

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**29 CFR Part 1614**

RIN 3046-AA94

Affirmative Action for Individuals With Disabilities in the Federal Government

AGENCY: Equal Employment Opportunity Commission.

ACTION: Proposed rule.

SUMMARY: The Equal Employment Opportunity Commission (“EEOC” or “Commission”) proposes to amend its regulations requiring the federal government to engage in affirmative action for individuals with disabilities. These changes will clarify the obligations that the Rehabilitation Act of 1973 imposes on federal agencies as employers, in addition to the obligation not to discriminate on the basis of disability. An initial economic analysis indicates that the regulations will have a moderate economic impact of less than \$100 million per year on federal agencies. Because the proposed regulation does not apply to the private sector, it will have no impact, economic or otherwise, on private businesses.

DATES: Submit comments on or before April 25, 2016.

ADDRESSES: You may submit comments, identified by RIN 3046-AA94, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* (202) 663-4114. (There is no toll free FAX number.) Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4070 (voice) or (202) 663-4074 (TTY). (These are not toll free numbers.)

- *Mail:* Bernadette Wilson, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, U.S. Equal Employment Opportunity Commission, 131 M Street NE., Washington, DC 20507.

- *Hand Delivery/Courier:* Bernadette Wilson, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, U.S. Equal Employment Opportunity Commission, 131 M Street NE., Washington, DC 20507.

Instructions: The Commission invites comments on the proposed changes from all interested parties. All comment submissions must include the agency

name and docket number or the Regulatory Information Number (RIN) for this rulemaking. Comments need be submitted in only one of the above-listed formats. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information you provide.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Copies of the received comments also will be available for inspection in the EEOC Library, FOIA Reading Room, by advanced appointment only, from 9 a.m. to 5 p.m., Monday through Friday except legal holidays, from April 25, 2016 until the Commission publishes the rule in final form. Persons who schedule an appointment in the EEOC Library, FOIA Reading Room, and need assistance to view the comments will be provided with appropriate aids upon request, such as readers or print magnifiers. To schedule an appointment to inspect the comments at the EEOC Library, FOIA Reading Room, contact the EEOC Library by calling (202) 663-4630 (voice) or (202) 663-4641 (TTY). (These are not toll free numbers.)

FOR FURTHER INFORMATION CONTACT: Christopher Kuczynski, Assistant Legal Counsel, (202) 663-4665, or Aaron Konopasky, Senior Attorney-Advisor, (202) 663-4127 (voice), or (202) 663-7026 (TTY), Office of Legal Counsel, U.S. Equal Employment Opportunity Commission. (These are not toll free numbers.) Requests for this document in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663-4191 (voice) or (202) 663-4494 (TTY).

SUPPLEMENTARY INFORMATION:**Executive Summary**

This Notice of Proposed Rulemaking (“NPRM”) proposes to amend 29 CFR 1614.203 to clarify the affirmative action obligations that Section 501 of the Rehabilitation Act of 1973 (“Section 501”) ¹ imposes on federal agencies ² as employers. It codifies a variety of obligations currently placed on federal agencies by management directives and Executive Orders, and adds three substantive affirmative action requirements: (1) Agencies must meet goals set by the EEOC, rather than by the

¹ 29 U.S.C. 791.

² Section 501 applies to “each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution.” 29 U.S.C. 791(b). For convenience, this Notice uses the term “federal agency” or “agency” to mean any federal entity covered by Section 501.

agencies themselves as currently required, for employment of people who have disabilities as defined under Section 501; (2) agencies must meet sub-goals set by the EEOC, rather than by the agencies themselves as currently required, for the employment of people with targeted/severe (hereinafter “targeted”) disabilities as defined by the Office of Personnel Management’s (“OPM’s”) Standard Form 256 (“SF-256”); ³ and (3) agencies must provide personal assistants to employees who, because of disabilities, require such assistance in order to be at work or participate in work-related travel, unless the provision of such services would impose an undue hardship on the agency. The rule would not have retroactive effect.

An initial economic analysis indicates that the proposed regulation may have a one-time initial cost to the federal government of approximately \$90,448.20; an annual cost to the federal government of between \$11,601,562.56 and \$58,732,303.77; and an annual economic benefit to the federal government of between \$3,514,752.00 and \$6,397,947.00. The rule is also expected to have a variety of non-monetizable qualitative and dignitary benefits for individuals with disabilities and individuals with targeted disabilities.

Background

Section 501 requires federal agencies to establish an affirmative action program for the hiring, placement, and advancement of individuals with disabilities. ⁴ The affirmative action requirement in Section 501 imposes two distinct obligations on federal agencies.

First, affirmative action requires that agencies not discriminate against individuals with disabilities. Section 501 provides that the standards used to determine whether a federal agency has discriminated against an individual with a disability “shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 . . . as such sections relate to employment.” ⁵ EEOC

³ Office of Pers. Mgmt., *Standard Form 256* (revised July, 2010), available at http://www.opm.gov/forms/pdf_fill/sf256.pdf. The term “targeted disability” was first officially recognized by the EEOC in MD-703, which was approved on December 6, 1979. Equal Emp’t Opportunity Comm’n, *Improving the Participation Rate of People with Targeted Disabilities in the Federal Workforce 4* (Jan., 2008), available at <http://www.eeoc.gov/federal/reports/pwtd.pdf>.

⁴ See 29 U.S.C. 791(b).

⁵ 29 U.S.C. 791(g).

regulations provide substantial guidance on these standards at 29 CFR part 1630. Additional guidance is provided in the many Section 501 discrimination cases decided by the Commission each year. These decisions are published on the EEOC's Web site, and significant decisions are compiled in a publicly available digest maintained by the Commission's Office of Federal Operations.⁶ This rule does not change any of the substantive nondiscrimination requirements that currently apply in the federal sector, as set forth in EEOC's regulations and cases.

Second, affirmative action requires each federal agency to maintain, update annually, and submit to the Commission an "affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities," and further directs the Commission to approve a plan if "the Commission determines . . . that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities."⁷

The regulations currently implementing this Section 501 requirement simply state that the federal government shall be a "model employer of individuals with disabilities," and instruct federal agencies to "give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities."⁸ Over the years, however, the EEOC has issued various Management Directives to provide guidance on how an agency's affirmative action plan ("Plan") should result in the federal government being a model employer of individuals with disabilities. In addition, several Executive Orders have been issued, setting numerical objectives for hiring by the federal government of individuals with disabilities, to support the goals of Section 501 of the Rehabilitation Act.

In 1987, the Commission issued Management Directive 713, setting the standards by which the Commission would judge an agency's Plan with regard to the hiring of people with disabilities.⁹ Management-Directive 713 required agencies with 1,000 or more employees to establish specific numerical objectives (goals) for

employment of people with targeted disabilities, and to report the number of people with targeted disabilities employed by the agency.¹⁰

In 2003, the EEOC issued Management Directive 715 ("MD-715"), which superseded MD-713.¹¹ Part B of MD-715 provides detailed standards by which the Commission judges an agency's affirmative action plan with regard to the hiring of people with disabilities. MD-715 reaffirms that affirmative action includes a nondiscrimination component and that the standards of the Americans with Disabilities Act ("ADA") govern the nondiscrimination requirements of Section 501.¹² MD-715 also reaffirms that not discriminating against people with disabilities does not exhaust an agency's affirmative action obligation to hire and advance people with disabilities. MD-715 requires agencies "to conduct an internal review and analysis of the effects of all current and proposed policies, practices, procedures and conditions that, directly or indirectly, relate to the employment of individuals with disabilities" and to "collect and evaluate information and data necessary to make an informed assessment about the extent to which the agency is meeting its responsibility to provide employment opportunities for qualified applicants and employees with disabilities, especially those with targeted disabilities."¹³ MD-715 also requires agencies to have written procedures for providing reasonable accommodations, including the amount of time decision makers have to answer reasonable accommodation requests.¹⁴ Finally, MD-715 reinforces the requirement from MD-713 that agencies with 1,000 or more employees are required "to maintain a special

recruitment program for individuals with targeted disabilities and to establish specific goals for the employment and advancement of such individuals," and to report the numbers of employees with targeted disabilities to the EEOC.¹⁵

In addition to MD-715, there are a number of Executive Orders, as well as guidance and policy documents implementing such Executive Orders, that overlap with MD-715 and guide the affirmative action efforts of federal agencies with regard to the hiring and advancement of people with disabilities.

President Bill Clinton issued Executive Order 13163 on July 26, 2000 "to support the goals articulated in section 501 of the Rehabilitation Act of 1973."¹⁶ Under this Executive Order, each federal agency was required to prepare a plan to increase the opportunities for individuals with disabilities to be employed in the agency, and to submit the plan to OPM within 60 days from the date of the order. The Executive Order stated that "based on current hiring patterns and anticipated increases from expanded outreach efforts and appropriate accommodations, the Federal Government, over the next 5 years, will be able to hire 100,000 qualified individuals with disabilities."¹⁷ The same day, President Clinton issued Executive Order 13164, requiring federal agencies to establish written reasonable accommodation procedures, with a series of detailed requirements to be included in those written procedures.¹⁸ Shortly thereafter, the EEOC issued *Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation*.¹⁹ In 2005, the EEOC issued additional guidance providing agencies with detailed practical advice for drafting and implementing reasonable accommodation procedures under Executive Order 13164.²⁰ And in 2008,

⁶ See *Digest of Equal Employment Opportunity Law*, Equal Emp't Opportunity Comm'n, <http://www.eeoc.gov/federal/digest/index.cfm> (last visited July 23, 2015).

⁷ 29 U.S.C. 791(b).

⁸ 29 CFR 1614.203(a).

⁹ Equal Emp't Opportunity Comm'n, *Management Directive 713*, 1987 WL 768434 (Oct. 3, 1987).

¹⁰ EEO Management Directive 712 (MD-712) preceded MD-713 by four years. MD-712 created documentation requirements for agencies' affirmative action plans, but did not include reporting requirements. MD-712 required agencies to focus on the employment of individuals with targeted disabilities; included detailed requirements for program administration and management, including staffing commitments and responsibilities; and required agencies with more than 1,000 employees to establish objectives for hiring people with targeted disabilities. Equal Emp't Opportunity Comm'n, *Management Directive 712*, 1983 WL 410824 (March 29, 1983). For a general history of the EEOC's Management Directives, see Office of Fed. Operations, Equal Emp't Opportunity Comm'n, *A Look at the EEOC's Office of Federal Operation's Federal Sector Programs: Past, Present, and Future*, Dig. of EEO L., Winter 2008, available at <http://www.eeoc.gov/federal/digest/xix-1.cfm>.

¹¹ Equal Emp't Opportunity Comm'n, *Management Directive 715* (Oct 1, 2003), available at <http://www.eeoc.gov/federal/directives/md715.cfm>.

¹² *Id.* at B.II.

¹³ *Id.* at B.III.

¹⁴ *Id.* at B.V.

¹⁵ *Id.* at B.V.

¹⁶ See Executive Order No. 13163, 3 CFR 285 (2001), available at <http://www.gpo.gov/fdsys/pkg/FR-2000-07-28/pdf/00-19322.pdf>.

¹⁷ *Id.*

¹⁸ 3 CFR 286 (2001), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=fr28jy00-140.pdf.

¹⁹ Equal Emp't Opportunity Comm'n, *Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation* (last modified Oct. 19, 2000), available at http://www.eeoc.gov/policy/docs/qanda-accommodation_procedures.html.

²⁰ Equal Emp't Opportunity Comm'n, *Practical Advice on Drafting and Implementing Reasonable Accommodation Procedures under Executive Order 13164*, (July 2005), available at <http://>

the Commission issued an extensive manual on promoting the employment of individuals with disabilities in the federal workforce.²¹

In July 2010, President Barack Obama issued Executive Order 13548, again setting a goal of having the federal government hire 100,000 persons with disabilities within five years.²² The Executive Order requires agencies to set agency-specific hiring goals for persons with disabilities as defined under Section 501 and sub-goals for persons with targeted disabilities as defined by SF-256, and to report those goals to the OPM. Again, policy and guidance documents were developed pursuant to this Executive Order.²³

On May 15, 2014, the Commission published an Advance Notice of Proposed Rulemaking (“ANPRM”) requesting public comment on specific inquiries regarding potential ways to strengthen its Section 501 affirmative action regulations.²⁴ The comment period ended July 14, 2014, and all comments received have been reviewed and given due consideration. The comments are available for review at the Federal eRulemaking Portal at <http://www.regulations.gov>.

