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

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MEMORANDUM

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FROM: Ellen J. Vargyas Ellen Vargyas
Equal Employment Opportunity Commission

RE: Draft Management Directive 715

We have attached a new draft of the EEOC's Management Directive 715 on federal sector affirmative action under Title VII and the Rehabilitation Act. This draft has been revised based on your comments.

Please contact Jocelyn Samuels of my office with any comments on this draft. She can be reached at (202) 663-4624 or at jocelyn.samuels@eeoc.gov. We would appreciate receiving your comments no later than close of business July 7, 1999.

Reconcile EEOC + model plan
Comm will vote –
Formula clean

MANAGEMENT DIRECTIVE 715

1. **SUBJECT.** Federal Affirmative Programs of Equal Employment Opportunity.

2. **PURPOSE.** To prescribe to Federal agencies instructions, policies, procedures, guidance, and formats for the design, development, and maintenance of:

   a. Equal employment opportunity/affirmative employment programs;
   b. Multi-year (three year cycles) affirmative employment plans; and
   c. Annual affirmative employment progress reports (including plan modifications when required).

3. **EFFECTIVE DATE.** [date]

4. **ORIGINATOR.** Equal Employment Opportunity Commission (hereinafter EEOC), Office of Federal Operations, Federal Sector Programs.

5. **OBSOLETE DATA.** This Management Directive supersedes three EEOC Management Directives. Parts A and C and the appendices supersede EEO MD-714, dated October 6, 1987. Parts B and C and the appendices supersede EEO MD-712 and EEO MD-713, dated March 29, 1983 and October 6, 1987, respectively.

6. **AUTHORITY.** This Directive is prepared pursuant to the EEOC's authority under Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791; Reorganization Plan 1 of 1978, issued pursuant to 5 U.S.C. § 901 *et seq.*; Executive Order 11478 (3 C.F.R. 1966-1970 Comp., p. 803), as amended by Executive Order 12106 (3 C.F.R. 1978 Comp., p. 263); Executive Order 13087 (63 Fed. Reg. 30097, May 29, 1998); and 29 C.F.R. Part 1614.

INTRODUCTION

Both Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973 require federal agencies to make affirmative efforts to prevent and correct discrimination and to open employment opportunities for all qualified people. Section 717 of Title VII, which bans discrimination based on race, color, sex, national origin, and religion, requires each agency to "maintain an affirmative program of equal employment opportunity for all . . . employees and applicants for employment." Section 501 of the Rehabilitation Act requires that each agency submit to the EEOC "an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities," which, among other things, ~~provides adequate employment opportunities for such individuals and~~ describes the ways in which an agency will meet the needs of its employees with disabilities.

Certain fundamental principles apply to agency programs under both of these laws. First, both laws were passed in response to Congressional findings that federal employers' actions had, even if unintentionally, resulted in substantial discrimination against, and exclusion of, minorities, women, and people with disabilities.[1]

Second, although there has been improvement over time, the problems Congress intended to address persist in the work force. For example, women and minorities continue to be concentrated at the lower grade levels, and their representation still falls as grade level rises. In addition, people with specified targeted disabilities comprised only 1.16% of the federal work force in Fiscal Year 1997 -- a decline of more than 13% from their representation of 1.24% of the federal work force in Fiscal Year 1993.[2] Moreover, pursuant to ~~in~~ complaints brought by federal employees, agencies are still frequently found to have discriminated against minorities, women, and/or people with disabilities.

Agency affirmative employment and affirmative action programs remain a critical tool to address work force conditions that limit opportunities for minorities, women, and people with disabilities. This is because both Title VII and the Rehabilitation Act anticipate that agencies will do more than simply respond when evidence of discrimination is brought to their attention after the fact. Under both laws, agencies are expected to take lawful proactive steps to promote equal employment opportunity, and to diagnose and respond to potential problems of exclusion *before* those problems develop into discrimination as a legal matter. Both laws also recognize that many of the actions taken to open opportunities - among them trying to attract the broadest possible pools of qualified applicants and removing barriers that restrict the ability of employees to achieve their fullest potential - will also improve the quality of the work force and the functioning of the government overall.

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1 *See ~~e.g.,~~* H.R. Rep. No. 238, 92d Cong., 1st Sess. 22, 23 (1971) (setting forth data showing exclusion of women and minorities); S. Rep. No. 415, 92d Cong., 1st Sess. 14 (1971) (noting need for corrective measures to address systemic barriers disadvantaging minorities and women); S. Rep. No. 318, 93rd Cong., 1st Sess. ___ (1973), *reprinted in* 1973 U.S.C.C.A.N. 2122 (stating that hearings on vocational rehabilitation showed that federal employment policies for individuals with disabilities "continued to be found wanting").

2 *See generally* EEOC Annual Report on the Employment of Minorities, Women, and People with Disabilities in the Federal Government, Fiscal Year 1997.

Toward these ends, this Directive sets forth agency obligations and explains how to do the following:

- **Assure an adequate commitment to agency programs.** Agencies must devote sufficient resources to maintain their programs and must ensure that their personnel are adequately trained. (*See* pp. __-__, *infra*.)

- **Conduct work force analyses.** Agencies must systematically monitor the participation of minorities, women, and people with disabilities in their work forces and track the effects of specified employment decisions on these groups. (*See* pp. __-__, *infra*.)

- **Evaluate agency policies and practices.** Guided by the results of their work force analyses, ~~If an agency's work force analyses show substantial disparities in participation rates or in the impact of particular types of employment decisions,~~ agencies are to review relevant policies and practices to assess whether those policies discriminate against, or arbitrarily limit employment opportunities for, any work force group~~minorities, women, or people with disabilities~~. Agencies must ~~also review specified policies to evaluate their impact on people with disabilities, and must~~ take appropriate action to eliminate or modify any artificial barriers that they find. (*See* pp. __-__, *infra*.)

- **Based on these analyses and evaluations, take action as necessary to open employment opportunities, including:**

    - engaging in outreach and targeted recruitment to reach the broadest possible pool of qualified applicants and taking steps, as appropriate, to improve the skills of those not yet qualified for particular jobs (*see* pp. __-__, *infra*);

    - improving training and employee development programs for all employees, including employees at the lower grade levels (*see* pp. __-__, *infra*);

    - setting goals for the employment of individuals with the targeted disabilities identified in this Directive (*see* pp. __-__, *infra*);

    - adopting procedures to facilitate granting requests for reasonable accommodation by individuals with disabilities, including written procedures for handling such requests (*see* pp. __-__, *infra*);

    - using excepted appointing authorities for specific groups of individuals with disabilities and~~/or~~ developing other mechanisms to increase the inclusion of people with disabilities in the group from which regular competitive appointments are made ~~expand employment opportunities for individuals with disabilities~~ (*see* pp. __-__, *infra*); and

- where warranted under strict scrutiny analysis, considering taking race, national origin, or gender into account in selection decisions. Such decisions will be warranted where there is strong evidence that an agency has engaged in employment discrimination and has yet to correct the effects of that discrimination, or where there is an operational need for diversity that has not been met by race-neutral means. Section V sets forth additional questions that agencies should ask in making this determination. (*See* pp. __-__, *infra*.)

- **Prepare required records and reports.** Agencies and identified components of those agencies must maintain records and report to the EEOC on a specified timetable about the results of their work force analyses, and about their plans and actions to implement their affirmative programs.

COMPONENTS OF AGENCY PROGRAMS

I. MAKING A COMMITMENT TO THE AFFIRMATIVE EMPLOYMENT PROGRAM[3]

All agencies must commit sufficient resources to maintain active and up-to-date affirmative employment programs under both Title VII and the Rehabilitation Act. Moreover, the commitment to affirmative employment principles must start at the top of the agency.

To make an adequate commitment to their affirmative employment programs, agencies must undertake the analyses and prepare -- and make available to employees -- the multi-year and annual reports required by this Directive. Agencies must also do at least the following.

A. Issue and Disseminate a Written Equal Employment Opportunity Policy and Accountability Statement

A written policy statement is a crucial internal guidance document for the affirmative employment program. The policy statement must:

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[3] The language of Title VII, which addresses affirmative "employment" programs, differs from the language of the Rehabilitation Act, which requires agencies to maintain affirmative "action" plans. For ease of reference, this Directive uses the terms "affirmative employment programs" or simply "affirmative programs" where it jointly discusses agency programs under both laws.

1. Describe the agency's legal obligations and commitment to equal employment opportunity and affirmative employment;

2. Prohibit all forms of unlawful discrimination in the workplace, including retaliation against employees or applicants because they have opposed an unlawful employment practice or participated in any way in a proceeding concerning employment discrimination;

3. Establish procedures to prevent ~~address~~ incidents of harassment~~, before they amount to a violation of federal law~~, as well as procedures to correct any harassment that occurs before it amounts to a violation of federal law;

4. Set forth the agency's EEO complaint processing procedures; and

5. Explain that managers, supervisors, EEO officials, and personnel officers will be held accountable for the implementation and management of the EEO and affirmative employment programs.~~; and~~

~~6. Emphasize that it is unlawful to retaliate against employees or applicants because they have opposed an unlawful employment practice or participated in any way in a proceeding concerning employment discrimination.~~

This policy statement should be reissued at least every three years. If the agency head changes within that period, (s)he should reissue the policy document.

The policy statement should be disseminated to all agency employees, for example ~~EEO personnel and to all managers and supervisors~~, through employee handbooks, intranet services, or the agency's website. In addition, ~~all employees should have access to the policy statement and to the plans and analyses prepared under this Directive. The~~ an agency should make the policy statement and the plans and analyses prepared under this Directive ~~should make these documents~~ available in designated locations such as its library, its EEO office, and/or its personnel offices.

B. Appoint a Senior Official to Manage the Program

The agency head must appoint a senior manager to serve as the chief EEO official and to take charge of the agency's affirmative programs under both Title VII and the Rehabilitation Act. The official must be objective and unbiased and be in a position to conduct ongoing independent reviews of agency personnel practices and actions. (S)he must have the same level of authority as other senior agency managers; (s)he also may not be the official responsible for executing and approving personnel actions.

Agencies should also evaluate their need for additional managers who can help to implement their affirmative programs. Such managers could, for example, advise an agency on means to improve its outreach and targeted recruitment, or serve as liaisons with particular work force groups within the agency's existing work force.

C. Provide Adequate Resources

Agencies must establish, and allot adequate resources to, complaints processing and affirmative employment units. These units must be adequately staffed, and employees must be qualified and knowledgeable. Additionally, agencies must provide sufficient space and administrative, analytical, or information systems support for all non-discrimination and affirmative employment functions.

D. Ensure the Quality and Efficiency of EEO Complaint Processing

Agencies must ensure that the EEO complaint process is efficient and effective. Agencies must review each stage of the complaints process to make certain that complaints are properly and timely handled and tracked and that results are consistent with applicable laws and regulations. Agencies should also evaluate whether EEO offices maintain appropriate records and have access to all relevant EEOC and agency regulations, policies, and procedures. Agencies must inform all agency employees about complaint procedures and the locations of EEO counselors.

E. Provide Training and Other Support Necessary to Ensure Implementation of the Affirmative Employment Program

Training should be conducted as necessary to familiarize all employees with their rights and responsibilities under the EEO laws. In particular, adequate training and technical assistance must be provided to all management and supervisory employees, as well as others involved in personnel decisions, to ensure that they are knowledgeable about, and able to fully implement, the agency's non-discrimination and affirmative employment obligations. This includes training on agency policies and programs for providing reasonable accommodation to employees and applicants with disabilities.

II. CONDUCTING WORK FORCE ANALYSES

The first step in developing an affirmative employment program is to monitor the participation of minorities, women, and people with disabilities in agency work forces. Through the work force analyses set forth below, agencies can assess the representation of minorities, women, and people with disabilities in various occupational categories, as well as at different grade levels, and can evaluate the rates at which these groups are selected for particular employment opportunities.

