July 14, 2014

Bernadette Wilson,
Acting Executive Officer, Executive Secretariat,
Equal Employment Opportunity
Commission, U.S. Equal Employment
Opportunity Commission, 131 M Street
NE., Washington, DC 20507

Re: Comments on Advance Notice of Proposed Rulemaking, RIN 3046-AA94, The Federal Sector's Obligation To Be a Model Employer of Individuals With Disabilities

Dear Ms. Wilson:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) submit these comments in response to the Commission's Advance Notice of Proposed Rulemaking concerning Section 501 of the Rehabilitation Act. CCD is a coalition of national disability organizations working together to advocate for national public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. Our responses to each question follow.

1. **What barriers do individuals with disabilities face in the federal recruitment and hiring process? For example, are there specific job qualifications that frequently exclude individuals with disabilities from federal jobs they can perform? What kinds of regulatory requirements, other than the existing requirement not to discriminate based on disability, might effectively address these barriers?**

   Individuals with disabilities face many barriers in recruitment and hiring for federal jobs. Among other things:

   - Some aspects of the application process for obtaining federal employment are not accessible to people with certain disabilities.

- The vast majority of federal agency websites have inaccessible features, making it difficult for individuals with disabilities to obtain information about relevant parts of the agencies in order to understand the agencies' activities, mission and focus.

- Federal job announcements frequently do not reach many potential job applicants with disabilities who are disconnected from the usual channels through which federal jobs are advertised.

- Many federal agencies impose job qualification standards that either: (1) categorically exclude people with certain disabilities without an individualized determination of their qualifications, or (2) screen out people with disabilities and are not necessary for the jobs in question. For example, people with epilepsy are needlessly precluded from certain positions with the U.S. Marshal Service, the Federal Motor Carrier Safety Administration, and the Transportation Security Administration; people with diabetes are needlessly precluded from employment opportunities based on standards established by the FBI, CIA, Federal Aviation Administration, Federal Motor Carrier Safety Administration, National Park Service, Department of Defense, and Peace Corps; people who are deaf or hard of hearing are needlessly precluded from certain positions with the U.S. Marshal Service, the FBI, and U.S. Immigration and Customs Enforcement; people with psychiatric disabilities are needlessly precluded from certain positions with the Federal Aviation Administration (these are not exhaustive lists). OPM's security clearance requirements screen out many people with psychiatric disabilities from doing a wide range of jobs for which they are qualified based on irrelevant factors such as receipt of counseling or past hospitalization.

- For many people with significant disabilities, the unavailability of supported and customized employment services serves as a barrier to federal (and other) employment.

- Employers' unfounded assumptions that people with disabilities are not capable of doing particular jobs are a significant barrier to federal (and other) employment.

- Many prospective job seekers with disabilities are unaware of the Schedule A hiring authority. Further, when individuals with disabilities do send their resumes to the federal agency Selective Placement Coordinators for Schedule A consideration, in many instances these coordinators return the resumes or redirect the individuals to USAJobs, defeating the purpose of the Schedule A process.

Regulatory requirements that would appropriately address these barriers include:

- Requiring federal agencies to ensure that job application processes are fully accessible to individuals with disabilities (including physical as well as mental disabilities)

- Requiring that federal agency websites be fully accessible to individuals with disabilities

- Requiring federal agencies to enter linkage agreements with a variety of different agencies and organizations that can connect them to job seekers with disabilities—including vocational rehabilitation agencies, Ticket to Work employment networks, independent living centers, veterans' service organizations, protection and advocacy organizations, supported employment providers, other disability service providers, One-Stops, and state disability service systems. These organizations and agencies can also help identify appropriate accommodations that may be needed by applicants with disabilities.

- Requiring federal agencies to do targeted outreach to such organizations and agencies to increase recruitment of individuals with disabilities for federal employment. Such outreach should include the entities listed in the Labor Department's resources for federal contractors at http://www.dol.gov/ofccp/regs/compliance/Resources.htm. As the Labor Department's list varies in its comprehensiveness across different states, EEOC should compile its own list of resources, working with disability organizations among others. CCD has compiled a list of contacts and web resources for disability organizations around the country; a copy is attached.

