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**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

DEC 28 2004

**MEMORANDUM**

**TO:** HEADS OF ALL FEDERAL AGENCIES

**FROM:** Peggy R. Mastroianni *Peggy R. Mastroianni*  
Associate Legal Counsel

**SUBJECT:** Coordination of the Rule Implementing Title III of the No Fear Act

Attached for your review pursuant to Executive Order 12067 is a final rule that the Commission proposes to publish in the Federal Register. It implements Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No Fear Act). The regulation adds a new subpart G to 29 C.F.R. Part 1614.

The Commission previously published an interim final rule in January 2004. Agencies and members of the public were given 90 days to submit comments. Over 140 comments were received, 16 of which came from agencies. We have incorporated into the proposed final rule the suggestions which we believe improve the interim rule. The preamble to the final rule, under the section entitled "Supplementary Information," discusses the significant comments, the changes that have been made to the interim final rule, and our reasons for not making other suggested revisions.

The interagency coordination period for the proposed final rule will terminate on January 14, 2005. If there are any questions about the rule, please contact Thomas Schlageter ([thomas.schlageter@eeoc.gov](mailto:thomas.schlageter@eeoc.gov)) or Gary Hozempa ([gary.hozempa@eeoc.gov](mailto:gary.hozempa@eeoc.gov)). These individuals can also be reached by telephone at (202) 663-4640.

Attachment

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[6570-01P]

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**29 CFR Part 1614**

**RIN: Federal Sector Equal Employment Opportunity**

**AGENCY: Equal Employment Opportunity Commission**

**ACTION: Final rule.**

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**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) is issuing a final rule implementing the posting requirements set forth in Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), P.L. 107-174. The No FEAR Act requires a Federal agency to post on its public Web site summary statistical data pertaining to complaints of employment discrimination filed under 29 CFR part 1614 by employees, former employees and applicants for employment. Title III authorizes EEOC to issue rules concerning the “time, form and manner” of the postings, to define the terms “issue” and “basis,” and to issue any other “rules necessary to carry out” Title III.

**EFFECTIVE DATE:** [Insert date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Schlageter, Assistant Legal Counsel, Gary John Hozempa, Senior General Attorney, or Mona Papillon, Senior General Attorney at (202) 663-4669 (voice) or (202) 663-7026 (TTY). This final rule also is available in the following alternative formats: large print, braille, audiotape and electronic file on computer disk. Requests for the final rule in an alternative format should be made to EEOC’s Publication Center at 1-800-669-3362 (voice), 1-800-800-3302 (TTY), or 703-821-2098 (FAX – this is not a

toll free number).

## **SUPPLEMENTARY INFORMATION:**

### **Introduction**

On January 26, 2004, EEOC published in the **Federal Register** an interim final rule setting forth the time, form and manner in which an agency shall post summary statistical EEO complaint data. 69 FR 3483 (2004). The interim rule included a 60-day comment period, which subsequently was extended an additional 30 days. 69 FR 13473 (2004).

EEOC received over 140 comments on the interim rule. One hundred and nine comments were submitted by persons identifying themselves as members of the "No FEAR Coalition." Sixteen comments were submitted by Federal agencies and departments. Four comments were submitted by civil rights groups composed of federal employees, one was submitted by a national civil rights group, one by an association of federal EEO executives, one by a Member of Congress, and one was submitted by an association of federal agency Web content managers. EEOC also received seventeen comments from individuals, most of whom identified themselves as federal or former federal employees.

The Commission has considered carefully all of the comments and has made some changes to the interim rule in response to the comments. The comments EEOC received and the changes made to the interim rule are discussed in more detail below.

### **Amendments to Complaints**

When EEOC circulated its first draft of the interim rule under Executive Order 12067, the regulation required that, when posting information about the bases and issues raised in a complaint, agencies include bases and issues added by amendment. Agencies commenting on

this provision argued that if bases and issues added by amendment were to be included among the data, withdrawals of issues and bases likewise should be reflected. When EEOC issued its interim final rule it decided to drop the requirement that agencies track amendments.

Based on comments received on the interim final rule, both from agencies and members of the public, EEOC has reconsidered its approach and now believes that bases and issues added by amendment should be included among the posted data. EEOC is particularly concerned that the number of times retaliation is alleged will not be portrayed accurately if amendments are not tracked. As a number of commentors noted, complainants often allege that they have been retaliated against for having filed an earlier, pending complaint. These claims of retaliation are considered like and related to the initial complaint and therefore must be treated as amendments to the initial complaint rather than as separate complaints. *See* EEOC Management Directive 110, Chapter 5, Example 6 at page 5-11. Since EEOC believes amendments adding a claim of retaliation need to be captured, EEOC also believes it is best to capture all issues and bases that are added.

Tracking amendments requires that an agency post the basis or issue raised in the amendment when it is time to post quarterly or year-end data for the current fiscal year, whichever posting period occurs first after a complaint is amended. Where the amendment occurs in the current fiscal year of a complaint filed in a prior fiscal year, an agency shall not go back and modify prior fiscal year data regarding issues and bases since prior year data is unaffected by amendments occurring in subsequent fiscal years. Further, in posting current fiscal year data, an agency shall not make changes in any categories other than bases and issues as a result of amendments to a complaint.

