

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### 29 CFR Part 1614

RIN 3046-AA94

#### Affirmative Action for Individuals With Disabilities in Federal Employment

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Final rule.

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) is issuing its final rule to amend the regulations that require federal agencies to engage in affirmative action for individuals with disabilities. These changes clarify the obligations that the Rehabilitation Act of 1973 imposes on federal agencies, as employers, that are over and above the obligation not to discriminate on the basis of disability. The regulation does not apply to the private sector or to state or local governments.

**DATES:** *Effective date:* This final rule will be applicable on March 6, 2017.

*Applicability date:* The applicability date for this final rule shall be January 3, 2018.

#### 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). (These are not toll free numbers.)

#### SUPPLEMENTARY INFORMATION:

##### Executive Summary

This final rule (Final Rule or Rule) amends 29 CFR 1614.203 to clarify the affirmative action obligations that Section 501 of the Rehabilitation Act of 1973 (Section 501)<sup>1</sup> imposes on federal agencies<sup>2</sup> as employers. The Rule codifies a variety of obligations currently placed on federal agencies by management directives and Executive Orders. It also adds two substantive affirmative action requirements. First,

the Rule requires agencies to take specific steps that are reasonably designed to gradually increase the number of employees who have a disability as defined under Section 501, and the number of employees who have a “targeted disability,” which is defined for purposes of this Rule to mean a disability that is either designated as “targeted disability or health condition” on the Office of Personnel Management’s (OPM’s) Standard Form 256 (SF-256),<sup>3</sup> or that falls under one of the first 12 categories of disability listed in Part A of Question 5 of the EEOC’s Demographic Information on Applicants form (Applicant Flow Form),<sup>4</sup> until they meet specific goals set by the EEOC. This is consistent with the approach taken by the Department of Labor’s Office of Federal Contract Compliance Programs in regulations issued to implement the obligation of federal contractors to engage in affirmative action for individuals with disabilities pursuant to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793 (Section 503).<sup>5</sup>

Second, the Rule requires agencies to provide personal assistance services (PAS) to employees who, because of targeted disabilities, require such

<sup>3</sup> Office of Pers. Mgmt., *Standard Form 256* (revised Aug., 2016), [https://www.opm.gov/forms/pdf\\_fill/sf256.pdf](https://www.opm.gov/forms/pdf_fill/sf256.pdf) [hereinafter *SF-256*]. Targeted disabilities include: developmental disabilities, for example, autism spectrum disorder; traumatic brain injuries; deafness or serious difficulty hearing, benefiting from, for example, American Sign Language; blindness or serious difficulty seeing even when wearing glasses; missing extremities (arm, leg, hand and/or foot); significant mobility impairments, benefiting from the utilization of a wheelchair, scooter, walker, leg brace(s) and/or other supports; partial or complete paralysis (any cause); epilepsy and other seizure disorders; intellectual disabilities; psychiatric disabilities; dwarfism; and significant disfigurement, for example, disfigurements caused by burns, wounds, accidents, or congenital disorders.

<sup>4</sup> EEOC, *Demographic Information on Applicants* (n.d.), [https://www.eeoc.gov/federal/upload/Applicant\\_Tracking\\_Form\\_2-19-2014-2.pdf](https://www.eeoc.gov/federal/upload/Applicant_Tracking_Form_2-19-2014-2.pdf) [hereinafter *Applicant Flow Form*]. The first 12 categories of disability listed in Part A of question 5 are: Deaf or serious difficulty hearing; blind or serious difficulty seeing even when wearing glasses; missing an arm, leg, hand, or foot; partial or complete paralysis (any cause); significant disfigurement (for example, severe disfigurements caused by burns, wounds, accidents, or congenital disorders); significant mobility impairment (for example, uses a wheelchair, scooter, walker or uses a leg brace to walk); significant psychiatric disorder (for example, bipolar disorder, schizophrenia, PTSD or major depression); intellectual disability (formerly described as mental retardation); developmental disability (for example, cerebral palsy or autism spectrum disorder); traumatic brain injury; dwarfism; and epilepsy or other seizure disorder.

<sup>5</sup> See 41 CFR pt. 60-741.45(a) (establishing 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).

assistance in order to be at work or participate in work-related travel. PAS are services that help individuals with disabilities perform activities of daily living, including, for example, assistance with removing and putting on clothing, eating, and using the restroom. Such services do not, however, include medical care, and need not be provided by someone who has medical training or qualifications.

The Commission recognizes that agencies may need some time to develop the capacity to meet these requirements. The Rule gives agencies one year to make any necessary changes in policy, staff, or other aspects of their operations. The applicability date of the Rule is thus January 3, 2018. Prior to that date, the Commission will provide extensive outreach and training to help agencies prepare to meet the new requirements.

The Commission’s economic analysis estimates that the Rule will have a one-time initial cost to the federal government of approximately \$145,580.40; an annual cost to the federal government of between \$23,151,538.70 and \$70,954,568.10; and an annual economic benefit to the federal government of approximately \$6,617,619.00. 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 imposes two distinct obligations on federal agencies. First, it prohibits agencies from discriminating against individuals with disabilities pursuant to the same standards that are “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.”<sup>6</sup> Current EEOC regulations provide substantial guidance on these standards at 29 CFR part 1630. Additional guidance is provided in the many EEOC appellate decisions on complaints of employment discrimination brought under Section 501. These decisions are published on the EEOC’s Web site, and significant decisions are compiled in a publicly available digest updated annually by the Commission’s Office of Federal Operations.<sup>7</sup> This Final Rule does not change any of the substantive nondiscrimination requirements that

<sup>6</sup> 29 U.S.C. 791(f).

<sup>7</sup> See *Digest of Equal Employment Opportunity Law*, Equal Emp’t Opportunity Comm’n, <http://www.eeoc.gov/federal/digest/index.cfm> (last visited Dec. 21, 2016).

<sup>1</sup> 29 U.S.C. 791.

<sup>2</sup> 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.

currently apply in the federal sector, as set forth in the EEOC's regulations and federal sector appellate decisions.

Second, the section 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." It further directs the Commission to approve an affirmative action plan (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."<sup>8</sup>

The regulations currently implementing the Section 501 affirmative action requirement simply state that the federal government shall be a "model employer of individuals with disabilities," and that federal agencies shall "give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities."<sup>9</sup> Over the years, however, the EEOC has issued various Management Directives to provide guidance on how an agency's 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.

In 1987, the Commission issued Management Directive 713 (MD-713), setting the standards by which the Commission would evaluate an agency's Plan with regard to the hiring of people with disabilities.<sup>10</sup> MD-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.<sup>11</sup>

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."<sup>12</sup> 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."<sup>13</sup> The same day, President Clinton issued Executive Order 13164, which requires federal agencies to establish written reasonable accommodation procedures, with a series of detailed requirements to be included in those written procedures.<sup>14</sup> Shortly thereafter, the EEOC issued *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation*.<sup>15</sup>

In 2003, the EEOC issued Management Directive 715 (MD-715),<sup>16</sup> which superseded MD-713 and is still in effect. 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. The Directive 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."<sup>17</sup> Pursuant to Executive Order 13164, 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.<sup>18</sup> 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.<sup>19</sup>

In 2005, the EEOC issued additional guidance providing agencies with detailed practical advice for drafting and implementing reasonable accommodation procedures under Executive Order 13164,<sup>20</sup> and in 2008, the Commission issued a detailed question-and-answer document on promoting the employment of individuals with disabilities in the federal workforce.<sup>21</sup>

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.<sup>22</sup> The Executive Order required agencies to set their own 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 OPM. Again, policy and guidance documents were developed pursuant to this Executive Order.<sup>23</sup>

<sup>17</sup> *Id.* at B.III.

<sup>18</sup> *Id.* at B.V.

<sup>19</sup> *Id.* at B.V.

<sup>20</sup> EEOC, *Practical Advice on Drafting and Implementing Reasonable Accommodation Procedures under Executive Order 13164*, (July 2005), [http://www.eeoc.gov/policy/docs/implementing\\_accommodation.pdf](http://www.eeoc.gov/policy/docs/implementing_accommodation.pdf).

<sup>21</sup> EEOC, *Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce* (n.d.), <http://eeoc.gov/federal/qanda-employment-with-disabilities.cfm> [hereinafter *Promoting Employment*].

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

<sup>23</sup> Office of Pers. Mgmt., *Model Strategies for Recruitment and Hiring of People with Disabilities* (Nov. 8, 2010), <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.

*Look at the EEOC's Office of Federal Operation's Federal Sector Programs: Past, Present, and Future*, Dig. of EEO L., Winter 2008, <http://www.eeoc.gov/federal/digest/xix-1.cfm>.

<sup>12</sup> See Executive Order No. 13163, 3 CFR 285 (2001), <http://www.gpo.gov/fdsys/pkg/FR-2000-07-28/pdf/00-19322.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> Executive Order No. 13164, 3 CFR 286 (2001), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000\\_register&docid=fr28jy00-140.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=fr28jy00-140.pdf).

<sup>15</sup> EEOC, *Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation* (last modified Oct. 19, 2000), [http://www.eeoc.gov/policy/docs/qanda-accommodation\\_procedures.html](http://www.eeoc.gov/policy/docs/qanda-accommodation_procedures.html) [hereinafter *13164 Guidance*].

<sup>16</sup> EEOC, *Management Directive 715* (Oct. 1, 2003), <http://www.eeoc.gov/federal/directives/md715.cfm> [hereinafter *MD-715*].

<sup>8</sup> 29 U.S.C. 791(b).

<sup>9</sup> 29 CFR 1614.203(a).

<sup>10</sup> EEOC, *Management Directive 713*, 1987 WL 768434 (Oct. 3, 1987).

<sup>11</sup> Management Directive 712 (MD-712) preceded MD-713 by four years. See EEOC, *Management Directive 712*, 1983 WL 410824 (March 29, 1983). 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. For a general history of the EEOC's Management Directives, see Office of Fed. Operations, EEOC, A

## The Rule

On May 15, 2014, the Commission published an Advance Notice of Proposed Rulemaking (ANPRM) requesting public comment on specific inquiries regarding ways to strengthen its Section 501 affirmative action regulations.<sup>24</sup> A total of 89 comments were received.<sup>25</sup> Taking the comments into account, the Commission published a Notice of Proposed Rulemaking (NPRM) proposing specific revisions to the Section 501 regulations on February 24, 2016.<sup>26</sup> The NPRM also asked for public input on 7 specific aspects of the proposal.<sup>27</sup>

The Commission received a total of 103 comments on the proposed rule, representing the opinions of 73 individuals, 52 disability advocacy organizations, 5 federal agencies, 2 federal government organizations, 3 state government organizations, 2 vocational rehabilitation organizations, and 1 group of administrative law students.<sup>28</sup> Twenty-one of the comments were non-responsive. The comments are available for review at the Federal eRulemaking Portal at <http://www.regulations.gov>.

The Commission has reviewed and given due consideration to all comments received during the public comment period, and now issues its Final Rule amending 29 CFR 1614.203 and 1614.601(f) to update, clarify, and put in one place the standards that the Commission will use to review and approve agency Plans. The comments resulted in numerous changes to the specific requirements proposed in the NPRM. Relevant comments and Commission responses are discussed in detail in the Section-by-Section Analysis below. The Commission also made several stylistic changes that do not affect the substantive requirements of the Rule.

Commenters also offered suggestions for additional requirements not proposed in the NPRM. In some cases, the suggested requirements were not added because the Commission lacked the requisite authority. For example, the Rule does not amend Workers' Compensation laws; revise regulations

governing the hiring authority for individuals with intellectual disabilities, severe physical disabilities, or psychiatric disabilities, as set forth at 5 CFR 213.3102(u) (Schedule A hiring authority for persons with certain disabilities) by, for example, extending the trial employment period or changing the eligibility criteria; create or abolish other hiring authorities; prohibit agencies from making their own hiring decisions; or extend Section 501 obligations to state and local governments, federal contractors,<sup>29</sup> or businesses in the private sector generally.

The Commission also did not add a provision that either grants or denies a private right of action to enforce the affirmative action regulations, as suggested by some commenters. The Commission requested public input on the ability of individuals to seek enforcement of the requirement to provide PAS, codified at paragraph (d)(5) of the Rule as amended, in individual cases. Nonetheless, this is a matter of first impression, and the Commission believes that its procedural regulations governing complaints of discrimination in the federal sector, found at 29 CFR 1614, subpart A, are the most appropriate place to address this question. As such, this Rule takes no position on the availability of a private remedy for either the PAS obligation or the affirmative action obligations more generally.

Other requirements were not added because they concerned issues that were beyond the scope of this rulemaking. For example, the Rule does not provide that a change in supervisors is a reasonable accommodation, that inaccessible job application processes may give rise to claims of employment discrimination, or that individuals have a right to representation during the interactive process, because these suggestions pertain to Section 501's nondiscrimination requirements, which are the same as the nondiscrimination requirements of Title I<sup>30</sup> and certain provisions of Title V<sup>31</sup> of the Americans with Disabilities Act (ADA) applicable to private and state and local government employers.<sup>32</sup> The EEOC has regulations describing the ADA's

nondiscrimination requirements at 29 CFR part 1630. For similar reasons, the Rule does not address methods of oversight established elsewhere in part 1614.

In some cases, suggested requirements were not added because they would affect matters governed by both EEOC and OPM regulations. For example, the Commission has not added requirements to the Rule designed to prevent violations of Section 501's qualification standard provisions.<sup>33</sup> Qualification standards are governed by EEOC's nondiscrimination regulations at 29 CFR part 1630.<sup>34</sup> These regulations clarify that the ADA/Section 501 qualification standard provisions require federal agencies to exempt an individual from a qualification standard, test, or other selection criterion if there is sufficient evidence that he or she cannot meet such standard, test, or criterion because of a disability, but can nevertheless perform the essential functions of the position with a reasonable accommodation (if one is required).<sup>35</sup> However, qualification standards are also governed by OPM regulations.<sup>36</sup> Similarly, the Final Rule does not address vacancy announcements; benefit programs such as return-to-work programs; or alternative models of employment such as apprenticeship programs, customized employment, and job splitting, which are also affected by OPM regulations. EEOC and OPM are working together to develop coordinated strategies on some of these issues and other matters over which both agencies have jurisdiction.

One commenter stated that the Rule should include an exemption for small agencies. However, except in the case of the workforce analysis and goal requirements imposed by paragraphs

<sup>33</sup> The ADA prohibits "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities," unless a defense applies. 42 U.S.C. 12112(b)(6), 12113(a). These provisions were made applicable to federal agencies when Congress incorporated all of the ADA's employment discrimination provisions into Section 501. See Rehabilitation Act Amendments, 106 Stat. at 4424.

<sup>34</sup> The Commission's ADA regulations were incorporated into EEOC's Section 501 regulations, via full notice and comment, after Congress incorporated the ADA's employment discrimination provisions into Section 501. See Federal Sector Equal Employment Opportunity, 67 FR 35,732, 35,735 (May 21, 2002) (codified at 29 CFR 1614.203(b)). Further guidance on the nondiscrimination requirements pertaining to qualification standards can be found in several cases issued through the federal sector complaint process.

<sup>35</sup> See 29 CFR 1630.10, .15(b), .15(c); 29 CFR pt. 1630, app. 1630.10, .15(b) and (c).

<sup>36</sup> See 5 CFR pt. 338 and authorities cited therein.

<sup>24</sup> 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, .601(f)).

<sup>25</sup> In addition to the 89 comments, the Commission received several duplicate comments.

<sup>26</sup> Affirmative Action for Individuals with Disabilities in the Federal Government, 81 FR 9123 (Feb. 24, 2016) (to be codified at 29 CFR 1614.203, .601(f)).

<sup>27</sup> *Id.* at 9130.

<sup>28</sup> Some comments represented the opinions of more than one entity, and some individuals submitted more than one comment.

<sup>29</sup> However, we note that federal contractors are subject to obligations to engage in affirmative action for individuals with disabilities under Section 503. See 29 U.S.C. 793(d); 41 CFR pt. 60-741.

<sup>30</sup> 42 U.S.C. 12101-12117.

<sup>31</sup> 42 U.S.C. 12201-12213.

<sup>32</sup> Congress incorporated all of the ADA's employment discrimination provisions in 1992. See Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344, 4424 (codified as amended at 29 U.S.C. 791(f)).

(d)(6) and (d)(7), discussed below, the commenter failed to identify any basis on which to conclude that the Rule's requirements were inappropriate for, or especially burdensome to, small agencies. For example, there is no reason to believe that small agencies cannot or should not adopt written reasonable accommodation procedures as required by paragraph (d)(3)(i) of the Final Rule. The Commission therefore has not added a general exemption.

