



N 6570-01P

## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**29 CFR Parts 1601 and 1626**

**RIN 3046-AB19**

### **Update of Commission's Conciliation Procedures**

**AGENCY:** Equal Employment Opportunity Commission

**ACTION:** Final rule.

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) is amending its procedural rules governing the conciliation process to bring greater transparency and consistency to the conciliation process and help ensure that the Commission meets its statutory obligations regarding conciliation.

**DATES:** This rule will become effective [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. However, this Rule shall only apply to conciliations for charges for which a Letter of Determination invitation to engage in conciliation has been sent to respondent on or after the effective date.

**FOR FURTHER INFORMATION CONTACT:** Andrew Maunz, Legal Counsel, Office of Legal Counsel at [andrew.maunz@eoc.gov](mailto:andrew.maunz@eoc.gov). Requests for this document in an alternative format should be made to the EEOC's Office of Communications and Legislative Affairs at (202) 663-4191 (voice) or (202) 663-4494 (TTY).

#### **SUPPLEMENTARY INFORMATION:**

##### **Introduction**

On October 9, 2020, the Commission published a Notice of Proposed Rulemaking (NPRM) outlining proposed revisions designed to update the Commission's conciliation procedures for charges alleging violations of Title VII of the Civil Rights Act of 1964 (Title

VII), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and/or the Age Discrimination in Employment Act (ADEA). 85 FR 64079. The NPRM described the Commission's obligations to engage in conciliation to resolve these charges, as articulated in Title VII and other statutes and explained by the Supreme Court in *Mach Mining, LLC v. EEOC*, 575 US 480 (2015).

Conciliation is an essential component of Title VII's statutory framework that Congress designed to prohibit, identify, and eradicate discriminatory employment practices. *See Alexander v. Gardner-Denver, Co.*, 415 US 36, 44 (1974); *Ford Motor Co. v. EEOC*, 458 US 219, 228 (1982) (“[t]he ‘primary objective’ of Title VII is to bring employment discrimination to an end.”); *Griggs v. Duke Power Co.*, 401 US 424, 429-30 (1971) (the objective of Title VII was to break down discriminatory employment practices that “favor an identifiable group ... over other employees”). Rather than simply afford victims a cause of action for damages as in other statutory regimes, Congress settled on a framework that “preferred” cooperation and voluntary compliance, over litigation. *Mach Mining*, 575 US at 486 (citation omitted). The Supreme Court explained that Title VII was designed to encourage “... ‘voluntary compliance’ and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace.” *Ford Motor*, 458 US at 228. “Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them.” *Id.* Conciliation was designed—and remains—a critical component of the Commission's mission to eliminate discriminatory employment practices, if possible, without litigation.

The Commission issued conciliation regulatory procedures in 1977 and has not changed them significantly since that time. *See* 85 FR at 64079. The NPRM described various challenges confronting the Commission's conciliation program. Notably, approximately one-third of respondents who receive a reasonable cause finding refuse to participate in conciliation. Overall, more than half of the cases in which the Commission finds reasonable cause that

discrimination occurred are not resolved through conciliation. *Id.* at 64080.<sup>1</sup> In order to increase the effectiveness of the EEOC's conciliation program and more frequently achieve the agency's statutory mission, the NPRM proposed certain targeted and straightforward revisions to the Commission's conciliation procedures. *See* 85 FR at 64083-84. The primary objective of these revisions is to make conciliation a more powerful mechanism to halt and remedy unlawful discriminatory employment practices in a greater percentage of charges without litigation—either by the Commission or by employees. The Commission aims to accomplish this with these revisions by implementing requirements regarding the information that it must provide in preparation for and during conciliation, particularly with respect to its findings and demands. At their core, they ensure the Commission will provide certain information—the essential facts and the law supporting the claim, findings, and demands. Compliance with these requirements should put beyond reasonable dispute in most, if not all, cases the Commission's compliance with *Mach Mining*. More important, it will facilitate as a matter of course in all cases respondents' identification of the specific discriminatory practices at issue. This will directly facilitate voluntary prospective remedial action regarding the policy or practice, notwithstanding respondents' position during conciliation or subsequent litigation. And by eliminating such discriminatory practices without litigation, the Commission accomplishes its primary statutory objective in conciliation to purge unlawful discrimination in employment. Moreover, by providing information regarding the basis for the Commission's finding and demands, the respondent will be able to more effectively assess its potential liability. This increased information will enhance the conciliation process for all parties to conciliation and may focus

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<sup>1</sup> The Commission's failure to conciliate cases may have significant ramifications. Each year, failed conciliations leave many victims of discrimination to fend for themselves. As explained below, too often many of these individuals do not commence an action in court because they cannot obtain an attorney and the prospect of litigating is too daunting. Many of those who litigate do so without counsel, potentially placing victims at a disadvantage. Even those represented by counsel may not prevail—and those who do obtain relief sought may not receive it until several years after the discrimination at issue. By conciliating more cases, the Commission will be getting more victims relief, preventing more future discrimination, and ensuring that relief is more timely obtained.

discussions in a way more likely to achieve a meeting of the minds or, alternatively, clearly distill areas of disagreement that may aid the Commission in subsequent litigation.

The Commission recognizes that currently, certain information is generally provided to employers prior to a cause finding and in the Letter of Determination, all of which occur prior to conciliation. The Commission also recognizes that the respondent is generally the holder of its own records and information. This rule is not meant to replace those disclosures or duplicate them,<sup>2</sup> but instead to ensure that the information the Commission provides about its position and findings enables respondents to properly evaluate their potential liability and the Commission's settlement offer, and ultimately, result in respondents becoming more likely to participate and resolve the charge.

The comment period for the NPRM closed on November 9, 2020. The Commission received a total of 58 comments in response to the NPRM—15 in favor, 33 in opposition, and 10 non-responsive. Commenters on both sides of the proposal included organizations and individuals. The Commission also received a comment from members of Congress in support of the rule. Former officials and employees of the Commission also submitted comments against the proposed changes. At least one commenter submitted two comments.

As explained in greater detail below, the Commission has carefully considered each of the comments it received. Based on these submissions, the Commission is publishing this final rule that, while similar to the proposed rule in most respects, nevertheless contains certain modifications, which are explained below.

### **Comments in Support of Proposal and the Commission's Responses**

Several commenters agreed that there are challenges in the Commission's conciliation practices and procedures as recounted in the proposed rule. Specifically, they echoed and illustrated the ways in which the Commission's procedures and practices complicated and

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<sup>2</sup> In many instances, these previous disclosures will satisfy the Commission's disclosure requirements under the final rule because the rule only requires disclosure of the information if the Commission has not already done so.

prevented the communication necessary to conciliate charges and stop employment practices that the Commission has determined after an investigation to be discriminatory. Commenters highlighted illustrative examples of conciliations in which the commenters allege the Commission issued large demands, with minimal explanation and insufficient support for the Commission's position. The commenters noted that in these and similar circumstances, the Commission's communications did not describe the act or practice alleged to be discriminatory, why it violated federal law, and which person or class was unlawfully harmed. 42 USC 2000e-5(b); *Mach Mining*, 575 US at 488. The Commission agrees that without this basic information, the respondent may not be able to evaluate the merit of the Commission's position or demand, weigh the demand against the risk and expense of possible litigation and take directed action to ameliorate the problem. Even more important, a demand without commensurate support does not "inform the employer about the specific allegations" in a way that "endeavors to achieve voluntary compliance." *Mach Mining*, 575 US at 488, 494. Indeed, it is axiomatic that a party cannot adequately evaluate a claim or related demand without understanding the factual and legal basis for it. A lack of information can also impact the employer's ability to evaluate its practices or provide potentially helpful information to the Commission that may facilitate conciliation or, at a minimum, inform the Commission's subsequent litigation assessment. In the commenters' view, this short-circuits the conciliation process before meaningful communication between the parties even commences. Without this information, a respondent cannot engage in this analysis and determine whether the offer presented by the EEOC is the best way to resolve the case under the circumstances.

Commenters emphasized the importance of a thorough understanding of the opposing party's position during discussions aimed at reaching a resolution prior to litigation. As one commenter put it, the lack of factual and legal support for a demand or response leaves both the Commission and the employer with an "asymmetrical view" of their own position and a lack of understanding of the other side's position. One law firm asserted that the ubiquity of the

EEOC's "no facts" strategy during conciliation indicates it is deeply engrained in the agency's culture. In the commenter's experience, the dearth of factual and legal support for demands frequently implies weaknesses in the underlying reasonable cause determinations. As another law firm put it: "[w]hen the conciliation process becomes simply a series of demands, unsupported by relevant facts or legal authority, it is at best a futile and resource-consuming exercise, and at worst, an attempt to bring the weight of the federal government to bear on and extort an employer with little proof of wrongdoing."

