Lambda Legal
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BY ELECTRONIC TRANSMISSION

Stephen Llewellyn
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE, Suite 4NW08R, Room 6NE03F
Washington, DC 20507
http://www.regulations.gov

Re: Equal Employment Opportunity Commission
Proposed Rulemaking – RIN 3046-AA85: "Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended"

Dear Mr. Llewellyn:

These comments on the Equal Employment Opportunity Commission's Proposed Rulemaking to revise its Americans with Disabilities Act ("ADA") regulations and interpretive guidance – RIN 3046-AA85 – are submitted on behalf of the 51 organizations and 3 individuals listed below. All of the undersigned are committed to protecting the rights of people living with the human immunodeficiency virus ("HIV") to be free from discrimination.

The ADA Amendments Act of 2008 ("the Act") made very important changes to the ADA, which were vitally needed to restore civil rights protections that the ADA was intended to provide. Those protections are of critical importance to people living with HIV, who continue to experience discrimination in employment in this country. But restrictive interpretations of what it means to be "disabled" under the ADA led to extensive analysis of whether that definition was met. For people living with HIV, this often meant that they had to testify about highly personal, intimate matters that had nothing to do with whether they were discriminated against because they had HIV. In some cases, that misplaced focus led to court findings that individuals with HIV were not protected by the ADA.

Overall, we believe that the Equal Employment Opportunity Commission ("the EEOC" or "the agency") has proposed regulations and interpretive guidance that properly reflect the clear intent of Congress. In particular, the proposed rulemaking embodies the Act's goals of ensuring that the ADA provide broad coverage to people with disabilities and ending extensive analysis of whether an individual's impairment meets the definition of a "disability" under the law. We applaud the agency's decision to issue interpretive guidance simultaneously with the proposed revisions to the regulations, as doing so should help facilitate compliance with, and proper implementation of, the ADA Amendments Act.

Below we address some portions of the proposed rulemaking of particular concern to people living with HIV. We request some changes in the language used in referring to HIV infection (Section I). We fully support the agency's proposed regulations regarding the term "substantially limits," both generally and specifically in reference to HIV infection

(Section II.A). We fully support the agency's proposals related to the term "is regarded as having an impairment" (Section II.B). We agree with the agency that the likely effect on the economy of changes resulting from the Act and the implementing regulations is very difficult to quantify and ask the agency to take note of some respects in which the proposed analysis probably overstates the likely costs (Section III).

I. Comments on Terminology Used in Referring to the Impairment of HIV Infection

The proposed regulations and interpretive guidance contain several references to "HIV" and "AIDS." For the reasons discussed below, the agency should use consistent terminology to refer to HIV infection within the final regulations and interpretive guidance. We strongly recommend the use of the comprehensive and straightforward term "HIV infection" – rather than "HIV and AIDS" or "HIV or AIDS."

HIV attacks and weakens the immune system.[1] The U.S. Supreme Court has ruled that "HIV infection satisfies the statutory and regulatory definition [under the ADA] of a physical impairment during every stage of the disease."[2] Acquired immunodeficiency syndrome ("AIDS") – which is caused by HIV – is generally understood to be an advanced stage of "HIV infection."[3] "HIV" and "AIDS" are not the same: all people with HIV have the impairment "HIV infection," but only a subset of those people have been diagnosed with "AIDS." However, the terms "HIV" and "AIDS" are often used interchangeably, and the term "HIV/AIDS" sometimes is used to refer to "HIV infection."

Unfortunately, the common use of both the terms "HIV" and "AIDS" to refer to "HIV infection" has resulted in some confusion in the disability discrimination context, making it desirable that the agency carefully choose the terms it uses. Most notably, judges in the U.S. Court of Appeals for the Seventh Circuit recently misinterpreted the medical

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1 *See*, *e.g.*, Centers for Disease Control & Prevention ("CDC"), *Basic Information*, http://www.cdc.gov/hiv/topics/basic/ (last visited Nov. 5, 2009) ("CDC, Basic Information").

2 *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998).

3 *See*, *e.g.*, *id.*. at 633-36 (describing then-current understanding of progression of HIV infection); *EEOC v. Lee's Log Cabin, Inc.*, 546 F.3d 438, 448 (7th Cir. 2008) (Williams, J., dissenting) (". . . AIDS is one stage of HIV (similar to what 'stage four cancer' might be to 'cancer'), and HIV is a disease that can render someone 'disabled' at all stages of the disease."); CDC, *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults*, MMWR 41 (RR-17) app. B (1992), *available at* http://wonder.cdc.gov/wonder/help/AIDS/MMWR-12-18-1992.html ("CDC 1993 Revised Classification").