### Authority

The Commission issues this Final Rule under its Section 501 rulemaking authority. Congress expressly granted the Commission authority to issue substantive regulations under Section 501 by incorporating the federal sector enforcement provisions of Title VII of the Civil Rights Act of 1964 (Title VII) in Section 505 of the Rehabilitation Act of 1973 (Section 505).<sup>37</sup> The incorporated provisions provide that “the Equal Employment Opportunity Commission . . . shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate” to carry out its federal sector responsibilities under Title VII (and, by incorporation, its federal sector responsibilities under Section 501).<sup>38</sup> The Commission also has express authority under Executive Order 12067 to “issue such rules, regulations, policies, procedures or orders as it deems necessary to carry out its responsibility[.]” to “provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity without regard to . . . handicap.”<sup>39</sup>

As explained above, Section 501 requires federal agencies to engage in “affirmative action” for individuals with disabilities. However, the statute neither defines the term “affirmative action” nor provides detailed standards by which to determine whether an agency has met this requirement. Proper and effective enforcement of the statute thus “necessarily requires the formulation of policy and the making of

rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>40</sup> This gap, together with the Commission’s “generally conferred authority” under Section 501, make it “apparent . . . that Congress . . . expect[s] the agency to be able to speak [to the issue] with the force of law . . . .”<sup>41</sup> The Commission thus has both the authority and the responsibility to issue regulations providing specific guidance to federal agencies on what they must do to satisfy their Section 501 obligation to engage in affirmative action for individuals with disabilities.

The Commission’s prior regulations implementing the affirmative action requirement, requiring agencies to be “model employers” of individuals with disabilities and to give “full consideration to the hiring, placement, and advancement” of qualified individuals with disabilities, were promulgated pursuant to the above authority in 1982.<sup>42</sup> The Commission has also used its authority under Section 501 to provide subregulatory guidance to federal agencies on the contents of affirmative action programs for individuals with disabilities since 1987.<sup>43</sup> Now, having found that its prior regulatory and subregulatory guidance was not sufficiently advancing the employment of qualified individuals with disabilities, the Commission again exercises its authority under Section 501 to strengthen the regulations implementing the affirmative action requirement.<sup>44</sup> The Final Rule strengthens the regulations by—

- gathering longstanding requirements previously found in a variety of documents into a single regulation, making them easier to find and clarifying that they have the force and effect of law;
- imposing a new requirement to take specific steps that are reasonably designed to gradually increase the number of employees with disabilities and employees with targeted disabilities until they meet specific goals set by the EEOC; and

<sup>40</sup> *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton*, 415 U.S. at 231).

<sup>41</sup> *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (citing *Chevron*, 467 U.S. at 845); see *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011) (citing *Chevron*, 467 U.S. at 843).

<sup>42</sup> See Federal Sector Equal Employment Opportunity, 67 FR 35,732, 35,735 (May 21, 2002) (codified at 29 CFR 1614.203(b)).

<sup>43</sup> See *Management Directive 713*, *supra* note 10.

<sup>44</sup> Cf. *Assoc. Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 261, 263–64 (D.C. Cir. 2014) (finding regulations that strengthened Section 503 affirmative action requirements on federal contractors valid under similar circumstances).

- imposing a new requirement to provide PAS to employees with targeted disabilities who need them during work hours and work-related travel.

### Section-by-Section Analysis

#### 1614.203(a) Definitions

Paragraph (a) of the proposed rule provided definitions of key terms. Many of the proposed definitions were simple abbreviations: (a)(1) provided that “ADA” refers to those portions of the ADA that are enforced by the Commission;<sup>45</sup> (a)(4) provided that “Plan” refers to an agency’s affirmative action plan, as required under 29 U.S.C. 791(b); (a)(5) provided 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) provided that “Section 501” means Section 501 of the Rehabilitation Act, codified at 29 U.S.C. 791. The Commission received no objections to these definitions, which are retained in the Rule.<sup>46</sup>

Paragraph (a)(2) of the proposed rule provided that the term “disability” has the same meaning as set forth in 29 CFR part 1630. One commenter stated that the term should instead be defined using a “standard set of disability identifiers” developed pursuant to section 4302 of the Affordable Care Act.<sup>47</sup> Because the Rule implements Section 501, and not the Affordable Care Act, the Commission is required to adopt the definition of “disability” that applies under Section 501. The proposed definition of “disability” has therefore been retained.

Proposed paragraph (a)(8), providing that the term “undue hardship” has the same meaning as set forth in 29 CFR part 1630, has also been retained.<sup>48</sup> Undue hardship, which is both a limitation on an agency’s obligation to make reasonable accommodations and to provide personal assistance services, considers the nature, extent, and cost of an accommodation or of providing personal assistance services in relation to an agency’s overall resources and the

<sup>45</sup> 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.

<sup>46</sup> Proposed paragraphs (a)(4), (a)(5), and (a)(6) have been redesignated (a)(6), (a)(7), and (a)(8) respectively in the Final Rule.

<sup>47</sup> 42 U.S.C. 300kk; see generally U.S. Dep’t of Health & Human Servs., *Implementation Guidance on Data Collection Standards for Race, Ethnicity, Sex, Primary Language, and Disability Status* (n.d.), <https://aspe.hhs.gov/sites/default/files/pdf/76331/index.pdf>.

<sup>48</sup> The paragraph has been redesignated (a)(10) in the Final Rule.

<sup>37</sup> See 29 U.S.C. 794a (incorporating 42 U.S.C. 2000e–5(e)(3), 2000e(f)–(k), 2000e(16)).

<sup>38</sup> 42 U.S.C. 2000e–16(b). This grant of authority to issue regulations implementing the federal sector provisions of Title VII is in addition to the more limited grant pursuant to EEOC’s responsibility to enforce Title VII in the private sector. See 42 U.S.C. 2000e–12(a) (granting the Commission authority to issue, amend, or rescind “suitable procedural regulations”).

<sup>39</sup> Executive Order No. 12067, 3 CFR, 1978 Comp., p. 206 (1978), <http://www.archives.gov/federal-register/codification/executive-order/12067.html>.

impact of the accommodation or of the requirement to provide personal assistance services on the operation of the agency's business. The term is one that agencies have been familiar with since they have been required to comply with Section 501 of the Rehabilitation Act, and agency's written reasonable accommodation procedures typically explain the term's meaning and application.

Paragraph (a)(3) of the proposed rule provided 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. To improve clarity, the definition has been revised to state that the term means any hiring authority that permits an agency to consider disability status "during the hiring process."

Paragraph (a)(7) of the proposed rule defined the term "targeted/severe disability" to mean disabilities specifically designated as "targeted/severe" on the SF-256.<sup>49</sup> As explained in the NPRM, disabilities that fall under this term are a subset of those that meet the definition of "disability" as defined under (a)(2). This subset is the focus of additional attention under several paragraphs in the Rule, discussed below. Some commenters stated that the Rule should use the term "significant disability" rather than "targeted/severe disability," because some individuals find the term "severe" to be stigmatizing. One of these commenters stated further that the Rule should adopt the definition of "significant disability" given in Section 7 of the Rehabilitation Act of 1973.<sup>50</sup>

<sup>49</sup> At the time the NPRM was published, the SF-256 used the term "targeted/severe disability" rather than "targeted disability."

<sup>50</sup> 29 U.S.C. 705(21) ("Except as provided in subparagraph (B) or (C), the term 'individual with a significant disability' means an individual with a disability—(i) who has a severe physical or mental impairment which seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome; (ii) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and (iii) who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, intellectual disability, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs described in subparagraphs (A) and (B) of

The Commission declines to use the term "significant disability" in place of "targeted/severe disability." The term "significant disability," as used by the federal government, refers to a group of disabilities that qualify an individual to receive certain government-funded services and benefits.<sup>51</sup> By contrast, the term "targeted/severe disability," as used in the proposed rule, was intended to refer to a group of disabilities that "have historically been used to exclude qualified individuals from employment,"<sup>52</sup> and therefore that, "as a matter of policy, [have been] identified for special emphasis in affirmative action programs."<sup>53</sup> We believe that use of a single term—"significant disability"—to refer both to disabilities that have historically been used to exclude qualified individuals from employment, and, at the same time, to a different group of disabilities that qualify an individual to receive certain government-funded services and benefits, is likely to cause confusion.

The Final Rule does, however, use the term "targeted disability" in place of "targeted/severe disability."<sup>54</sup> OPM's revised SF-256 uses the term "targeted disabilities or serious health conditions" rather than "targeted/severe disabilities." The revision to the Rule therefore both conforms the Rule to OPM's new terminology and addresses the commenters' concern that some individuals find the term "severe" to be stigmatizing. In addition, the definition of the term has been widened to include disabilities that fall under one of the first 12 categories of disability listed in Part A of question 5 on the EEOC's Applicant Flow Form, which include several disabilities that have historically been used to exclude qualified individuals from employment, but that are not designated as "targeted" on the SF-256 (for example cerebral palsy).<sup>55</sup> The EEOC recognizes that it will be helpful for agencies to have an updated SF-256 that conforms to the Applicant Flow Form. The EEOC continues to work with OPM in such an effort. In the meantime, the EEOC will consider both sets of disabilities to be "targeted" for purposes of the Rule.

Definitions of the terms "personal assistance services" and "personal

paragraph (2) to cause comparable substantial functional limitation.").

<sup>51</sup> See, e.g., 29 U.S.C. 796b ("Services may be provided under [29 U.S.C. ch. 16, subch. VII, pt. A] to any individual with a significant disability, as defined in section 705(21)(B) of [title 29].").

<sup>52</sup> *Promoting Employment*, *supra* note 21, at I.

<sup>53</sup> *MD-715*, *supra* note 16, at app. A.

<sup>54</sup> The definition of "targeted disability" appears in paragraph (a)(9) of the Final Rule.

<sup>55</sup> See *Applicant Flow Form*, *supra* note 4, at 2.

assistance service provider" have been added to the paragraph at (a)(5) and (a)(6), because several commenters expressed confusion over the meaning of the term in the proposed rule. We discuss the definition in connection with paragraph (d)(5) below.

#### 1614.203(b) Nondiscrimination

Paragraph 1614.203(b) of the existing regulations 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 NPRM proposed minor revisions to improve clarity. The Commission received no objections to the proposed revisions, which have been retained in the Final Rule.

#### 1614.203(c) Model Employer

This paragraph redesignates and revises paragraph 1614.203(a) of the current regulations, which provides that the federal government shall be a "model employer" of individuals with disabilities, and that agencies shall "give full consideration to the hiring, placement, and advancement of individuals with disabilities."

The NPRM did not propose any textual changes to the paragraph. However, some commenters objected to the use of the term "placement," both here and throughout the regulation, because some individuals with disabilities find it offensive. Accordingly, alternate language has been incorporated here and throughout the Rule where possible. However, because Section 501 itself uses the term "placement,"<sup>56</sup> the Rule retains the term where it directly references the language of the statute.

Other commenters stated that the paragraph should be revised to reflect the affirmative action requirements imposed through this rulemaking. The Commission agrees. Accordingly, the paragraph has been revised to state that "[a]gencies shall [ ] take affirmative action to promote the recruitment, hiring, and advancement of qualified individuals with disabilities, with the goal of eliminating under-representation of individuals with disabilities in the federal workforce," and that agencies shall give "full consideration to the . . . retention of qualified individuals with disabilities in the federal workforce."

#### 1614.203(d) Affirmative Action Plan

As provided by Section 501, this paragraph states that each agency shall adopt and implement a Plan that

<sup>56</sup> See 29 U.S.C. 791(b).

provides sufficient assurances, procedures, and commitments to provide adequate recruitment, hiring, and advancement opportunities for individuals with disabilities at all levels of federal employment. It also sets forth the requirements that the Plan must meet in order to be approved by the Commission. The specific requirements are discussed in separate sections below.

Several commenters stated that the term “adequate,” as used in the statutory language quoted above, should be defined to mean “adequate to ensure meeting the goals required under paragraph (d)(7) of this section.” The Commission disagrees. If, on the one hand, the proposed definition was intended simply to clarify the meaning of the word, the Commission believes that the clarification is unnecessary. Section 501 requires the Commission to approve agency Plans if they “provide[] sufficient assurances, procedures, and commitments to provide adequate recruitment, hiring, and advancement opportunities for individuals with disabilities at all levels of federal employment.” By setting forth the criteria that the Commission will use to determine whether to approve a Plan in paragraph (d), the Rule effectively defines the meaning of that phrase as a whole. If, on the other hand, the definition was suggested in order to create additional criteria by which the Commission will evaluate agency Plans, the Commission disagrees with the suggestion because it would imply, contrary to paragraph (f) and to the Commission’s intention, that paragraph (d) does not set forth an exhaustive list of Plan criteria.

*1614.203(d)(1)(i) Disability Hiring and Advancement Program: Recruitment*

Paragraph (d)(1)(i) of the proposed rule required agencies to use programs and resources that identify applicants who are eligible to be appointed under hiring authorities that take disabilities into account, examples of which include specialized training programs and databases of potential job applicants with disabilities. The paragraph also required agencies to establish and maintain contacts with organizations that specialize in the employment of individuals with disabilities, such as American Job Centers, State Vocational Rehabilitation Agencies, the Veterans’ Vocational Rehabilitation and Employment Program, Centers for Independent Living, and Employment Network Service providers. In addition, the NPRM asked whether the Rule should require agencies to 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 were not hired, and, if so, whether inclusion in the database should be voluntary.

A significant number of commenters stated that recruitment of individuals with targeted disabilities should receive additional emphasis in the paragraph. Consistent with the federal government’s policy of giving targeted disabilities “special emphasis in affirmative action programs,”<sup>57</sup> paragraph (d)(1)(i) has been amended to require agencies to use programs and resources that identify job applicants with disabilities, “including individuals with targeted disabilities,” who are eligible for appointment under a special hiring authority, and to establish and maintain contacts with organizations that specialize in providing assistance to individuals with disabilities, “including individuals with targeted disabilities,” in securing and maintaining employment.

Some commenters stated that agencies should be required to use all of the programs and resources, and to maintain contact with all of the disability organizations, given as examples in the paragraph. Some stated that use of additional programs and resources, such as internship programs and community message boards, and contact with additional disability organizations, such as state Protection and Advocacy organizations, Ticket to Work networks, supported and customized employment providers, college or university career centers that cater to individuals with disabilities, and local education authorities, should also be mandatory.

The Commission is not persuaded that every agency will benefit from the same set of programs, resources, and disability organizations in their efforts to recruit individuals with disabilities and individuals with targeted disabilities. The particular programs, resources, and disability organizations referenced in the paragraph have therefore been kept as examples. Because there is no need to make the list of examples exhaustive, most of the suggested additions were not included in the final paragraph, though they certainly may be appropriate resources to assist agencies in meeting their affirmative action obligations. However, because it was a particularly common suggestion, internship programs were added as examples of programs or resources that can be used to identify individuals who may be appointed

under hiring authorities that take disability into account.

Some commenters stated that, instead of requiring agencies to “maintain contacts” with organizations that specialize in the employment of individuals with disabilities, the Commission should require agencies to establish and maintain “linkage agreements or other formal arrangements” with such organizations. The paragraph has been revised to state that the required contacts may include formal agreements, but does not make formal agreements mandatory. The EEOC lacks the information necessary to determine, for example, how many formal agreements each agency should have, what each party to the agreement should be obligated to do, and what should happen if a party fails to meet an obligation in the agreement. Further, the Commission suspects that different approaches may be appropriate for different agencies.

Many commenters responding to the proposal to require 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 generally favored some version of the proposal, but there was disagreement regarding the location of the database. For example, several commenters stated that the file/database needs to be government-wide in order to be effective. Other commenters stated that the databases should be required, but they would be more effective if each agency maintained its own database of individuals with disabilities who had already evidenced interest in the agency.

Upon further consideration, however, the Commission has concluded that agencies should be encouraged to maintain such databases, rather than making such databases mandatory for every agency. Databases containing the résumés of applicants eligible for appointment under the Schedule A hiring authority for individuals with certain disabilities, and similar resources, will greatly assist agencies in locating and hiring qualified job applicants with disabilities and targeted disabilities. Such databases will be of significant help as agencies seek to meet their targets with regard to hiring such individuals.

The Commission therefore retains “databases of potential job applicants with disabilities” as an example of programs and resources that identify such applicants in paragraph (d)(1)(i)(A) of the Rule, and encourages agencies to develop new databases or augment existing résumé databases to fulfill these

<sup>57</sup> MD-715, *supra* note 16, at app. A.

functions. Should an agency decide to maintain such a database, the Commission advises the agency to include individuals in the database on a voluntary basis only, and to retain in the database only such information as is necessary to determine an applicant's identity, qualifications, and eligibility for appointment under a hiring authority that takes disability into account. Medical information about an individual's specific disability should not be included. The Commission is willing to provide technical assistance to any agency with regard to maintaining a database consistent with all applicable privacy<sup>58</sup> and record retention<sup>59</sup> laws and regulations.

*1614.203(d)(1)(ii) Disability Hiring and Advancement Program: Application Process*

Paragraph (d)(1)(ii) of the proposed rule required agencies to ensure that they have sufficient staff to handle any disability-related issues that arise during the application and selection processes. It also required the agency to provide such staff with training, support, and other resources sufficient to enable them to (A) answer any disability-related questions from members of the public regarding the application and hiring processes; (B) provide job applicants with necessary reasonable accommodations; (C) accept applications for appointment under hiring authorities that take disability into account; (D) determine whether individuals who have applied for appointment under a hiring authority that takes disability into account are eligible for such appointment; (E) forward the application of an individual who has applied for appointment to a particular position under a hiring authority that takes disability into account and who is eligible to the relevant hiring officials, and explain to those officials how and when the

individual may be appointed; and (F) oversee any other disability-related hiring programs. Proposed paragraphs (d)(1)(ii)(D) and (d)(1)(ii)(E) were combined into a single paragraph (d)(1)(ii)(E) in the Final Rule, in order to clarify that agencies are not required to determine whether an individual is eligible for appointment under a hiring authority that takes disability into account unless such individual is being considered for a particular position.

