



## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

### **29 CFR Part 1608**

### **RIN 3046-AB39**

## **Rescission of Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended**

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Final interpretive rule.

**SUMMARY:** The Equal Employment Opportunity Commission (“EEOC” or “Commission”) is rescinding its regulations regarding Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964 (“Guidelines”), and removing it from the Code of Federal Regulations. The Commission is rescinding the Guidelines and removing them from the Code of Federal Regulations because the Guidelines are inconsistent with the statutory language and were not supported by Supreme Court precedent when issued; they are obsolete; they only apply to affirmative action to benefit women or minorities; and they do not take into account multiple relevant Supreme Court cases and numerous developments in the lower courts, over the past four decades since their issuance in 1979.

**DATES:** This final interpretive rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], and applicable as of June 29, 2026.

**FOR FURTHER INFORMATION CONTACT:** Raymond Peeler, Associate Legal Counsel, Office of Legal Counsel at 202-821-6367 (voice), 1-800-669-6820 (TTY), [raymond.peeler@eeoc.gov](mailto:raymond.peeler@eeoc.gov). Requests for copies of this final interpretive rule in alternative formats should be made to the Office of Communications and Legislative Affairs at (202) 921-3191 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL video phone).

## **SUPPLEMENTARY INFORMATION:**

### ***I. Rescission and Removal of the Guidelines***

#### ***A. Background***

Title VII of the Civil Rights Act of 1964 prohibits “discriminat[ion]” against workers “because of [their] race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a)(1). In 1977, the then-Commission proposed—and in 1979 enacted—Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act, As Amended. The Guidelines’ stated purpose was to protect “employers, labor organizations, and other persons subject to title VII [who] have changed their employment practices and systems to improve employment opportunities for minorities and women[.]” 29 CFR 1608.1(a). Employers and other entities subject to Title VII, the then-Commission believed, lacked sufficient guidance regarding the circumstances under which, and the means through which, they could take race- and sex-conscious affirmative action. *Id.*

When the Guidelines were proposed in 1977, cases questioning whether affirmative action was compatible with Title VII were winding their way through the lower courts. *See, e.g., Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761 (E.D. La. 1976), *aff’d*, 563 F.2d 216 (5th Cir. 1977), 571 F.2d 337 (5th Cir. 1978), *cert. granted*, 439 U.S. 1045 (1978). The district court and the Fifth Circuit in *Weber* had already held that the challenged affirmative action program at issue, a racial quota, violated Title VII. Despite the percolating cases, the then-Commission chose to preemptively issue guidance opining that Title VII should be interpreted to permit race- and sex-conscious affirmative action, and explaining to employers when and how they purportedly could take such action permissibly without exposing themselves to liability for violating Title VII.

In the final Guidelines, the then-Commission conceded that objections to race- and sex-conscious affirmative action were “based upon the principles of title VII.” 29 CFR 1608.1. Nevertheless, the then-Commission invoked legislative intent as a limitation on those principles. Namely, the then-Commission opined that Title VII exists “to overcome the effects of past and present employment practices which are part of a larger pattern of restriction, exclusion, discrimination, segregation and inferior treatment of minorities and women in many areas of life.” 44 FR 4422, 4422 (Jan. 19, 1979). From this, the then-Commission reasoned that one of Congress’s purposes in enacting Title VII was “to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place.” 29 CFR 1608.1. To further this purported legislative intent, the then-Commission concluded that “appropriate voluntary affirmative action, or affirmative action pursuant to an administrative or judicial requirement, does not constitute unlawful discrimination in violation of [Title VII].” 44 F R at 4422.

In response to commentators who argued that the proposed affirmative action guidelines violated the text of Title VII—specifically, that “Title VII requires that all employment decisions be made without any consideration of race, color, religion, sex, or national origin, regardless of the circumstances”—the then-Commission concluded that such a view of Title VII “does not comport with” the then recent position taken by the Supreme Court on affirmative action in college admissions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). 44 FR at 4423. And as discussed in section B.1, below, the then-Commission found additional support in two Supreme Court Title VII decisions, *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), and *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

Once finalized, the Guidelines were offered to the public as the Commission’s “written interpretation and opinion” pursuant to Section 713(b)(1) of Title VII. 29 CFR

1608.2.<sup>1</sup> Therefore, employers who entered into affirmative action plans or programs in good faith and in conformity with the Guidelines were afforded 713(b) protection if the underlying unlawful employment practice complained of was a result of such a plan. *Id.* § 1608.4. As such, pursuant to Section 713(b) of Title VII, the Guidelines provided a statutory defense to claims brought against employers and other covered entities that relied on the Guidelines in good faith and took race- or sex-conscious action in conformance with them.

