

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 724

RIN 3206-AO26

### Elijah E. Cummings Federal Employee Anti-Discrimination Act of 2020

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing proposed regulations that would govern Federal antidiscrimination (including retaliation) and whistleblower protection. The proposed rule would implement statutory changes and amend the regulations to incorporate technical revisions and other changes relating to these subjects to make the rule more efficient and effective.

**DATES:** Comments must be received on or before February 7, 2022.

**ADDRESSES:** You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for sending comments.

**Instructions:** All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked “late,” and OPM is not required to consider them in formulating a final decision. Before acting on this proposal, OPM will consider and respond to all comments within the scope of the regulations that

we receive on or before the closing date for comments. Changes to this proposal may be made in light of the comments we receive.

**FOR FURTHER INFORMATION CONTACT:**

Timothy Curry by email at [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov) or by telephone at (202) 606-2930 (voice) and 711 (TTY).

**SUPPLEMENTARY INFORMATION:** The Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020 (Cummings Act) became law on January 1, 2021. The law amends the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (“No FEAR Act”), Public Law 107-174. In the No FEAR Act of 2002, Congress entrusted the President with the authority to promulgate rules to carry out Title II of the No FEAR Act and the President, in turn, delegated to OPM the authority to issue regulations to implement these provisions. The regulations at title 5, Code of Federal Regulations, part 724 carry out that authority and, as modified by the proposed rule, will assist agencies in carrying out, consistent with law, these No FEAR Act amendments. First, OPM proposes to rename the title of this part to state the current purpose and content of this part by removing “Implementation of,” which was appropriate for the initial regulations established in 2006. We also propose to amend the authority citation to add a reference to the Cummings Act.

The proposed regulations clarify procedures and add new requirements. In particular, they require an agency to: Provide notice, in an accessible format, of a finding of intentionally committed discriminatory (including retaliatory) <sup>1</sup> acts on the public internet website (linked directly from the home page) of the agency after all appeals have been exhausted; submit the annual report in an accessible, electronic format prescribed by the Director of OPM; submit a disciplinary action report, in an accessible, electronic format, to the Equal Employment Opportunity Commission (EEOC); establish, or leverage, a system to track each complaint of discrimination; and provide a notation of any adverse action taken under section 7512 of title 5, United States Code, for a covered act of

<sup>1</sup> Retaliation is a form of prohibited discrimination.

discrimination (including retaliation) in the personnel record of an agency employee found to have intentionally committed discriminatory (including retaliatory) acts, after all appeals are exhausted.

The proposed regulations also will update references and language due to statutory changes and clarify procedures and requirements to support agencies in complying with the requirements of the No FEAR Act. OPM will issue revised language for Notice obligations, § 724.202, which includes the model paragraphs for agency No FEAR notices, in a separate rulemaking.

Finally, OPM proposes to remove references to requirements and deadlines that were established when the law was initially implemented and that have been fulfilled. As noted in the original final rule implementing the No FEAR Act, Congress found that, “[i]n order to maintain a productive workplace that is fully engaged with the many important missions before the Government, it is essential that the rights of employees, former employees, and applicants for Federal employment, under antidiscrimination and whistleblower protection laws, be steadfastly protected and that agencies that violate these rights be held accountable.” 71 FR 27185 (May 10, 2006). Additionally, through the No FEAR Act amendments, it was the sense of Congress that accountability in the enforcement of the rights of Federal employees is furthered when Federal agencies agree to take appropriate disciplinary action against Federal employees who are found to have intentionally committed discriminatory (including retaliatory) acts, but that accountability is not furthered if Federal agencies react to increased accountability for their lawful responsibility by taking unfounded disciplinary actions against Federal employees or by violating the procedural rights of managers who have been accused of discrimination. Accordingly, disciplinary actions against Federal employees alleged to have intentionally committed discriminatory (including retaliatory) acts should not be taken reflexively, but rather as the result of methodical consideration of all the facts and pursuant to the prescribed processes.

## 5 CFR Part 724—Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002

### Subpart A—Reimbursement of Judgment Fund

This subpart implements the portion of Title II of the No FEAR Act of 2002 concerning the obligation of Federal agencies to reimburse the Judgment Fund for payments. Key terms used throughout title 5, Code of Federal Regulations (CFR), part 724 are defined in this subpart.

Currently in 5 CFR 724.102, the No FEAR Act is defined. OPM proposes to remove the quotation marks from and revise the definition of “No FEAR Act” to reflect that the term means the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, as amended by the Cummings Act. In addition, there are definitions of “Antidiscrimination Laws” and “Payment.” Congress enacted the “Genetic Information Nondiscrimination Act (GINA) of 2008”, effective November 21, 2009, after finding that “Federal legislation establishing a national and uniform basic standard is necessary to fully protect the public from discrimination and allay their concerns about the potential for discrimination, thereby allowing individuals to take advantage of genetic testing, technologies, research, and new therapies.” Title II of GINA prohibits employment discrimination on the basis of genetic information. OPM proposes to revise the definitions of “Antidiscrimination Laws” and “Payment” in 5 CFR 724.102 to add sections 2000ff *et seq.* of title 42, United States Code, which codifies GINA, to the list of statutes that comprise the Antidiscrimination Laws. “Antidiscrimination Laws” is further revised to make clear it applies to laws prohibiting discrimination (including retaliation).

### Subpart B—Notification of Rights and Protections and Training

This subpart implements the portion of Title II of the No FEAR Act concerning the obligation of Federal agencies to notify all employees, former employees, and applicants for Federal employment of the rights and protections available to them under the Federal Antidiscrimination Laws and Whistleblower Protection Laws. This subpart also implements Title II concerning the obligation of agencies to train their employees on such rights and remedies. The regulations describe agency obligations and the procedures for written notification and training.