- Requiring federal agencies to meet certain goals with respect to the hiring and employment of individuals receiving supported and customized employment services.

- Requiring federal agencies to review their job qualification standards on an annual basis to determine whether any of the standards screen out people based on disability and, if so, whether the standard may be appropriately modified to avoid that result.

- Requiring federal agencies to include in their MD-715 reports to EEOC all instances where job applicants were disqualified for a disability-related reason, so that the EEOC may scrutinize such decisions and take action where appropriate.

- Requiring federal agencies to conduct a variety of disability-related trainings for hiring managers and others involved in hiring, including training concerning the capabilities of individuals with disabilities, the importance of reasonable accommodations, and the requirements of federal disability rights laws.

- Requiring better training of individuals involved in the Schedule A hiring process and improved efforts to publicize Schedule A and inform individuals with disabilities about how to use it.

2. **Would requiring federal agencies to adopt employment goals for individuals with disabilities help them to become model employers of individuals with disabilities? What are the advantages and disadvantages of requiring federal agencies to adopt employment goals? How and what information should be used to analyze the benefits and costs of such a requirement?**

Any effort to make federal agencies model employers of individuals with disabilities must include employment goals for individuals with disabilities. Without such quantifiable goals, it is extremely difficult to ensure accountability. The imposition of employment goals by each federal agency during the last several years, in the wake of Executive Order 13548, has coincided with important progress in hiring people with disabilities in federal jobs. By contrast, the dismal failure of federal contractor affirmative action efforts during decades of implementation of Section 503 of the Rehabilitation Act, which did not impose employment goals until last year, suggests that goals and other concrete measures are needed.

Any cost-benefit analysis of the imposition of employment goals must take into account the benefits—non-economic as well as economic—of increasing the number of individuals with disabilities in the federal workforce. The absence of significant numbers of people with disabilities in the workforce over many decades has fueled public prejudices and stereotypes that people with disabilities are incapable of many (or any) types of work. It has also helped to perpetuate assumptions that many people with disabilities make about themselves based on years of being told that they are incapable. This state of affairs has done enormous damage to people with disabilities and to our society, and has deprived employers of the skills and talents of large numbers of individuals with disabilities.

3. **If goals are adopted—**

   a. **How should the goals be set? For example:**

      i. **Should an agency's goal be to have a workforce that reflects the availability of individuals with disabilities in the national labor pool, to increase the number of individuals with disabilities it employs by a certain amount each year, or to have its new hires reflect the availability of qualified individuals with disabilities in the applicant pool? How should the goal(s) account for people with disabilities who are not participating in the labor force, or the extent to which people with disabilities in the labor pool are qualified for agency positions?**

Employment goals should not be tied to the availability of individuals with disabilities in the national labor pool or the applicant pool. The prevalence of individuals with disabilities in the labor market and the applicant pool is artificially low for the reasons described in our responses to questions 1 and 2, and does not reflect the availability of qualified individuals with disabilities. It is important for an employment goal to reflect a target that is higher than the status quo. While we appreciate that any goal must be a realistic one for federal employers to

meet, we believe that it must take into account the need to *increase* the number of individuals with disabilities both in the applicant pool and in the national labor pool through recruitment and outreach efforts, linkage agreements, and other strategies.

ii. Should the regulations give federal agencies the option of either meeting a uniform goal(s) set by EEOC or meeting a goal(s) which they set after considering factors enumerated in the regulations? What are the advantages and disadvantages of this approach, and what factors are most relevant for establishing goals?