An AIDS diagnosis indicates that a patient has met certain criteria, such as the presence of a clinical condition listed in the CDC's AIDS surveillance case definition or a CD4+ lymphocyte count of less than 200/μl. *See* CDC 1993 Revised Classification; Bernd S. Kamps & Christian Hoffmann, *Introduction*, *in* HIV Medicine 2007 23, 26-27 (Christian Hoffmann et al. eds., 15th ed., Flying Publisher 2007), *available at* www.hivmedicine.com/hivmedicine2007.pdf.. Once a patient has been diagnosed with AIDS, the diagnosis never goes away, even if the AIDS-defining illness has been successfully treated and/or her CD4+ count rises above 200/μl. *See*, *e.g.*, CDC 1993 Revised Classification.

relationship between "HIV" and "AIDS," treating them as two separate and distinct medical conditions.[4] In *EEOC v. Lee's Log Cabin, Inc.*, the EEOC represented the interests of a job applicant allegedly denied employment because she has HIV; in support of the claim the agency submitted evidence that showed the disabling effects of AIDS on the applicant. On appeal, the Seventh Circuit upheld a decision granting summary judgment for the employer, in part on the basis that absent evidence or an allegation that the employer actually knew the applicant had AIDS – as opposed to HIV – the court deemed all evidence of the disabling effects of AIDS to be irrelevant to the claim.

The decision in *Lee's Log Cabin* illustrates a lack of understanding of the relationship between "HIV" and "AIDS" on the part of the judiciary and the general public, including employers. The agency risks contributing to that misunderstanding by using the phrases "HIV or AIDS" and "HIV and AIDS" in the proposed regulations.[5] By not using those terms, the agency will help avoid the risk that employers and courts improperly will consider HIV and AIDS to be two distinct impairments within the meaning of the ADA. Therefore, in the final regulations and interpretive guidance, the term "HIV infection" – and not "HIV and AIDS" or "HIV or AIDS" – should be used. Specifically, the following changes should be made:

- In Section 1630.2(i)(2), the statement "Human Immunodeficiency Virus (HIV) and AIDS affect functions of the immune system and reproductive functions" should be reworded to read "Human Immunodeficiency Virus (HIV) infection affects functions of the immune system and reproductive functions."
- In Section 1630.2(j)(5)(F), the phrase "HIV or AIDS, which substantially limit functions of the immune system" should be reworded to read "HIV infection, which substantially limits functions of the immune system."
- In the Appendix, the statement "the Human Immunodeficiency Virus (HIV) affects functioning of the immune system" should be reworded to read "Human Immunodeficiency Virus (HIV) infection affects functioning of the immune system," to reflect the fact that the "impairment" at issue – comparable to the examples of "cancer" and "diabetes" – is "HIV infection."[6]

To provide further important clarity on this issue, the regulations also should state specifically that: (1) the term "HIV infection" as used in the regulations and interpretive guidance includes "AIDS" as well as "HIV;" and (2) that individuals who claim that they have been discriminated against on the basis of "HIV," "AIDS," "HIV/AIDS," "HIV and

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4 *EEOC v. Lee's Log Cabin, Inc.*, 546 F.3d 438 (7th Cir. 2008), *amended by* 554 F. 3d 1102 (7th Cir. 2009).

5 *See* Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48436 (proposed September 23, 2009) (to be codified at 29 C.F.R. pt. 1630) ("Comparing CPS-ASEC and ACS Estimates"); *id.* at 48440-41 §§ 1630.2(i)(2), 1630.2(j)(5)(F). The interpretive guidance properly refers to "HIV infection" in its section on the "regarded as" prong. 74 Fed. Reg. at 48449 app. § 1630.2(l).

6 *See* 74 Fed. Reg. at 48446 app. § 1630.2(i).

AIDS," or "HIV or AIDS" all should be understood to be raising a claim involving the impairment "HIV infection."

II. Comments on Proposed Revisions to Section 1630.2 and Related Interpretive Guidelines

The agency has appropriately proposed many changes to Section 1630.2 of the regulations, in which the term "disability" and related concepts are defined. The enactment of the ADA Amendments Act necessitates major revision of this section, given changes in the related statutory language, the instructions on rules of construction, and Congress's explicit rejection of narrow interpretations of "disability" applied by federal courts and the agency. The inclusion of many examples in the regulatory sections and interpretive guidance furthers the agency's responsibility to provide guidance on the meaning and application of the Act.

