Congress of the United States
Washington, DC 20515

September 27, 2007

Mr. Thomas J. Donohue
President and CEO
U.S. Chamber of Commerce
1615 H Street, NW
Washington, D.C. 20062-2000

Dear Mr. Donohue:

We are in receipt of the letter of August 22, 2007 from the Chamber of Commerce opposing H.R. 3195, the ADA Restoration Act. As you know, H.R. 3195 currently has 203 cosponsors, including 162 Democrats and 41 Republicans. As with the original ADA, we are honored to be leaders of this bipartisan effort.

We are surprised by the content of the letter and we would like to allay a number of your fears about this piece of legislation. As an initial matter, please note that this bill is not designed to improve all aspects of the ADA. Rather, H.R. 3195 is intended to do one simple thing: restore the rights of those whom we had always intended to be covered by the definition of disability.

As Members of Congress who were active in the development of the original ADA, and who fully understood what we intended to do when we created and passed the law, we can reassure you that H.R. 3195 is not a wholesale rewriting of the ADA.

Our bill simply makes the language of the ADA definition more clear. We never intended for people with disabilities – or, for that matter, their employers – to spend inordinate amounts of time and legal fees parsing out whether a person is disabled "enough" to be protected under the ADA. It is particularly counter-intuitive for such parsing to take place in the courts after an employer has explicitly acknowledged that an adverse decision has been taken on the basis of a person's physical or mental impairment.

Unfortunately, this is the type of activity that we have seen in the courts because of the courts' misreading of our statutory text in the original ADA. The result of such activity by lawyers and courts has been devastating for people with disabilities. As you surely recognize, most people whom we fully intended to be protected from unfair discrimination in employment are often not covered today because of court decisions that have narrowly interpreted the definition of disability.

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H.R. 3195 is designed to restore the coverage that we had originally intended. The essential purpose of the ADA is to protect people who have been adversely treated because of a physical or mental impairment despite their qualifications for a job or a service. The ADA was designed to encourage employers to focus on whether individuals can do a job, with or without a reasonable accommodation, despite the existence of such impairments. H.R. 3195 restores this original intent by shifting the focus of lawyers and courts to a person's *abilities* – as opposed to encouraging lawyers and courts to engage in legal fishing expeditions into the highly personal and often embarrassing details about the impact of a person's physical or mental impairment on some major life activity or another – details that are often completely irrelevant to the person's job skills and abilities.

Our bill thus benefits not only people with disabilities by giving them a fair chance to work, but also benefits employers by helping them avoid costly discussions and potential legal battles that focus simply on the minute details of a person's physical or mental impairment.

The Chamber letter expresses concern that H.R. 3195 would "prohibit employers from considering any side effects of medication or corrective devices used to mitigate an individual's impairment, even though side effects from some medications can be quite serious." To the contrary, H.R. 3195 prohibits employers from *discriminating* against a person because of a person's use of a mitigating measure – such as use of a wheelchair, a prosthetic limb, anti-seizure medication, or insulin – or because of the side effects of such a measure. But an employer is *always* permitted to argue that a person is not *qualified* for a job based on a person's use of a mitigating measure or the side effects of such measures. Such a claim would be based, however, on the actual impact of any side effects of the measure on the person's ability to do the job, and not on the mere fact that the individual is using a mitigating measure.

The letter also asserts that H.R. 3195 "would reverse the long-standing rule that allows employers to determine what the essential functions of a job are, allowing plaintiffs to second-guess routine job decisions that employers must make every day." But there is simply no basis for such a reading of our bill. H.R. 3195 does not change the provisions of the ADA with regard to the essential functions of a job. Those provisions of the law remain a key part of the ADA's antidiscrimination mandate.

Under the ADA currently, and as amended by H.R. 3195, an employer is expected to articulate the essential functions of the job. If an applicant or employee asks for an accommodation based on a known physical or mental limitation, the employer must then determine whether it can provide a reasonable accommodation without undue hardship.

The regulations issued by the Equal Employment Opportunity Commission (EEOC) to the ADA anticipate an interactive discussion around the issue of reasonable accommodation. Presumably, this will include a discussion of whether some functions are essential, whether an accommodation imposes an undue hardship, and whether the person is qualified for the job with the accommodation. Courts are expected to review

those same determinations if a case arrives at court: are the functions essential; does the accommodation impose an undue hardship; and is the person qualified? If there is a determination that a person with a physical or mental impairment is not able to perform the essential functions, even with a reasonable accommodation that does not impose an undue hardship, that person is not qualified for purposes of the ADA.