A total of 89 comments were received,²⁵ representing the views of 53 individuals, 49 advocacy groups, 10 government entities including state governments and branches of the military, 5 businesses, 2 lawyers or lawyers associations, 1 institution of higher learning, and 1 union representative.

Of the 89 comments, 80 were generally supportive of the Commission’s proposal to amend its Section 501 regulations and included at least one suggestion for what should be included in the rule. Only 2 of the comments were generally negative (1 from an individual and 1 from a

government entity), and 7 were nonresponsive (6 from individuals, and 1 from an advocacy group).

This NPRM proposes to amend 29 CFR 1614.203 to update, clarify, and put in one place the standards the Commission will use to review and approve affirmative action plans developed by agencies pursuant to Section 501. The proposed rule was informed and significantly shaped by all of the comments received. Following final promulgation of this regulation, EEOC will reconcile this regulation’s reporting requirements with existing obligations under MD-715 to ensure that agencies do not engage in duplicative efforts and reporting. The rule would not have retroactive effect.

The NPRM also modifies the goals for hiring people with disabilities in the federal government that are currently set forth by MD-715 and Executive Order 13548 in one respect: The proposed rule would require agencies to take specific steps that are reasonably designed to gradually increase the number of employees with disabilities as defined under Section 501, and the number of employees with targeted disabilities as defined in SF-256, until they meet specific goals set by the EEOC. This is consistent with the approach taken by the Department of Labor in regulations issued to implement the obligation of federal contractors pursuant to Section 503 of the Rehabilitation Act of 1973.²⁶

Finally, the NPRM adds a requirement that an agency’s Plan include the provision of personal assistants to employees who, because of their disabilities, require such assistance in order to be at work or go on work-related travel. Personal assistance services (PAS) assist employees with disabilities with eating, drinking, using the restroom, and putting on and taking off clothing as needed to allow them to participate in the workforce. Such services do not, however, include medical care, and do not have to be provided by someone who has medical training or qualifications.

For many individuals with targeted disabilities, such as paralysis or cerebral palsy, full participation in the workplace is impossible without such services. Lack of PAS in the workplace and/or the fear of losing PAS provided by means-tested assistance programs are stubborn and persistent barriers to employment for individuals with certain significant disabilities. Although providing an additional person to assist

an employee with a disability to perform his or her job duties may fall under an agency’s nondiscrimination obligation to provide a reasonable accommodation (for example, hiring a sign language interpreter), an agency is not required to hire a personal assistant to perform PAS as part of its reasonable accommodation obligation. The NPRM therefore places this obligation on agencies through the affirmative action requirement of Section 501.

However, the Commission has determined that the requirement to provide PAS should be subject to an undue hardship defense, the same limitation on the obligation to provide reasonable accommodations as a matter of nondiscrimination.²⁷ The defense ensures that agencies will not be required to provide PAS if doing so would involve significant cost relative to the available resources, or significant disruption of the agency’s functions.

Each requirement of the proposed rule is discussed in the detailed Section-by-Section Analysis below, and relevant comments are discussed within each section.

Section-by-Section Analysis

1614.203(a) Definitions

Paragraph (a) of the proposed rule provides definitions of key terms. None of the definitions are novel. Many of the defined terms are simple abbreviations: (a)(1) Provides that “ADA” refers to those portions of the ADA that are enforced by the Commission;²⁸ (a)(4) provides that “Plan” refers to an agency’s affirmative action plan, as required under 29 U.S.C. 791(b); (a)(5) provides that “Schedule A hiring authority for persons with certain disabilities” refers to the hiring authority for individuals with intellectual disabilities, severe physical disabilities, and psychiatric disabilities, as set forth at 5 CFR 213.3102(u); and (a)(6) provides that “Section 501” means Section 501 of the Rehabilitation Act, codified at 29 U.S.C. 791.

Paragraph (a)(2) clarifies that, for purposes of the regulation, “disability” has the same meaning that it does under the ADA and Section 501.²⁹ As amended by the ADA Amendments Act

²⁷ See 29 CFR 1630.15(d); part 1630, app. 1630.15(d).

²⁸ These are title I of the ADA, 42 U.S.C. 12101 through 12117, and title V of the ADA, 42 U.S.C. 12201 through 12213, as it applies to employment.

²⁹ See 42 U.S.C. 12102; 29 CFR 1630.2, .3; 29 CFR part 1630, app. 1630.2, .3. The Rehabilitation Act incorporates the ADA definition of “disability.” 29 U.S.C. 794(d).

www.eeoc.gov/policy/docs/implementing_accommodation.pdf.

²¹ Equal Emp’t Opportunity Comm’n, *Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce* (n.d.), available at <http://eeoc.gov/federal/qanda-employment-with-disabilities.cfm>.

²² Executive Order No. 13548, 3 CFR 168 (2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-07-30/pdf/2010-18988.pdf>.

²³ Office of Pers. Mgmt., *Model Strategies for Recruitment and Hiring of People with Disabilities* (Nov. 8, 2010), available at <https://www.chcoc.gov/content/model-strategies-recruitment-and-hiring-people-disabilities-required-under-executive-order>. This guidance document was developed in consultation with the White House, the Department of Labor, and the EEOC.

²⁴ The Federal Sector’s Obligation to Be a Model Employer of Individuals with Disabilities, 79 FR 27,824 (May 15, 2014) (to be codified at 29 CFR 1614.203).

²⁵ In addition to the 89 comments, the Commission received several duplicate comments.

²⁶ The Section 503 regulations establish a 7% utilization goal for employment of qualified individuals with disabilities for the contractor’s entire workforce or each job group in the contractor’s workforce. See 41 CFR 60-741.45(a).

of 2008 (“ADAAA”),³⁰ and implemented by the Commission’s regulations at 29 CFR part 1630, the term “disability” is construed broadly and includes a wide range of medical conditions.³¹

Paragraph (a)(3) provides that the term “hiring authority that takes disability into account” means any hiring authority that permits an agency to consider disability status in the selection of individuals for employment, and provides examples of such, including the Section A hiring authority for persons with certain disabilities; the Veterans’ Recruitment Appointment authority, as set forth at 5 CFR part 307; and the 30% or More Disabled Veteran authority, as set forth at 5 CFR 316.302(b)(4), 316.402(b)(4).

Paragraph (a)(7) defines the term “targeted/severe disability” to mean a disability specifically designated as “targeted/severe” in SF–256. Under the definitions set forth in this paragraph, the term “targeted disabilities” is defined more narrowly than “disabilities”; individuals with targeted disabilities are a subset of individuals who have disabilities as defined under Section 501.

Paragraph (a)(8) defines “undue hardship” as having the same meaning as set forth in 29 CFR part 1630.

1614.203(b) Nondiscrimination

This paragraph states that Section 501 prohibits disability discrimination in employment, and that the standards used to determine whether an agency has violated the prohibition against discrimination are those applied under the ADA. The paragraph reminds agencies that discrimination on the basis of disability is prohibited in all aspects of employment, including hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

1614.203(c) Model Employer

This paragraph is taken directly from 29 CFR 1614.203(a) of the existing regulations. Other than redesignating the paragraph as 1614.203(c), the proposed rule makes no changes to the paragraph.

³⁰ ADA Amendments Act of 2008, Pub. L. 110–325, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

³¹ For a discussion of the ADAAA’s definition of “disability,” see, for example, Equal Emp’t Opportunity Comm’n, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008* (n.d.), available at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

1614.203(d) Affirmative Action Plan

This paragraph sets forth the requirements that an agency’s affirmative action plan must meet in order to provide “sufficient assurances, procedures, and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.”³² Each requirement is discussed in detail below.

1614.203(d)(1) Disability Hiring and Advancement Program

A strong majority of commenters stated that the rule should require agencies to improve their outreach and recruitment efforts. Many of these commenters made specific suggestions, for example, that agencies should be required to develop programs and resources that may be used to identify qualified job applicants with disabilities who may be hired using the Schedule A hiring authority for persons with certain disabilities before a position is advertised, or establish and maintain contacts with disability organizations. Paragraph (d)(1)(i) incorporates these suggestions, and provides examples of ways in which an agency could meet this requirement.³³

A large number of commenters stated that the rule should require federal agencies to make certain information available to job applicants and potential job applicants with disabilities, including information about how to request a reasonable accommodation and how to apply for appointment to a position under noncompetitive disability-related hiring authorities. Paragraph (d)(1)(ii) addresses this concern. It also requires agencies to ensure there is appropriate staff to respond to all disability-related issues relating to the application and placement processes, including questions about reasonable accommodation and appointment under hiring authorities that take disability into account.

Paragraph (d)(1) also addresses the common concern that hiring officials should be given accurate information regarding reasonable accommodation and the appropriate use of hiring authorities that take disability into account. The paragraph requires that the agency provide necessary reasonable accommodations to job applicants with disabilities; accept applications for

³² 29 U.S.C. 791(b).

³³ Many suggestions offered by commenters track the current requirements of MD–715. The preamble does not note each time a section of the NPRM repeats a requirement currently placed on agencies by MD–715.

appointment under hiring authorities that take disability into account; determine eligibility for such appointment; forward applications from eligible individuals to the relevant hiring managers, and ensure that these managers know how and when they may appoint such individuals, consistent with all applicable laws.

Many commenters stated that agencies should be required to develop and implement advancement programs for current employees with disabilities, for example by taking steps to ensure that employees with disabilities are enrolled in management training when eligible; developing a mentoring program for employees with disabilities; or administering exit interviews that include questions on how the agency could improve the recruitment, hiring, inclusion, and advancement of individuals with disabilities. Paragraph (d)(1)(iv) adopts this suggestion.

Some common suggestions were not incorporated into the rule, however. The proposed rule does not modify the competitive service hiring process by, for example, awarding additional “points” to candidates with disabilities, adopting preferences, reserving certain positions for individuals with disabilities, or requiring agencies to interview all qualified candidates with disabilities.³⁴ The rule also does not require agencies to provide mandatory training to supervisors and hiring officials, to incorporate equal employment opportunity and affirmative action principles into supervisors’ and hiring officials’ performance reviews, or to take disciplinary action against employees who have engaged in discrimination, because these issues are already addressed elsewhere by Commission regulations.³⁵

1614.203(d)(2) Disability Anti-Harassment Policy

Some commenters stated that agencies should be required to state specifically in their anti-harassment policies that harassment based on disability is prohibited. This paragraph adopts this suggestion.

1614.203(d)(3) Reasonable Accommodation

Many commenters stated that agencies should be required to have written reasonable accommodation procedures. Executive Order 13164 has required agencies to have such

³⁴ The competitive hiring process is governed by OPM regulations.

³⁵ See 29 CFR 1614.102(a)(5), (6), (9).

procedures since 2000,³⁶ and MD-715, as updated in 2003, includes this requirement as well.³⁷ The Commission has made this requirement part of the proposed rule. The paragraph also adopts several commenters' suggestions for what should be included in the written procedures, many of which are similar to components of reasonable accommodation procedures described in Executive Order 13164 and MD-715. They include a statement that expedited processing and interim accommodations will be provided when possible; instructions for managers on how to recognize and report requests for reasonable accommodation; an explanation of the applicable confidentiality requirements; processing deadlines; information on how to challenge a denial under the federal equal employment opportunity complaint process; and a statement that requestors will be notified of the basis for a denial. The notification requirement is incorporated into the rule at (d)(3)(iii).

Some commenters stated that the rule should require agencies to establish a "centralized fund" to pay for required reasonable accommodations. The purpose of the suggested requirement is to ensure that sufficient funds are available for more costly accommodations, when necessary. Under MD-715, agencies are asked to report whether they use a centralized fund for purposes of providing reasonable accommodations across the agency.³⁸ However, in the Commission's judgment, mandating this requirement as part of an agency's affirmative action obligation raises too many practical concerns as to the precise manner in which appropriated funds are to be held, requested, and disbursed within the agency. Additionally, centralized funding is not a complete solution—problems remain if the fund is too small, or if relevant decision-makers within the agency are unaware of the fund's existence or of the means of accessing it.