A. Proposals related to the term "substantially limits" (proposed § 1630.2(j))

In particular, the regulations addressing the definition of the term "substantially limits" required extensive revision. The language of the Act makes clear Congress's intent that the "substantially limits" portion of the "disability" definition be interpreted significantly differently by the courts and the agency than it had been previously. Congress specifically found that the agency previously had defined the term to "express[] too high a standard" and included among the purposes of the Act its expectation that the agency would revise that definition.[7] In addition, Congress found that the U.S. Supreme Court – in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) – interpreted the term "to require a greater degree of limitation than was intended by Congress."[8]

Given this Congressional intent, the agency has properly deleted reference to the terms "condition, manner or duration" in its revised definition of the term "substantially limits." As noted by the Supreme Court in *Toyota Motor Manufacturing*, the EEOC – not Congress – had defined "substantially limits" to mean, *inter alia*, "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity."[9] As the agency states in its proposed rulemaking, Congress's intent that "substantially limits a major life activity" not be a demanding standard to meet[10] and that the term "substantially limits"

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7 ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2(a)(8), 2(b)(6), 122 Stat. 3553, 3554 (2008).

8 *Id.* at § 2(a)(7), 122 Stat. at 3553.

9 534 U.S. at 195-96 (quoting 29 C.F.R. § 1630.2(j)).

10 *See* Pub. L. No. 110-325, §§ 2(a)(5), (6), (7), (8), 122 Stat. at 3553-54; *id.* at §§ 2(b)(4), (5), (6), 122 Stat. at 3554.

be "interpreted consistently with the findings and purposes of the [Act]"[11] is effectuated by the agency's omission of the phrase "condition, manner or duration."

Similarly, with respect to the major life activity of "working," the proposed rule appropriately acknowledges that most individuals who are substantially limited in the major life activity of working also will be substantially limited in another major life activity.[12] But Congress specifically provided that an individual need not be substantially limited in more than one major life activity to be disabled.[13] The proposed regulatory language concerning the major life activity of working is consistent with Congress's goal of ensuring that the courts no longer engage in "extensive analysis" of whether an impairment is a disability and no longer require a "high level of limitation" to find someone substantially limited in a major life activity.[14]

Including a non-exclusive listing of "impairments that will consistently meet the definition of disability" [15] is manifestly appropriate, for several reasons. First, it is in accord with common sense to acknowledge that some impairments consistently will meet the definition of disability. This is certainly true in the case of HIV infection. At every stage of HIV infection, the virus attacks the immune system and weakens it.[16] It is simply a medical fact that untreated HIV infection substantially limits the function of the immune system.[17] Therefore, under the ADA Amendments Act, HIV infection consistently must be found to meet the definition of "disability."

Second, including this listing is consistent with the purposes of the Act. As noted above, it is clear that Congress intended that the ADA should be interpreted and applied to provide "broad coverage" and that the analysis of whether the disability definition is met "should not demand extensive analysis."[18] Providing examples of impairments for which "the individualized assessments of the limitations on a person can be conducted quickly and easily," resulting in a determination that the person is substantially limited in a major life activity, is consistent with those Congressional directives. It is also consistent with Congress's original expectation that the ADA's definition of "disability" would be "interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973."[19] Congress's finding that this "expectation has not been fulfilled" supported passage of the ADA Amendments Act.[20]

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11 42 U.S.C. § 12102(4)(B) (2009).

12 *See* 74 Fed. Reg. at 48442 § 1630.2(j)(7).

13 42 U.S.C. § 12102(4)(C).

14 *See* Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554; *see also id.* at §§ 2(b)(1), (4), (6), 122 Stat. at 3554; 42 U.S.C. §§ 12101(4)(a), (b) (2009).

15 *See* 74 Fed. Reg. at 48441 § 1630.2(j)(5).

16 *See*, *e.g.*, CDC, Basic Information; *Bragdon*, 524 U.S. at 633-36.

17 *See*, *e.g.*, CDC, Basic Information.

18 *See* Pub. L. No. 110-325, §§ 2(a)(1), 2(a)(4), 2(a)(5), 2(b)(1), 2(b)(5), 122 Stat. at 3553-54; 42 U.S.C. § 12102(4)(A) (2009).

