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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA-2016-0013]

Notice of Final Equal Employment Opportunity Program Circular

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of availability of final Circular.

SUMMARY: The Federal Transit Administration (FTA) has placed in the docket and on its website guidance in the form of a Circular to assist recipients in complying with various Equal Employment Opportunity regulations and statutes. The purpose of this Circular is to provide recipients of FTA financial assistance with instructions and guidance necessary to carry out the U.S. Department of Transportation's Equal Employment Opportunity regulations. FTA is updating its Equal Employment Opportunity Circular to clarify the requirements for compliance.

EFFECTIVE DATE: The final Circular becomes effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For program questions, Anita Heard, Office of Civil Rights, Federal Transit Administration, 1200 New Jersey Avenue SE, Room E54-306, Washington, DC 20590, phone: (202) 493-0318, or e-mail, anita.heard@dot.gov. For legal questions, Bonnie Graves, Office of Chief Counsel, 90 Seventh Street, Suite 15-300, San Francisco, CA 94103, phone: (202) 366-4011, fax: (415) 734-9489, or e-mail, bonnie.graves@dot.gov.

SUPPLEMENTARY INFORMATION:

This notice provides a summary of the final changes to the EEO Circular and responses to comments. The final Circular itself is not included in this notice; instead, an electronic version may be found on FTA's website, at www.transit.dot.gov, and in the docket, at www.regulations.gov. Paper copies of the final Circular may be obtained by contacting FTA's Administrative Services Help Desk, at (202) 366-4865.

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I. Overview

FTA is updating its EEO Circular to clarify what recipients must do to comply with Titles VI and VII of the Civil Rights Act of 1964, Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 49 U.S.C. Chapter 53 (Federal Transit law), other Federal civil rights statutes, and the U.S. Department of Transportation (DOT) regulations in 49 CFR part 21.

FTA issued a notice of availability of the proposed Circular and a request for comments in the **Federal Register** (81 FR 11348) on March 3, 2016. The comment period closed May 2, 2016. We received comments from 19 entities, including transit

agencies, State DOTs, individuals, and the American Public Transportation Association. In addition, in accordance with Executive Order 12067, FTA coordinated development of this final Circular with the Equal Employment Opportunity Commission (EEOC). We have made clarifying edits in response to EEOC comments on the Circular. This notice addresses comments received and explains changes we made to the Circular in response to comments.

II. Chapter-by-Chapter Analysis

General Comments

The Circular is organized topically. Each chapter begins with an introduction and is divided into sections and subsections. The organizational structure includes the text of the guidance, followed by a clearly delineated discussion section (as needed), which provides the means of complying with the law, as well as relevant good practices.

One commenter requested a clarification of items presented as “good practices.” The commenter expressed concern that the good practices might form the basis for a deficiency finding in a future FTA oversight review. To address this concern we added a statement at the beginning of chapter 1: “Good practices, while encouraged, are not requirements. Agencies that do not utilize these practices are not subjecting themselves to findings in oversight reviews.”

One commenter objected to the statement on the cover page of the Circular that states, “FTA reserves the right to update this Circular to reflect changes in other revised or new guidance and regulations that undergo notice and comment, without further notice and comment on this Circular.” This language appears on the cover page of all FTA

circulars. In the event a regulatory or other cross-cutting requirement has changed, it has changed with a notice and comment process, so there is no need for a second notice and comment process in order to update the Circular to reflect the change. FTA encourages stakeholders to sign up for e-mail updates on FTA’s website, www.transit.dot.gov.

One commenter suggested that FTA should monitor recipients more closely instead of relying on recipients’ certification of compliance. FTA conducts reviews of all recipients on a triennial basis, conducts specialized EEO reviews, and investigates complaints. In addition, recipients’ employees have the right to file complaints with the Equal Employment Opportunity Commission. Given the remedies available to employees, the large number of FTA recipients, and limited FTA resources, we believe our level of monitoring recipients for compliance is appropriate.