Members of Congress who submitted comments highlighted that on several occasions they had identified issues with the Commission's conciliation process; these issues were distinct from the examples provided by law firm and industry commenters.

The commenters in favor of the proposed rule agreed that the Commission's proposal addresses the principal challenges in its conciliation procedures and processes in ways that are likely to result in more meaningful conciliations and, ultimately, more agreements. Specifically, commenters stated that the proposed changes would "entice" more respondents to participate in conciliation. Commenters also noted that establishing these requirements through regulations, as opposed to through sub-regulatory guidance or employee training, would bring more certainty to the conciliation process. As articulated by the Ranking Member of the House Committee on Education and Labor, "[t]hese commonsense requirements will increase transparency in the conciliation process and facilitate quicker resolutions of charges as the employer will have more information about the underlying charge, EEOC's position, and the employer's legal obligations."

*Commission Response:* The Commission recognizes the importance of an effective conciliation program in its mission to identify and eradicate discriminatory employment actions and practices and, in so doing, obtain relief for its victims without the delay, expense, and uncertainty of possible litigation. The Commission also appreciates the place of primacy that conciliation holds in Title VII's statutory framework. By providing information concerning the factual and legal

bases for its position for charges where it has found reasonable cause, the Commission believes it places itself in a stronger position to achieve conciliation in more cases—eliminating a greater number of unlawful employment practices and obtaining relief for victims of discrimination earlier than it can through litigation. By providing such information, the Commission can alleviate criticisms that demands are excessive or not supported by the evidence and the law. Providing this information should facilitate respondents' identification and redress of discriminatory practices regardless of the outcome of conciliation. Provided with this information, the Commission believes that a greater number of respondents will be more likely to engage in the conciliation process and comply voluntarily to resolve the charge. And by employing its revised conciliation procedures, the Commission will satisfy the requirements of 42 USC 2000e-5(b), as elucidated in *Mach Mining*. The Commission hopes that this final rule will reduce collateral attacks on the conciliation process during Commission litigation. In the event of such a challenge, the Commission will be able to demonstrate that it has met the conciliation requirements of the statute by submitting an affidavit stating that it has taken the required steps. *See Mach Mining*, 575 US at 494-95. Ultimately, the Commission has concluded that the final rule will improve its ability to carry out in more cases its statutory mandate to eliminate discriminatory employment practices and achieve relief for workers “far more quickly than could litigation proceeding at its often ponderous pace.” *Ford Motor Co.*, 458 US at 228.

As noted above, by improving the Commission's effectiveness to carry out its conciliation responsibilities, the final rule also affords considerable benefits to charging parties. As the EEOC is only able to litigate a small fraction of cases that fail conciliation, in most cases where conciliation fails, workers must fend for themselves in court to obtain relief. This means that charging parties must file and litigate their own lawsuits to secure any relief. Many choose not to sue. And, as several commenters noted, those that decide to seek legal action may be in the position of having to litigate without counsel. Even those who obtain counsel frequently fail to obtain significant relief and, if they prevail, may wait years for discovery, motions, trial, and

appeals to conclude. By resolving more cases through conciliation, more victims of discrimination will obtain relief than would have otherwise and even the ones that would have obtained relief through litigation eventually, will receive relief more quickly, without incurring the expense and risk of litigation.

*Suggestions by Commenters:* Several commenters who supported the proposed rule also suggested what they saw as improvements. The Commission addresses each of the suggestions below:

1. *Extend the time period by which respondents must respond to the Commission's conciliation offer beyond fourteen days:* Several commenters stated that the Commission should give respondents more than 14 days to respond, especially in certain complex and systemic cases.

*Commission response:* The Commission declines to change the language or the requirement as it was originally proposed in sections 1601.24(d)(5) and 1626.12(b)(5) because the Commission concludes that these sections contain sufficient flexibility to allow longer response periods in appropriate cases. The proposed rule stated that respondents will be provided “*at least* 14 days.” There will certainly be cases where the Commission extends this period beyond 14 days, and the language allows the Commission to make this determination on a case-by-case basis. As a result, the Commission leaves unchanged the proposed language in the final rule.

2. *Allow anonymity in circumstances only where charging parties or aggrieved individuals are at risk of retaliation:* Several commenters urged the Commission to limit the charging parties or aggrieved individuals to whom it grants anonymity in conciliation under sections 1604.24(d)(1) and 1626.12(b)(1). Specifically, commenters suggested that the Commission grant anonymity only to current employees of the respondent because they, unlike former employees or failed applicants, are at risk of retaliation. Commenters indicated that it is often difficult to

respond to the Commission's findings of discrimination, particularly in individual cases, when they do not know the identity or circumstances of a particular victim.

Although conciliation is not intended to provide an opportunity to challenge the cause finding, one commenter noted that that a respondent could face an allegation that it did not hire an individual because of her race and that if the identity of the individual is withheld, it would not be able to determine if there were other reasons the individual was not hired, such as failing to show up for her interview.

*Commission response:* The Commission acknowledges that it in some cases it may be difficult for respondents to evaluate the merits of the Commission's conciliation proposal if the respondent is unaware of the identity of the victim(s). Respondents do receive the name of the charging parties when they are notified of the charge soon after it is filed. Some commenters suggest that anonymity be limited to only current employees recognizing their concern about potential retaliation. However, the Supreme Court has noted that former, current, and prospective employees are protected from retaliation. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997). Therefore, the Commission does not adopt this proposed change.

3. *Requiring the charging party to participate in conciliation:* One commenter suggested that the charging party should be required to participate in the conciliation, similar to a mediation.

*Commission response:* The Commission declines to adopt this proposed change. In conciliation, the Commission does not merely serve as the advocate of the charging party or aggrieved individual. Rather, the Commission's core objective is to vindicate the public's interest and eliminate discriminatory employment policies and practices. In some cases, but not all, this will achieve relief for the charging party as well as other workers and potential employees. Given these varied interests, conciliations take different forms and the charging party's participation varies from

case to case for a myriad of reasons. The Commission believes it is important to the Commission's ability to achieve the broader purposes of conciliation to preserve its flexibility regarding the involvement of the charging party in each case. *See EEOC v. Waffle House, Inc.*, 534 US 279, 291 (2002) ("The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake."). As a result, the Commission declines to mandate the charging party's participation in every instance.

4. *Commission must respond to all counteroffers and affirmative defenses*: Multiple commenters stated that the rule should require the Commission to respond to all counteroffers a respondent makes and that the Commission must respond to all affirmative defenses that are raised during conciliation.

*Commission response*: Conciliation is, first and foremost, the means Congress "preferred" the Commission to use to target and eliminate discrimination in employment. Indeed, Congress did not afford the Commission authority to commence litigation until 1972. Conciliation is not a rigid, structured, bargaining framework. As the Supreme Court made clear in *Mach Mining*, Congress afforded the Commission wide latitude to pursue voluntary compliance with a statutory provision, "every aspect" of which "smacks of flexibility." *Mach Mining*, 575 US at 492; 42 USC 2000e-5(b). And like the Supreme Court in that case, the Commission declines to infuse the conciliation process with a rigid code of rules that handcuffs the agency by limiting the broad strategic leeway Title VII affords to it to execute its mission. *See Mach Mining*, 575 US at 492 (rejecting the petitioner's "proposed code of conduct" and "bargaining checklist" because "Congress left to the EEOC such strategic questions about whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield."). The Commission meets its statutory obligation by providing the basic

factual and legal information for the respondent to evaluate the claim and identify the discriminatory action or practice. But once this is accomplished, the Commission retains “discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.” *Id.* The Commission declines to adopt such proposals because they damage the flexibility critical to its ability to conciliate claims without any concomitant benefit.

5. *Disclosures should be made in writing:* In the NPRM, the Commission solicited comments on whether the disclosures described in the proposed rule should be made in writing. 85 FR at 64081. Several commenters advocated written disclosures in order to ensure clarity. Significantly, one commenter contended that written disclosure of all material should be required so that all parties have a complete and unambiguous understanding of the Commission’s position. Another commenter explained that written disclosures are more effective than mere oral exchanges in the negotiation process. This commenter noted that if the parties are required to communicate and exchange information in writing, it is less likely that the parties will be unclear as to the other parties’ positions and information exchanged during the process.