The regulations should require federal agencies to meet a uniform goal that applies across all agencies. While agencies have set widely different employment goals for themselves in the wake of Executive Order 13548, we believe that there should not be a significant difference in percentage goals that are achievable across agencies. People with disabilities can perform a wide range of jobs and each agency should be able to find qualified people with disabilities for all types of jobs. The goal should be based on data showing what kind of goal is feasible and appropriate. For example, the EEOC set for itself an employment goal of 20% and succeeded in achieving that goal even without taking many of the steps that may be required in the Section 501 regulations; accordingly, a goal higher than 20% is likely appropriate. In addition, the regulations should require agencies to impose a subgoal that measures employment of people with significant or "targeted" disabilities.

iii. Would information about the number of federal employees who have self-identified as individuals with disabilities on the Standard Form 256 (SF 256) and in the most recent Federal Employee Viewpoint Survey be helpful in establishing goals for the employment of people with disabilities? The Commission has recently added questions about disability to the form used by federal agencies to collect demographic information on job applicants. Could data collected using that form, as revised, be used to set goals? What are the advantages and disadvantages of relying on these data? What other data are available?

Both the SF256 data and the demographic data that is now being collected from job applicants may be useful in setting employment goals (for individuals with disabilities as well as individuals with targeted disabilities, as these forms collect data on both groups). That does not mean, however, that this data should be used to set a different goal for each agency. Rather, EEOC should focus on those agencies that have done the best job of employing people with disabilities and use data from those agencies to help set an employment goal.

We note that the SF 256 collects data that is different in some respects than data collected by the EEOC's form for job applicants (including some differences in the types of disabilities listed and in the fact that the SF 256 does not permit individuals to identify as having more than one listed disability) and the EEOC's applicant form is more consistent with Schedule A's listed disabilities. In order to have consistent applicant flow data, the disability-related questions on the SF 256 form should be revised to comport with the newer form collecting demographic data from job applicants.

iv. Should the goal(s) be applied to specified job categories, GS, or SES levels, or applied across federal agencies' workforces?

The goals should be applied to all job categories in all GS and SES levels. As the Department of Labor recognized in regulations implementing Section 503, there is no basis to treat different job groups differently with respect to employment goals for people with disabilities.

b. Which types of disabilities should count toward fulfillment of the goal(s), and why? For example, should there be separate goals for individuals with disabilities as defined by the Rehabilitation Act and individuals with the most significant disabilities (known in federal employment as ''targeted disabilities'')?

The regulations should impose one goal for employment of people with disabilities as defined in the Rehabilitation Act and the ADA, and a second goal focusing specifically on employment of individuals with targeted or significant disabilities. Both measures are important. Particularly in light of the breadth of the definition of disability under the amended ADA and Rehabilitation Act, it is important to have a goal ensuring that people with significant disabilities—in large part, those who have been most commonly excluded from the workplace—are employed at appropriate rates. To determine which disabilities count as significant or targeted disabilities, we recommend that EEOC use those listed on the current form that seeks demographic data from federal job applicants, as well as those included in the Rehabilitation Act's list of significant disabilities. Alternatively, the EEOC could analyze data collected through SF 256 forms to determine which types of disabilities have been least prevalent in the federal workforce and use that analysis to inform the creation of a list and the setting of a goal.

c. What should an agency do to determine whether the goals have been met? For example, should it rely solely on voluntary self-disclosure through SF 256 and the form used by federal agencies to collect demographic information on job applicants? Or should it also, for example, consider individuals who have requested reasonable accommodation or entered the workforce through the Schedule A excepted hiring authority for ''persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities''?

It is reasonable for an agency to use all three of these measures to determine whether it has met the goals, provided that it is possible to do so without counting individuals multiple times (e.g. a person who has disclosed a disability on the SF 256 and also has disclosed her disability in connection with a request for reasonable accommodation).

d. Should there be consequences for federal agencies that fail to meet the goals? If so, what should they be?

In order to ensure that its regulations have a meaningful impact, the EEOC should impose consequences for failure to meet required goals. For example, regulations should require that agencies include hiring, employment, identifying and providing reasonable accommodations, and

promotion of people with disabilities as part of performance evaluations and bonus evaluations for all employees involved in hiring, providing accommodations, promotion, and termination (including under the Federal Equal Opportunity Recruiting Program).

In addition, the regulations should obligate EEOC's Office of Federal Operations to use the full range of its authority to enforce federal agencies' compliance with Section 501, including meeting required employment goals. While there may be some circumstances that would excuse a failure to meet the required goals, EEOC should hold agencies to these goals absent specific compelling circumstances.