Paragraph (d)(3)(ii) addresses the commenters' underlying concerns by requiring agencies to inform all employees who are authorized to grant or deny requests for reasonable accommodation that, under the "undue

hardship" standard set forth by Section 501's nondiscrimination requirement, all available resources are considered when determining whether a denial of reasonable accommodation based on cost is appropriate. In addition, the agency should ensure that relevant decision-makers are informed about various external resources that may be used to fund reasonable accommodations, including, for example, a centralized fund specifically created by the agency for providing reasonable accommodations, the Department of Defense Computer and Electronic Accommodations Program ("CAP"),³⁹ and agency funds that, although not designated specifically for providing reasonable accommodations, may be used for that purpose.

Other commenters stated that the rule should place further restrictions, in addition to those that already apply under 29 CFR part 1630, on the amount of medical information an agency may request to support a request for reasonable accommodation. Under current anti-discrimination standards, an agency cannot require supporting medical documentation if the existence of a disability and the need for accommodation are obvious, and can require no more than is necessary to establish the existence of a disability and the need for accommodation.⁴⁰ Because additional restrictions would deny agencies documentation necessary to establish disability and the need for accommodation, no additional restrictions have been adopted in the proposed rule.

1614.203(d)(4) Accessibility of Facilities and Technology

Many commenters stated that greater compliance with Section 508 of the Rehabilitation Act ("Section 508")⁴¹ and the Architectural Barriers Act of 1968 ("ABA")⁴² would improve the hiring, retention, inclusion, and advancement of individuals with disabilities. Section 508 requires all electronic and information technology purchased, maintained, or used by the agency to be accessible to people with disabilities, and the ABA requires the agency to ensure that its facilities are physically accessible to people with disabilities. Many of these commenters suggested more specifically that the Commission should issue or amend implementing regulations for these

laws, or otherwise strengthen their enforcement.

The Commission has not been given authority by Congress to issue or amend substantive regulations implementing Section 508 or the ABA, or to engage in or strengthen federal agencies' enforcement of those laws.⁴³ The Commission therefore cannot include in the proposed rule any provisions that implement or enforce these laws.

However, paragraph (d)(4) is intended to ensure that federal employees with disabilities have the information they need to utilize existing enforcement and compliance mechanisms. The paragraph requires agencies to provide all employees with contact information for the employees inside the agency who are responsible for ensuring compliance with these laws, and with clear instructions on how to file complaints under existing rules. It also requires agencies to assist employees in filing a complaint with another federal agency, where investigation shows that such other entity is responsible for the alleged violation.

1614.203(d)(5) Personal Services Allowing Employees To Participate in the Workplace

Personal services allowing employees to participate in the workplace may include assistance with eating, drinking, using the restroom, and putting on and taking off clothing. For many individuals with targeted disabilities such as paralysis or cerebral palsy, full participation in the workplace is impossible without such services. The lack of PAS in the workplace and/or the fear of losing personal services provided by means-tested assistance programs are stubborn and persistent barriers to employment for individuals with certain significant disabilities.

The nondiscrimination standards set forth under the ADA in 29 CFR part 1630, and incorporated into Section 501, already require agencies to provide certain job-related services to an individual with a disability as a reasonable accommodation if doing so enables the individual to apply for a job, perform job functions, or enjoy the benefits and privileges of employment, so long as the provision of such services does not impose an undue hardship on the agency. For example, an agency may be required to provide sign language

³⁶ Executive Order No. 13164, *supra* note 18; see also *Policy Guidance On Executive Order 13164*, *supra* note 12.

³⁷ See *Management Directive 715*, *supra* note 11, at B.V.

³⁸ Equal Emp't Opportunity Comm'n, *Instructions to Federal Agencies for EEO MD-715 I* (last updated July 20, 2004), available at <http://www.eeoc.gov/federal/directives/715instruct/section1.html> ("The Model EEO Program and Agency Self-Assessment Checklist").

³⁹ See generally Computer/Electronic Accommodations Program, <http://www.cap.mil> (last visited Aug. 3, 2015).

⁴⁰ See, e.g., *Policy Guidance On Executive Order 13164*, *supra* note 19.

⁴¹ 29 U.S.C. 794d.

⁴² 42 U.S.C. 4151-4157.

⁴³ Rulemaking authority for Section 508 and the ABA belongs to the Architectural and Transportation Barriers Compliance Board ("Access Board"). See 29 U.S.C. 792(b), 794d(a)(2). The Access Board also enforces the ABA. See 29 U.S.C. 792(e). Enforcement of Section 508 is accomplished by filing a complaint with the allegedly noncompliant agency. See 29 U.S.C. 794d(f).

interpreter services, assistance with note taking or photocopying, or use of a job coach as reasonable accommodations, absent undue hardship.

The provision of other personal services needed on the job, however, such as assistance with eating or using the restroom, is not considered a reasonable accommodation under the ADA, and therefore is not considered a reasonable accommodation for purposes of the nondiscrimination requirements of Section 501.⁴⁴ A number of commenters stated that agencies should, however, be required to provide PAS to individuals who need them because of a disability as part of the agencies' affirmative action obligations under Section 501. We adopt this suggestion at paragraph (d)(5). We note that several federal agencies currently provide PAS on a voluntary basis and have been doing so for several decades.⁴⁵

Paragraph (d)(5) also clarifies that agencies can fulfill the PAS requirement by hiring persons who perform both PAS and additional tasks, including provision of professional services and other duties, as time permits. The agency can also require a person hired as a personal assistant to perform PAS for more than one individual with a disability. Thus, an agency might be able to satisfy this requirement by, for example, hiring a pool of personal assistants (either solely for assistance tasks or for assistance tasks and other professional services) throughout the agency or at a particular location.⁴⁶ The

pool hiring approach would be consistent with how many agencies currently address sign language interpreter needs. Whether this approach is feasible will depend on the particular services required and other relevant facts.

*1614.203(d)(6) and 1614.203(d)(7)
Utilization Analysis and Goals*

A majority of commenters stated that agencies should be required to adopt employment goals for individuals with disabilities. Some commenters also stated that agencies should be required to adopt separate goals for individuals with disabilities in the higher ranks of the civil service.

Since 1987, federal agencies have been required by the EEOC to set numerical objectives (goals) for the number of people with targeted disabilities employed in their workforces and report that data annually to the Commission.⁴⁷ Since 2010, federal agencies have been required under Executive Order 13548 to set an internal goal for the percentage of employees with targeted disabilities and the percentage of employees with disabilities as defined under Section 501 in their workforces, and submit those targets to OPM. In OPM's report for fiscal year 2014, the percentage of employees with reportable disabilities in the federal government was 14.64% (191,086 individuals out of a federal workforce of 1,305,392).⁴⁸ The percentage of employees with targeted disabilities in the federal government was 1.18% (15,343 individuals).⁴⁹

Paragraph (d)(7) sets forth the goals that the EEOC expects federal agencies to be able to achieve, based on current federal employment data. First, an affirmative action plan should adopt the goal of achieving a 12% representation rate for people with disabilities as defined by Section 501 at both the GS–

11 level⁵⁰ and above, including the Senior Executive Service (“SES”),⁵¹ and at the GS–10 level and below. Second, the Plan should adopt the goal of achieving a 2% representation rate for individuals with targeted disabilities as defined by SF–256 at the GS–11 level and above (including SES), and at the GS–10 level and below.

The 12% goals established in paragraph (d)(7) are based, in part, on historical data on the employment of persons with disabilities in the federal workforce compiled by OPM. OPM data show that the federal government, viewed as a whole, has already reached a representation rate of 12% at both the GS–10 level and below and the GS–11 level and above.⁵² Results from the most recent Federal Employee Viewpoint Survey further indicate that approximately 13.5% of the federal workforce identify as a person with a disability.⁵³

It should be noted that the OPM data are based on persons who either self-identify as a person with a disability or are veterans with a disability rating of 30% or higher. These figures likely undercount the number of persons with disabilities as defined by Section 501 who are employed or available to be employed by the federal government—in the Commission's final rule implementing changes made by the ADAAA, the Commission estimated that as many as 60 million individuals, or approximately 24% of the eligible workforce, had ADA qualifying disabilities.⁵⁴

The sub-goal for targeted disabilities is also based, in part, on historical data from OPM. Individuals with targeted disabilities currently make up 1.91% of

⁵⁰ Most federal employees are part of the General Schedule (GS) pay system. The General Schedule has fifteen grades—GS–1 (lowest) to GS–15 (highest). See generally *General Schedule Classification and Pay*, Office of Pers. Mgmt., <http://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/> (last visited Mar. 24, 2015).

⁵¹ High-level leadership positions in the federal government are occupied by members of the SES. SES members have a different pay scale than employees who are part of the GS pay system. See generally *Senior Executive Service: Leading America's Workforce*, Office of Pers. Mgmt., <http://www.opm.gov/policy-data-oversight/senior-executive-service/> (last visited Mar. 24, 2015).

⁵² See *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2014*, supra note 48, at 25.

⁵³ *Governmentwide Unweighted Results: Demographic, Items 85–98*, Office of Pers. Mgmt., <http://www.fedview.opm.gov/2014/Reports/ResponsePCT.asp?AGY=ALL&SECT=8> (last visited July 28, 2015).

⁵⁴ See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as amended, 76 FR 16,978, 16,990 (March 25, 2011) (codified at scattered sections of 29 CFR part 1630).

⁴⁴ See 29 CFR part 1630, app. 1630.9.

⁴⁵ The Commission provides personal assistant services to employees with disabilities who require them. The Department of Labor, the Department of Transportation, and the Department of Justice's Civil Rights Division also provide workplace PAS for employees with disabilities. See Department of Labor statement of work on providing personal assistance services as a reasonable accommodation for qualified Department of Labor employees with disabilities (2014) (on file with the Commission); Dep't of Transp., *Disability Resource Center Services Handbook* (Nov. 2014), available at <http://www.transportation.gov/individuals/disability/disability-resource-center-drc-services-handbook> (providing guidance to the Department of Transportation on meeting its obligations regarding the retention and promotion of individuals with disabilities by providing personal assistance and other services); Civil Rights Div., U.S. Dep't of Justice, *Reasonable Accommodation Manual A.2.5* (n.d.) (on file with the Commission) (providing that the Civil Rights Division will provide part-time personal care attendants at work or on official travel when necessary and otherwise reasonable).

⁴⁶ The Department of Labor provides personal assistance services to qualified headquarter employees in this manner. A contractor provides and manages a pool of qualified personnel to provide personal assistance services to approximately 10 employees. Personal assistance tasks include assistance with general office tasks (filing, copying and collating, note taking, etc.), assistance with transportation and travel management (excluding driving, but including

overnight travel), assistance with evacuation during emergencies, assistance with personal care related needs on the job (removing or putting on coats, eating lunch, and taking bathroom breaks), assistance with computer technology, when appropriate, and reading services for visually impaired employees. Department of Labor statement of work, supra note 49.

⁴⁷ *Management Directive 715*, supra note 11, at B.VI; *Management Directive 713*, supra note 9, at ¶ 9.

⁴⁸ See Office of Pers. Mgmt., *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2014*, 25 (Oct. 9, 2015) available at <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/disability-report-fy2014.pdf> (including individuals classified as “30% or more disabled veterans,” but excluding employees who are not on the GS or SES pay scales).

⁴⁹ *Id.* (excluding employees who are not on the GS or SES pay scales).

federal employees at the GS–10 level and below and approximately 0.8% of federal employees at the GS–11 level and above.⁵⁵ These figures are based on the number of persons who self-report as having targeted disabilities on SF–256. In addition, the Commission has encouraged federal agencies with 1,000 or more employees to set a goal of a 2% representation rate for individuals with targeted disabilities for some time.⁵⁶

As with the data on the percentage of persons with disabilities in the federal workforce, there is reason to believe that these figures undercount the number of persons with targeted disabilities employed or available to be employed by the federal government. The American Community Survey (“ACS”), administered by the U.S. Census Bureau, asks a series of questions related to disability such as whether, due to a physical, mental, or emotional problem, the person has serious difficulty hearing, seeing (even with glasses), remembering, concentrating, or making decisions, walking or climbing stairs, bathing or dressing, and/or doing errands alone.⁵⁷ Using this definition, the ACS estimates that approximately 10.5% of the population aged 18–64 is a person with a disability.⁵⁸ Because the ACS frames its questions in terms of “serious difficulty,” it is likely that most of the persons falling within this definition would qualify as persons with targeted disabilities. In addition, there are likely persons with targeted disabilities as defined by SF–256, such as persons with epilepsy or certain psychiatric disabilities, who would not fall into the ACS definition.