## **Bases and Issues**

The interim rule requires that an agency post the number of complaints raising each basis of alleged discrimination and the number of complaints raising each challenged employment action. A few agencies opined that this will make it appear as if more complaints have been filed than is actually the case.

Given that sections 301(b)(4) and (5) of the No FEAR Act specifically require that this information be posted, EEOC does not have the discretion to change this part of the rule. Moreover, agencies must post the total number of complaints filed. Persons viewing all three data categories will be able to ascertain that the total number of times a basis or issue is asserted does not correspond to the number of complaints actually filed. Therefore, there is no basis for concern that the number of complaints filed will appear inflated.

Other commentators objected to the requirement that an agency post a complaint as having been filed even if it raises a basis not protected by one of the federal EEO statutes. One objection was that such a complaint is not really an EEO complaint and therefore should not be counted. Another objection was that the inclusion of complaints raising a non- EEO basis unintentionally could convey the message that an EEO complaint can be maintained regardless of the basis alleged.

The very designation "non-EEO" basis will alert a viewer that the complaint falls outside the scope of the EEO laws. Thus, EEOC does not believe that requiring agencies to post this information will mislead the public into believing that employment discrimination laws protect an employee or applicant from non-covered forms of discrimination. Complaints raising a non-EEO basis, such as whistle blowing, will be dismissed. EEOC believes, however, that it is

important to know how many claims filed under part 1614 do not belong in that process because it may indicate that employees need to be better informed of their rights and the correct forums in which to pursue their allegations of wrongdoing, or that persons are misusing the EEO complaint process.

A few commentors were concerned about bases that are mislabeled by a complainant. Where a complainant appears to misidentify a basis (*e.g.*, the complainant alleges race discrimination and identifies her race as “Danish”) and the agency determines that the complainant’s intent is to raise a national origin claim, the agency shall post only the corrected basis.

### **Enforcement**

A number of comments focused on the fact that the interim rule does not contain an enforcement mechanism in the event an agency fails to post its EEO data. Some commentors want EEOC to fashion a scheme in which EEOC can sanction agencies and agency managers for non-compliance. While directing the Commission to establish the “time, form, and manner” in which an agency must post its EEO data, the statute does not specify what action, if any, EEOC may take in the event an agency does not fulfill its posting obligations. Since the statute neither authorizes EEOC to sanction agency non-compliance nor sets forth the means by which EEOC can compel compliance, EEOC has not created an enforcement mechanism.

### **Counseling**

A few commentors objected to the absence of counseling data in the posting requirements, arguing that counseling is an important part of the process. EEOC’s initial decision not to have agencies post counseling activity was based on its conclusion that the No

FEAR Act does not address pre-complaint activity, which would include counseling. Nothing proffered in the comments convinces EEOC that its initial interpretation was in error.

That EEO counseling activity will not be tracked under the No FEAR Act does not lessen its importance or minimize EEOC's belief that counseling is a vital component of the federal sector complaint process. Many matters brought to a counselor's attention are resolved before they become formal complaints. Counselors further perform the very valuable function of assisting complainants to accurately define the matters about which they wish to complain. EEOC requires agencies to report counseling activity on the Form 462 ("Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints") because it believes the counseling function is significant.

#### **EEOC Form 462**

A few agencies opined that, now that they must post EEO data under Title III (and report EEO data under Title II), EEOC should discontinue the use of EEOC Form 462. As an alternative, a few agencies suggested that they be allowed to consolidate EEOC Form 462 with the information they must post under the No FEAR Act.

Form 462 seeks more, and in many cases different, information than is required to be posted under the No FEAR Act. While the posting of No FEAR data is primarily for use by the public, Form 462 data is intended for EEOC use and is delivered directly to EEOC for this reason. In addition to reporting consolidated Form 462 data to Congress, EEOC reviews each agency's report to assess that agency's compliance with its EEO obligations under part 1614. These roles, reporting to Congress and assessing an agency's EEO program, are not responsibilities given to EEOC under the No FEAR Act. As a result, EEOC does not regard an

agency's posting obligations under the No FEAR Act as serving the same purpose as its Form 462 reporting requirements. For these reasons, EEOC will not discontinue the use of Form 462.

### **Government-Wide Data**

A few commentors suggested that EEOC post government-wide EEO statistics on its Web site, using each agency's posted data as the source material. Since the statute does not require EEOC to post consolidated data and given that EEOC already consolidates Form 462 data, which overlaps somewhat with the No FEAR data, EEOC has decided not to consolidate government -wide No FEAR data, at least for now.

In a similar vein, commentors suggested that EEOC post on its Web site a regularly updated listing indicating which agencies fully are in compliance with the posting requirements, partially are in compliance, or have not posted data. Again, this is beyond the responsibilities imposed by the statute and EEOC therefore will not implement the suggestion.