### Section 724.203 Notification of Final Agency Action

Subpart B of the No FEAR Act, as amended by the Cummings Act, will now provide for two different notices. The notice regulations already existing at 5 CFR 724.202 were derived from section 202 of the original text of the No FEAR Act; the new requirement implements section 1133 of the Cummings Act. The existing regulation applies to the notice of rights agencies are required to provide to current and former Federal employees and applicants for Federal employment. OPM proposes to redesignate § 724.203 for notification of final agency action to implement the new public disclosure obligations an agency must undertake when there has been a finding of discrimination (including retaliation) against the agency and all appeals have been exhausted. (The Cummings Act refers to this as a “notice of violation.”) Specifically, an agency must provide notice in an accessible format linked from its public-facing website of any final decision in which there has been a finding of discrimination (including retaliation) against the agency. Note that a claim of discrimination need not include retaliation as a basis and retaliation can separately be raised as a basis for a claim of discrimination.

Under the proposed § 724.203, the head of the Federal agency subject to the finding must provide notice on the agency’s public website within 90 days after the date on which any of the events specified in section 1133 of the Cummings Act occur, that is, the date on which—

- all appeals of a final action by a Federal agency, including when a Federal agency fails to take a final action and the administrative judge’s decision becomes final (see 29 CFR 1614.109(i)), involving a finding of intentionally committed discriminatory (including retaliatory) acts prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act have been exhausted;
- all appeals of a final decision by the EEOC involving a finding of intentionally committed discriminatory (including retaliatory) acts prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act have been exhausted; or
- a court of jurisdiction issues a final judgment involving a finding of intentionally committed discriminatory (including retaliatory) acts prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act.

OPM interprets the phrase “final judgment” in the description of the third event to mean the date on which the opportunity for further appeal expires, either because the time for any further appeal elapses or because the court issuing the final decision in the case is the final reviewing court from which relief could be sought.

The agency’s notification must identify the date on which the finding was made, the date on which each discriminatory act was found to have occurred, and the law found to have been violated by each such discriminatory act, and, once again, advise Federal employees of the rights and protections available under the provisions of law covered by paragraphs (1) and (2) of section 201(a) of the No FEAR Act. Where an EEOC decision fails to identify the date on which each act found by the EEOC to be discriminatory occurred, the agency should affirmatively note its inability to specify such dates, for that reason.

### Section 724.204 Training Obligations

In OPM’s current regulations, training obligations are addressed at § 724.203. However, due to the addition of the new requirement for notification of final agency action as discussed above at § 724.203, OPM proposes to add a new section designated as § 724.204 for the training obligations. The proposed § 724.204 describes the training that each Federal agency must provide to all of its employees (including supervisors and managers) about the rights and remedies available under the Antidiscrimination Laws and Whistleblower Protection Laws applicable to them. Agencies were required to provide the initial training by December 17, 2006, and, thereafter, on a training cycle of no longer than every two years. Because the deadline for the initial training has passed, OPM proposes to remove that deadline from § 724.204(d) (formerly § 724.203(d)).

Consistent with the No FEAR Act, however, the regulations continue to require agencies to train new employees on the rights and remedies available under the antidiscrimination and whistleblower protection laws as part of its agency orientation program or other training program. Any agency that does not use a new employee orientation program for this purpose must train new employees within 90 calendar days of the new employees’ appointment. In this context, “new employees” are those who are new to the agency, including those who transfer from one Federal agency to another. In addition, each agency must continue to train all

existing employees on a training cycle of no longer than every two years.

### Subpart C—Annual Report

This subpart implements the portion of Title II of the No FEAR Act concerning the obligation of Federal agencies to report on specific topics concerning Federal Antidiscrimination Laws and Whistleblower Protection Laws applicable to them, covering Federal employees, former Federal employees, and applicants for Federal employment. Section 1134(b) of the Cummings Act adds a new reporting requirement to section 203 of the No FEAR Act for a disciplinary action report. To incorporate the new disciplinary action report requirement into part 724, OPM proposes to change the subpart C heading from “Annual Report” to “Reporting Obligations.”

#### Section 724.302 Reporting Obligations

OPM proposes to change the heading for § 724.302 from “Reporting obligations” to “Annual report” to clarify that the provisions in § 724.302(a) through (c) are specific to the annual report required by section 203(a) of the No FEAR Act, which requires Federal agencies to create annual reports on a number of items concerning Federal Antidiscrimination Laws and Whistleblower Protection Laws as defined in section 201 of the Act. The annual reports are to be submitted to: The Speaker of the U.S. House of Representatives; President Pro Tempore of the U.S. Senate; U.S. Senate Committee on Homeland Security and Governmental Affairs; U.S. House of Representatives Committee on Oversight and Reform; each committee of Congress with jurisdiction relating to the agency; the EEOC; the Attorney General; and OPM.

Section 1134(a) of the Cummings Act requires that the annual reports mandated by section 203(a) of the No FEAR Act be submitted in an electronic format prescribed by the Director of OPM. OPM proposes to amend paragraphs (a) and (c) of § 724.302 to require that each agency submit its annual report in a Portable Document Format (PDF) or other electronic file format that conforms with the standards of Section 508 of the Rehabilitation Act, as amended (29 U.S.C. 794(d)), and its implementing regulations (36 CFR part 1194). Section 508 of the Rehabilitation Act requires Federal agencies to make their information and communication technology accessible to people with disabilities in a manner that is substantially equivalent to the access provided to people without disabilities. The annual report must be formatted to

enable it to be attached to an electronic mail (email) message (or a successor electronic delivery system identified by OPM) addressed to the receiving Congressional office or agency. This electronic format will be required for any annual report submitted under this provision on or after January 1, 2022. Agencies may, however, begin use of the OPM-prescribed electronic format requirements prior to January 1, 2022. Annual report submissions to OPM should be sent to [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov). Annual report submissions to the Equal Employment Opportunity Commission, pursuant to 5 CFR 724.302(c)(6), should be sent to [federalsectoreeo@eeoc.gov](mailto:federalsectoreeo@eeoc.gov).

Under the provisions of the No FEAR Act, each agency's first annual report was due on March 30, 2005, as explained in the current text at 5 CFR 724.302(b). Agencies that had submitted their reports before the original regulations became final were instructed in § 724.302(b) to ensure that their reports contained data elements 1 through 8 of paragraph (a) of this section and to provide any necessary supplemental reports by April 25, 2007. Given that the March 2005 and April 2007 deadlines have passed and the instructions for reports submitted prior to the finalization of the regulations are no longer relevant, OPM proposes to remove those deadlines and instructions from the regulations at § 724.302(b).