Despite data suggesting that utilization goals higher than those proposed in paragraph (d)(7) for all disabilities and targeted disabilities could be justified, the Commission elects to establish targets that are in line with, but slightly above, historic utilization patterns in the federal government. The goals in paragraph (d)(7) are aggressive in comparison with

those imposed on federal contractors by the regulations implementing Section 503 of the Rehabilitation Act⁵⁹ and, at the same time, readily achievable based on current federal employment data. The Commission expects that early successes in meeting the goals will create momentum for higher agency targets in the future.

Paragraph (d)(7) further states that the utilization goals for persons with disabilities and for persons with targeted disabilities will be assessed both above and below the GS–10 level, including SES. This was done for two reasons. First, OPM employment data show that individuals with disabilities are disproportionately represented at lower levels of employment within the federal government. In fiscal year 2014, the representation rate of individuals with disabilities at the GS–11 level and above was roughly 30% lower than their representation rate at the GS–10 level and below, and the representation rate of individuals with targeted disabilities was almost 60% lower at the GS–11 level and above.⁶⁰ Establishing a separate goal for representation at GS–11 and above should rectify this imbalance.

Second, the Commission does not wish to see a rise in the representation of individuals with disabilities as defined by Section 501 at higher levels of employment be accompanied by a corresponding fall in their representation rate at lower levels. As a result, the proposed rule also requires agencies to adopt the goal of achieving a 12% representation rate for individuals with disabilities as defined by Section 501 and a 2% representation rate for individuals with targeted disabilities as defined by SF–256 at the GS–10 level and below.

Paragraph (d)(6) requires agencies to perform the workforce analysis necessary to determine whether these goals set forth in paragraph (d)(7) have been met. The paragraph clarifies that the analysis must be performed on an annual basis, and that it may classify individuals as having disabilities or targeted disabilities on the basis of records relating to self-identification via SF–256, appointment of individuals under noncompetitive disability-related hiring authorities, and requests for reasonable accommodation. This

workforce analysis is largely consistent with what is currently required under MD–715.⁶¹

The Commission recognizes that there are many reasons why it may take some agencies more time than others to meet the utilization goals, such as budgetary constraints (including hiring freezes), the number of additional individuals with targeted disabilities that would have to be hired to achieve the goals, and the nature of certain jobs within an agency’s workforce that may include valid physical standards that individuals with certain disabilities may not be able to meet. The rule therefore does not specify a timeframe for achieving the goals. Rather, the rule requires each agency to create and submit a Plan that includes specific steps reasonably designed to gradually increase the number of employees with disabilities and targeted disabilities, with the objective of achieving the goals established pursuant to paragraph (d)(7)(i) of this section. Paragraph (d)(7)(ii) provides examples of such steps, including increased use of hiring authorities that take disability into account, additional outreach and recruitment efforts, disability-related training for all employees, and adoption of training, internship, and mentoring programs for individuals with disabilities. The rule explicitly provides that the Commission will not disapprove a Plan solely because the agency has failed to meet a goal.

Although Section 501 generally prohibits employers from asking questions about whether an applicant has a disability before making a job offer, there are still a number of ways that agencies may learn about a particular applicant’s disability. First, the applicant may choose to disclose his or her disability, or the disability may

⁵⁵ See *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2014*, supra note 48, at 25 (excluding employees not on the SES or GS pay scales).

⁵⁶ See Equal Emp’t Opportunity Comm’n, *Annual Report on the Federal Work Force Part II Work Force Statistics Fiscal Year 2011 1–23* (n.d.), available at http://www.eeoc.gov/federal/reports/fsp2011_2/upload/fsp2011_2.pdf.

⁵⁷ See *American Community Survey (ACS)*, U.S. Census Bureau, <https://www.census.gov/people/disability/methodology/acs.html> (last visited July 28, 2015).

⁵⁸ *2013 American Community Survey 1-Year Estimates: Disability Characteristics*, U.S. Census Bureau, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_S1810&prodType=table (last visited July 28, 2015).

⁵⁹ See 41 CFR 60–741.45(a) (establishing a utilization goal of 7% for employment of individuals with disabilities for the contractor’s entire workforce or each job group in the contractor’s workforce).

⁶⁰ See *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2014*, supra note 48, at 25 (excluding employees not on the SES or GS pay scales).

⁶¹ See *Management Directive 715*, supra note 11, at B.III. MD–715 requires agencies to collect data on the total workforce distribution of employees with disabilities for both the permanent and temporary workforce; the representation and distribution of employees with disabilities, by grade, in both the permanent and temporary workforce; the permanent and temporary workforce participation of employees with disabilities in major occupational groups by grades; the representation of individuals with disabilities among applicants for permanent and temporary employment; the representation of employees with disabilities among those who received promotions, training opportunities and performance incentives; and the representation of employees with disabilities among those who were voluntarily and involuntarily separated. MD–715 requires that agencies separately identify applicants and employees with targeted disabilities. *Id.* The Directive explains that each agency must collect and evaluate this data in order to make “an informed assessment about the extent to which the agency is meeting its responsibility to provide employment opportunities for qualified applicants and employees with disabilities, especially those with targeted disabilities.” *Id.*

be obvious. Second, the disability may be disclosed in paperwork establishing eligibility for appointment under the Schedule A hiring authority for persons with certain disabilities. Third, an employer is permitted to invite job applicants to self-identify as individuals with disabilities or targeted disabilities prior to a conditional offer of employment, if the invitation is made pursuant to an affirmative action program for people with disabilities, and if the information is used only for that purpose.⁶²

1614.203(d)(8) Recordkeeping

This paragraph sets forth the recordkeeping requirements imposed by the rule, and directs agencies to make the required records available to the Commission upon request. The required records are necessary for an agency to determine whether it is providing “adequate hiring, placement, and advancement opportunities for individuals with disabilities,” as required under Section 501. Specifically, the rule requires that each agency keep a record of: (1) The number of individuals with disabilities and the number of individuals with targeted disabilities who apply for employment; (2) the number of individuals with disabilities and the number of individuals with targeted disabilities that the agency hires; (3) the number of adverse actions the agency takes based on medical information, including rescissions of conditional job offers; and (4) details regarding all requests for reasonable accommodation the agency receives.

A significant number of commenters stated that the rule should require agencies to track the careers of individuals who are appointed under the Schedule A hiring authority for persons with certain disabilities, to ensure that they are appropriately converted to a career or career-conditional appointments in the competitive service and promoted. The paragraph adopts this suggestion, and, accordingly, requires agencies to keep records of the date of hire, entering grade level, probationary status, and current grade level of each employee hired under that authority, as well as the number of such employees converted to the competitive service each year.

⁶² See, e.g., Letter from Peggy R. Mastroianni, Legal Counsel, Equal Emp’t Opportunity Comm’n, to Patricia A. Shiu, Director, Office of Fed. Contract Compliance Programs, Dep’t of Labor (Aug. 8, 2013), available at <http://www.dol.gov/ofccp/regs/compliance/section503.htm> (follow “EEOC Opinion on the Invitation to Self-Identify” hyperlink).

1614.203(e) Reporting

This paragraph sets forth the reporting requirements imposed by the rule. As provided under Section 501,⁶³ the paragraph requires each agency to submit a copy of its Plan to the Commission on an annual basis, the results of the two most recent workforce analyses performed pursuant to paragraph (d)(7), and the number of employees appointed under the Schedule A hiring authority for persons with certain disabilities. The proposed paragraph does not specify the precise time and manner of submission, as EEOC intends to reconcile this regulation’s reporting requirements with existing obligations under MD-715 following final promulgation of the rule. As suggested by several commenters, the paragraph also requires agencies to make the information submitted to the Commission available to the public.

1614.203(f) Commission Approval and Disapproval

Paragraph (1) provides that the Commission will approve a Plan if it determines that the Plan, as implemented, meets the requirements set forth in paragraph (d) of this section. Paragraph (2) provides that the Commission will disapprove a Plan if it determines that the Plan, as implemented, does not meet those requirements. The paragraph further clarifies that failure to achieve a goal set forth in proposed paragraph (d)(8)(i), by itself, is not grounds for disapproval unless the Plan fails to require the agency to take specific steps that are reasonably designed to achieve the goal.

Request for Comments

The Commission invites comments on all aspects of the proposed regulation. In addition, it invites comments on the following specific issues.

As discussed above, agencies are not required to provide PAS, such as assistance with eating or using the restroom, under the reasonable accommodation standards set forth in 29 CFR part 1630. The unavailability of PAS, however, is a significant hindrance to the employment of persons with certain targeted disabilities. Paragraph (d)(6) addresses this concern by requiring agencies to provide PAS to employees with disabilities as part of the agencies’ affirmative action obligations under Section 501. To ensure that the Commission’s final decision whether to include this requirement is based on a sound record, the Commission invites responses to the following questions:

⁶³ 29 U.S.C. 791(b).

1. Should Section 501 regulations require agencies to provide PAS to employees who need them because of a disability while they are on the job or on job-related travel as part of the affirmative action obligation? Do the services described in the regulations accurately capture the PAS that a person with a disability might require?

2. If the rule should require agencies to provide PAS, should assistants be assigned to a particular individual, or should they respond to requests for PAS by different individuals, as needed? Should the agency be allowed to assign non-PAS tasks to assistants when no personal assistance is required?

3. The proposed rule does not address how the obligation to provide PAS would be enforced. The Commission is requiring that agencies provide PAS as part of their affirmative action obligations under Section 501. Affirmative action obligations, such as employment goals or advancement plans, are not generally enforceable through the part 1614 process. The requirement to provide PAS is unlike most general affirmative action obligations, however, as an agency’s failure to comply with this obligation will directly harm specific, identifiable individuals. The Commission invites comments on (a) whether the Commission should enforce the PAS requirement in the manner envisioned in paragraph (f) of the proposed rule, or instead offer a process through which individuals denied PAS can request that the Commission review agency denials and order relief to persons wrongly denied those services.

4. Is the Commission’s estimate of the costs associated with a PAS requirement, discussed in the regulatory procedures section below, accurate? If not, what is a more accurate estimate? Would particular agencies, or types of agencies, experience significant logistical difficulties in complying with the PAS requirement? What is a realistic estimate of costs arising from offering a process for enforcement of the obligation to provide PAS? Please include supporting references.

The Commission also invites responses to the following general questions regarding the proposed rule:

5. EEOC is interested in learning from the public what would be appropriate minimum standards for federal agencies regarding goals for hiring of persons with disabilities. As proposed, the goals for representation rates have been set at 12% for individuals with all disabilities and 2% for individuals with targeted disabilities. Are these levels appropriate? What data exists that show

that the goals should either be higher or lower than in this proposed rule?

6. EEOC is interested in whether agencies should maintain a file or database of individuals who have been determined to be eligible for appointment under a hiring authority that takes disability into account, but who have not been hired by the agency. EEOC is interested in whether such individuals should be asked whether they wish to be included in such a database, or whether the database should be created automatically from those who apply via a hiring authority that takes disability into account.

7. EEOC requests comments from the public on any of the standards proposed in this rule governing affirmative action with respect to the hiring, advancement, and retention of federal employees with disabilities. This includes the PAS requirement, the utilization analysis and goals provision, and the recordkeeping and reporting requirements. It also includes the affirmative action requirements related to reasonable accommodations. EEOC requests any data or evidence that shows that these standards are either too strict or too lenient and any information on the costs and benefits related to each standard.

Regulatory Procedures

*Executive Order 13563*⁶⁴ and *Executive Order 12866*⁶⁵ (*Regulatory Planning and Review*)

This proposed rule has been drafted and reviewed in accordance with Executive Order 13563 and Executive Order 12866. This rule has been designated a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the proposed rule has been reviewed by the Office of Management and Budget.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its cost (recognizing that some benefits and costs are difficult to quantify); to tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives; and to select, from among alternative regulatory approaches, including the alternative of not regulating, those approaches that maximize net benefits (including potential economic, environmental, public health and safety,

and other advantages, distributive impacts, and equity).