### **Issuance of the Interim Final Rule**

Some commentors questioned EEOC's reasons for issuing an interim final rule rather than a final rule. EEOC's implementation of this rule as an interim final rule with provision for post-promulgation public comment was based upon the exceptions found at 5 U.S.C. 553(b)(A), (b)(B) and (d). Agency posting obligations under Title III of the No FEAR Act began in the first quarter of FY 2004. It was essential that agencies understood their responsibilities regarding the posting requirements so that they could begin capturing EEO data immediately. EEOC determined under 5 U.S.C. 553(b)(A) that this regulation, which covers the time, form and manner of agency postings under Title III of the No FEAR Act, affects agency organization, procedure, or practice and has no effect on the substantive rights of non-agency parties. In



addition, it was feared that the absence of rules or the later promulgation of rules would result in confusion concerning the posting requirements, to the detriment of the public. EEOC therefore determined under 5 U.S.C. 553(b)(B) that it would be contrary to the public interest to delay promulgation of these rules by issuing a notice of proposed rule making rather than the interim final rule that was issued. For the same reasons, EEOC determined under 5 U.S.C. 553(d)(3) that there was good cause for the rule to become effective immediately upon publication with provision for post-promulgation public comment. An additional advantage to this approach was that agencies were able to try out the rules, and the public was able to observe how agencies sought to comply with them, thus informing the comments they submitted to EEOC. Given the quality of the comments and the adjustments EEOC has made to the final rule in response, EEOC believes the issuance of the interim final rule worked to the advantage of all parties.

#### **Link Location and Name**

Section 1614.703(d) of the interim rule requires an agency to title its posted EEO information "Equal Employment Opportunity Data Posted Pursuant to the No Fear Act." This section further requires an agency to prominently place a hyperlink to the data on the homepage of its public Web site. There was some objection both to the location of the hyperlink and its name.

As for the location, agencies argue that their homepages already are well populated with hyperlinks which primarily are mission-specific. Adding another hyperlink, thereby producing crowding, may in fact be counter-productive. Moreover, many people visiting an agency Web site do so through hyperlinks from other non-agency Web sites or search engines that bypass an agency's homepage. Some agencies allow internet users to compose a personal homepage,

which again bypasses the agency's standard homepage. For these and other reasons, the agencies that commented uniformly were of the opinion that a hyperlink on an agency's homepage is not the best way to ensure the public's access to an agency's posted EEO data. These agencies therefore suggested that each agency decide itself where to place its EEO data and hyperlinks to that data since each agency best knows where a target audience goes to look for certain information. A number of agencies offered suggestions where the hyperlink would be better placed, such as on the "About the Agency" or "Working for the Agency/Employment" pages.

The Commission is concerned that without a uniform hyperlink location members of the public seeking EEO data from more than one agency will have trouble finding the data. If one agency's hyperlink is on the "About the Agency" page, another's is on the "Employment Opportunities" page, another's is on a page entitled "Civil Rights," and another's is on the homepage, locating the data for multiple agencies could well end up as an exercise in trial and error. Even assuming that the homepage is not the best or most intuitive location for the hyperlink, EEOC is convinced that it would not be in the public interest to allow each agency to decide where on its Web site it will place the hyperlink. Thus, if not the homepage, EEOC must dictate another uniform location. The problem is that there are no other uniform locations. Agencies do not label their "About the Agency" and "Employment" pages identically. Thus, there is no way to standardize through a rule an alternative location for the link. This leaves only the homepage as the one Web page all agencies possess in common, and therefore it is the homepage which shall house the link.

Regarding the title of the hyperlink, EEOC agrees that it is too wordy. EEOC, however, does not agree that the label "No FEAR" will be widely misunderstood by members of the

public. On the contrary, the term “No FEAR Act” has attained familiarity among employees and those involved in EEO matters. Accordingly, the final rule provides that the hyperlink shall be called “No FEAR Act Data.” However, agencies will be required to title the page where its data appears as follows: “Equal Employment Opportunity Data Posted Pursuant to Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), P.L. 107-174.”

### **Public Hearings**

Seventy-eight percent (78%) of the comments were received from the No FEAR Coalition or persons identifying themselves as members of the No FEAR Coalition. The No FEAR Coalition members submitted their comments using an identical or nearly identical letter. The Coalition requested that EEOC convene public hearings in different parts of the country in order to address the issues of employment discrimination and EEOC’s rule making under the No FEAR Act. The Coalition requested that EEOC establish a citizens’ advisory board that would oversee EEOC’s promulgation of this final rule. The Coalition made suggestions that have been raised by other commentors, such as developing a rule that will ensure managers found to have engaged in discrimination are appropriately disciplined, that these manager’s names be provided to Congress, that counseling data be among that required to be posted, that amendments to complaints be tracked, and that data pertaining to agency subelements be posted.

Those comments provided by the Coalition and which also were raised by others are discussed both above and below. With respect to holding public hearings as part of the rule making process, EEOC is required by the Administrative Procedure Act to “give interested persons an opportunity to participate in the rule making through submission of written data,

views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. § 553(c).

