now and do not ever anticipate needing it in the future. These include: bequest motives, benevolence toward relatives or friends who require accessibility features, and general feelings of empathy and responsibility toward individuals with disabilities. In other words, people in society value

equity, fairness, and human dignity; even if they cannot put a dollar value on how important it is to them. These are the exact values agencies are directed to consider in E.O. 13563.

c. Questions.

In addition to the discrete questions set out above, the Department invites the public to provide information to assist the Department in improving its estimates of the costs and benefits of implementing the ADA Amendments Act (other than with respect to employment). The Department is interested in information regarding the additional actual costs incurred in providing testing accommodations since the ADA Amendments Act took effect and the actual incremental increase in testing accommodations granted since the ADA Amendments Act took effect. Finally, the Department is interested in information to ensure that its estimates of benefits and costs are comprehensive. For example, are other covered entities, besides post-secondary institutions and national examination centers incurring any costs in order to implement the Act's changes to titles II and III of the ADA? If so, who and how so? In addition to testing accommodations, are there any other specific benefits that people with disabilities have accrued (other than in employment) as a result of the ADA Amendments Act?

B. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation, and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. First, the ADA Amendments Act took effect on January 1, 2009, and all covered entities have been required to comply with the Act since that date and thus, should be familiar with the requirements of the law. Second, the rule does not include reporting requirements and imposes no new recordkeeping requirements.

Third, as shown above, the only title II and title III entities that would be significantly affected by the proposed changes to the ADA regulations are testing entities and institutions of higher education. The type of accommodations that most likely will be requested and required by those whose coverage has been clarified under titles II and III of ADA Amendments Act will be additional time in testing situations. While many of these testing or higher education entities are small businesses or small governmental entities, the costs associated with additional testing time are minimal; therefore, the Department believes the economic impact of the proposed regulation will be neither significant for these small entities nor disproportionate relative to the costs for larger entities.

The Department estimates that approximately 7,021 post-secondary institutions could be impacted based on data from the U.S. Department of Education, Institute of Education Sciences, and the National Center for Education Statistics.²⁸ The Department used data from the U.S. Census Bureau (Statistics of U.S. Businesses) from 2007 for Junior Colleges (NAICS²⁹ 6112) and Colleges, Universities, and Professional Schools (NAICS 6113) that was analyzed by U.S. Small Business Administration, Office of Advocacy³⁰ to estimate the proportion of those entities that would meet the SBA's criteria for small business or entity. As shown in Table 2, small post-secondary entities are estimated to account for approximately 42.1 percent of all post-secondary establishments. Therefore, the Department estimates that 2,954 small post-secondary establishments would be impacted.

²⁸ U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library*, Table 2, available at <http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8460>.

²⁹ NAICS refers to the North American Industry Classification System.

³⁰ U.S. Small Business Administration, *Firm Size Data*, available at <http://www.sba.gov/advocacy/849/12162>.

The overall rule's cost estimates for post-secondary institutions were calculated based on the number of entities and number of post-secondary students affected. Because larger entities have more students, on average, than smaller ones, the Department used the proportion of the industry sub-group's receipts for small and large entities as a proxy for the number of students. This method assumes that per student costs are roughly the same for institutions of differing sizes; the Department does not have robust data for adjusting the estimation. Thus, using receipts for Junior Colleges (NAICS 6112) and Colleges, Universities, and Professional Schools (NAICS 6113) as a proxy for number of students, small post-secondary institutions are estimated to bear 4.8 percent of the costs for that industry sub-group, or approximately \$2.2 million of the \$46 million first year costs (*see* Table 2 in the Initial Regulatory Assessment for the NPRM) for post-secondary institutions, which would average to a little over \$750 per small entity establishment in the first year, for the approximately 2,954 small entity post-secondary establishments. Approximately 4,067 post-secondary establishments (57.9 percent of the 7,021) would be medium or large entities, and they would incur \$43.9 million in costs during the first year, which would average out to approximately \$10,796 per medium/large post-secondary establishment during the first year. This \$10,796 per medium/large post-secondary establishment during the first year is approximately 14.3 times higher than the cost that would be incurred by small post-secondary establishments during that same time.

