Supporting Statement
Recordkeeping under Title VII, ADA, and GINA

A. Justification

1. Legal and administrative requirements

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, as amended (Title VII), which prohibits discrimination against individuals on the basis of race, color, religion, sex, or national origin; Title I of the Americans with Disabilities Act (ADA), which prohibits discrimination against qualified individuals with disabilities; and Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits discrimination based on genetic information. Section 709 of Title VII, 42 U.S.C. § 2000e-8, section 107(a) of ADA, 42 U.S.C. § 12117, and section 209 of GINA, 42 U.S.C. § 2000ff-6, authorize the EEOC to issue recordkeeping regulations that are deemed reasonable, necessary or appropriate to the enforcement of the Acts. The Commission has issued recordkeeping regulations pursuant to those statutory sections which are found throughout 29 C.F.R. Part 1602. The statutory language authorizing the recordkeeping is included at the end of this supporting statement. The recordkeeping requirements in Part 1602 cover all non-federal employers with 15 or more employees, as well as certain apprenticeship committees and labor unions (hereinafter referred to collectively as "employers" for ease of reference). The recordkeeping requirements themselves do not mandate the creation of any records. However, they do require that all employment records a covered employer creates or uses in the course of business (including, for example: personnel records such as hiring, promotion, demotion, transfer, termination, rates of pay, selection for training, or reasonable accommodation requests; apprenticeship records such as test papers, interview records, or reasonable accommodation requests; union records such as membership or referral records) must be preserved for the periods specified in Part 1602.

2. Use of collected information

Recordkeeping is necessary to the enforcement of Title VII, ADA, and GINA. After a charge of unlawful employment discrimination is filed with the EEOC by an employee or applicant against an employer and served by the EEOC on the employer, the employer is often asked to submit a position statement. The respondent employer typically uses the preserved records to prepare its position statement and may attach relevant retained records to document its defense to the allegations in the charge. Sometimes the EEOC will request additional documents relevant to the matter during the investigation and conciliation of the charge. The EEOC investigators review the records proffered or requested (including records relating to the charging party and to other similarly-situated employees or applicants) to help determine whether

reasonable cause exists to believe that a charging party's allegation of discrimination against the respondent employer is true. In particular, the investigator reviews records to determine what exactly occurred and whether there is evidence that the action was taken for a prohibited reason or produced an adverse impact on members of a protected class.

If the records are not preserved, an employer may be unable to reconstruct what actually occurred and, absent documentary evidence, may have difficulty refuting a charging party's allegations during an EEOC investigation or subsequent court proceeding. In addition, without access to these records the EEOC's ability to investigate, issue determinations, conciliate, and litigate will be unduly complicated, made more costly, and, in some cases, defeated.

3. Use of information technology

This collection of information does not involve the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, and the EEOC has not considered using information technology to reduce the burden because this is a recordkeeping requirement which does not require reporting or the creation of any records. However, employers may create and retain records electronically, and we assume that many employers do so to comply with this recordkeeping requirement.

4. Description of efforts to identify duplication

Other agencies may require entities they regulate to keep certain types of records related to their areas of regulation, e.g., banking, pay, tax, or health records. The EEOC is not aware of any other agency that requires employers to preserve all employment records. In the PRA notices we publish every three years in the Federal Register, we invite the public to comment on the recordkeeping requirement, and we have never received any comment indicating that it duplicates another agency's requirement. In addition, no employer subject to these recordkeeping requirements has ever expressed to EEOC that the recordkeeping requirement duplicates another agency's requirement.

5. Impact on small business

Small businesses with 15 or more employees are subject to this recordkeeping requirement. The burden on small businesses is minimal because, as discussed in item 1 above, employers must only preserve records that they otherwise make or use in the course of their business. The regulation does not require them to create any new records. For these reasons, the EEOC has not taken any additional steps to further minimize the already low burden on small businesses.