Some commenters stated that the paragraph should be more specific as to who should perform the duties described above. Commenters suggested, for example, that only employees who focus on disability-related issues full time, employees who themselves have disabilities, or employees who are not under the supervision of the office of human resources should perform the duties. One commenter stated that the paragraph should specify the number of staff members who are assigned to these duties.

The Commission believes that agencies should be afforded some flexibility in how the duties are carried out and declines to adopt a one-size-fits-all approach. Some small agencies, for example, may not need an employee who works on disability-related issues on a full-time basis, and the proper number of employees required to handle duties related to the hiring of individuals with disabilities will vary depending on an agency's size and structure. Additionally, we see no reason to conclude categorically that employees who handle issues related to applications from individuals with disabilities should not be under the supervision of an agency's human resources office, though we caution that a human resources specialist assigned to handle applications for a particular job may not necessarily have the necessary expertise to handle requests for reasonable accommodation, questions about hiring authorities that take disability into account, and other questions from job applicants with disabilities. Finally, the Commission does not believe that employees with disabilities are necessarily the only individuals capable of effectively handling duties related to the hiring of other individuals with disabilities, and embodying such an assumption in the Final Rule may actually work to encourage the segregation of individuals with disabilities into specific job categories.

Some commenters stated that the paragraph should require agencies to provide relevant staff members with accurate information on reasonable

accommodation, the Schedule A hiring authority for persons with certain disabilities, the affirmative action requirements imposed under this rulemaking, and other disability-related issues. Because the paragraph already requires agencies to provide "sufficient training, support, and other resources to carry out" the tasks listed above, the Commission concludes that no additional language is necessary.

*1614.203(d)(1)(iii) Disability Hiring and Advancement Program: Advancement*

This paragraph of the proposed rule required agencies to take specific steps to ensure that current employees with disabilities have sufficient opportunities for advancement, such as engaging in efforts to ensure that employees with disabilities are informed of and have opportunities to enroll in relevant training, developing and maintaining mentoring programs, and administering exit interviews that address the recruitment, hiring, inclusion, and advancement of individuals with disabilities.

Some commenters stated that all of the specific steps referenced in the paragraph should be mandatory. Others stated that they should be made more specific, by, for example, requiring agencies to hire dedicated "disability advancement staff"; approach all employees with disabilities when training opportunities arise; give all notices of training opportunities "promptly" to individuals with disabilities in accessible formats; hire full-time assistive technology experts, and make use of the programs, resources, and disability organizations referenced in paragraph (d)(1)(i) to facilitate advancement.<sup>60</sup> Again, the Commission is not persuaded that every agency will benefit from the same strategies for improving advancement opportunities for individuals with disabilities and individuals with targeted disabilities. The Rule has therefore retained the original examples.

Some commenters stated that the paragraph should contain prohibitions against disability discrimination. For example, commenters stated that the paragraph should require agencies to make reasonable accommodations available to participants in mentoring

<sup>60</sup> As an alternative, the same commenter suggested that the paragraph should be revised to require "extra," "concentrated," or "specialized" efforts to ensure that employees with disabilities are aware of training opportunities. Because the Commission does not know how the additional language would change the obligations imposed by the paragraph, the alternative suggestion was not considered.

<sup>58</sup> Résumés, like all records that are personally identifiable and contained in a system of records, are subject to the confidentiality requirements of the Privacy Act. See 5 U.S.C. 552a. Privacy Act requirements regarding résumés that are submitted by applicants to federal agencies, including those submitted by applicants for appointment under the Schedule A hiring authority for individuals with certain disabilities, are specifically addressed by the Office of Personnel Management's Government-Wide Systems of Records Notice, OPM/GOVT-5, Recruiting, Examining, and Placement Records. See Privacy Act of 1974, System of Records, 71 FR 35,351 (June 19, 2006); Privacy Act of 1974; Routine Use Implementation; System of Records, 80 FR 74,815 (Nov. 30, 2015).

<sup>59</sup> Federal record retention requirements are overseen by the National Archives and Records Administration (NARA). See, e.g., *Records Management*, Nat'l Archives.gov & Recs. Admin., <https://www.archives.gov/records-mgmt/> (last visited Dec. 21, 2016).

programs, that individuals with disabilities must be afforded equal opportunities to gain work experience, and that individuals appointed under the Schedule A hiring authority for persons with certain disabilities should be afforded supervision similar to that given other employees.<sup>61</sup> As explained above, the Commission believes that it is inappropriate to provide new guidance on nondiscrimination obligations applicable to federal agencies, as well as to private and state and local government employers, in a regulation that applies only to the affirmative action obligations of federal agencies.

Some commenters stated that the paragraph should require review of all adverse actions taken against individuals with disabilities by, for example, the head of the agency or a neutral, non-agency party. Federal employees already possess several means of subjecting adverse actions to further review. Depending on the issues involved, employees may make use of existing internal mechanisms including alternative dispute resolution, if available; file complaints of employment discrimination pursuant to 29 CFR 1614.106; file appeals with the Merit Systems Protection Board; and file appeals with the U.S. Office of Special Counsel.<sup>62</sup> The Commission has been given no reason to believe that an additional layer of review would improve either the accuracy or the speed with which reviews are carried out. Indeed, because an additional layer of review would not toll existing time frames for filing complaints of discrimination, it is quite likely that such a requirement would significantly burden agencies while resulting in little if any impact on the number of discrimination complaints filed, or worse, cause confusion for employees with disabilities that could result in late filing of complaints. The commenters'

<sup>61</sup> One commenter stated that the Rule should prohibit individuals appointed under the Schedule A hiring authority for people with certain disabilities from filing discrimination complaints. Because this requirement does not implement principles of affirmative action, it has not been included.

<sup>62</sup> See generally *Employee Rights & Appeals: Alternative Dispute Resolution*, Office of Pers. Mgmt., <https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/#url=Alternative-Dispute-Resolution> (last visited Dec. 21, 2016) (discussing alternative dispute resolution); *Employee Rights & Appeals: Appeals*, Office of Pers. Mgmt., <https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/#url=Appeals> (last visited Dec. 21, 2016) (discussing the right to file a complaint of discrimination under the 1614 process and to file appeals with the Merit Systems Protection Board and U.S. Office of Special Counsel).

suggestion therefore was not incorporated into the Rule.

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

Paragraph (d)(2) of the proposed rule required agencies to state expressly in their anti-harassment policies that disability-based harassment is prohibited. The Commission received no comments objecting to the requirement. It therefore has been retained in the Final Rule.

Some commenters stated that the paragraph should also require agencies to provide training on the disability-based harassment policy. The Commission is not persuaded that the addition is necessary. Agencies routinely provide training on their anti-harassment policies. If, as required under this paragraph, an agency's policy expressly states that disability-based harassment is prohibited, the training should naturally address the topic. The Commission notes that Commissioners Chai R. Feldblum and Victoria A. Lipnic recently published a report on how agencies and other employers can improve efforts to prevent harassment that discusses disability-based harassment throughout, and that includes a section specifically on the prevalence of disability-based harassment.<sup>63</sup>

#### 1614.203(d)(3)(i) Reasonable Accommodation: Procedures

Proposed paragraph (d)(3)(i) required agencies to make reasonable accommodation procedures available to job applicants and employees in both written and accessible formats. It also required the procedures to address a minimum of 20 specific topics, including expedited processing, interim accommodations, reasonable accommodation requests, confidentiality, processing deadlines, the process for filing complaints pursuant to 29 CFR 1614.106, and notice of denied requests.

Commenters did not object to the proposal to make reasonable accommodation procedures available in written and accessible formats. One commenter stated that the paragraph should require the procedures to be available online. Recognizing the central importance of online access in the modern workplace, the paragraph now provides that "[t]he Plan shall require the agency to . . . post on its public Web site, and make available to all job

<sup>63</sup> See Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace* 12–13 (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf).

applicants and employees in written and accessible formats, reasonable accommodation procedures. . . ."

Some commenters suggested adding a statement that "accessible formats" include American Sign Language (ASL). The requirement to make reasonable accommodation procedures available in written "and accessible formats" was drafted so as not to require the accessible format to be "written," and to provide job applicants with maximum flexibility to request a type of accessible format that meets his or her particular needs. The language is sufficiently general that it should be interpreted to encompass ASL, as well as documents in Braille or large print, documents in an electronic format that can be read by screen reading software, an individual who can read the document aloud, and other types of accessible formats.

Most of the public comments addressing this paragraph concerned 4 of the 20 required topics—

- (d)(3)(i)(B) (*redesignated (d)(3)(i)(B) and (d)(3)(i)(C)*)<sup>64</sup>: *Reassignment*. The proposed paragraph required the procedures to explain that the agency will consider reassignment to a position for which the employee is qualified, and not just permission to compete for such a position, as a reasonable accommodation if no other reasonable accommodation would permit the employee to perform the essential functions of his or her current position. It also required the procedures to explain how and where officials should conduct searches for vacant positions when considering reassignment as a reasonable accommodation. The Commission has revised the paragraph to clarify that agencies need only consider reassignment "to a vacant position" as a reasonable accommodation, consistent with 29 CFR 1630.2(o)(2)(ii).

Several commenters stated that the paragraph should clarify that the "reassignment rule applies to nondiscrimination obligations," *i.e.*, that failure to provide reassignment as a reasonable accommodation may give rise to liability for employment discrimination. Because each of the 20 required topics pertain to the obligation to provide reasonable accommodations, which is a nondiscrimination obligation,<sup>65</sup> they all in some sense express principles that "apply to nondiscrimination obligations." The Commission therefore disagrees that this paragraph in particular should include

<sup>64</sup> For reasons of clarity, the proposed paragraph was split into 2 paragraphs in the Final Rule.

<sup>65</sup> 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9; 29 CFR pt. 1630, app. 1630.9, .9(e).



the suggested statement. However, in response to the commenters' concerns, the proposed paragraph has been revised to state that reassignment "is" a reasonable accommodation, and that such reassignment "must" be considered if the agency determines that no other reasonable accommodation would permit the employee to perform the essential functions of his or her current position.

One commenter stated that the paragraph should clarify that only employees, and not job applicants, may require reassignment as a reasonable accommodation. Because the paragraph requires an agency's procedures to state that it will consider reassignment when the "employee" can no longer perform the essential functions of his or her "current position," no further clarification is required.

One commenter stated that the paragraph should require agencies to develop and maintain a database of vacant positions within the agency, and to require that agency officials use the database when considering whether to provide reassignment as a reasonable accommodation. The Commission believes that the addition is unnecessary, as long as an agency "[n]otifies] supervisors and other relevant agency employees how and where they are to conduct searches for available vacancies when considering reassignment as a reasonable accommodation" as required under revised paragraph (d)(3)(i)(C).

• (d)(3)(i)(I) (*redesignated (d)(3)(i)(J)*): *Requests for supplemental medical documentation.* The proposed paragraph required the procedures to explain the agency's right to request relevant supplemental medical information if the information submitted by the requester is insufficient. The Commission has revised the paragraph to clarify that "insufficient" means "insufficient for the purposes specified in paragraph (d)(3)(i)(I) of this section" (referring to the agency's right to require documentation 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 the job, or enjoy the benefits and privileges of the workplace").

One commenter stated that the paragraph should cap the number of times an agency may request supplemental documentation. As explained in the NPRM, current anti-discrimination law already prohibits agencies from requesting more

documentation than is necessary to establish the existence of a disability and the need for accommodation.<sup>66</sup> To the extent that the proposed cap would further restrict agencies, it would have the effect of denying them documentation that may be necessary to carry out the interactive process, potentially resulting in denials of needed accommodations. Therefore, the Commission has declined to impose a cap on the number of agency requests for documentation to support an accommodation request.

• (d)(3)(i)(L) (*redesignated (d)(3)(i)(M) and (d)(3)(i)(O)*)<sup>67</sup>: *Deadlines.* The proposed paragraph required the procedures to designate a maximum amount of time, absent extenuating circumstances, that the agency has to either provide a requested accommodation or deny the request. It also required the procedures to explain that the time limit begins to run when the accommodation is first requested, and that, where a particular reasonable accommodation can be provided in less than the maximum amount of time allowed, failure to respond promptly may result in a violation of the Rehabilitation Act.

One commenter stated that the Commission should eliminate the time limit requirement. The suggestion runs counter to longstanding federal policy. Executive Order 13164 states that each agency's procedures must "[d]esignate a time period during which reasonable accommodation requests will be granted or denied, absent extenuating circumstances."<sup>68</sup> As instructed by Executive Order 13164, the Commission provided further clarification of the requirement in guidance, which is still in effect.<sup>69</sup>

Some commenters stated that the paragraph should require the procedures to provide additional information on the types of extenuating circumstances that would justify a delay in providing a reasonable accommodation. Commenters stated, for example, that the procedures should list all possible extenuating circumstances, should provide that an inability to secure funding is not an extenuating circumstance, should state that a delay is justified "[a]s long as both parties are actively engaged in the interactive process," or should state that a requester's failure to engage in the interactive process, for example by

failing to provide necessary documentation, constitutes an extenuating circumstance.

Extenuating circumstances are, by definition, factors that cannot "reasonably have been anticipated or avoided in advance of the request for accommodation."<sup>70</sup> Thus, it is not possible to specify all such circumstances in a regulation. In addition, some agencies may define certain acts or omissions during the interactive process as "extenuating circumstances," while others may not. For example, the inability to provide equipment needed as a reasonable accommodation because a vendor has suddenly and unexpectedly gone out of business might be an extenuating circumstance for a small agency making a purchase of the equipment for the first time, but not for a large agency that has extensive experience with providing reasonable accommodations.

The Commission therefore believes that it is not possible to create a definitive list of what constitute extenuating circumstances. However, a new paragraph has been added at (d)(3)(i)(N) clarifying the Commission's longstanding position that "the agency will not be expected to adhere to its usual timelines if an individual's health professional fails to provide needed documentation in a timely manner."<sup>71</sup>

• (d)(3)(i)(N) (*redesignated (d)(3)(i)(P)*): *Interim accommodations.* The proposed paragraph required the agency's procedures to explain that, where a reasonable accommodation cannot be provided immediately, the agency must provide an interim accommodation whenever possible.

One commenter stated that the paragraph should not require an agency's procedures to state an interim accommodation "must" be provided "whenever possible," but rather that the agency will "seek to" provide interim accommodations during a delay. Another commenter stated that the procedures should not require the agency to provide interim accommodations if the existence of a disability, the need for accommodation, and the effectiveness of the proposed accommodation have not been established.

The Commission disagrees that agencies should only be required to "seek to" provide an interim accommodation when there is a delay in providing a preferred accommodation. Interim accommodations may be necessary in order to avoid, for example, a worsening of symptoms, exacerbation

<sup>66</sup> See, e.g., 13164 Guidance, *supra* note 15.

<sup>67</sup> For reasons of clarity, the paragraph on deadlines in the proposed rule was split into 2 paragraphs in the Final Rule.

<sup>68</sup> Executive Order No. 13164, *supra* note 14.

<sup>69</sup> See 13164 Guidance, *supra* note 15.

<sup>70</sup> *Id.*

<sup>71</sup> See *id.*

of a medical condition, or pain. They therefore may play a crucial role in preserving the requesting individual's ability to work. The Commission also disagrees that interim accommodations should only be required once the existence of a disability, the need for accommodation, and the effectiveness of a proposed accommodation have been established. The term "establish" connotes a formal finding. There may be reasons why an agency does not make a formal finding even though it is reasonably likely that the requesting individual is entitled to a reasonable accommodation, such as where a disability is obvious even though the appropriate accommodation has not been established.

For the foregoing reasons, the paragraph has been amended to require an interim accommodation that allows the requesting individual to perform some or all of the essential functions of his or her job when "all the facts and circumstances known to the agency make it reasonably likely that [the] individual will be entitled to a reasonable accommodation, . . . [and] it is possible to do so without imposing undue hardship on the agency."

Other commenters stated that agencies should be required to address topics in addition to the 20 proposed in the NPRM in their reasonable accommodation procedures. For example, commenters stated that the procedures should be required to explain that employees and applicants do not need to use "magic words" in order to begin the interactive process; that reasonable accommodations may be available to help applicants meet qualification standards; that the interactive process is "ongoing"; and that employees and job applicants have an obligation to participate in the interactive process. None of the requirements were added because they are implicit in existing EEOC requirements. For example, the requirement to explain that employees and applicants do not need to use "magic words" in order to begin the interactive process is implicit in the existing requirement to "[p]rovide guidance to supervisors on how to recognize requests for reasonable accommodation" at (b)(i)(3)(G). Moreover, the list of 20 topics is only intended to set a minimum; agencies are free to address additional topics in the procedures if they wish to do so.

The Commission made an unrequested change to proposed paragraph (d)(3)(i)(G) (redesignated (d)(3)(i)(H) in the Final Rule), clarifying that decision makers should communicate with individuals who

have requested a reasonable accommodation early in the interactive process "and throughout the process." The revision does not represent a change in Commission policy.