Section 1134(a) of the Cummings Act amends Section 203(a) of the No FEAR Act by updating the names of two Congressional committees that must receive the annual report: The U.S. Senate “Committee on Governmental Affairs” is now the U.S. Senate “Committee on Homeland Security and Governmental Affairs”, and the U.S. House “Committee on Government Reform” is now the U.S. House “Committee on Oversight and Reform.” Accordingly, OPM proposes to amend § 724.302(c) to revise the committee names, as well as to encompass any successor committees.

#### Section 724.303 Disciplinary Action Report

OPM proposes to add § 724.303, a new section for “Disciplinary action report,” in accordance with the establishment of the new reporting requirement in section 1134(b) of the Cummings Act. The provision tracks the statute to the effect that, not later than 120 days from the date on which a Federal agency takes final action (or fails to take a final action and the administrative judge's decision becomes final; see 29 CFR 1614.109(i)), or a Federal agency receives a final decision

issued by the EEOC (*i.e.*, a decision from the EEOC's Office of Federal Operations (OFO), or a decision as to which the time to seek OFO review has elapsed) involving a finding of intentionally committed discriminatory (including retaliatory) acts in violation of a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act, as applicable, the applicable Federal agency must submit to the EEOC a report stating (1) whether disciplinary action has been proposed against a Federal employee as a result of the violation; and (2) the reasons for any disciplinary action.

### Subpart D—Best Practices

#### Section 724.401 Purpose and Scope

As described in 5 CFR 724.401, current subpart D, titled “Best Practices,” implements Title II of the No FEAR Act concerning the obligation of the President or his designee (OPM) to conduct a comprehensive study of best practices in the executive branch for taking disciplinary actions against employees for conduct that is inconsistent with Federal Antidiscrimination and Whistleblower Protection Laws and the obligation to issue advisory guidelines for agencies to follow in taking appropriate disciplinary actions in such circumstances. As explained further below, the obligations under the subpart have been fulfilled. Therefore, OPM proposes to revise subpart D, by removing the heading and content in its entirety and renaming and redesignating the subpart for new requirements under the Cummings Act. OPM may elect in the future, under its statutory authority, to conduct future studies if necessary.

#### Section 724.402 Best Practices Study

#### Section 724.403 Advisory Guidelines

Pursuant to current § 724.402, OPM conducted a comprehensive study in the executive branch to identify best practices for taking appropriate disciplinary actions against Federal employees for conduct that is inconsistent with Federal Antidiscrimination and Whistleblower Protection Laws. As required by current § 724.403, OPM developed advisory guidelines for best practices that agencies may follow to take appropriate disciplinary actions against employees for conduct that is inconsistent with Federal Antidiscrimination Laws and Whistleblower Laws. OPM compiled its best practices findings and advisory guidelines and issued them in the report “Disciplinary Best Practices and Advisory Guidelines Under the No FEAR Act” in September 2008. A copy

of the report can be found on <https://www.opm.gov/policy-data-oversight/employee-relations/reference-materials/nofearact.pdf> or provided upon a request to the Manager, Employee Accountability, Accountability and Workforce Relations, Employee Services, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415. Given that OPM fulfilled its one-time obligations under this subpart, these sections are no longer needed in the regulations and will be removed.

#### Section 724.404 Agency Obligations

Under current § 724.404, each Federal agency was required to provide a written statement to Congress, the EEOC, the Attorney General and OPM within 30 working days of the issuance of the advisory guidelines. The written statement was to describe in detail whether the agency had adopted the guidelines and would fully follow them; the reasons for non-adoption, if such agency had not adopted the guidelines; and the reasons for the decision not to fully follow the guidelines, as well as an explanation of the extent to which the agency would not follow them if such agency would not do so. Given that the 30-day deadline for the agency reports has expired and the No FEAR Act does not envision an ongoing obligation for agency statements on the advisory guidelines, this section is no longer needed in the part 724 regulations and will be removed.

#### Subpart D—Complaint Tracking and Notation in Personnel Record [Redesignated]

##### Section 724.401 Purpose and Scope

The proposed removal of the Best Practices text (because those requirements were previously fulfilled) allows OPM to redesignate subpart D to address two new amendments to the No FEAR Act established by the Cummings Act: A new section 207, concerning the obligation of Federal agencies to track discrimination complaints from filing to resolution (Complaint Tracking), and a new section 208, containing a requirement to place a notation in the personnel record of a Federal employee who is found, following an adverse action, and after all appeals have been exhausted, to have intentionally committed discriminatory (including retaliatory) acts (Notation in Personnel Record). Proposed § 724.401 explains that the purpose of subpart D is to implement these new requirements.

##### Section 724.402 Complaint Tracking

Under proposed § 724.402, OPM incorporates the requirement of the Cummings Act that each agency create a tracking system for discrimination complaints. Not later than January 1, 2022, each Federal agency must establish or leverage an existing system to track each complaint of discrimination arising under section 2302(b)(1) of title 5, United States Code, and adjudicated through the Equal Employment Opportunity process from the filing of a complaint with the Federal agency to resolution of the complaint. In a case where there was a finding of intentionally committed discriminatory (including retaliatory) acts, the agency would also need to track whether a decision has been made regarding any follow-up disciplinary action, and what decision was reached.