19 Pub. L. No. 110-325, § 2(a)(3), 122 Stat. at 3553; *see also* 42 U.S.C. § 12201(a) (2009) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser

The treatment of discrimination claims of people who had or were perceived as having HIV infection demonstrates the appropriateness – in light of those Congressional goals – generally of including examples of impairments that "will consistently meet the definition of disability" and specifically of identifying HIV infection as such an impairment. The ADA was intended to protect people living with HIV from being discriminated against based on HIV infection.[21] As the U.S. Supreme Court noted in *Bragdon v. Abbott*, "[e]very court which addressed the issue before the ADA was enacted . . . concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap."[22] Under the Rehabilitation Act, courts readily concluded, without extensive analysis, that the definition was satisfied.[23] In some cases, the courts did not need to decide the issue, because the defendant conceded that HIV infection is a handicap.[24]

Under the ADA, some courts and defendants continued to view HIV infection as it had been viewed under the Rehabilitation Act, with courts readily finding that it was a disability[25] or defendants conceding that it was.[26] However, increasingly courts interpreted the ADA more restrictively, resulting in extensive consideration of whether a plaintiff with HIV infection had a "disability" and, in some cases, finding that the plaintiff did not.[27] In

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standard than the standards applied under title V of [the Rehabilitation Act] or the regulations issued by Federal agencies pursuant to such title.").

20 Pub. L. No. 110-325, § 2(a)(3), 122 Stat. at 3553.

21 *See*, *e.g.*, H.R. Rep. No. 101-485, pt. 3, n.18 (1990) ("Persons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under this first test of the definition."); *see also*, *e.g.*, *id.*, pt. 2, at 52 & 106 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 334 & 389; *id.*, pt. 3, at 76, *reprinted in* 1990 U.S.C.C.A.N. at 498.

22 *Bragdon*, 524 U.S. at 644 (1998) (citing cases).

23 *See*, *e.g.*, *Martinez ex rel. Martinez v. School Bd. of Hillsborough County., Fla.*, 861 F.2d 1502, 1506 (11th Cir. 1988); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 377 (C.D. Cal. 1986).

24 *See*, *e.g.*, *Glanz ex rel. Vadnais v. Vernick*, 756 F. Supp. 632, 635 (D. Mass. 1991); *Robertson ex rel. Robertson v. Granite City Community Unit Sch. Dist. 9*, 684 F. Supp. 1002, 1006 (S.D. Ill. 1988); *Local 1812, Am. Fed. Of Gov't Employees v. U.S. Dep't of State*, 662 F. Supp. 50, 54 (D.D.C. 1987).

With respect to other impairments as well, typically under the Rehabilitation Act a person's status as "disabled" was either undisputed or not extensively analyzed. *See*, *e.g.*, *Strathie v. Dep't of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) (noting that it was undisputed that employee with impaired hearing was handicapped); *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) (same re employee with diabetes); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 n.7 (2d Cir. 1977) (same re plaintiffs with vision in only one eye).

25 *See*, *e.g.*, *Wallengren v. Samuel French, Inc.*, 39 F. Supp. 2d 343, 347 (S.D.N.Y. 1999); *Cloutier v. Prudential Ins. Co.*, 964 F. Supp. 299, 301 (N.D. Cal. 1997): *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994).

26 *See*, *e.g.*, *Holiday v. City of Chattanooga*, 206 F.3d 637, 642 (6th Cir. 2000); *Doe v. University of Md. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995).

27 *See*, *e.g.*, *Cruz Carrillo v. AMR Eagle, Inc.,* 148 F. Supp. 2d 142, 144-45 (D.P.R. 2001); *EEOC v. General Electric Co.*, 17 F. Supp. 2d 824, 827-31 (N.D. Ind. 1998) (discussing disability definition in conjunction with a "regarded as" claim); *U.S. v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1079-

particular, increasing focus was placed on the extent to which a plaintiff with HIV infection was limited in the major life activity of reproduction. Whether or not the protections of the ADA were available to someone who had HIV in many cases turned on whether the plaintiff was male or female,[28] of childbearing age, gay or heterosexual, or planned to have children.[29] Even when the courts allowed the case to proceed to the issue at the heart of the discrimination claim – whether an adverse action was taken because the person had or was perceived as having HIV – typically the person meant to be protected from discrimination first had to go through the demeaning process of providing testimony about highly personal, intimate matters that are wholly irrelevant to whether he or she had experienced discrimination based on HIV infection.[30]

In enacting the ADA Amendments Act, Congress made it clear that such rulings and evidentiary hurdles were not what it had intended when it passed the ADA. In identifying HIV infection as an impairment that will consistently meet the definition of disability, the agency is simply stating the obvious. "[F]unctions of the immune system" is a "major life activity,"[31] and individuals infected by HIV have substantially impaired immune system function, especially when treatment – a mitigating measure – is not considered.[32] Thus, no extensive analysis is needed to conclude that a person who has HIV infection is disabled.

