FOOD MARKETING INSTITUTE

November 20, 2009

Mr. Stephen Llewellyn
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE, Suite 4N@08R
Room 6NE03F
Washington, DC 20507

Re : Proposed Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended (RIN 3046-AA85)

Dear Mr. Llewellyn,

The Food Marketing Institute[1] ("FMI") and the members that we represent appreciate the opportunity to respond to the Equal Employment Opportunity Commission's ("EEOC's") request for comments on the proposed rule to implement the equal employment provisions of the Americans with Disabilities Act ("ADA"), as amended by the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). 74 Fed. Reg. 48431 (Sept. 23, 2009). FMI supported the ADAAA. However, as discussed more fully below, we are concerned with the way in which the EEOC has interpreted some of the ADAAA's provisions in the proposed rule.

The ADAAA retained the statutory definition of a 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. The EEOC proposes to amend the meaning of some of the key statutory terms thru the rulemaking process.

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[1] FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

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Specifically, the proposed rule includes lists of impairments that would "consistently meet" the definition of disability or that "may be disabling." See, proposed 29 CFR 1630.2(j)(5), (6). First, the legislative history demonstrates that *per se* lists of this nature are beyond the scope of the compromise supported by those who passed the law. Second, *per se* lists will minimize the role of individualized assessments that have been the hallmark of this law.

Third, the list of conditions itself is overly broad and essentially renders meaningless the statutory requirement that the impairment "substantially limit" a major life activity. For example, the list of conditions that would "consistently meet" the definition of disability includes, "cancer, which substantially limits major life activities such as normal cell growth." Cancer is by definition abnormal cell growth, [2] hence this definition is so overly broad that it would include conditions such as basal cell carcinoma, which is extremely common and relatively easily treated with little or no (let alone substantially limiting) impact on an individual's functioning.

We urge the EEOC to reconsider its approach of including *per se* lists. If such lists are included in the final rule, the Commission should ensure that the impairments identified are consistent with the statutory requirement that the impairment substantially limit a major life activity.

We are also concerned with the manner in which the EEOC has proposed to address the modifications to the "substantially limits" portion of the statutory definition. Specifically, the ADAAA expressly overruled existing judicial interpretations of the phrase and directed the EEOC to clarify the phrase. Unfortunately, the proposed rule does little beyond reiterating the new standard enacted by the ADAAA. The EEOC's proposal provides little or no guidance to employers to help them understand the new standard. Indeed, the EEOC seems to take great pains to state what the standard does *not* mean, but offers little helpful guidance to employers to enable them to understand the point at which an impairment *does* qualify as "substantially limiting."

In this regard, the Commission should specify that the duration of an impairment is a key consideration in determining whether an impairment "substantially limits" a major life activity. We endorse the recommendation of the Society of Human Resource Management regarding the adoption of a bright line 6-month standard. The Commission seems disposed to this type of approach in the *per se* lists discussed above and we believe such a standard would be helpful to employers in this context. In the absence of a bright line, the final rule should allow employers to

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[2] See, American Cancer Society Website at http://www.cancer.org/docroot/CRI/content/CRI_2_4_1x_What_Is_Cancer.asp?sitearea= (Nov. 19, 2009) ("What Is Cancer? The body is made up of hundreds of millions of living cells. Normal body cells grow, divide and die in an orderly fashion…. Cancer begins when cells in a part of the body start to grow out of control. There are many kinds of cancer, but they all start because of out-of-control growth of abnormal calls. Cancer cell growth is different from normal cell growth. Instead of dying, cancer cells continue to grow and form new, abnormal cells.")

consider the duration, condition and manner of an impairment in determining whether the impairment "substantially limits" a major life activity.

We urge the EEOC to explain the Commission's interpretation of "substantially limits" so that the employer community has more than a "we'll know it when we see it" type of analysis to utilize in the all-too-frequent exercise of applying the ADA to specific situations.

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The 2008 amendments to the ADA are an important milestone that should be implemented in a rational and comprehensible manner that enables employers to understand and meet their obligations. We respectfully request that you consider our comments as you promulgate the final rule. If you have any questions on the foregoing or if we may be of assistance in any way, please do not hesitate to let us know.

Sincerely,

Deborah R. White
Senior Vice President &
Chief Legal Officer

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