Whether an agency holds public hearings as part of its rule making is discretionary with the agency. In the case of the No FEAR Act, EEOC believes that the limited scope of EEOC’s rule making authority is such that written comments are sufficient to ensure meaningful public participation.

In this regard, EEOC’s rule making duties under Title III of the No FEAR Act are straightforward. Title III requires an agency to post on its public Web site summary statistical data pertaining to complaints of employment discrimination filed with the agency. The statistics that shall be posted are set forth specifically in the statute. EEOC’s only role is to issue rules establishing the “time, form and manner” in which the statistics are posted. In such a narrow context, public hearings as an adjunct to written comments would not better inform EEOC’s rule making process in any appreciable manner. It is unlikely that ideas as to when or how pre-defined statistics should be posted on an agency Web site could or would be better communicated orally than in writing. Accordingly, EEOC concludes that holding the suggested regional public hearings will not significantly aid the rule making process. Similarly, EEOC does not believe it would be advantageous to convene a citizens’ advisory board.

#### **Posting by Subelements**

Some commentors objected to the fact that EEOC is not requiring agency subelements to post subelement data on their respective public Web pages. The final rule requires that an agency with a subelement post both consolidated EEO data (*i.e.*, data deriving from both the parent agency and the subelement) and separate subelement data. The physical location of where this data is posted, whether on the agency’s public Web page or the subelement’s, will not matter

to the end-user. The final rule requires that subelements that have their own Web sites shall post a link on their homepages to their subelement-specific data. So long as a link to the subelement's data can be found on both the subelement's and parent agency's Web pages, the data can be accessed from either Web site. In short, being able to access the data is what is important, not where in cyberspace the data is stored.

A few persons commented that the 1,000 employee threshold used to define a subelement is too low. Others argued that it is too high. EEOC chose the 1,000 employee figure because that is the same figure we use in EEOC Management Directive 715 (affirmative programs of equal employment opportunity).

#### **Other Data**

Some commentors disagreed with EEOC's position that EEO data not required to be posted by the statute cannot be posted with No FEAR data but may appear elsewhere. Commentors argued that by excluding other, related data, agencies are forced to present an incomplete view of their EEO performance. Commentors especially believed data regarding complaints found to be without merit by an administrative judge or EEOC should be posted along with the No FEAR Act data.

Other commentors wanted additional information posted because they believe it would indicate whether an agency is engaging in a pattern of discrimination, or is unfairly processing complaints, or obstructing the EEO complaint process. It was suggested, for example, that agencies post the grade levels of persons filing complaints, the number of complaints that allege unfair processing, the number of work hours an agency expends on EEO complaint processing, the number of days beyond the regulatory time frame it takes an agency to complete an

investigation in a specific case, and the number of terminations, including constructive discharges, for each protected group.

Admittedly, the categories of data set forth in the statute do not present a complete view of an agency's EEO compliance. But the categories represent the information Congress deems most important and EEOC believes this information should not be obscured or rendered less prominent through juxtaposition with other non-required data. Consequently, the final rule specifically prohibits an agency from co-mingling other data with that required to be posted under the statute. An agency may, however, include a link on the No FEAR data page to any additional or related data it posts on another Web page.

#### **Posting Format**

In the preamble to the interim rule, EEOC stated that it had not decided whether to mandate a uniform posting format and layout but would revisit the issue when promulgating the final rule. Eight agencies asked EEOC to develop a standardized form or format for posting data. The rationale most often cited was that a uniform template would make it easier for interested parties to compare data among agencies. Interestingly, some agencies favoring a template nevertheless wanted to be able to choose whether to use EEOC's template or another one.

In the Commission's view, there is no point in making a template available if its use is not mandatory. Given the number of agencies that did not comment on the interim final rule and the number that did comment but did not address whether EEOC should require use of a uniform template, most agencies appear to be satisfied with the format they are using to post their respective EEO data. In this respect, agencies are timely posting EEO data pursuant to the interim rule. This indicates that agencies have developed a workable format. Consequently, the

Commission has decided not to mandate the use of a uniform format at this time.

It was suggested that agencies having minimal EEO complaint activity should be able to use a modified posting format appropriate to the data being reported. EEOC agrees, which is another reason it has decided not to require a standardized posting format. Thus, for example, agencies having only a few complaints may use any posting format that provides all required information for the complaints that are filed.

### **Remands**

A number of complaints are dismissed by agencies on procedural grounds (*e.g.*, failure to comply with the applicable time limits, failure to state a claim). The complainant can appeal the dismissal to EEOC. If EEOC finds the complaint was dismissed improperly, EEOC remands the complaint to the agency for further processing. A few commentors inquired how remands should be handled.

Once the complaint is remanded, the agency will have to track its status for posting purposes but only with respect to subsequent information applicable to the remanded complaint. Thus, for example, information about the issues and bases raised in the complaint that was previously posted by the agency shall not be changed regardless of whether the remanded complaint is returned to the agency with more, less, or different issues and bases. All pertinent information applicable to the subsequent processing of the complaint (*e.g.*, whether it was timely investigated following remand, whether it subsequently involves a finding of discrimination with or without a hearing) shall be posted. With respect to remanded complaints where an investigation was not completed prior to the agency's dismissal of the complaint and the time to complete the investigation had not yet expired at the time of the agency's dismissal, the

investigative period for purposes of § 1614.704(f) & (l) will be deemed to commence on the date the agency receives the remanded complaint. For purposes of posting data under § 1614.704(k)(1) & (2) (complaints filed in prior fiscal years), a remanded complaint will retain its original filing date.