6. Consequences if information were collected less frequently

If the records required by the regulation to be preserved were not retained at all or were retained for a shorter period of time, the EEOC's ability to investigate, issue determinations, conciliate, and litigate would be unduly complicated, made more costly, and, in some cases, defeated. An individual who wishes to file a charge has up to 300 days from the date of the discriminatory conduct to do so; therefore, it is necessary for employers to retain pertinent records for at least one year to ensure that they are not destroyed before a charging party files his/her charge. Further, retaining the records benefits employers because, as noted above in item 2, an employer asked to respond to charges filed against it often needs the records to prepare a position statement. For these reasons, the regulation requires employers to preserve employment records for the following periods:

> Private Employers – one year from the date of the making of the record or the personnel action involved, but, if a charge of discrimination is filed or an action is brought by the Commission or Attorney General under Title VII, ADA, or GINA, all employment records relevant to that charge or action must continue to be preserved until final disposition of the charge or action.
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> Apprenticeship Committees – two years from the date an application was received, except that where an annual statistical report is required by the Commission, the person required to file the report shall preserve the list and forms for a period of two years or the period of a successful applicant's apprenticeship, whichever is longer. Persons required to file Report EEO–2 or similar reports, shall preserve any other record made solely for the purpose of completing such reports for a period of one year from the due date thereof. Other records relating to apprenticeship shall be retained for a period of two years from the date of the making of the record, but, if a charge of discrimination is filed or an action is brought by the Attorney General under Title VII, ADA, or GINA, all employment records relevant to that charge or action must continue to be preserved until final disposition of the charge or action.
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> Labor Unions – records made solely for the purpose of completing Report EEO–3 shall be preserved for a period of one year from the due date of the report. Other membership or referral records (including applications for same) shall be retained for a period of one year from the date of the making of the record, but, if a charge of discrimination is filed or an action is brought by the Commission or Attorney General under Title VII, ADA, or GINA, all employment records relevant to that charge or action must continue to be preserved until final disposition of the charge or action.

State and Local Governments – two years from the date of the making of the record or the personnel action involved, but, if a charge of discrimination is filed or an action is brought by the Attorney General, all personnel records relevant to that charge or action must be preserved until final disposition of the charge or action.

Educational Institutions – two years from the date of the making of the record or the personnel action involved, but, if a charge of discrimination is filed or an action is brought by the Commission or Attorney General, all personnel records relevant to that charge or action must be preserved until final disposition of the charge or action.

7. Special circumstances

There are no special circumstances.

8. Consultation outside the agency

As required by 5 C.F.R. § 1320.12, the EEOC published a notice in the Federal Register on February 20, 2018 (83 FR 7178) soliciting comments on the proposed extension of our recordkeeping regulations. The EEOC received only three public comments; however, none of these comments addressed the EEOC's recordkeeping requirements. Accordingly, no changes have been made to the requirements based upon the unresponsive comments.

Over the years, the EEOC has attended numerous conferences comprised of advocacy groups and employers concerning enforcement of Title VII and the ADA. The EEOC also presents many forums for discussion of enforcement issues through its various outreach, training, and assistance to small business programs.

In November of 2010, the EEOC furnished copies of its proposed Federal Register notice expanding its recordkeeping requirements from TVII and ADA to TVII, ADA, and GINA to the following, inviting them to review the proposed regulatory change and provide comments:

U.S. Department of Labor
Office of the Solicitor

Office of Health Plan Standards and Compliance Assistance
U.S. Department of Labor
Employee Benefits Security Administration

U.S. Department of Health and Human Services
Office for Civil Rights

U.S. Small Business Administration
Office of Advocacy

Disability Rights Section
U. S. Department of Justice
Civil Rights Division

Office of the Chief Counsel
U.S. Department of the Treasury
Internal Revenue Service

Over the years, the EEOC has consulted with the U.S. Department of Labor (DOL) on our respective agency recordkeeping regulations, and coordinated with the Office of Federal Contract Compliance Programs (OFCCP) of the DOL on their proposed recordkeeping regulations to eliminate the possibility of unnecessary duplication.

The EEOC has also met with representatives of OFCCP, the Employment Standards Administration, the Wage and Hour Administration, the Solicitor's Office and other components of DOL to discuss various aspects of our agency recordkeeping requirements.