In general, these analyses are a starting point for an agency to determine whether ~~The fundamental question underlying each of these analyses is the following: is~~ the rate at which minorities, women, and people with disabilities are represented in the work force or selected for particular employment opportunities is the rate the agency would expect given the presence of those groups among those who are available and qualified for the jobs. ~~If not -- if there is~~ A substantial disparity between actual and expected representation is a signal that something in an agency's practices may be artificially limiting employment opportunities for particular work force groups. ~~then agencies must investigate to assess why the disparity exists, and must take appropriate action to address any problems that are found.~~

In some instances -- and particularly with regard to the representation of people with disabilities -- the data are unavailable to make some of these determinations. In addition, none of these analyses are designed to identify when discrimination exists as a legal matter. Some of the additional questions necessary to make that determination are set forth in Section V, *infra*. Instead, these analyses provide a "red flag" of potential problems. ~~that *something* in an agency's practices may be limiting employment opportunities for minorities, women, and/or people with disabilities.~~ It is only through further investigation that agencies will be able to identify the causes of any limitations that exist, and will be able to determine what responsive action, if any, is required.

A. Obtaining and Handling Information on Agency Employees

1. Title VII

Title VII sets ~~There are~~ no explicit limits on an agency's ability to request and maintain information about the race, national origin, or gender of its employees or applicants. For purposes of these work force analyses, therefore, agencies may request employees and/or applicants to provide demographic information. Agencies may use Standard Form 181, issued by the Office of Personnel Management ("OPM"), or other appropriate forms approved by the Office of Management and Budget, to collect such information from employees. ~~Agencies may also obtain~~ Demographic data on the federal work force are also available in ~~from~~ the ~~Civilian~~ Central Personnel Data File, which is an automated file compiled from personnel action information submitted by agencies to OPM.

In order to prevent misuse of this information, agencies should do the following:

- **Make responses voluntary.** Agencies should notify employees and applicants that response to requests for information on race, national origin, or gender is voluntary and that the information will be used only for statistical purposes or to implement the agencies' affirmative employment program responsibilities.

- **Keep information separate.** Agencies should keep information on a person's race, national origin, or gender separately from that person's employment application and personnel file. Decision makers should not have access to this information unless it is lawful to take the information into account in making a selection decision.

2. **Rehabilitation Act**

a. **Limits on requests for information**

The Rehabilitation Act explicitly limits the circumstances in which agencies may request information about the disabilities of their employees or applicants.[4] Consistent with those limitations, agencies may, for purposes of these work force analyses, identify individuals with disabilities in any of the following ways:

- Agencies may rely on observation of visually apparent disabilities or on information that individuals with disabilities choose to disclose about the existence of hidden disabilities.

- Agencies may use information obtained from approved government forms which invite federal employees to self-identify as individuals with disabilities.[5] ~~Standard Form 256, the "Self-Identification of Handicap" form (SF 256) issued by OPM and intended to be given to each federal employee as (s)he enters the work force. A copy of SF 256 is attached as Appendix __.~~

- Agencies tracking applications from individuals with disabilities or considering the use of excepted appointing authorities or other affirmative action programs may invite applicants to indicate whether and to what extent they have the types of disabilities that are covered by the program at issue.

Whenever an agency invites individuals to provide information about their disabilities to compile their work force analyses or for other affirmative action purposes, the agency must clearly notify the applicants and employees that:

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[4] For a discussion of those limitations ~~circumstances~~, *see* 29 C.F.R. pt. 1630 app. §§ 1630.13, .14 (1998); *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (10/95); and *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, No. 915.002 (3/25/97) at pp. 15-17. All EEOC guidance cited in this Directive may be found on the EEOC's website at www.eeoc.gov.

[5] The government currently uses Standard Form 256, the "Self Identification of Handicap" form issued by OPM. A copy of SF 256 is attached as Appendix __.

- response to the invitation is voluntary and refusal to provide the information will not lead to any adverse employment consequences;

- the information will be kept confidential and used only for affirmative action purposes; and

- individuals may self-identify at any time during their employment, and failure to provide the information initially will not excuse the agency from Rehabilitation Act requirements.

Further, agencies may request only the information that is necessary to achieve the particular purpose justifying the request. Thus, for example, an agency may not request that individuals with disabilities give their names if the agency is seeking merely aggregate data (*e.g.*, representation of people with disabilities in the applicant pool) and does not need to identify specific individuals.

b. Limits on disclosure of information

Agencies must keep medical and disability-related information about individual employees and applicants confidential in accord with EEOC regulations. Such information must be collected and maintained on separate forms and kept in separate files. It may be disclosed *only* as follows:

1. supervisors and managers may be informed about necessary work restrictions or accommodations;

2. first aid and safety personnel may be told if the disability might require emergency treatment;

3. government EEO officials investigating compliance with the Rehabilitation Act should be provided information on request;

4. state workers' compensation offices, state second injury funds, and workers' compensation insurance carriers may be provided information as required by relevant state laws; and

5. agencies may use the information for insurance purposes.[6]

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[6] *See* 29 C.F.R. pt. 1630 app. § 1630.14(b), (c) (1998); *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (10/95) at p. 21. There may be other, very limited, situations in which federal law directs disclosure of disability-related information to certain agency supervisors for specific purposes. *See* Executive Order 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (requiring disclosure of disability-related

In addition, for affirmative action purposes alone, medical and disability-related information may be disclosed to managers and others involved in a selection process, as well as to those responsible for the agency's affirmative action program, ~~employment activities~~; where, for example, the information indicates that an applicant may be eligible for excepted appointment. ~~or other affirmative action benefits.~~ Moreover, disability-related information may be used to manage, evaluate, and report on EEO and affirmative programs; data generated from government forms ~~from SF 256~~ may, for example, be provided to those who conduct the work force analyses required by this Directive.

To preserve maximum confidentiality, these disclosures should be restricted to as narrow a group as possible consistent with serving the affirmative action purposes at issue. Moreover, all individuals to whom information is disclosed must be informed about confidentiality requirements and instructed not to disclose the information further than necessary to satisfy those purposes.

B. Work Force Analyses

For each of their work force analyses, ~~Except as otherwise noted below,~~ agencies should count all permanent employees -- that is, any member of the permanent work force serving under either a competitive or excepted appointment, including permanent employees who work full-time, ~~permanent~~ part-time, or ~~permanent~~ intermittent work schedules. For individuals with disabilities, this count should include all employees serving under the excepted appointing authorities for individuals with specified types of disabilities. Except as explicitly required by specific subsections below, agencies need not include employees serving under temporary appointment in their work force analyses. In analyzing its total work force representation, however, each agency should state the percentage of that work force that is comprised of temporary employees.

For the Title VII portion of these analyses, agencies should track Whites, Blacks, Hispanics, Asian American/Pacific Islanders, and American Indians/Alaskan Natives, further broken down between men and women.[7]

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information about applicants for certain federal positions when necessary in the interests of national security).

[7] These racial and ethnic categories are subject to change based on the *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782, issued by the Office of Management and Budget on October 30, 1997. If these changes require modification to the requirements of this Directive, the EEOC will issue updated guidance. ~~as appropriate.~~

The Rehabilitation Act portion of these analyses distinguishes between (a) targeted disabilities, and (b) all other reported disabilities. The targeted disabilities have been identified in prior EEOC Management Directives, and remain targeted for purposes of this Directive as well. These disabilities are currently identified by their code numbers on ~~along with the codes that identify them on~~ Standard Form 256 (attached), and, for reporting purposes, are: deafness (16 and 17); blindness (23 and 25); missing extremities (28 and 32 through 38); partial paralysis (64 through 68); complete paralysis (71 through 78); convulsive disorders (82); mental retardation (90); mental illness (91); and distortion of limbs and/or spine (92). The reported disabilities are those *other* impairments that meet the definition of disability as set forth in the Rehabilitation Act, and include those disabilities (beyond those identified as targeted disabilities) that are listed on SF 256.[8]

While each agency's affirmative program should address the needs of all employees and applicants with disabilities, this Directive requires separate reporting on those with targeted disabilities because individuals with these disabilities have traditionally encountered especially significant barriers to employment. Therefore, for each of the analyses listed below -- and wherever the work force analyses require information on individuals with "disabilities" -- agencies should track targeted and other reported disabilities separately.

The groups for whom tracking must be done, under both Title VII and the Rehabilitation Act, are referred to collectively as the "work force groups." Each group individually, *e.g.*, Hispanic~~s~~ men, Asian women, or people with disabilities, is referred to as a "work force group."

Except as otherwise explained below, the same analysis is required under Title VII and the Rehabilitation Act. Unless otherwise noted, moreover, agencies should report the results of these work force analyses to the EEOC.

1. Work Force Demographics

a. Total Work Force Representation

(i) Title VII

Under Title VII, agencies should compare representation of each work force group in its total work force to representation of that group in the Civilian Labor Force ("CLF"). The EEOC has provided agencies with data, derived from the 1990 CLF, needed to make these comparisons. It will provide updated CLF data upon completion of the next decennial Census.

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[8] SF 256 is subject to change. Should a new government form be issued to collect disability data, the EEOC will issue updated guidance as appropriate.

Total agency work force representation should be compared with national CLF percentages. Work force representation in regional or field offices should be compared to representation in the national, regional, state, local, or Metropolitan Statistical Area (MSA) CLF that best reflects the actual recruitment area for the majority of the office's non-clerical jobs.

Under Title VII, this analysis serves purely informational purposes for the agency, and will help the EEOC to prepare its required annual reports to the President and Congress. Comparisons involving the total work force should not be used for decision making purposes under Title VII.

(ii) Rehabilitation Act

There are currently no comprehensive CLF or other data that track the participation of individuals with disabilities in the U.S. labor force. ~~As a result, in order to permit useful analyses of agency work forces,~~ The EEOC has previously estimated that 5.95% of the available work force is comprised of individuals with targeted disabilities.[9] This Directive does not, however, require agencies to use this estimate in evaluating the representation of people with disabilities in their work forces. First, this estimate is based on data that substantially predated enactment of the Americans with Disabilities Act, and thus may well understate the current availability of people with disabilities in the labor force at large. Second, the federal government is developing new estimates, based on more current and comprehensive data, that will enable agencies to compare actual and expected representation of individuals with disabilities with greater precision than is now possible. ~~This estimate is approximate, and should not be used to assess availability for any particular job. Nonetheless, by comparing the representation of individuals with targeted disabilities in their overall work forces to this 5.95% availability figure, agencies will gain a reasonably reliable sense of whether they are providing adequate employment opportunities for individuals with targeted disabilities.~~

The EEOC will issue updated guidance once new estimates have been derived of the availability of people with disabilities in the labor force. Until then, ~~For individuals with other reported disabilities,~~ agencies should ~~simply~~ record the representation of people with reported and targeted disabilities in their own work forces. No comparisons are required. Agencies are, however, required to set goals for the employment of individuals with targeted disabilities that will enable them to evaluate their progress in opening employment opportunities for such individuals. *See* Section IV(B)(1), *infra*.

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9 *See, e.g.*, EEOC Annual Report on the Employment of Minorities, Women, and People with Disabilities in the Federal Government, Fiscal Year 1997, at p. 251.

b. Work Force Representation by Occupational Category

(i) Title VII

CLF data are categorized by occupation, and federal jobs can be matched with their corresponding CLF occupation(s). In addition, OPM has further classified all federal jobs -- as well as the comparable CLF occupation(s) -- into one of six occupational categories: Professional, Administrative, Technical, Clerical, Other, and Blue Collar ("PATCOB" categories). As detailed below, agencies must identify the PATCOB category in which each of their jobs belongs and then make certain comparisons based on those categorizations.[10] The EEOC has previously provided to agencies data that identify CLF availability for each work force group in each of the PATCOB categories.

Some of these comparisons require agencies to identify their "major occupations." ~~within the occupational categories.~~ This term means those agency occupations that are heavily populated and that have advancement potential to upper level positions. ~~The EEOC has no specific numerical definition of "major occupations." However,~~ Agencies may assume that such occupations include any critical agency function performed by 100 or more employees. In addition, agencies should treat as "major occupations" any positions, regardless of the number of employees who perform them, in which incumbents are expected to make significant policy or administrative decisions on behalf of the agency.

The occupational comparisons required by this section will not be sufficient for agencies to evaluate whether discrimination exists. Instead, substantial disparities revealed by these comparisons are a "red flag" that there may be *some* limitation on the employment opportunities of a particular work force group ~~minorities and women~~. The agency must then investigate the reason(s) for the disparities.