### **Settlements**

A few commentors noted that the interim final rule is silent on the issue of settlements and asked how settlement information should be tracked. The No FEAR Act does not require an agency to post settlement information (*e.g.*, how many complaints were settled, when or where in the process settlement took place, the bases and issues that were settled, etc.) and consequently neither the interim nor the final rule deal with settlements. Prior to settlement, an agency shall post all required information (*e.g.*, a complaint was filed, the number of persons who filed the complaint, the issues and bases raised in the complaint, whether the investigation was completed within the applicable period if settlement occurred after the investigative step). Once a complaint is settled, subsequent information about the complaint does not have to be tracked. An allegation by a complainant, pursuant to 29 CFR § 1614.504, that the agency has breached a settlement agreement does not constitute a complaint for purposes of this subpart and therefore information about a breach allegation is not information that must be posted.

### **Short Form Title**

Some commentors objected to EEOC's use of the term "No FEAR Act" as a shorthand method of referring to the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002. These commentors opined that the term does not appear in the statute, use of the phrase in the Library of Congress's *Thomas* search engine does not lead to the statute, members



of the public may confuse the term with matters having to do with homeland security, and members of the public will not associate the term with employment discrimination.

The term "No FEAR" is, like most shorthand titles for statutes, an acronym: **N**otification and **F**ederal **E**mployee Antidiscrimination and **R**etaliati**A**ct. It is the popular name by which this statute is known and it is commonly and widely used in the media and throughout the federal government. The full name of the statute appears at the beginning of this preamble and the regulation. EEOC believes this provides the public with information sufficient both to know under what statute these rules are being promulgated and to find the statute should members of the public wish to read it.

## **Title II Issues**

While Title III of the No FEAR Act requires an agency to post EEO complaint data on its public Web site, Title II imposes other requirements. With respect to federal employment discrimination laws, Title II mandates, among other things, that an agency: 1) reimburse the Judgment Fund for payments it makes when found to have engaged in prohibited discrimination; 2) notify covered individuals of their rights and protections under the federal EEO laws; and 3) submit an annual report to Congress, EEOC and the Attorney General detailing, among other information, disciplinary actions taken against employees who engage in prohibited discrimination. Title II empowers the President or the President's designee to issue rules necessary to carry out that Title. The President delegated this rule making authority to the Office of Personnel Management (OPM).

It appears that a number of commentors did not distinguish between EEOC's rule making authority under Title III and OPM's authority under Title II. Thus, for example, commentors

urged EEOC to write rules ensuring that there would be management accountability for discriminating against employees, comprehensive training for employees (and managers) concerning the protections afforded them and the obligations imposed upon them under the various federal statutes, and accurate agency reporting to Congress. As explained, however, these issues do not fall within the rule making authority applicable to Title III of the No FEAR Act and EEOC therefore has no authority to address them.

### **Miscellaneous Comments**

A few commentators discussed provisions not included in the No FEAR Act which they believe should have been included; for example, authority for EEOC to sue agencies directly and award punitive damages to federal employees. Others called for EEOC to promulgate rules beyond the posting requirements set forth in Title III, arguing that to do so would make the posting requirements more effective. Suggestions included: requiring agencies to post the names of agency employees found to have engaged in prohibited discrimination; referring such persons to the Office of Special Counsel for possible disciplinary action; adding specific notations to such persons' Official Personnel Files indicating that they had been found to have engaged in prohibited discrimination; requiring agencies to review their posted EEO data in order to determine whether there were problem areas or managers. Other comments addressed the need for sanctions for the posting of false or incomplete data. One commentator wanted EEOC to clarify both the authority of EEOC administrative judges under part 1614 and the hearing process in general. All of these suggestions are beyond the scope of EEOC's authority under the No FEAR Act.

### **Matters of General Applicability**

A few commentators wondered how to calculate percentages required by the rule. The percentage components under § 1614.704(h)(2) & (3), (i)(1), and (j)(1) are to be based on the number of final actions rendered in that fiscal year which involve findings of discrimination, and not the total number of final actions rendered in that fiscal year regardless of whether a finding of discrimination is involved. With respect to § 1614.704(i)(2) & (3) and § 1614.704(j)(2) & (3), the percentage figure shall be based on the total number of findings for that particular subcategory.

