

**NLWJC - KAGAN**

**EMAILS RECEIVED**

**ARMS - BOX 021 - FOLDER -009**

**[12/29/1997 - 12/31/1997]**

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Richard Socarides ( CN=Richard Socarides/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME:29-DEC-1997 16:00:01.00

SUBJECT: Non-Discrimination Executive Order

TO: Thomas L. Freedman ( CN=Thomas L. Freedman/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Mary L. Smith ( CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Bruce N. Reed ( CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

Sylvia is fine w/ it. We discussed a "low key" signing, probably in the first 15 days of the year.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Todd A. Summers ( CN=Todd A. Summers/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:29-DEC-1997 13:22:18.00

SUBJECT: Proposed Talking Points for Chris

TO: Lawrence J. Haas ( CN=Lawrence J. Haas/OU=OMB/O=EOP @ EOP [ OMB ] )

READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

CC: Richard J. Turman ( CN=Richard J. Turman/OU=OMB/O=EOP @ EOP [ OMB ] )

READ:UNKNOWN

TEXT:

Richard Turman is apparently at a meeting at Treasury, so these have NOT been reviewed by him. The talking points on the Administration's funding accomplishments had been previously approved by his office.

I just talked to Sandy. She'll be back in Atlanta shortly and is prepared for a call from Robert Pear. I've left instructions to give him her Atlanta number if he calls. Sandy is calling Daniel Zingali, Director of AIDS Action Council, to ask that he respond favorably. I'm going to call Dr. Hitt, Chair of the President's Advisory Council on HIV/AIDS, and Winnie Stachelberg, Legislative Director for the Human Rights Campaign. If we get wind of the likelihood of a bad response, I'll let you know.

I think these points are consistent with the conversation this morning. If not, can you mark them up with your comments and get them back to me ASAP before I fax these to Chris.

Thanks,

Todd

----- Forwarded by Todd A. Summers/OPD/EOP on 12/29/97  
01:16 PM -----

Todd A. Summers  
12/29/97 01:05:06 PM  
Record Type: Record

To: Richard J. Turman/OMB/EOP  
cc:  
Subject: Proposed Talking Points for Chris

Richard -

Can you look these over - I'd like to fax these to Chris and Sandy

Thanks - Todd

=====

### Increase of \$165 Million

Administration is proposing a \$165 million increase in the Ryan White CARE Act, which provides primary care, drug therapies, and supportive services to people living with HIV and AIDS - this would represent a 14% increase in Ryan White funding

\$100 million of the increase will go to the AIDS Drug Assistance Program (a set-aside out of Title II) - this represents a 35% increase.

\$65 million will go to the other Titles of the CARE Act, which funds care and services

Title I - Emergency Relief for major metropolitan areas

Title II (other than ADAP) - Grants to states for services and planning

Title III - Early treatment intervention for those who are HIV positive

Title IV - Services for women, children, and youth

### Administration's Record on HIV/AIDS Funding

Nearly tripled funding for the Ryan White CARE Act since start of term

Discretionary AIDS funding at HHS increased over 60% since start of term

Specific Federal Funding for State AIDS Drug Assistance Program up nearly 450% since 1996.

AIDS research funding at NIH increased by 50% since start of term

HIV Prevention funding for the Centers for Disease Control and Prevention up 27% since start of term

### Other Accomplishments

The President worked vigorously to save the Medicaid program, which is the largest single payor for AIDS services and treatment in the country -- in 1997, federal Medicaid expenditures for people living with HIV/AIDS totaled \$1.8 billion, including nearly \$500 million for AIDS drugs.

The President established the HIV Vaccine Initiative, with the goal of finding a vaccine against HIV within 10 years.

The President has pushed for increases in the Ryan White CARE Act, including a 450% increase in the State AIDS Drug Assistance Program since 1996.

This Administration has supported the research that resulted in the new treatments that are saving so many lives, with funding for AIDS research at NIH increasing 50% since the start of this Administration.

### Talking Points on Medicaid Expansion Issue

The announcement by HHS that an HIV Medicaid expansion is not feasible at the present time in no way lessens the Administration's resolve to continue to seek workable means of extending life prolonging therapies to those in need. This proposed \$100 million increase in ADAP reflects that commitment

The President has long been committed to health care for all Americans, and is pleased with the incremental progress that has been made on a bipartisan basis in recent years. Insurance reform and increased access to health insurance for children are important first steps. But the ultimate goal of high quality health insurance for all Americans remains.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jim R. Esquea ( CN=Jim R. Esquea/OU=OMB/O=EOP [ OMB ] )

CREATION DATE/TIME:29-DEC-1997 19:11:58.00

SUBJECT: FDA & CDC Funding for Food Safety Activities

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP@EOP [ OPD ] )

READ:UNKNOWN

CC: Thomas Reilly ( CN=Thomas Reilly/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Richard J. Turman ( CN=Richard J. Turman/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Jill M. Pizzuto ( CN=Jill M. Pizzuto/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Wm G. White ( CN=Wm G. White/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Barry T. Clendenin ( CN=Barry T. Clendenin/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Joshua Gotbaum ( CN=Joshua Gotbaum/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

TEXT:

Josh Gotbaum asked that I forward the attached E-mail to you re: FDA & CDC food safety funding.