Table 1: Firm and Receipts data for Post-Secondary Institutions in 2007

Firm and Receipts data for Post-Secondary Institutions, all Firms and Small Entities 2007									
	Junior Colleges (NAICS 6112)			Colleges, Universities, and Professional Schools (NAICS 6113)			Sum of Junior Colleges (6112) and Colleges, Universities, and Professional Schools (6113)		
	Firms	Establish- ments	Est. receipts (\$000,000)	Firms	Establish- ments	Est. receipts (\$000,000)	Firms	Establish- ments	Est. receipts (\$000,000)
Total (all firms/ entities)	468	862	6,982	2,456	4,022	165,761	2,924	4,884	172,743
SBA size standards for small entities	<i>SBA small business standard is \$19.0 million; small business totals here include those with receipts under \$20 million*</i>			<i>SBA small business standard is \$25.5 million; small business totals here include those with receipts under \$25 million*</i>					
Total small entities	372	432	1,711	1,566	1,623	6,653	1,938	2,055	8,364
Percent small entities	79.5%	50.1%	24.5%	63.8%	40.4%	4.0%	66.3%	42.1%	4.8%

* Data reported in size categories which do not exactly match industry small business classifications: i.e. from \$10 million to \$14.99 million, and from \$15 million to \$19.99 million; and from \$20 million to \$24.99 million, and from \$25 million to \$29.99 million.

Source: Calculated from data from U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. See U.S. Small Business Administration, *Firm Size Data*, available at <http://www.sba.gov/advocacy/849/12162>.

Table 2: Estimated Small Entity Establishments for Post-Secondary Institutions in 2010-11

Estimated Small Entity Establishments for Post-Secondary Institutions In 2010–11	
Total Post-Secondary Establishments (all firms/entities) Academic year 2010–2011*	7,021
Percent small entities (2007)**	42.1%
Total impacted small entity establishments***	2,954

*Source: U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library*, Table 2, available at <http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8460>

**Percent of small establishments calculated for the sum of Junior Colleges (NAICS 6112) and Colleges, Universities, and Professional Schools (NAICS 6113). Source Calculated from data from U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. See U.S. Small Business Administration, *Firm Size Data*, available at <http://www.sba.gov/advocacy/849/12162>.

***Estimated using percent of small establishments for sectors 6112 and 6113.

In addition to post-secondary institutions, the Department estimates that some national testing entities would also be impacted. Data specifically on national testing organizations, including size break-out by receipts, was not found, so the Department applied ratios calculated for the larger industry group of Educational Support Services (NAICS 611710) data to estimate the number of Educational Test Development and Evaluation Services (NAICS 6117102).³¹ Approximately 1,397 national testing organizations would be impacted by this rule, irrespective of size. If the ratio of small to large Educational Test Development and Evaluation Services entities (NAICS 6117102) is the same as that for the larger industry group of Educational Support Services, 89.5 percent in 2007, then approximately 1,250 of 1,397 establishments would be small entity establishments.

Table 3: Education Support and Test Development Services Establishment and Receipts

	Educational Support Services (NAICS 611710)		Educational test development and evaluation services (NAICS 6117102)		
	Establishments	Est. receipts (\$000,000)		Establishments	Est. receipts (\$000,000)
Total (all firms)	6,781	10,672	<i>Census Bureau value</i>	1,397	2,907
SBA for small entities	<i>SBA small business standard is \$14.0 million for all Educational Support Services; small business totals here include those with receipts under \$15 million*</i>				
Total small entities	6,067	4,062	<i>estimated</i>	1,250	1,106
Percent small entities	89.5%	38.1%	<i>Educational Support Services as proxy</i>	89.5%	38.1%

*Data reported in size categories which do not exactly match industry small business classifications: i.e. from \$10 million to \$14.99 million, and from \$15 million to \$19.99 million.

Source: Calculated from data from U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, *see* U.S. Small Business Administration, *Firm Size Data*, available at

³¹ Using data reported by the Census Bureau for 2007 for both industry groups.

http://www.sba.gov/advocacy/849/12162 (last visited Nov. 1, 2013), and data from the U.S. Census Bureau, *see* U.S. Census Bureau, *Industry Statistics Portal*, available at *http://www.census.gov/econ/isp/index.php*.

Small entity establishments in the Educational Support Services industry group account for 38.1 percent of that industry's receipts. If receipts are used as a proxy for number of students in a manner similar to that described above for post-secondary entity establishments, then small national testing entities (NAICS 611710) can be expected to bear 38.1 percent of the costs estimated for the industry as a whole, or approximately \$1.1 million of the \$2.8 million first-year costs. Thus, costs from this rule are estimated to average to a little over \$850 each, in the first year, for the approximately 1,250 small national testing establishments. Approximately 147 national testing center establishments (10.5 percent of the 1,397) would be medium or large entities, and they would incur \$1.74 million in costs during the first year, which would average out to approximately \$11,818 per medium/large national testing center establishment during the first year. This \$11,818 per medium/large national testing center establishment is approximately 13.8 times as high as the cost that would be incurred by small national testing center establishments during that same time.

As explained above, the Department estimates that 2,954 small post-secondary establishments and approximately 1,250 small national testing establishments would be impacted by this rule, for a total of approximately 4,200 small business establishments.

The estimates were based on average estimates for all entities, irrespective of size. The cost of the additional training these entities may need to undertake as a result of the ADA Amendments Act and this rule is expected to total no more than \$500 per entity. The cost of additional proctors to these entities is unclear as we have not found robust information of the number of test-takers at these entities, on average.