*Commission response:* The Commission agrees that written disclosures help ensure clarity throughout the conciliation process. The Commission further agrees that providing information in writing will ensure full transparency of the conciliation process. Exchanging information in writing, where appropriate, eliminates confusion and promotes more accurate and complete information regarding the relevant issues. For these reasons, the Commission will keep the “written” reference that was in the NRPM and clarify that the other disclosures be in writing. However, for sections 1601.24(d)(3) and 1626.12(b)(3), the requirement that the disclosure be in writing shall apply only to the initial conciliation proposal made by the EEOC. In order to

preserve the Commission's flexibility in conciliation, in recognition of the fact that demands are made at various times in a sequence of offers and counteroffers, and in order to avoid the increased burden on its staff to prepare a written explanation to accompany each change of position, the Commission has determined that disclosures explaining the basis for its requests for relief for subsequent offers and counteroffers need not be in writing and may be issued orally.

6. *Mediators should handle conciliation, not investigators:* One commenter urged the Commission to assign mediators to handle conciliations instead of investigators.

*Commission response:* The Commission disagrees with this comment and shall not adopt it. As the Commission has maintained throughout this process, it is not looking fundamentally to change its conciliation structure with this rule. Investigators remain in the best position to handle conciliation discussions as they are familiar with the case and the issues surrounding it. Furthermore, the process and purpose of conciliation is different than mediation. Accordingly, the Commission rejects this proposal.

7. *The Commission should disclose additional information:* A number of commenters stated that the Commission should make certain disclosures under sections 1601.24(d)(1), such as the identity of harassers or at-fault supervisors and potential class sizes.

*Commission response:* The Commission agrees that these disclosures will allow respondents to better assess their potential liability by identifying discriminatory practices, policies, and actions, and as a result advance the Commission's conciliation efforts to identify and eliminate discriminatory employment practices. However, the identities of harassers or supervisors may not be known at the time of conciliation. Similarly, sometimes class size may not have been fully determined. Accordingly,

the final rule makes the disclosures references in the last two sentences of § 1601.24(d)(1) mandatory, only if known to the Commission.

8. *Establish a “good faith” standard:* A few commenters requested that the Commission impose a “good faith” standard on itself during conciliation.

*Commission Response:* At the outset, the Commission rejects the notion that it does not undertake its statutory responsibilities in good faith. All Commission employees are expected to approach conciliation in good faith and endeavor to achieve conciliation and its purposes within the framework of the Commission’s procedures. In those situations where a respondent may disagree with the Commission’s strategy in a particular case or a hard line taken in discussions does not mean that Commission personnel are not acting in good faith. The Commission declines to impose upon itself a standard as suggested that could open a door to collateral litigation. For these reasons the Commission declines to adopt such a standard, preferring the straightforward approach as updated by the final rule.

9. *Alter the privilege standard:* Several commenters requested that the Commission revise provisions concerning privilege contained in sections 1601.24(e) and 1626.12(c). Specifically, these commenters argued that the Commission should preclude itself from claiming privilege on the underlying facts it gathers and limiting the discretion of Commission employees in identifying privileged material.

*Commission response:* The Commission declines to make specific statements regarding privilege beyond that which is set forth in the proposed rule. The Commission will continue to claim all privileges to which it is entitled by law. The Commission declines to amend the rule to outline specific criteria for employees to follow concerning assertions of privilege.

10. *Confidentiality of conciliations:* Multiple commenters asked that the Commission prohibit itself from seeking publication of the conciliation, through terms in the

conciliation agreement. One commenter explains that, in their experience, it is common for the Commission to require, as a condition of successful conciliation, that a respondent agree to waive confidentiality and allow the Commission to issue a public press release announcing some or all of the terms of the parties' agreement. The commenter contends that this serves not only to deter employers from entering conciliation at the outset but can serve to lead a case that might otherwise be resolved via conciliation to instead fail to be resolved in conciliation.

*Commission response:* The Commission will not make this change. Section 706 of Title VII clearly requires approval to disclose information concerning conciliation. 42 USC 2000e-5(b) (“Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.”). As the Commission has explained, conciliation is a “favored” method to identify and eliminate illegal discrimination in employment. Publication of conciliation results—or certain elements of those results—often furthers this objective. There are valid reasons for the Commission to seek approval to publicize certain successful agreements and the Commission will continue to do so where appropriate.

11. *Limit disclosure of individual's information to another aggrieved individual:* Some commenters were concerned that sections 1601.24(f) and 1626.12(d) would result in disclosure of information about other victims to the charging party or to other aggrieved individuals that may violate a victim's privacy.

*Commission response:* The Commission agrees with this concern and has included language in the rule that information may be shared with charging parties “except for information about another charging party or individual” to ensure that information about an individual is not disclosed to another charging party or aggrieved individual.

Although objected to by some commenters who opposed the rule, the Commission will not be taking out the “upon request” language regarding disclosures to charging parties. It is important for the Commission to maintain its discretion and flexibility with how it engages with aggrieved individuals during the conciliation process.

Moreover, the burden on staff to provide this information to all identified aggrieved parties would be substantial in class cases.

12. *Commission should always make initial offer*: One commenter advocated a requirement that the Commission always make the initial offer in conciliation.

*Commission Response*: The Commission will not add this requirement to the final rule. Although the Commission agrees that often it is appropriate for the Commission to make the initial offer in conciliation, this is not always the case. There are circumstances in which a respondent may prefer to make the initial offer or where such an outcome is otherwise appropriate or more likely to secure terms “acceptable to the Commission.” 42 USC 2000e-5(f)(1). The imposition of such a procedural requirement could operate to impede the Commission’s ability to execute this critical statutory obligation to eliminate unlawful discriminatory practices. Therefore, the Commission declines to make this change.

13. *Provide more details to support demands for monetary damages*: Several commenters contend that the Commission should require more explanation for the basis of its damages requested in conciliation. One commenter argues that the Commission will often take the position with respect to compensatory or punitive damages that a charging party is entitled to the maximum statutory cap on compensatory and punitive damages from the start. Consequentially, the commenter urges the Commission to make clear that an initial offer should not routinely rely on the maximum statutory damages cap in an attempt to leverage a higher final settlement. Likewise, another commenter echoes this sentiment and states that the

final rule should provide that merely reciting the statutory maximums for compensatory or punitive damages does not satisfy the rule's requirements.

*Commission Response:* The Commission believes that the descriptions provided in sections 1601.24(d)(3) and 1626.12(b)(3) in the NPRM are sufficient because the language covers all requests for damages and relief, including punitive damages.

Under the final rule, whatever the Commission's offer—including if it is the statutory cap—must be accompanied by an explanation based on the facts of the case.

Furthermore, the commenters' suggestions risk taking away the flexibility that the Commission is seeking to maintain while also increasing transparency in conciliation.

14. *Add language about providing funds to third parties:* One commenter suggested adding language to the rule that would expressly encourage terms allowing distribution of excess settlement funds to third parties, such as charities.

*Commission response:* The Commission declines to add this provision. While these type of clauses may be appropriate in certain circumstances, the Commission is aware that they have recently been subject to greater scrutiny. For these reasons, and to ensure maximum flexibility in conciliation and avoid unnecessary encumbrances on its discretion, the Commission concludes that it would be inappropriate to include such a provision in its regulations. *See Frank v. Gaos*, 139 S. Ct. 1041 (2019).

### **Comments Opposing the Rule Change and the Commission's Responses**

The EEOC also received comments opposing the rule change. These comments included concerns about the length of the comment period, particularly during the COVID-19 pandemic; whether the rule was premature in light of a pilot program; whether the rule favored employers over workers; whether the rule would undermine the Commission's ability to prevent and remedy discrimination; the rule's potential economic impact; the rule's relationship to the *Mach Mining* case; and whether the Commission sufficiently justified the rule's impact on its enforcement mission.

*Comments Regarding the Length of the Comment Period:* Several commenters claimed that a 30-day comment period was too short and asked that it be extended, some citing Executive Order 13563 and arguing that it provides comment periods should generally be at least 60 days. Others suggested that a short time period deprives the public of a sufficient opportunity to weigh in, citing the COVID-19 pandemic.