To correctly implement the Act, the EEOC must adopt regulations and interpretive guidance that lead to far fewer cases in which the defendant disputes whether the plaintiff is disabled and to far less analysis of that issue where there is a dispute. The agency's provision of examples of impairments that will consistently meet the definition of disability should

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83 (W.D. Wis. 1998) (analyzing whether five-year old child with HIV infection was substantially limited in a major life activity); *see also* 154 Cong. Rec. H8297-98 (Sept. 17, 2008) (statement of Rep. Baldwin).

28 *Compare Rodriguez v. Manpower TNT Logistics, Inc.*, 2006 U.S. Dist. LEXIS 68735, *14 (D.P.R. Sept. 21, 2006) (finding that female plaintiff's "testimony that her decision not to have more children was based on the possibility of passing the medical condition to the child brings her within the protection of the ADA"), *with Cruz Carrillo,* 148 F. Supp. 2d at 145 (finding that male plaintiff failed to establish that he was disabled because he failed to introduce medical evidence that HIV substantially limits a man's ability to reproduce and his testimony that the HIV infection "removed his incentive to reproduce" was not sufficient evidence).

29 *See*, *e.g.*, *Blanks v. Southwestern Bell Communications, Inc.,* 310 F.3d 398 (5th Cir. 2002) (affirming grant of summary judgment to employer, finding plaintiff with HIV not "disabled" largely because he testified that he did not want to have any more children); *Gutwaks v. Am, Airlines, Inc.*, 1999 U.S. Dist. LEXIS 16833, 13 (N.D. Tex. Sept. 2, 1999) (granting employer's motion for summary judgment, finding plaintiff with HIV not "disabled" because he "admits he does not currently, nor has he ever, desired to father children."); *see also* 154 Cong. Rec. H8297-98.

30 *See*, *e.g.*, *Blanks,* 310 F.3d at 401 (discussing testimony that plaintiff and his wife had decided not to have more children and plaintiff's wife had a procedure to prevent her from having more children); *Lederer v. BP Products. N. Am.*, 2006 U.S. Dist. LEXIS 87368, *12 (S.D.N.Y. Nov. 30, 2006) (deciding employer's motion for summary judgment in part based on review of plaintiff's sworn statements concerning his intentions with respect to marriage and fathering children).

31 42 U.S.C. § 12102(2)(B) (2009).

32 *See id.* at §§ 12102(2)(B), (4)(E)(i).

have that effect, thus achieving Congress's goal that "the primary object of attention in cases brought under the ADA [will] be whether entities covered under the ADA have complied with their obligations" under the law.[33]

B. Proposals related to the term "is regarded as having an impairment" (proposed § 1630.2(l))

Actions taken because of symptoms of an impairment or the use of mitigating measures are taken due to perceptions about the physical or mental state of the employee. Therefore, the EEOC properly employed the new definition of what it means to be "regarded as" disabled in its proposed Section 1630.2(l)(2). Congress revised the third prong of the disability definition in part to "reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973."[34] In *Arline*, the Court held that the third prong must be interpreted broadly, to achieve the Rehabilitation Act's purpose of prohibiting discrimination "because of the prejudiced attitudes or ignorance of others."[35] Accordingly, the Court explained that prohibited discrimination included discrimination based on assumptions about the possible effect on *other* people of an individual's actual or perceived impairment.[36] Discrimination because of other attributes of an impairment – such as symptoms or the use of mitigating measures – is similarly prohibited under the Court's broad view of the "regarded as" prong.

An employer who takes an action against an employee because of symptoms of an actual or presumed impairment is perceiving the person as impaired; it is simply irrelevant whether the employer knows the name of the underlying impairment or assumes that the person has a particular diagnosis. Similarly, an employer who terminates an employee because the employee uses a particular mitigating measure, such as medication, is terminating an employee because the employer perceives the employee as having some physical or mental impairment. The "regarded as" prong of the disability definition applies, *inter alia*, to situations in which discrimination is prompted by stereotypical assumptions or unfounded fears[37] and such assumptions and fears can be triggered by symptoms or use of mitigating measures.