A. Chapter 1—Introduction and Applicability

Chapter 1 of the Circular is an introductory chapter that reviews the organization of the Circular, the authority for establishing the Circular, and applicability to recipients.

One commenter suggested we add “disability,” “veteran status,” and “genetic information” to the list of bases on which discrimination is prohibited, and we have added those terms in section 1.2, Organization of this Circular. In section 1.3, Authorities, we have added the Equal Pay Act, the Age Discrimination in Employment Act, Title I of the Americans with Disabilities Act, Sections 501 and 505 of the Rehabilitation Act of 1973, and Title II of the Genetic Information Nondiscrimination Act of 2008. In the Definitions section we have made clarifying edits to the terms Complainant, Concentration, Disability, Discrimination, Disparate Impact, Disparate Treatment, Protected Class, and Underutilization. We have added definitions for the

terms Four-fifths Rule, Reasonable Accommodation, Retaliation, and Sex-based Discrimination. Finally, we replaced the term Primary Recipient with the term Direct Recipient, and replaced the term One-person Rule with the term Whole-person Rule.

FTA requested comments regarding a potential change to the threshold for Equal Employment Opportunity Program submission from the current standard of recipients with 50 transit-related employees, to recipients with 100 transit-related employees. Commenters supported this threshold increase, and we have adopted the increased threshold in the final Circular. Further, agencies with 50–99 employees will not be required to conduct a utilization analysis with goals and timetables or to submit an EEO Program to FTA. They will instead prepare and maintain an abbreviated EEO Program and provide it to FTA upon request or for any State Management Review or Triennial Review. The Circular does not apply to transit employers with fewer than 50 employees.

One commenter asked FTA to clarify the 100 transit-related employees threshold and to more clearly define what collateral duties include for part-time employees. This information is in section 1.4 of the Circular and in a footnote in that section. When calculating the total number of transit-related employees, agencies are required to include all part-time employees and employees with collateral duties that support the transit program. For example, a budget analyst who processes payments for the transit program would be considered a transit-related employee.

FTA requested comments on potential changes to the Memorandum of Understanding (MOU) between FTA and the Federal Highway Administration (FHWA). We received no comments. The Circular has been revised to reflect that pursuant to an

MOU with FHWA, FHWA and FTA will jointly review, monitor, and approve State DOT EEO Programs.

B. Chapter 2—EEO Program Requirements

Chapter 2 explains the seven required elements of an EEO Program for FTA review. The chapter details required language, required supporting documentation, the type of analysis that must be conducted, and the acceptable methods to report the results of that analysis.

2.1 Frequency of Update

FTA proposed that EEO Programs be updated and submitted to FTA on a triennial basis or as major changes occur in the workforce or employment conditions. One commenter suggested FTA add the language, “whichever comes first” at the end of the sentence to clarify that FTA requires the EEO Program to be updated at a minimum every three years, or sooner if conditions warrant. We have made that change.

In addition, given that transit agencies must submit data to the EEOC every other year, we have changed the reporting requirement to FTA to every four years. This should lessen the burden on transit agencies and allow them to report to EEOC and to FTA in the same year using the same data. FTA plans to publish a submission schedule for all agencies with 100 or more transit-related employees. In order to get all agencies on a four-year schedule, some agencies may be required to submit an updated EEO Program sooner than they would otherwise have to. FTA will work to minimize impacts on agencies as we get all agencies on a new four-year schedule.

FTA proposed removing the following sentence, which appears in the 1988 Circular: “At the discretion of FTA Office of Civil Rights, less information may be requested where the recipient’s previously submitted EEO Program has not changed significantly.” Several commenters disagreed with this proposal, asserting a requirement for a full update of an EEO Program when there are no significant changes places an unnecessary burden on small agencies that are in compliance and have limited staff, and is not necessary for agencies with strong EEO Programs or EEO Programs that have not changed significantly. In response to commenters, we have restored that language.