The Guidelines also set forth the elements of an affirmative action plan under the Guidelines, 29 CFR 1608.4, as well as other scenarios in which the then-Commission believed an employer lawfully could have an affirmative action plan—such as pursuant to the now-revoked Executive Order (“E.O.”) 11246, 29 C.F.R. § 1608.5; a Commission conciliation or settlement agreement, *id.* § 1608.6; a state or local law, *id.* § 1608.7; a court order, *id.* § 1608.8; or reliance on the directive of a government agency, *id.* § 1608.9—and outlined what must be shown in those circumstances in order for an employer to try to use such an affirmative action plan as a defense. For example, the Guidelines state, for 713(b)(1) to apply, specific portions of an affirmative action plan needed to be dated and in writing—noting absence of such “may make it more difficult to provide credible evidence that . . . [the alleged unlawful action] was taken pursuant to a plan or program.” 29 CFR 1608.4. Once a respondent to a charge pleads “that the challenged action was taken pursuant to and in accordance with a plan or program which was adopted or implemented in good faith, in conformity with, and in reliance upon [the] Guidelines,” and specific portions “are in writing,” then “the Commission will determine whether the assertion is true.” 29 CFR 1608.10(b). If the Commission so finds, the

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<sup>1</sup> Pursuant to 713(b), if an employer pleads and proves that the alleged unlawful employment practice complained of was “in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission,” then it “shall not be subject to any liability or punishment for or on account of the [practice].” 42 U.S.C. 2000e-12(b).

Commission will issue a no reasonable cause determination and “will advise the respondent that: (1) The Commission has found that the respondent is entitled to the protection of section 713(b)(1) of Title VII; and (2) That the determination is itself an additional written interpretation or opinion of the Commission pursuant to 713(b)(1).”

*Id.* For those affirmative action plans or programs not specifically relying on the Guidelines, the Guidelines provide that if a respondent asserts as a defense to a charge of discrimination that the underlying action was taken in accordance with an affirmative action plan of the type described in the Guidelines, the Commission will determine whether that is true and whether the program conforms with the requirements of the Guidelines. 29 C.F.R. 1608.10(a). “If the Commission so finds, the Commission shall issue a determination of no reasonable cause” and “where appropriate, will state the determination is a written opinion of the Commission under Section 713(b)(1).” *Id.* The respondent then may rely on the Commission’s determination for future charges alleging similar facts. *Id.* However, “[i]f the Commission does not so find, it will proceed with the investigation in the usual manner.” *Id.*<sup>2</sup>

*B. Reasons for Rescinding the Guidelines*

As explained more fully herein, the Commission has determined that rescission of the Guidelines is necessary because they 1) are inconsistent with the plain text of Title VII and were unsupported by Supreme Court Title VII caselaw addressing affirmative action when issued; 2) are obsolete; 3) contemplate only plans which benefit minorities and women; and 4) may conflict with subsequent caselaw and the U.S. Constitution. The totality of the reasons for rescission outweighs any potential reliance interests, which themselves are minimal.

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<sup>2</sup> On October 1, 1981, the Commission issued *CM-607 Affirmative Action*, providing detailed guidance on the Guidelines and instructions for EEOC processing of charges in which a respondent asserts that the challenged action was based on an affirmative action plan. The Commission has issued a separate notice rescinding *CM-607*.

1. The Guidelines are inconsistent with the plain text of Title VII

First, the Commission is rescinding the Guidelines because they are inconsistent with the plain text of Title VII and were not supported by any Supreme Court Title VII precedent addressing affirmative action when issued.<sup>3</sup>

The Supreme Court has repeatedly stressed that “statutory interpretation must ‘begi[n] with,’ and ultimately heed, what a statute actually says.” *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (quoting *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 583 U. S. 109, 127 (2018)); *see also, e.g., Babb v. Wilkie*, 589 U.S. 399, 404 (2020) (holding that “the plain meaning of the statutory text shows that age need not be a but-for cause of an employment decision in order for there to be a violation of § 633a(a)” of the Age Discrimination in Employment Act). Indeed, when the then-Commission adopted the Guidelines, it acknowledged that affirmative action had “been challenged under Title VII as inconsistent with statutory language requiring that employment decisions not be based on race [or] sex . . . considerations.” 44 FR at 4422.<sup>4</sup>

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<sup>3</sup> As discussed in subsequent sections, the Commission has further determined that the Guidelines should be rescinded even if they were initially justified when issued.