##### Section 724.403 Notation in Personnel Record

Under proposed § 724.403, OPM addresses a new requirement for agencies to document any adverse action taken against a Federal employee found to have intentionally committed discriminatory (including retaliatory) acts. If a Federal agency takes an adverse action covered under section 7512 of title 5, United States Code, against a Federal employee for intentionally committed discriminatory (including retaliatory) acts prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the Act, the agency must, after all appeals relating to that action have been exhausted and the finding remains, include a notation of the adverse action, and the reason for the action, in the personnel record of the employee. This requirement of the statute underscores agencies' current responsibility to notate an employee's personnel record if a chapter 75 adverse action is taken and the reason for the action. The obligation for such a notation is fulfilled when the agency processes the Standard Form (SF) 50, "Notification of Personnel Action," which is located at <https://www.opm.gov/forms/pdfimage/sf50.pdf>, or equivalent for agencies with an OPM-approved exception to the SF 50, which is required documentation for section 7512 adverse actions. The SF 50 creates a permanent record of the adverse action taken by recording the "Nature of Action" and "Remarks." OPM uses nature of action and remarks to identify the different types of personnel actions to facilitate certain payroll/personnel processes and Agency unique requirements. The Nature of Action is the required phrase that explains the

action that is occurring (e.g., suspension, reduction in grade or pay, or removal). Under the Remarks section of the SF 50, the agency must provide the reason for the action. OPM will establish a new nature of action code and new remark code for actions taken against a Federal employee for intentionally committing discriminatory (including retaliatory) acts identified by the No FEAR Act as amended by the Cummings Act. Instructions for processing the SF 50 are found in OPM's *Guide to Processing Personnel Actions* at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/#url=Processing-Personnel-Actions>.

#### Technical Amendments

OPM proposes to correct the spelling of "Judgment" in the table of contents and the regulatory heading for subpart A. The proposed rule corrects the quotation marks by removing them in the definition of the No FEAR Act in § 724.102. The proposed rule corrects the capitalization in "antidiscrimination" and "whistleblower protection laws" in the Disciplinary Actions model paragraph in § 724.202(g) for consistency with the capitalization of the terms elsewhere in the model paragraphs. Also, the proposed rule adds a period at the end of the last sentence in the Disciplinary Actions model paragraph. Within § 724.202, OPM proposes to revise all references to "web sites" to read "websites" and references to "Web site" to read "website". Within § 724.302(a)(4), OPM proposes to correctly identify the citation to the Equal Employment Opportunity regulations at subpart G of part 1614 of title 29, Code of Federal Regulations. In 724.302(b) OPM proposes to correct March 30th to appear as March 30.

#### Expected Impact of This Proposed Rule

##### A. Statement of Need

OPM is issuing the proposed rule to implement the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020 (hereafter, the Cummings Act), which amends the No FEAR Act of 2002. The No FEAR Act of 2002 states that "[t]he President (or the designee of the President) shall issue—(1) rules to carry out this title [Pub. L. 107–174, Title II §§ 201–206, May 15, 2002, 116 Stat. 568]." See 5 U.S.C.A. 2301 note, Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, sec. 204 (emphasis supplied). President George W. Bush designated OPM as the entity that would carry out

the President's obligation to issue rules to carry out title II of the No FEAR Act. Accordingly, OPM has an obligation to promulgate amendments necessary to implement the new requirements created by the Cummings Act and incorporate them into the regulatory scheme.

The Cummings Act added five new requirements to the original No FEAR Act. (1) Each Federal agency must now post a notice, on a public-facing website, of any final finding of discrimination or retaliation by the agency in violation of applicable law. (2) Agencies will be required to submit their annual reports in a uniform manner to be prescribed by OPM in its regulations. (3) An agency that has been found to have committed discrimination or retaliation must notify the Equal Employment Opportunity Commission (EEOC) whether disciplinary action has been proposed against any agency employee as a result of the finding. (4) Every agency must establish a system to track each complaint of discrimination, arising under one of the statutes listed in 5 U.S.C. 2302(b)(1), through its conclusion, including whether a decision has been made regarding disciplinary action. (5) Each agency that takes an adverse action against an employee under 5 U.S.C. 7512 in relation to a finding of discrimination or retaliation by the agency must add a notation about that action to the employee's personnel record. OPM is implementing these statutory requirements in the least burdensome way it can while still effectuating the congressional purposes of the No FEAR Act, as amended by the Cummings Act.

The rulemaking proposes new regulations that require an agency to provide notice of a finding of discrimination (including retaliation) on the public internet website (linked directly from the home page) of the agency after all appeals have been exhausted; submit the annual report in an accessible, electronic format prescribed by the Director of the OPM; submit a disciplinary action report, in an accessible, electronic format, to the EEOC; establish, or leverage, a system to track each complaint of discrimination; and provide a notation of any adverse action taken under section 7512 of title 5, United States Code, for a covered act of discrimination (including retaliation) in the personnel record of an agency employee found to have intentionally engaged in an act of discrimination, after all appeals are exhausted.

### *B. Impact*

The purpose of the OPM regulations is largely to conform existing

regulations to the new statutory requirements. OPM regulations do fill in some policy gaps, but any regulatory decisions will have a marginal impact on transfers, costs, and benefits, and the regulatory amendments proposed in this rulemaking go no further than is necessary to implement the statutory changes. Without these amendments, it will be impossible for OPM to comply with its own obligations under the No FEAR Act, as amended, and agencies will lack guidance concerning how to effectuate their own obligations under the Cummings Act.

Under the existing regulations, it is difficult for members of the public to determine whether an agency has been the subject of a finding of discrimination (including retaliation) against the agency, because such findings are posted only in physical form on agency bulletin boards. The statute now requires an electronic posting on a public-facing website. Agencies already provide notice on their public websites related to No FEAR, so the additional burden should be minimal.

Currently, there is not a uniform method for agencies to submit annual No FEAR Act reports. An agency may submit its annual report in any format and via any means of delivery, which means there is room for improvement in consistency and efficiency in the agency reporting process. OPM aims to provide a format that will simplify reporting for agencies and better enable Congress to review and grasp results from across the Government. The ongoing burden should be minimal once new regulations are published and the new format is adopted at each agency.

OPM assumes that agencies currently have some system for tracking complaint information, if for no other purpose than compiling and preparing the annual report of No FEAR Act data. Agencies with simpler systems may need to develop a more robust tool to meet the statutory requirement for a system that tracks each complaint from filing through resolution and including disciplinary action, if taken as a consequence of a finding of discrimination, but we do not expect that the additional effort will be very burdensome.

The requirement that an agency notify the EEOC whether the agency has proposed disciplinary action against any agency employee as a result of a finding that the agency has violated one or more of the Antidiscrimination or Whistleblower Protection Laws, will add a new burden to agencies, but this burden has been imposed by Congress, and OPM is merely aligning its

regulations to the statute to incorporate the new requirement.