Finally, EEOC should ensure that the Office of Federal Operations is sufficiently staffed to timely decide appeals of federal agency actions alleged to violate Section 504 or Section 501. While the timeliness of OFO decisions is a concern that reaches beyond disability rights claims, it is a critical issue that must be addressed. The protracted delays that are common in the appeals process, which frequently takes years, deny individuals meaningful relief.

4. **Are there specific hiring policies and practices other than, or in addition to, establishing goals that should be part of the regulation for being a model employer of individuals with disabilities? For example, should the proposed model employer regulation require agencies to work with entities specializing in the placement of individuals with disabilities, such as state vocational rehabilitation agencies or the Department of Labor's Office of Workers' Compensation Programs; to interview all qualified job applicants with disabilities; to assign additional "points" to qualified applicants with disabilities; to subject their qualification standards (including safety requirements) to internal or external review to identify unnecessary barriers to people with disabilities; to include certain information about affirmative action for individuals with disabilities in their job advertisements; to observe certain guidelines for determining the essential functions of the job; or to engage in additional, targeted outreach? Commenters suggesting that specific policies or practices be included in the proposed regulation are encouraged to include information about the benefits and costs of the suggested policy or practice.**

We strongly recommend that EEOC include all of these requirements among the obligations for model employers. More specifically, we urge the EEOC to include the additional requirements set out in our response to Question 1 and to require federal agencies to:

- Provide accommodations that include waiving an essential job function that may be assigned to another willing employee.

- Submit to EEOC periodic reports detailing the agency's outreach efforts and strategies being implemented to increase hiring of people with disabilities, and analyzing applicant flow, hiring data, and retention data (including, for example, the number of referrals from organizations with whom agencies have linkage agreements, the number of applicants for employment, the number of applicants known to have disabilities, the number of job openings, the number of jobs filled, the number of

known individuals with disabilities hired, the types of jobs for which these individuals were hired).

- Conduct periodic internal meetings to discuss the effectiveness of the agency's recruitment and hiring strategies and determine whether new or modified strategies are needed.

- The tool of using additional points to weight in favor of hiring individuals with disabilities is particularly important. Other tools are useful to increase the pool of applicants with disabilities and to keep people with disabilities in the workforce. Section 501, however, mandates "affirmative action," which means doing more than simply increasing the number of applicants with disabilities and trying to retain people with disabilities. Affirmative action means treating a class of individuals more favorably (usually to compensate for past discrimination). We note that Section 501 does not permit claims of "reverse discrimination" brought by individuals without disabilities.

5. **Are there any policies or practices related to retention, inclusion, and advancement of federal employees with disabilities, other than policies and practices that are already required by EEOC regulations, that a federal agency should be required to adopt to become a model employer of individuals with disabilities? For example, should the proposed model employer regulation require agencies to have reasonable accommodation procedures meeting certain standards, or to take certain remedial actions if they fail to achieve roughly equal average levels of compensation for employees with and without disabilities? Are there particular policies related to travel, technology, or security measures that could eliminate systemic barriers to federal employment of people with disabilities? Should agencies be required to gather feedback regarding their efforts to retain, include, and advance employees with disabilities on an ongoing basis, for example by convening roundtables with managers or conducting exit interviews with individuals with disabilities when they leave the agency? Please be as specific as possible about what the proposed new regulation should require. You are encouraged to provide information about the benefits and costs of the suggested policy or practice.**

   We urge EEOC to include in its Section 501 regulations, at a minimum:

   - A requirement that federal agencies conduct exit interviews for departing employees with disabilities to learn whether their departure is related in any way to their disabilities and if so, what measures might prevent the departure.

   - A requirement that federal agencies make available a process for employees with disabilities to provide anonymous feedback concerning the agency's handling of accommodation requests or other issues related to individuals' disabilities, as well as non-anonymous forums for such feedback—such as roundtables.