The occupational comparisons required under Title VII are as follows. For an agency's multi-year plan, these comparisons should be done for each of the most recent three fiscal years:

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[10] These comparisons are intended to evaluate whether there are barriers that limit the broadest possible utilization of qualified people in all work force groups. As a result, and because people currently employed in other types of jobs may often be qualified to perform the federal sector jobs at issue, these analyses should not, outside the Professional category, be restricted to comparisons between those in a specific agency job and those already performing that job in the labor force at large. Thus, some of these comparisons rely on ATCOB data from the CLF.

- **ATCOB/ATCOB comparisons.** Agencies should:

  1. cumulate the jobs in their work forces that fall within each of the ATCOB -- Administrative, Technical, Clerical, Other, and Blue Collar -- categories;

  2. calculate the percentage representation of each Title VII work force group [redacted] in each of those categories;

  3. compare the percentage representation of each of the work force groups in each of the agency's ATCOB categories with the representation of that group in the same ATCOB category in the CLF. *See* Appendix __.

  This analysis applies only to the ATCOB categories. Agencies should not cumulate or evaluate jobs in the Professional category for this portion of their analyses. Because professional jobs typically require specified licenses or education, availability for each professional job will be measured individually.

  Agency-wide plans, as well as those filed by major operating components or military commands that have nationwide operations, should use the national CLF in calculating representation in each CLF ATCOB category. Regional and field offices should use the geographic CLF that best reflects their actual recruiting area for the majority of their jobs in each occupational category.

- **Major occupation/ATCOB comparisons.** Agencies should compare the representation of the Title VII work force groups in each non-professional major occupation to the representation of the groups in the relevant Administrative, Technical, Clerical, Other, and Blue Collar category in the CLF. *See* Appendix __. Again, representation in an agency's professional occupations should *not* be compared to representation in the CLF Professional category as a whole.

  Agency-wide plans, as well as those filed by major operating components or military commands that have nationwide operations, should use the national CLF in comparing total representation in each major occupation to the appropriate ATCOB CLF category. Regional offices and field installations should use the geographic CLF that best reflects their actual recruiting area for each major occupation.

- **Professional occupation/professional occupation comparisons.** The third step is to compare the representation of each Title VII work force group in each professional occupation to the representation of that group in the corresponding occupation(s) in the CLF. *See* Appendix __. The EEOC has provided data to each agency that state the levels of CLF representation for each work force group for each federal occupation in the Professional category.

These data state availability for professional jobs on a nationwide basis. If agencies wish to show that certain professional jobs cannot be recruited nationally, they may contact the EEOC. In such circumstances, the EEOC will provide data that more closely reflect the actual recruiting area for the position.

(ii) Rehabilitation Act

Because there are no occupation-specific data on individuals with disabilities, this Directive limits the occupational analyses that agencies must make. To provide a baseline for understanding the types of jobs in which individuals with disabilities are employed, agencies should calculate the (a) representation of individuals with disabilities in each of the agency's ATCOB categories; and (b) representation of such individuals in each professional occupation. No comparisons to other data are required for these purposes.

c. Work Force Representation by Grade

Grade level analyses will reveal whether certain work force groups are disproportionately concentrated at particular grades. To make this determination, agencies must calculate, for each of the most recent three fiscal years:

- for each of the PATCOB categories, the representation of each work force group at each grade level (*e.g.*, that people with targeted disabilities comprise 1% of agency Administrative employees at the GS 13 level);
- for the work force as a whole, the percentage of the agency's minorities, women, and people with disabilities that is employed at each grade level (*e.g.*, that 5% of an agency's Hispanic employees are employed in jobs at the GS 14 level) .

For this analysis, agencies must also track separately the representation of each work force group in temporary jobs at each grade level. For these purposes, temporary workers are those who have been employed under temporary appointing authorities at any time during the fiscal year being analyzed. Employees with disabilities who are serving under excepted appointing authorities specifically for people with disabilities should continue to be counted as permanent employees. *See* Appendix __.

Grade levels are those reflected in the General Schedule and run between grade 1 and grade 15; analyses must also be done of representation in the Senior Executive Service. Other pay levels may be substituted when appropriate.

2. Effects of Employment Decisions

a. Recruitment and Accessions

(i) Accessions

Agencies must analyze their accessions for each of the most recent three fiscal years. Accessions are personnel actions that add employees to an agency's work force. These include new hires, transfers from other agencies, or conversions from temporary to permanent appointment.

Under Title VII and for ATCOB jobs, agencies should compare the percentage that each Title VII work force group comprises of its accessions to the percentage representation of that group in the relevant ATCOB category. Agencies should separately track accessions for each professional occupation and should make comparisons to the comparable CLF occupation. These comparisons will help to determine whether members of each work force group are being hired at rates roughly consistent with their availability.

Because comparative data are unavailable, agencies should simply record the percentage that individuals with disabilities constitute of agency accessions in each ATCOB ~~occupational~~ category and in each professional occupation. *See* Appendix __.

(ii) Applicant flow data

Agencies are also advised to compile applicant flow data to evaluate their recruitment efforts and selection rates for each work force group. Where agencies are aware of the race, national origin, gender, or disability of ~~an~~ their applicants, they should calculate the percentage that applicants of that work force group ~~minorities, women, and/or people with disabilities~~ comprise of the applicant pool for each job. This information must be kept separate from the candidate's application and personnel file.

This Directive does not require that agencies create new records for this purpose. Instead, agencies should simply keep those materials (including resumes, personnel documents, and letters of inquiry) that they make or keep in the normal course of their recruitment and hiring processes. Agencies should maintain these records for the longer of one year or, where a complaint of discrimination has been filed, until final disposition of the complaint.

Where an agency compiles applicant flow data, it can compare the percentage of minorities and women in its applicant pool to the percentage of these groups in the relevant occupational and geographic CLF. Substantial disparities between these numbers are a signal that the agency's recruitment efforts may have been insufficient.

Under both Title VII and the Rehabilitation Act, moreover, agencies should use any applicant flow data they compile to compare selection rates for each work force group. *See* Appendix __. Where selection rates differ materially for different work force groups, the agency should further investigate the practices or policies it uses to fill a position.

b. Promotions

~~Under both laws,~~ Agencies must do the following for all work force groups:

- Determine the number and percentages of promotions awarded to members of each work force group at grade groupings GS 1 - 4 and GS 5 - 8, and at individual grade levels from GS 9 through the Senior Executive Service;

- Compare those percentages to each group's percentage representation in the relevant grade level or grouping from which the promotions were made. *See* Appendix ___.

Agencies should conduct each of these analyses for each of the most recent three fiscal years and should include both competitive and career-ladder promotions.

If these analyses reflect substantial disparities in participation by any work force group, agencies should undertake additional analyses to help track the source of the imbalance. Agencies should analyze:

- **Time-in-grade.** By PATCOB category, agencies should evaluate whether the time served in grade prior to promotion is comparable for all work force groups. Thus, for each PATCOB category, agencies should determine the average time spent by male and female Whites, Blacks, Hispanics, Asian American/Pacific Islanders, and American Indian/Alaskan Natives, and by people with targeted and other reported disabilities, in the grades covered by jobs in that occupational category. ~~grade groupings GS 1 - 4 and GS 5 - 8, and in each grade level from GS 9 through the Senior Executive Service.~~ *See* Appendix ___.

- **Training.** [redacted] for grade groupings GS 1 - 4 and GS 5 - 8 and each individual grade level from GS 9 through the Senior Executive Service, agencies should compare the percentage that each work force group comprises of those selected for employee development training opportunities with that group's percentage representation in the relevant grade level or grade grouping. *See* Appendix __.

- **Awards.** By grade grouping, agencies should compare the percentage of awards that each work force group receives with that group's representation in the grade grouping. For monetary awards, agencies should also compare the dollar amount received by each work force group in a grade grouping with that group's representation in the grouping. Grade groupings for this purpose are GS 1-4, GS 5-8, GS 9-12, and GS 13 and above. *See* Appendix __.

The EEOC has provided charts that agencies may use in tracking data on time-in-grade, training, and awards. These data need not be reported to the EEOC on a routine basis; agencies must, however, make the data available to the EEOC on request.

c. Separations and Disciplinary Actions

~~Under both Title VII and the Rehabilitation Act,~~ Agencies must analyze separations and disciplinary actions for each of the most recent three fiscal years for all work force groups. For these purposes, separations are those personnel actions, excluding retirements, that subject employees to a voluntary or involuntary loss of their jobs. Separations include terminations, reductions-in-force, and transfers. Disciplinary actions include any adverse actions taken against permanent employees.

To determine if the separation rate for any work force group makes up a disproportionate share of total separations, agencies must compare the percentage of separations to which each work force group has been subjected to that group's percentage representation in the agency work force as a whole. *See* Appendix ___. Agencies must similarly compare the percentage of disciplinary actions to which each work force group has been subjected to that group's percentage representation in the work force. *See* Appendix __. Agencies should also bear in mind that there can be disparities in the ~~assess the~~ severity of ~~the~~ disciplinary actions ~~that are taken,~~ and are encouraged to take proactive steps to evaluate whether ~~to ensure that~~ members of a particular work force group are being ~~not~~ treated more harshly than others for similar conduct.

d. EEO Complaints

Each agency must analyze its EEO complaints to identify any employment practices that are or may be barriers to equal employment opportunity, any trends or patterns that suggest the need for further investigation, or any particular decision makers whose employment decisions are subject to repeated challenge. Each agency must also ensure that it has fully complied with all orders rendered or agreements reached at any stage of the EEO process.

Agencies need not report the results of this analysis to the EEOC.

e. Selection Criteria

Under Title VII, agencies must comply with the Uniform Guidelines on Employee Selection Procedures.[11] Thus, agencies must assess whether facially neutral selection criteria disproportionately exclude any protected ~~women or any minority~~ group and, if so, whether such criteria are justified. An agency need evaluate only those criteria that the agency imposes above the threshold qualification standards set by OPM. An agency need not report the results of this analysis to the EEOC.

f. Annotation of Files

To promote equal opportunity for individuals with disabilities, an agency may also want to track the employment history of each of its employees with a disability. Thus, for each individual whose disability is previously -- and permissibly -- known to the agency, the agency may keep records of, among other things:

- each vacancy, promotion, or training opportunity for which the individual was considered;
- in each case in which the individual was rejected for such an employment opportunity, the reason for the rejection, as well as a description of any accommodations considered;
- in each case in which the individual was selected for such an employment opportunity, a description of any accommodation made by the agency to enable the individual to take full advantage of the opportunity.

Tracking done pursuant to this subsection need not be reported to the EEOC. All medical and disability-related information generated by this type of analysis must be kept confidential in accordance with this Directive.

III. REVIEWING AGENCY POLICIES, PRACTICES, EQUIPMENT, AND FACILITIES

Where they make use of comparative data, agency work force analyses will show whether there are substantial disparities between the levels of participation that might have been expected for minorities, women, or people with disabilities, and the levels of participation that those groups actually enjoyed. The next step is for agencies to investigate the reasons for any such disparities that they discover. ~~as well as to evaluate the impact of certain additional policies on individuals with disabilities.~~

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11 29 C.F.R. Part 1607 (1998).

Agencies should start with the results of their work force analyses. Some of these ~~an agency's work force~~ analyses may point directly to employment practices that need to be closely reviewed. For example, analysis of an agency's EEO complaints may reveal a particular practice that has disproportionately excluded qualified women or minorities. More typically, however, the work force analyses will not identify specific practices that are responsible for any imbalances that are found. Thus, in most cases, an agency's first step after conducting its work force analyses will be to determine *whether* there are particular practices that have caused the imbalances and that are artificial barriers to equal employment opportunity. Sometimes these investigations may require additional numerical analyses that focus on specific occupations or agency offices.