*Commission Response:* The Administrative Procedure Act (APA) requires that agencies give “interested persons an opportunity to participate” in rulemaking, but it does not establish specific time periods in which a rule must be open for public comment. 5 U.S.C. 553(c). Neither does Executive Order 13563, which provides that an agency “afford the public a meaningful opportunity to comment through the Internet on a proposed regulation, with a comment period that should generally be at least 60 days.” The language of the APA and Executive Order 13563 anticipates that some rules are extensive and complex, running scores or hundreds of pages in the Federal Register; others are far less so. As a result, the “60 days” benchmark is neither mandatory nor necessarily appropriate for all rules. Here, as with all EEOC rulemakings, the Office of Management and Budget reviewed the NPRM before publication and agreed that the 30-day comment period was appropriate in light of the contents of the proposed rule.<sup>3</sup> The comment period must afford the public a meaningful opportunity to comment. This has occurred. The depth and breadth of the substantive comments the Commission received evidences that interested persons had a meaningful opportunity to comment.

In addition, the Commission conducted a meeting that called attention to the proposed rule. Specifically, on August 18, 2020, the Commission held a public meeting to discuss and vote on the NPRM. Notice of the meeting was published in the Federal Register which identified the topic of the meeting. The public was invited to listen to the meeting live. Press reports before and after the meeting reported the discussion of the proposed rule. The transcript

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<sup>3</sup> Similarly, Section 6(a) of Executive Order 12866 states that in “most cases” the comment period should be “not less than 60 days.”

of the meeting was timely uploaded on to the EEOC website.<sup>4</sup> As a result, the public had notice of this proposed rule from several sources and ample opportunity to research and evaluate the proposal, beginning nearly two months before the NPRM was published in the Federal Register. The Commission concludes that the length of the comment period on this rule was appropriate and declines to extend it.

*Allegation that the Rule is Premature Because of the Ongoing Pilot Program:* Some commenters contend that the NPRM fails to acknowledge the Commission's ongoing pilot program regarding conciliation procedures and that the Commission should wait to finalize the rule until after the pilot has concluded and been studied. Others argued that the public too should be given the opportunity to study the pilot and incorporate those efforts in further comments regarding this rule. Some commenters expressed concern that the results of the pilot program could be at odds with the rule, suggesting the Commission should delay the final rule to ensure harmony with the results of the pilot.

*Commission response:* In May of 2020, the EEOC launched a six-month pilot program. The pilot was extended in November 2020. This pilot made only a single change to the conciliation process.<sup>5</sup> Specifically, the pilot added a requirement that conciliation offers of certain amounts be approved by the certain levels of management prior to being shared with respondents. This requirement adds additional oversight by management to ensure that conciliation proposals are in line with the facts of the case. The pilot program is not related to this rulemaking; it addresses a different aspect of conciliation. It does not incorporate or add any of the changes to the conciliation procedures that were proposed or are being implemented in this final rule. Given the lack of overlap or connection between the pilot program and this rule, the results of the pilot are not relevant to this rulemaking and there is no reason to delay the latter so that the Commission

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<sup>4</sup> See <https://www.eeoc.gov/meetings/meeting-august-18-2020-discussion-notice-proposed-rulemaking-conciliation>.

<sup>5</sup> Concurrently with the pilot, the agency conducted refresher training on conciliation practices. In addition to training on the pilot, the refresher training included an emphasis on the pre-determination interview (PDI) requirement, which is conducted before the Commission issues its reasonable cause finding. While some overlap may occur between what employees are already expected to disclose during the PDI and what this final rule ensures is disclosed during conciliation, the pilot did not require any new disclosures.

or the public may study the former. As this rule is neither related to nor dependent on the pilot or its outcome, the Commission declines the delay sought by these commenters.

*Comments that the Rule Primarily Benefits Employers and Respondents:* Some commenters faulted the rule for requiring the Commission to disclose certain information to respondent automatically, while only providing the information to charging parties and aggrieved individuals upon request. Others raised concerns that the new rules could turn the conciliation process into “quasi-litigation” by making conciliation more formal and could generate collateral litigation. Still others expressed concern that the disclosures contemplated could potentially reveal the Commission’s litigation strategy and inadvertently assist respondents in litigation.

*Commission Response:* The Commission appreciates the concerns expressed regarding the circumstances under which disclosures are made to respondents versus charging parties and aggrieved individuals. However, because the Commission is mindful of the need to maintain flexibility with respect to how staff engage with charging parties and aggrieved individuals, and recognizes the burden disclosure would impose upon staff, the Commission will retain the language “upon request”.

The Commission is implementing the final rule to improve conciliation. The final rule should enhance the Commission’s effectiveness in executing its statutory mandate to identify and eliminate discriminatory employment practices and obtain appropriate relief for victims without litigation, as Congress preferred. The rule accomplishes this end by requiring that the Commission provide certain basic information—the facts and law in support of the claim and who or what class of victims was affected by the allegedly discriminatory practice—that it already develops. By providing this information, respondents can better identify and correct the discriminatory action, policy, or practice. By facilitating such a result without litigation, the Commission achieves its primary goal of ending the discriminatory practice and potentially impacting other employees who may have been affected by the practice. As a result, the primary beneficiaries of more effective conciliations are victims and potential victims of discrimination,

as well as the public. The Commission intends for these improvements to encourage more respondents to engage in the process, thus increasing the likelihood of voluntary compliance, and successful conciliations. These results should also provide benefits to discrimination victims by obtaining relief far sooner than would be possible in litigation. Without successful conciliation, employees and applicants are, in most cases, left to fend for themselves to try and obtain relief through litigation. For these reasons, the Commission disagrees with commenters' assertion that the final rule primarily benefits employers.

Nothing in the final rule is intended to create new causes of action for respondents or others; to the contrary, the rule is designed to alleviate concerns that the Commission has failed to meet its conciliation obligation, as explained in *Mach Mining*. Should the Commission's conciliation efforts be challenged in litigation, the final rule provides a framework that allows the Commission to easily demonstrate it has met the requirements laid out in *Mach Mining*, by simply affirming through an affidavit that it followed the procedures described in the statute. Thus, rather than raising the likelihood of collateral litigation over conciliation, the final rule will have the opposite effect by providing a guidepost for the Commission to follow in meeting its conciliation obligations. Furthermore, as the Commission pointed out in the NPRM, the confidentiality provisions of Title VII are inherent barriers to a probing judicial review of conciliation and protects the information disclosed. *See* 85 FR at 64080-81. For these reasons, the Commission has determined that this final rule will not unnecessarily open its conciliation process to judicial review or collateral attacks from employers.

The Commission appreciates the concerns expressed regarding the circumstances under which disclosures are made to respondents versus charging parties and aggrieved individuals. However, because the Commission is mindful of the need to maintain flexibility regarding how staff engage with charging parties and aggrieved individuals, and in recognition of the burden disclosure would impose upon staff, the Commission will retain the language "upon request" as it relates to charging parties and aggrieved individuals. As noted above, the level of engagement

by a charging party or aggrieved individual can vary from conciliation to conciliation.

Furthermore, as also noted above, the Commission must also focus on the public interest when attempting to resolve the case through conciliation.

The rule is designed to improve the conciliation process by making it more meaningful and effective. Adequate information must be provided to the respondent to allow it to address the discriminatory conduct as well as assess its potential liability. The rule protects disclosure of privileged information, which will protect any confidential attorney work product related to litigation strategy.

*Concerns That the Rule Would Undermine the Commission's Ability to Prevent and Remedy*

*Discrimination and Would Harm Workers:* Some commenters expressed concern that compliance with this rule would divert resources that otherwise would be used to directly serve charging parties. For example, some commenters stated that the new rule would cause the Commission to initiate fewer actions in court or somehow disincentivize the Commission from issuing cause findings. There was also concern that the disclosures required by the proposed rule could lead to retaliation against workers.

*Commission response:* The law requires that the Commission provide information to respondents regarding “the alleged unlawful employment practice.” *Mach Mining*, 575 US at 488. The Commission has determined that, at a minimum, this must include factual and legal information sufficient to support its reasonable cause finding and any demand that it has made. This affords a respondent with basic information about the claim, such as the action or practice that the Commission has determined to be discriminatory in violation of Title VII, and the person or categories of persons it has harmed. *Id.* Instead of being “extensive” or “burdensome,” the disclosures required by the final rule are straight forward. The Commission’s employees already engage in the analysis and work outlined in the rule such that compliance with the rule will not “divert” resources away from services currently provided to the victims of discrimination. In every case where there is a finding of discrimination, the Commission develops facts, identifies

aggrieved parties, evaluates the scope and potential of class or systemic allegations, analyzes legal theories, and calculates potential damages. The rule requires that some of this information be communicated to respondent so that it may evaluate the claim to be conciliated. In communicating this information, the Commission will support its conciliation demand and reinforce its reasonable cause finding, thereby increasing the likelihood of voluntary resolution of charges, just as Congress preferred.