Example: an agency issues 100 final actions in a given fiscal year, 25 of which involve findings of discrimination. Of those 25 cases involving findings of discrimination, 15 were rendered after a hearing and 10 were rendered without a hearing. Of the 15 rendered after a hearing, 10 involve findings of race discrimination and 5 involve findings of sex discrimination. Of the 10 rendered without a hearing, 5 involve findings of race discrimination and 5 involve findings of age discrimination. In posting its percentage data under § 1614.704(h)(2) and (3), the agency will report that 40% (10 of 25) of the final actions involving discrimination were rendered without a hearing and that 60% (15 of 25) were rendered after a hearing. (The agency also will post under § 1614.704(h)(1) that there were 25 final actions involving findings of discrimination). In posting percentage data under § 1614.704(i)(1), the agency will post that 15 and 60% (15 of 25) of the final actions involving a finding of discrimination were based on race discrimination, 5 and 20% (5 of 25) were based on sex discrimination, and 5 and 20% (5 of 25) were based on age discrimination. Under § 1614.704(i)(2), the agency will post that 5 and 33% (5 of 15) of the final actions involving race discrimination were rendered without a hearing and that 5 and 100% (5 of 5) of the final actions involving age discrimination were rendered without a hearing. The agency further will post that 10 and 66% (10 of 15) of the final actions involving

race discrimination were rendered after a hearing and that 5 and 100% (5 of 5) of the final actions involving sex discrimination were rendered after a hearing.

EEOC's explanatory comments in the preamble to the interim final rule applicable to those provisions that have not been changed in the final rule should continue to be used as guidance. That language can be found at 69 FR 3483 (2004).

## **Regulatory Procedures**

### *Executive Order 12866*

Pursuant to Executive Order 12866, EEOC has coordinated this final rule with the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities.

The posting requirements contained in Title III of The No FEAR Act apply only to federal executive agencies, the United States Postal Service, and the Postal Rate Commission. All of these agencies, including EEOC, are required by the No FEAR Act to post statistical data on their public Web sites pertaining to EEO complaints filed with them. In addition, EEOC has to post government-wide data pertaining to requests for EEO hearings and appeals of EEO complaints.

Much of the information that will be used as source material to post the statistical data required by Title III already is collected and maintained by the agencies in connection with their pre-existing reporting obligations. All affected agencies currently maintain public Web sites. Consequently, the Congressional Budget Office estimated that the total cost for all agencies to

comply with The No FEAR Act's posting requirements will not exceed \$5 million annually. House Rept. 107-101 Part 1, June 14, 2001, p 11-12. Also, according to the CBO, it will cost EEOC \$500,000 annually to post the additional government-wide data required by § 302. *Id.* Thus, the total cost of Title III of the No FEAR Act should be less than \$5.5 million annually.

The benefits of posting EEO data will flow not just to the federal agencies but to the public. An agency will be able to compare its EEO program statistics against prior quarters and years to determine if there are trends that need to be addressed or whether progress is being made. An agency can also compare its statistics against those of other agencies. Both types of analyses should be useful to the agency in monitoring its own compliance with 29 CFR part 1614 and ensuring equal opportunity in the agency's employment programs. Public posting will ensure that members of the public will have access to this information and will be able to make independent assessments of agencies' compliance and progress. Agency employees will be able to assess the degree to which their agency provides equal employment opportunity. Likewise, potential job applicants will be able to judge the relative desirability of each agency's working environment. The public display of this information should provide agencies with added incentives to improve their EEO programs and to prevent discrimination proactively so that they can demonstrate that they are true equal employment opportunity employers. Increased monitoring and improved compliance through public posting of EEO statistics should lead to a decline in incidents of employment discrimination, which is the primary goal of the No FEAR Act.

#### *Paperwork Reduction Act*

This regulation contains no new information collection requirements subject to review by the

Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Regulatory Flexibility Act*

The Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities, because it does not affect any small business entities. The regulation affects only federal government entities. 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 (SBREFA)). 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 Commission,

Dated:

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Cari M. Dominguez  
*Chair*

Accordingly, for the reasons set forth in the preamble, EEOC 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; 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, 1069 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. Subpart G is added to read as follows:

**Subpart G – Procedures under the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act)**

Sec.

1614.701 Purpose and scope.

1614.702 Definitions.

1614.703 Manner and format of data.

1614.704 Information to be posted - all Federal agencies.

1614.705 Comparative data - all Federal agencies.

1614.706 Other data.

1614.707 Data to be posted by EEOC.

Authority: Sec. 303, Pub. L. 107-174, 116 Stat. 574.

**Subpart G – Procedures under the Notification and Federal Employee**

**Antidiscrimination and Retaliation Act of 2002 (No FEAR Act)**

**§1614.701 Purpose and scope.**

This subpart implements Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), P.L. 107-174. It sets forth the basic responsibilities of federal agencies and the Commission to post certain information on their public Web sites.

**§1614.702 Definitions.**

The following definitions apply for purposes of this subpart.

(a) The term *Federal agency* means an Executive agency (as defined in 5 U.S.C. 105), the United States Postal Service, and the Postal Rate Commission.

(b) The term *Commission* means the Equal Employment Opportunity Commission and any subdivision thereof authorized to act on its behalf.

(c) The term *investigation* refers to the step of the federal sector EEO process described in 29 CFR 1614.108 and 1614.106(e)(2) and, for purposes of this subpart, it commences when the complaint is filed and ceases when the complainant is given notice under § 1614.108(f) of the right to request a hearing or to receive an immediate final decision without a hearing.