III. Comments on Preliminary Regulatory Impact Analysis

The analysis of the costs and benefits associated with the changes to EEOC's regulations is incomplete without noting the tremendous benefits – some of them intangible – associated with broader coverage under the ADA. For years, the promise of protection against disability discrimination has been unfulfilled for many people living with disabilities

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33 *See* Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554.
34 *Id.* at § (2)(b)(3), 122 Stat. at 3554.
35 480 U.S. at 284.
36 *Id.* at 282-85.
37 *See* H.R. Rep. No. 110-730, at 16-17; *see also* Pub. L. No. 110-325, § 2(a)(2), 122 Stat. at 3553.

in the U.S. The agency's regulations implementing the ADA Amendments Act will help ensure that everyone has a fair opportunity to work, as Congress intended. The resultant benefits to American society include the economic benefits of having more qualified individuals in the workforce, plus the unquantifiable benefits of having a more just society. Attainment of those benefits should not be sacrificed by delaying adoption of the implementing regulations in order to engage in further regulatory impact analysis.

As the proposed rulemaking notes, the likely effect on the economy of changes to the Act and the regulations necessarily is difficult to quantify, and the analysis must be based on numerous assumptions. Several of the assumptions discussed in the proposed rulemaking specifically relate to people with HIV infection, so the following should be noted:

- The agency correctly notes that, as a result of enactment of the ADA Amendments Act, the courts should consistently conclude that people with HIV infection are entitled to the ADA's protections.[38]
- The agency attempts to estimate the number of requests for reasonable accommodations that will result from the ADA Amendments Act based in part on the numbers of individuals with impairments that will consistently meet the definition of disability. The agency notes that calculating on that basis requires the assumption that "such individuals now perceive themselves as protected by the law when they previously assumed that they were not."[39] We believe that the agency should state more strongly that such an assumption is unlikely to be valid. People with HIV infection are among those with an impairment that will consistently meet the definition of disability. Although, as discussed above, some courts have interpreted the "disability" definition so restrictively that plaintiffs living with HIV have not been found to be disabled, people with HIV generally have believed that federal law prohibiting disability discrimination protected them from adverse job actions based on their having HIV infection. Therefore, even if it were safe to assume that all workers with HIV infection will request a reasonable accommodation – which is not an accurate assumption – it is not safe to assume that all workers with HIV infection will request reasonable accommodation *as a result of* the ADA Amendments Act. Of those workers with HIV infection who request a reasonable accommodation, some would have done so in the absence of the Act; although some of those would have been unsuccessful in the absence of the new law, others would have been successful. Therefore, to the extent the agency estimates the likely number of requests for reasonable accommodation that will result from the ADA Amendments Act based on the number of workers with HIV infection, the figure is likely to be overstated.
- The agency's use of the number of people self-identified as having "AIDS or AIDS related condition" in the Census Bureau's Survey of Income and Program

38 *See* 74 Fed. Reg. at 48436.

39 *See id.*

Participation understates the number of people with HIV infection.[40] The CDC estimated that in 2007 more than 500,000 adults and adolescents in the United States were infected with HIV/AIDS.[41] Under the ADA Amendments Act and the proposed rulemaking, those individuals would be considered to be disabled. However, the economic impact of the proposed rulemaking will relate to only a small portion of that number, for reasons including the following: (1) many of those individuals would be viewed as entitled to reasonable accommodation even in the absence of the ADA Amendments Act; (2) many of those individuals do not need any reasonable accommodation in order to work; and (3) of those not currently working, not everyone will seek to work (e.g., some people with HIV infection are unable to work even with reasonable accommodations).

- In many cases in which people living with HIV infection do need reasonable accommodations, the needed accommodations are not expensive for the employer to provide. For example, some people with HIV infection suffer side effects from their medications such that they need flexible work hours and/or a work station close to restroom facilities. Therefore, estimates of the cost of reasonable accommodations resulting from the ADA Amendments Act that rely in part on numbers of workers with HIV infection are likely to overestimate the cost.

If you have any questions or wish for clarification regarding any of the above comments, please contact, on behalf of the undersigned, Bebe J. Anderson, HIV Project Director, Lambda Legal, 120 Wall Street, Suite 1500, New York, New York, 10005, telephone (212) 809-8585, email banderson@lambdalegal.org.

Sincerely,

Gwen J. Bampfield, President/CPO
The ACCESS Network, Inc.
5710 Okatie Highway, Suite B, Ridgeland, SC 29936
gwenbam@aol.com

Brandon M. Macsata, CEO
ADAP Advocacy Association
1501 M Street, NW, 7th Floor, Washington, DC 20005
info@adapadvocacyassociation.org

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40 *See* 74 Fed. Reg. at 48437, citing CDC, *Prevalence and Most Common Causes of Disability Among Adults – United States, 2005*, 58(16) Morbidity and Mortality Weekly Report 421-426 (2009), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5816a2.htm.