As noted in the attachment, HHS was provided an additional \$25 million over the FY 1998 enacted level of \$24 million for FDA food safety activities. HHS was advised that the additional \$25 million was to be used to meet the President's food safety commitments.

HHS instructed FDA to use \$5 million of the \$25 million for import inspection and the balance for domestic food safety activities. We spoke to HHS staff and advised them that \$5 million was not sufficient for import inspection and that a greater portion of the \$25 million was to be dedicated to international import inspection. We will keep you updated if there are further developments.....

----- Forwarded by Jim R. Esquea/OMB/EOP on 12/29/97  
06:17 PM -----

Jim R. Esquea

12/23/97 06:36:19 PM

Record Type: Record

To: Joshua Gotbaum/OMB/EOP@EOP, Barry T. Clendenin/OMB/EOP@EOP

cc: Richard J. Turman/OMB/EOP@EOP, Thomas Reilly/OMB/EOP@EOP, Wm G. White/OMB/EOP@EOP, Jill M. Pizzuto/OMB/EOP@EOP

Subject: FDA & CDC Funding for Food Safety Activities

You asked that we provide you with an assessment of the OSTP staff

complaint that FDA and CDC have not been provided enough funding to meet the Administration's stated goals in the President's Food Safety Initiative.

#### FDA's Food Safety Import Funding Level

The passback for FDA included \$24 million in FDA's base to continue food safety initiative activities begun in FY 1998 and an additional \$25 million to fund food import inspection activities and some expanded domestic food safety activities, for a total food safety initiative level of \$49 million.

When we passed back the \$25 million for FDA (we also passed back \$5 million for CDC food safety), we advised HHS that this was all the additional funding they would be getting to cover additional FDA food safety initiative activities and the President's food safety commitments. We did not passback a split for domestic and international food safety and left it to HHS' judgment, assuming that HHS would allocate the funds to meet the President's most recent import inspection commitment.

In previous discussions with FDA, we determined that FDA could reasonably obligate in FY 1999 at least \$15 million to develop a comprehensive international import inspection program and hire over 60 international import inspectors (FDA currently has roughly four FTEs doing international inspection). With such an increase, FDA will be able to evaluate/investigate the food safety systems of 50 to 55 countries phased in over two years.

#### HHS Advised FDA to Spend Less on Imports

Instead of adequately funding the food import inspection initiative to meet the President's commitment to "dramatically expanding" FDA's food import inspections, HHS apparently advised FDA that of the \$25 million we passed back, \$20 million was for domestic food safety and \$5 million for the President's Food Import inspection initiative.

We spoke to Bill Beldon today at ASMB and advised him that the HHS split for domestic and food import was not sufficient to meet the President's commitment for food import inspections and that FDA would need at least \$15 million, although we were not precluding HHS from allocating more than \$15 million to import inspections of the total \$25 million passed back for food safety. Bill acknowledged our concern and said he would communicate this concern to the rest of ASMB and FDA.

It is our considered judgment that the additional \$25 million (+20% over the FY 1998 enacted level for FDA food safety activities) that was passed back to FDA will be enough to meet the Administration's commitments on food safety in FY 1999, but the funds need to be allocated according to Administration priorities i.e., the majority of the \$25 million should go to import inspection.

#### Analysis of OSTP Concern Re: CDC Food Safety Funding

In the attached e-mail OSTP staff states that "\$5 million would not enable CDC to put in place the early warning system the President

promised last January." We assume OSTP is referring to the "Food Safety: From Farm to Table" initiative announced to support the FY 1998 Budget. If this is the case, the statement is not accurate.

The Food Safety initiative announced by the President last January (and subsequently summarized in a May 1997 report prepared by EPA, HHS and USDA) outlined specific policies and resource levels for FY 1998. While the interagency report identified some "long-term" activities, it did not identify specific resource levels for FY 1999 or other outyears. Specifically, the initiative proposed an additional \$10 million for CDC in FY 1998 (a 222% increase) over FY 1997 to expand from five to eight the number of "Foodnet" active surveillance sentinel sites that conduct epidemiological research on foodborne pathogens, as well as expand the use of molecular "finger-printing" technology to identify the source of infectious agents.

Congress enacted the resources proposed in the FY 1998 Food Safety initiative for CDC. The OMB recommended level for FY 1999 is a \$5 million (+34%) increase over the level proposed by the President in FY 1998 for CDC, but lower than the \$21 million (+145%) increase requested by HHS for FY 1999. The OMB recommendation would allow CDC to build upon the activities that CDC will conduct in FY 1998, although not to the level that HHS would like. HHS is appealing for an additional \$5 million over the OMB recommendation in FY 1999.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Todd A. Summers ( CN=Todd A. Summers/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:29-DEC-1997 15:15:50.00

SUBJECT: News

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

I talked with Sandy and Chris - we're going with the "at least \$100 million" line.