However, in recognition of the complications that could arise with respect to conciliations already in progress, this rule will only apply to conciliations for charges for which a Letter of Determination invitation to engage in conciliation has been sent to respondent on or after the effective date.

Concerns that the rule will cause fewer cases in which reasonable cause is found are inconsistent with the requirements of the final rule. The Commission's mission in conciliation is to identify and designate for elimination unlawful discriminatory employment practices, as well as to obtain relief for victims of discrimination. Whenever the investigation of a charge reveals that unlawful discrimination has likely occurred, the Commission will issue a finding of reasonable cause. This rule merely requires that certain basic information regarding such a charge be provided to the respondent. The Commission is confident that this information will support its findings of reasonable cause and convey the strength of the Commission's determination.

The Commission also rejects the assertion that the final rule will somehow frustrate its mission. The Commission's mission is to prevent and remedy unlawful employment discrimination. While litigation is a useful tool in achieving that end, it is not the exclusive means to achieve that result. Indeed, as noted above, Congress favored conciliation over litigation as a means to eliminate discriminatory employment practices. Furthermore, there is no reason to believe that the new rule will cause Commission employees to find reasonable cause in fewer cases where such a finding is merited pursuant to the facts and the law.

Section 706 of Title VII directs the Commission, after it finds reasonable cause, to endeavor to eliminate discrimination through informal methods of conference, conciliation, and persuasion. Congress further directed that the EEOC could only commence a civil action if, and only if, conciliation fails. By so doing, Congress made it clear that conciliation is the preferred method to address discrimination. *See Mach Mining*, 575 US at 486 (“in pursuing the goal of bringing employment discrimination to an end, Congress chose ‘cooperation and voluntary compliance’ as its preferred means”). This rule advances that choice.

Commenters’ concerns that disclosures could result in retaliation against aggrieved parties are misplaced. The rule provides protection for all workers reasonably susceptible of retaliation, which, of course, is prohibited by Title VII. The Commission will vigorously pursue employers who engage in retaliation against employees who attempt to vindicate their rights.

*Concerns About Economic Impact:* Some commenters expressed concern that the rule does not take into account the negative economic effects of discrimination. Others lodged concerns that the rule claims economic benefits of more conciliations, while ignoring the additional costs to the Commission. One commenter said the Commission relied on “trickle-down economics” to claim that cost savings would benefit the economy overall.

*Commission response:* Concerns that the rule does not take into account the negative economic effects of discrimination are misplaced. The Commission is aware of the economic effects of unlawful discrimination and uses every tool available to it to prevent and end unlawful discrimination. Conciliation is an important part of that. The more cases the Commission successfully conciliates, the greater the number of unlawful employment practices it eliminates and the greater number of incidents of discrimination are remedied, achieving its statutory mission. The Commission believes the final rule will lead to greater participation and more successful conciliations, which will have positive economic impacts for employees, employers, and the public at large.

The Commission disagrees with the comments that this rule will increase the rates of discrimination or allow discrimination to go unpunished or unaddressed. These comments fail to explain how the rule will cause more employers to engage in unlawful discrimination or to discriminate more extensively. To the contrary, this rule requires the Commission to provide to respondents factual and legal information about the claim to be conciliated. This will allow the respondent to better identify and address any underlying policy or practice that is discriminatory, even if the respondent elects to contest the particular charge or litigate for other reasons. And as more such policies and practices are identified and eliminated, fewer workers will suffer unlawful discrimination.

*Concerns That the Rule is Inconsistent with Mach Mining and Statutory Authority:* Some commenters argued that the rule is inconsistent with the Supreme Court decision in *Mach Mining*, and that because the changes are not required by statute or court decision the Commission should not make them. For example, a number of commenters pointed to the language of the *Mach Mining* decision that said Title VII's conciliation provision "smacks of flexibility" to argue that the Commission's proposed rule was contrary to the Court's holding. *Id.* at 492. Others believe conciliation is already successful and fear that these additional procedures will introduce an unnecessary rigidity that will compromise that success. Still others suggest that any changes to the Commission's conciliation process should be accomplished through internal guidance or pilots instead of rulemaking. Some commenters also claimed that the proposal was inconsistent with the language of Title VII itself, primarily citing to the use of "informal" in the statute regarding conciliation, and was therefore outside of the Commission's authority.

*Commission response:* The Commission disagrees that the final rule conflicts with *Mach Mining*. In *Mach Mining*, the Supreme Court began by emphasizing the importance of conciliation. The Court noted that Title VII "imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit." *Mach Mining*, 575 US at 486.

That “obligation,” as the Court has held repeatedly, is “mandatory, not precatory” and “is a key component of the statutory scheme. In pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means.” *Id.* (punctuation and citations omitted). When undertaken effectively, conciliation should “end discrimination far more quickly than could litigation proceeding at its often ponderous pace.” *Ford Motor*, 458 US at 228.

The Court found that Title VII “provides certain concrete standards pertaining to what that endeavor must entail.” *Mach Mining*, 575 US at 488. Based on the statutory language describing the “attempt” the Commission must undertake in conciliation, namely “informal methods of conference, conciliation, and persuasion,” the Court explained that “[t]hose specified methods necessarily involve communication between parties, including the exchange of information and views.” *Id.* (citing 42 USC 2000e-5(b)). Not only does Title VII require “communication,” the Court continued, but “[t]hat communication ... concerns a particular thing: the ‘alleged unlawful employment practice.’” *Id.* (citing 42 USC 2000e-5(b)). Specifically, the Court held, in order “to meet the statutory condition, [the Commission] must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.” *Id.* If “the Commission does not take those specified actions, it has not satisfied Title VII’s requirement to attempt conciliation.” *Id.*

Beyond these basic requirements that are mandatory in all cases, the Court recognized that the Commission enjoys broad discretion regarding the way in which it conducts conciliations. *Id.* at 492. The Court’s statement regarding “flexibility” cited by commenters was in support of “the latitude Title VII gives the Commission to pursue voluntary compliance with the law’s commands.” *Id.* The Commission is not required “to devote a set amount of time or resources” or take “any specific steps or measures” in conciliation. *Id.* The Commission “alone decides whether in the end to make an agreement or resort to litigation,” including “whenever [it

is] unable to secure terms acceptable *to the Commission.*” *Id.* Once it has satisfied its obligations, the Commission decides how it will respond to the respondent and negotiate and how long it will do so. *Id.* (stating that “Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer’s counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.”).

The Commission’s final rule focuses on the requirement that it communicate about the “claim.” *Id.* at 488. The Supreme Court held that the Commission must, at a minimum, communicate to the respondent “what practice has harmed which person or class” in order to comply with its conciliation obligation and that courts may review such efforts to ensure compliance with Title VII. *See id.* The Commission has determined that the final rule comprehensively and thoroughly covers the information required to make it compliant with *Mach Mining*. If respondents raise specious challenges, the Commission will be in a strong position to respond and, as appropriate, seek sanctions or other relief.

Some commenters point out that the rule is not mandated by *Mach Mining* or Title VII. While the requirements set out in the rule are not spelled out in either the Court’s opinion or the statute, the final rule—or any regulation—need not be *required* by the Supreme Court or a statute to be appropriate. In fact, both Title VII and *Mach Mining* make clear that the Commission “must tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance. *Mach Mining*, 575 U.S. at 488. The Commission is exercising its “wide latitude” and “expansive discretion” over the conciliation process to clarify the contents of statutorily required communications to respondents in such a way that its satisfaction of the requirements will be clear. *Id.* at 488-89. The Commission has concluded that a recitation and summary of the factual and legal basis is a core component of any

“communication about the claim”. This would include the identification of the action or practice the Commission has deemed discriminatory, the reason for its conclusion, as well as “what person or class” has been unlawfully harmed—all so that the respondent might be able to bring itself into compliance. With this rule the Commission is implementing a procedure to ensure that it satisfies the conciliation requirements of Title VII, as elucidated in *Mach Mining*.