41 *See* CDC, *Cases of HIV Infection and AIDS in the United States and Dependent Areas*, *2007*, 19 HIV/AIDS Surveillance Report, 8, *available at* http://www.cdc.gov/hiv/topics/surveillance/resources/reports/2007report/pdf/2007SurveillanceReport.pdf.

Lynda Dee, Executive Director
AIDS Action Baltimore, Inc.
10 E Eager Street, 1st Floor, Baltimore, Maryland 21202
lyndamdee@aol.com

Denise McWilliams, General Counsel
AIDS Action Committee of Massachusetts, Inc.
294 Washington Street, 5th Floor, Boston, MA 02108
dmcwilliams@aac.org

William McColl, Political Director
AIDS Action Council
1730 M Street, NW, Suite 611, Washington, DC 20036
wmccoll@aidsaction.org

David Ernesto Munar, Vice President, Policy and Communications
AIDS Foundation of Chicago
411 S Wells Street, # 300, Chicago, IL 60607
dmunar@aidschicago.org

Carl Schmid, Deputy Executive Director
The AIDS Institute
2001 S Street, NW, Suite 510, Washington, DC 20009
cschmid@theaidsinstitute.org

Stacey LaFleur, Executive Director
AIDSLaw of Louisiana, Inc.
3801 Canal Street, Suite 331, New Orleans, LA 70119
slafleur@aidslaw.org

Ronda B. Goldfein, Executive Director
AIDS Law Project of Pennsylvania
1211 Chestnut Street, Suite 600, Philadelphia, PA 19107
www.aidslawpa.org

Ann Hilton Fisher, Executive Director
AIDS Legal Council of Chicago
180 N Michigan Avenue, Suite 2110, Chicago, IL 60601
ann@aidslegal.com

Bill Hirsh, Executive Director
AIDS Legal Referral Panel
1663 Mission Street, Suite 500, San Francisco, CA 94103
bill@alrp.org

Jessica Gupta, Director of Public Policy
AIDS Taskforce of Greater Cleveland
3210 Euclid Avenue, Cleveland, OH 44115
jgupta@atfgc.org

Chris Collins, Vice President and Director, Public Policy
amfAR
1150 17th Street, NW, Suite 406, Washington, DC 20036
chris.collins@amfar.org

Rose Saxe, Staff Attorney
American Civil Liberties Union
125 Broad Street, 18th Floor, New York, NY 10004
rsaxe@aclu.org

Deborah Arrindell, Vice President, Health Policy
American Social Health Association
1275 K Street, NW, Suite 1000, Washington, DC 20005
Debarrindell@aol.com

Kimberly Carbaugh, Director of Policy
Association of Nurses in AIDS Care
3538 Ridgewood Road, Akron, OH 44333
kimberly@anacnet.org

Ana Hopperstad, Executive Director
The Boulder County AIDS Project
2118 14th Street, Boulder, CO 80302
ana@bcap.org

Javier G. Salazar, Director of Research and Policy
CAEAR Foundation
2001 S Street, NW, Suite 510, Washington, DC 20009
Javier@caear.org

Michael Kaplan, Executive Director
Cascade AIDS Project
208 SW Fifth Avenue, Suite 800, Portland, OR 97204
mkaplan@cascadeaids.org

Cajetan Luna, Executive Director
Center for Health Justice
8235 Santa Monica Boulevard, Suite 214, West Hollywood, CA 90046
cajetan@healthjustice.net

Catherine Hanssens, Executive Director
The Center for HIV Law and Policy
65 Broadway, Suite 832, New York, NY 10006
chanssens@hivlawandpolicy.org

Ruth Pederson, Executive Director
Colorado AIDS Project
2490 W. 26th Street, Suite A300, Denver, CO 80211
ruthp@coloradoaidsproject.org

Jeff Goodman, Board President
Common Ground – The Westside HIV Community Center
2012 Lincoln Boulevard, Santa Monica, CA 90405
JGoodman@Commongroundwestside.org

Julie Davids, Senior Consultant
Community HIV/AIDS Mobilization Project (CHAMP)
80A 4th Avenue, Brooklyn, NY 11238
jdavids@champnetwork.org

Elizabeth Ollinick, Esq
ECBA Volunteer Lawyers Project
237 Main Street, Suite 1000, Buffalo, NY 14203
ebrophy@wnylc.com

Rev. Pat Bumgardner, Chair
Global Justice Ministry of Metropolitan Community Churches
446 W 36th Street, New York, NY 10018
RvPatMCCNY@aol.com