9. Gifts or payments
The EEOC does not provide payments or gifts to employers that are subject to this requirement.

10. Confidentiality of information
The EEOC does not provide an assurance of confidentiality as the regulations do not require employers to report any information to the Commission. Any of the records maintained pursuant to the regulations that are subsequently disclosed to the EEOC during an investigation are protected from public disclosure by the confidentiality provisions of sections 706(b) and 709(e) of Title VII, which are incorporated by reference into ADA and GINA.

11. Questions of a sensitive nature
There are no questions of a sensitive nature; in fact, there are no questions of any nature involved in this collection as it is a recordkeeping requirement only.

12. Information collection burden
This information collection is limited to record retention; it does not require record creation or reporting. In order to estimate the hour burden for retaining these records we made some assumptions.

First, firms do not engage in a special process to meet Title VII, ADA, and GINA recordkeeping requirements specifically. We assume that firms already create, access, and collect records during the employment process. Some or all of this information may be collected automatically through electronic means or entered by the employees. Once created or collected, the

information is automatically retained until the firm decides to destroy the information. Therefore, firms with processes in place incur little or negligible additional cost in complying with the EEOC's record retention requirement. The total number of employers that are subject to the recordkeeping requirement is estimated to be 961,709, which combines estimates from private employment,[1] the public sector,[2] colleges and universities,[3] and referral unions.[4]

Second, newly formed firms may incur a small cost in time when installing and learning how to use their automated data collection systems. Although the information required under Title VII, ADA, and GINA is collected automatically, we assume some effort and time has to be expended so that employers can familiarize themselves with the Title VII, ADA, and GINA recordkeeping requirements and inform staff about those requirements. We estimate that 30 minutes would be spent for this familiarization process. This figure is same as our previous estimate. Once this cost is incurred during the familiarization process, we assume that the employer will never face this cost again.

The annual hour burden is based on the number of new firms with 15 or more employees that enter the market annually. Using 2011 data from the Small Business Administration, we estimate that there are 74,528 firms[5] that would incur a start-up burden due to the recordkeeping requirements in Part 1602. Assuming 30 minutes of time per firm, we estimate that the total annual hour burden is 37,264 hours.

13. Information collection cost burden

There is no additional annual cost to the employers as this is a recordkeeping requirement which does not require reporting or the creation of any new documents. As noted above, employers must only retain those records that they have already made or kept for other reasons.

14. Cost to federal government

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[1] Source: U.S. Small Business Administration: Statistics of U.S. Business, Release Date 1/2017. (https://www.sba.gov/advocacy/firm-size-data). Select "U.S. Data under U.S. Static Data.

[2] Source of original data: 2012 Census of Governments: Employment. Individual Government Data File (https://www2.census.gov/govs/apes/12ind_all_tabs.xls), Local Downloadable Data zip file 12ind_all_tabs.xls. The original number of government entities was adjusted to only include those with 15 or more employees.

[3] Source: U.S. Department of Education, National Center for Education Statistics, IPEDS, Fall 2015. Number and percentage distribution of Title IV institutions, by control of institution, level of institution, and region: United States and other U.S. jurisdictions, academic year 2015-16 (https://nces.ed.gov/pubs2016/2016111.pdf).

[4] EEO-3 Reports filed by referral unions in 2016 with EEOC.

[5] Data from SBA estimated that there were 414,043 firm births in 2014-2015. Business Dynamics Statistics (BDS) https://www.census.gov/ces/dataproducts/bds/.Using data about firm size from the BDS, we estimated that about 18.0 percent of businesses have 15 or more employees. Therefore, 18.0 percent of 414,043 led to an estimated 74,528 new firms with 15 or more employees. The number of 18.03876016 percent (i.e. unrounded) is included in the calculation to determine the number of firms.

There is no cost to the Federal Government because this is merely a recordkeeping requirement for regulated entities and does not obligate the EEOC to incur any costs.

15. Program changes or burden adjustments
There have been no program changes or adjustments to the requirements of this information collection since its last approval.

16. Publication of data for statistical use
No data will be published.

17. Approval not to display the expiration date
The EEOC is not seeking approval for non-display of the OMB approval date for this collection.

18. Exceptions to the certification statement
There are no exceptions to the EEOC's certification statement.

42 U.S.C. § 2000e-8(c)

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.