Based on the above analysis, the Department can certify that the rule will not have a significant economic impact on a substantial number of small entities. The Department seeks comments and additional data on the costs to small entities of this rulemaking.

C. Executive Order 13132: Federalism

Executive Order 13132 directs that, to the extent practicable and permitted by law, an agency shall not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, that is not required by statute, or that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Because this rule does not have federalism implications as defined in the Executive Order, does not impose direct compliance costs on State and local governments, is required by statute, and does not preempt State law within the meaning of the Executive Order, the Department has concluded that compliance with the requirements of section 6 is not necessary.

D. Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800) 514-0301 (voice); (800) 514-0383 (TTY) that the public is welcome to call to obtain assistance in understanding anything in this proposed rule. If any commenter has suggestions for how the regulation could be written more clearly, please contact Zita Johnson-Betts, Deputy Chief, Disability Rights Section, whose contact information is provided in the introductory section of this proposed rule entitled, “FOR FURTHER INFORMATION CONTACT.”

E. Paperwork Reduction Act

This proposed rule does not contain any new or revised “collection[s] of information” as defined by the Paperwork Reduction Act of 1995.44 U.S.C. 3501 *et seq.*

F. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Parts 35 and 36

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

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and sections 12134, 12186, and 12205a of the Americans with Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008, Public Law 110–325, 122 Stat. 3553 (2008), Parts 35 and 36 of title 28 of the Code of Federal Regulations are proposed to be amended as follows:

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

Subpart A—General

1. The authority citation for 28 CFR Part 35 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a of the Americans with Disabilities Act, as amended

2. Revise § 35.101 to read as follows:

§ 35.101 Purpose and broad coverage.

(a) Purpose. The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C.12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

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

3. Amend § 35.104 to revise the definition of “disability” to read as follows:

§ 35.104 Definitions.

* * * * *

Disability. The definition of “disability” can be found at § 35.108.

* * * * *

4. Add § 35.108 to subpart A to read as follows:

§ 35.108 Definition of disability.

(a) General. (1) Disability means, with respect to an individual,

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

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in § 35.108(f) of this part.

This means that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both “transitory and minor.”

(2) Rules of construction. (i) An individual may establish coverage under any one or more of the three prongs of the definition of disability in paragraph (a)(1) of this section, the “actual disability” prong in paragraph (a)(1)(i) of this section, the “record of” prong in paragraph (a)(1)(ii) of this section, or the “regarded as” prong in paragraph (a)(1)(iii) of this section.

(ii) Where an individual is not challenging a public entity’s failure to provide reasonable modifications under § 35.130(b)(7), it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” or “record of” prong regardless of whether the individual is challenging a public entity’s failure to provide reasonable modifications.

(b) Physical or mental impairment. (1) The phrase “physical or mental impairment” means:

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

(ii) Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) The phrase “physical or mental impairment” includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, specific learning disabilities (including but not limited to dyslexia), HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(3) The phrase “physical or mental impairment” does not include homosexuality or bisexuality.

(c) Major life activities. (1) General. Major life activities include, but are not limited to:

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

(ii) The operation of a major bodily function, including the 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 systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

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

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

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

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

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

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

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

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

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

(ix) The six-month "transitory" part of the "transitory and minor" exception in paragraph (f)(1) of this section does not apply to the "actual disability" or "record of" prongs of the definition of disability. The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) Predictable assessments. (i) The principles set forth in § 35.108(d)(1) are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.

(ii) Applying the principles set forth in § 35.108(d)(1), the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under § 35.108(a)(1)(i) (the “actual disability” prong) or § 35.108(a)(1)(ii) (the “record of” prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in § 35.108(d)(1), it should easily be concluded that the following types of impairments, will, at a minimum, substantially limit the major life activities indicated:

- (A) Deafness substantially limits hearing and auditory function;
 - (B) Blindness substantially limits visual function;
 - (C) An intellectual disability substantially limits reading, learning, and problem solving;
 - (D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;
 - (E) Autism substantially limits learning, social interaction, and communication;
 - (F) Cancer substantially limits normal cell growth;
 - (G) Cerebral palsy substantially limits brain function;
 - (H) Diabetes substantially limits endocrine function;
 - (I) Epilepsy, muscular dystrophy, and multiple sclerosis substantially limit neurological function;
 - (J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function;
- and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this paragraph may substantially limit additional major life activities not explicitly listed above.

(3) Condition, manner and duration. (i) At all times taking into account the principles in § 35.108(d)(1), in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

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

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may

nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

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

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

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

(e) Has a record of such an impairment. (1) General. An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) Broad construction. Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in § 35.108(d)(1) apply.