Executive Order 12866 directs agencies to submit a regulatory impact analysis for those regulatory actions that are “economically significant” within the meaning of section 3(f)(1).⁶⁶ A regulatory action is economically significant under section 3(f)(1) if it is anticipated (1) to “[h]ave an annual effect on the economy of \$100 million or more,” or (2) to “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.”⁶⁷ Executive Order 13563 reaffirms the principles established by Executive Order 12866, and further emphasizes the need to reduce regulatory burden to the extent feasible and permitted by law.⁶⁸

Currently, guidance on the federal government’s obligation to engage in affirmative action for individuals with disabilities is scattered throughout a number of overlapping Executive Orders,⁶⁹ management directives,⁷⁰ and guidance and policy documents.⁷¹ In contrast, the Commission’s current Section 501 regulations do not provide a detailed explanation of what an agency must do to comply with its Section 501 affirmative action obligations, or of how the Commission will assess Plans submitted to it for approval pursuant to 29 U.S.C. 791(b).⁷²

The proposed rule is necessary to ensure that federal agencies’ affirmative action obligations are in a regulation, rather than merely in management directives and sub-regulatory guidance, so that the obligations will have the

⁶⁶ Executive Order 12866 refers to “those matters identified as, or determined by the Administrator of [the Office of Information and Regulatory Affairs] to be, a significant regulatory action within the scope of section 3(f)(1).” *Id.* The Office of Management and Budget states that “Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1).” Office of Mgmt. & Budget, *Circular A-4* (Sept. 17, 2003), available at http://www.whitehouse.gov/omb/circulars_a004_a-4.

⁶⁷ Executive Order No. 12866, *supra* note 65.

⁶⁸ Executive Order No. 13563, *supra* note 64.

⁶⁹ See, e.g., Executive Order No. 13164, *supra* note 18; Executive Order No. 13548, *supra* note 11.

⁷⁰ See, e.g., *Management Directive 715*, *supra* note 11.

⁷¹ See, e.g., *Policy Guidance on Executive Order 13164*, *supra* note 19; *Promoting Employment of Individuals with Disabilities in the Federal Workforce*, *supra* note 21. See generally *supra* notes 9 through 23 and accompanying discussion.

⁷² See 29 CFR 1614.203(a) (stating only that the federal government shall be a “model employer of individuals with disabilities,” and instructing federal agencies to “give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities”).

force of law. Moreover, by compiling federal agencies’ affirmative action obligations in one place, rather than in a range of documents, none of which are comprehensive, the proposed rule would provide agencies with easy access to the necessary information, thereby facilitating increased compliance.

The Commission has determined that the proposed rule will have an annual effect of less than \$100 million on federal agencies, including both estimated costs and estimated savings arising from the rule, based on the high estimate of projected costs. In addition, the rule is expected to result in one-time compliance costs for agencies of approximately \$90,448.20, and have a variety of positive qualitative and dignity benefits. The Commission’s economic impact analysis is presented immediately below.

Many of the proposed requirements will have no economic effect, because they will impose no new requirements or burdens on federal agencies—

- Paragraph (a), which sets forth definitions of key terms, imposes no requirements.
- Paragraph (b), which provides that Section 501 prohibits discrimination on the basis of disability, and that the standards for determining whether Section 501 has been violated in a complaint alleging employment discrimination are the same standards applied under the ADA, merely revises paragraph (b) in the current regulations for clarity.
- Paragraph (c), which requires agencies to be model employers of individuals with disabilities, is identical to paragraph (a) of the current regulations.

• The requirement to adopt an affirmative action plan, in paragraph (d) of the proposed rule, is imposed by Section 501.⁷³

- Paragraphs (d)(1)(i), which requires outreach, and (d)(1)(iii), which requires agencies to take steps to ensure that individuals with disabilities have sufficient advancement opportunities, impose no new annual burden on agencies because they provide guidance on how to fulfill existing requirements, rather than impose new ones.⁷⁴

⁷³ 29 U.S.C. 791(b).

⁷⁴ See, e.g., 29 CFR 1614.102(a)(10), (a)(11), (a)(13), (b)(1); *Promoting Employment of Individuals with Disabilities*, *supra* note 21; *Policy Guidance on Executive Order 13164*, *supra* note 19; *Management Directive 715*, *supra* note 11. Indeed, the Commission anticipates that the additional guidance contained in the proposed rule, in the form of helpful examples and suggestions, will reduce agency burden by making it easier to satisfy the existing requirements. However, because the

⁶⁴ Executive Order No. 13563, 3 CFR 215 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/infreg/eo12866/eo13563_01182011.pdf.

⁶⁵ Executive Order No. 12866, 3 CFR 638 (1993), available at <http://www.whitehouse.gov/sites/default/files/omb/infreg/eo12866.pdf>.

• The requirements of paragraph (d)(3)(i), which requires written reasonable accommodation procedures, and paragraph (d)(3)(iii), which requires agencies to provide individuals who have been denied a reasonable accommodation with written notice of the reasons for the denial, are taken from MD-715, Executive Order 13164, and existing agency guidance.⁷⁵

• The recordkeeping requirements of paragraph (d)(8), with the exception of (d)(8)(iii) and (d)(8)(iv) (discussed below), are taken from MD-715.

• The requirement to submit an Affirmative Action Plan to the Commission for approval on an annual basis, found in (e)(1), is imposed by Section 501.⁷⁶

Other requirements of the proposed rule will impose no new burdens on federal agencies because they codify aspects of the existing MD-715 and program review processes. MD-715 requires agencies to conduct annual internal reviews of their policies, practices, and procedures to determine whether they provide sufficient employment opportunities to qualified applicants and employees with disabilities, especially those with targeted disabilities. As part of this analysis, agencies must determine the numerical representation and distribution of applicants and employees with disabilities and targeted disabilities.⁷⁷

Many of these requirements are reflected in the proposed rule. Paragraph (d)(6) reaffirms that agencies are required to gather distribution data in order to assess whether individuals with disabilities and individuals with targeted disabilities are being given sufficient employment opportunities and paragraph (d)(7)(ii) reaffirms that additional steps must be taken, as appropriate, to address statistical disparities.⁷⁸

Commission does not have any data upon which to base an estimate of time saved, it does not quantify that benefit here.

⁷⁵ See *Policy Guidance on Executive Order 13164*, *supra* note 19.

⁷⁶ 29 U.S.C. 791(b).

⁷⁷ See *Management Directive 715*, *supra* note 11, at B.III. MD-715 also requires agencies to determine whether they are meeting obligations imposed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., on an annual basis. See *Management Directive 715*, *supra* note 11, at A. Those requirements are not relevant to this rulemaking.

⁷⁸ The Commission recognizes that proposed paragraph (d)(7)(i) requires agencies to adopt specific goals for employment of individuals with all disabilities and individuals with targeted disabilities for purposes of this assessment, and that this aspect of the proposed rule may impose annual burdens on federal agencies. The burdens associated with (d)(7)(i) are discussed below, and the Commission seeks comment on the estimated costs provided.

The following aspects of the rule, all of which require agencies to make certain information more readily available, may impose one-time compliance costs on federal agencies:

- Paragraph (d)(2) requires agencies to clarify in their harassment policies that disability-based harassment is prohibited;
- (d)(3)(ii) requires agencies to inform all employees who are authorized to grant or deny requests for reasonable accommodation about reasonable accommodation funding;
- (d)(4) requires agencies to make certain contact information available to employees; and
- (e)(2) requires agencies to make their Affirmative Action Plans available to the public.

We estimate that agencies will spend approximately 5 hours performing these tasks, updating policies, and checking for compliance. Multiplying by the number of agencies covered by the rule (218)⁷⁹ yields a total of 1090 burden hours. We assume that these tasks will be performed by an employee at the GS-14 step 5 level, in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA region.⁸⁰ The hourly compensation rate for such an employee, adjusted to include benefits, is \$82.98 per hour,⁸¹ yielding a total estimated cost of \$90,448.20.

Other aspects of the proposed rule will impose recurring or ongoing costs on federal agencies.

Paragraph (d)(1)(ii) requires agencies to ensure that staff are available to perform certain tasks. We provide both a high and a low estimate of the annual costs associated with this requirement. To calculate the high estimate, we assume that each covered agency will

⁷⁹ The number of agencies covered by the requirements of MD-715 varies from year to year. The number of agencies covered in Fiscal Year 2014 was 218.

⁸⁰ Pay rates for employees at the GS-14 level depend on the within-grade level, or "step," of the employee, which ranges between one and ten, and on the geographic location of the employee. See generally *General Schedule Classification and Pay*, *supra* note 50. The Commission realizes that not all of these tasks will be performed by employees meeting these criteria; the assumption is made purely for purposes of the economic analysis.

⁸¹ See Office of Pers. Mgmt., *Salary Table 2015-DCB: Hourly Basic (B) Rates by Grade and Step, Hourly Overtime (O) Rates by Grade and Step* (Jan. 2015), available at http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/pdf/DCB_h.pdf (providing hourly monetary compensation rates); Congressional Budget Office, *Comparing the Compensation of Federal and Private-Sector Employees* 9 (Jan. 2012), available at https://www.cbo.gov/sites/default/files/01-30-FedPay_0.pdf (reporting that the cost of providing benefits to federal workers averages between \$15.50 and \$24.70 per hour). For purposes of this analysis, we assume a cost of \$24.70 per hour for benefits.

need to hire at least one new employee to perform the required tasks, at the GS-14 step 5 level, in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA region. The compensation rate for a government employee at this level, adjusted to include benefits, is \$173,011.00 per year.⁸² Multiplying by the number of agencies covered by the rule yields a total cost of \$37,716,398.00.

To calculate the low estimate, we note that almost all federal agencies already employ personnel who provide these services. For example, agencies already employ 229 Disability Program Managers ("DPMs") or Selective Placement Program Coordinators ("SPPCs") (who perform, among other things, certain tasks of a DPM),⁸³ most commonly at the GS-12 or GS-13 level. We assume that approximately 10% of agencies, or 22 agencies, will need to hire a new staff person at the GS-12 step 5 level, in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA region. The annual salary of such an employee, adjusted to include benefits, is \$137,940.00.⁸⁴ Multiplying by 22 yields a total annual cost of \$3,034,680.00.

Based on the two calculations above, the Commission estimates that paragraph (d)(1)(ii) will result in recurring annual costs of between approximately \$3,034,680.00 at the low end and \$37,716,398.00 at the high end.

Paragraph (d)(7)(i), which requires agencies to adopt specific goals for employment of individuals with all disabilities and individuals with targeted disabilities, is likely to impose recurring or ongoing costs on federal agencies in three respects.

First, to determine whether the goals have been met, agencies will need to determine—

- the percentage of employees at the GS-11 level or above, including SES, who are individuals with disabilities;
- the percentage of employees at the GS-11 level or above, including SES,

⁸² See Office of Pers. Mgmt., *Salary Table 2015-DCB: Annual Rates by Grade and Step* (Jan. 2015), available at <http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/pdf/DCB.pdf> (providing annual monetary compensation rates); *Comparing the Compensation of Federal and Private-Sector Employees*, *supra* note 88, at 9.

⁸³ See *Disability Employment: Selective Placement Program Coordinator Directory*, Office of Pers. Mgmt., <http://www.opm.gov/policy-data-oversight/disability-employment/selective-placement-program-coordinator-directory/> (last visited Aug. 3, 2015).

⁸⁴ See *Salary Table 2015-DCB: Annual Rates by Grade and Step*, *supra* note 82; *Comparing the Compensation of Federal and Private-Sector Employees*, *supra* note 81, at 9.

who are individuals with targeted disabilities;

- the percentage of employees at the GS–10 level or below who are individuals with disabilities; and
- the percentage of employees at the GS–10 level or below who are individuals with targeted disabilities.

Associated costs should be minimal. OPM already gathers data on the representation of individuals with disabilities and individuals with targeted disabilities at each grade level within each agency. The OPM data include employees classified as veterans with 30% or more disability.⁸⁵ Agencies therefore may make the required determinations by requesting the relevant raw data from OPM, and performing the four simple calculations noted above. The Commission estimates that agencies will spend 2 hours to perform the required analysis, to determine whether goals have been met, and to maintain the associated records, on an annual basis. Multiplying by the number of agencies covered by the rule yields a total of 436 burden hours. We assume that these tasks will be performed by an employee at the GS–14 step 5 level in the Washington-Baltimore-Northern Virginia, DC–MD–VA–WV–PA region, at an hourly rate of \$82.98 per hour (adjusted to include benefits).⁸⁶ Multiplying the hourly rate by the number of burden hours yields a total recurring annual cost of \$36,179.28.