The regulation also provides that an agency must include a notation of the adverse action and the reason for the action in the personnel record of the employee if the agency takes an adverse action covered under section 7512 of title 5, U.S. Code, against the employee for an intentional act of discrimination (including retaliation). In order to ease agencies' compliance with this statutory requirement, OPM proposes to establish a new nature of action code and new remark code for agencies to notate and provide the reason for the adverse action. This will enhance transparency as to the basis for agency action and serve the congressional purpose by providing a deterrent to prohibited behavior.

### *C. Regulatory Alternatives*

For the most part, the changes reflected in OPM's implementing regulations are required by statute and cannot be avoided or further simplified. The Cummings Act requires that an agency provide notice of a finding of discrimination (including retaliation) on the public internet website (linked directly from the home page) of the agency after all appeals have been exhausted; agencies were already posting physical copies at their agency worksites, and now OPM has modified its regulations to incorporate the new electronic posting requirement. In addition, the statute requires that the Director of OPM prescribe an electronic format for agencies to submit annual reports about cases in Federal court pending or resolved in each fiscal year and arising under the Federal Antidiscrimination Laws and Whistleblower Protection Laws applicable to them in which an employee, former Federal employee, or applicant alleged a violation(s) of these laws. We have laid out an approach that we believe is minimally burdensome for agencies. The Cummings Act imposed on agencies a new obligation to submit a disciplinary action report to the Equal Employment Opportunity Commission (EEOC) whenever the agency is found to have violated one of the anti-discrimination or whistleblowing provisions. Our proposed regulations incorporate this new obligation. The Cummings Act requires an agency to track each complaint of discrimination or retaliation; we assume agencies already do this in some fashion, but we now instruct them how to fulfill all the terms of the statutory requirement, which should cause minimal additional burden. Similarly, the statute provides the requirement that the agency insert a

notation of any adverse action taken under section 7512 of title 5, United States Code, for a covered act of discrimination (including retaliation) in the personnel record of an agency employee found to have intentionally engaged in an act of discrimination, after all appeals are exhausted, and we believe this can be accomplished with relatively minimal burden.

OPM considered alternatives with respect to the electronic format for the annual report. Currently, agencies submit their annual reports electronically or via hard copy. One option was to require agencies to submit the annual report as a Portable Document Format (PDF) via email. The other option was to give agencies flexibility to determine the electronic file format, as long as the format conforms with the standards of Section 508 of the Rehabilitation Act, as amended (29 U.S.C. 794(d) and 36 CFR part 1194), and the means of submission. Under this option, which is preferred by OPM, the regulation would give the agency authority to determine a format within their available means. Submission via another avenue, such as fax or U.S. Postal Service, would require use of more resources, including staff time, than submission via email.

OPM also considered alternatives with regard to the complaint tracking system. One option was for agencies to establish a new system to track complaints. Alternatively, agencies could leverage an existing system. Currently, the existing annual report requirement involves the collection of data elements that are closely related to the data elements agencies must capture in a complaint tracking system as required by the Cummings Act. For example, among other elements, agencies must report annually on the number of cases; the status or disposition (including settlement) of each case; and the number of employees disciplined and the nature of discipline for conduct that is inconsistent with Antidiscrimination Laws and Whistleblower Protection Laws. Similarly, agencies must now track each complaint of discrimination arising under section 2302(b)(1) of title 5, United States Code, and adjudicated through the Equal Employment Opportunity process from the filing of a complaint with the Federal agency to resolution of the complaint. In a case where there was a finding of intentional discrimination, the agency would also need to track whether a decision has been made regarding any follow-up disciplinary action, and what decision was reached. In considering the options for a tracking system, OPM weighed the

burden of an agency developing or procuring a new system and determined that regulations should not mandate establishment of a new system if an agency can leverage an existing system.

In considering the regulation for disciplinary action reports, OPM tracked the statute to the effect that, not later than 120 days from the date on which a Federal agency takes final action, or a Federal agency receives a final decision issued by the EEOC (*i.e.*, a decision from the EEOC's Office of Federal Operations (OFO), or a decision as to which the time to seek OFO review has elapsed) involving a finding of intentional discrimination (including retaliation) in violation of a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act, as applicable, the applicable Federal agency must submit to the EEOC a report stating (1) whether disciplinary action has been proposed against a Federal employee as a result of the violation; and (2) the reasons for any disciplinary action. OPM proposes to require that agencies submit the disciplinary action report in an accessible, electronic format. As is the case with the annual report, this option gives agencies flexibility to determine the electronic file format, as long as the format conforms with the standards of Section 508 of the Rehabilitation Act, as amended (29 U.S.C. 794(d) and 36 CFR part 1194). This preferred option gives agencies authority to determine a format within their available means. OPM did not prescribe the means of submission for the disciplinary action reports. Given that the report is to be submitted only to the EEOC, OPM defers to the EEOC and agencies to determine the best delivery method for disciplinary action reports.

Regarding the statutory requirement that an agency provide notice linked from its public-facing website of any final decision in which there has been a finding of discrimination (including retaliation) against the agency, OPM has not specified any design requirements. Agencies have the discretion to lay out the required information and links in the most beneficial and cost-effective manner to achieve the outcome of public notice about agency efforts at accountability for applicable violations. In adopting this approach, OPM assumes that covered agencies have public websites that they update regularly with information for the public and that these updates will occur with no more frequency than other changes that an agency may make to its public-facing website.

Finally, there is the statutory requirement that an agency document

any adverse action taken against a Federal employee found to have engaged in an act of discrimination. If a Federal agency takes an adverse action covered under section 7512 of title 5, United States Code, against a Federal employee for an act of intentional discrimination (including retaliation) prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the Act, the agency must, after all appeals relating to that action have been exhausted and the finding remains, include a notation of the adverse action, and the reason for the action, in the personnel record of the employee. OPM considered that this requirement could be met by the agency preparing a written statement that describes the adverse action and the reason for the action and filing the written statement in the employee's Official Personnel Folder. A potential disadvantage to this approach is a lack of consistency across agencies on how documentation is prepared. OPM determined that an alternative, more effective approach is to establish a new nature of action code and new remark code for agencies to notate and provide the reason for the adverse action. This preferred option promotes consistency and transparency across Federal agencies in documenting adverse actions taken for acts of intentional discrimination (including retaliation). In addition, establishment of new processing codes specifically for adverse actions that result from violations of the antidiscrimination laws will help to distinguish these actions from adverse actions taken for other types of misconduct. This will facilitate data collection and thereby improve the efficiency of agency reporting processes.