Sandy talked to Daniel Zingali, who will respond that he's happy about the proposed increased and pleased to continue working with the Administration on more systemic solutions.

Winnie Stachelberg (from the Human Rights Campaign) is out of town and unreachable (at least by us, and we have better numbers than Robert Pear). We also think that if they are contacted, they'll say the right thing.

Todd

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Richard Socarides ( CN=Richard Socarides/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME:29-DEC-1997 11:02:58.00

SUBJECT: revised Phoneix agenda

TO: Laura Emmett ( CN=Laura Emmett/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

----- Forwarded by Richard Socarides/WHO/EOP on 12/29/97  
11:02 AM -----

Michele Cavataio

12/23/97 06:08:22 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: revised Phoneix agenda

Here it is...

Message Sent

To:

- 
- Richard Socarides/WHO/EOP
  - Grace A. Garcia/PIR/EOP
  - John M. Goering/PIR/EOP
  - Brenda Toineeta/PIR/EOP
  - Tamara Monosoff/PIR/EOP
  - Maria E. Soto/PIR/EOP
  - Michael J. Sorrell/PIR/EOP
  - Jennifer A. Dolan/PIR/EOP
  - Michael Wenger/PIR/EOP
  - Beverly J. Barnes/WHO/EOP
  - Stacie Spector/WHO/EOP
  - Ann F. Lewis/WHO/EOP
  - Audrey M. Hutchinson/PIR/EOP

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS\_EXT:[ATTACH.D40]MAIL48460426X.316 to ASCII,

The following is a HEX DUMP:

FF57504374080000010A02010000000205000000872200000002000020C0DA33AE8AAE75C0436E  
.672E9CD65E9D78DEF579BAB616C7BF923DD1C3311F2F8B1AC7122845213D456AB0E546ECC2940A  
D7BD9DEB5B36CE1BE46635C22B8D0730F176A4AEA127D995AAAFDC2A670CDBD585664EE9AC2CBA

**DRAFT**  
**Agenda Proposal #1**  
**President's Advisory Board On Race**  
**Phoenix, January 13-14, 1998**

**Theme:** Race in the Workplace

The purpose of this meeting is to examine whether there is economic opportunity for all Americans. We will explore why, despite gains, significant disparities still exist between minorities and whites and the extent to which employment discrimination is due to race or other factors. Further, we will examine whether there is a need for continued responses to address these issues and identify some promising practices to reduce disparities.

**Key Questions:**

- Is there economic opportunity for all Americans and has this situation changed?
- Are there continuing disparities in employment? What are the main causes of these disparities? Does discrimination continue to effect employment opportunities for minorities?
- What governmental and non-governmental programs and policies are most effective in addressing the causes of labor market disparities? How much more needs to be done to reduce and eliminate disparities and how long should such programs continue?

**Day 1:**

10:00am - 1:00pm

The day begins with a meeting of corporate and labor leaders as well as other employee representatives with Labor Secretary Herman moderating the discussion. (This is one in a series of regional meetings.) The meeting will focus on means by which these entities will increase their involvement in promoting racial diversity in the workplace and supporting the Race Initiative.

2:00 - 4:00pm

Board members will next visit local, workplace Promising Practices.

5:00 - 7:00pm

There will be a meeting with regional leaders of American Indian tribes to hear their concerns.

**Day 2:**

The second day will begin the full Board meeting. The morning will focus on race and workplace issues among local Phoenix citizens. It will be followed by an afternoon session which will move from the local to the national perspective and address the causes of continued disparities, the methods to redress these problems, and the success or failure of these methods.

9:30am-11:30am

The first round table discussion will bring together local citizens to discuss the issue of whether economic opportunity is open to all Americans. The key exchange would be among those who say that there is economic opportunity in Phoenix for anyone who wants it (Arizona has the second highest growth rate in the U.S.) and those who can share stories about well-trained, experienced minorities who still can't get good jobs. It would include employee and management representatives from a large corporation and a small business, a representative from the Chamber of Commerce, and a representative from the Urban League.

1:00 - 1:30pm

Overview of the economic status of minorities

1:30 - 3:30pm

This round table would move from the local to the national perspective and begin by addressing the question of whether there is economic opportunity for all Americans. The round table will focus on the causes of continued disparities and possible programs and policies to address them. It could include a discussion of fears of "reverse discrimination" and whether programs designed to eliminate disparities should continue. (Possible panelists include: Leonard Valverde, ASU; Lorenda Sanchez, California Indian Manpower Coalition; Paul Ong, UCLA, Claudia Withers, Fair Employment Council of DC; Lawyers from Adarand case; Jerry Coangelo, corporate leader; William Julius Wilson, Harvard; Alejandro Portes, Princeton; Glen Loury, Boston University; Thomas Sowell, Stanford; Antonio Hernandez, MALDEF; Tony Carnevale)

4:30 - 6:00pm

The day will conclude with a community forum in which Board members learn of the race concerns in the Phoenix area.