*1614.203(d)(3)(ii) Reasonable Accommodation: Cost of Accommodations*

Paragraph (d)(3)(ii) of the proposed rule required agencies 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. As a clarification, this portion of the paragraph has been revised to state that all available resources are considered, "excluding those designated by statute for a specific purpose that does not include reasonable accommodation." The paragraph also required the agency to ensure that relevant decision-makers are informed about various external resources that may be used in providing 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),<sup>72</sup> and agency funds that, although not designated specifically for providing reasonable accommodations, may be used for that purpose. The purpose of the paragraph was to ensure that sufficient funds are available for more costly accommodations when necessary.

Many commenters stated that the paragraph should require a centralized fund. In the NPRM, the Commission stated that it did not require a centralized fund due to practical concerns regarding the precise manner in which an agency's appropriated funds are held, requested, and disbursed, and due to the fact that centralized funding does not ensure that sufficient funds are provided for costly accommodations where, for example, the fund is too small or relevant decision-makers do not know how to access the fund. The commenters argued that these concerns could be overcome by, for example, requiring agencies to base the size of the fund on costs in previous years and instructing relevant personnel how to access the fund.

<sup>72</sup> See generally Computer/Electronic Accommodations Program, <http://www.cap.mil> (last visited Aug. 3, 2015).

The EEOC has supported the use of a centralized fund to pay for reasonable accommodation.<sup>73</sup> We think that a centralized fund is one of the best and easiest ways to ensure that requests for reasonable accommodation are not denied for reasons of cost, and that individuals with disabilities are not excluded from employment due to the anticipated cost of a reasonable accommodation, if the resources available to the agency as a whole would enable it to provide one without undue hardship.

However, the Commission is not persuaded that a centralized fund is the only way to achieve this objective. For example, centralized contracting vehicles may be an effective alternative. The paragraph has thus been amended to require agencies to take specific steps—which may include adoption of a centralized fund—to achieve these goals. The paragraph further states that such steps must be reasonably designed to, at a minimum—

- ensure that anyone who is authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware that, pursuant to the regulations implementing the undue hardship defense at 29 CFR part 1630, all resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, are considered when determining whether a denial of reasonable accommodation based on cost is lawful; and
- ensure that anyone authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware of, and knows how to arrange for the use of, agency resources available to provide the accommodation, including any centralized fund the agency may have for that purpose.

The revised paragraph requires agencies to adopt systems that perform the same valuable functions of centralized funds, while providing them with flexibility to work within existing budgetary schemes.

*1614.203(d)(3)(iii) Reasonable Accommodation: Notification of Basis for Denial*

Paragraph (d)(3)(iii) of the proposed rule required agencies to provide a job applicant or employee who is denied a reasonable accommodations with a written notice that explains the reason

<sup>73</sup> See, e.g., EEOC, *Instructions to Federal Agencies for EEO MD-715 I* (last updated July 20, 2004), <http://www.eeoc.gov/federal/directives/715instruct/section1.html> ("The Model EEO Program and Agency Self-Assessment Checklist").

for the denial, notifies the applicant or employee of any available internal appeal or informal dispute resolution processes, provides instructions on how to file a complaint of discrimination pursuant to 29 CFR 1614.106, and explains that, pursuant to 29 CFR 1614.105, the right to file a complaint will be lost unless the job applicant or employee initiates contact with an EEO Counselor within 45 days of the denial regardless of whether he or she participates in an informal dispute resolution process. The paragraph has been amended to clarify that the notice must be made available in accessible formats.

One commenter stated that agencies should also be required to provide notices to individuals when they first request reasonable accommodations, stating that they may file complaints of discrimination if the agency fails to make a decision on or before a “date certain.” The same commenter stated that agencies should also provide notices whenever they determine that extenuating circumstances justify a delay in provision of an accommodation.

The intended purpose of the suggested notices appears to be to (a) inform job applicants and employees who request reasonable accommodations that, absent extenuating circumstances, the agency must either provide a reasonable accommodation or deny the request within a certain number of days; (b) ensure that requesting individuals are aware of any alleged extenuating circumstances that justify a delay in providing a reasonable accommodation; and (c) inform requesters that they have the right to file complaints of discrimination if the agency fails to meet its deadlines absent extenuating circumstances. Reasonable accommodation procedures that comply with paragraph (d)(3)(i) should already satisfy these objectives: (d)(3)(i)(M) requires the procedures to designate the maximum amount of time the agency has, absent extenuating circumstances, to either provide a requested accommodation or deny the request; (d)(3)(i)(S) requires the agency to notify requesters of any alleged extenuating circumstances that justify a delay; and (d)(3)(i)(T) requires the agency to explain the requester’s right to file a complaint. The additional notices are therefore unnecessary.

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

Paragraph (d)(4) of the proposed rule required agencies to provide all employees with contact information for

individuals who are responsible for ensuring agency compliance with Section 508 of the Rehabilitation Act (Section 508),<sup>74</sup> which requires all electronic and information technology purchased, maintained, or used by the agency to be readily accessible to and usable by people with disabilities, and for individuals who are responsible for ensuring agency compliance with the Architectural Barriers Act of 1968 (ABA),<sup>75</sup> which requires the agency to ensure that its facilities are physically accessible to people with disabilities. It also required agencies to provide clear instructions on how to file complaints alleging violations of those laws, and to assist individuals with filing complaints against another federal agency when an investigation has shown that such other agency is responsible for the alleged violation. The paragraph does not require the agency to provide legal advice, or to represent individuals in complaints against other agencies; it merely requires agencies to provide contact information. The paragraph has been modified to clarify that the information must be available in accessible formats, and that it should be available online.

Some commenters stated that the paragraph should require agencies to provide the information to new hires “immediately.” The paragraph requires agencies to provide the information to “all” employees. Because “all” employees include newly hired employees, no change was required.

Some commenters stated that the paragraph should require agencies to inform employees of their substantive rights under Section 508 and the ABA, in addition to their enforcement rights under those laws. Because employees may be equally unaware of their substantive rights and their enforcement rights under Section 508 and the ABA, the revised paragraph requires agencies to provide employees with information on both. Again, the paragraph does not require agencies to provide legal advice or represent the individual. Agencies may satisfy this requirement by providing Internet links to existing resources on Section 508 and the ABA.

Other commenters stated that the requirement to “assist” individuals with filing complaints against other agencies was unclear, and that, to the extent that it was intended to require agencies to act as advocates for, or advisors to, individuals in actions against other agencies, it should be struck. The paragraph was not intended to require agencies to act as advocates for

employees in actions against other agencies. The paragraph has been modified to clarify that agencies are only required to provide information on where to file a complaint against another agency when an investigation shows that such other agency is responsible for an alleged violation.

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

Currently, agencies are required to provide certain job-related services to individuals with disabilities as reasonable accommodations if doing so would enable them to apply for a job, perform job functions, or enjoy the benefits and privileges of employment, absent undue hardship. For example, an agency may be required to provide sign language interpreters, readers, assistance with note taking or photocopying, or permission to use a job coach as a reasonable accommodation.<sup>76</sup> However, provision of PAS that are needed on the job, such as assistance with eating or using the restroom, is not considered a reasonable accommodation under the ADA or as a matter of nondiscrimination under Section 501.

The NPRM proposed to place this obligation on agencies as an affirmative action requirement under Section 501. Paragraph (d)(5) of the proposed rule required agencies to provide PAS, such as assistance with removing and putting on clothing, eating, and using the restroom, to employees who need them because of a disability during work hours and job-related travel, unless doing so would impose undue hardship. It further provided that agencies are permitted to assign PAS providers to more than one individual with a disability, and to require them to do non-PAS tasks as time permits. In addition, the NPRM requested public input on (a) whether the description of PAS in the proposed paragraph was adequate; (b) whether the requirement to provide PAS should be kept in the Final Rule; (c) whether individuals who provide PAS should be assigned to particular individuals or, instead, asked to provide services to multiple individuals as needed; and (d) whether the agency should be allowed to assign other tasks to PAS providers when no personal assistance is needed.

Many commenters responding to the question of whether the NPRM’s description of PAS was adequate complained that the description was vague. Commenters offered various suggestions for making the description more precise—some stated that it

<sup>74</sup> 29 U.S.C. 794d.

<sup>75</sup> 42 U.S.C. 4151–4157.

<sup>76</sup> See 29 CFR pt. 1630, app. 1630.9.

should include additional examples, one stated that it should exclude medical services, one stated that the list of examples should be exhaustive, and two stated that the paragraph should incorporate language used in the definition of PAS given elsewhere in the Rehabilitation Act.<sup>77</sup>

The Commission has chosen the last option. The term “personal assistance services,” as it is used in the disability community, expresses an open-ended concept. It is therefore not possible to provide an exhaustive list of examples, and addition of a few examples will necessarily fail to capture the full meaning. New paragraph (a)(5) thus provides that the term “personal assistance services” means “assistance with performing activities of daily living that an individual would typically perform if he or she did not have a disability, and that is not otherwise required as a reasonable accommodation, including, for example, assistance with removing and putting on clothing, eating, and using the restroom.” New paragraph (a)(4) defines the related term “personal assistance service provider” to mean “an employee or independent contractor whose primary job functions include provision of personal assistance services.”

Comments on whether the PAS requirement should be kept in the Final Rule were mixed. Many disability advocacy organizations and individuals strongly favored the requirement, emphasizing that a lack of PAS in the workplace poses a major barrier to employment for some individuals with disabilities. Other commenters objected. Some argued that the associated costs would be too high. Some argued that the Commission lacks the authority to impose the requirement. Others objected that compliance with the requirement would be extremely difficult or impossible because, for example, it would require agencies to violate appropriations and antideficiency laws; require them to coordinate with local nursing boards; lead to the depletion of reasonable accommodation funds; result in reduced hiring of individuals with disabilities; conflict with merit systems principles and veterans’ preference rules, at least to the extent that it would require agencies to hire providers chosen by the individuals who need

them; require agencies to provide services in a variety of locations; or lead to the hiring and retention of unqualified employees.

The Final Rule retains the requirement to provide PAS during work hours<sup>78</sup> and job-related travel, absent undue hardship, and further clarifies in revised paragraph (d)(5)(iii) that agencies may not take adverse actions against job applicants and employees on the basis of their need, or perceived need, for PAS. Public comments from advocacy organizations and individuals confirm that 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 disabilities. For many individuals with targeted disabilities such as paralysis or cerebral palsy, full participation in the workplace is impossible without PAS.

The Commission is not persuaded by the objections raised by commenters. First, the issue of cost is addressed in the section on Executive Orders 13563 and 12866 below. Second, we disagree that the Commission lacks authority to impose the requirement. As explained above, the Commission has Section 501 rulemaking authority under Section 505 and Executive Order 12067, and, having found that its prior regulatory and subregulatory guidance was not sufficiently advancing the employment of qualified individuals with disabilities, here exercises its authority to strengthen the regulations implementing the Section 501 affirmative action requirement.<sup>79</sup> Because public comments confirm that a lack of PAS in the workplace is a persistent barrier to employment for individuals with certain significant disabilities, one of the ways in which the regulation is being strengthened is by requiring agencies to provide PAS to individuals who need them during work hours and job-related travel, absent undue hardship.

Third, as to the arguments that compliance would be extremely difficult or impossible, the Commission

<sup>78</sup> Work hours include time that an employee is teleworking, whether the telework is part of an agency telework program available to all employees or is being provided as a reasonable accommodation. The Commission sees no legal reason to treat the provision of PAS for workers who are teleworking any differently from the provision of other services by individuals as a reasonable accommodations, such as sign language interpreters and readers. Determinations of whether PAS can be provided to an employee who is teleworking without undue hardship should be made on a case-by-case basis, as are decisions about reasonable accommodations.

<sup>79</sup> See *supra* notes 37–44 and accompanying text.

notes as it did in the preamble to the proposed rule that several federal agencies currently provide PAS on a voluntary basis, and have been doing so for decades without any of the negative consequences imagined by commenters.<sup>80</sup>

Responses to the question of whether PAS providers should be assigned to single individuals or to multiple individuals were mixed. Some stated that providers should be assigned to single individuals because (a) PAS are often required on very short notice, (b) receipt of PAS from multiple providers is likely to make the individual with a disability feel uncomfortable, and (c) services are improved if the provider is familiar with the individual’s needs. Others stated that agencies should be given maximum flexibility. Commenters were more uniformly in favor of allowing agencies to assign non-PAS tasks to PAS providers, as long as the PAS-related assignments were given higher priority. One commenter disagreed, arguing that assignment of both PAS and non-PAS tasks to a single individual would create practical problems in contracting, creation of position descriptions, and performance assessment.

In both respects, the Final Rule grants flexibility to agencies in revised paragraph (d)(5)(ii). Again the Commission looks to actual practice for guidance. Federal agencies have used a variety of models for providing PAS to equal effect. The Commission, for example, has hired federal employees to provide PAS to individuals with disabilities on a one-to-one basis, whereas the Department of Labor has contracted for a pool of qualified personnel to provide PAS and other services to multiple employees.<sup>81</sup> Moreover, if an agency finds that a

<sup>80</sup> 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) [hereinafter DOL statement] (on file with the Commission); Dep’t of Transp., *Disability Resource Center Services Handbook* (Nov. 2014), <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).

<sup>81</sup> DOL statement, *supra* note 80.

<sup>77</sup> See 29 U.S.C. 705(28) (“The term ‘personal assistance services’ means a range of services, provided by one or more persons, designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform if the individual did not have a disability. Such services shall be designed to increase the individual’s control in life and ability to perform everyday activities on or off the job.”).

particular approach is impracticable or does not meet employees' needs, the paragraph permits the agency to adopt an alternative approach.

Other comments on the requirement raised the following issues:

- *Eligibility.* Some stated that an agency should only be required to provide PAS to individuals who are qualified to perform their jobs. Although the Commission does not believe that the proposed paragraph provided otherwise, it has been revised to state that agencies are required to provide PAS only if they "would, together with any reasonable accommodations required under [29 CFR] part 1630 . . . , enable the employee to perform the essential functions of his or her position."<sup>82</sup>

Other commenters stated that an agency should only be required to provide PAS to individuals who have targeted disabilities. As discussed in the NPRM, the Commission believes that individuals who do not have targeted disabilities will not require PAS in order to participate in the workplace.<sup>83</sup> The paragraph has therefore been revised in the manner suggested.

- *Additional services.* Some commenters stated that the paragraph should require agencies to provide additional services to employees with disabilities, including help with getting to and from work, identifying transportation options and accessing transportation, assistance with becoming familiar with surroundings, and "informational and navigational awareness, as well as lightweight communication." The commenters did not, however, cite to any studies or other objective sources establishing that such services would significantly improve employment of individuals with disabilities, or to any data on which to base an estimate of the economic impact of the requirement. The Commission has not incorporated these suggestions.

A significant number of commenters stated that the Rule should require agencies to permit employees with disabilities to use job coaches and other forms of supported employment paid for by outside sources. The Commission strongly endorses the use of supported employment. Indeed, permission to use a job coach or other forms of supported employment is a reasonable accommodation that may be required if such a person needs those services to

perform the essential functions of a position and if providing those services does not impose an undue hardship on the agency.<sup>84</sup> As explained above, however, the Commission believes that it would be inappropriate to provide guidance on nondiscrimination requirements applicable to federal agencies, as well as to private and state and local government employers, in a regulation that applies to the affirmative action obligations of federal agencies.

- *Undue hardship exception.* One commenter stated that agencies should not be required to establish undue hardship in order to deny a request for PAS, because, given the fact that they typically have very large budgets, agencies "will have very limited ability to deny such requests . . . regardless of the nature of the request." The commenter did not suggest an alternative standard.

The Commission disagrees with the commenter's characterization. First, the paragraph does not require agencies to provide PAS to individuals who request them "regardless of the nature of the request." The paragraph only requires agencies to provide personal assistants, who will assist the employee with eating, using the restroom, and similar activities to individuals who need them because of a targeted disability; it does not require agencies to provide services that the individual does not need in order to participate in the workplace, or services that are needed for reasons other than disability. Second, agencies may be able to establish undue hardship for reasons other than cost.<sup>85</sup>

- *Selection and evaluation of personal assistance service provider.* Some commenters stated that the paragraph should require PAS providers to meet certain qualification standards, such as those imposed by OPM for all government employees and specific standards based on experience and training. Others stated that an agency should be required to consult with individuals who receive PAS during their providers' performance reviews.

These requirements were not incorporated into the Rule because they primarily concern OPM functions. EEOC is not in the best position to determine what qualifications PAS providers have to possess, and we do not wish to limit unduly the choices of employees who may want to work with a PAS provider who may not necessarily possess specific certifications or

credentials. This is similar to the approach the Commission has taken under the ADA with respect to sign language interpreters and readers provided as reasonable accommodations. However, the revised paragraph does provide that PAS must be provided by a personal assistance service provider, meaning an employee or independent contractor whose primary job functions include provision of personal assistance services at (d)(5)(ii).

Some commenters stated that the paragraph should require agencies to consider the preferences of individuals with disabilities when selecting their PAS providers. The Commission agrees and notes that this is the same principle that applies when an employer is choosing from among available accommodations.<sup>86</sup> New paragraph (d)(5)(iv) requires agencies, when selecting someone to provide personal assistance services to a single individual, to give primary consideration to the individual's preferences to the extent permitted by law.