<sup>4</sup> The text of Title VII states:

- (a) It shall be an unlawful employment practice for an employer –
  - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race . . . [or] sex . . .; or (2) to limit segregate or classify his employees or applications for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual’s race . . . [or] sex . . .

42. U.S.C. 2000e-2(a)(1)–(2). Further, Title VII states:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee . . . to grant preferential treatment to an individual or to any group because of the race . . . [or] sex . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . [or] . . . sex . . . employed by any employer . . . in comparison with the total number of percentage of persons of such race . . . [or] sex . . . in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

42 U.S.C. 2000e-2(j).

In adopting the Guidelines, however, the then-Commission relied heavily on its view that the purpose of Title VII was to improve the employment opportunities of minorities and women, and as a result, notwithstanding its recognition that the same protections apply to all protected groups, the then-Commission concluded that affirmative action to benefit minorities and women was nevertheless consistent with Title VII. 29 CFR 1608.1(a).

When the Guidelines were issued, however, there was no Supreme Court precedent supporting the then-Commission's interpretation of Title VII. To justify its atextual interpretation of Title VII, the then-Commission relied on *Albemarle Paper Company v. Moody*, a backpay case dealing with employment selection tests. The then-Commission reasoned that "the Supreme Court has called upon employers [in Title VII cases] ' . . . to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'" including through voluntary affirmative action plans. 44 FR at 4423 (citing 422 U.S. 405, 418 (1975) (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973))).<sup>5</sup> *Albemarle Paper* did not go that far. The decision, in fact, does not address voluntary affirmative action plans at all. Rather, the decision addresses the scope of relief under Title VII that a class of employees and applicants were entitled to following a determination that their employer had used an unlawfully discriminatory employment test in hiring. 422 U.S. at 408–09.<sup>6</sup> The Court's holding on

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<sup>5</sup> The full sentence including the portion of the quote eliminated by an ellipsis states, "It is the reasonably certain prospect of a *backpay award* that 'provide(s) the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" 422 U.S. at 418 (emphasis added).

<sup>6</sup> In promulgating the Guidelines, the Commission also relied on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) generally, which addresses arbitrary employment tests that have a disproportionate effect on minorities, but, as with *Albemarle*, does not discuss affirmative action prophylactically.

these post-liability issues is not analogous to the permissibility of pre-liability race- and sex-conscious affirmative action under Title VII.

The Commission’s reliance in the Guidelines on *Albemarle* for sweeping authorization to look beyond Title VII’s text to remedial intent was always suspect. The Supreme Court has since made clear that any employment practice that violates the plain terms of Title VII’s antidiscrimination provisions is not excused because of a benign or benevolent motive. *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) (concluding that the employer’s “ultimate aim—however well intentioned or benevolent it might have seemed”—did not change the fact that it was because of race); *cf. Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (concluding that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy”). The EEOC’s statutory authority to issue rules under Title VII is limited to procedural matters. *See* 42 U.S.C. 2000e-12(a) (“The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.”); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (“Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to . . . Title [VII].” (citing *Albemarle v. Moody*, 422 U.S. at 431)). And regardless of the Commission’s Title VII enforcement authority, the Guidelines may conflict with the “single, best meaning” of Title VII as reflected in binding Supreme Court precedent. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). The issuance of the Guidelines therefore may have exceeded the Commission’s authority.