(3) Reasonable modification. An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) Is regarded as having such an impairment. (1) An individual is “regarded as having such an impairment” if the individual is subjected to an action prohibited by the ADA, because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.

(2) An individual is “regarded as having such an impairment” any time a public entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established under title II of the ADA only when an individual proves that a public entity discriminated on the basis of disability within the meaning of title II of the ADA, 42 U.S.C. 12131–12134.

(g) Exclusions. The term “disability” does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

Subpart B—General Requirements

5. In § 35.130, add paragraphs (b)(7)(i), (b)(7)(ii), and **paragraph (i)** to read as follows:

§ 35.130 General prohibitions against discrimination.

* * * * *

(b) * * *

(7) * * *

(i) A public entity is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the “regarded as” prong of the definition of disability at § 35.108(a)(1)(iii).

(ii) [Reserved]

* * * * *

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

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

Subpart A—General

6. The authority citation for 28 CFR Part 36 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186b and 12205a of the Americans with Disabilities Act, as amended.

7. Revise § 36.101 to read as follows:

§ 36.101 Purpose and broad coverage.

(a) Purpose. The purpose of this part is to implement subtitle A of title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181–12189), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

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

8. Amend § 36.104 to revise the definition of “disability” to read as follows:

§ 36.104 Definitions.

* * * * *

Disability. The definition of “disability” can be found at § 36.105.

* * * * *

9. Add § 36.105 to subpart A to read as follows:

§ 36.105 Definition of disability.

(a) General. (1) Disability means, with respect to an individual,

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

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in § 36.105(f) of this part.

This means that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both “transitory and minor.”

(2) Rules of construction. (i) An individual may establish coverage under any one or more of the three prongs of the definition of disability in paragraph (a)(1) of this section, the “actual disability” prong in paragraph (a)(1)(i), the “record of” prong in paragraph (a)(1)(ii), or the “regarded as” prong in paragraph (a)(1)(iii).

(ii) Where an individual is not challenging a covered entity’s failure to provide reasonable modifications under § 36.302, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” or “record of” prong regardless of whether the individual is challenging a covered entity’s failure to provide reasonable modifications.

(b) Physical or mental impairment. (1) The phrase “physical or mental impairment” means:

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

(ii) Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, post traumatic stress syndrome, emotional or mental illness, and specific learning disabilities.

(2) The phrase “physical or mental impairment” includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, specific learning disabilities (including but not limited to dyslexia), HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(3) The phrase “physical or mental impairment” does not include homosexuality or bisexuality.

(c) Major life activities. (1) General. Major life activities include, but are not limited to:

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

(ii) The operation of a major bodily function, including the 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 systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

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

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

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

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

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation

that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.

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

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive errors.

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

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

(ix) The six-month "transitory" part of the "transitory and minor" exception in paragraph (f)(1) of this section does not apply to the "actual disability" or "record of" prongs of the definition of disability. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) Predictable assessments. (i) The principles set forth in § 36.105(d)(1) are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination

through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.

(ii) Applying the principles set forth in § 36.105(d)(1), the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under § 36.105(a)(1)(i) (the “actual disability” prong) or § 36.105(a)(1)(ii) (the “record of” prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation of a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in § 36.105(d)(1), it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated:

- (A) Deafness substantially limits hearing and auditory function;
- (B) Blindness substantially limits visual function;
- (C) An intellectual disability substantially limits reading, learning, and problem solving;
- (D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;
- (E) Autism substantially limits learning, social interaction, and communication;
- (F) Cancer substantially limits normal cell growth;
- (G) Cerebral palsy substantially limits brain function;
- (H) Diabetes substantially limits endocrine function;
- (I) Epilepsy, muscular dystrophy, and multiple sclerosis substantially limit neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function;
and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this paragraph may substantially limit additional major life activities not explicitly listed above.

(3) Condition, manner and duration. (i) At all times taking into account the principles in § 36.105(d)(1), in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

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

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is

substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

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

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

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

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

(e) Has a record of such an impairment. (1) General. An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) Broad construction. Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most

people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in § 36.105(d)(1) apply.

(3) Reasonable modification. An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) Is regarded as having such an impairment. (1) An individual is “regarded as having such an impairment” if the individual is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.

(2) An individual is “regarded as having such an impairment” any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established under title III of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of title III of the ADA, 42 U.S.C. 12181–12189.

(g) Exclusions. The term “disability” does not include: (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

Subpart B—General Requirements

10. In § 36.201, add paragraph (c) to read as follows:

§ 36.201 General.

* * * * *

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

Subpart C—Specific Requirements

11. In § 36.302. add paragraph (g) to read as follows:

§ 36.302 Modifications in policies, practices, or procedures.

* * * * *

(g) A covered entity is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the “regarded as” prong of the definition of disability at § 36.105(a)(1)(iii).

____ January 22, 2014 _____
Date

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