2.2.1 Statement of Policy

FTA proposed that agencies would be required to update their EEO policy annually or after the naming of a new CEO/GM or EEO Officer. One commenter suggested that if there are no changes to the EEO policy, there would be no need to update it. We revised the language to require a review and update at least every four years, when the EEO Program is submitted to FTA, or after the naming of a new CEO/GM or EEO Officer.

2.2.2 Dissemination

FTA proposed that top management officials would need to meet quarterly to discuss the EEO Program and its implementation. Several commenters objected to this frequency, asserting it would be overly burdensome for the agency, and recommending semiannual or annual meetings would be sufficient. We agreed with those comments and revised the Circular to reflect that the meetings take place at least semiannually.

In this section, FTA proposed that agencies be required to conduct EEO training for all new supervisors or managers within 30 days of their appointment. Two commenters suggested this timeframe should be extended; one suggested the training take place within six months, and one recommended it take place within 90 days. We have revised the Circular to require that training for supervisors and managers be conducted within 90 days of their appointment.

FTA proposed that agencies be required to meet with employees of protected classes and affinity groups to seek input on EEO Program implementation. Two commenters suggested that all employees should be invited to provide input on the program implementation, not just members of protected classes or affinity groups. We have revised the Circular to require meetings with all employees and affinity groups to seek input on EEO Program implementation.

2.2.3 Designation of Personnel

In order to ensure impartiality and independence of the EEO Officer, FTA proposed that the EEO Officer would need to be separated from human resources officials. Several commenters objected to this proposal. The general consensus was that in agencies where the administrative staffs are small, separation of duties is impossible. One agency asserted that to create an EEO position separate from human resources would dilute the department's effectiveness to ensure EEO and legal compliance. Others suggested such a separation would cast concerns on the ability of the human resources department to protect equal employment opportunity. One commenter suggested FTA should not attempt to dictate how individual agencies avoid such conflicts of interest and that there would be substantial costs involved. Another commenter asserted the proposed

separation ignored the normal function and role of a human resources department—to be knowledgeable about and enforce labor and employment laws, regulations and workplace rules—and that attempting to carve out functions in a way that is illogical would only serve to confuse all employees in the organization. In response, we have revised this section to state that in order to maintain the independence and integrity of the EEO Officer, it may be necessary to separate the function from human resources. Agencies are not required to separate EEO and HR. However, in the event the EEO Officer is part of HR, we have added language that requires the agency to include in its EEO Program a detailed method for eliminating conflicts of interest in complaint investigations, including a narrative describing how independence and integrity of the EEO process will be achieved and maintained.

Similar to the separation of function between EEO and HR, FTA proposed that in order to maintain distance between the investigation of EEO complaints and defense of the agency, that the functional unit that reviews EEO matters be separate and apart from the functional unit that represents the agency in EEO complaints. Several commenters objected to this proposal. One commenter expressed concern about the phrasing of the language, specifically that attorneys rather than EEO Officers would represent an agency at administrative hearings. Another commenter expressed concern that the separation could inhibit a lawyer's ability to provide legal guidance on EEO requirements or could require the creation of two EEO offices, for internal and external complaints. Another commenter stated that the EEO Officer is better suited to report to a legal office because of the need for advice regarding perplexing or difficult EEO matters and the level of expertise needed to navigate the numerous EEO laws, regulations, and court rulings. In

response, we clarified that the attorney who provides legal expertise to the EEO Officer in the investigation of a case cannot represent the agency in the same EEO case.

FTA proposed that in order to ensure complaints are investigated effectively, those individuals charged with investigating complaints must have EEO investigative training. Two commenters requested clarification on what would constitute sufficient EEO investigative training for EEO Officers. We have revised the Circular to include the specific information that should be covered in this training.