Some commenters argue that the final rule imposes “rigid” or “extensive” burdens that will curtail the Commission’s “flexibility” and “discretion”. As noted above, the final rule requires the Commission to provide certain basic information that the Commission has concluded will categorically satisfy the minimum statutory requirements of its “communication” with respondents. Since EEOC staff already perform this work, this rule does not require the reallocation of resources, and is neither extensive nor voluminous. Contrary to assertions in many comments, this does not weaken the Commission’s position in conciliation or litigation in that it does not require the Commission to “lay all its cards on the table,” “devote a set amount of time or resources,” or “take any specific steps or measures” in *any* conciliation. Once the information has been provided, the Commission “alone decides” in each case how it will respond to a particular respondent, the manner and particulars of how it will negotiate, and how long it will do so. *See id.* at 492. The Commission “alone decides whether in the end to make an agreement or resort to litigation,” including “whenever [it is] unable to secure terms acceptable to the Commission.” *Id.* The final rule ensures clear and consistent satisfaction of statutory requirements in accordance with the Court’s opinion in *Mach Mining* while maintaining the Commission’s flexibility to conciliate as it deems appropriate.<sup>6</sup>

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<sup>6</sup> As the Court explained in *Mach Mining* and the Commission noted above, “Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer’s counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.” *Id.* at 492. The final rule does nothing to limit or curtail this discretion that the Commission has applied for decades in pursuit of its mission to eradicate unlawful employment discrimination.

While several commenters expressed a preference for internal guidance or pilot programs rather than a rule, the Commission has previously implemented Quality Enforcement Practices and internal guidance to enhance its conciliation efforts, changes that resulted in significant training of EEOC staff. While these changes improved the conciliation process, the Commission believes more should be done to build on that progress and has concluded the structure and predictability of a rule is the best way to make sure that it is consistently satisfying its statutory conciliation obligations. As already noted in the NPRM and above, less than half the cases for which the Commission finds reasonable cause are resolved through conciliation. The Commission aims to achieve more success, including fewer cases in which the respondent opts out of the process entirely. The Commission's purpose is to enhance the processes that will improve its ability to remedy unlawful discrimination without the need to resort to litigation.

Some commenters argued that conciliation is already successful and that the allegedly rigid procedures imposed in the final rule are unnecessary. One commenter noted that following *Mach Mining*, the amount of collateral litigation attacking conciliation decreased and the number of successful conciliations increased. An increase in successful conciliations is admirable and the Commission recognizes and commends the achievements of its employees in the conciliation process. Nothing in the final rule diminishes or recharacterizes that success. To the contrary, the final rule aims to build upon that success. As noted in the NPRM, from fiscal years 2016 to 2019, the Commission successfully conciliated approximately 41.23% of those cases in which it found reasonable cause. This amounts to only a slight increase over the previous four fiscal years. Also, during these years, employers continued to decline to participate in conciliation in approximately 33% of such cases. 85 FR at 64080. The Commission is concerned about the overall rate of successful conciliation and that one-third of employers refuse to participate in conciliation. While there may be many reasons why an employer refuses to conciliate, at least some of these respondents may be motivated, at least in part, by the belief that the current conciliation process is flawed and not worth the effort. The Commission is not targeting a

specific percentage of successful conciliations or employer participation. However, the Commission is making minor changes that it believes will allow it to continue to improve its processes and, in so doing, identify and eliminate more discriminatory employment practices.

Finally, this final rule is consistent with section 706 of Title VII's use of "informal" when describing the Commission's efforts to resolve cases after finding reasonable cause, and in turn, the Commission's procedural rulemaking authority. The Commission's final rule does not establish a "formal" process, but instead provides basic procedures for information sharing that are fundamental to any settlement discussion. The rule does not establish "quasi-litigation" with formal rules of evidence or rules of procedure that would be found in federal court. It instead establishes base level procedures, but otherwise leaves conciliation as an informal process that can be adjusted as needed by the case.

*Concerns that the Commission Did Not Justify How the Rule Furthers Its Enforcement Mission:*

A few commenters contended that the Commission had not presented any statistics or other data to support its belief that the proposed changes would make successful conciliation more likely or increase respondents' participation in conciliation. In addition, one commenter, argued that many respondents simply have no interest in conciliating, for reasons beyond the Commission's control. In support of this position, the commenter described instances in which employers agreed to resolve a matter after the Commission had filed suit for a higher amount than what the Commission offered in conciliation. Finally, other commenters challenged the portions of the proposed rule requiring that the Commission disclose information obtained that caused it to doubt there was reasonable cause on a variety of grounds.

*Commission response:* The Commission has explained the reasons it believes that the final rule is reasonably likely to increase participation in conciliation. These provisions should encourage greater confidence that the communications in the conciliation process will include the sort of information that the Court determined were required. Providing such basic factual and legal

information will encourage more employers to participate and will provide them with a better understanding of the Commission's position.

As explained above, there are many reasons that respondents elect not to conciliate and, as the commenter explained, some of these reasons are beyond the Commission's control. A decision by a respondent to settle a case during litigation for more than what it could have settled during conciliation actually supports the Commission's reason for the rule change. In these situations, a respondent was willing to reach an agreement with the Commission after it received more information about the strength of the case against them, which they obtained in the litigation process. By better explaining its case in conciliation, the Commission makes it more likely that respondents will understand the risk of litigation and be more willing to resolve the matter during conciliation, freeing the Commission's resources to litigate other more challenging cases.

The Commission's Office of Enterprise, Data, and Analytics (OEDA) has conducted a comprehensive analysis of the reasons why conciliations fail.<sup>7</sup> Their analysis identifies two primary reasons charges are not resolved through conciliation: (1) the respondent's choice not to participate and (2) the parties cannot agree on monetary relief. OEDA's statistics also indicate that in cases where employers agree to participate in conciliation, there is more than a 50% chance of achieving resolution. Getting more employers to agree to participate is the first step to getting more resolutions. By providing basic information about the facts and legal arguments behind the claim, the Commission increases the likelihood that the respondent will recognize the merit of the Commission's position and conciliate.

Finally, the Commission has decided to remove from the final rule any requirement that it disclose material information that caused it to doubt its determination of reasonable cause. After reviewing the points raised by several commenters, the Commission is concerned about the

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<sup>7</sup> The need to complete this analysis was cited by a commenter opposed to the proposed rule as a reason not to move forward. The analysis has been completed and is consistent with the changes made in the final rule.

potential for collateral challenges that this requirement may create. As the Commission has stated above, the purpose of this final rule is not to create or encourage potential new avenues for dilatory litigation on conciliation. Based on its review of the comments, the Commission believes the litigation risks of this part of the proposal outweigh the increase in transparency that would be achieved specifically by this provision. The Commission expects that its personnel will continue to evaluate, weigh, and proactively address evidence that runs contrary to a reasonable cause finding in its summary under § 1601.24(d)(2). In cases where the facts or the law suggest that reasonable cause is lacking, existing protocols require field personnel not to make such a finding. And the Commission’s employees adhere to these protocols—and their professional obligations—in evaluating cases. For these reasons and after carefully considering the comments regarding this proposal, the Commission has removed this requirement from the final rule.

### **Final Regulatory Revisions**

After considering all comments received, the Commission is finalizing the proposed rule as modified in the discussion above.<sup>8</sup> These changes will bring more clarity, transparency, and consistency to the conciliation process. They will encourage more respondents to participate and the Commission to better articulate its positions at the outset of conciliation. The final rule sets out procedures that will support the Commission’s ability to meet statutory obligations to attempt to conciliate, *i.e.*, to “tell the employer about the claim—essentially, what practice has harmed which person or class—and provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.” *Mach Mining*, 575 US at 488. As the Court noted, conciliations “necessarily involve communication between parties, including the exchange of

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<sup>8</sup> As noted in the NPRM, the language in § 1626.12 is slightly different in some places than the language of 1601.24 due to the different conciliation language in the ADEA. 85 FR at 64081 n. 10. This includes the fact that the ADEA does not require that conciliation start after a reasonable cause finding, so the provisions in 1601.24 that are dependent on a reasonable cause finding are not found in § 1626.12. *See* 29 U.S.C. 626(d)(2). A letter from former employees of the Commission took issue with the Commission using the phrase “allegations” in the ADEA portion of this rule. The reason that Commission used the phrase “allegations” instead of referencing a reasonable cause finding is because the ADEA section that describes the Commission’s conciliation obligations is not dependent on a reasonable cause finding, unlike Title VII. *See* 29 U.S.C. 626(d)(2).

information and views.” *Id.* This final rule ensures that the Commission’s exchange of information occurs in an open, transparent manner. These changes should make the conciliation process more successful and, in so doing, enhance the Commission’s fulfilment of its mission to eliminate unlawful discrimination in employment.