Second, because paragraph (d)(7)(i) encourages federal agencies to hire individuals with disabilities, it may impose ongoing costs by increasing the number of federal employees who need a reasonable accommodation.

We first consider the number of additional employees who will need a reasonable accommodation. Because research shows that the federal government as a whole has already achieved a representation rate of 12% for people with disabilities as defined by Section 501 both at the GS–10 level and below and at the GS–11 level and above,⁸⁷ the Commission does not expect that agencies will hire a large number of individuals who have disabilities as defined under Section

501, but do not have targeted disabilities, as a result of the rule.

However, the federal government will need to hire additional individuals with targeted disabilities to meet the 2% goals at the GS–10 level and below and at the GS–11 level and above.⁸⁸ Data show that individuals with targeted disabilities currently represent 1.81% of federal employees at the GS–10 level and below, and that approximately 384 additional employees with targeted disabilities are required to reach the 2% goal.⁸⁹ Such individuals represent approximately 0.8% of federal employees at the GS–11 level and above, and approximately 10,381 additional individuals with targeted disabilities are required to reach the goal.⁹⁰ Although many of these 10,765 additional employees will not need reasonable accommodations, we assume for purposes of this economic analysis that they will.

We next consider the cost of the required accommodations. Although many accommodations have no financial cost,⁹¹ we assume for purposes of this economic analysis that the needed accommodations will have a cost. The Job Accommodation Network (“JAN”) has found that, if an accommodation has a cost, it will typically be approximately \$500.00. While some accommodations will cost more (for example sign language interpreters or specialized computer equipment), they are the exception rather than the rule. Multiplying the estimated 10,765 additional federal employees who will need reasonable accommodations by the estimated cost of \$500.00 per accommodation yields a total estimated recurring⁹² cost of \$5,382,500.00.

Third, again because paragraph (d)(7)(i) encourages the hiring of individuals with disabilities, it may impose ongoing costs arising from the obligation to provide PAS to new

employees under paragraph (d)(5) of the proposed rule. The Commission estimates that between 1.1% and 2.0% of the estimated 10,765 additional federal employees, or between 118 and 215 individuals, will require PAS to function in the workplace.⁹³ Further, although the proposed rule allows agencies to hire a single personal assistant to provide services to multiple individuals, and to require personal assistants to perform additional duties, we nevertheless assume for the purposes of this analysis that each individual who will be entitled to PAS under the proposed rule will require a dedicated personal assistant for 40 hours per week.⁹⁴ We provide both a high and a low estimate of associated costs under these assumptions.

To calculate the low estimate, we assume that the agency will hire personal assistants on a contract basis,

⁹³ The Commission is aware of only one study that asks specifically about the need for personal assistance services among persons with disabilities in the workplace. The low estimate is based on that study’s finding that 1.1% of surveyed individuals with disabilities reported the need to have a personal assistant to help with job-related activities as a reasonable accommodation. See Craig Zwerling, et al., *Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995*, 45 J. Occupational & Env’tl. Med. 517, 519 (2003). This study only included employed individuals with disabilities. The Commission recognizes that, because individuals who need personal assistance services have disproportionately high unemployment rates, the study likely underestimates the percentage of such individuals in the labor pool.

However, there is very little research on which to base an estimate of the difference between the need for personal assistance services at work among individuals who are currently employed and individuals who are unemployed but seeking work. The Commission is only aware of one study, conducted in 2003, that partially addressed this issue. That study found that approximately 7.7% of employed individuals with disabilities reported difficulty with self-care, while approximately 8.6% of individuals with disabilities who were unemployed and seeking work reported such difficulty. See Susan Stoddard et al., *Personal Assistance Services as a Workplace Accommodation*, 27 Work 363, 364 (2006). Because difficulty with self-care is not equivalent to the need for personal assistance services at work, those findings are not apposite. However, the 0.9% difference in difficulty with self-care between the two populations may be used as an estimate of differences in self-care-related needs more generally. Therefore, in order to calculate the high estimate, the Commission assumes that an additional 0.9% of the additional hires, or a total of 2%, will require personal assistance services.

⁹⁴ Because individuals who require personal assistance services generally do not require them continuously throughout the workday, the cost of providing such services to a single individual will represent a fraction of this figure. See, e.g., Tatiana I. Solovieva et al., *Cost of Workplace Accommodations for Individuals with Disabilities: With or Without Personal Assistance Services*, 2 Disability & Health J. 196, 201 (2009) (reporting that the median annual cost of accommodations for individuals who need personal assistance services is \$8000.00).

⁸⁵ See, e.g., *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2014*, supra note 48, at 25.

⁸⁶ See *Hourly Basic (B) Rates by Grade and Step*, supra note 81; *Comparing the Compensation of Federal and Private-Sector Employees*, supra note 81, at 9.

⁸⁷ See *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2014*, supra note 48, at 25.

⁸⁸ The regulation does not require agencies to create positions or vacancies for persons with targeted disabilities; agencies may place individuals with targeted disabilities into existing vacancies.

⁸⁹ See *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2014*, supra note 48, at 25.

⁹⁰ See *id.*

⁹¹ See Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact 3* (updated Sept. 1, 2014), available at <http://askjan.org/media/downloads/LowCostHighImpact.pdf> (finding that 57% of all reasonable accommodations have no costs).

⁹² See *id.* We note that JAN’s estimate of \$500.00 is for one-time costs associated with providing a reasonable accommodation. However, given the limitations of the study, JAN was unable to provide an estimate of ongoing or annual costs. We therefore assume a cost of \$500.00 per year for purposes of this estimate.

at market rates. The average hourly wage for a personal assistant is approximately equivalent to the federal contract employee minimum hourly wage of \$10.10.⁹⁵ Multiplying this amount by the approximate total number of work hours per year (2,080) yields a total annual cost of \$21,008.00 per assistant. Multiplying by the low estimate of the number of new hires expected to require PAS (118) yields a total cost of \$2,478,944.00 per year. Multiplying by the high estimate of the number of new hires expected to require PAS (215) yields a total cost of \$4,516,720.00 per year.

To calculate the high estimate, we assume that the agency will hire the personal assistant at the GS-5 step 5 level, in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA region. The annual compensation rate for such an employee, adjusted to include benefits, is \$64,581.97.⁹⁶ Multiplying by the low estimate of the number of new hires expected to require PAS (118) yields a total cost of \$7,620,672.46 per year. Multiplying by the high estimate of the number of new hires expected to require such services (215) yields a total cost of \$13,885,123.55 per year.

In addition, some existing federal employees may receive PAS from federal agencies as a result of the rule. The Commission is not aware of any existing data concerning the number of such employees, and is not aware of any means of determining that number short of surveying the entire federal workforce. The Commission is aware of one 2003 study measuring the number of employed individuals who require personal services at work because of a disability.⁹⁷ That study found that 1.1%

⁹⁵ See, e.g., Douglas Klayman, et al., Soc. Dynamics, LLC, *Funding Options for Personal Assistance Services* 16 (2009), available at [www.dol.gov/odep/research/FundingOptionsPersonalAssistanceServices\(PAS\).pdf](http://www.dol.gov/odep/research/FundingOptionsPersonalAssistanceServices(PAS).pdf) (finding that the average hourly wage was \$9.11); Denetta L. Dowler et al., *Personal Assistance Services in the Workplace: A Literature Review*, 4 *Disability & Health J.* 201, 206 (2011) (finding that the average hourly wages of between \$8.18 and \$12.00); Tatiana I. Solovieva et al., *Personal Assistance Services (PAS) for Individuals with Disabilities: Self-Care at the Workplace*, 36 *Work* 339, 341 (2010) (reporting an average hourly wage of \$8.34). The federal contract employee minimum hourly wage was adopted under Executive Order No. 13658, 79 FR 9851 (Feb. 12, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-02-20/pdf/2014-03805.pdf>.

⁹⁶ To adjust for the cost of benefits, we divided the annual salary for an employee at this level (\$39,395.00) by 0.61. See *Salary Table 2015-DCB: Annual Rates by Grade and Step*, supra note 82; *Comparing the Compensation of Federal and Private-Sector Employees*, supra note 88, at 9 (reporting that benefits account for 39% of the cost of total compensation for federal workers).

⁹⁷ See Craig Zwerling et al., supra note 93.

of individuals who had medical conditions resulting in certain serious functional limitations⁹⁸ required “a personal assistant to help with job-related activities.”⁹⁹

In practice, however, the Commission suspects that the number of existing federal employees who would receive PAS as a result of this rule is close to zero. Individuals who require PAS because of a disability typically cannot work, because once an individual begins to earn an income the cost of the required assistance is shifted away from the public benefit system and onto the individual. One study has found that an individual would need to earn approximately \$40,000.00 per year simply to offset the accompanying loss of benefits.¹⁰⁰ Even at higher salaries, the benefits of working would be marginal.

Nevertheless, because the Commission lacks any other source of data on the issue, we estimate for purposes of this economic analysis that 1.1% of existing federal employees with targeted disabilities will be given PAS by their employing agencies as a result of the proposed rule.¹⁰¹ There are approximately 1,343 individuals with targeted disabilities in the federal workforce.¹⁰² Multiplying that number by 0.011 yields an estimated total of 169

⁹⁸ Specifically, the study included individuals who had “difficulty with [activities of daily living] (bathing, dressing, eating, getting in or out of bed or chair, or using the toilet); difficulty with [instrumental activities of daily living] (preparing own meals, shopping for personal items, using the telephone, doing heavy work around the house, or doing light work around the house); functional limitations (lifting 10 pounds, walking up 10 steps, walking a quarter mile, standing for 20 minutes, bending down from a standing position, reaching over the head, using the fingers to grasp or handle something, or holding a pen or pencil); difficulty seeing (even with their glasses); difficulty hearing (even with a hearing aid); reported mental health or cognitive diagnoses (Down’s Syndrome, mental retardation, schizophrenia, delusional disorders, bipolar disorder, major depression, severe personality disorder, alcohol abuse, drug abuse, other mental or emotional conditions); or reported use of a cane, crutches, walker, wheelchair. Or scooter to get around.” *Id.* at 518.

⁹⁹ *Id.* at 519.

¹⁰⁰ See Douglas Klayman, et al., supra note 95, at 17.

¹⁰¹ The 2003 study found that 1.1% of persons with medical conditions resulting in certain serious functional limitations require personal assistance in the workplace. Craig Zwerling et al., supra note 93, at 519. The group of individuals included in the study more closely matches the definition of “targeted/severe disability” than the definition of “disability,” as those terms are used in this rule. See note 98, supra. As noted above, the definition of “disability” is to be construed much more broadly for purposes of Section 501.

¹⁰² See *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2014*, supra note 48, at 25 (excluding employees who are not on the GS or SES pay scales).

current federal employees who require personal assistance services.

We are aware that at least 16 current federal employees are already being provided PAS at the agency’s expense. Because provision of PAS to these individuals would not represent new costs to these agencies, we exclude these individuals from the analysis, which leaves 153 individuals who will receive PAS from their employing agencies as a result of the rule. Multiplying that number by the low estimate of the associated costs as calculated above (\$21,008.00) yields an estimated cost of \$3,214,224.00. Multiplying by the high estimate of associated costs (\$64,581.97) yields an estimated cost of \$9,881,041.41.

Based on the calculations above, we conclude that the PAS requirement will have a total cost of between \$5,693,168.00 and \$23,766,164.96 per year.

Paragraphs (d)(8)(iii) and (d)(8)(iv) require agencies to keep records of all agency employees hired under the Schedule A hiring authority for persons with certain disabilities, to calculate the number of such employees who have been converted to career or career-conditional appointment, and to calculate the number of such employees who have been terminated prior to conversion. The Commission estimates that it will take agencies 2 hours to gather the required data, to perform the required calculations, and to create and maintain the associated records, on an annual basis. Multiplying by the number of agencies covered by the rule yields a total of 436 burden hours. We assume that these tasks will be performed by an employee at the GS-14 step 5 level in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA region, at an hourly rate of \$82.98 per hour (adjusted to include benefits).¹⁰³ Multiplying the hourly rate by the number of burden hours yields a total of 436 burden hours, or a cost of \$36,179.28.