FTA proposed removing the requirement that EEO Officers concur on hires and promotions. Several commenters objected to this change. They asserted this requirement ensured the EEO Officer was involved in the process. They also suggested the removal of this function would undermine their ability to be part of the process. Two commenters supported the removal of the statement, stating the requirement was overly burdensome. We reinstated the statement and provided a sample concurrence checklist in an Attachment that clarifies what “concurrence” entails.

2.2.4 Utilization Analysis

The utilization analysis is a comparative analysis in which the female and minority availability for each EEO subgroup is compared with the current workforce representation of females and minorities.

There was a concern that “two or more races (not Hispanic or Latino)” is a subcategory that is currently not collected on the EEO-4 forms. OMB approved the change of the EEO-4 categories to be consistent with the EEO-1, including two or more races.

One commenter was concerned that extending to agencies with fewer than 100 transit employees the requirement to complete the FTA's electronic database for analysis and utilization of hires, promotions, and personnel's applications, without additional financial resources, would be extremely burdensome for smaller agencies to complete and track. The commenter urged FTA to consider limiting the FTA analysis and utilization database submittal only to agencies that meet the threshold for the submittal of an EEO Program. In response, we revised the Circular to provide that agencies with 50–99 employees will not be required to submit a full plan to FTA every four years, and will not be required to conduct a utilization analysis.

Two commenters sought clarification on how to track individuals with disabilities and veteran status with no baseline for availability. We have included language in section 2.2.6 that states we are not asking agencies to set a goal for veterans or persons with disabilities based on availability numbers. There is no whole person rule or four-fifths analysis. The agency can set its own specific aspirational goals, but the Circular asks agencies to track raw numbers; for example, the number applied, number hired, number applied for promotion, and number promoted.

One commenter requested clarification on setting department/unit/functional area goals. The Circular states, “Although FTA requires utilization data summarized for each job category, agencies are encouraged to compile workforce statistics for each department, job category, grade/rank of employee (e.g., Road Supervisor I or II, Mechanic A or B, etc.), and job title to include salary ranges and principal duties for the jobs in each subcategory.” We did not revise the Circular based on this comment, as the

Circular states setting goals based on workforce statistics for each department, job category, grade/rank of employee is an encouraged good practice. It is not a requirement.

2.2.5 Goals and Timetables

One commenter asserted that setting long-term and short-term goals and timetables for each individual minority group, broken down by specific racial/ethnic subcategories for men and women, could only be achieved by conducting targeted recruitments, which could be perceived as discriminatory in California under the Fair Employment and Housing Act (FEHA). FTA did not revise the proposal, as the short-term and long-term goals are aspirational goals based on identified underutilization and the results of the employment practices analysis.

2.2.6 Assessment of Employment Practices

FTA proposed that agencies be required to describe their efforts to locate, qualify, and train employees in protected classes. One commenter asserted all employees, not just employees of a protected class, should be able to receive training and that any action to locate, qualify, and train employees in protected classes could be perceived as discriminatory under FEHA. Certainly all employees should be able to avail themselves of training; the only documentation FTA requires in the EEO Program is those efforts to locate, qualify, and train employees in protected classes.

Another commenter asked for clarification on whether or not test validation documentation is required for all candidate selections. As clarification, test validation is completed per test, not per candidate. The commenter also asked FTA to clarify or remove the requirement that agencies provide a narrative of current seniority policies and

procedures for union and non-union workers. We have revised the Circular to provide that agencies must provide a narrative for union and non-union workers if the seniority policies are different. In order to conduct a qualitative assessment of seniority practices to determine any potential disparate impact, a narrative must be provided.