2. The Guidelines are obsolete

Second, the Commission is rescinding the Guidelines because they are obsolete given the caselaw that has developed since their issuance. In the 46-plus years since the Guidelines were issued, a copious amount of caselaw has developed addressing when, if

ever at all, an employer may lawfully engage in voluntary affirmative action. *See generally* BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW, Chapter 38 (6th ed. 2021) (providing overview of caselaw on affirmative action); *see, e.g., Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303 (2025); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *United States Steel Workers of Am. AFL-CIO-CLC v. Weber*, 433 U.S. 193 (1979); *see also, e.g., Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996). This caselaw has rendered the Guidelines obsolete. In evaluating a charge of discrimination involving an affirmative action plan, the proper inquiry is whether the charging party has been subjected to discrimination prohibited by Title VII, as determined by binding legal authority, not whether the respondent's affirmative action plan conforms to guidelines that were issued before the Supreme Court had ever addressed the permissibility of affirmative action under Title VII. Because the Guidelines "encourage" affirmative action benefiting minorities and women, their rescission is also consistent with Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (Jan. 21, 2025), which revoked Executive Order 11246.

Even assuming, *arguendo*, the Guidelines were ever justified, the Supreme Court has recognized that explicitly race-based actions are inherently suspect and their use must be limited in duration and have a clear end date. *Cf. SFFA*, 600 U.S. at 212 (concluding that a "race conscious" college admissions program must have an "end point"); *id.* at 314 (Kavanaugh, J., concurring) (stating that in *Grutter*, the Court did not exempt college admissions from the requirement that "all governmental use of race must have a logical end point" and that this requirement "assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter" (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003))). Because more than four decades have passed

since the Guidelines were adopted, their “end point” has surely been reached, if not far surpassed, and they must be rescinded.

Moreover, the historical and cultural factors that gave rise to affirmative action programs in the immediate wake of the civil rights advancements of the 1960s are simply not present in 2026. The societal context today is different. *Cf. SFFA*, 600 U.S. at 213 (noting that twenty years earlier it had held that it expected that in twenty-five years “racial preferences [in college admissions] will no longer be necessary to further the interest approved today”). As with college admissions, in the employment context, the interests advanced when the Guidelines were adopted in 1979 that were purported to have justified race-conscious affirmative action programs, even if present then, are simply not present today. The Guidelines remain frozen in time and cannot account for the more than 60 years of progress made under Title VII towards equal employment opportunity.<sup>7</sup>

3. The Guidelines provide a defense for affirmative action efforts on behalf of only women and minorities

Third, the Guidelines facially and impermissibly endorse only those affirmative action plans aimed at remedying past discrimination against minorities or women. *See, e.g.*, 29 CFR 1608.1(a) (stating that employers must continue to change practices to “improve employment opportunities for minorities and women” and that the Guidelines were being issued to allow “affirmative action to [be] undertaken to improve the conditions of minority and women” because the Commission did not believe that Congress intended to “immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minority and women without litigation”); *id.* § 1608.1(c) (“Voluntary affirmative action to improve opportunities for minorities and

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<sup>7</sup> By way of contrast, the latest Supreme Court decision addressing affirmative action under Title VII was issued almost 40 years ago in 1987. *See Johnson v. Transp. Agency*, 480 U.S. 616 (1987). Much more recently, the Supreme Court has rejected the use of race to provide advantage in another context. *See, e.g., SFFA*, 600 U.S. 181 (2023) (finding considerations of race in admissions at two universities violated the Fourteenth Amendment and/or Title VI of the Civil Rights Act of 1964).

women must be encouraged and protected . . . .”); *id.* § 1608.1(d) (“These Guidelines describe the circumstances in which persons subject to title VII may take or agree upon action to improve employment opportunities of minorities and women . . . .”). Clearly, the Guidelines were promulgated for the express purpose of protecting affirmative action only on behalf of women and minorities.

To the extent specific provisions, such as 29 CFR 1608.3, might be read in isolation to potentially authorize affirmative action plans for persons other than women and minorities, such a reading would be incongruent with the singular rationale set forth in Section 1608.1 for the adoption of the Guidelines as protecting affirmative action plans for women and minorities. The regulatory text is explicit that at the time of the Guidelines’ adoption, affirmative action was understood as supporting only women and minorities.

Moreover, Section 1608.5 incorporates affirmative action plans created by federal contractors pursuant to the now-revoked E.O. 11246.<sup>8</sup> Those plans are likewise limited to women and minorities. *See* 41 CFR 60-2.10–2.17. Thus, any E.O. 11246 affirmative action plan defense contemplated by 29 CFR 1608.5 necessarily would be available only for women and minority affirmative action programs, and not those supporting any other category of individuals.