Agencies must go beyond their numerical analyses in evaluating whether their policies are non-discriminatory, however. First, for some employment decisions affecting individuals with disabilities, there will be insufficient data for an agency to make useful comparisons of actual and expected representation. Second, many of the practices or policies identified below (such as selection criteria) must be regularly reviewed for an agency to meet its non-discrimination responsibilities -- whether or not the agency's work force analyses show an overall imbalance in representation of a particular protected group. Thus, in addition to the investigations spurred by their work force analyses, agencies should periodically address all of the questions raised below with respect to their employment of each of the work force groups. Section III(A)(2) further sets forth some of the specific policies to which agencies must pay particular attention in evaluating barriers to the employment of people with disabilities.

These investigations will in most instances be conducted by the agency's EEO staff, but should involve managers and supervisors from other offices as necessary. Agencies may also wish to consult EEOC staff, or officials of other agencies with substantive expertise in the anti-discrimination laws, for assistance in conducting their investigations. In addition, agencies should include individuals with disabilities ~~should be included~~ among those responsible for evaluating the impact of agency practices on people with disabilities.

A. How Should an Agency Determine Which Practices to Review?

1. Title VII and the Rehabilitation Act

Among the questions agencies should consider during their investigations are the following. This list is not exhaustive.

1. ~~Does the~~ Where there is a substantial numerical ~~observed~~ imbalance in the representation of a particular work force group, does it exist agency-wide or is it restricted to particular regions, offices, or components? Does the imbalance occur across occupations or occupational categories, or only in a single job series?

2. Does the observed imbalance result from only a few instances of decision making or does it occur each time the particular type of employment decision is made?

3. Are there particular decision makers, or groups of decision makers, whose employment selections consistently exclude members of particular groups?

4. What are the selection criteria and qualification standards for the particular types of employment opportunities in question?

   a. Are any selection criteria facially exclusionary? Are there any physical or mental qualification standards for the job?

   b. Are there unwritten or unannounced selection criteria that are nonetheless being used for the employment decisions?

   c. Do the agency's selection criteria exceed those imposed by OPM qualification standards?

   d. Have the standards been applied differently to members of different work force groups?

   e. Even if they are facially neutral, do any criteria disproportionately exclude particular work force ~~women or particular minority~~ groups? Do any exclude people with disabilities?

   f. Do the selection criteria measure abilities that are truly necessary to perform the jobs or complete the training in question, or do they demand skills or credentials that are not actually required for effective job performance?

   g. Do the selection criteria in fact measure the skills they purport to assess? Is there an adequate match between high scores in the selection process and performance on the job?

   h. Even if the selection criterion is justified, are there any accommodations to enable people with disabilities to meet the standard?

5. Are the grade levels set for entry into the employment opportunities at issue appropriate?

6. Are the agency's recruitment efforts resulting in a diverse pool of qualified applicants?

7. Does ~~the~~ any observed imbalance result from a failure of members of particular groups to *apply* for the types of opportunities in question? Is there an identifiable disincentive to particular groups in either the application process or the job?

~~8. Do vacancy announcements for the job communicate the agency's willingness to hire people with disabilities? Do they state that the agency will provide reasonable accommodation for qualified individuals with disabilities?~~

8. Are the employment opportunities in question restricted to internal applicants, or has the agency searched for external candidates as well?

9. In what geographic area(s) has the agency recruited for the positions at issue? Are there additional areas in which the agency reasonably could recruit?

10. Have the employment opportunities in question been advertised and announced in ways designed to promote the broadest dissemination of information?

11. Do the job descriptions for the employment opportunities in question accurately reflect the actual demands of the job?

12. Are adequate training opportunities made available to employees at the lower grade levels? Is career counseling available to all employees? Are training opportunities equitably distributed among occupational groups?

~~14. Do agency contracts reflect the obligation to make services and facilities accessible to employees with disabilities?~~

13. What are the criteria used in deciding on separations?

2. Rehabilitation Act

Under the Rehabilitation Act, agencies must *also* review the following, whether or not the agency's work force analyses have revealed numerical imbalances in the representation of people with disabilities ~~these policies have resulted in numerical imbalances~~:

1. physical and mental qualification standards;

2. selection or job criteria -- in vacancy announcements, position descriptions, or elsewhere -- that describe *how* a job is to be done, rather than simply stating outcomes that are to be accomplished;

3. any other policies or criteria that agencies know or should know -- through prior requests for accommodation, complaints, or a common sense understanding of the likely impact of a particular policy -- might exclude individuals with disabilities;

4. policies -- including, for example, those that affect the purchase of equipment, the hiring of readers or interpreters, or the flexibility to restructure work schedules -- that might affect the agency's ability to provide reasonable accommodations;

5. [redacted]

6. policies, practices, and equipment related to the [redacted] use of information technology; and

7. the accessibility of physical facilities to individuals with disabilities.

As a practical matter, it may be difficult for an agency to review all of its policies, practices, equipment, and facilities at one time and to anticipate in every case where such policies could adversely affect individuals with different kinds of disabilities. Nonetheless, it is critical for agencies to review at least the above-listed policies on a regular basis.[12] These reviews are not dependent on notification to the agency by a particular individual that (s)he has been excluded from an employment opportunity on the basis of disability; rather, agencies must anticipate -- and respond -- where their policies, equipment, or facilities may operate as artificial barriers to the employment opportunities of individuals with disabilities.

Additionally, each agency must also include in all of its vacancy announcements a statement that the agency will provide reasonable accommodation for qualified individuals with disabilities. This statement will encourage applications from individuals with disabilities, as well as help to ensure that individuals with disabilities are not deterred from applying for jobs for which they cannot meet the criteria without a reasonable accommodation.

B. How Should an Agency Evaluate its Practices?

The basic question that an agency should ask in reviewing its practices is whether any practice operates as an artificial barrier to [redacted] the employment

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[12] Agencies should set reasonable review cycles. Certain agency actions may themselves trigger the need for review -- where, for example, agencies issue new vacancy announcements, change their leave procedures, or purchase or upgrade computer systems. Even absent a specific triggering event, however, each agency must ensure that all of the above-listed policies (*e.g.*, existing physical and mental qualification standards) are reviewed at least once in the three year period covered by the agency's multi-year affirmative action plan.

opportunities of any work force group~~minorities, women, or people with disabilities.~~ ~~An artificial barrier will arise where an agency practice unnecessarily restricts opportunities for a particular work force group or groups.~~ Sometimes these practices will be discriminatory, or unlawful under other statutes. Sometimes they will simply represent missed opportunities for an agency to open employment opportunities to a wider group of qualified individuals. Agencies should address both types of practices.

1. Title VII and the Rehabilitation Act

a. Facial discrimination

In some cases, agencies may have policies that explicitly limit the participation of particular work force groups. Based on concerns about safety, for example, agencies may refuse to hire people with epilepsy for jobs handling heavy machinery, or to hire drivers who have insulin-dependent diabetes. An agency might, alternatively, seek to exclude pregnant women from jobs that the agency perceives to be dangerous.

~~Even if these policies are based on legitimate safety concerns, they will typically be unlawful.~~ An agency may exclude individuals based on sex only in the very limited cases in which gender is a bona fide occupational qualification for the job.[13] Moreover, ~~Under~~ the Rehabilitation Act requires an individualized assessment of whether applicants with particular disabilities ~~moreover, agencies must evaluate each applicant to assess whether (s)he~~ poses a direct threat -- that is, a significant, current risk of substantial harm to themselves ~~himself/herself~~ or others that cannot be eliminated by reasonable accommodation.[14] This showing requires objective evidence; agencies may not make assumptions ~~assume~~ that people with certain impairments are unable to safely perform particular jobs.

b. Other disparate treatment

Artificial barriers will also exist where there is evidence of bias or other disparate treatment in particular selection decisions. Such disparate treatment need not be malicious or borne of animosity toward a particular work force group; nor is it typically revealed in explicit, "smoking gun" documents. In fact, disparate treatment may sometimes result simply from stereotypes about what particular groups can, or will be willing to, do or from decisions that favor those who are most like the decision makers. Thus, agencies must be vigilant to detect any assumptions about particular groups that underlie employment decision making.

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13 *See* 42 U.S.C. § 2000e-2(e)(1). The BFOQ defense is an extremely narrow one. *See International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). In addition, it can never be used to defend race-based distinctions.

14 *See* 29 C.F.R. part 1630 app. 1630.2(r) (addressing direct threat standards).

c. Facially neutral policies

Even facially neutral policies may be artificial barriers. For example, a facially neutral standard may exclude individuals with disabilities if it describes *how* a job function is to be performed rather than stating simply the outcome that is to be achieved. A change to a new technology system may similarly disadvantage employees with disabilities. Moreover, some facially neutral selection criteria -- like educational credentials or physical fitness requirements -- are likely to disproportionately exclude particular minority groups or women.

It is unlawful to use a selection criterion or policy that disproportionately excludes members of any work force group ~~minorities, women, or people with disabilities~~ -- or even a single individual with a disability -- unless the criterion or policy is job-related and consistent with business necessity. Thus, agencies must ensure a match between their selection criteria and the jobs for which those criteria are used. Even if the agency can demonstrate that a criterion or policy is job-related and consistent with business necessity, moreover, it should investigate whether there are less discriminatory alternatives available. In addition, under the Rehabilitation Act, agencies must consider whether an individual with a disability who has been excluded by a criterion or policy could meet it with a reasonable accommodation.[15]

Artificial barriers may also arise if neutral procurement policies create impediments to prompt delivery of effective reasonable accommodations. Where agency policy requires multiple approvals or substantial paperwork to purchase new equipment, for example, that policy should be modified to permit expeditious response where reasonable accommodations that involve new equipment have been requested.

d. Barriers based on perceptions

Exclusionary barriers can also arise from the *perceptions* of employees or applicants. If members of a work force group ~~minorities, women, or people with disabilities~~ believe that selection processes are biased against them, they may be unwilling to apply for employment opportunities with an agency, even if there is no actual bias in the agency's employment practices. Where, for example, there are few Hispanic employees among top management of an agency, Hispanics may believe that it is futile to apply for promotions -- even if the agency uses neutral criteria to make promotion decisions and would in fact welcome additional applications from Hispanic employees.

Agencies must address situations that create a climate of mistrust within the agency. In particular, agencies should ensure that all ~~first-line~~ supervisors get adequate training in affirmative employment principles and responsibilities, and that the agency's commitment to EEO principles in all employment decisions is adequately communicated.

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15 *See* 29 C.F.R. pt. 1630 app. § 1630.10 (1998).

2. Rehabilitation Act

Under the Rehabilitation Act, agencies must also ensure that they meet the following standards.

a. Information technology and equipment

Agencies must provide to federal employees with disabilities access to information and data that is comparable to the access provided to federal employees without disabilities.[16] To meet this standard, agencies must ~~should~~ regularly evaluate the accessibility of their electronic and information technology ~~systems~~.[17]

Final standards for evaluating accessibility are to be published by the Architectural and Transportation Barriers Compliance Board by early in the year 2000, and incorporated into agency procurement policies by August of that year; proposed standards are to be issued in September 1999. ~~In the interim, agencies should apply the *Requirements for Accessible Software Design* published by the Department of Education,[18] and should make efforts to use, develop, and procure accessible systems.~~ Absent a showing of undue burden, agencies will be required to make efforts to use, develop, and procure electronic and information technology that is accessible as defined in these standards; ~~such efforts will be required once final standards have been adopted;~~ even if agencies can demonstrate that undue burden will result from making technology ~~systems~~ accessible, moreover, they will be required to provide alternative means of access to the information disseminated through inaccessible technology.

~~Agencies should also review procedures governing approval and purchase of information technology to identify any practices that might interfere with the provision of a reasonable~~

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16 Rehabilitation Act, Section 508, 29 U.S.C. § 794d, *as amended by* Pub. L. No. 105-220, 112 Stat. 1203 (1998). National security systems, as defined in the Clinger-Cohen Act, 40 U.S.C. § 1452, are exempt from these requirements. 29 U.S.C. § 794d(a)(5).