- *Process for requesting PAS.* Some commenters stated that the paragraph should require agencies to have written procedures for processing PAS requests, similar to the reasonable accommodation procedures required under paragraph (d)(4). Some stated more specifically that agencies should be permitted to require medical documentation, be required to use a centralized fund, or be required to consult with vocational rehabilitation agencies during the process.

The Commission agrees that agencies should have procedures for processing requests for PAS. Paragraph (d)(5)(v) of the Final Rule requires agencies to adopt such procedures, and to make them available online and in written and accessible formats. Because the intent of the Rule is to require agencies to treat PAS requests like requests for reasonable accommodation, the paragraph further provides that agencies may satisfy the requirement by stating in their reasonable accommodation procedures that the process for requesting personal assistance services, the process for determining whether such services are required, and the agency's right to deny such requests when provision of the services would pose an undue hardship, are the same as for reasonable accommodations.

<sup>82</sup> 29 CFR 1630.203(5)(i)(B), as amended.

<sup>83</sup> Affirmative Action for Individuals with Disabilities in the Federal Government, 81 FR 9123, 9134 n.101 (Feb. 24, 2016) (to be codified at 29 CFR 1614.203, .601(f)).

<sup>84</sup> See 29 CFR pt. 1630, app. 1630.9.

<sup>85</sup> EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), <https://www.eeoc.gov/policy/docs/accommodation.html#undue>.

<sup>86</sup> See 29 CFR pt. 1630, app. 1630.9.

1614.203(d)(6) and 1614.203(d)(7)(i)  
Utilization analysis and goals

Paragraph (d)(7)(i) of the proposed rule required agencies to adopt the goal of achieving a 12% representation rate for people with disabilities at the GS-11 level<sup>87</sup> and above, including the Senior Executive Service (SES);<sup>88</sup> a 12% representation rate for people with disabilities at the GS-10 level and below; a 2% representation rate for individuals with targeted disabilities at the GS-11 level and above, including the SES; and a 2% representation rate for people with targeted disabilities at the GS-10 level and below. Paragraph (d)(6) required agencies to perform the workforce analysis necessary to determine whether these goals have been met annually, based on SF-256 records, records of requests for reasonable accommodation, and records of appointments under hiring authorities that take disability into account. In addition, the NPRM asked for public input on whether the proposed goals were appropriate, and whether there are any data showing that the goals should be raised or lowered.

The Commission received a small number of comments requesting clarification of the proposed goals. One commenter asked whether the 2% goals were intended to be sub-goals of the 12% goals, *i.e.*, whether the individuals who are counted as individuals with targeted disabilities for purposes of determining whether a 2% goal has been met may also be counted as individuals with disabilities for purposes of determining whether a 12% goal has been met.

The 2% goals are intended to be sub-goals. Disabilities that fall under the term “targeted disability” are a subset of those that fall under the term “disability” as defined under Section 501. Thus, any employee who has a targeted disability, and who therefore counts toward a 2% goal for individuals with targeted disabilities, will necessarily have a condition that meets the Section 501 definition of “disability,” and will therefore also

count toward the 12% goal for individuals with disabilities.

Another commenter asked whether the fact that the NPRM proposed a 12% goal for individuals with disabilities at the GS-11 level and above, and a 12% goal for individuals with disabilities at the GS-10 level and below, meant that it proposed a 24% overall goal for individuals with disabilities. Similarly, the commenter wondered whether the 2% goals “combined” to create a 4% overall goal for individuals with targeted disabilities. Because each 12% and each 2% goal applies to a different segment of the workforce, the Rule does not impose goals of 24% and 4% overall.<sup>89</sup>

A small number of commenters stated that the goals should not be retained in the Final Rule because the proposed methods of measuring agencies’ representation rates—SF-256 records, reasonable accommodation records, and documentation relating to appointment of individuals under hiring authorities that take disability into account—are inaccurate. SF-256 data, according to commenters, are especially likely to underestimate representation rates for individuals with disabilities and individuals with targeted disabilities because many employees are reluctant to disclose disabilities using this form. Some stated that a greater number of employees would self-disclose if, for example, the form did not ask the individual to indicate his or her specific type of disability, or if it included questions on topics other than disability.

The Commission acknowledged in the NPRM that SF-256 data are likely to underestimate representation rates for individuals with disabilities and individuals with targeted disabilities, and, for that reason, used prior SF-256 data as a starting point when it developed the goals.<sup>90</sup> As discussed, SF-256 data themselves (together with other data that agencies are permitted to use under (d)(6)) indicate that the federal government as a whole has achieved representation rates that are close to 12% for individuals with disabilities and 2% for individuals with targeted disabilities; actual representation rates may be much larger. The Commission also reminds agencies that they have the discretion to

periodically request employees to respond to voluntary surveys updating their SF-256 information. If accompanied by an explanation of why self-reporting is important, resurveying can enhance data accuracy. The Commission therefore is not persuaded that the proposed goals are overly burdensome due to problems of measurement.

However, the Commission does acknowledge commenters’ assertions that there may be ways to improve the accuracy of self-reported data, for example by asking individuals to indicate whether they have disabilities or targeted disabilities without asking for more detailed information. The Commission is not able to amend the SF-256, as suggested by some commenters, because OPM controls the content of the SF-256. Nor can the Commission require OPM to establish an “authoritative” system for tracking disability information, as suggested by another commenter.

Instead, the Final Rule allows, but does not require, agencies to collect disability information using forms other than the SF-256. Paragraph (d)(6)(ii)(A) has thus been amended to allow agencies to classify individuals for purposes of the workforce analysis based on “[t]he individual’s self-identification as an individual with a disability or an individual with a targeted disability on a form, including but not limited to the Office of Personnel Management’s Standard Form 256, which states that the information collected will be kept confidential and used only for statistical purposes, and that completion of the form is voluntary.”<sup>91</sup> The paragraph permits agencies to design their own forms or use existing forms as appropriate. For example, agencies are permitted to use the approach taken in EEOC’s Applicant Flow Form. This form asks, among other things, whether the individual has a non-targeted disability. It does not, however, require the individual to identify which non-targeted disability he or she has.<sup>92</sup> The Final Rule also

<sup>87</sup> 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 Dec. 21, 2016).

<sup>88</sup> 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 Dec. 21, 2016).

<sup>89</sup> Where X represents the total number of employees on the GS and SES scales and Y represents the total number of employees employed at the GS-10 level and below,  $0.02(Y) + 0.02(X - Y) = 0.02(X)$ ;  $0.12(Y) + 0.12(X - Y) = 0.12(X)$ .

<sup>90</sup> Affirmative Action for Individuals with Disabilities in the Federal Government, 81 FR 9123, 9128–29 (Feb. 24, 2016) (to be codified at 29 CFR 1614.203, .601(f)).

<sup>91</sup> The other records discussed in this paragraph will also be kept confidential, because they are subject to the Privacy Act. See 5 U.S.C. 552a. Additionally, records relating to reasonable accommodation are subject to the ADA’s confidentiality requirements, as incorporated. See 42 U.S.C. 12112(d)(4)(A) (imposing the requirements); 29 U.S.C. 791(f) (incorporating the requirements into Section 501); 29 CFR 1630.14(c) (implementing the requirements); 29 CFR pt. 1630, app. 1630.14(c) (discussing the requirements); 29 CFR 1614.203(b) (incorporating the ADA regulations at 29 CFR pt. 1630 into the Section 501 regulations).

<sup>92</sup> *Applicant Flow Form*, *supra* note 4, at 3.

makes conforming amendments to 29 CFR 1614.601(f) (discussed below).<sup>93</sup>

One commenter argued that the goals should be eliminated for agencies that have limited opportunities to use the Schedule A hiring authority for persons with certain disabilities, and for small agencies that typically draw from a small applicant pool. The commenter also argued that small agencies should be exempted because it is sometimes possible to determine which employees within the agency have a disability based solely on aggregate data, which, according to the commenter, may result in “per se violations of [the confidentiality requirements of] the Rehabilitation Act.”

The Final Rule does not include exemptions for agencies that have limited opportunities to use the Schedule A hiring authority for persons with certain disabilities or for small agencies. The Commission believes that all agencies are able to take steps to improve employment opportunities for individuals with disabilities, including targeted disabilities. Agencies that have limited opportunities to use the Schedule A hiring authority for persons with certain disabilities may still, for example, take steps to improve the application process as required under (d)(1)(ii); adopt advancement programs as required under (d)(1)(iii), and take other actions recommended under (d)(7)(ii) to the extent permitted by law. Agencies that typically draw from a small applicant pool may take steps to expand the pool, as required under (d)(1)(i). These and other steps specified throughout paragraph (d) are all that the Rule requires of an agency that fails to achieve a goal—paragraph (f)(2) (discussed below) provides that “failure to achieve a goal set forth in paragraph (d)(7) of the Rule, by itself, is not grounds for disapproval unless the Plan

<sup>93</sup> One commenter stated that current regulations at 29 CFR part 1630 should also be amended, because those regulations generally prohibit agencies from asking disability-related questions, as would be required under (d)(6). The Commission disagrees. The anti-discrimination regulations permit agencies (and employers generally) to ask disability-related questions for purposes of engaging in affirmative action for individuals with disabilities. *Cf. Assoc. Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25, 37–38 (D.D.C. 2014) (holding that the ADA does not prohibit federal contractors from inviting job applicants to self-identify as individuals with disabilities pursuant to regulations implementing the affirmative action requirement imposed on federal contractors by Section 503), *aff’d*, 773 F.3d 257 (D.C. Cir. 2014); Letter from Peggy R. Mastroianni, Legal Counsel, EEOC, to Patricia A. Shiu, Director, Office of Fed. Contract Compliance Programs, Dep’t of Labor (Aug. 8, 2013), <http://www.dol.gov/ofccp/regs/compliance/section503.htm> (follow “EEOC Opinion on the Invitation to Self-Identify” hyperlink) (discussing job applicants).

fails to require the agency to take specific steps that are reasonably designed to achieve the goal.”

The Commission does not see how compliance with the goal requirements could lead to “per se violations of the Rehabilitation Act.” The commenter appears to have assumed that the Rule requires agencies to make detailed, grade-level-by-grade-level disability information available to the public. It does not. The Rule only requires agencies to publish representation rates for people with disabilities and people with targeted disabilities in two broadly defined groups. Moreover, nothing in the Rule requires an individual with a disability to self-identify as such; if an individual does not wish to disclose his or her disability status, he or she need not fill out the SF–256 or similar forms.

One commenter stated that agencies should be allowed to set their own goals. After the ANPRM public comment period, the Commission decided to adopt government-wide goals in the proposed rule.<sup>94</sup> The commenter did not provide any basis on which to overturn that decision. Upon further consideration, the Commission has determined that the proposed government-wide approach continues to be the most appropriate one.

Most commenters responding to the question of whether the proposed goals were appropriate stated that they were too low. These commenters generally argued that, because existing representation rates for individuals with disabilities and individuals with targeted disabilities are already close to 12% and 2% respectively, the proposed goals would merely “maintain the status quo.”<sup>95</sup>

The Commission disagrees that the proposed goals would merely “maintain the status quo.” Although it is true that

<sup>94</sup> See *Affirmative Action for Individuals with Disabilities in the Federal Government*, 81 FR at 9128.

<sup>95</sup> For example, commenters cited a recent OPM report finding that 14.64% of federal employees have reportable disabilities, 18.8% of federal employees at the GS–10 level and below have disabilities, 12.6% of federal employees at the GS–11 level and above have disabilities, 1.18% of federal employees have targeted disabilities, 1.91% of federal employees at the GS–10 level and below have targeted disabilities, and 0.8% of federal employees at the GS–11 level and above have targeted disabilities, 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), <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/disability-report-fy2014.pdf> [hereinafter *2014 Report*], and a recent survey indicating that 13.5% of federal employees have disabilities, *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 Dec. 8, 2016).

the federal government as a whole has achieved representation rates of close to 12% and 2%, many individual agencies have not.<sup>96</sup> For these agencies, meeting the goals would represent significant improvement. Further, because the goals apply at both higher and lower levels of employment, agencies that employ a disproportionately high number of individuals with disabilities in lower paying positions would also see significant improvement by meeting the goals. As noted in the NPRM, the representation rates for individuals with disabilities and individuals with targeted disabilities are significantly lower at the GS–11 level and above than at the GS–10 level and below.<sup>97</sup>

Additionally, the commenters failed to identify any data on which the Commission could reasonably base higher goals. Many commenters simply picked numbers without justification. Some commenters stated that the Commission should “look to those agencies that have done the best job of employing people with disabilities, as well as workforce data” to set the goals, but provided no explanation as to how this could reasonably be done, and instead chose goals that did not appear to be connected either with agency benchmarks or with workforce data.<sup>98</sup> One commenter stated that the goals should be based on census data. However, the census definition of “disability” matches neither the Section 501 definition of “disability” nor the definition of “targeted disability” under paragraph (a).<sup>99</sup> Census data, therefore, are inapposite. Because commenters failed to identify any reasonable alternatives, and because the Commission believes that the 12% and 2% goals are based on the best available data, the Final Rule retains goals of 12% for individuals with disabilities and 2% for individuals with targeted disabilities.

Some commenters stated that the goals should be extended to employees who are on neither the GS nor the SES scale. We agree. However, to avoid the difficulties inherent in establishing “equivalencies” across differing pay

<sup>96</sup> See, e.g., *2014 Report*, *supra* note 95, at 10.

<sup>97</sup> See *id.* at 25.

<sup>98</sup> These commenters recommended goals of “at least” 15% for people with disabilities and 4% for people with targeted disabilities.

<sup>99</sup> The ACS collects disability data by asking a series of questions 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. See *American Community Survey (ACS)*, U.S. Census Bureau, <https://www.census.gov/people/disability/methodology/acs.html> (last visited Dec. 21, 2016).

scales, the Commission has decided to classify non-GS employees using a simple pay cutoff. The revised paragraph thus requires agencies to adopt 12% and 2% goals for “employees at the GS–11 level and above, together with employees who are not paid under the General Schedule but who have salaries equal to or greater than employees at the GS–11, step 1<sup>100</sup> level in the Washington, DC locality”<sup>101</sup> and “employees at the GS–10 level and below, together with employees who are not paid under the General Schedule but who have salaries less than employees at the GS–11, step 1 level in the Washington, DC locality.” Express reference to the SES was removed from the paragraph because SES employees are included in the category of “employees who are not paid under the General Schedule but who have salaries equal to or greater than employees at the GS–11, step 1 level in the Washington, DC locality.”

Some commenters stated that the Rule should impose separate goals for each individual grade level, or for each individual job series and grade level. The Commission does not believe that the additional burden on agencies of meeting such goals would substantially promote the hiring, retention, and advancement of individuals with disabilities and individuals with targeted disabilities. For example, we see no reason to require agencies to have the same percentage of individuals with disabilities at both the GS–4 and GS–5 levels, and we are unsure what inference should be drawn from the fact that an agency employs a disproportionately low number of individuals at the GS–12 level, for example, but not at the GS–13 level. Of course, significant disparities in the distribution of individuals with disabilities or individuals with targeted disabilities within the pay grouping may raise concerns. For example, an agency that meets goals for the employment of people with targeted disabilities in both

pay groupings, but that employs most such individuals at the GS–1 through GS–4 and GS–11 through GS–12 levels, is probably insufficiently attentive to its obligations to provide advancement opportunities. However, absent evidence at this time that agencies would attempt to circumvent their affirmative action obligations in this way, the Rule continues to group employees according to whether they are employed at higher or lower levels, rather than according to individual grade level and job series, for purposes of meeting the (d)(7)(i) goals.

Two commenters stated that federal jobs “limit[ing] advancement, or segregat[ing] federal workers on the basis of disability (including segregation into separate work areas or separate lines of advancement)” should not count toward achievement of the goals. We assume that the commenters are referring to positions that “limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability” in violation of Section 501’s nondiscrimination requirements.<sup>102</sup> Although we agree with the general principle that an agency should not benefit from employing individuals with disabilities if the agency also discriminates against them, we believe that the appropriate response in these cases is to challenge the discriminatory behavior under 29 CFR 1614.106.

Some commenters stated that the Rule should establish a deadline for achieving the goals. The Commission disagrees. As noted in the NPRM, 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.

Some commenters stated that the paragraph should require agencies to adopt other types of goals in addition to, or instead of, representation rate goals—

- *Hiring and promotion goals.* Some commenters stated that certain percentages of each agency’s new hires should be, and certain percentages of each agency’s promotions should be given to, individuals with disabilities and individuals with targeted disabilities. As applied to agencies that underperform with respect to

employment of individuals with disabilities and individuals with targeted disabilities, hiring and retention goals do not impose more stringent requirements than the corresponding representation rate goals. They were therefore not added.