Notably, the Department of Labor has issued a notice of intent to rescind its regulations implementing now-revoked E.O. 11246. Those regulations are foundational to the plans endorsed in Section 1608.5 of the Guidelines and to the “self-analysis” mandated by Section 1608.4 (“The employer may utilize techniques used in order to comply with EO 11246, as amended, and its implementing regulations, including 41 CFR part 60-2 (known as Revised Order 4), or related orders issued by the Office of Federal

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<sup>8</sup> E.O. 11246 was revoked on January 21, 2025, by E.O. 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.”

Contract Compliance Programs . . .”). The Guidelines therefore incorporate an Executive Order and regulatory scheme that no longer have any valid authorizing source of law, which further supports rescission of the Guidelines.

Because the Guidelines provide a defense for affirmative action efforts on behalf of only women and minorities, they result in different standards for “majority-group” individuals to prove Title VII discrimination where an employer asserts this defense. In June 2025, the Supreme Court unanimously held that the evidentiary standard for proving disparate treatment under Title VII does not depend on whether a plaintiff is a member of a “minority group” or “majority group.” *Ames*, 605 U.S. at 310. Rather, Title VII provides the “same protections for every ‘individual.’” *Id.* Because the Guidelines are limited to affirmative action plans to improve opportunities for minorities and women, they provide less protection to majority-group employees, which may be contrary to *Ames* and the text of Title VII.

In limiting protections to affirmative action plans that favor certain groups because of their race, national origin, and sex, the Guidelines also implicate constitutional equal protection guarantees. Government actions that involve race- and sex-based classifications are subject to heightened scrutiny under the Constitution. *See United States v. Skrametti*, 605 U.S. 495, 510 (2025) (contrasting strict scrutiny (race, alienage, national origin) and intermediate scrutiny (sex) with rational basis review). It is highly questionable whether the Commission could establish that it had constitutionally adequate reasons for the *categorical* exclusion of men and those in a racial majority, i.e., Whites, at the time it issued the Guidelines, much less that the exclusion continues to be justified decades later. If an employer were able to establish that an affirmative action plan to address purported “under-representation” of men or white individuals from the workplace that met the Guidelines’ requirements, it is not clear why such an affirmative action plan for men or White individuals should not be entitled to the same protections as

those for minorities or women. *Cf. SFFA*, 600 U.S. at 206 (stating, in the context of a case addressing the constitutionality of affirmative action in college admissions, that “[e]liminating racial discrimination means eliminating all of it” and that “the Equal Protection Clause applies ‘without regard to any differences of race, of color, or of nationality’—it is ‘universal in [its] application’” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))); *see also Frank v. Xerox Corp.*, 347 F.3d 130, 137 (5th Cir. 2003) (employer’s affirmative action efforts to correct underrepresentation of Whites in its workforce constituted unlawful discrimination against Black employees).

As discussed in the next section, even if the Guidelines were not limited to affirmative action benefiting women and minorities, they still would be suspect given the sea change in caselaw addressing the legality of affirmative action programs since the Guidelines were issued.

4. The Guidelines potentially conflict with subsequent caselaw and the Constitution

Fourth, aside from the limitation to minorities and women, other aspects of the Guidelines potentially conflict with subsequent caselaw and the U.S. Constitution. For example, in *Ricci v. DeStefano*, 557 U.S. 557, 579–80 (2009), the Supreme Court faulted the district court for concluding that a city’s decision to reject test scores was not discriminatory even though the city took the action solely because the higher-scoring candidates were White. Even if the city rejected the results to avoid disparate impact liability, the Court explained, its decision was nevertheless based on race. In an amicus brief filed by the United States, and joined by the then-Commission, the government argued that an employer’s refusal to certify test results does not violate Title VII’s disparate treatment provision when based on a reasonable belief that the test violates Title VII’s disparate impact provision, and for support, the government pointed to 29 CFR 1608.4(b)(1) and (3). Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328). The Supreme Court disagreed, concluding that an employer is permitted to engage in intentional discrimination only if it has a “strong basis in evidence” to believe that the action was necessary to avoid disparate-impact liability. The Guidelines do not require that an employer use a “strong basis in evidence” standard for past unlawful discrimination remedied through a race-conscious employment decision-making framework such as affirmative action. Although 29 CFR 1608.3 discusses circumstances in which an employer may appropriately engage in voluntary affirmative action, the Guidelines do not impose any particular evidentiary standard that the employer must meet in making this determination.<sup>9</sup> *Ricci* states that in order to take actions based on