#### *D. Costs*

This proposed rule will affect the operations of the Federal agencies in the Executive branch—ranging from cabinet-level departments to small independent agencies. Regarding implementation of the Cummings Act requirements, this proposed rule will require individuals employed by these agencies to revise and rescind policies and procedures to implement certain portions of this proposed rule. The proposed rule mandates that agencies establish or leverage an existing system to track discrimination complaints arising under section 5 U.S.C. 2302(b)(1) and adjudicated through the EEO process from filing through resolution and including disciplinary action, if taken as a consequence of a finding of discrimination.

In order to estimate the costs to implement this requirement, OPM collected information from one large

agency; one medium size agency; and one small agency. Each agency provided to OPM estimates for establishing a new complaint tracking system and estimates for annual maintenance for any new complaint tracking system which will permit the agency to track discrimination complaints arising under 5 U.S.C. 2302(b)(1) and adjudicated through the EEO process from filing through resolution and including disciplinary action (if applicable). For example, the large agency reported to OPM that it would cost approximately \$1,000,000 to establish a new complaint tracking system and incur annual maintenance costs of approximately \$375,000. There are at least 34 large agencies impacted by this requirement. The medium size agency reported to OPM that it would cost approximately \$804,000 to establish a new complaint tracking system and incur annual maintenance costs of approximately \$160,000. There are at least 31 medium size agencies impacted by this requirement. Finally, the small agency reported to OPM that it would cost approximately \$61,000 to establish a new complaint tracking system and incur annual maintenance costs of approximately \$23,000. There are at least 50 small agencies impacted by this requirement. Thus, based on the information provided by these agencies, the average cost for establishment of a complaint tracking system is estimated to be \$622,000. The average annual cost of maintenance of a complaint tracking system is estimated to be \$186,000. OPM anticipates these costs may vary depending on agency size and whether the agency is able to leverage existing complaint tracking systems in lieu of purchasing a new complaint tracking system.

The remaining requirements of the proposed rule will require no additional costs for agencies or only negligible costs. With respect to the requirement to provide notice on the agency's public website of a finding of discrimination (including retaliation), the additional cost to agencies will be negligible if there are any costs at all. As noted above, agencies already provide notice on their public websites related to No FEAR and thus an additional notice does not present a greater cost. The regulation also requires that agencies report to Congress, the EEOC, Attorney General, and OPM annually in an electronic format via email on cases arising under each of the respective provisions of the Antidiscrimination Laws and Whistleblower Protection Laws in which an employee, former Federal employee, or applicant alleged

a violation(s) of these laws. This regulatory change mandates the format of the existing annual report requirement. Currently, agencies primarily submit annual reports electronically. We expect that those few agencies which submit their reports in paper format will experience less cost with the required electronic format given there will be less handling involved in printing and preparing a paper copy for mailing, as well as avoidance of the mailing costs.

Further, the proposed rule requires that agencies submit to the EEOC a report stating whether disciplinary action has been proposed against a Federal employee for a violation of the Antidiscrimination and Whistleblower Protection Laws not later than 120 days after the date on which a Federal agency takes final action, or 120 days after a Federal agency receives a final decision from the EEOC's Office of Federal Operations (OFO) or the time to seek OFO review has elapsed. No additional costs for agencies are required as they already report to the EEOC on discrimination and the report required by the proposed rule does not require additional cost. Similarly, no additional cost is needed to include a notation of the adverse action and the reason for the action in the personnel record of the employee if the agency takes an adverse action covered under section 7512 of title 5, U.S. Code, against the employee for an intentional act of discrimination (including retaliation). Agencies regularly make required notations of adverse actions and the reason in the personnel record of employees.

#### *E. Benefits*

A significant way the regulation achieves transparency and accountability is through the requirements for agencies to provide notice linked directly from the home page of their public website of a finding of discrimination (including retaliation) and maintain the notice there for one year. Additionally, the regulation's requirement for publication of findings of discrimination (including retaliation) on agency websites gives employees and the general public greater confidence that action is taken for violations. These requirements meet a need for greater accountability and transparency. FY 2020 data show that retaliation remains the most frequently cited claim in discrimination charges.<sup>2</sup> Nonetheless, studies consistently have found that retaliation has low reporting rates and factors that contribute to this include

that victims feel it is not likely the harasser will be found responsible. These studies also have found that another factor in the lack of reporting of retaliation is that victims believe the employer will disregard the finding or shield the harasser from consequences.<sup>3</sup> Agency websites are highly visible and valuable channels of communication. Thus, the regulation's requirement for notifications on the Federal agency websites should help employees and the public become more aware that actions are being taken to address discrimination (including retaliation).

Another way that the regulation provides transparency and accountability is through mandating that agencies establish a system or leverage an existing system to track discrimination complaints arising under section 5 U.S.C. 2302(b)(1) and adjudicated through the EEO process from filing through resolution, including disciplinary action, if taken as a result of a finding of discrimination. Agencies can greatly benefit by such a change to a digital infrastructure. Using web-based data collection and analytic capabilities can diminish agencies' risks of errors, duplication of effort, and lack of transparency.

In another reporting requirement—the annual report to Congress, the EEOC, Attorney General, and OPM—the regulation instructs that submission of data be made in an accessible, electronic format via email. This improved format for the annual report should facilitate submission, receipt, and review of the data for oversight purposes.

The provision implementing the requirement for a notation in the personnel record of an employee if the agency takes an action covered under 5 U.S.C. 7512 relates to Congress's finding that accountability is furthered when agencies take action against employees found to have committed discriminatory (including retaliatory) acts. In addition, Congress's requirement is no doubt intended to deter such employees from further engaging in activities that are in violation of the antidiscrimination and whistleblower protection laws.

Finally, the regulation will support the Administration's priority to advance comprehensive equity as discussed in E.O. 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* at <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the->

<sup>2</sup> See <https://www.eeoc.gov/fiscal-year-2021-congressional-budget-justification>.