17 Under Section 508, each agency is to evaluate the accessibility of its electronic and information technology every two years and submit the results of that self-evaluation to the Attorney General of the United States. The Attorney General is to make the first report on the federal government's use of electronic and information technology by February 7, 2000, and is to report biannually to the President and Congress thereafter. ~~An initial report on accessibility was to have been completed by each agency, and submitted to the Attorney General of the United States, by February 7, 1999. *See* Section 508(c). This section of the EEOC's Directive anticipates that agencies will continue to conduct regular and systematic evaluations of accessibility and will respond where problems are found.~~

18 ~~A copy of the *Requirements* is attached as Appendix __.~~

~~accommodation in a particular case. Such practices should be modified in advance to ensure that reasonable accommodation requests can be addressed promptly.~~

b. Physical facilities

Agencies must regularly evaluate the accessibility of their physical facilities for individuals with disabilities. Agencies should have in place, and should publicize to employees and applicants, procedures for the identification of facilities that might create architectural, transportation, and/or communications barriers. Although the agency's obligation to review its facilities is not contingent on receipt of particular requests for reasonable accommodation, its reasonable accommodation procedures should include instructions on the ways in which individuals may request modifications in particular facilities. See Section __ *infra.*

In general, agencies should evaluate whether their facilities meet the requirements of Section502 of the Rehabilitation Act, which requires newly constructed Federal facilities, and altered portions of existing facilities, to comply with the Architectural Barriers Act of 1968.[19] The Rehabilitation Act also requires agencies to ensure that Federal programs sited in existing facilities are accessible to people with disabilities. ~~If facilities do not meet these standards, agencies should develop plans to bring them into compliance on a timely basis.~~

IV. OPENING EMPLOYMENT OPPORTUNITIES

The work force analyses and ~~subsequent~~ investigations of agency practices should enable agencies to identify and modify practices that are artificial barriers. But fixing identified barriers may be insufficient to create full equality of employment opportunity. In some cases, there may be no identifiable agency practice that is responsible for an ~~the~~ observed imbalance. In other cases, there may be a discernible reason for an ~~the~~ imbalances -- but it may not be a discriminatory or exclusionary policy. In still other situations, fully remedying an ~~the~~ identified barrier may require the agency to take follow-up steps, such as recruitment or training. Agencies are required to take additional action as appropriate to respond to the results of their investigations. Additionally, and regardless of the results of their work force analyses, agencies must ~~will need to~~ create reasonable accommodation procedures to ~~help~~ enable employees with disabilities to take full advantage of employment opportunities in the work force.

There are numerous ways that agencies can address the findings of their investigations. Among the steps that agencies should consider ~~take to respond in such situations~~ are the following: engaging in targeted outreach and recruitment to ensure that sources for candidates

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[19] 42 U.S.C. § 4151 *et seq.* If more stringent standards would govern accessibility of particular facilities under the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, agencies should consider adhering to those standards. For technical assistance in this area, agencies may contact the Architectural and Transportation Barriers Compliance Board.

who are minorities, women, and people with disabilities are not overlooked; providing enhanced training opportunities to help employees to advance to higher grades; considering new ways to tap employee skills and talents; setting goals for employment of people with targeted disabilities; and establishing procedures to improve the functioning of the work place for employees with disabilities.

None of the steps listed above is governed by strict scrutiny,[20] and none requires a finding that an agency has engaged in unlawful discrimination. An agency will be able to take [redacted] these actions if it believes, after completing the work force analyses and investigations required under this Directive, that additional steps are necessary to address problems that are found. Indeed, this Directive *requires* agencies to [redacted] engage in some of the actions discussed below.

Additional analysis *will* be necessary before agencies may take race, national origin, gender, or disability into account in particular selection decisions. The requirements of that analysis are separately addressed in Section V, *infra*.

A. Title VII and the Rehabilitation Act

Under both laws, agencies are expected to undertake recruitment, training, and other actions as necessary to respond to the results of their work force analyses and investigations. As to individuals with disabilities, moreover, agencies should pay particular attention in these activities to those individuals who face especially significant barriers to employment. People with the disabilities included on the EEOC's list of targeted disabilities are likely to encounter such barriers in jobs in every occupational category. People with other disabilities may also face pervasive barriers, particularly in specific jobs or job categories. In identifying those on whom their efforts should focus, therefore, agencies should consider the following.

1. How severe is the disability? Generally, the more severe the disability, the more likely it is to subject the individual to especially significant employment barriers.

2. Is the disability the subject of particularly high levels of stigma?

3. Is the disability visually apparent?

4. Is the individual eligible for an excepted appointment? Such appointments may be available for individuals who are mentally retarded or severely physically disabled, or who have experienced a significant period of mental illness. *See* Section __, *infra*.

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[20] *See* ~~*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) and~~ Section V(A), *infra*, for a discussion of the strict scrutiny standard.

5. What is the nature of the job? If, for example, people with insulin-dependent diabetes have traditionally been barred from police officer's jobs -- although they may be able to fully perform those jobs with or without reasonable accommodation -- agencies should make particular efforts to consider such individuals.

1. Recruitment

Both Section 717 and the Rehabilitation Act anticipate that agencies will make efforts to include minorities, women, and people with disabilities in their applicant pools.[21] Recruitment efforts do not guarantee jobs to particular groups or require that race, national origin, gender, or disability be taken into account in selection decisions. As a result, they do not restrict anyone's ability to participate in the application process; instead, they help to give minorities, women, and people with disabilities a fair opportunity to compete for vacancies. Such action is thus appropriate in numerous situations, including where: minorities, women, or people with disabilities are being hired at rates below their availability; agency applicant pools include insufficient numbers of these groups; the existence of artificial barriers has in the past deterred applications from diverse groups; or an agency has relied on internal candidates for promotions and has thereby perpetuated exclusion of particular groups from upper level jobs.

Agencies should establish and maintain continuing contact with the following types of entities, among others and as appropriate to the particular job for which they are recruiting, in trying to expand the presence of minorities, women, and/or people with disabilities in their applicant pools:

1. media outlets, including Internet sites, directed at minority or female audiences and/or at people with disabilities;

2. Historically Black Colleges and Universities, the Hispanic Association of Colleges and Universities, and other schools that focus on, or specialize in training, minorities, women, or people with disabilities;

3. civil rights, ~~and~~ advocacy and/or relevant professional organizations;

4. other organizations of or established for the benefit of individuals with disabilities;

5. state employment security agencies;

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[21] Recruitment obligations are also imposed by the Federal Equal Opportunity Recruitment Program, which mandates that agencies conduct continuing programs of recruitment of minorities and women to eliminate underrepresentation of these groups in agency work forces. *See* 5 U.S.C. § 7201 and 5 C.F.R. Part 720 (1998). This program is administered by OPM.

6. state vocational rehabilitation agencies;

7. state education or social services agencies;

8. sheltered workshops;[22]

9. centers for independent living; and

10. disability coordinators at colleges and universities.

Agencies are also encouraged to engage in cooperative recruitment efforts with other agencies to maximize the use of limited resources and/or to compile pools of qualified applicants to which the agencies can refer whenever any of them has a vacancy to be filled.

To ensure effective outreach to and recruitment from these, or other, entities, agencies should engage in a broad range of activities. Among other possibilities, agencies should consider:

1. holding briefings or making other presentations to publicize the agency's commitment to opening employment opportunities for minorities, women, and people with disabilities;

2. disseminating vacancy announcements for particular jobs to, and participating in job fairs held by, schools or organizations that focus on minorities, women, or people with disabilities;

3. establishing internship, mentoring, or other training programs that are open to all individuals from such schools or organizations;

4. if feasible, maintaining files of all rejected applicants who were determined by the agency to be qualified for particular types of jobs and consulting these files when openings for these jobs become available;

5. if feasible, maintaining files of those recently terminated through reductions-in-force who might be interested in future job vacancies;

6. maintaining contact with appropriate social service agencies or organizations to obtain technical assistance and advice on hiring and accommodating people with disabilities;

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[22] However, contracts with sheltered workshops do not substitute for employment of qualified individuals with disabilities in an agency's own work force.

7. including minorities, women, and people with disabilities in agency advertising, as well as among employees who recruit on behalf of the agency;

8. undertaking community service and other projects that might be of interest to minorities, women, and/or people with disabilities; and

9. participating in cooperative efforts to resolve employment-related problems in the community, including needs for improved transportation, education, and childcare.

Additionally, agencies should consider steps to improve the skills of individuals who are not yet qualified for particular jobs and that can thereby expand the qualified labor pool. Agencies might, for example, participate in programs that expose high school students to the work of the agency; create partnership arrangements with a school that serves inner city residents or people with particular kinds of disabilities; or participate in career night and informational fairs for students. These types of efforts, while not targeting those who are currently capable of filling particular jobs, can help -- without reliance on race, national origin, gender, or disability -- to develop the capabilities of individuals who could in the future become contributing members of the federal work force.

2. Maximizing Employee Development

Agencies should also consider steps to promote the development and potential of all of their employees. Such steps might be warranted if, for example, certain groups are not well-represented at higher grade levels; there are insufficient training opportunities for employees to advance to higher grades; or disparities in promotion rates are the result of insufficient numbers of qualified minorities, women, or people with disabilities in the eligible pools.

Steps that agencies might take include, but are not limited to, the following.

1. Offering additional skill enhancement training programs to enable employees to reach higher grade levels.

2. Creating lists of skills possessed by employees to identify those that might help promote the agency mission in higher level jobs.

3. Sponsoring career enhancement internship programs to give employees specialized training and exposure.

4. Making participation in existing training programs mandatory.

5. Facilitating the formation of employee groups that work to improve employee communications skills.

6. Structuring details or assignments to expose employees to numerous occupations within the agency.

7. Considering whether there are incentives, including paying for training, that can be offered to encourage employees to enroll in outside training or continuing education classes.

8. Establishing mentoring programs to link employees at different grade levels.

9. Making career counseling services available to all employees.

10. Encouraging managers to promote the development of each of their employees through making new types of assignments, taking the time to teach and reinforce new skills, and engaging in collaborative work efforts, among other actions.

Agencies must ensure that qualified individuals with disabilities have adequate opportunities to participate in these professional development activities, that no artificial barriers limit their participation, and that reasonable accommodations are made where necessary. As consistent with applicable legal standards, moreover,[23] agencies may also consider establishing individual development plans for employees with disabilities, and particularly for employees with targeted disabilities, who wish to progress to higher grade levels. Such plans might identify the positions for which the employee would like to be trained, the skills or knowledge that the employee would need to develop in order to attain the positions, and the means and schedule by which the employee could gain such skills and knowledge. To the extent that such plans contain disability-related information, they should be kept confidential in accordance with this Directive.

3. Exploring New Policies

Agencies should also consider whether there are other ways that they can tap the skills and talents of all of their employees. Agencies might consider, for example:

1. Redefining selection criteria to give credit to applicants for overcoming social, economic, or [redacted] ~~physical~~ disadvantage.

2. Consistent with the needs of the agency, redesigning job criteria, or restructuring job functions, to open jobs to individuals with diverse abilities.

3. Implementing alternative dispute resolution mechanisms and training supervisors and employees in conflict resolution to promote a climate of trust and openness.

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[23] *See* Section __, *infra*.

8. Creating means to more clearly communicate to employees the expectations of their supervisors and the skills necessary to advance to higher level jobs.

B. Rehabilitation Act

In addition to the efforts listed above, agencies are expected to undertake the following activities specifically for individuals with disabilities.

1. Set Goals for Employment of Individuals with Targeted Disabilities

Agencies with 1,001 or more employees must set numerical goals for the employment of individuals with the targeted disabilities set forth on the EEOC's list. For this purpose, all such targeted disabilities may be considered as a group; further, the goals may address hiring, placement, and/or advancement of individuals with such disabilities as is most relevant and useful for the particular agency. ~~These goals will help agencies to measure how far they have come – and how far they need to go – in equalizing employment opportunities for individuals with targeted disabilities.~~

The EEOC has previously estimated that individuals with targeted disabilities comprise 5.95% of the available labor pool for federal jobs. That estimate is based on outdated data, may well understate the current availability of such individuals, and should not currently be used as the benchmark for evaluating an agency's representation of people with targeted disabilities. Indeed, because there is currently no reliable estimate ~~of the absence of reliable~~ ~~data~~ of the availability of individuals with targeted disabilities in the labor force at large, agencies will not be able to set goals for their own employment of such individuals with precision.