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<sup>9</sup> Section 1608.3(a) allows affirmative action where a policy has an adverse effect where it “[t]end[s] to deprive’ persons of equal employment opportunities.” Certainly the “tends to deprive” standard falls short of *Ricci*’s “strong basis in evidence” standard. And § 1608.3(b), allowing affirmative action “to correct the effects of prior discriminatory practices,” and § 1608.3(c), allowing affirmative action where there is a

race under Title VII—including those intended to remedy past discrimination—an employer must meet an exacting evidentiary standard that the Guidelines do not require. Thus, the Guidelines may be inconsistent with *Ricci*.<sup>10</sup>

The analysis in *Ricci* also suggests that the Guidelines may be unconstitutional. Relying heavily on *Ricci*, the Department of Justice (DOJ) issued an opinion on June 9, 2026, concluding that the Guidelines are unconstitutional because they endorse the use of “racial preferences” under Title VII even though “Congress has never demonstrated that ‘racial classifications’ under Title VII are necessary to ‘remediat[e] specific, identified instances of past discrimination that violated the Constitution or a statute’” and the Guidelines “encourage racial quotas, lack any definite endpoint, rely on arbitrary and undefined racial categories, and impose burdens on other racial groups” (citations omitted). 50 Op. O.L.C. (June 9, 2026) (slip op. at 24).

The Court’s *Ricci* decision is part of a broader sea change in Supreme Court jurisprudence rejecting purpose-driven interpretations of anti-discrimination protections in favor of textualist and colorblind approaches that treat everyone the same without exception. See *Callais v. Louisiana*, 145 S. Ct. 1131 (2026) (Voting Rights Act case); *Ames*, 605 U.S. 303; *SFFA*, 600 U.S. 181 (Equal Protection Clause case); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Equal Protection Clause case). The only affirmative action case that the then-Commission relied on in adopting the Guidelines—*Bakke*, 438 U.S. 265—was effectively overruled in *SFFA*. To the extent there is Supreme Court caselaw that has blessed the use of affirmative action as

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historically limited labor pool, contain no evidentiary standards that an employer must meet to show these circumstances exist.

<sup>10</sup> In E.O. 14281, *Restoring Equality of Opportunity and Meritocracy* (Apr. 23, 2025), President Donald Trump criticized disparate-impact liability and stated that “[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.” Because the EEOC is not required to provide a defense under section 713(b) for employers that decide to adopt voluntary affirmative action plans, the rescission of the Guidelines aligns with the Executive Order.

consistent with Title VII, *see Weber*, 443 U.S. 193; *Johnson*, 480 U.S. 616, the Commission is not taking a position herein on whether those decisions have been effectively overruled; the Commission defers to DOJ's position regarding that question. Regardless, that question need not be addressed here because the existence of these cases does not require that the Commission promulgate or retain outdated and unhelpful guidance, including a safe harbor, on the topic of affirmative action into perpetuity.

5. Any reliance interests in the Guidelines are minimal and are outweighed by the reasons for rescission

Although the rescission of the Guidelines means that employers will not be able to assert a defense under section 713(b) for actions taken pursuant to an affirmative action plan after the rescission, the Commission does not believe the rescission will have a meaningful impact on how employers will implement their Title VII responsibilities. Even when affirmative action is asserted as a potential defense in a case, it does not appear that employers rely on affirmative action plans that have been formulated to meet the requirements of the Guidelines. Rather, when an affirmative action plan has been at issue, courts have almost always looked at whether the employer has violated Title VII by adopting and implementing the plan, not whether the plan is legally insulated pursuant to the Guidelines and section 713(b). *See generally* BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW, Chapter 38 (6th ed. 2021) (discussing affirmative action caselaw). Decisions addressing the Guidelines are especially rare, and the Commission has not located a decision in which a court has held that an employer was protected from liability because of its reliance on the Guidelines. Regardless, because the rescission will not be retroactive, employers will still be able to assert a defense<sup>11</sup>—assuming, *arguendo*, the employer can establish all prerequisites necessary to assert such

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<sup>11</sup> Whether the defense is successful will hinge on numerous factors, which the Commission does not attempt to prejudge here, including whether all conditions precedent are met and whether the alleged unlawful conduct was actually taken pursuant to said plan.

a defense—under section 713(b) for actions taken before the rescission. *See* 29 U.S.C. 2000e-12(b) (defense is available notwithstanding that “written interpretation or opinion of the Commission” is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect” after employer takes challenged employment decision).