In addition to imposing costs, the Commission expects the proposed rule to have positive economic effects. By bringing a greater number of individuals with disabilities into the workforce, the rule will reduce dependence on government benefits.¹⁰⁴ To calculate the

¹⁰³ See *Hourly Basic (B) Rates by Grade and Step*, supra note 81; *Comparing the Compensation of Federal and Private-Sector Employees*, supra note 81, at 9.

¹⁰⁴ See, e.g., Jean P. Hall, et al., *Employment as a Health Determinant for Working-Age, Dually-Eligible People with Disabilities*, 6 *Disability & Health J.* 100 (2013) (finding that employment of individuals with disabilities is associated with lower per-person, per-month Medicaid expenditures).

economic benefits to the federal government of providing PAS to a single individual, we assume that each individual receiving such services from an employer would otherwise rely on Social Security and Supplemental Security Income benefits to pay for those services. An individual who requires PAS throughout the day, but who lacks an income and is actively looking for work, is most likely relying on government benefits to meet the significant cost of hiring a personal assistant. Research indicates that, for every individual with a disability who transitions from receipt of benefits to gainful employment, the federal government saves approximately \$19,380.00 in paid benefits, and gains approximately \$8,079.00 in tax revenue, on an annual basis.¹⁰⁵ Multiplying the sum (\$27,459.00) by the low and high estimates of the number of new hires expected to require personal services (118 and 215) yields an estimated economic benefit of between \$3,240,162.00 and \$5,903,685.00 per year.

In addition to its economic effects, the proposed rule is expected to have a variety of qualitative and dignitary benefits, all of which further values identified in Executive Order 13563 such as equity, human dignity, and fairness. Most significantly, the rule will increase the number of hiring and advancement opportunities available to individuals with disabilities by making them better aware of federal job openings. Research demonstrates that employment is an important determinant of both perceived quality of life and health status among individuals with disabilities.¹⁰⁶ Additional anticipated qualitative and dignitary benefits of the rule include, but are not limited to—

- Promotion of human dignity and self-respect, and diminished feelings of exclusion and humiliation;
- reduced prevalence of disability-based stereotypes and associated stigma;
- increased diversity, understanding, and fairness in the workplace; and
- improved interactions with coworkers and workplace morale.

The rule is also expected to prevent disability-based employment discrimination by making job applicants, employees, and agency management better aware of the

protections against discrimination provided by Section 501.

In summary, the Commission estimates that the rule as a whole will have a one-time initial cost to the federal government of approximately \$90,448.20; an annual cost to the federal government of between \$14,182,706.56 and \$66,937,421.52; and an annual economic benefit to the federal government of between \$3,240,162.00 and \$5,903,685.00. The rule is also expected to have a variety of non-monetizable qualitative and dignitary benefits for individuals with disabilities and individuals with targeted disabilities.

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to employees and agencies of the federal government. For this reason, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Age discrimination, Equal employment opportunity, Government employees, Individuals with disabilities, Race discrimination, Religious discrimination, Sex discrimination.

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR part 1614 as follows:

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

- 1. The authority citation for part 1614 continues to read as follows:

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e–16 and 2000FF–6(e); E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964–1965 Comp., p. 306; E.O. 11478, 3 CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR, 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

Subpart B—Provisions Applicable to Particular Complaints

- 2. Revise § 1614.203 to read as follows:

§ 1614.203 Rehabilitation Act.

(a) *Definitions.* The following definitions apply for purposes of this section:

(1) The term *ADA* means title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 through 12117), title V of the Americans with Disabilities Act, as amended (42 U.S.C. 12201 through 12213), as it applies to employment, and the regulations of the Equal Employment Opportunity Commission implementing titles I and V of the ADA at part 1630 of this chapter.

(2) The term *disability* means disability as defined under § 1630.2(g) through (l) of this chapter.

(3) The term *hiring authority that takes disability into account* means a hiring authority that permits an agency to consider disability status in the selection of individuals for employment, including the hiring authority for individuals with intellectual disabilities, severe physical disabilities, or psychiatric disabilities, as set forth at 5 CFR 213.3102(u); the Veterans' Recruitment Appointment authority, as set forth at 5 CFR part 307; and the 30% or More Disabled Veteran authority, as set forth at 5 CFR 316.302(b)(4), 316.402(b)(4).

(4) The term *Plan* means an affirmative action plan for the hiring, placement, and advancement of individuals with disabilities, as required under 29 U.S.C. 791(b).

(5) The term *Schedule A hiring authority for persons with certain disabilities* means the hiring authority for individuals with intellectual disabilities, severe physical disabilities, or psychiatric disabilities, as set forth at 5 CFR 213.3102(u).

(6) The term *Section 501* means section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791).

(7) The term *targeted/severe disability* means a disability designated as such on

¹⁰⁵ See Douglas Klayman, et al., *supra* note 95, at 17.

¹⁰⁶ See, e.g., Jean P. Hall, et al., *supra* note 104, at 100 (finding that, among individuals who are eligible for both Medicaid and Medicare, paid employment is associated with significantly better quality of life, self-reported health status, and health behaviors).

the Office of Personnel Management's Standard Form 256 (SF-256).

(8) The term *undue hardship* has the meaning set forth in part 1630 of this chapter.

(b) *Nondiscrimination.* Federal agencies shall not discriminate on the basis of disability in regard to the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. The standards used to determine whether Section 501 has been violated in a complaint alleging employment discrimination under this part shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in part 1630 of this chapter.

(c) *Model employer.* The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.

(d) *Affirmative action plan.* Pursuant to 29 U.S.C. 791, each agency shall adopt and implement a Plan that provides sufficient assurances, procedures, and commitments to provide adequate recruitment, hiring, placement, and advancement opportunities for individuals with disabilities at all levels of federal employment. An agency fails to satisfy this requirement unless it has adopted and implemented a Plan that meets the following criteria:

(1) *Disability hiring and advancement program—(i) Recruitment.* The Plan shall require the agency to take specific steps to ensure that a broad range of individuals with disabilities will be aware of and be encouraged to apply for job vacancies, when eligible. Such steps shall include, at a minimum—

(A) Use of programs and resources that may be used to identify job applicants with disabilities who are eligible to be appointed under a hiring authority that takes disability into account, consistent with applicable OPM regulations, examples of which could include training programs for individuals with disabilities that lead directly to employment or that provide the qualifications necessary for particular positions within the agency, and databases of potential job applicants with disabilities; and

(B) Establishing and maintaining contacts with organizations specializing in the placement of individuals with disabilities, including, for example,

American Job Centers, State Vocational Rehabilitation Agencies, the Veterans' Vocational Rehabilitation and Employment Program, Centers for Independent Living, and Employment Network service providers.

(ii) *Application process.* The Plan shall ensure that the agency has designated sufficient staff to handle any disability-related issues that arise during the application and placement processes, and will require the agency to provide such individuals with sufficient training, support, and other resources to carry out their responsibilities under this section, which shall include, at a minimum—

(A) Ensuring that disability-related questions from members of the public regarding the agency's placement process are answered promptly and correctly, including questions about reasonable accommodations needed by job applicants during the application and placement processes, and questions about how individuals may apply for appointment under a hiring authority that takes disability into account;

(B) Processing requests for reasonable accommodations needed by job applicants during the application and placement processes, and ensuring that the agency provides such accommodations when required to do so under the standards set forth in part 1630 of this chapter;

(C) Accepting applications for appointment under hiring authorities that take disability into account, consistent with applicable OPM regulations;

(D) Determining whether individuals who have applied for appointment under a hiring authority that takes disability into account are eligible for appointment under that authority;

(E) If an individual has applied for appointment to a particular position under a hiring authority that takes disability into account and is eligible for appointment under such authority, forwarding the individual's application to the relevant hiring officials, and explaining to those officials how and when they may appoint the individual, consistent with all applicable laws;

(F) Overseeing any other agency programs designed to increase hiring of individuals with disabilities.

(iii) *Advancement program.* The Plan shall require the agency to take specific steps to ensure that current employees with disabilities have sufficient opportunities for advancement. Such steps may include, for example—

(A) Efforts to ensure that employees with disabilities are informed of and have opportunities to enroll in relevant

training, including management training when eligible;

(B) Development or maintenance of a mentoring program for employees with disabilities; and

(C) Administration of exit interviews that include questions on how the agency could improve the recruitment, hiring, inclusion, and advancement of individuals with disabilities.

(2) *Disability anti-harassment policy.* The Plan shall require the agency to state specifically in its anti-harassment policy that harassment based on disability is prohibited and to include in its training materials examples of the types of conduct that would constitute disability-based harassment.

(3) *Reasonable accommodation—(i) Procedures.* The Plan shall require the agency to adopt, and make available to all job applicants and employees in written and accessible formats, reasonable accommodation procedures that are easy to understand and that, at a minimum—

(A) Explain relevant terms such as "reasonable accommodation," "disability," "interactive process," "qualified," and "undue hardship," consistent with applicable statutory and regulatory definitions, using examples where appropriate;

(B) Provide that reassignment to a position for which an employee is qualified, and not just permission to compete for such position, will be considered as a reasonable accommodation if the agency determines that no other reasonable accommodation will permit the employee with a disability to perform the essential functions of his or her current position, and notify supervisors and other relevant agency employees about how and where to conduct a search for available vacancies when reassignment is being considered;

(C) Explain that an individual may request a reasonable accommodation orally or in writing at any time, that an individual need not have a particular accommodation in mind before making a request, and that the request may be made to a supervisor or manager in the individual's chain of command, the office designated by the agency to oversee the reasonable accommodation process, any agency employee connected with the application process, or any other individual designated by the agency to accept such requests;

(D) Include any forms the agency uses in connection with a reasonable accommodation request as attachments, and indicate that such forms are available in alternative formats that are accessible to people with disabilities;

(E) Describe the agency's process for determining whether to provide a reasonable accommodation, including a description of the interactive process, and the individual from whom requestors will receive a final decision;

(F) Provide guidance to supervisors on how to recognize requests for reasonable accommodation;

(G) Require that decision makers communicate, early in the interactive process, with individuals who have requested a reasonable accommodation;

(H) Explain that the agency may require an individual who requests a reasonable accommodation to provide medical information that is sufficient to explain the nature of the individual's disability, his or her need for reasonable accommodation, and how the requested accommodation, if any, will assist the individual to apply for a job, perform the essential functions of a job, or enjoy the benefits and privileges of the workplace;

(I) Explain the agency's right to request relevant supplemental medical information if the information submitted by the requestor is insufficient;

(J) Explain the agency's right to have medical information reviewed by a medical expert of the agency's choosing at the agency's expense;

(K) Explain the agency's obligation to keep medical information confidential, in accordance with applicable laws and regulations, and the limited circumstances under which such information may be disclosed;

(L) Designate the maximum amount of time the agency has, absent extenuating circumstances, to either provide a requested accommodation or deny the request, explain that the time limit begins to run when the accommodation is first requested, and explain that, where a particular reasonable accommodation can be provided in less than the maximum amount of time allowed, failure to respond to a request in a prompt manner may result in a violation of the Rehabilitation Act;

(M) Provide for expedited processing of requests for reasonable accommodations that are needed sooner than the maximum allowable time frame permitted under paragraph (d)(3)(i)(L) of this section;

(N) Explain that, where a reasonable accommodation cannot be provided immediately, the agency must provide an interim accommodation whenever possible;

(O) Inform applicants and employees how they may track the processing of requests for reasonable accommodation;

(P) Explain that, where there is a delay in either processing a request for,

or providing, a reasonable accommodation, the agency must notify the individual of the reason for the delay;

(Q) Explain that individuals who have been denied reasonable accommodations have the right to file complaints in the Equal Employment Opportunity process and other statutory processes, as appropriate;

(R) Encourage the use of voluntary informal dispute resolution processes that individuals may use to obtain prompt reconsideration of denied requests for reasonable accommodation;

(S) Provide that the agency shall give the requestor a notice consistent with the requirements of paragraph (d)(3)(iii) of this section at the time a requested accommodation is denied; and

(T) Provide information on how to access, at a minimum, Commission guidance and technical assistance documents.

(ii) *Cost of accommodations.* The Plan shall require the agency to inform all employees who are authorized to grant or deny requests for reasonable accommodation that, pursuant to the regulations implementing the undue hardship defense at 29 CFR part 1630, all available resources are considered when determining whether a denial of reasonable accommodation based on cost is appropriate. The Plan shall also require the agency to provide such employees with a list of all resources available for providing reasonable accommodations, and with instructions on how to gain access to those resources. Available resources may include a centralized fund specifically created by the agency for providing reasonable accommodations, the Department of Defense Computer and Electronic Accommodations Program (CAP), and agency funds that, although not designated specifically for providing reasonable accommodations, may be used for that purpose consistent with all applicable laws.