Agencies must, however, bear in mind that the current federal representation of individuals with targeted disabilities – 1.16% of the federal work force in Fiscal Year 1997 – is far below any conceivable estimate that could be reliably derived of the availability of individuals with these disabilities. That level of representation thus falls far short of providing the "adequate" employment opportunities for people with disabilities required by the Rehabilitation Act. As a result, all agencies must make serious and sustained efforts to improve their representation of people with disabilities, and must set goals that reflect a good faith estimate of the representation that should result when those efforts are made consistently.

The EEOC is available to provide technical assistance on appropriate goals for individual agencies, and will be monitoring the goals that are set to ensure that they reflect a sufficient commitment on the part of each agency to increase its representation of people with disabilities. In addition, the EEOC anticipates that data will soon be available to provide a more accurate measure of the availability of people with disabilities in the work force at large. The EEOC will issue updated guidance once such data are available, and will measure the adequacy of each agency's efforts against that data at that time.

~~Nonetheless, if setting goals for their work forces as a whole, agencies may want to consider the EEOC's estimate that individuals with these disabilities comprise approximately 6% of the available labor pool and take steps to move toward that level of utilization. If setting goals for the placement or advancement of individuals with disabilities in particular jobs or pay grades, agencies should bear in mind the results of their other work force analyses. If, for example, an agency's distribution of individuals with targeted disabilities across pay grades substantially differs from the distribution of agency employees across those pay grades generally, agencies might set as a goal taking steps to reduce that gap.~~

These goals will help agencies measure how far they have come -- and how far they need to go -- in equalizing employment opportunities for individuals with targeted disabilities. They thus serve as a yardstick to evaluate the effectiveness of an agency's affirmative action efforts. Agencies may be able to meet their ~~these~~ goals through numerous means -- including, for example, the elimination of artificial barriers, the adoption of enhanced procedures relating to reasonable accommodation, the expansion of part-time employment opportunities or opportunities for telecommuting, or a redoubled focus on recruitment. Agencies are encouraged to pursue the combination of these, or other activities, that will best serve their work forces and most effectively expand employment opportunities. If agencies wish to take disability into account in a selection decision, they should consult Section V(B), *infra*. ~~Goals do not require that agencies take disability into account in selection decisions. Where agencies do take disability into account in selections, moreover, they may hire and promote only individuals with disabilities who are qualified to perform the job at issue.~~

2. Improve the Functioning of the Work Place for All Employees with Disabilities

Agencies must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability.[24] Unless the agency can show that accommodation would impose undue hardship on the operation of its programs, a failure to provide one will violate a core non-discrimination provision of the Rehabilitation Act.

As a matter of affirmative action, agencies must do more than simply respond to requests for reasonable accommodation and comply with the minimum necessary to meet their non-discrimination obligations. In the first instance, agencies should respond to requests for reasonable accommodation in ways that will maximize employment opportunities for people with disabilities. Agencies should, for example, consider providing accommodations that would enable individuals with disabilities to be contributing members of the work force even in circumstances in which an undue hardship defense might, as a legal matter, be available.

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[24] *See* 42 U.S.C. § 12112(b)(5); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (3/1/99) (hereinafter "EEOC Reasonable Accommodation Guidance").

Additionally, agencies are required ~~expected~~ to take other proactive steps to improve their ability to respond to the needs of employees and applicants with disabilities. Regardless of the results of their work force analyses, agencies must institute procedures for responding to requests for reasonable accommodation. Agencies must also consider the additional steps listed here and implement those – as well as others that they may devise – that are ~~do at least the following, and should take additional steps~~ appropriate to their particular situations.

a. ~~Institute Procedures for Responding to Requests for~~ Reasonable Accommodation Procedures

Agencies must be prepared in advance to respond effectively and efficiently to requests for reasonable accommodation. Accordingly, agencies must establish and publicize written procedures that will govern their handling of reasonable accommodation requests.

The procedures should permit flexibility in processing each request for reasonable accommodation. They should be easy to understand; impose as few burdens as possible on employees or applicants with disabilities; allow for expedited consideration and a streamlined process, where appropriate ~~procedures~~; and provide for meaningful dialogue between the employee and his/her supervisor. Agencies should consult individuals with disabilities in formulating their procedures.

The agency's procedures should do at least the following:

1. **Define the agency's legal obligations, including key legal terms (*e.g.*, reasonable accommodation, disability, qualified individual with a disability, and undue hardship) in plain language.** Agencies should also include references to applicable statutes, regulations, and other guidance.

2. **Explain how an employee or applicant should initiate a request for reasonable accommodation.** An agency must always consider oral requests for reasonable accommodation promptly. For tracking purposes, an agency may make a written record of the request.

3. **Specify to whom a request should be submitted, from whom an individual will receive a final decision, and the time period in which decisions will be made.** The procedures should explain the role of each office or agency official who will be involved in the decision making on a request. The procedures should eliminate unnecessary levels of review and permit first-line supervisors flexibility in authorizing accommodations. Time limits for decision making should be as short as reasonably possible, and any delays should be explained to the individual.

4. **Explain restrictions on obtaining and handling medical and disability-related information.** The procedures should address the limited circumstances in which

the agency may request supplemental medical information; the types of documentation an individual might provide in response to such a request; and the agency's responsibility to keep all information related to the individual's request for reasonable accommodation confidential.

5. **Compile a list of the resources, including sources for technical assistance, available to provide information about, and fund, accommodations.** The procedures should identify assistance that can be provided both by the agency and by other entities, including the Job Accommodation Network.

6. **Set forth the requirement that the agency consider reassignment in appropriate cases.** The procedures should also describe the means of identifying available vacancies and the decision making process to be followed when the agency considers reassignment.

7. **Require that decisions on reasonable accommodation, including on requests for particular accommodations, be in writing and specify the reasons for denial, if applicable.** These decisions should be written in plain language. Where an accommodation is provided, the written summary need not detail the reasons the accommodation was granted.

8. **Create a flexible and informal process for reconsidering denials of reasonable accommodation.** Agencies should specify how individuals can, on an expedited and informal basis, obtain review of denials of requests for reasonable accommodation. This process is to be separate from, and will not affect, the agency's EEO complaint process.

Agencies should also create record keeping systems for tracking responses to requests for reasonable accommodation. These systems should limit paperwork requirements to the extent possible but should permit agencies to assess their performance in providing reasonable accommodations. The systems should enable agencies to evaluate, among other things, the types of jobs for which accommodations have been requested; the disposition of those requests; the specific accommodations that were granted or denied; and any technical assistance that was obtained in responding to the request.

The EEOC is available to provide technical assistance on the drafting and implementation of these reasonable accommodation procedures as well as on the handling of specific accommodation requests.

b. ~~Consider~~ Practices to Facilitate Providing Reasonable Accommodations

Agencies should consider implementing practices that will facilitate the agency's ability to consider and grant requests for reasonable accommodation. Among such practices are:

- establishing a central pool of staff assistant slots, that would not be included in the existing ~~any individual~~ office's personnel ceiling, to provide readers, interpreters, and other assistants throughout the agency or agency component;

- implementing funding mechanisms that will avoid charging individual offices for the cost of accommodations; and

- creating central offices that can, among other services, demonstrate and evaluate equipment and assistive devices; expeditiously purchase equipment needed for reasonable accommodation; provide technical assistance and referrals for information on reasonable accommodations; coordinate training on reasonable accommodations and other non-discrimination obligations; and expeditiously prepare agency printed and audiovisual materials in alternative formats on request. Where an agency lacks the resources to create such offices, it should consider working with other agencies – such as the Department of Defense or the Department of Agriculture's Target Center – that have established programs to provide these types of assistance.

c. ~~Plan to~~ Initiating the Reasonable Accommodation Process in Certain Circumstances

In general, an individual with a disability must request a reasonable accommodation. Nonetheless, there are circumstances in which, for affirmative action purposes, an agency should consider initiating the reasonable accommodation process even absent a request from the individual with a disability – and even in cases in which the disability does not prevent the individual from asking for the accommodation.[25] Specifically, if an employee with a known disability is having significant difficulty performing his or her job, and it is reasonable to conclude that the performance problem may stem from the employee's known disability, it is appropriate for the agency to ~~should~~ notify the employee of the performance problem and inquire whether the problem is related to the employee's disability. If the employee indicates that the performance problem is in fact disability-related, the agency must inquire whether the employee needs a reasonable accommodation to help improve his or her performance.

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[25] If the agency knows or should know that an individual's disability prevents him/her from requesting a reasonable accommodation, the agency must initiate the reasonable accommodation interactive process as a matter of non-discrimination. *See* EEOC Reasonable Accommodation Guidance at p. 51.

To ensure that its inquiries are narrowly focused, an agency should:

- have prior knowledge that an individual has a disability as defined by the Rehabilitation Act; this section does not authorize new disability-related inquiries of employees.

- make the inquiry only where an employee's performance problems are significant.

- have reason to believe, based on objective evidence, that the performance problem results from the disability.

- ask about the need for a reasonable accommodation only after it has confirmed with the individual that the performance problem is in fact related to the disability.

d. ~~Consider~~ Additional Actions to Meet the Needs of Individuals with Disabilities

Certain actions are not typically required as reasonable accommodations under the non-discrimination provisions of the Rehabilitation Act.[26] Nonetheless, to meet their affirmative action responsibilities, agencies should ~~must~~ consider whether to ~~they should~~ take additional voluntary actions to meet the needs of employees with disabilities, such as:

1. authorizing agency-wide Flexiplace or other work-at-home arrangements, and expanding agency part-time work opportunities, to promote maximum flexibility for individuals with disabilities;

2. providing transportation-related services, including parking arrangements or accessible vans to transport individuals with disabilities to and from work, even where transportation services are not available to employees generally;

3. providing personal assistants, who could help individuals with disabilities with daily functions such as eating and toileting;

4. creating a new job for an individual with a disability where the agency cannot reallocate the functions of an existing job that that individual cannot perform because of his/her disability or where reassignment to a vacant position is not possible or required;

5. reallocating essential job functions;

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[26] *See* 29 C.F.R. pt. 1630 app. § 1630.9 (1998); EEOC Reasonable Accommodation Guidance at pp. 4-5.

6. providing an individual with a disability with the accommodation of his or her choice, or with the accommodation that is most effective, even though the agency could meet its non-discrimination obligations by providing another effective, but less expensive, accommodation.

V. TAKING RACE, NATIONAL ORIGIN, GENDER, OR DISABILITY INTO ACCOUNT IN SELECTION DECISIONS

Constitutional standards must be considered where agencies take race, national origin, gender, or disability into account in selection decisions. The applicable constitutional standards for programs for minorities and women differ, however, from those applicable to programs for people with disabilities. The relevant analyses ~~under Title VII and the Rehabilitation Act~~ are addressed separately here.

Under both Title VII and the Rehabilitation Act, the groundwork laid under this Directive will be sufficient to justify each of the steps described in the preceding sections; no additional justification for such actions is necessary. The requirements of this section, therefore, apply only to selection decisions that take race, national origin, gender, or disability into account.

A. Title VII

~~Under the United States Constitution,~~ Agencies may take race, national origin, or gender into account in selection decisions only if they can satisfy strict scrutiny – that is, only if their programs are narrowly tailored to serve a compelling government interest.[27] This means that an agency may make selection decisions that take race, national origin, or gender into account **only** if the agency has reason to believe that discrimination, or the effects of discrimination, are at work, or if the agency's operations require a certain level of minority or female representation that has not been reached by race-neutral means.

1. Compelling Interest

This Directive does not require that agencies take race, national origin, or gender into account in selection decisions. Agencies must ensure that all decisions to consider such factors

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[27] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). As a matter of law, strict scrutiny standards apply only to decisions that take race and national origin into account. Gender-based decisions must be supported by an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 532 (1996). Nonetheless, agencies should, as a practical matter, follow the analysis applied to decision making based on race and national origin to ensure that any decisions in which gender plays a role meet applicable legal requirements. As a result, the text treats gender-based decisions in the same way as decisions based on race or national origin.

are adequately justified under applicable law.[28] Nonetheless, where significant exclusion of minorities and women persists in specific jobs despite elimination of barriers, recruitment, or other neutral actions to open employment opportunities ~~agency compliance with the foregoing sections of this Directive~~, agencies may consider taking race, national origin, or gender into account in selection decisions as the final step in the continuum of their corrective actions. This is because a statistically significant disparity between the level of minority or female participation in a job and the percentage of qualified minorities or women in the relevant labor pool is evidence that discrimination may be the reason for the difference. Under such circumstances, the agency has a sufficient basis for taking race, national origin, or gender into account in selection decisions.