### *C. Conclusion*

The Commission has voted to rescind the Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended. Even when first issued, the Guidelines were suspect, given their inconsistency with the statutory text and narrow application to affirmative action benefiting women and minorities. Since the issuance of the Guidelines in 1979, the Supreme Court and numerous courts have issued a vast number of cases addressing affirmative action. That caselaw has rendered the Guidelines obsolete and also potentially legally incorrect in various respects. Rescinding the Guidelines is unlikely to significantly affect employers, given the lack of evidence that today’s employers adopt affirmative action plans in reliance on the Guidelines.

## ***II. Procedural Issues and Regulatory Review***

### *A. Administrative Procedure Act*

The Commission issued the Guidelines in 1979 pursuant to its authority under section 713 as a “written interpretation or opinion of the Commission” that would provide a defense to potential Title VII liability for someone who “pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance” on the Guidelines. 42 U.S.C. 2000e-12(b). Because the Commission lacks substantive rulemaking authority, *see id.* § 2000e-12(a) (authorizing Commission to issue “suitable procedural regulations” only), the Guidelines merely provide the Commission’s non-binding interpretations of Title VII. Recognizing this limitation, the Commission characterized the Guidelines as “Interpretative Guidelines” when they were issued,

though it voluntarily underwent the notice-and-comment process before promulgation of the Guidelines.<sup>12</sup> 44 FR at 4422.

Under the Administrative Procedure Act (“APA”), agencies are not required to follow the notice-and-comment process for “interpretative rules.” 5 U.S.C. 553(b) (A). In *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92 (2015), the Supreme Court held that the Department of Labor (“DOL”) was not required to follow notice-and-comment procedures when it rescinded an interpretive rule in the form of an opinion letter that had interpreted an administrative exemption as applying to mortgage-loan officers.<sup>13</sup> The Court held that the APA exception in § 4 of the APA (5 U.S.C. 553) is “*categorical*.”<sup>14</sup> 575 U.S. at 100 (emphasis added). As a result, courts “lack authority ‘to impose upon [an] agency its own notion of which procedures are ‘best’ or most likely to further some

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<sup>12</sup> The terms “interpretative guidelines” and “interpretive guidelines” are interchangeable, as are the terms “interpretative rules” and “interpretive rules.” The latter phrasings (“interpretive . . .”) are the more common current-day phrasings. See *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 n.1 (2015).

<sup>13</sup> Similar to the EEOC’s Affirmative Action Guidelines, the DOL opinion letter at issue in *Perez* provided a defense to liability for employers that had relied on the letter in good faith. Section 258 of the Portal-to-Portal Act provides:

[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged.

29 U.S.C. 258.

<sup>14</sup> The Supreme Court stated in *Perez*: “[T]he D.C. Circuit correctly read § 2 [5 U.S.C. 551] of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.” 575 U.S. at 101. This statement should not be understood to mean that an agency must use notice-and-comment procedures to rescind a document that the agency *voluntarily* decided to use in adopting the document. This statement relates only to the definition of “rule making” in 5 U.S.C. 551(5), which, as explained by the Court, does not “say what procedures an agency must use when it engages in rulemaking.” *Id.* Those required procedures are in § 4 (5 U.S.C. 553), which the Court concluded *categorically* exempts interpretive rules from notice-and-comments requirements. Thus, notice-and-comment procedures are not required for the rescission of interpretive rules even if those procedures were used when the rules were adopted. See *Rescission of Procedures for Implementing the National Environmental Policy Act*, 90 FR 29,453, 29,455 (July 3, 2025) (agency voluntarily provided notice-and-comment opportunity to respond to interim final rule: “As the Supreme Court has held, where notice-and-comment procedures are not required, prior use of them in promulgating a rule does not bind the agency to use such procedures in repealing it.” (citing *Perez*, 575 U.S. at 101)).

vague, undefined public good.” *Id.* at 102 (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978)).