- *Retention rate goals.* One commenter stated that agencies should be required to adopt the goal of having a retention rate for employees who were appointed under the Schedule A hiring authority for persons with certain disabilities that is equal to or greater than the retention rate for other employees. The Commission lacks any data establishing what the retention rate for individuals who were appointed under the Schedule A hiring authority for persons with certain disabilities should be. Further, a function of paragraphs (d)(8)(iv) and (d)(8)(v), requiring agencies to keep detailed records on individuals who were appointed under the Schedule A hiring authority for persons with certain disabilities, and paragraph (d)(1)(iii), requiring agencies to report data regarding such individuals, is to ensure that both individuals within the agency and the Commission will be alerted if the agency is experiencing problems with retention. The Commission concludes that a separate goal is unnecessary.

- *Goals for utilization of supported employment.* Some commenters stated that the Rule should impose goals for hiring and employment of individuals receiving supported employment services. The commenter cited no evidence that such goals would eliminate a significant barrier to employment for a large number of individuals with disabilities, and neither stated what percentage the goal should be nor provided any data on which to base the goal. However, in light of the commenters’ observation that there is an evidence base showing that supported employment services are an effective way to maintain employment for many individuals with disabilities, provision of such services has been added as an example of a strategy that an agency may use to increase the number of employees with disabilities and targeted disabilities in paragraph (d)(7)(ii), discussed below.

#### 1614.203(d)(7)(ii) Progression Toward Goals

Proposed paragraph (d)(7)(ii) required agencies that fail to meet one or more goals required under paragraph (d)(7)(i) to take specific steps that are reasonably designed to gradually increase the number of employees with disabilities and targeted disabilities, examples of

<sup>100</sup> Pay rates for employees at a given GS 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 87.

<sup>101</sup> The rate of pay for employees on the GS and SES scales is determined by adding a “locality adjustment” to a base rate. See generally *Pay & Leave: Salaries & Wages*, Office of Pers. Mgmt., <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2016/general-schedule/> (last visited Dec. 21, 2016) (discussing alternative dispute resolution). Washington, DC is currently in the “Washington-Baltimore-Northern Virginia, DC–MD–VA–WV–PA region.” *Id.* The Rule refers to the “Washington, DC locality” in the event that the locality is renamed or defined differently in the future.

<sup>102</sup> 42 U.S.C. 12112(b)(1); 29 CFR 1630.5.



which included increased use of hiring authorities that take disability into account; consideration of disability or targeted disability status as a positive factor in hiring, promotion, or assignment decisions, to the extent permitted by law; additional outreach and recruitment efforts; adoption of training, internship, and mentoring programs for individuals with disabilities; and disability-related training for all employees. Agencies interested in the last example are encouraged to review the components of effective harassment prevention training set forth in the report issued by Commissioners Feldblum and Lipnic in June 2016.<sup>103</sup> For reasons indicated in the section immediately above, “[i]ncreased efforts to hire and retain individuals who require supported employment because of a disability, who have retained the services of a job coach at their own expense or at the expense of a third party, and who may be given permission to use the job coach during work hours as a reasonable accommodation without imposing undue hardship on the agency” has been added as an example.

One commenter asked whether the paragraph requires agencies that do not meet the goals to hire individuals with disabilities or individuals with targeted disabilities who are not qualified for the job, or who are less qualified than other candidates. It does not. Hiring authorities that take disability into account do not provide agencies with a means of hiring individuals who are unqualified, and agencies are not required to hire individuals who are unqualified in order to, for example, provide disability-related training for all employees, engage in additional outreach and recruitment efforts, or adopt training, internship, or mentoring programs for individuals with disabilities.

Some commenters stated that agencies should always be required to consider disability status and targeted disability status as positive factors in hiring, promotion, and employment decisions, regardless of whether the agency has failed to meet a goal. Other commenters stated that certain kinds of disability-related training, such as awareness and anti-stigma training, should also be mandatory. The purpose of these efforts is to address problems of underrepresentation. To the extent that an agency is meeting its (d)(7)(i) goals, the Commission is without reason to believe that such efforts are necessary.

<sup>103</sup> See Chai R. Feldblum & Victoria A. Lipnic, *supra* note 63.

#### 1614.203(d)(8) Recordkeeping

This paragraph of the Final Rule requires that each agency keep, and make available to the Commission upon request,<sup>104</sup> 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 disabilities, and the number of individuals with targeted 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 regarding all requests for reasonable accommodation the agency receives. Aside from minor stylistic and terminological differences, it is identical to paragraph (d)(8) of the proposed rule.<sup>105</sup>

One federal agency stated that the paragraph should not require agencies to keep records of all reasonable accommodation requests because, in the agency’s opinion, it is more efficient to handle some requests “informally.” The commenter’s position runs counter to longstanding federal policy. Executive Order 13164 instructs agencies to ensure that their systems of recordkeeping “track the processing of requests for reasonable accommodation,”<sup>106</sup> and

<sup>104</sup> The records will be subject to all applicable record retention requirements, including the record retention requirements overseen by NARA. See, e.g., *Records Management*, *supra* note 59.

<sup>105</sup> The records required under this paragraph are subject to the confidentiality requirements of the Privacy Act. See 5 U.S.C. 552a. Records relating to reasonable accommodation are also subject to the confidentiality requirements imposed by the ADA, as incorporated. See 42 U.S.C. 12112(d)(4)(A) (imposing the requirements); 29 U.S.C. 791(f) (incorporating the requirements into Section 501); 29 CFR 1630.14(c) (implementing the requirements); 29 CFR pt. 1630, app. 1630.14(c) (discussing the requirements); 29 CFR 1614.203(b) (incorporating the implementing regulations into the regulations implementing Section 501).

<sup>106</sup> Executive Order No. 13164, *supra* note 14.

guidance on the Executive Order provides that the records must (among other things) allow the agency to identify “the number and types of reasonable accommodations that have been requested in the application process and whether those requests have been granted or denied; . . . the number and types of reasonable accommodation for each job, by agency component, that have been approved, and the number and types that have been denied; . . . [and] the amount of time taken to process each request for reasonable accommodation . . . .”<sup>107</sup> Such records are a necessary component of an agency’s efforts to ensure that the agency is processing requests for reasonable accommodation in accordance with the nondiscrimination requirements of Section 501.

One commenter suggested that the paragraph should require agencies to develop systems that make their employment data available to vocational rehabilitation agencies “in real time.” The commenter failed to clarify how such a system would work, but, to the extent that it would grant non-agency access to agency personnel files, it is likely to create significant problems of privacy and data security.

#### 1614.203(e) Reporting

The paragraph requires each agency to submit to the Commission, on an annual basis, a report that contains a copy of its Plan; the results of its two most recent workforce analyses performed pursuant to paragraph (d)(6) of the Rule showing the percentages of individuals with disabilities and individuals with targeted disabilities in both of the specified pay groups; the number of individuals appointed under the Schedule A hiring authority for persons with certain disabilities during the previous year; 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 an explanation of any changes that were made to the Plan since the prior submission. The paragraph also requires agencies to make all information submitted to the Commission pursuant to this requirement available to the public by, at a minimum, posting a copy of the submission on its public Web site and providing a means by which members of the public may request copies of the submission in accessible formats. Aside from minor stylistic differences, it is identical to paragraph (e) of the proposed rule.

<sup>107</sup> See *13164 Guidance*, *supra* note 15.

Several commenters stated that the proposed reporting requirements overlapped with those of MD-715, and therefore that, in order to avoid redundancies, MD-715 should be amended. As stated in the NPRM, the Commission intends to modify the requirements of MD-715 after final promulgation of this Rule to eliminate redundancies.

Some commenters stated that the paragraph should require agencies to report (and, if not already required to do so, keep records of) additional information, including, for example, the number of individuals appointed under the Schedule A hiring authority for persons with certain disabilities who were subjected to removal or offered voluntary resignation; the representation rates for individuals with disabilities and individuals with targeted disabilities broken down by grade level; a list of the disability organizations with which the agency maintains partnerships; the retention and performance rates for employees with disabilities and employees with targeted disabilities; the numbers of employees classified as having disabilities on the basis of conditions that developed pre-hire, that developed post-hire, or were service-related; and the number of individuals appointed under each veterans' authority who identified themselves as having a targeted disability. The Commission is not persuaded that it is necessary to report information at this level of detail in order to determine whether an agency has satisfied its Section 501 obligation to engage in affirmative action for individuals with disabilities.

#### 1614.203(f) *Standards for Approval and Disapproval of Plans*

Paragraph (f) of the proposed rule provided that the Commission will (1) approve an agency Plan if it determines that the Plan, as implemented, meets the requirements set forth in paragraph (d) of the rule, and (2) disapprove a Plan if it determines that it, as implemented, does not meet those requirements. The paragraph further clarified that failure to achieve a goal set forth in 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 in the future. Having received no objections, the Commission adopts the paragraph in the Final Rule unchanged.

#### 1614.601(f) *EEO Group Statistics*

Section 1614.601 requires each agency to establish a system to collect and maintain accurate demographic

information about its employees, and paragraph 1614.601(f) specifies how agencies are to gather disability data. As explained above, paragraphs (d)(6)(ii) and (d)(6)(iii) specify how agencies are to gather disability data for purposes of the workforce analyses required under (d)(6)(i). In order to avoid any conflict between sections 1614.203 and 1614.601, paragraph 1614.601(f) has been amended to provide that “[d]ata on disabilities shall be collected using a method permitted under § 1614.203(d)(6)(ii) and § 1614.203(d)(6)(iii).” The revised paragraph imposes no new obligations on federal agencies.

#### **Executive Order 12866<sup>108</sup> and Executive Order 13563<sup>109</sup> (Regulatory Planning and Review)**

This Rule has been drafted and reviewed in accordance with Executive Order 12866 and Executive Order 13563. 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 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).<sup>110</sup> 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.”<sup>111</sup> 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.<sup>112</sup> It 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).

As explained above, the Commission has concluded that the existing practice of explaining Section 501's affirmative action obligations through management directives and sub-regulatory guidance,<sup>113</sup> and not through regulation,<sup>114</sup> has failed to sufficiently advance the employment of qualified individuals with disabilities. Detailed regulations are necessary in order to ensure that the obligations have, and are recognized to have, the force of law. Moreover, the Rule will make it easier for agencies to learn about their affirmative action obligations by presenting them all in one place, rather than in a range of documents, none of which are comprehensive.

EEOC has conducted an economic analysis of this Final Rule in accordance with EO 12866 and EO 13563. The analysis, revised in response to public comments and in light of the revisions discussed above, is presented below.

Except where noted, we assume that work required under the Rule will be performed by GS-12 step 5 level employees in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA region.<sup>115</sup> The compensation rate for such employees,

<sup>108</sup> Executive Order No. 12866, 3 CFR 638 (1993), <http://www.whitehouse.gov/sites/default/files/omb/infogeg/12866.pdf>.

<sup>109</sup> Executive Order No. 13563, 3 CFR 215 (2011), [http://www.whitehouse.gov/sites/default/files/omb/infogeg/12866/13563\\_01182011.pdf](http://www.whitehouse.gov/sites/default/files/omb/infogeg/12866/13563_01182011.pdf).

<sup>110</sup> 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).” Executive Order No. 12866, *supra* note 108. 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., 2003), [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4](http://www.whitehouse.gov/omb/circulars_a004_a-4).

<sup>111</sup> Executive Order No. 12866, *supra* note 108.

<sup>112</sup> Executive Order No. 13563, *supra* note 109.

<sup>113</sup> See *supra* notes 10–23 and accompanying text.

<sup>114</sup> Prior paragraph 1614.203(a) stated only that the federal government shall be a “model employer of individuals with disabilities,” and that federal agencies shall “give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.”

<sup>115</sup> In the NPRM, the Commission assumed that some of the required tasks would be performed by employees at the GS-14 level. On reflection, we believe that they are more likely to be performed by employees at the GS-12 level. The Commission realizes that not all of these tasks will be performed by GS-12 step 5 level employees in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA region; the assumption is made purely for purposes of the economic analysis.

adjusted to include benefits, is \$66.78 per hour<sup>116</sup> or \$143,968.85 per year.<sup>117</sup>

#### *Provisions Imposing No Additional Burden*

The NPRM stated that many of the requirements in the proposed rule would have no economic effect, because they did not impose new requirements or burdens on federal agencies—

- Proposed paragraph (a), which set forth definitions of key terms, imposed no substantive requirements.
- Proposed paragraph (b), which provided 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 revised paragraph (b) in the current regulations for clarity.
- Proposed paragraph (c), which required agencies to be model employers of individuals with disabilities, was identical to paragraph (a) of the current regulations.
- The requirement to adopt an affirmative action plan, in proposed paragraph (d), is imposed by Section 501.<sup>118</sup>
- Proposed paragraph (d)(1)(iii), which required agencies to take steps to ensure that individuals with disabilities have sufficient advancement opportunities, provided guidance on how to fulfill existing requirements rather than imposing new ones.<sup>119</sup>

<sup>116</sup> See Office of Pers. Mgmt., *Salary Table 2016—DCB: Hourly Basic (B) Rates by Grade and Step, Hourly Overtime (O) Rates by Grade and Step* (Jan. 2016), [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/DCB\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/DCB_h.pdf) (providing hourly monetary compensation rates). To adjust for the cost of benefits, we divided the annual salary by 0.61. See Congressional Budget Office, *Comparing the Compensation of Federal and Private-Sector Employees* 9 (Jan. 2012), [https://www.cbo.gov/sites/default/files/01-30-FedPay\\_0.pdf](https://www.cbo.gov/sites/default/files/01-30-FedPay_0.pdf) [hereinafter *Comparing Compensation*] (reporting that the cost of providing benefits to federal workers averages between \$15.50 and \$24.70 per hour).

<sup>117</sup> See Office of Pers. Mgmt., *Salary Table 2016—DCB: Annual Rates by Grade and Step* (Jan. 2016), <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/DCB.pdf> [hereinafter *Annual Rates*] (providing annual monetary compensation rates). To adjust for the cost of benefits, we divided the annual salary by 0.61. See *Comparing Compensation*, *supra* note 116, at 9 (reporting that benefits account for 39% of the cost of total compensation for federal workers).

<sup>118</sup> 29 U.S.C. 791(b).

<sup>119</sup> See, e.g., 29 CFR 1614.102(a)(10), (a)(11), (a)(13), (b)(1); *Promoting Employment*, *supra* note 21; *13164 Guidance*, *supra* note 15; *MD–715*, *supra* note 16. Indeed, the Commission anticipated that the additional guidance contained in the proposed rule, in the form of helpful examples and suggestions, would reduce agency burden by making it easier to satisfy the existing requirements.

• The requirements of proposed paragraphs (d)(3)(i) (requiring written reasonable accommodation procedures) and (d)(3)(iii) (requiring agencies to provide individuals who have been denied a reasonable accommodation with written notice of the reasons for the denial) were taken from MD–715, Executive Order 13164, and existing agency guidance.<sup>120</sup>

- The recordkeeping requirements of proposed paragraph (d)(8), with the exception of the requirements imposed by (d)(8)(iii) and (d)(8)(iv) (discussed below), were taken from MD–715.<sup>121</sup>
- The requirement to submit a Plan to the Commission for approval on an annual basis, found in proposed paragraph (e)(1), is imposed by Section 501.<sup>122</sup>

The Commission received no objections to this aspect of the economic analysis, and none of the revisions made to these paragraphs impose additional requirements or burdens on federal agencies.

#### *One-Time Costs*

The NPRM stated that the following aspects of the proposed rule, all of which required agencies to make certain information more readily available, imposed one-time compliance costs on federal agencies—

- Proposed paragraph (d)(2) required agencies to clarify in their harassment policies that disability-based harassment is prohibited.
- Proposed paragraph (d)(3)(ii) required agencies to inform all employees who are authorized to grant or deny requests for reasonable accommodation that all resources available to the agency as a whole are considered when determining whether a denial of reasonable accommodation based on cost is lawful.
- Proposed paragraph (d)(4) required agencies to make certain contact information available to employees.
- Proposed paragraph (e)(2) required agencies to make their Plans available to the public.

The Commission estimated that agencies would need to spend approximately 5 hours performing these tasks, updating policies, and checking for compliance. The Commission received no objections to this estimate in the public comments. Revisions to

However, because the Commission did not have any data upon which to base an estimate of time saved, it did not quantify the benefit.

<sup>120</sup> See MD–715, *supra* note 16; Executive Order No. 13164, *supra* note 14; *13164 Guidance*, *supra* note 15.

<sup>121</sup> See MD–715, *supra* note 16.

<sup>122</sup> 29 U.S.C. 791(b).

these paragraphs, however, led us to adjust the estimate—

• Proposed paragraph (d)(3)(ii) has been revised to require agencies to inform all employees who are authorized to make hiring decisions, in addition to employees authorized to grant or deny requests for reasonable accommodation, that all resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, are considered when determining whether a denial of reasonable accommodation based on cost is lawful.

• Proposed paragraph (d)(3)(ii) has also been revised to require agencies to ensure that anyone authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware of, and knows how to arrange for the use of, agency resources available to provide the accommodation.

• Proposed paragraph (d)(4) has been revised to require agencies to make information on substantive Section 508 and ABA rights available to employees, in addition to contact information.

To account for the additional requirements, the Commission has doubled the estimate of the time needed to perform the necessary tasks, from 5 to 10 hours. Multiplying by the number of agencies covered by the Rule (218)<sup>123</sup> and by the hourly compensation rate of \$66.78 yields a total estimated cost of \$145,580.40.