One commenter noted that revising union agreements is a complex process that cannot be done unilaterally by an agency. In response, we revised the Circular to state, “When agencies are negotiating or amending union agreements, FTA requires agencies to review and revise the agreements wherever current provisions are identified as barriers to equal employment.” The commenter further asserted, with regard to disciplinary procedures and termination practices, that it would be unreasonable to require agencies to use the “same” standard for determining when a person will be demoted, disciplined, or laid off in light of collectively bargained-for procedures and practices, and in light of state civil service law provisions governing the appointment, promotion and continuance of employment of certain agency employees (including layoffs). We have not revised the Circular in response to this comment, as the Circular provides for placing employees in similarly situated groupings (e.g., subject to the same schedule of disciplinary charges) and requires separate analyses for employees subject to different disciplinary processes.

2.2.7 Monitoring and Reporting

FTA proposed that agencies would be required to evaluate their EEO Programs at least quarterly. Several commenters objected to meeting with management quarterly to discuss the EEO Program and its implementation. They asserted it would be overly burdensome for the agency. We revised the Circular to reflect the evaluation should take place, at a minimum, semiannually.

Some commenters suggested that unit managers should not have access to EEO information and that tracking this information is entirely a human resources function. There was also concern that reviewing this information with all levels of management could breach confidentiality for smaller agencies. The Circular has been revised to say all “program” EEO-related meetings should be discussed. The meetings that are conducted with managers are to discuss the agency’s progress in terms of meeting their EEO Program goals and requirements, not to discuss individual EEO complaints.

One commenter questioned whether FTA is requiring the agency to track the agenda and outcome of every single meeting that the EEO Officer has with the CEO/GM, with any management official, and with human resources, with a concern on resource management. We are revising the Circular to provide documentation of meetings where EEO is officially discussed; for example, official EEO training and official meetings with management to report on EEO Program progress and plans of actions. There is no need to document every conversation.

FTA proposed that one element of a successful EEO Program is to, “Produce documentation that supports actions to implement the plan for minority and female job applicants or employees and informs management of the program’s effectiveness.” One commenter suggested replacing “for minority and female” with “to improve diversity of.” FTA did not adopt this suggestion. We believe it is important to specifically state “minority and female” as opposed to the more general “improve diversity,” in order to ensure agencies are documenting their efforts appropriately. FTA proposed that one of the EEO Program attachments would be an organization chart showing the reporting relationships of all positions. One commenter suggested the organizational chart section

should be revised so that it did not include the names of all employees. We have revised the Circular to clarify that only directors, department heads, and executive leadership are to be named on the organization chart.

FTA sought comment on how long it would take to develop an EEO Program with the requirements set out in chapter 2 of the Circular. FTA also sought suggestions from recipients regarding how to use information technology to decrease the amount of time it takes to develop an EEO Program. One commenter suggested that the Circular has new data collection requirements that will require coordination with departmental units such as human resources and information technology. The commenter sought a 12-month grace period before new statistical data is required. As stated above, FTA will be drafting a new schedule for quadrennial submission of EEO Programs to FTA. FTA will work with agencies that find themselves on the “earlier” side of the schedule and that may need to update their internal practices in order to develop an effective EEO Program.

C. Chapter 3—EEO Compliance Oversight, Complaints, and Enforcement

One commenter requested additional clarity and definition of factors and concerns that may trigger a discretionary review. We revised the Circular to clarify the six factors that contribute to the selection for a civil rights specialized review.

D. Attachments

In the proposed Circular, FTA included several Attachments: Attachment 1, References; Attachment 2, Sample EEO Policy Statement; and Attachment 3, Sample Excel Charts. We did not receive comments on any of the Attachments. In response to comments that the EEO Officer should concur in the hiring and promotion process, we have added a new Attachment, Sample Concurrence Checklist. Additionally, we added a copy of the EEO-4 form, Program Submission checklist, EEO Program checklist. The Circular now includes: Attachment 1, Sample Policy Statement; Attachment 2, Sample Concurrence Checklist; Attachment 3, EEO-4 Form; Attachment 4, Sample Employment Practices and Utilization Analysis Excel Charts; Attachment 5, EEO Program Submission Checklist; Attachment 6, Sample EEO Program Checklist; Attachment 7, References.

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Acting Administrator

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