Possible Cabinet participation:

Secretary Herman, Janet Yellen, Aida Alvarez, Secretary Daly

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Emil E. Parker ( CN=Emil E. Parker/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:30-DEC-1997 17:17:48.00

SUBJECT: Child support enforcement update

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Bruce N. Reed ( CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

CC: Cathy R. Mays ( CN=Cathy R. Mays/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

CC: Gene B. Sperling ( CN=Gene B. Sperling/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

CC: Peter A. Weissman ( CN=Peter A. Weissman/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

CC: Cynthia A. Rice ( CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

Cynthia asked me to update you on child support enforcement (CSE) issues in her absence.

Block grant. As you know, OMB has been assuming a child support enforcement offset of \$60 million in FY 1999 and \$300 million over five years. OMB proposes to achieve these savings by converting the CSE program, under which the Federal government reimburses States for 66 percent of their child support collection costs (without a cap) and provides incentive payments, into a block grant. Under the current structure, many States make a profit on the child support enforcement program--Federal payments (matching and incentive) and the State share of TANF collections exceed State child support enforcement spending--making the program an attractive target for savings.

A proposal to convert the CSE program into a block grant would likely be poorly received by both States and child support advocates. The OMB proposal would endanger the Administration's hard-won and well-deserved legacy in the child support area; I also doubt the Congressional Republicans would embrace this approach. Cynthia and I are in complete agreement that there are better ways to achieve this relatively modest level of savings from the CSE program, and we have urged HHS to develop an alternative package that generates comparable savings.

With Barbara Chow away for vacation, I have been unable to determine the status of the OMB proposal. There is a rumor that OMB is no longer carrying the \$300 million in savings but that the policy change remains very much alive. To my knowledge, none of the principals in the budget process except possibly Director Raines has focused on this issue. To put forward a block grant proposal without any external or even much internal vetting would be most unwise.

Systems penalty. On another note, HHS staff met with Ron Haskins today to provide technical assistance regarding his child support enforcement

automated systems penalty proposal. His approach is quite similar to the options we have been discussing internally--replacing the current penalty (termination of Federal child support enforcement and possibly TANF funding) for failure to put an automated system in place with a smaller sanction. The proposed penalty would start at 4 percent of FY 1997 Federal CSE matching funds and rise by 4 percentage points each year, up to a high of 20 percent in the fifth year and thereafter. We were contemplating somewhat larger penalties--5 or 10 percent. Under the Haskins proposal, a State would earn back 75 percent of the most recent penalty (but not earlier penalties) once its system was certified--this is also similar in principle to the approach under consideration internally.

Haskins was receptive to the HHS comments, which were largely technical in nature (e.g., would the new reduced penalty apply to failure to enact required legislation, as well as to automated system development--answer was no; could States enter into multi-year corrective action plans--answer was yes). He intends to hold a meeting including Republican and Democratic House and Senate staff, States, advocates and the Administration on January 8 to discuss his systems penalty proposal. Health and Human Services would like to arrive at a firm Administration position prior to that meeting; they suggest a pre-meeting on January 6.

Please let me know if you have questions.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Stacie Spector ( CN=Stacie Spector/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME:30-DEC-1997 17:49:16.00

SUBJECT: Childcare and Medicare Events

TO: Sarah A. Bianchi ( CN=Sarah A. Bianchi/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Paul A. Tuchmann ( CN=Paul A. Tuchmann/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Patricia Solis-Doyle ( CN=Patricia Solis-Doyle/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: June Shih ( CN=June Shih/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Jamie B. Schwartz ( CN=Jamie B. Schwartz/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Ron Klain ( CN=Ron Klain/O=OVP @ OVP [ UNKNOWN ] )  
READ:UNKNOWN

TO: Emily Bromberg ( CN=Emily Bromberg/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Amy W. Tobe ( CN=Amy W. Tobe/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Sidney Blumenthal ( CN=Sidney Blumenthal/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Sara M. Latham ( CN=Sara M. Latham/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Kevin S. Moran ( CN=Kevin S. Moran/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Christopher C. Jennings ( CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Katharine Button ( CN=Katharine Button/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Jordan Tamagni ( CN=Jordan Tamagni/OU=WHO/O=EOP @ EOP [ UNKNOWN ] )  
READ:UNKNOWN

TO: Aviva Steinberg ( CN=Aviva Steinberg/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Karen E. Skelton ( CN=Karen E. Skelton/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Michael D. McCurry ( CN=Michael D. McCurry/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TO: Douglas B. Sosnik ( CN=Douglas B. Sosnik/OU=WHO/O=EOP @ EOP [ WHO ] )  
 READ:UNKNOWN