<sup>3</sup> See <https://hbr.org/2020/10/do-your-employees-feel-safe-reporting-abuse-and-discrimination>.

*federal-government*. As described in E.O. 13985, “a first step to promoting equity in Government action is to gather the data necessary to inform that effort.” By striving for the transparency and accountability as previously described, this regulation helps “recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity” so that the Federal government can continue to serve as a model employer described in E.O. 14035, *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce*, at <https://www.federalregister.gov/documents/2021/06/30/2021-14127/diversity-equity-inclusion-and-accessibility-in-the-federal-workforce>.

E.O. 14035 establishes an initiative on diversity, equity, inclusion, and accessibility (DEIA) in the federal workforce. As part of OPM’s work, a Government-Wide Strategic Plan To Advance Diversity, Equity, and Accessibility In The Federal Workforce was released in November 2021, available at <https://www.whitehouse.gov/wp-content/uploads/2021/11/Strategic-Plan-to-Advance-Diversity-Equity-Inclusion-and-Accessibility-in-the-Federal-Workforce-11.23.21.pdf>. This plan directs agencies to prioritize a number of efforts to support sustainability and continued improvement on DEIA matters. This includes tracking complaints related to discrimination, harassment, and retaliation and collecting data on complaints of discrimination, harassment (including sexual harassment), and retaliation. The data collection requirements under this proposed rule compliment and support the objectives of the DEIA strategic plan and the data collected will help inform decision-making and policy development.

In practice, our current system often places the primary responsibility for enforcing antidiscrimination laws on individual workers, who must file complaints with their employer or a government agency. There is often an asymmetry of information and resources between employers and employees, which can create hurdles for workers to defend their rights. Discrimination should not be tolerated in workplaces. By implementing these new statutory measures, the regulations will help achieve greater accountability in identifying and addressing discrimination (including retaliation) in the Federal workplace, helping to promote a Federal workplace free from discrimination that will attract well-qualified individuals to Federal service and help agencies to retain their

employees, regardless of their background. This proposed rule is consistent with the Administrations’ efforts to promote equity within the Federal workforce. By enhancing data collection and reducing harm for transparency requirements, the Federal government may be able to better identify patterns and protect those at risk of discrimination, including members of underserved communities. OPM will make data available to the reporting agencies and EEOC under the new nature of action code and new remark code which require agencies to notate and provide the reason for the adverse action as a way of monitoring agency progress. This proposed rule also helps position the Federal Government as a model workplace in its commitment to remove barriers to equal employment opportunity.

#### *F. List of Studies Considered*

Equal Employment Opportunity Commission Fiscal Year 2020 Congressional Budget Justification, Section VIII—February 2020, <https://www.eeoc.gov/fiscal-year-2021-congressional-budget-justification> “Do Your Employees Feel Safe Reporting Abuse and Discrimination?” Harvard Business Review—October 8, 2020, <https://hbr.org/2020/10/do-your-employees-feel-safe-reporting-abuse-and-discrimination>

#### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

#### **E.O. 13563 and E.O. 12866, Regulatory Review**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated a “significant regulatory action” under Executive Order 12866.

#### **E.O. 13132, Federalism**

This regulation will not have substantial direct effects on the States, on the relationship between the

National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

#### **E.O. 12988, Civil Justice Reform**

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

#### **Unfunded Mandates Reform Act of 1995**

This proposed rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

#### **Congressional Review Act**

The Congressional Review Act (5 U.S.C. 801 *et seq.*) requires rules (as defined in 5 U.S.C. 804) to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this action before its effective date, as required by 5 U.S.C. 801. OMB’s Office of Information and Regulatory Affairs has determined that this proposed rule is not a “major rule” as defined by the Congressional Review Act (5 U.S.C. 804(2)).

#### **Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)**

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### **List of Subjects in Title 5 CFR Part 724**

Government employees.  
Office of Personnel Management.  
**Stephen Hickman,**  
*Federal Register Liaison.*

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR part 724 as follows:

#### **PART 724—TITLE II OF THE NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION ACT OF 2002**

- 1. Revise the authority citation for part 724 to read as follows:

**Authority:** Sec. 204 of Pub. L. 107–174, 116 Stat. 566; Presidential Memorandum dated July 8, 2003, “Delegation of Authority Under Section 204(a) of the Notification and Federal Employee Antidiscrimination Act of 2002”; Sec. 1131–1138 of Pub. L. 116–283.



- 2. Revise the heading for part 724 to read as set forth above.
- 3. Revise the heading for subpart A to read as follows:

#### Subpart A—Reimbursement of Judgment Fund

- 4. In § 724.102, revise the definitions of “Antidiscrimination Laws” and “No FEAR Act”, and the first sentence of the definition of “Payment” to read as follows:

##### § 724.102 Definitions.

\* \* \* \* \*

*Antidiscrimination Laws* refers to 5 U.S.C. 2302(b)(1), 5 U.S.C. 2302(b)(9) as applied to conduct described in 5 U.S.C. 2302(b)(1), 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791, and 42 U.S.C. 2000ff *et seq.* These laws prohibit discrimination, including retaliatory acts.<sup>1</sup>

\* \* \* \* \*

*No FEAR Act* means the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, as amended by the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020;

\* \* \* \* \*

*Payment*, subject to the following exception, means a disbursement from the Judgment Fund on or after October 1, 2003, to an employee, former employee, or applicant for Federal employment, in accordance with 28 U.S.C. 2414, 2517, 2672, 2677 or with 31 U.S.C. 1304, that involves alleged discriminatory or retaliatory conduct described in 5 U.S.C. 2302(b)(1) and (b)(8) or (b)(9) as applied to conduct described in 5 U.S.C. 2302(b)(1) and/or (b)(8) or conduct described in 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791, and 42 U.S.C. 2000ff *et seq.*

\* \* \* \* \*

#### Subpart B—Notification of Rights and Protections and Training

##### § 724.203 [REDESIGNATED AS § 724.204]

- 5. Redesignate § 724.203 as § 724.204.
- 6. Add a new § 724.203 to read as follows:

##### § 724.203 Notification of final agency action.

(a) Not later than 90 days after the date on which an event described in paragraph (b) of this section occurs with respect to a finding of discrimination (including retaliation), the head of the Federal agency subject to the finding

shall provide notice, in an accessible format:

(1) On the public website of the agency, in a clear and prominent location linked directly from the home page of that website;

(2) Stating that a finding of discrimination (including retaliation) has been made; and

(3) Which shall remain posted for not less than one year.