(d) The term *hearing* refers to the step of the Federal sector EEO process described in 29 CFR 1614.109 and, for purposes of § 1614.704(k)(3), it commences on the date the agency is informed by the complainant or EEOC, whichever occurs first, that the complainant has



requested a hearing and ends on the date the agency receives from the EEOC notice that the AJ is returning the case to the agency to take final action. For all other purposes under this subpart, a hearing commences when the EEOC Administrative Judge (AJ) receives the complaint file from the agency and ceases when the AJ returns the case to the agency to take final action.

(e) For purposes of § 1614.704(h), (i) and (j), the phrase *without a hearing* refers to a final action by an agency that is rendered:

- (1) When an agency does not receive a reply to a notice issued under § 1614.108(f);
- (2) After a complainant requests an immediate final decision;
- (3) After a complainant withdraws a request for a hearing; and
- (4) After an administrative judge cancels a hearing and remands the matter to the agency.

(f) For purposes of § 1614.704(h), (i) and (j), the term *after a hearing* refers to a final action by an agency that is rendered following a decision by an administrative judge under § 1614.109(f)(3)(iv), (g) or (i).

(g) The phrase *final action by an agency* refers to the step of the federal sector EEO process described in 29 CFR 1614.110 and, for purposes of this subpart, it commences when the agency receives a decision by an Administrative Judge (AJ), receives a request from the complainant for an immediate final decision without a hearing or fails to receive a response to a notice issued under § 1614.108(f) and ceases when the agency issues a final order or final decision on the complaint.

(h) The phrase *final action by an agency involving a finding of discrimination* means:

(1) A final order issued by an agency pursuant to § 1614.110(a) following a finding of discrimination by an administrative judge; and

(2) A final decision issued by an agency pursuant to § 1614.110(b) in which the agency finds discrimination.

(i) The term *appeal* refers to the step of the federal sector EEO process described in 29 CFR 1614.401 and, for purposes of this subpart, it commences when the appeal is received by the Commission and ceases when the appellate decision is issued.

(j) The term *basis of alleged discrimination* refers to the individual's protected status (i.e., race, color, religion, sex, national origin, age, disability, or retaliation). Only those bases protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. 206(d), and the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 *et seq.*, are covered by the federal EEO process.

(k) The term *issue of alleged discrimination* means one of the following challenged agency actions affecting a term or condition of employment as listed on EEOC Standard Form 462 ("Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints"): Appointment/hire; assignment of duties; awards; conversion to full time; disciplinary action/demotion; disciplinary action/reprimand; disciplinary action/suspension; disciplinary action/removal; duty hours; evaluation/appraisal; examination/test; harassment/non-sexual; harassment/sexual; medical examination; pay/overtime; promotion/non-selection; reassignment/denied; reassignment/directed; reasonable accommodation; reinstatement; retirement; termination; terms/conditions of employment; time and attendance; training; and, other.

(l) The term *subelement* refers to any organizational sub-unit directly below the agency or

department level which has 1,000 or more employees.

**§1614.703 Manner and format of data.**

(a) Agencies shall post their statistical data in the following two formats: Portable Document Format (PDF); and an accessible text format that complies with section 508 of the Rehabilitation Act.

(b) Agencies shall prominently post the date they last updated the statistical information on the Web site location containing the statistical data.

(c) In addition to providing aggregate agency-wide data, each agency shall include separate data for each agency subelement. Such data shall be identified as pertaining to the particular subelement.

(d) Data posted under this subpart will be titled " Equal Employment Opportunity Data Posted Pursuant to Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), P.L. 107-174," and a hyperlink to the data, entitled "No FEAR Act Data" will be posted on the homepage of each agency's public Web site. In the case of agencies with subelements, the data shall be made available by hyperlinks from the homepages of the Web sites (if any exist) of the subelements as well as the homepage of the Web site of the parent agency.

(e) Agencies shall post cumulative data pursuant to § 1614.704 for the current fiscal year. Agencies may not post separate quarterly statistics for the current fiscal year.

(f) Processing times required to be posted under this subpart shall be recorded using number of days.

**§1614.704 Information to be posted - all Federal agencies.**

Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, each federal agency shall post the following current fiscal year statistics on its public Internet Web site regarding EEO complaints filed under 29 CFR part 1614.

(a) The number of complaints filed in such fiscal year.

(b) The number of individuals filing those complaints (including as the agent of a class).

(c) The number of individuals who filed two or more of those complaints.

(d) The number of those complaints, whether initially or through amendment, raising each of the various bases of alleged discrimination and the number of complaints in which a non-EEO basis is alleged.

(e) The number of those complaints, whether initially or through amendment, raising each of the various issues of alleged discrimination.

(f) The average length of time it has taken an agency to complete, respectively, investigation and final action by an agency for:

(1) All complaints pending for any length of time during such fiscal year;

(2) All complaints pending for any length of time during such fiscal year in which a hearing was not requested; and

(3) All complaints pending for any length of time during such fiscal year in which a hearing was requested.