TO: Stephanie S. Streett ( CN=Stephanie S. Streett/OU=WHO/O=EOP @ EOP [ WHO ] )  
 READ:UNKNOWN

TO: Paul E. Begala ( CN=Paul E. Begala/OU=WHO/O=EOP @ EOP [ WHO ] )  
 READ:UNKNOWN

TO: John Podesta ( CN=John Podesta/OU=WHO/O=EOP @ EOP [ WHO ] )  
 READ:UNKNOWN

TEXT:

This is an FYI for next weeks events: Preliminary Event planning meetings have taken place via conference call with many WH offices represented. Details will tighten up tomorrow and Friday, but here is where we are:

Medicare, Tuesday, January 6th:

Site: TBD (tomorrow)  
 Program: President, VP ?, 2 real people (1- in the 62-65 range, 1-displaced worker. Jennings/Bianchi working on)  
 Audience: Cong. members, advocates, groups (AARP, AFL-CIO, etc.), real people  
 Time: TBD (tomorrow)  
 Message: Access, Security (Backdrop message (words) will be decided tomorrow)  
 Cabinet: Shalala and Herman being invited for on-stage, w/ no speaking role

Childcare, Wednesday, January 7th:

Site: East Room (pending confirmation)  
 Program: President, First Lady, VP ?  
 Audience: Childcare conference people, cong. members, advocates (inside and outside beltway)  
 Time: TBD (tomorrow)  
 Message: Affordability, Quality, School Age, Early Learning. (Backdrop message (words) will be decided tomorrow). Historical, Bipartisan, and a starting point.  
 Cabinet: Herman, Shalala, Riley, Rubin, Reno, Barram all being invited on stage with no speaking role.  
 Other: Possible entrance for POTUS/FLOTUS with kids along side of them  
 Paper: 1 pager on initiative, 2 pager on the actual policy, 4 separate 1 pagers on each area (afford., quality, school age, early learn.), and a Q and A.

All policy information and specifics (or lack there of) are being held very closely and we are asking that we keep all details confidential to avoid spoiling the proposed policy announcements. PS - all question marks in above outline, mean that calls are out, therefore decision pending. Thank you.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Barry White ( CN=Barry White/OU=OMB/O=EOP [ OMB ] )

CREATION DATE/TIME:30-DEC-1997 14:30:00.00

SUBJECT: Outyear paths for child care supplement and teachers/class size

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP@EOP [ OPD ] )

READ:UNKNOWN

CC: Michael Cohen ( CN=Michael Cohen/OU=OPD/O=EOP@EOP [ OPD ] )

READ:UNKNOWN

CC: Jennifer L. Klein ( CN=Jennifer L. Klein/OU=OPD/O=EOP@EOP [ OPD ] )

READ:UNKNOWN

CC: Mary I. Cassell ( CN=Mary I. Cassell/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Jennifer Friedman ( CN=Jennifer Friedman/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Nicole R. Rabner ( CN=Nicole R. Rabner/OU=WHO/O=EOP@EOP [ WHO ] )

READ:UNKNOWN

CC: Barbara Chow ( CN=Barbara Chow/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Wayne Upshaw ( CN=Wayne Upshaw/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Keith J. Fontenot ( CN=Keith J. Fontenot/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

Barry White ( CN=Barry White/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

TEXT:

In the attached Lotus worksheet, pls find the tentative outyear paths for these two new policies on the mandatory side of the budget. I need to hear back from you that these, or other paths of your choosing, are what you want to appear in the Budget. The only things you cannot change are the year-by-year and five year totals; the distribution between the two policies should fit whatever story line you want to tell.

Note that the story lines can have targets that go beyond five years; I understand that you may want to do that for teachers/class size -- e.g., "XXX thousand teachers by 200?" We will include such targets in the budget texts, but the only year by year numbers in the technical documents will be for the 1999-2003 period.

I would appreciate it if I could have an answer on these paths no later than Monday, January 5. Pls feel free to consult with my staff on any of this in the interim.

Thanks.



**Clinton Presidential Records  
Automated Records Management  
System [EMAIL]**

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

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**Hex Dump file is not in a recognizable format, has been incorrectly decoded or is damaged.**

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**File Name:** p\_u6352793\_opd\_html\_1.xls

**Attachment Number:** [ATTACH.D24]MAIL44972536V.316

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Stacie Spector ( CN=Stacie Spector/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME:30-DEC-1997 11:13:58.00

SUBJECT: medi

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Paul E. Begala ( CN=Paul E. Begala/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TEXT:

FYI - we are working on having a call at 12pm. you both will be notified for confirmation of this, I have talked with Christa (who will be on the call if we can do it at 12pm), I have talked with the scheduler on this, and they have talked with Chris Jennings from DPC to begin developing and coordinating. We will include the regular line up of folks in other WH offices to make sure bases are covered.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jennifer L. Klein ( CN=Jennifer L. Klein/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:30-DEC-1997 14:06:25.00

SUBJECT: Title IX Meeting

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

CC: Neera Tanden ( CN=Neera Tanden/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TEXT:

I think Elena should come to this meeting with Justice and WH Counsel on Title IX.m Let me know what she wants to do.