This is what the ADA has always required and H.R. 3195 does not change that in any way. Indeed, the determination of whether a person is qualified to perform the job has always been at the heart of the ADA, and this remains true under the ADA as amended by H.R. 3195. Working based upon one's ability is what the ADA is all about.

Regarding the Chamber's argument that our bill grants "inappropriate deference" to agencies, our bill just sets forth current law – an agency interpretation of a statute will be entitled to substantial deference by the courts. This is not a particularly radical statement; it is a simple restatement of the Supreme Court's ruling in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). We added this language to the bill because the Supreme Court surprisingly failed to give deference to regulations and guidance issued by both the EEOC and the Department of Justice (DOJ) regarding mitigating measures in several court cases. The Court's relatively formalistic reason was that the definition had been placed outside of the general titles of the ADA, while the authority granted to the agencies was located within the titles themselves. We also note that there are no "prosecutors" involved with the ADA or H.R. 3195, both of which are remedial civil rights statutes designed to promote equal opportunity to employment, services, and facilities for people with disabilities.

Finally, the Chamber's letter expresses concern over the impact that H.R. 3195 will have on accessibility requirements for public accommodations under Title III of the ADA (the public accommodations section) and you tie this concern to upcoming regulations to be issued by the DOJ on Title III.

As a practical matter, the definition change in H.R. 3195 should have no impact on Title III. That Title requires businesses to eliminate policies and eligibility criteria that exclude people with disabilities, to make modifications in policies and procedures subject to various defenses, and to remove physical barriers that impede accessibility, with the law placing different requirements on existing facilities, new facilities, and renovated facilities.

Unlike employment cases brought under Title I of the ADA, only a very small fraction of cases brought under Title III turn on the definition of disability. Rather, Title III cases turn on whether a business is a covered public accommodation and whether discrimination has occurred on the basis of a person's disability. Amending the definition of disability under the ADA to provide protection to those with impairments that are often mitigated through medication or devices (such as those who use hearing aids, insulin, and anti-seizure medication) is highly unlikely to impact physical access to places of public accommodation. Indeed, we are hard pressed to think of one example of a request for physical accessibility or program accessibility under H.R. 3195 that would not already be within the scope of the ADA.

The clarification of the definition of the ADA is by no means a "radical change." Moreover, it *will* ensure that those who "are deserving of" the ADA's protections will be covered by the law. We hope you agree that people "deserving of the ADA's protections" include the many people with epilepsy, diabetes, heart conditions, depression, multiple sclerosis, cancer, and intellectual disabilities who have been told by the courts that they are not "disabled enough" to gain protection under the ADA. In addition, we strongly agree with the EEOC's and the DOJ's initial determination that mitigating measures should not be taken into account in determining the impact of an impairment on a person (e.g., insulin for a person with diabetes, anti-seizure medication for a person with epilepsy, glasses for a person with poor eyesight). It is the *courts* that have not seen fit to interpret the law as Congress originally intended.

Finally, passage of this law will not overwhelm the EEOC and cause it to be unable to do its job. The statistics on the number of charges filed with the EEOC, and the number of findings of reasonable cause, are closely comparable to other civil rights statutes protecting our citizens. As you are aware, any individual who charges discrimination under any of the civil rights laws must prove that the discrimination occurred *because of* an illegitimate factor. Many people who believe they have been treated unfairly in some way are unable to sustain the burden of proof on that issue, regardless of the characteristic at issue.

The Chamber's letter expresses a willingness to work with Congress in ensuring that the ADA is "improved," and we appreciate your interest in doing so. It is our belief that the narrowed coverage of disability created by courts must first and foremost be fixed, and our legislation is designed to solve that problem.

We therefore ask you and the Chamber to reconsider your opposition to H.R. 3195 in light of the above. As you well know, as a founding chair of the Business Leadership Network instrumental in educating businesses about compliance with the ADA, there are companies all over the country that are eager and willing to hire people based upon their abilities to perform a job and that are not interested in focusing on who does and does not have a disability. We seek your support in again supporting the ADA and the ADA Restoration Act, because making hiring decisions based upon abilities is what H.R. 3195 is all about.

Sincerely,

STENY H. HOYER
House Majority Leader

F. James Sensenbrenner
Member of Congress