## **Regulatory Procedures**

### *Executive Order 12866*

This rule has been determined to be significant under EO 12866 by the Office of Management and Budget because it raises novel legal or policy issues arising out of legal mandates or the President’s priorities. The rule will not have an annual effect on the economy of \$100 million or more, nor will it adversely affect the economy in any material way. Thus, it is not economically significant for purposes of EO 12866 review. However, the rule will have many benefits as demonstrated by the following cost-benefit analysis.

The rule imposes no direct costs on any third parties and only imposes requirements on the EEOC itself. The rule, if implemented, will likely require the EEOC to conduct training of staff to ensure that it is complying with the new regulation. While these changes and training would likely be absorbed within the Commission’s normal operating expenses, any additional expenses that the agency would incur could be offset by cost savings derived from these changes. For example, charging parties often file Freedom of Information Act (FOIA) requests with the Commission after receiving a “right to sue notice” in order to receive the charge file. If more cases are resolved in conciliation, these cases would not result in right to sue notices and the Commission would receive fewer FOIA requests, resulting in cost savings for the government.

Furthermore, while the parties ultimately determine whether a conciliation agreement is reached, if the Commission is able to conciliate more cases successfully, it will benefit employees, employers, and the economy as a whole. With respect to employees, an increase in successful conciliations will result in more employees receiving remedies for the discrimination they suffered within an accelerated timeframe. Many employees who receive reasonable cause

findings are unable to obtain any relief without conciliation because they do not pursue litigation for fiscal, emotional, or other reasons, or even if they do pursue litigation, ultimately do not attain relief. Even employees who ultimately would otherwise be successful in litigation may benefit from a conciliation because they would then receive remedies sooner and avoid the time, cost, stress, and uncertainty of litigation.

Employers will also benefit from the EEOC conciliating cases more successfully. In some cases, conciliations may provide an opportunity for employers to more quickly correct any discriminatory conduct or policies and seek compliance assistance from the EEOC.

Additionally, while employers pay \$45,466<sup>9</sup> on average to settle cases in conciliation, they will save time, resources, and money by avoiding (often costly and lengthy) litigation. It is difficult to quantify the average cost of litigating an employment discrimination case for an employer because the cost of a case depends on several factors, such as the complexity of the case, length of the litigation, and the jurisdiction in which it is litigated.<sup>10</sup>

The stage at which litigation concludes has a large effect on litigation costs – attorneys’ fees and other litigation expenses are significantly higher for cases that go through trial, as opposed to those that end in summary judgment. For example, in 2013, one experienced defense attorney estimated that the average attorney’s fees for employers for cases that end in summary judgment was between \$75,000 and \$125,000; while cases that go to trial average between \$175,000 and \$250,000 in fees.<sup>11</sup> Factoring for inflationary changes in legal fees, the present value of those costs is closer to \$83,000 to \$139,000 for cases ending in summary judgment and

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<sup>9</sup> This was the average for fiscal year 2019.

<sup>10</sup> This analysis focuses only on an employer’s litigation costs because most plaintiff-side attorneys use contingency-fee arrangements for pursuing claims, in which the attorney receives a portion of the recovery and charges little or nothing if no recovery is obtained. See Martindale-Nolo Research, *Wrongful Termination Claims: How Much Does a Lawyer Cost?* (Nov. 14, 2019), available at <https://www.lawyers.com/legal-info/labor-employment-law/wrongful-termination/wrongful-termination-claims-how-much-does-a-lawyer-cost.html> (noting that 75% of plaintiffs lawyers in employment litigation use contingency fee arrangements and another 15% use a combination of a contingency fee and hourly rate). Thus, more frequent conciliation will save litigation costs for those few plaintiffs who pay their attorneys an hourly rate.

<sup>11</sup> John Hyman, *How Much Does it Cost to Defend an Employment Lawsuit*, in WORKFORCE, (May 14, 2013), available at <https://www.workforce.com/news/how-much-does-it-cost-to-defend-an-employment-lawsuit>.

\$195,000 to \$279,000 for cases that end after a trial.<sup>12</sup> Taking the middle of each range in present value results in average costs of \$111,000 for cases ending in summary judgment and \$237,000 for cases that end after trial. The Commission recognizes that many employers will find these fee estimates to be low, but because there is insufficient, publicly available data for calculating the amount that employers have expended in defending against a charge through conciliation<sup>13</sup> and which otherwise would be subtracted for purposes of this analysis, the Commission believes such a conservative estimate is appropriate.

To determine the average amount spent on attorney's fees, the Commission also must consider the number of cases that were the subject of conciliation that are either resolved at summary judgment or proceed to trial. The majority of cases of employment discrimination are not tried.<sup>14</sup> Some studies suggest that two-thirds or more of employment discrimination lawsuits that are filed in court end in summary judgment.<sup>15</sup> Those statistics, however, include cases filed in court after the EEOC dismissed the charge without a reasonable cause determination. In conciliation cases, by contrast, the EEOC has conducted an investigation and found reasonable cause to conclude that discrimination may have occurred. The Commission believes it is

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<sup>12</sup> These calculations were made using the Department of Labor Bureau of Labor Statistics's (BLS) Consumer Price Index calculator, *available at* [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm). These increases are likely conservative, as they are similar to increases in legal service costs over a shorter time frame. Historical data for the BLS Producer Price Index for Legal Services in the Mid-Atlantic region, *available at* [https://www.bls.gov/regions/mid-atlantic/data/producerpriceindexlegal\\_us\\_table.htm](https://www.bls.gov/regions/mid-atlantic/data/producerpriceindexlegal_us_table.htm), reveals that average costs for employment and labor legal services increased from 100 in December 2014 (the earliest data available) to 109.9 in April 2020 (the most recent non-"preliminary" data), an increase of approximately 10%. Similarly, the US Department of Justice's USAO Attorney's Fees Matrix, which only measures the change in fees between 2015-2020 across the legal field, reveals a roughly 12% change in hourly rate for the most experienced attorneys in the District of Columbia. *See* <https://www.justice.gov/usao-dc/page/file/1305941/download>.

<sup>13</sup> "There do not appear to be any reliable statistics on the percentage of employers who retained outside counsel to defend charges filed with the EEOC." Philip J. Moss, *The Cost of Employment Discrimination Claims*, 28 Maine Bar J. 24, 25 (Winter 2013). Supposing "conservatively" that 50% of employers relied on outside counsel at an hourly rate averaging \$250 (in 2013) and invested 20 hours in cases during the EEO process, *Id.*, employers would average \$2,500 in legal costs during the EEO process ( $\$250 \times 20 \text{ hours} \times 0.5$ ), which in present value would average \$2,792. The costs for employers who use in-house counsel or human resource professionals to handle their EEOC charges are more difficult to quantify.

<sup>14</sup> Paul D. Seyfarth, *Efficiently and Effectively Defending Employment Discrimination Cases*, 63 AmJur Trials 127, § 81 (Supp. 2020) ("It is an undeniable fact that most employment discrimination cases do not get tried; they are either settled or disposed of via summary judgment.").

<sup>15</sup> Charlotte S. Alexander, Nathan Dahlberg, Anne M. Tucker, *The Shadow Judiciary*, 39 Rev. of Lit. 303 (2020) (Table 3) (finding that among summary judgment motions in employment cases handled by magistrate judges in the Northern District of Georgia, 78% are granted in part or in full); Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y. L. Sch. L. Rev. 815, 817 (2012/2013) (finding that approximately two-thirds of all equal pay act cases end at the summary judgment stage).

reasonable to assume that more of these latter cases will survive summary judgment. With this assumption, the average litigation cost for employers is \$174,000.<sup>16</sup>

Resolving more cases through conciliation will be beneficial to the economy as a whole because the litigation costs that the parties save can be put towards more productive uses, such as expanding businesses and hiring more employees. It is difficult to quantify how many cases in which the Commission finds reasonable cause end up being litigated in court because, if the EEOC decides to not litigate the case, the Commission does not track lawsuits filed by private plaintiffs. The Commission believes that cases in which the EEOC found reasonable cause are the most likely to be litigated by a private plaintiff because the EEOC has already determined that there is reasonable cause to believe that the case has merit. While not all cases in which reasonable cause is found and conciliation is unsuccessful are litigated, there is reason to believe that a significant portion are. The Commission itself files lawsuits in roughly 10% of the cases in which reasonable cause is found and conciliation is not successful.<sup>17</sup> It is reasonable to believe that private plaintiffs file lawsuits in at least an additional 40% of cases, so that overall half the cases in which reasonable cause is found, but conciliation is unsuccessful, end up being litigated in court.<sup>18</sup>

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<sup>16</sup> Average summary judgment fees (\$111,000) + average trial fees (\$237,000)/2 = \$174,000. This figure is within the range of other estimates for average attorney fee costs. See AmTrust Financial, Employment Practices Liability (EPLI) Claims Trends, Stats & Examples, available at <https://amtrustfinancial.com/blog/insurance-products/top-trends-employment-practices-liability-claims> (asserting that attorney fee costs in 2018 averaged \$160,000, which in present value would amount to \$167,000); Moss, *supra* note 7 (citing Blasi and Doherty, California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at \$0, UCLA-RAND Center for Law and Public Policy (2010)) (estimating costs to employers in state-level employment discrimination cases in California in 2010 at \$150,000, which taken to present value would average approximately \$180,000).