(b) An event described in this paragraph is any of the following:

(1) All appeals of a final action by a Federal agency, including when a Federal agency fails to take a final action and the administrative judge’s decision becomes final (see 29 CFR 1614.109(i)), involving a finding of intentionally committed discriminatory (including retaliatory) acts prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act have been exhausted.

(2) All appeals of a final decision by the Equal Employment Opportunity Commission (EEOC) involving a finding of intentionally committed discriminatory (including retaliatory) acts prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act have been exhausted.

(3) A court of jurisdiction issues a final judgment involving a finding of intentionally committed discriminatory (including retaliatory) acts prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act. “Final judgment” under this event means the date on which the opportunity for further appeal expires, either because the time for any further appeal elapses or because the court issuing the final decision was the final reviewing court from which relief could be sought.

(c) A notification provided under paragraph (a) of this section with respect to a finding of discrimination (including retaliation) shall—

(1) Identify the date on which the finding was made, the date on which each discriminatory act occurred, and the law violated by each such discriminatory act; and

(2) Advise Federal employees of the rights and protections available under the provisions of law covered by paragraphs (1) and (2) of section 201(a) of the No FEAR Act.

■ 7. Amend newly redesignated § 724.204 by revising paragraph (d) and removing paragraph (e) and to read as follows:

##### § 724.204 Training obligations.

\* \* \* \* \*

(d) Each agency must train new employees as part of its agency orientation program or other training program. Any agency that does not use a new employee orientation program for this purpose must train each new employee within 90 calendar days of the new employees’ appointment. Each agency must train all employees on a training cycle of no longer than every two years.

- 8. Revise the heading of subpart C to read as follows:

#### Subpart C—Reporting Obligations

\* \* \* \* \*

- 9. Amend § 724.302 by:
  - a. Revising the section heading;
  - b. Revising the introductory text of paragraph (a);
  - c. Revising paragraph (a)(4);
  - d. Revising paragraph (b);
  - e. Revising the introductory text of paragraph (c); and
  - f. Revising paragraphs (c)(3) and (4).

The revisions read as follows:

##### § 724.302 Annual report.

(a) Except as provided in paragraph (b) of this section, each agency must report in an electronic format as prescribed in paragraph (c) of this section no later than 180 calendar days after the end of each fiscal year the following items:

\* \* \* \* \*

(4) The final year-end data about discrimination complaints for each fiscal year that was posted in accordance with Equal Employment Opportunity Regulations at subpart G of part 1614 of title 29 of the Code of Federal Regulations (implementing section 301(c)(1)(B) of the No FEAR Act);

\* \* \* \* \*

(b) The first report also must provide information for the data elements in paragraph (a) of this section for each of the five fiscal years preceding the fiscal year on which the first report is based to the extent that such data is available. Under the provisions of the No FEAR Act, agency reports are due annually on March 30. Reports must include data elements 1 through 9 of paragraph (a) of this section.

(c) Agencies must submit the annual report as an attachment in an accessible, electronic format (*i.e.*, Portable Document Format (PDF) or other electronic file format) via electronic mail. The PDF or other electronic format must conform with the standards of section 508 of the Rehabilitation Act, as amended (29 U.S.C. 794(d), and its implementing regulations at 36 CFR part 1194). This electronic format will be

<sup>1</sup> Retaliation is a form of prohibited discrimination.

required for any annual report submitted on or after January 1, 2022. Agencies must provide copies of each report to the following:

\* \* \* \* \*

(3) U.S. Senate Committee on Homeland Security and Governmental Affairs, or any successor Committee;

(4) U.S. House of Representatives Committee on Oversight and Reform, or any successor Committee;

\* \* \* \* \*

■ 9. Add § 724.303 to read as follows:

**§ 724.303 Disciplinary action report.**

Not later than 120 days after the date on which a Federal agency takes final action (including when a Federal agency fails to take a final action and the administrative judge's decision comes final; see 29 CFR 1614.109(i)), or 120 days after a Federal agency receives a final decision from the EEOC's Office of Federal Operations (OFO) or the time to seek OFO review has elapsed, involving a finding of intentionally committed discriminatory (including retaliatory) acts, in violation of a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act, as applicable, the applicable Federal agency shall submit to the EEOC a report stating—

(1) whether disciplinary action has been proposed against a Federal employee as a result of the violation; and

(2) the reasons for any disciplinary action proposed as a result of the violation.

10. Revise subpart D to read as follows:

**Subpart D—Complaint Tracking and Notation in Personnel Record**

Sec.

724.401 Purpose and scope.

724.402 Complaint tracking.

724.403 Notation in personnel record.

**§ 724.401 Purpose and scope.**

This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of Federal agencies to track discrimination complaints from filing to resolution and notate adverse actions in the personnel record of a Federal employee for intentionally committed discriminatory (including retaliatory) acts.

**§ 724.402 Complaint tracking.**

Not later than January 1, 2022 (one year after the date of enactment of the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020), each

Federal agency shall establish or leverage an existing system to track each complaint of discrimination arising under section 2302(b)(1) of title 5, United States Code, and adjudicated through the Equal Employment Opportunity process from the filing of a complaint with the Federal agency to resolution of the complaint; where there is a finding of intentionally committed discriminatory (including retaliatory) acts, the agency shall also track whether a decision has been made regarding disciplinary action as a consequence of this finding.

**§ 724.403 Notation in personnel record.**

If a Federal agency takes an adverse action covered under section 7512 of title 5, United States Code, against a Federal employee for intentionally committed discriminatory (including retaliatory) acts prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) of the No FEAR Act, the agency shall, after all appeals relating to that action have been exhausted, include a notation of the adverse action and the reason for the action in the personnel record of the employee.

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