----- Forwarded by Jennifer L. Klein/OPD/EOP on 12/30/97  
01:54 PM -----

Robert N. Weiner

12/30/97 02:03:24 PM

Record Type: Record

To: Jennifer L. Klein/OPD/EOP

cc:

Subject: Title IX Meeting

Thursday January 8 at 2 pm.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Daniel I. Werfel ( CN=Daniel I. Werfel/OU=OMB/O=EOP [ OMB ] )

CREATION DATE/TIME:30-DEC-1997 14:49:35.00

SUBJECT: EEOC Proposed Rule

TO: John F. Morrall III ( CN=John F. Morrall III/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

TO: Thomas L. Freedman ( CN=Thomas L. Freedman/OU=OPD/O=EOP@EOP [ OPD ] )

READ:UNKNOWN

TO: Daniel J. Chenok ( CN=Daniel J. Chenok/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP@EOP [ OPD ] )

READ:UNKNOWN

TO: Susan M. Carr ( CN=Susan M. Carr/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

TEXT:

Attached for your convenience is an electronic version of the rule as submitted to OMB.

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

WPC#

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Draft12/8/97 [BillingCode657006]EQUALEMPLOYMENTOPPORTUNITYCOMMISSION29CFR Part1614RINFederalSectorEqualEmploymentOpportunityAGENCY: EqualEmploymentOpportunityCommission(EEOC) @ACTION: NoticeofProposedRulemaking

SU

MMARY: TheEqualEmploymentOpportunityCommissionisproposingrevisionstoits deralsectorcomplaintprocessingregulationstoimplementrecommendationsmadebytheCharmansFederalSectorWorkgroup.TheCommissionproposestorequirethatagenciesestablishormakeavailablealternativedisputeresolution(ADR)programsduringtheEEOprecomplaintprocess.TheCommissionproposesrevisionstothe counselingprocess, thebasesfordismissalofcomplaints,andproceduresforrequestingahearing.TheCommissionalsoproposestoprovideadministrativejudgeswiththeauthoritytoissuedismissalsandfinaldecisionsoncomplaints.TheCommissionproposesanumberofchangestothe classcomplaintprocedures, includingauthorizingadministrativejudgestoissuefinaldecisionsonclasscertificationandrequiringthatadministrativejudgesdeterminewhetherasettlementagreementisfair andreasonable.TheCommissionproposeschangestotheappealsprocedures toprovideagenci

estherighttoappealanadministrativejudgesfinaldecision,torevisetheappellatebriefingschedule,toestablishdifferentstandardsofreviewforagencyfinaldecisionsandadministrativejudgesfinaldecisions,andtoeliminatetherighttorequestreconsiderationof a

-@), decisiononappeal.Finally,theCommissionproposestoamendtheremediessectionoftheregulationtopermitadministrativejudgestoawardattorneysfeesandtoprovideforpaymentofattorneysfeesforallservicesprovidedbyanattorneythroughouttheequalemploymentopportunity(EEO)process,includingcounseling.  DATES:   Comments on the notice of proposed rulemaking must be received on or before  [60 days after Federal Register publication date].

ADDRESS:   Written comments should be submitted to Frances M. Hart, Executive Officer,  Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507. As a convenience to commentators, the Executive Secretariat will accept comment transmissions by facsimile (FAX) machine. The telephone number of the FAX receiver is (202) 6634114. (This is not a toll free number.) Only comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by call the Executive Secretariat staff at (202) 6634078 (voice) or (202) 6634077 (TDD). (These are not toll free numbers.) Copies of comments submitted by the public will be available for review at the Commissions Library, room 6502, 1801 L Street, N.W., Washington, D.C. between the hours of 9:30 a.m. and 5:00 p.m.  FOR FURTHER INFORMATION CONTACT:   Nicholas M. Inzeo, Deputy Legal Counsel, \$" Thomas J. Schlageter, Assistant Legal Counsel or Kathleen Oram, Senior Attorney, Office of Legal Counsel, 2026634669 (voice), 2026637026 (TDD). This notice is also available in the

following formats: large print, braille, audiotape and electronic file on computer disk. Requests 0\*( for this notice in an alternative format should be made to EEOCs Publications Center at 18006693362.