Soraya Elcock, Vice President of Policy and Government Relations
Harlem United Community AIDS Center
123-125 W 124th Street, New York, NY 10027
esoraya@harlemunited.org

James Hoyt, Chairman
Hepatitis, AIDS, Research Trust
513 E 2nd Street, Florence, CO 81226
jhoyt@heart-intl.net

Karen Stuart, Coordinator
HIV/AIDS Law Project
305 S 2nd Avenue, Phoenix, AZ 85003
Kstuart@clsaz.org

William "Trip" Oldfield III, Executive Director
HIV & AIDS Legal Services Alliance (HALSA)
3550 Wilshire Blvd, Suite 750, Los Angeles, CA 90010
toldfield@halsalegal.org

Bob Bowers, President
HIVictorious, Inc.
P.O. Box 3032, Madison, WI 53704
bob@hivictorious.org

Andrea Weddle, Executive Director
HIV Medicine Association
1300 Wilson Boulevard, Suite 300, Arlington, VA 22209
aweddle@idsociety.org

Maeve McKean, Legal Fellow
The International Community of Women Living with HIV/AIDS (ICW), Global
1345 Emerald Street, NE, Washington, DC 20002
mmckean@genderhealth.org

Darrel Cummings, Chief of Staff
L.A. Gay & Lesbian Center
McDonald/Wright Building, 1625 N Schrader Boulevard, Los Angeles, CA 90028
dcummings@lagaycenter.org

Bebe J. Anderson, HIV Project Director
Lambda Legal Defense & Education Fund, Inc.
120 Wall Street, Suite 1500, New York, NY 10005
banderson@lambdalegal.org

Erick Seelbach, Director of Prevention, Education, and Public Policy
Lifelong AIDS Alliance
1002 E Seneca, Seattle, WA 98122
ericks@llaa.org

Mark Peterson, Director
Michigan Positive Action Coalition (MI-POZ)
Detroit, MI
mark_ab_peterson@yahoo.com

Joseph Interrante, CEO
Nashville CARES
501 Brick Church Park Drive, Nashville, TN 37207
jinterrante@nashvillecares.org

Matthew Lesieur, Director of Public Policy
The National Association of People with AIDS
154 Christopher Street, 1st Floor, New York, NY 10014
mlesieur@napwa.org

Kellan Baker, Policy Associate
National Coalition for LGBT Health
1325 Massachusetts Avenue, NW, Suite 705, Washington, DC 20005
kellan@lgbthealth.net

Ravinia Hayes-Cozier, Director of Government Relations and Public Policy
National Minority AIDS Council
1931 13th Street, NW, Washington, DC 20009
rcozier@nmac.org

Sean Barry, Executive Director
New York City AIDS Housing Network (NYCAHN)
80-A Fourth Avenue, Brooklyn, NY 11217
barry@nycahn.org

Jalene M. Salazar, La Gente Medical Case Manager
Servicios de La Raza, Inc.
4055 Tejon Street, Denver, CO 80211
jalenes@serviciosdelaraza.org

Lisa Diane White, Director of Programs
SisterLove Inc.
PO Box 10558, Atlanta, GA 30310
lwhite@sisterlove.org

Ron Crowder, Executive Director
Street Works
520 Sylvan Street, Nashville, TN 37206
rcrowder@street-works.org

Coco Jervis, Senior Policy Associate
Treatment Action Group (TAG)
611 Broadway, Suite 308, New York, NY 10012
coco.jervis@treatmentactiongroup.org

Naina Khanna, Coordinator
U.S. Positive Women's Network (PWN) - National
414 13th Street, Oakland, CA
nkhanna@womenhiv.org

Anna Ford
Urban Coalition for HIV/AIDS Prevention Services (UCHAPS)
Washington, DC
aford@aidaction.org

Matthew Lesieur, Director of Public Policy
Village Care of New York
154 Christopher Street, 1st Floor, New York, NY 10014
MatthewL@vcny.org

Daniel Bruner, Director of Legal Services
Whitman-Walker Clinic
1701 14th Street, NW, Washington, DC 20009
dbruner@wwc.org

Naina Khanna, Director of Policy and Community Organizing
Women Organized to Respond to Life-threatening Disease (WORLD)
414 13th Street, Oakland, CA
nkhanna@womenhiv.org

Jeffrey Goodman
2020 14th Street, Santa Monica, CA 90405
jeffgoodman@jeffgoodman.biz

Ebony Johnson
4330 3rd Street, Washington, DC 20011
Epjohnso@cnmc.org

Naina Khanna
414 13th Street, Oakland, CA
nkhanna@womenhiv.org