#### *Paragraph (d)(1)(ii)*

The NPRM stated that proposed paragraph (d)(1)(ii), requiring agencies to have sufficient staff to answer disability-related questions from members of the public, process requests for reasonable accommodations made by job applicants, accept and process applications for appointment under hiring authorities that take disability into account, and oversee any other disability-related hiring programs, would impose recurring costs on federal agencies. The Commission provided both a high and a low estimate. To calculate the high estimate, we assumed that each covered agency would need to hire at least one new employee to assist the existing agency staff in performing the required tasks. To calculate the low estimate, we assumed that approximately 10% of agencies, or 22 agencies, would need to hire a new employee. Using the updated annual

<sup>123</sup> 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.

compensation rate of \$143,968.85, we multiply by the total number of covered agencies (218) to arrive at a high estimate of \$31,385,209.30 per year, and by 22 to arrive at a low estimate of \$3,167,314.70 per year.

*Paragraph (d)(5)*

The NPRM stated that proposed paragraph (d)(5), requiring agencies to provide PAS to employees who need them because of a disability, would impose costs because some current federal employees require PAS.<sup>124</sup> The Commission was aware of only one study measuring the number of employed individuals who require personal services at work because of a disability (2003 study), finding that 1.1% of individuals with disabilities, as that term was defined, required “a personal assistant to help with job-related activities.”<sup>125</sup> We thus estimated that 1.1% of current federal employees with targeted disabilities would require PAS.<sup>126</sup>

One commenter stated that this estimate was far too low, and that the proposed paragraph would require federal agencies to provide PAS to “multitudes” of federal employees. The Commission disagrees. It is simply not true that “multitudes” of current federal employees are unable to eat, use the restroom, or perform similar tasks without assistance. The Commission reminds readers that (d)(5) does not

<sup>124</sup> Paragraph (d)(5) is also expected to impose costs arising from the need to provide PAS to individuals who are hired because of the Rule. These costs are discussed in the section on paragraph (d)(7) below.

<sup>125</sup> See Craig Zwerling, et al., *Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995*, 45 J. Occupational & Environ. Med. 517, 519 (2003). For purposes of the study, an individual had a disability if he or she 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.

<sup>126</sup> The group of individuals included in the study, see *supra* note 125, more closely matches the definition of “targeted disability” than the definition of “disability” under paragraph (a). As noted throughout, the Section 501 definition of “disability” is very broad.

require agencies to assist employees by, for example, typing or reading work materials aloud for someone who requires these services because of a disability, because those types of job-related services are already required as reasonable accommodations absent undue hardship. (Of course, an agency would not be required to provide these specific accommodations if an alternative would be both less expensive and equally effective.) The paragraph also does not require agencies to hire an assistant to perform essential functions of the individual’s job, or to perform tasks that the individual can perform on his or her own.

As explained in the NPRM, the Commission suspects that the actual number of current federal employees who will receive PAS pursuant to (d)(5) is close to zero. A federal employee who requires PAS to remain in the workplace, but does not receive PAS from his or her agency, generally would need to pay for such services out-of-pocket. An individual who has no income, by contrast, typically relies on public benefits to pay for PAS. One study has found that an individual would need to earn approximately \$40,000.00 per year simply to break even.<sup>127</sup>

Nevertheless, because the Commission lacks any additional data, we continue to assume for purposes of the analysis that 1.1% of current federal employees with targeted disabilities require PAS. There are approximately 19,536 individuals with targeted disabilities in the federal workforce.<sup>128</sup> Multiplying that number by 0.011 yields an estimated total of 215 current federal employees who require PAS. The Commission is aware of 16 current employees who are already given PAS by their agencies. Because provision of PAS to these individuals would not represent new costs, we exclude these individuals from the analysis, leaving an estimated 199 current employees who will receive PAS as a result of (d)(5).

Even though the proposed paragraph allowed agencies to assign PAS providers to multiple individuals, and to perform additional duties, the Commission assumed in the NPRM that agencies would provide each individual with the equivalent of a full-time PAS provider.<sup>129</sup> We provided both a high

<sup>127</sup> See Douglas Klayman, et al., Soc. Dynamics, LLC, *Funding Options for Personal Assistance Services* 17 (2009), [www.dol.gov/odep/research/FundingOptionsPersonalAssistanceServices\(PAS\).pdf](http://www.dol.gov/odep/research/FundingOptionsPersonalAssistanceServices(PAS).pdf).

<sup>128</sup> See 2014 Report, *supra* note 95, at 25.

<sup>129</sup> Because individuals who require personal assistance services generally do not require them

and a low estimate of associated costs. To calculate the low estimate, we assumed that agencies would contract with vendors to provide each individual with PAS for the equivalent of full-time hours at the minimum hourly rate for federal contractors (\$10.10).<sup>130</sup> To calculate the high estimate, the Commission assumed that agencies would hire a PAS provider for each individual at the GS–5 level.

One commenter stated that the estimates were far too low. The commenter further stated that, to generate the low-end estimate, the Commission should assume that agencies will hire PAS providers at the GS–6 level, which, according to the commenter, is a level appropriate for practical nurses.

The commenter’s assertions are out of step with all available evidence. PAS providers earn, on average, an amount per hour that is approximately equal to the federal minimum wage,<sup>131</sup> and an amount per year that is significantly lower than the annual salary of a GS–5 level employee.<sup>132</sup> We therefore retain the prior assumptions. To generate the low estimate, we multiply \$10.10 by the equivalent of full-time hours (2,080 hours per year), yielding an estimated annual per-person cost of \$20,800.00. Multiplying by the number of covered agencies yields a total estimated cost for providing PAS to current federal employees of \$4,180,592.00 per year. To generate the high estimate, we multiply the annual salary of a GS–5, step 5 level employee in the Washington-Baltimore-

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 \$8,000.00).

<sup>130</sup> See Executive Order No. 13658, 79 FR 9851 (Feb. 12, 2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-02-20/pdf/2014-03805.pdf>.

<sup>131</sup> See, e.g., *Personal Assistant Career*, MyMajors, <http://www.mymajors.com/career/personal-assistant/salary/> (last visited Dec. 21, 2016) (reporting that PAS providers have an average hourly wage of \$10.20); Douglas Klayman, et al., *supra* note 127, at 16 (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).

<sup>132</sup> PAS providers have an average annual income of \$21,210.00. See, e.g., *Personal Assistant Career*, *supra* note 131. A GS–5 step 5 level employee in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA region earns \$39,967.00—a full 88% more. See *Annual Rates*, *supra* note 117.

Northern Virginia, DC-MD-VA-WV-PA region (\$65,519.67, adjusted to include benefits)<sup>133</sup> by the number of covered agencies, for a total estimated cost of \$13,038,414.33 per year.

In calculating both the high- and low-end costs of providing PAS, the Commission did not include the cost of having PAS providers accompany employees on work-related travel. First, we believe that whether an agency is required to provide PAS or not, it would have the obligation to pay the cost of a PAS provider to travel with an employee as a reasonable accommodation.<sup>134</sup> Additionally, the Commission lacks any reliable data on which to base such an estimate, since there is no way of knowing how many employees who require PAS would be hired into jobs that require travel and how often travel would be required.

#### Paragraph (d)(6)

In the NPRM, the Commission asserted that proposed paragraph (d)(6), requiring agencies to gather workforce data, imposed no new costs on agencies because they are already required to gather such data under MD-715.<sup>135</sup> However, paragraph (d)(6)(ii)(A) has been amended to allow agencies to develop novel ways of gathering voluntary self-report data if the SF-256 does not meet their needs. We estimate that 50 agencies will gather voluntary self-identification data using a form other than the SF-256, and that each agency will spend 10 hours per year administering the survey, for a total of 500 additional burden hours. Multiplying by the hourly compensation rate of \$66.78, we conclude that paragraph (d)(6) will have a total annual cost of approximately \$33,390.00.

<sup>133</sup> See *supra* note 117.

<sup>134</sup> See 29 CFR pt. 1630, app. 1630.2(o) (stating that it may be a reasonable accommodation for an employer to provide "a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips"). Additionally, federal regulations specifically provide for the reimbursement of travel expenses for family members or other attendants needed by an employee with a disability to make work-related travel possible. See 41 CFR 301-12, -13, -70.

<sup>135</sup> 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. See MD-715, *supra* note 16, at B.III. MD-715 also requires agencies to determine whether they are meeting obligations imposed by Title VII, 42 U.S.C. 2000e-2000e-17, on an annual basis. See *id.* at A. Those requirements are not relevant to this rulemaking.

#### Paragraph (d)(7)

The NPRM noted that 3 aspects of proposed paragraph (d)(7), requiring agencies to adopt employment goals for individuals with disabilities and individuals with targeted disabilities, were likely to impose recurring costs. First, to determine whether the goals have been met, agencies would need to determine how many individuals with disabilities are employed at each GS and SES level. The NPRM stated that the associated costs would be minimal because agencies could simply request the information from OPM.<sup>136</sup> The Commission estimated that each agency would spend 2 hours performing the required tasks, for an estimated total of 436 burden hours.

Again, revisions to the Rule require us to adjust the estimate. In addition to the information described above, agencies that have employees who are on neither the GS nor the SES pay scale will need to determine how many such employees—

- are individuals with disabilities and have salaries equal to or greater than an employee at the GS-11 step 1 level in the Washington, DC locality;
- are individuals with targeted disabilities and have salaries equal to or greater than employees at the GS-11 step 1 level in the Washington, DC locality;
- are individuals with disabilities and have salaries less than employees at the GS-11 step 1 level in the Washington, DC locality; and
- are individuals with targeted disabilities and have salaries less than employees at the GS-11 step 1 level in the Washington, DC locality.

There are approximately 114 agencies that have employees on non-GS, non-SES pay scales. The Commission estimates that each such agency will spend 2 hours collecting the required information, for a total of 228 additional burden hours. Adding the previous estimate yields an overall estimate of 664 burden hours arising from the obligation to determine whether the employment goals have been met. Multiplying by the hourly compensation rate \$66.78 yields a total estimated annual cost of \$44,341.92.

Second, the NPRM stated that 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 considered the number of additional employees who would require a reasonable

<sup>136</sup> See, e.g., 2014 Report, *supra* note 95, at 25.

accommodation. Based on OPM data, the Commission estimated that the federal government as a whole would need to hire approximately 384 individuals with targeted disabilities at the GS-10 level or below, and approximately 10,381 individuals with targeted disabilities at the GS-11 level or above (including the SES), to meet the goals.

Because the goals have been revised to cover employees who are on neither the GS nor the SES pay scale, the estimate has been revised—<sup>137</sup>

- Agencies will need to hire approximately 1,594 additional individuals with targeted disabilities to meet the 2% goal for individuals who are either at the GS-10 level or below or who are not paid under the General Schedule and who have salaries that are less than that of an employee at the GS-11 step 1 level in the Washington, DC locality.<sup>138</sup>

- Agencies will need to hire approximately 15,385 additional individuals with targeted disabilities to meet the 2% goal for individuals who are either at the GS-11 level or above or who are not paid under the General Schedule and who have salaries equal to or greater than that of an employee at the GS-11 step 1 level in the Washington, DC locality.

- Agencies will need to hire approximately 4,262 additional individuals with disabilities to meet the 12% goal for individuals who are either at the GS-11 level or above or who are not paid under the General Schedule and who have salaries equal to or greater than that of an employee at the GS-11 step 1 level in the Washington, DC locality.

As in the NPRM, we assume that each new hire will require a reasonable accommodation,<sup>139</sup> and estimate the

<sup>137</sup> See *id.* Because OPM reports only limited data regarding federal employees who are on neither the GS nor the SES pay scale, the Commission assumed for purposes of this analysis that employees, employees with disabilities, and employees with targeted disabilities are distributed between higher and lower levels of employment in roughly the same proportions as employees on the GS and SES scales. We also note that, based on an initial review of 2015 data, the number of new hires required to reach the goals would likely be lower than estimated above, resulting in lower costs overall. See Office of Pers. Mgmt., *Report on the Employment of Individuals with Disabilities in the Federal Executive Branch: Fiscal Year 2015*, 27 (2015), <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/disability-report-fy2015.pdf>.

<sup>138</sup> 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.

<sup>139</sup> As noted in the NPRM, this is almost certainly an overestimate, because many individuals with disabilities do not require an accommodation. See

cost of each accommodation to be \$500.00 per year.<sup>140</sup> Multiplying by the total number of estimated new hires (21,241) yields an estimated cost of \$10,620,500.00 per year arising from the need to provide reasonable accommodations to new hires.

Third, the NPRM stated that proposed paragraph (d)(7)(i) would impose ongoing costs by encouraging agencies to hire employees who are entitled to PAS under paragraph (d)(5). We assumed that the percentage of individuals who require PAS among new hires with targeted disabilities would reflect the percentage of individuals requiring PAS among individuals who have targeted disabilities, are unemployed, and are looking for work. Based on the 2003 study, and on a 2006 study that investigated the prevalence of reported “self-care difficulties” among employed and unemployed individuals with disabilities,<sup>141</sup> we estimated that between 1.1% and 2% of individuals who have targeted disabilities, are unemployed, and looking for work require PAS. However, because neither study assessed the need for PAS among unemployed individuals,<sup>142</sup> we noted at the time that the estimates may be both under- and over-inclusive.

The Commission has refined its approach. We again assume that the percentage of individuals requiring PAS among new hires with targeted disabilities will reflect the percentage of those requiring PAS among individuals who have targeted disabilities, are unemployed, and looking for work. To determine the latter percentage, we first attempt to determine the number of individuals who have targeted disabilities, are unemployed, and are looking for work. We then attempt to determine the number of individuals who have targeted disabilities, are unemployed, are looking for work, and who require PAS. Finally, we compare

Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact 3* (updated Sept. 1, 2014), <http://askjan.org/media/downloads/LowCostHighImpact.pdf>.

<sup>140</sup> See *id.* (finding that, if an accommodation has a cost, it will typically be approximately \$500.00). This is also almost certainly an overestimate, because many individuals with disabilities do not require an accommodation; if an accommodation is required, it is likely to have no cost; and if it does have a cost, the cost does not necessarily recur. See *id.*

<sup>141</sup> Susan Stoddard et al., *Personal Assistance Services as a Workplace Accommodation*, 27 *Work* 363, 364 (2006).

<sup>142</sup> As explained, the 2003 study assesses the need for PAS among employed individuals with disabilities, and the 2006 study assesses the prevalence of reported self-care difficulties among unemployed individuals with disabilities.

the two numbers to arrive at a percentage.

To determine the number of individuals who have targeted disabilities, are unemployed, and are looking for work, we rely on census data. As discussed above, the census definition of “disability” matches neither the definition of “disability” nor the definition of “targeted disability” under paragraph (a). However, the census data are the best available to the Commission at this time. Further, because the census definition requires “serious difficulty” with an activity such as seeing or walking, it is likely that most people who meet the census definition have a targeted disability.<sup>143</sup> We therefore rely on census data to conclude for purposes of the economic analysis that there are approximately 1,282,377 individuals who have targeted disabilities, are unemployed, and are looking for work.<sup>144</sup>

To determine the number of individuals who have targeted disabilities, are unemployed, are looking for work, and who require PAS, we first note that there are approximately 1,257,000 individuals employed as personal assistance service providers throughout the country.<sup>145</sup> Assuming that each provider is assigned to a single individual, there are approximately 1,257,000 individuals who require PAS nationally, presumably because of a targeted disability.<sup>146</sup> Not all of these individuals are unemployed and looking for work, however—some are already employed,

<sup>143</sup> See *supra* note 99.

<sup>144</sup> See *Employment Status by Disability Status and Type* (2014), U.S. Census Bureau, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_B18120&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B18120&prodType=table) (last visited Dec. 21, 2016) (reporting that 1,282,377 individuals who meet the census definition of “disability” are noninstitutionalized, between the ages of 18 and 64, unemployed, and looking for work). Use of the census data will lead to an overestimate of costs. As noted in the NPRM, some individuals with targeted disabilities, such as individuals with epilepsy or certain psychiatric disabilities, likely do not fall into the census definition. Therefore, the census data are likely to underestimate the total number of individuals with targeted disabilities who are unemployed and looking for work, thereby making the proportion of such individuals needing PAS seem artificially large.

<sup>145</sup> *Personal Assistant Career*, *supra* note 131.

<sup>146</sup> We recognize that some individuals with disabilities may receive PAS from family members, rather than from persons who work as personal assistance service providers. We have no data, however, about how many such individuals receive PAS exclusively from family members, and consequently, whether and to what extent 1,257,000 individuals who require PAS underestimates the actual number. We believe that any difference would be small, however, since individuals who receive PAS from family members likely also receive PAS from individuals who are PAS providers.

some are retired, some are below working age, and some do not participate in the workforce for other reasons.

The Commission is not aware of any data showing how many individuals who require PAS because of a targeted disability are unemployed and looking for work. To arrive at an approximation, we assume that the workforce participation and unemployment rates for such individuals reflect those of individuals who have disabilities that result in self-care difficulty more generally.<sup>147</sup> Research shows that roughly 8% of these individuals participate in the workforce (are either employed or unemployed and looking for work),<sup>148</sup> and that their unemployment rate is approximately 18.14%.<sup>149</sup> Thus, roughly 18.14% of 8%, or 1.4512%, of individuals with disabilities resulting in self-care difficulty are unemployed and looking for work. Applying this percentage to the estimated number of individuals who require PAS because of a targeted disability (1,257,000), we find that there are approximately 18,242 individuals who have a targeted disability, are unemployed, are looking for work, and who require PAS nationally.