SUPPLEMENTARY INFORMATION:   p  Introduction  P

As part of an ongoing effort to evaluate and improve the effectiveness of the Equal Employment Opportunity Commission's operations, the Chairman established the Federal Sector Workgroup to review the federal sector's equal employment opportunity process. The Workgroup was composed of representatives from office throughout the Commission. The Workgroup focused on the effectiveness of the EEOC in enforcing the statute that prohibits workplace discrimination in the federal government, namely: section 717 of Title VII of the Civil Rights Act of 1964, which prohibits discrimination against applicants and employees based on race, color, religion, sex and national origin; section 501 of the Rehabilitation Act of 1973, which prohibits employment discrimination on the basis of disability; section 15 of the Age Discrimination in Employment Act, which prohibits employment discrimination based on age, and the Equal Pay Act, which prohibits sex-based wage discrimination.  The Workgroup's review evaluated the Commission's administrative processes governing its enforcement responsibilities in the federal sector and developed recommendations to improve its effectiveness. In addition, there views sought to implement the goals of Vice President Gore's National Performance Review (NPR), including eliminating unnecessary layers of review, delegating decision-making authority to front-line employees, developing partnership between management and labor, seeking stakeholder input when making decisions, and measuring performance by results. , '\*  The Federal Sector Workgroup issued a report titled The Federal Sector EEO Process. . . . Recommendations for Change in May 1997. The report contains numerous recommendations for changing the federal sector complaint process, including changes to the Part 1614 regulations, changes to EEOC's Management Directive 110 which contains additional guidance and instructions on the federal complaint process, and changes to EEOC's internal procedures.  The Commission proposes to amend Part 1614 to implement the regulatory recommendations. The proposed changes, which are discussed in greater detail below, address the continuing perception of unfairness and inefficiency in the federal sector complaint process. In addition, the proposals accomplish the National Performance Review goal of removing unnecessary layers of review and delegating decision-making authority to front-line employees.  The Commission coordinated this proposed regulation with all federal agencies pursuant to Exec. Order No. 12067 (1978). A number of comments were received from agencies, which included helpful suggestions to improve the proposed regulation as well as criticisms of essential elements of the proposals. The

Commission believes, however, that it would be inappropriate to decide whether or how to make changes to this proposal without the benefit of public comment. Federal agencies are, of course, the entities whose conduct would be regulated by these proposals and making decisions based only on their input, without having the opportunity to consider the input of other stakeholders, including complaining parties and their representatives, would be insufficient. The Commission will seriously consider the agency comments in conjunction with the public comments. The Commission has made certain limited changes, principally in the form of added clarifications, pursuant to agency comments.

Commission propose to amend section 1614.102 to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO precomplaint process. The required precomplaint ADR program would be in addition to the provisions in the current regulation that encourage the use of ADR at all stages of the complaint process. Agencies would be free to develop the program that best suits their particular needs. While many agencies have adopted the mediation model as their ADR initiative, other resolution techniques would be acceptable, provided that they conform to the core principles set forth in EEOC's policy statement on ADR, which will be contained in Management Directive 110. Although ADR is believed to be most effective at the early stages of a dispute, agencies may continue their ADR efforts at any stage in the process, including after the formal complaint has been filed. The Commission also proposes to change section 1614.105, which covers precomplaint processing, to require that a counselor advise aggrieved persons that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation. If a matter is not resolved during ADR or during traditional counseling activities, the counselor will conduct a final interview and the aggrieved person may file a formal complaint. As noted above, agencies would be free to establish the type of ADR program they offer during the counseling period as long as it is consistent with the ADR program core principles set out by EEOC. Before aggrieved persons make a choice between counseling and ADR, counselors must fully inform them about the counseling process and the ADR program. Counselors must also inform aggrieved persons that if the ADR process does not result in a resolution of the dispute, they will receive a final interview and have the right to file a formal complaint. If the aggrieved person chooses to participate in the agency's ADR program, the role of the counselor would be limited to advising that person of his or her rights and responsibilities in the EEO complaint process, as set forth currently in section 1614.105(b). Counselors would not be required, in those instances, to attempt to resolve the dispute, but would not be precluded from doing so, if they believe a matter could be resolved quickly. Many agencies whose submitted comments on the draft revisions when it was coordinated under Exec. Order No. 12067 (1978) welcomed Alternative Dispute Resolution (ADR) at the precomplaint process stating that ADR would result in an early resolution of many cases and create a positive view of the EEO process. A number of agencies suggested that not all cases are appropriate for ADR. Rather, these agencies requested that they should have the flexibility to establish what type of matter or circumstance would be eligible for ADR. Several agencies also requested that consideration be given to the practical difficulties of creating an ADR program, and accordingly, that ample time be provided to them to obtain the necessary expertise, personnel and funds for ADR. Under the proposed regulations, agencies would be free to develop ADR programs that would best serve their particular needs and unique circumstances. The EEOC encourages creativity and flexibility in establishing ADR programs. This would certainly encompass an array of ADR programs. Agencies with limited funds and resources could use these services, in whole or in part, of another agency, a volunteer organization or other resources to provide for their ADR programs. Keeping with our emphasis on flexibility, an agency could, within certain limitations, exclude circumstances or matters not appropriate for its ADR program. As circumstances and needs change within a particular agency, it could modify its ADR program. However, it is essential that all agency ADR programs comply with the spirit of the EEOC's policy statement on the following core principles of ADR: 1) Provide for an impartial and independent forum for the parties to discuss their dispute; 2) Allow both parties to develop a realistic assessment of their own as well as the other party's procedural and substantive alternatives; 3) Promote trust by the parties in the forum thereby facilitating the discussion of each party's perceptions; 4) Ensure that the rights are preserved; 5) Have the support of upper level management in order to be effective; 6) Ensure that the parties willingly and voluntarily agree to the resolution of the dispute; and 7) Ensure the confidentiality of the parties.