(g) The number of complaints dismissed by an agency pursuant to 29 CFR 1614.107(a), and the average length of time such complaints had been pending prior to dismissal.

(h)(1) The total number of final actions by an agency rendered in such fiscal year

involving a finding of discrimination and, of that number,

(2) The number and percentage that were rendered without a hearing, and

(3) The number and percentage that were rendered after a hearing.

(i) Of the total number of final actions by an agency rendered in such fiscal year involving a finding of discrimination,

(1) The number and percentage of those based on each respective basis,

(2) The number and percentage for each respective basis that were rendered without a hearing, and

(3) The number and percentage for each respective basis that were rendered after a hearing.

(j) Of the total number of final actions by an agency rendered in such fiscal year involving a finding of discrimination,

(1) The number and percentage for each respective issue,

(2) The number and percentage for each respective issue that were rendered without a hearing, and

(3) The number and percentage for each respective issue that were rendered after a hearing.

(k) Of the total number of complaints pending for any length of time in such fiscal year,

(1) The number that were first filed before the start of the then current fiscal year,

(2) The number of individuals who filed those complaints in earlier fiscal years, and

(3) The number of those complaints that are pending, respectively, at the investigation, hearing, final action by an agency, and appeal step of the process.

(1) Of the total number of complaints pending for any length of time in such fiscal year, the total number of complaints in which the agency has not completed its investigation within the time required by 29 CFR 1614.106(e)(2) plus any extensions authorized by that section or § 1614.108(e).

**§1614.705 Comparative data - all Federal agencies.**

Commencing on January 31, 2004 and no later than January 31 of each year thereafter, each federal agency shall post year-end data corresponding to that required to be posted by § 1614.704 for each of the five immediately preceding fiscal years (or, if not available for all five fiscal years, for however many of those five fiscal years for which data are available). For each category of data, the agency shall post a separate figure for each fiscal year.

**§ 1614.706 Other data.**

Agencies shall not include or otherwise post with the data required to be posted under § 1615.704 and 1615.705 of this subpart any other data, whether or not EEO related, but may post such other data on another, separate, Web page.

**§1614.707 Data to be posted by EEOC.**

(a) Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, the Commission shall post the following current fiscal year statistics on its public Internet Web site regarding hearings requested under this part 1614.

- (1) The number of hearings requested in such fiscal year.
- (2) The number of individuals filing those requests.
- (3) The number of individuals who filed two or more of those requests.

(4) The number of those hearing requests involving each of the various bases of alleged discrimination.

(5) The number of those hearing requests involving each of the various issues of alleged discrimination.

(6) The average length of time it has taken EEOC to complete the hearing step for all cases pending at the hearing step for any length of time during such fiscal year.

(7)(i) The total number of administrative judge (AJ) decisions rendered in such fiscal year involving a finding of discrimination and, of that number,

(ii) The number and percentage that were rendered without a hearing, and

(iii) The number and percentage that were rendered after a hearing.

(8) Of the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage of those based on each respective basis,

(ii) The number and percentage for each respective basis that were rendered without a hearing, and

(iii) The number and percentage for each respective basis that were rendered after a hearing.

(9) Of the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage for each respective issue,

(ii) The number and percentage for each respective issue that were rendered without a hearing, and

(iii) The number and percentage for each respective issue that were rendered after a hearing.

(10) Of the total number of hearing requests pending for any length of time in such fiscal year,

(i) The number that were first filed before the start of the then current fiscal year, and

(ii) The number of individuals who filed those hearing requests in earlier fiscal years.

(11) Of the total number of hearing requests pending for any length of time in such fiscal year, the total number in which the Commission failed to complete the hearing step within the time required by § 1614.109(i).

(b) Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, the Commission shall post the following current fiscal year statistics on its public Internet Web site regarding EEO appeals filed under section 1614.

(1) The number of appeals filed in such fiscal year.

(2) The number of individuals filing those appeals (including as the agent of a class).

(3) The number of individuals who filed two or more of those appeals.

(4) The number of those appeals raising each of the various bases of alleged discrimination.

(5) The number of those appeals raising each of the various issues of alleged discrimination.

(6) The average length of time it has taken EEOC to issue appellate decisions for:

(i) All appeals pending for any length of time during such fiscal year;



(ii) All appeals pending for any length of time during such fiscal year in which a hearing was not requested; and

(iii) All appeals pending for any length of time during such fiscal year in which a hearing was requested.

(7)(i) The total number of appellate decisions rendered in such fiscal year involving a finding of discrimination and, of that number,

(ii) The number and percentage that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage that involved a final action by an agency after a hearing.

(8) Of the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage of those based on each respective basis of discrimination,

(ii) The number and percentage for each respective basis that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage for each respective basis that involved a final action by an agency rendered after a hearing.

(9) Of the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage for each respective issue of discrimination,

(ii) The number and percentage for each respective issue that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage for each respective issue that involved a final action by

an agency rendered after a hearing.

(10) Of the total number of appeals pending for any length of time in such fiscal year,

(i) The number that were first filed before the start of the then current fiscal year, and

(ii) The number of individuals who filed those appeals in earlier fiscal years.