The results of the work force analyses required by this Directive are the starting point for any inquiry into whether an agency can satisfy the strict scrutiny standard. But these work force analyses are designed as an "early warning" diagnostic tool, not as a means to actually determine whether discrimination exists. Thus, agencies should not assume that the results of their work force analyses will alone justify taking race, national origin, or gender into account. Agencies must consider at least the following additional questions.

a. Do the jobs at issue require special skills or qualifications?

In order to determine whether a sufficient disparity exists to justify taking race, national origin, or gender into account, agencies must first identify the relevant labor pool -- that is, the group of people who are qualified to perform the jobs at issue. The nature of the particular jobs ~~at issue~~ will determine who is qualified to perform them.

Because those performing other jobs may in some cases be qualified to perform the particular jobs at issue, the relevant labor pool should not automatically be limited to those currently employed in precisely the occupations under consideration. In identifying the jobs that should be included in the relevant labor pool, agencies should apply the following:

- The relevant CLF ATCOB category will be the applicable labor pool if the jobs at issue are in the ATCOB categories and do not require special skills or qualifications, such as positions in training programs and most entry level jobs. ~~positions in training programs; or jobs that do not require special skills or qualifications.~~ A job also does not require special skills where the skill involved is one that most people have or can readily acquire.

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[28] Agencies should consult the "Memorandum to General Counsels from John Schmidt, addressing *Post-Adarand Guidance on Affirmative Action in Federal Employment*" (Department of Justice, February 29, 1996), for guidance.

- The Professional category of jobs should not be used as the relevant labor pool for individual professional jobs. For entry level professional jobs, agencies should use the comparable occupational title(s) in the CLF as the relevant labor pool.

For upper level jobs in any occupational category, agencies should refine their broad CLF comparisons. For example, agencies should use comparable occupational titles, and not more general occupational categories, in assessing availability for upper level jobs. Where training, education, or experience are truly necessary for effective job performance, agencies should also assess whether other refinements are possible. Additional sources of data that may help to identify the qualified labor pool for upper level jobs include the following:

- **~~Civilian~~ Central Personnel Data File**: These data include the educational levels, tenure, grade levels, and salaries of current federal employees. They may be useful in identifying the pool of federal employees who meet the valid requirements set for upper level jobs if a job is to be filled within the government. Agencies should bear in mind that decisions not to recruit externally may operate as artificial barriers in certain circumstances and should review such decisions if there is evidence that they are having this effect.

- **Applicant flow data**: Applicant flow data can be used to measure the representation of each work force group among the pool of candidates who meet the minimum qualifications for each job. If, however, those data show that the representation of a particular work force group is significantly lower than the representation of that group in the comparable CLF occupation, the applicant pool may not be truly representative of the available and qualified labor force. In such cases, agencies should evaluate their recruitment and hiring practices to determine if any have a chilling effect on particular groups of applicants.

b. What is the relevant recruitment area for the jobs at issue?

After identifying the applicable labor pool, agencies must identify the areas of the country in which they should measure the availability of that qualified group. This will depend on the geographic areas in which the agency recruits for the jobs at issue. This information may be available in the agency's affirmative employment plans, particularly at the regional level. Agencies should also ask the following questions, among others:

1. Are the types of jobs at issue advertised in national publications? Are job announcements placed on the Internet?

2. Over time, have applications for the types of jobs at issue been submitted from across the country?

3. Has the agency considered recruiting nationally for jobs that have in the past been recruited locally?

4. Are there openings for the types of jobs at issue in numerous agency offices or installations?

In many cases, and particularly for professional or upper level jobs, the recruitment area is likely to be nationwide. In such circumstances, agencies should use national representation in the applicable CLF occupational category as the appropriate ~~comparator~~ pool for comparison purposes. In cases in which agencies reasonably expect to recruit in a smaller area, they should use the narrower CLF data, reflecting availability state-wide, for a region, or for a standard metropolitan statistical area, that are most relevant for the particular jobs.

c. What is the extent of the disparity?

The next step is to determine whether there is a large enough disparity between the representation of a work force group in the federal jobs at issue and in the relevant labor ~~appropriate comparator~~ pool.

As an initial matter, agencies may consider the following questions to evaluate which (if any) of the work force imbalances they have found may be sufficiently significant to justify taking race, national origin, or gender into account.

1. How large is the disparity? The larger the disparity in percentage terms, the more likely it is to be significant.

2. How many jobs are affected? Generally, the larger the number of jobs at issue, the lower the percentage threshold for finding that disparities in representation are significant.

3. How long has the disparity existed? As a general rule, the longer the disparity has persisted, the more likely it is to show a history of discrimination.

4. Is there other evidence of discrimination in the jobs at issue? Disparities may more readily be treated as significant if there is also non-statistical evidence of discrimination.

In most cases, agencies should then use statistical tests to measure the significance of work force imbalances. Consistent with applicable case law, the Department of Justice has stated that, absent an adequate non-discriminatory explanation, a disparity of more than two or three standard deviations between these numbers will be sufficient to show a compelling need ~~justify decisions~~ to take race, national origin, or gender into account. Computer software that calculates standard deviations is widely available; EEOC can also assist agencies on request in assessing whether this standard is satisfied. Where sample sizes are small, agencies should consult agency statisticians or the Department of Justice about other statistical tests that can be used.

d. Is there other evidence of discrimination or of an operational need for diversity?

All evidence of problems of discrimination in the work force -- and not simply statistical evidence -- should be considered in assessing whether there is a need to take race, national origin, or gender into account as a remedial tool. Thus, agencies should include the results of all of their work force analyses -- including the results of EEO administrative complaints and lawsuits, as well as other reports of possible discrimination -- in evaluating the need for this type of decision making.

In addition, agencies should consider whether they have an operational need for diversity that is not now being met -- that is, a need for a certain level of representation of minorities and women in particular jobs. Agencies may have such a need, for example, in law enforcement positions, for jobs in EEO offices, or for employees of community relations offices who are called upon to quiet racial tensions in troubled neighborhoods. ~~or for jobs whose occupants address issues of particular concern to minorities or minority communities.~~ Where it exists, an operational need to take race, national origin, or gender into account does not depend on a showing that there is or has been discrimination in the agency's operations. An agency should instead compare ~~It thus can be implemented -- if warranted -- by comparing~~ the level of representation of the particular work force group in the job at issue ~~work force~~ to the level of representation the agency has determined is necessary to satisfy the operational need.

2. Narrow Tailoring

If an agency has a compelling reason to take ~~basis for taking~~ race, national origin, ~~and~~ or gender into account, it must also ensure that its mechanisms for doing so are narrowly tailored. The specific considerations for narrow tailoring will vary depending on the nature of an agency's program. Agencies should keep the following in mind:

1. The agency should consider ~~race~~-neutral alternatives that are available to all employees before taking race, national origin, or gender into account.

2. The agency should not make race, national origin, or gender the sole or dominant factor in a selection.

3. Any numerical goals should be reasonable, based on the availability of qualified individuals in the relevant geographic area.

4. The agency's program should not impose excessive burdens on non-targeted groups.

5. The agency's program should extend only to those groups for whom a compelling interest can be shown. ~~there is a need for race-based decision making.~~

6. The agency's program should be temporary. The program should be reviewed regularly and should last only as long as is necessary to accomplish the agency's legitimate goals.

B. Rehabilitation Act

The strict scrutiny standard does not apply to agency selection decisions that take disability into account. Instead, such decisions are judged under the "rational relationship" test of the Constitution. Under that test, agencies need show only that there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose." Indeed, disability-based distinctions will be lawful if there is "any reasonably conceivable state of facts" that could provide a rational basis for the classification.[29]

As a result, agencies need not undertake the more extensive analysis laid out above for decisions which take race, national origin, or gender into account. Congress and the President have both recognized that individuals with disabilities have long been excluded from employment opportunities in both the public and the private sectors, and have exhorted agencies to take affirmative action to increase the representation of people with disabilities in the federal work force.[30] Agencies may consider this history of exclusion, as well as these legal mandates, in evaluating whether there is a basis for taking disability into account in selection decisions. Agencies may also consider whether they have met their goals for employment of people with disabilities, and whether their work force analyses have shown an underselection of individuals with disabilities for particular employment opportunities that has not been corrected by other means.

The legitimacy of an agency's decision to consider disability in a selection decision must always be assessed with regard to the specific job that the agency seeks to fill or the particular program that it wishes to implement. In particular, agencies must always ensure that individuals

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[29] *Heller v. Doe*, 509 U.S. 312, 320 (1993).

[30] *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. § 791 (requiring federal agency affirmative action plans for individuals with disabilities); Americans with Disabilities Act, 42 U.S.C. § 12101(a)(2), (3) (noting that disability discrimination is a "serious and pervasive social problem"); Executive Order 13078, Sections 1(c), 2(a) (March 13, 1998) (urging a "coordinated and aggressive national policy" to improve employment for people with disabilities); *Recharting the Course: First Report of the Presidential Task Force on Employment of Adults with Disabilities* (November 15, 1998) at p. 8 (aggressive efforts necessary to bring people with disabilities into government positions).

selected for each employment opportunity are qualified to perform the essential functions of the job. Assuming that an agency can meet these standards, the following are some of the means it might consider to improve employment opportunities for people with disabilities.

1. Excepted appointing authorities

Individuals with specified categories of disabilities may be eligible for excepted appointment under authorities administered by the Office of Personnel Management. These authorities, which exempt eligible individuals from the competitive appointment process, currently include Section 213.3102(t) of Schedule A for employment of individuals who are mentally retarded, Section 213.3102(u) of Schedule A for employment of individuals with severe physical disabilities, and Section 213.3202(k) of Schedule B for employment of persons who have experienced a significant period of substantially disrupted employment due to mental illness. *See* 5 C.F.R. §§ 213.3102(t), (u); 213.3202(k) (1998); *see also* 5 C.F.R. §213.3102(ll) (1998) (authorizing excepted appointments for readers, interpreters, and personal assistants for people with disabilities).[31] In general, these authorities are intended to help agencies consider applicants with disabilities who are qualified to perform the jobs at issue.

Agencies must ensure that management and personnel officials are fully informed about the availability and scope of, and procedures for, use of excepted appointing authorities. When employment opportunities arise, agencies should encourage applications from individuals who might be eligible for employment under such authorities.[32] For example, agencies should include in their vacancy announcements a statement that they will consider individuals who are eligible for excepted appointment and should list the appointment authorities. Moreover, agencies are to

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[31] Special appointing authorities and hiring preferences are also available for certain categories of disabled veterans. *See, e.g.*, 5 U.S.C. § 3309 (eligible disabled veterans who pass competitive service exam receive an extra 10 points); 5 U.S.C. § 3112 (agencies may make non-competitive appointments of disabled veterans with compensable service-connected disabilities of 30% or more); 38 U.S.C. § 4214(b), (c) (authorizing veterans readjustment appointments for certain veterans of the Vietnam war, and requiring affirmative action plans for disabled veterans covered by this section). Each of these authorities is enforced by OPM, and eligibility for the benefits conferred will depend on the terms of the particular statute.