Comparing the estimated number of individuals who have targeted disabilities, are unemployed, are looking for work, and who require PAS (18,242) to the estimated total number of individuals who have targeted disabilities, are unemployed, and are looking for work (1,282,377), we find that the former group represents 1.42% of the latter. Assuming, as discussed above, that this relationship will be

<sup>147</sup> We suspect that the workforce participation rate for individuals who require PAS is significantly lower than the workforce participation rate for individuals who have disabilities that result in self-care difficulty. But again, because the Commission lacks more specific data, and also because lower workforce participation rates may be offset by higher unemployment rates for individuals who require PAS, we believe that the data on individuals who have disabilities that result in self-care difficulty are adequate for purposes of this analysis.

<sup>148</sup> Am. Insts. for Research, *One Size Does Not Fit All: A New Look at the Labor Force Participation of People with Disabilities 4* (2015), <http://www.air.org/sites/default/files/downloads/report/Labor-Force-Participation-People-with-Disabilities-Yin-Sept-2015.pdf>.

<sup>149</sup> In 2014, the number of employed individuals who had disabilities that resulted in self-care difficulty was 548,700, and the number who were unemployed and looking for work was 121,600. The total number of such individuals who participated in the workforce in 2014 was therefore 670,300. The 121,600 who were unemployed and looking for work represent 18.14% of this total. All of these figures were obtained using the data retrieval tool at Cornell Univ., *American Community Survey (ACS) Employment Statistics*, Disability Statistics, <https://www.disabilitystatistics.org/reports/acs.cfm?statistic=3> (last visited July 7, 2016).

reflected in the estimated 16,979 new hires who have targeted disabilities, we conclude that 241 new hires will require PAS.

To generate an estimate of the associated costs, we rely on the estimated per-person costs for providing PAS calculated in the section on paragraph (d)(5) above. Multiplying 241 by the low estimate of the associated costs (\$21,008.00) yields a total estimated cost of \$5,062,928.00 per year, and multiplying by the high estimate of the associated costs (\$65,519.67) yields a total estimated cost of \$15,790,240.47 per year.

In summary, the estimated annual costs arising from paragraph (d)(7) will be \$44,341.92 (the estimated cost of determining whether goals have been met) plus \$10,620,500.00 (the estimated cost of providing reasonable accommodations to individuals hired pursuant to the goals) plus between \$5,062,928.00 and \$15,790,240.47 (the estimated cost of providing PAS to individuals hired pursuant to the goals), for a total estimated annual cost of between \$15,727,769.92 and \$26,455,082.39.

Paragraphs (d)(8)(iii) and (d)(8)(iv)

The requirements of proposed paragraphs (d)(8)(iii) and (d)(8)(iv)—to keep records of all 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—were adopted unchanged in the Final Rule. The NPRM estimated that it would take each agency 2 hours to gather the required data, to perform the required calculations, and to create and maintain the associated records. Multiplying by the number of covered agencies yielded an overall estimate of 436 burden hours per year.

One commenter stated that the estimate is too low for small agencies that do not have “automated [human resources (HR)] systems.” The commenter did not state how many such agencies there are. For purposes of this analysis, the Commission estimates for purposes of this analysis that 20 agencies lack an automated HR system.

The commenter also did not provide an estimate of the amount of time that such agencies would need to perform the required tasks, except to say that the “guidepost . . . is the amount of time it takes to manually prepare the MD-715 report.” We disagree that it would take agencies the same amount of time to meet the requirements of (d)(8)(iii) and

(d)(8)(iv) as it would take them to prepare an entire MD-715 report. The commenter is reminded that, to the extent paragraph (d)(8) requires agencies to maintain the same records that are required under MD-715, it imposes no new burden. The (d)(8) requirements exceed those of MD-715 only insofar as they require records relating to the Schedule A hiring authority for persons with certain disabilities. We also note that the associated burden is likely to be proportional to the size of the agency—if an agency is small enough that it lacks an automated HR system, it is not likely to have appointed an overwhelmingly large number of individuals under the Schedule A hiring authority for persons with certain disabilities.

Nevertheless, the Commission estimates for purposes of this analysis that each of the estimated 20 agencies lacking automated HR systems will need to spend an additional 10 hours performing the required tasks, for a total of 200 additional burden hours. Adding this to the previous estimate yields a total estimate of 636 burden hours. Multiplying by the hourly compensation rate of \$66.78 yields a total estimated cost for paragraphs (d)(8)(iii) and (d)(8)(iv) of \$42,472.08 per year.

Economic Benefits

As stated in the NPRM, the Rule is also expected to have positive economic effects by bringing a greater number of individuals with disabilities into the workforce.<sup>150</sup> Because individuals who require PAS throughout the day and who are looking for work most likely rely on government benefits to meet the significant cost of hiring a personal assistant, the NPRM assumed that each individual who receives PAS from an agency would otherwise have relied on Social Security and Supplemental Security Income benefits to pay for those services. Research indicated 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,<sup>151</sup> for a total annual benefit of \$27,459.00 per individual. The Commission received no objections to this analysis. Multiplying by the revised estimate of the number of new

hires who are expected to require PAS (241) yields a total estimated economic benefit of \$6,617,619.00 per year.

Non-Economic Effects

The NPRM also noted that, in addition to economic effects, the proposed rule would 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 NPRM stated that the rule would 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.<sup>152</sup> In addition, the NPRM stated that the proposed rule would have qualitative and dignitary benefits, including—

- 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.

All of these considerations apply equally well to the Final Rule. 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.

Summary

In summary, the Commission estimates that the Rule as a whole will have a one-time initial cost to the federal government of approximately \$145,580.40, an annual cost to the federal government of between \$23,151,538.70 and \$70,954,568.10, and an annual economic benefit to the federal government of \$6,617,619.00. 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

<sup>150</sup> 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).

<sup>151</sup> See Douglas Klayman, et al., *supra* note 127, at 17.

<sup>152</sup> See, e.g., Jean P. Hall, et al., *supra* note 150, 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).

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 amends 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.

■ 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 during the hiring process, 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 *personal assistance service provider* means an employee or independent contractor whose primary job functions include provision of personal assistance services.

(5) The term *personal assistance services* means assistance with performing activities of daily living that an individual would typically perform if he or she did not have a disability, and that is not otherwise required as a reasonable accommodation, including, for example, assistance with removing and putting on clothing, eating, and using the restroom.

(6) 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).

(7) 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).

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

(9) The term *targeted disability* means a disability that is designated as a “targeted disability or health condition” on the Office of Personnel Management’s Standard Form 256 or that falls under one of the first 12 categories of disability listed in Part A of question 5 of the Equal Employment Opportunity Commission’s Demographic Information on Applicants form.

(10) 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 the ADA.

(c) *Model employer.* The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, advancement, and retention of qualified individuals with disabilities in the federal workforce. Agencies shall also take affirmative action to promote the recruitment, hiring, and advancement of qualified individuals with disabilities, with the goal of eliminating under-representation of individuals with disabilities in the federal workforce.

(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 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, including individuals with targeted 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 identify job applicants with disabilities, including individuals with targeted 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 programs that provide the qualifications necessary for particular positions within the agency to individuals with disabilities, databases of individuals with disabilities who previously applied to the agency but were not hired for the positions they applied for, and training and internship programs that lead directly to employment for individuals with disabilities; and

(B) Establishment and maintenance of contacts (which may include formal agreements) with organizations that specialize in providing assistance to individuals with disabilities, including



individuals with targeted disabilities, in securing and maintaining employment, such as 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 selection processes, and shall require the agency to provide such individuals with sufficient training, support, and other resources to carry out their responsibilities under this section. Such responsibilities shall include, at a minimum—

(A) Ensuring that disability-related questions from members of the public regarding the agency's application and selection processes are answered promptly and correctly, including questions about reasonable accommodations needed by job applicants during the application and selection processes and questions about how individuals may apply for appointment under hiring authorities that take 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) If an individual has applied for appointment to a particular position under a hiring authority that takes disability into account, determining whether the individual is eligible for appointment under such authority, and, if so, forwarding the individual's application to the relevant hiring officials with an explanation of how and when the individual may be appointed, consistent with all applicable laws;

(E) 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, post on its public Web site, 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) Explain that reassignment to a vacant position for which an employee is qualified, and not just permission to compete for such position, is a reasonable accommodation, and that the agency must consider providing reassignment to a vacant position as a reasonable accommodation when it determines that no other reasonable accommodation will permit an employee with a disability to perform the essential functions of his or her current position;

(C) Notify supervisors and other relevant agency employees how and where they are to conduct searches for available vacancies when considering reassignment as a reasonable accommodation;

(D) Explain that an individual may request a reasonable accommodation orally or in writing at any time, need not fill out any specific form in order for the interactive process to begin, and 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;

(E) 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;

(F) Describe the agency's process for determining whether to provide a reasonable accommodation, including the interactive process, and provide contact information for the individual or program office from whom requesters will receive a final decision;

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

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

(I) Explain when 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;

(J) Explain the agency's right to request relevant supplemental medical information if the information submitted by the requester is insufficient for the purposes specified in paragraph (d)(3)(i)(I) of this section;

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

(L) 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;

(M) Designate the maximum amount of time the agency has, absent extenuating circumstances, to either provide a requested accommodation or deny the request, and explain that the time limit begins to run when the accommodation is first requested;

(N) Explain that the agency will not be expected to adhere to its usual timelines if an individual's health professional fails to provide needed documentation in a timely manner;

(O) Explain that, where a particular reasonable accommodation can be provided in less than the maximum amount of time permitted under paragraph (d)(3)(i)(M) of this section, failure to provide the accommodation in a prompt manner may result in a violation of the Rehabilitation Act;

(P) 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)(M) of this section;

(Q) Explain that, when all the facts and circumstances known to the agency make it reasonably likely that an individual will be entitled to a reasonable accommodation, but the accommodation cannot be provided immediately, the agency shall provide an interim accommodation that allows the individual to perform some or all of the essential functions of his or her job, if it is possible to do so without imposing undue hardship on the agency;

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

(S) 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, including any extenuating circumstances that justify the delay;

(T) Explain that individuals who have been denied reasonable accommodations have the right to file complaints pursuant to 29 CFR 1614.106;

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

(V) Provide that the agency shall give the requester a notice consistent with the requirements of paragraph (d)(3)(iii) of this section at the time a request for reasonable accommodation is denied; and

(W) Provide information on how to access additional information regarding reasonable accommodation, including, at a minimum, Commission guidance and technical assistance documents.

(ii) *Cost of accommodations.* The Plan shall require the agency to take specific steps to ensure that requests for reasonable accommodation are not denied for reasons of cost, and that individuals with disabilities are not excluded from employment due to the anticipated cost of a reasonable accommodation, if the resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, would enable it to provide an effective reasonable accommodation without undue hardship. Such steps shall be reasonably designed to, at a minimum—

(A) Ensure that anyone who is authorized to grant or deny requests for

reasonable accommodation or to make hiring decisions is aware that, pursuant to the regulations implementing the undue hardship defense at 29 CFR part 1630, all resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, are considered when determining whether a denial of reasonable accommodation based on cost is lawful; and

(B) Ensure that anyone authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware of, and knows how to arrange for the use of, agency resources available to provide the accommodation, including any centralized fund the agency may have for that purpose.

(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 at the time of the denial, in an accessible format when requested, that—

(A) Explains the reasons for the denial and notifies the job applicant or employee of any available internal appeal or informal 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) Provides instructions on how to file such a complaint; and

(D) Explains that, pursuant to 29 CFR 1614.105, the right to file a complaint will be lost unless the job applicant or employee initiates contact with an EEO Counselor within 45 days of the denial, regardless of whether the applicant or employee participates in an informal dispute resolution process.

(4) *Accessibility of facilities and technology—(i) Notice of rights.* The Plan shall require the agency to adopt, post on its public Web site, and make available to all employees in written and accessible formats, a notice that—

(A) Explains their rights under Section 508 of the Rehabilitation Act of 1973, 29 U.S.C. 794d, concerning the accessibility of agency technology, and the Architectural Barriers Act, 42 U.S.C. 4151 through 4157, concerning the accessibility of agency building and facilities;

(B) Provides 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, 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; and

(C) Provides instructions on how to file complaints alleging violations of the accessibility requirements of the Architectural Barriers Act of 1968 and Section 508 of the Rehabilitation Act of 1973.

(ii) *Assistance with filing complaints at other agencies.* If an agency's investigation of a complaint filed under Section 508 of the Rehabilitation Act of 1973 or the Architectural Barriers Act of 1968 shows that a different entity is responsible for the alleged violation, the Plan shall require the agency to inform the individual who filed the complaint where he or she may file a complaint against the other entity, if possible.

(5) *Personal assistance services allowing employees to participate in the workplace—(i) Obligation to provide personal assistance services.* The Plan shall require the agency to provide an employee with, 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 if—

(A) The employee requires such services because of a targeted disability;

(B) Provision of such services would, together with any reasonable accommodations required under the standards set forth in part 1630 of this chapter, enable the employee to perform the essential functions of his or her position; and

(C) Provision of such services would not impose undue hardship on the agency.

(ii) *Service providers.* The Plan shall state that personal assistance services required under paragraph (d)(5)(i) of this section must be performed by a personal assistance service provider. The Plan may permit the agency to require personal assistance service providers to provide personal assistance services to more than one individual. The Plan may also permit the agency to require personal assistance service providers to perform tasks unrelated to personal assistance services, but only to the extent that doing so does not result in failure to provide personal assistance services required under paragraph (d)(5)(i) of this section in a timely manner.

(iii) *No adverse action.* The Plan shall prohibit the agency from taking adverse actions against job applicants or employees based on their need for, or

perceived need for, personal assistance services.

(iv) *Selection of personal assistance service providers.* The Plan shall require the agency, when selecting someone who will provide personal assistance services to a single individual, to give primary consideration to the individual's preferences to the extent permitted by law.

(v) *Written procedures.* The Plan shall require the agency to adopt, post on its public Web site, and make available to all job applicants and employees in written and accessible formats, procedures for processing requests for personal assistance services. An agency may satisfy this requirement by stating, in the procedures required under paragraph (d)(3)(i) of this section, that the process for requesting personal assistance services, the process for determining whether such services are required, and the agency's right to deny such requests when provision of the services would pose an undue hardship, are the same as for reasonable accommodations.

(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 and salary level who have disabilities, and the percentage of its employees at each grade and salary level who have targeted disabilities.

(ii) *Source of data.* For purposes of the analysis required under paragraph (d)(6)(i) of this section, an employee may be classified as an individual with a disability or an individual with a targeted disability on the basis of—

(A) The individual's self-identification as an individual with a disability or an individual with a targeted disability on a form, including but not limited to the Office of Personnel Management's Standard Form 256, which states that the information collected will be kept confidential and used only for statistical purposes, and that completion of the form is voluntary;

(B) Records relating to the individual's appointment under a hiring authority that takes disability into account, if applicable; and

(C) Records relating to the individual's requests for reasonable accommodation, if any.

(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 employees at the GS–11 level and above, together with employees who are not paid under the General Schedule but who have salaries equal to or greater than employees at the GS–11, step 1 level in the Washington, DC locality, are individuals with disabilities;

(B) No less than 12% of employees at the GS–10 level and below, together with employees who are not paid under the General Schedule but who have salaries less than employees at the GS–11, step 1 level in the Washington, DC locality, are individuals with disabilities;

(C) No less than 2% of employees at the GS–11 level and above, together with employees who are not paid under the General Schedule but who have salaries equal to or greater than employees at the GS–11, step 1 level in the Washington, DC locality, are individuals with targeted disabilities; and

(D) No less than 2% of employees at the GS–10 level and below, together with employees who are not paid under the General Schedule but who have salaries less than employees at the GS–11, step 1 level in the Washington, DC locality, are individuals with targeted 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 or targeted disabilities employed at the agency until it meets 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 disabilities, as applicable;

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

(E) Increased efforts to hire and retain individuals who require supported employment because of a disability, who have retained the services of a job coach at their own expense or at the expense of a third party, and who may be given permission to use the job coach during work hours as a reasonable accommodation without imposing undue hardship on the agency; and

(F) 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 disabilities, and the number of individuals with targeted 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, and the number of such employees who were terminated prior to being converted to a career or career-conditional appointment in the competitive service; 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 showing the percentage of employees with disabilities and employees with targeted disabilities in each of the designated pay groups;

(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 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 providing a means by which members of the public may request copies of the submission in accessible formats.

(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.

■ 3. Amend § 1614.601 by revising paragraph (f) to read as follows:

**§ 1614.601 EEO group statistics.**

\* \* \* \* \*

(f) Data on disabilities shall be collected using a method permitted under § 1614.203(d)(6)(ii) and § 1614.203(d)(6)(iii).

\* \* \* \* \*

Dated: December 21, 2016.

For the Commission.

**Peggy R. Mastroianni,**  
*Legal Counsel.*

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