(iii) *Notification of basis for denial.* The Plan shall require the agency to provide a job applicant or employee who is denied a reasonable accommodation with a written notice that—

(A) Explains the reasons for the denial and notifies the job applicant or employee of any available internal appeal or dispute resolution processes;

(B) Informs the job applicant or employee of the right to challenge the denial by filing a complaint of discrimination under this part;

(C) Explains that such complaint must be filed within 45 days of the denial regardless of whether the individual

participates in an informal dispute resolution process; and

(D) Provides instructions on how to file such a complaint.

(4) *Accessibility of facilities and technology—(i) Contact information.* The Plan shall require the agency to provide all employees with contact information for an agency employee who is responsible for ensuring the physical accessibility of the agency's facilities under the Architectural Barriers Act of 1968, 42 U.S.C. 4151 through 4157, and an agency employee who is responsible for ensuring that the electronic and information technology purchased, maintained, or used by the agency is readily accessible to, and usable by, individuals with disabilities, as required by Section 508 of the Rehabilitation Act of 1973, 29 U.S.C. 794d.

(ii) *Filing complaints.* The Plan shall require the agency to provide all employees clear instructions on how to file a complaint under Section 508 of the Rehabilitation Act of 1973, 29 U.S.C. 794d, concerning the accessibility of agency technology, and a complaint under the Architectural Barriers Act, 42 U.S.C. 4151 through 4157 concerning the accessibility of a building or facility.

(iii) *Assistance with filing complaints at other agencies.* If investigation of a complaint filed under Section 508 of the Rehabilitation Act of 1973 or the Architectural Barriers Act shows that it is beyond the agency's power to correct the identified inaccessibility, the agency shall assist the individual in identifying the responsible party, and, if possible, filing a complaint with such party.

(5) *Personal services allowing employees to participate in the workplace.* The Plan shall require the agency to provide, in addition to professional services required as a reasonable accommodation under the standards set forth in part 1630 of this chapter, personal assistance services during work hours and job-related travel to employees who need them because of a disability, unless doing so would impose undue hardship. Personal assistance services may include, for example, assistance with removing and putting on clothing, eating, and using the restroom. An individual who performs personal assistance services may be required to perform additional tasks, as time permits, including provision of assistance required as a reasonable accommodation and other duties, and may be required to perform personal assistance services for more than one individual with a disability.

(6) *Utilization analysis—(i) Current utilization.* The Plan shall require the agency to perform a workforce analysis

annually to determine the percentage of its employees at each grade level, including the Senior Executive Service, who have disabilities as defined by the Rehabilitation Act, and the percentage of its employees at each grade level, including the Senior Executive Service, who have targeted/severe disabilities.

(ii) For purposes of the analysis required under paragraph (d)(6)(i) of this section, employees may be classified as individuals with disabilities or individuals with a targeted/severe disability on the basis of—

(A) Self-identification records gathered in the manner prescribed by the Office of Personnel Management;

(B) Records acquired during the course of appointments made under hiring authorities that take disability into account; and

(C) Records of requests for reasonable accommodation.

(iii) *Data accuracy.* The Plan shall require the agency to take steps to ensure that data collected pursuant to paragraph (d)(6)(i) of this section are accurate.

(7) *Goals*—(i) *Adoption.* The Plan shall commit the agency to the goal of ensuring that—

(A) No less than 12% of its employees at the GS–11 level or above, including employees in the Senior Executive Service, are individuals with disabilities;

(B) No less than 12% of its employees at the GS–10 level or below are individuals with disabilities;

(C) No less than 2% of its employees at the GS–11 level or above, including employees in the Senior Executive Service, are individuals with targeted/severe disabilities; and

(D) No less than 2% of its employees at the GS–10 level or below are individuals with targeted/severe disabilities.

(ii) *Progression toward goals.* The Plan shall require the agency to take specific steps that are reasonably designed to gradually increase the number of persons with disabilities and targeted/severe disabilities employed at the agency until they meet the goals established pursuant to paragraph (d)(7)(i) of this section. Examples of such steps include, but are not limited to—

(A) Increased use of hiring authorities that take disability into account to hire or promote individuals with disabilities or targeted/severe disabilities, as applicable;

(B) To the extent permitted by applicable laws, consideration of disability or targeted/severe disability

status as a positive factor in hiring, promotion, or assignment decisions;

(C) Disability-related training and education campaigns for all employees in the agency;

(D) Additional outreach or recruitment efforts; and

(E) Adoption of training, mentoring, or internship programs for individuals with disabilities.

(8) *Recordkeeping.* The Plan shall require the agency to keep records that it may use to determine whether it is complying with the nondiscrimination and affirmative action requirements imposed under Section 501, and to make such records available to the Commission upon the Commission's request, including, at a minimum, records of—

(i) The number of job applications received from individuals with disabilities and the number of individuals with disabilities who were hired by the agency;

(ii) The number of job applications received from individuals with targeted/severe disabilities and the number of individuals with targeted/severe disabilities who were hired by the agency;

(iii) All rescissions of conditional job offers, demotions, and terminations taken against applicants or employees as a result of medical examinations or inquiries;

(iv) All agency employees hired under the Schedule A hiring authority for persons with certain disabilities, and each such employee's date of hire, entering grade level, probationary status, and current grade level;

(v) The number of employees appointed under the Schedule A hiring authority for persons with certain disabilities who have been converted to career or career-conditional appointments in the competitive service each year, and the number of such employees who were terminated prior to being converted to a career or career-conditional appointment in the competitive service each year; and

(vi) Details about each request for reasonable accommodation including, at a minimum—

(A) The specific reasonable accommodation requested, if any;

(B) The job (occupational series, grade level, and agency component) sought by the requesting applicant or held by the requesting employee;

(C) Whether the accommodation was needed to apply for a job, perform the essential functions of a job, or enjoy the benefits and privileges of employment;

(D) Whether the request was granted (which may include an accommodation

different from the one requested) or denied;

(E) The identity of the deciding official;

(F) If denied, the basis for such denial; and

(G) The number of days taken to process the request.

(e) *Reporting*—(1) *Submission to the Commission.* On an annual basis, each federal agency shall submit to the Commission for approval, at such time and in such manner as the Commission deems appropriate—

(i) A copy of its current Plan;

(ii) The results of the two most recent workforce analyses performed pursuant to paragraph (d)(6) of this section;

(iii) The number of individuals appointed to positions within the agency under the Schedule A hiring authority for persons with certain disabilities during the previous year, and the total number of employees whose employment at the agency began by appointment under the Schedule A hiring authority for persons with certain disabilities; and

(iv) A list of any changes made to the Plan since the prior submission, if any, and an explanation of why those changes were made.

(2) *Availability to the public.* Each agency shall make the information submitted to the Commission pursuant to paragraph (e)(1) of this section available to the public by, at a minimum, posting a copy of the submission on its public Web site, and by providing means by which members of the public may request copies of the submission in alternative formats accessible to individuals with disabilities.

(f) *Commission approval and disapproval*—(1) *Basis for approval.* If the Commission determines that an agency has adopted and implemented a Plan that meets the requirements set forth in paragraph (d) of this section, the Commission shall approve the Plan.

(2) *Basis for disapproval.* If the Commission determines that an agency has failed to adopt and implement a Plan that meets the requirements set forth in paragraph (d) of this section, the Commission shall disapprove the Plan as required by 29 U.S.C. 791(b). Failure to achieve a goal set forth in paragraph (d)(7)(i) of this section, by itself, is not grounds for disapproval unless the Plan fails to require the agency to take specific steps that are reasonably designed to achieve the goal.

Dated: February 16, 2016.

For the Commission.

Cynthia G. Pierre,
Chief Operating Officer.

[FR Doc. 2016-03530 Filed 2-23-16; 8:45 am]

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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN 1506-AB23

Financial Crimes Enforcement Network; Withdrawal of Finding and Notice of Proposed Rulemaking Regarding Liberty Reserve S.A.

AGENCY: Financial Crimes Enforcement Network (“FinCEN”), Treasury.

ACTION: Withdrawal of finding and notice of proposed rulemaking.

SUMMARY: This document withdraws FinCEN’s finding that Liberty Reserve S.A. (“Liberty Reserve”) is a financial institution of primary money laundering concern and the related notice of proposed rulemaking seeking to impose the fifth special measure regarding Liberty Reserve, pursuant to section 311 of the USA PATRIOT Act (“Section 311”). Because of material subsequent developments that have mitigated the money laundering risks associated with Liberty Reserve, FinCEN has determined that Liberty Reserve is no longer a primary money laundering concern that warrants the implementation of a special measure under Section 311.

DATES: The finding and notice of proposed rulemaking are withdrawn as of February 24, 2016.

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at (800) 767-2825.

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56 (the “USA PATRIOT Act”). Title III of the USA PATRIOT Act amends the anti-money laundering provisions of the Bank Secrecy Act (BSA), codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314, 5316-5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR chapter X. The authority of the Secretary of the Treasury to administer

the BSA and its implementing regulations has been delegated to the Director of FinCEN.

Section 311 of the USA PATRIOT Act (“Section 311”) grants the Director of FinCEN the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, foreign financial institution, class of transactions, or type of account is of “primary money laundering concern,” to require domestic financial institutions and financial agencies to take certain “special measures” to address the primary money laundering concern. The special measures enumerated under Section 311 are prophylactic safeguards that defend the U.S. financial system from money laundering and terrorist financing. FinCEN may impose one or more of these special measures in order to protect the U.S. financial system from these threats. To that end, special measures one through four, codified at 31 U.S.C. 5318A(b)(1) through (4), impose additional recordkeeping, information collection, and information reporting requirements on covered U.S. financial institutions. The fifth special measure, codified at 31 U.S.C. 5318A(b)(5), allows the Director to prohibit or impose conditions on the opening or maintaining of correspondent or payable-through accounts for the identified institution by U.S. financial institutions.

II. The Finding and Notice of Proposed Rulemaking

A. The Finding and Notice of Proposed Rulemaking

Based upon review and analysis of relevant information, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in Section 311, the Director of FinCEN found that reasonable grounds existed for concluding that Liberty Reserve S.A. (“Liberty Reserve”) was a financial institution of primary money laundering concern. FinCEN published a proposed rule proposing the imposition of the fifth special measure on June 6, 2013, pursuant to the authority under 31 U.S.C. 5318A.¹

B. Subsequent Developments

Since FinCEN’s finding and related NPRM regarding Liberty Reserve, material facts regarding the circumstances of the proposed rulemaking have changed. Liberty Reserve was a web-based money transfer system when FinCEN published notice

of its finding and NPRM on June 6, 2013. The Department of Justice announced on May 28, 2013 that it had charged seven of Liberty Reserve’s principals and employees with money-laundering, seized five domain names, including “LibertyReserve.com,” and seized or restricted the activity of 45 bank accounts related to Liberty Reserve. In light of these actions, Liberty Reserve has since ceased to function as a financial institution.

III. Withdrawal of the Finding and NPRM

For the reasons set forth above, FinCEN hereby withdraws its finding that Liberty Reserve is of primary money laundering concern and the related NPRM published on June 6, 2013, seeking to impose the fifth special measure regarding Liberty Reserve.

Jamal El-Hindi,

Deputy Director, Financial Crimes Enforcement Network.

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DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

[NPS-GOGA-19691; PX.XGOGA1604.00.1]

RIN 1024-AE16

Special Regulations, Areas of the National Park Service, Golden Gate National Recreation Area, Dog Management

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service proposes to amend its special regulations for Golden Gate National Recreation Area regarding dog walking. The rule would apply to 22 locations within the park and would designate areas within these locations for on-leash and regulated (*i.e.*, voice and sight control) off-leash dog walking. Areas in these 22 locations that are not designated as open to dogs would be closed to dogs, except for service animals in accordance with National Park Service regulations. The rule would modify and, in some circumstances, relax the National Park System-wide pet regulations for these 22 locations. To the extent not modified by this rule, dog walking in all NPS-managed areas within the park would continue to be regulated under National Park System-wide pet regulations.

¹ See 78 FR 34008 (June 6, 2013) (RIN 1506-AB23).