[32] Toward this end, agencies are authorized to invite applicants to self-identify as individuals with disabilities covered by these excepted appointing authorities. Such invitations should include only those disabilities that might qualify individuals for excepted appointment, and should be extended to all applicants applying for a particular job -- not simply to those with visually apparent disabilities. Those involved in the selection process may be informed that an applicant may be eligible for an excepted appointment, but any disability-related information the agency obtains must otherwise be kept confidential. *See* 29 C.F.R. pt. 1630 app. §1630.14(b), (c) (1998).

establish mechanisms by which applications from these individuals will be forwarded to selecting officials for consideration along with applications from individuals listed on competitive certificates. Finally, agencies should ensure that managers and personnel officials are aware of the circumstances in which individuals with disabilities who have been hired under excepted appointing authorities may be converted to the competitive service without competitive examination.[33]

2. Promoting the selection of individuals with disabilities

In addition to using excepted appointing authorities, agencies should implement mechanisms to increase the employment of individuals with disabilities through competitive hiring authorities available to all applicants regardless of disability. Toward this end, and as permitted under the law, agencies may ~~also~~ design their own programs to facilitate the consideration or selection of individuals with disabilities for particular employment opportunities. Under appropriate circumstances, for example, agency managers ~~agencies~~ might be able to take ~~treat~~ the existence of a disability, and particularly of a targeted disability, into account in selecting among candidates who have applied under regular appointing authorities and are qualified for a particular job ~~as a "plus" factor in considering the application of an individual with a disability who is qualified to do the job~~.

As consistent with the law, moreover, agencies might consider additional means to encourage applications from qualified individuals with disabilities. Agencies might, for example, publicize their willingness to provide reasonable accommodations in the application process; devise and publicize alternative ways, in addition to the use of excepted appointing authorities, that applicants with disabilities can demonstrate their ability to perform the jobs for which they have applied; and/or select particular agency supervisors to serve as the contact point and liaison for applicants with disabilities. ~~decide, for example, to accept applications from such individuals after the closing date; accept applications from outside the area of consideration specified in the vacancy announcement; or waive criteria such as previous federal experience.~~ Agencies should publicize these expanded opportunities for individuals with disabilities through their vacancy announcements or in other ways designed to communicate effectively with those who might be eligible to participate. Agencies could consider, for example, including in their website special sections on hiring and employment opportunities for people with disabilities.

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[33] *See* 5 C.F.R. §§ 213.3102(t), (u); 315.709 (1998) (authorizing employees with severe physical disabilities and mental retardation to convert to competitive status after completion of two years of satisfactory service in their excepted positions). OPM is to promulgate additional regulations to provide the same opportunities to individuals who have experienced a significant disruption of their working lives as the result of mental illness. *See* Executive Order 13124, 64 Fed. Reg. 31103 (June 4, 1999) (directing OPM to issue regulations extending the same hiring rules that apply to individuals with severe physical disabilities or mental retardation to those with psychiatric disabilities).

Agencies are also encouraged to consider applicants with known disabilities, and particularly applicants known to have targeted disabilities, for vacant positions for which they may be qualified when they are not selected for the position for which they have originally applied. This Directive does not require that selecting or personnel ~~hiring~~ officials investigate whether their agencies have vacancies other than those for which a particular applicant has applied, and it remains the primary responsibility of the applicant to conduct his or her own job search. Nonetheless, if an agency's personnel or EEO office ~~selecting official~~ is aware of vacant jobs for which a particular applicant with a disability might be qualified, that office ~~(s)he~~ should notify the applicant of the vacancy and ask whether the applicant would like to be considered for it. If the applicant consents, the agency ~~selecting official~~ should provide the necessary information to ensure that the individual can submit an application for the open position. Such a practice simply expands the pool of applicants for the available vacancy, but can thereby help to maximize the employment opportunities available to individuals with disabilities.

VI. REPORTS TO THE EEOC

To enable agencies to focus on establishing and maintaining effective affirmative programs, this Directive limits paperwork and reporting burdens to the extent possible. Nonetheless, reports to the EEOC enable the EEOC to perform its oversight responsibilities and provide technical assistance to agencies. Record keeping obligations also offer agencies a means to internally evaluate their affirmative programs.

A. The Multi-Year Plan

1. Contents of the plan

Multi-year plans should cover three year periods. Each agency must prepare its initial multi-year plan for submission to the EEOC on dates specified in Appendix __; the plans must be reviewed and revised as necessary, and resubmitted every three years thereafter. Plans may be submitted in hard copy and/or electronically; those submitted electronically should be prepared in an accessible format, such as WAI-compliant HTML.

Agencies and reporting components with ~~more than~~ 500 or more employees must submit full-scale multi-year plans. Agencies and components with fewer than 500 employees may submit abbreviated multi-year plans. *See* Appendix __ for a list of the information that abbreviated plans must include. All references to "agencies" below include both agencies as a whole and those agency components that are required to file reports.

Full-scale multi-year plans must contain the following information:

1. **Certification that the plan is approved.** The plan must identify the agency, the head of the agency or reporting component, and the principal EEO official by name and title, and must include the signatures of these officials. The title page of the

plan must also provide the agency's or component's location and number of employees and state that the plan has been made available to all employees.

2. **Copies of the agency's EEO policy and accountability statement.** Agencies must also certify that the statement has been made available to all agency employees[redacted].

3. **Report on the qualifications of the agency's principal EEO official.** The report should specify the official's training and experience related to equal employment opportunity.

4. **Description of the agency's organization.** The reporting position of the EEO operation must be shown in the organizational chart. The agency must also identify the resources it has committed to its affirmative employment program.

5. **Results of the work force analyses.** Agencies must submit the data forms attached as appendices to this Directive, unless Section __ provides that the forms are for record keeping purposes only. Analyses should cover each of the most recent three fiscal years.

6. **Planned investigations.** Agencies must identify the policies and practices that they plan to review in the period covered by the multi-year plan. Agencies must also report any modifications that they have made to policies or practices as a result of their reviews in the immediately preceding fiscal year.

7. **Copies of the agency's reasonable accommodation procedures.** In their first multi-year plans, agencies must submit copies of their procedures for responding to requests for reasonable accommodation. Thereafter, agencies need submit these procedures to the EEOC only if they have been changed. Agencies should also describe how these procedures have been made available to employees and applicants.

8. **Planned corrective action.** Agencies must report on the actions they plan to take to open employment opportunities to minorities, women, and people with disabilities during the period covered by the multi-year plan. Agencies should report on activities such as outreach and targeted recruitment; enhanced training programs; and the use of excepted appointing authorities. Agencies must assign responsibility for the implementation of each such action and set specific target dates for its completion. Agencies must also report their goals for the employment of individuals with targeted disabilities.

2. Components that must prepare plans

Agencies and their components must prepare the following.

1. **Agency-wide plans.** Agency-wide plans are to cover the entire work force of the agency and must aggregate data from all subordinate units. Agency-wide plans must include all major operating components and field offices or installations. Agency-wide plans must be submitted to the EEOC's Office of Federal Operations in Washington, D.C.

2. **Major operating component (MOC) and military command plans.** These plans must cover all employees in the MOC or command nationwide and include data from all subordinate units. MOCs and military commands with 500 or more employees must submit full-scale plans to their headquarters offices. The EEOC will select a number of these plans for review and evaluation. *See* Appendix __ for a listing of MOCs and commands subject to this requirement.

3. **Regional office plans.** The plans of agency regional offices must cover all employees within the regional office's jurisdiction. Regional offices that supervise fewer than 500 employees should complete only the abbreviated plan required by this Directive for smaller agencies and should forward the results to their headquarters offices for inclusion in the agency-wide plan. Regional offices that supervise ~~more than~~ 500 or more employees must prepare and submit full-scale, region-wide multi-year plans to the appropriate EEOC District Office, as well as to their headquarters offices.

4. **Field installation plans.** In some agencies, there are individual installations that do not report to a regional office. They should do the following.

    a. Installations with fewer than 500 employees should prepare only abbreviated plans and forward the results to the appropriate reporting unit in the agency for inclusion in the unit's plan.

    b. Installations with between 500 and 999 employees should prepare full-scale multi-year plans and submit them to the appropriate regional or other reporting unit for inclusion in that unit's plan.

    c. Installations with 1000 or more employees must develop and submit full-scale multi-year plans to the appropriate EEOC District Office as well as to the regional or other reporting unit.

Agencies may contact the EEOC if they wish to discuss reporting arrangements that more closely conform to their organizational structures.

B. Annual Progress Reports

All agencies must submit annual progress reports to the EEOC. Full-scale progress reports must contain updates for the preceding fiscal year of all of the information reported in the multi-year plan, including work force analyses; the policies and practices that have been reviewed and the modifications that have been made; and the actions that have been taken to open employment opportunities for minorities, women, and people with disabilities. Full-scale plans must also contain reports on the investigations and corrective actions planned for the following year. Abbreviated progress reports -- to be filed by those agencies and components that prepared abbreviated multi-year plans -- are simply to update the work force analyses.

EEOC ENFORCEMENT AND OVERSIGHT

The EEOC enforces Section 717 of Title VII and Section 501 of the Rehabilitation Act. To fulfill its statutory responsibilities under these laws, the EEOC will do the following.

I. PROVIDE TECHNICAL ASSISTANCE

The EEOC is available to provide technical assistance to help agencies comply with affirmative employment requirements. The EEOC can provide assistance on, among other topics, preparing affirmative employment plans; conducting work force analyses; evaluating agency practices; preparing reasonable accommodation procedures; exploring corrective actions; and identifying specific reasonable accommodations. The EEOC can also refer agency officials to non-government sources for technical assistance.

Among other things, agencies should feel free to consult or contact the following for technical assistance:

1. EEOC's telephone information line, at (800) 669-EEOC;

2. EEOC's Office of Federal Operations, at (202) 663-4599;

3. EEOC's Website, at www.eeoc.gov, for, among other things, regulations and policy documents that explain an agency's non-discrimination obligations;

4. EEOC's Technical Assistance Manual, which explains non-discrimination obligations for people with disabilities, and provides extensive references for other sources of information;

5. the Job Accommodation Network, at (800) 526-7234, for information and advice on custom job and work site accommodations.

Requests for further information concerning this Directive may also be submitted to the:

Director
Affirmative Employment Programs Division
Office of Federal Operations
EEOC
1801 L Street, N.W.
Washington, D.C. 20507

II. EVALUATE AGENCY REPORTS

The EEOC will review each multi-year plan to evaluate the adequacy of the actions the agency plans to take to improve employment opportunities for minorities, women, and people with disabilities. The EEOC will not approve plans which do not contain the required work force analyses; which do not follow the requirements of this Directive with regard to review of agency policies and practices or the establishment of procedures to respond to requests for reasonable accommodation; or which do not identify specific actions to open employment opportunities in the agency's work force. If a multi-year plan is disapproved, the agency must respond in a timely manner to the EEOC's evaluation of the plan and make all revisions necessary to bring the plan into compliance with EEOC requirements.

The EEOC will also review agency annual progress reports to gauge the effectiveness of affirmative program efforts. Among other things, the EEOC will examine: evidence that the agency has made progress in taking its designated corrective actions; identification of new corrective actions; and the completeness and accuracy of all submitted information.

Where multi-year plans or progress reports show that an agency is giving insufficient attention to its affirmative employment obligations, the EEOC will apprise the appropriate Congressional committees.

III. CONDUCT ON-SITE EVALUATIONS

The EEOC will conduct on-site reviews as necessary to ensure that affirmative programs under both Title VII and the Rehabilitation Act comply with this Directive. These on-site reviews will focus on each of the elements of an agency's affirmative program as set forth in this Directive. The EEOC will communicate its findings to the agency and, where necessary, will conduct a follow-up review at a subsequent date.

IV. PREPARE ANNUAL REPORTS

The EEOC's annual report to the President and Congress will focus on individual agency performance in complying with the requirements of Title VII, the Rehabilitation Act, and this Directive. The report will examine agencies' utilization of minorities, women, and people with disabilities, and will evaluate the status of equal employment opportunity in the federal government.

CONCLUSION

This Directive sets forth some of the ways in which agencies can comply with their obligations, under both Title VII and the Rehabilitation Act, to improve employment opportunities for minorities, women, and people with disabilities. The requirements of this Directive are fully consistent with applicable law and serve important goals. These requirements will help agencies to uncover and respond to discrimination; they will also enable agencies to act proactively before discrimination has occurred. By helping agencies to recognize and remove artificial barriers; expand the representativeness of their applicant pools; and maximize the potential of all of their employees, moreover, these efforts will assist the government in making equal employment opportunity a reality. Agencies must promptly implement vigorous and effective affirmative programs in accordance with this Directive.

Ida L. Castro
Chairwoman
Equal Employment Opportunity Commission