- A requirement that federal agencies include in their MD-715 reports to EEOC all instances where job applicants were terminated or demoted for a disability-related reason, so that the EEOC may scrutinize such decisions and take action where appropriate.

- A requirement that federal agencies include in their MD-715 reports a list of all employees on Schedule A probationary status and the length of time that each has been on such status, so that EEOC can take steps to ensure that individuals are moved to permanent status after two years as required by the program. Currently many individuals remain on probationary status (during which they may be terminated without civil service protections and without regular step increases in salary afforded to other federal employees) long past the two-year deadline—often for five or more years.

Our recommendations concerning reasonable accommodation issues are included in our response to Question 6.

6. **Are there any policies or practices related to reasonable accommodation, other than policies and practices that are already required by EEOC regulations, that federal agencies should be required to adopt to become model employers of individuals with disabilities? For example, should the proposed model employer regulation require agencies to establish certain time limits for the provision of accommodations; observe certain limitations on the collection of medical information during the interactive process; or adopt certain methods of funding, or budgeting for, reasonable accommodations, such as a centralized funding mechanism that would avoid charging individual program budgets for the cost of accommodations, or a centralized contracting vehicle or contract authority to streamline the accommodation process? Again, please be as specific as possible about what sorts of policies or practices the proposed new regulation should require. You are encouraged to provide information about the benefits and costs of the suggested policy or practice.**

   We urge EEOC to include in its Section 501 regulations, at a minimum:

   - A requirement that federal agencies use a centralized fund to finance reasonable accommodations for employees, so that each division within the agency is not responsible for funding accommodations for its employees.

   - A requirement that all federal agencies participate in the Defense Department's Computer/Electronics Accommodations Program (CAP).

   - A requirement that all federal agencies afford reasonable accommodations needed to enable employees with disabilities to travel to and from work and for work travel.

- A requirement that federal agencies provide all employees with written policies concerning reasonable accommodations, and that these policies clearly describe the process for requesting reasonable accommodations, the type of information that must be produced to obtain an accommodation, the name and title of the person whom employees may contact for assistance in requesting a reasonable accommodation, information about how to request alternative accommodations if a requested accommodation is denied, and information about how to request reconsideration of a denial of a requested accommodation.

- A requirement that federal agencies defer to the opinion of an employee's treating professional when such professional states that the employee requires a reasonable accommodation.

- A requirement that federal agencies apply a presumption that accommodations must be made to ensure the retention of employees facing potential termination due to disability-related conduct.

7. What requirements, other than those discussed above and the existing requirement not to discriminate based on disability, should be included in the proposed regulation to better clarify what it means to be a model employer of individuals with disabilities?

- Currently, customized employment strategies are not used for individuals hired through the Schedule A hiring authority, and supported employment is not widely used for these individuals. Given the importance of these strategies for many individuals with significant disabilities, and the tremendous success that they have had, their use is critical to improving employment rates of individuals with significant disabilities throughout the federal government and should be a particular priority for individuals hired through Schedule A.

- The need for training is discussed in response to Question 2. Because unfounded assumptions about the capabilities of individuals with disabilities are such a significant barrier to their employment, we emphasize the importance of effective training for agency personnel. Such trainings should occur frequently; should include the participation of individuals with disabilities; and should address common misconceptions about the employment capabilities of people with disabilities, examples of accommodations that may be provided to individuals with a variety of disabilities, and how the accommodations process should work. The Commission should conduct train-the-trainer sessions to assist other agencies in developing effective trainings.

ACCSES

American Association of People with Disabilities

American Council of the Blind

Association of University Centers on Disabilities

APSE

The Arc of the United States

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Brain Injury Association of America

Disability Rights Legal Center

Easter Seals

Epilepsy Foundation

Lutheran Services in America Disability Network

National Alliance on Mental Illness

National Association of Councils on Developmental Disabilities

National Association of State Directors of Developmental Disabilities Services

National Council on Independent Living

National Disability Rights Network

National Down Syndrome Congress

National Multiple Sclerosis Society

Paralyzed Veterans of America

SourceAmerica

United Spinal Association