Likewise here, under both the APA and *Perez*, the Commission rescinds the Guidelines without notice and comment. Although the Guidelines were issued after notice and comment, the Commission has voted to approve a final rescission of the Guidelines without following the same process. When the Commission proposed the Guidelines, it followed notice-and-comment procedures because it believed “public comment would be useful,” not that it was required. 42 FR at 64,826. As discussed above, the Commission has identified multiple compelling justifications for rescinding the Guidelines, and therefore, determines that they should be rescinded expeditiously without notice and comment.

*B. Review Under Executive Order 14192*

The Commission has examined this rescission and has determined that it is consistent with the policies and directives outlined in E.O. 14192, “Unleashing Prosperity Through Deregulation.” This rescission is expected to be an E.O. 14192 deregulatory action.

*C. Review Under Executive Order 12866 (as Amended by Executive Order 14215)*

The Commission has complied with the principles in section 1(b) of E.O. 12866, as amended by E.O. 14215, Regulatory Planning and Review. This rescission is not a “significant regulatory action” under section 3(f) of the Executive Order and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Executive Order.

*D. Review Under Paperwork Reduction Act*

The Paperwork Reduction Act (44 U.S.C. chapter 35) (“PRA”) applies to Federal collections of information when an agency creates a new paperwork burden on regulated entities or modifies an existing burden. This rescission imposes no new information

collection requirements on the public, and therefore it will create no new paperwork burdens or modifications to existing burdens that are subject to review by the Office of Management and Budget under the PRA.

*E. Unfunded Mandates Reform Act of 1995*

This rescission will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, 1532(a).

*F. 29 CFR Part 1695*

Commission regulations at part 1695 of title 29 of the CFR provide procedures that generally apply to a “guidance document,” which is defined as “any statement of Commission policy or interpretation concerning a statute, regulation, or technical matter within its jurisdiction that is intended to have general applicability and future effect, but which is not intended to be binding in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556.”

The Commission has determined that the rescission of the Guidelines does not constitute a “guidance document,” and therefore, the procedures in CFR part 1695 do not apply to the rescission. In issuing the Guidelines, the Commission “made a statement of Commission policy or interpretation concerning a statute, regulation, or technical matter.” However, in merely rescinding the Guidelines *without replacing them with a different* “statement of Commission policy or interpretation,” the Commission is not issuing a “guidance document.”

This understanding is confirmed by the specific requirements of part 1695, which contemplate that the procedures will apply only when the Commission affirmatively makes a “statement of Commission policy or interpretation” and not when the

Commission rescinds such a statement. Other provisions refer either to the “repeal” or “rescission” of guidance, thereby distinguishing rescission of guidance from its adoption. *See* 29 CFR 1695.7(a), (e); 29 CFR 1695.8(d); 29 CFR 1695.9.

Excluding rescissions from 29 CFR part 1695 is also consistent with Executive Order 13891, which prompted the issuance of 29 CFR part 1695. Executive Order 13891 targeted the issuance of agency documents that regulate stakeholders, including the potential misuse of guidance documents to impose binding legal requirements. *See* Exec. Order No. 13891, Sec. 1 (Oct. 15, 2019) (“Americans deserve an open and fair regulatory process that imposes new obligations on the public only when consistent with applicable law and after an agency follows appropriate procedures.”), *rescinded by* Exec. Order 13992 (Jan. 20, 2021) (*rescinded by* Exec. Order 14148 (Jan. 20, 2025)). Executive Order 13891 required agencies to adopt procedures ensuring that they do not issue documents that improperly regulate stakeholders. The exclusion of guidance rescissions from 29 CFR part 1695 is consistent with the policy of that Executive Order.

*G. Congressional Review Act*

Out of an abundance of caution, the Commission has submitted this document for review under 5 U.S.C. 801.

**List of Subjects in 29 CFR Part 1608**

Affirmative action plans, Equal employment opportunity.

**PART 1608—[REMOVED AND RESERVED]**

For the reasons discussed in the preamble, and under the authority of 42 U.S.C. 2000e-12(b), the Commission removes and reserves 29 CFR part 1608.

Signed this 1<sup>st</sup> day of July, 2026.

**Andrea R. Lucas,**

*Chair, Equal Employment Opportunity Commission.*

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