<sup>17</sup> For fiscal year 2019, the Commission filed 157 lawsuits. EEOC Litigation Statistics, <https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2019>. Overall, in fiscal year 2019, there were 1,427 cases in which the Commission found reasonable cause but conciliation was unsuccessful. <https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2019>.

<sup>18</sup> To give some sense of the scope of cases, federal courts reported that 42,053 “Civil Rights” cases were filed in federal court during the most recent year. [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0630.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf). While not all these civil rights cases involve employment discrimination, and this number would include cases where a private plaintiff filed suit after the EEOC did not find reasonable cause, it illustrates that the assumption – that half of the roughly 1,400 cases in which conciliation is unsuccessful end up in court – is likely a low estimate.

Using the numbers above, if the Commission successfully conciliated only 100 more cases each year, that would save the economy over \$4 million in litigation costs.<sup>19</sup>

Therefore, the Commission's rule, which establishes basic information disclosure requirements that will make it more likely that employers have a better understanding of the EEOC's position in conciliation and, thus, make it more likely that the conciliation will be successful, will result in significant economic benefits when it is successfully implemented.

#### *Executive Order 13771*

This rule is not expected to be an EO 13771 regulatory action because it will not impose total costs greater than \$0. As described above, the Commission's rule will result in more successful conciliations and therefore, overall cost reduction, so this is considered a deregulatory action. Details on the expected impacts of the rule can be found in the Commission's analysis above.

#### *Paperwork Reduction Act*

This rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### *Regulatory Flexibility Act*

The Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities because it applies exclusively to employees and agencies of the federal government and does not impose a burden on any business entities. For this reason, a regulatory flexibility analysis is not required.

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

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not

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<sup>19</sup> 100 successful conciliations x \$45,466 (average conciliation for fiscal year 19) = \$4,546,600. However, this number is offset by the litigation costs saved in 50 cases (assuming half the cases would have ended in in litigation): 50 x \$174,000 = \$8,700,000. \$8,700,000 - \$4,546,600 = \$4,153,400 in savings for every 100 cases that are conciliated.

significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Congressional Review Act*

While the Commission believes the rule is a rule of agency procedure that does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996), it will still follow the reporting requirement of 5 U.S.C. 801. This is not a “major rule” as the term is defined in 5 U.S.C. 804(2).

**List of Subjects in 29 CFR Parts 1601 and 1626**

Administrative practice and procedure, Equal Employment Opportunity  
For the Commission.

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Janet Dhillon,  
Chair

For the reasons set forth in the preamble, the Commission amends 29 CFR parts 1601 and 1626 as follows:

**PART 1601 – PROCEDURAL REGULATION**

1. The authority citation for part 1601 continues to read as follows:

Authority: 42 U.S.C. 2000e to 2000e-17; 42 U.S.C. 12111 to 12117; 42 U.S.C. 2000ff to 2000ff-

11.

2. Amend § 1601.24 by adding paragraphs (d), (e), and (f) to read as follows:

**§ 1601.24 Conciliation: Procedure and authority**

\* \* \* \* \*

(d) In any conciliation process pursuant to this section, after the respondent has agreed to engage in conciliation, the Commission will:

(1) To the extent it has not already done so, provide the respondent with a written summary of the known facts and non-privileged information that the Commission relied on in its reasonable cause finding, including identifying known aggrieved individuals or known groups of aggrieved individuals for whom relief is being sought, unless the individual(s) has requested anonymity. In the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, to the extent it has not already done so, identify for respondent the criteria that will be used to identify victims from the pool of potential class members. In cases in which that information does not provide an accurate assessment of the size of the class, for example, in harassment or reasonable accommodation cases, the Commission shall provide more detail to respondent, such as the identities of the harassers or supervisors, if known, or a description of the testimony or facts we have gathered from identified class members during the investigation. The Commission will disclose the current class size and, if class size is expected to grow, an estimate of potential additional class members to the extent known;

(2) To the extent it has not already done so, provide the respondent with a written summary of the Commission's legal basis for finding reasonable cause, including an explanation as to how the law was applied to the facts. In addition, the Commission may, but is not required to, provide a response to the defenses raised by respondent;

(3) Provide the respondent with the basis for monetary or other relief, including the calculations underlying the initial conciliation proposal and an explanation thereof in writing. A written explanation is not required for subsequent offers and counteroffers;

(4) If it has not already done so, and if there is a designation at the time of the conciliation, advise the respondent in writing that the Commission has designated the case as systemic, class, or pattern or practice as well as the basis for the designation; and

(5) Provide the respondent at least 14 calendar days to respond to the Commission's initial conciliation proposal.

(e) The Commission shall not disclose any information pursuant to paragraph (d) of this section where another federal law prohibits disclosure of that information or where the information is protected by privilege.

(f) Any information the Commission provides pursuant to paragraph (d) of this section to the Respondent, except for information about another charging party or aggrieved individual, will also be provided to the charging party, upon request. Any information the Commission provides pursuant to paragraph (d) of this section about an aggrieved individual will also be provided to the aggrieved individual, upon request.

## **PART 1626 – PROCEDURES – AGE DISCRIMINATION IN EMPLOYMENT ACT**

1. The authority citation for part 1626 continues to read as follows:

**Authority:** Sec. 9, 81 Stat.605, 29 U.S.C.628; sec. 2, Reorg Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

2. Revise § 1626.12 to read as follows:

### **§ 1626.12 Conciliation efforts pursuant to section 7(d) of the Act**

(a) Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion. Upon failure of such conciliation the Commission will notify the charging party. Such notification enables the charging party or any person aggrieved by the subject matter of the charge to commence action to enforce their rights without waiting for the lapse of 60 days. Notification under this section is not a Notice of Dismissal or Termination under § 1626.17.

(b) In any conciliation process pursuant to this section the Commission will:

(1) If it has not already done so, provide the respondent with a written summary of the known facts and non-privileged information that form the basis of the allegation(s), including

identifying known aggrieved individuals or known groups of aggrieved individuals, for whom relief is being sought, but not if the individual(s) has requested anonymity. In the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, if it has not already done so, identify for respondent the criteria that will be used to identify victims from the pool of potential class members;

(2) If it has not already done so, provide the respondent with a written summary of the legal basis for the allegation(s). In addition, the Commission may, but is not required to provide a response to the defenses raised by respondent;

(3) Provide a written basis for any monetary or other relief including the calculations underlying the initial conciliation proposal, and an explanation thereof. A written explanation is not required for subsequent offers and counteroffers;

(4) If it has not already done so, advise the respondent in writing that the Commission has designated the case as systemic, class, or pattern or practice, if the designation has been made at the time of the conciliation, and the basis for the designation; and

(5) Provide the respondent at least 14 calendar days to respond to the Commission's initial conciliation proposal.

(c) The Commission shall not disclose any information pursuant to paragraph (b) of this section where another federal law prohibits disclosure of that information or where the information is protected by privilege.

(d) Any information the Commission provides pursuant to paragraph (b) of this section to the respondent, except for information about another charging party or aggrieved individual, will also be provided to the charging party, upon request. Any information the Commission provides pursuant to paragraph (b) of this section to the respondent about an aggrieved individual will be provided to the aggrieved individual, upon request.

3. Amend § 1626.15 by adding a new sentence to the end of paragraph (d) to read as follows:

**§ 1626.15 Commission enforcement.**

\* \* \* \* \*

(d) \* \* \* Any conciliation process under this paragraph shall follow the procedures as described in § 1626.12.

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