The Federal Sector EEO Process... Recommendations for Change. (Rep

ort) (EEOC May 1997) (released October 1, 1997) at 4748. Management Directive 110 (MD 110) will further provide further information and amplify these core principles. Some agencies suggest that the regulations should clarify the precise roles and responsibilities of the person responsible for conducting ADR during the pre-complaint process and the EEO counselor, for example, whether the mediator or counselor will complete the counselor's report if mediation or other means of ADR fails. These concerns and other questions raised by the agencies about how ADR and EEO counseling will coexist will be explained in MD 110. Each agency will have discretion to develop its own procedures in accordance with the regulation and MD 110. With this flexibility, there will most likely not be uniformity among h+&\* agencies in the precise roles and responsibilities of EEO counselors and persons conducting ADR activities. Dismissals

The Commission proposes to amend section 1614.107 to remove one basis for dismissal of EEO complaints and add two new bases for dismissal. The Commission proposes to eliminate the provision in section 1614.107 (h) that permits agencies to dismiss complaints for failure to accept a certified offer of full relief. The full relief dismissal policy was premised on the view that at adjudication of a claim is unnecessary if the agency is willing to make the complainant whole. The regulatory process, however, has been criticized because complainants are placed in the position of risking dismissal of their complaints if they do not believe the offer of their opposing party is an offer of full relief. If a complainant makes the wrong assessment of the offer and EEOC decides on appeal that the agency did offer full relief, the complainant is precluded from proceeding with the complaint or from accepting the offer. In addition, difficulties assessing what constitutes full relief increased when, as a result of the Civil Rights Act of 1991, damages became available to federal employees. Unless the agency offers the full amount of damages permitted under the statutory caps in the law, it is virtually impossible to assess whether the agency has offered full relief. The Commission found that offers of full relief must address compensatory damages, where appropriate. *Jackson v. USPS*, Appeal No. 01923399 (1992); Request No. 05930306 \$X" (1993). During coordination of EEOC's proposals pursuant to Executive Order 12067, some agencies agreed with EEOC's position that full relief dismissals have become rare since compensatory damages became available to federal employees. Other agencies recommended that h+&\* P

EEOC revises the procedure to permit an independent review and certification of full relief offers by EEOC, arguing that certification of offers by EEOC would minimize the risk complainants must now take in determining on their own whether an agency's offer constitutes full relief. Finally, many agencies simply disagreed with the proposal to eliminate the full relief dismissal provision, arguing that they continue to use it in some cases. As noted above, without certification of full relief offers by EEOC, complainants are in the unfortunate position of trying to evaluate whether the agency they believed discriminated against them has truly offered them all the relief they would be entitled to in a federal court, and jeopardizing their whole case if they decide in error. The Commission has determined that it would not be a wise use of our limited resources at this time to create a certification procedure for full relief offers. Hence, for all of the reasons set forth above, the Commission proposes eliminating the regulatory provision permitting agencies to dismiss complaints for failure to accept a certified offer of full relief. The Commission proposes to add dismissal provisions permitting agencies to dismiss complaints for two reasons. First, the Commission proposes to permit agencies to dismiss complaints that alleged dissatisfaction with the processing of a previously filed complaint (commonly called spinoff complaints). EEOC's regulations at 29 CFR Part 1613, which were superseded by 29 CFR Part 1614 in 1992, expressly permitted complainants to file separate complaints alleging dissatisfaction with agencies processing of their original complaints. 29 CFR 1613.262 (1991). The procedure resulted in the filing of multiple spinoff complaints. The Commission recognized the need to limit these complaints, and did not include the Part 1613 provision in Part 1614. Guidance was provided in Management Directive 110. Complainants continued, however, to file spinoff complaints. Any alleged unfairness or discrimination in the h+&\* processing of a complaint can and must be raised during the processing of the underlying complaint and there is ample authority to deal with such complaints in that process. There is no provision in either the regulations or the management directive permitting the filing of a separate complaint on this issue. The Commission proposes to add the dismissal provision permitting dismissal of spinoff complaints to ensure that a balance is maintained between fair and non-discriminatory agency processing of complaints and the need to eliminate multiple filing of burdensome complaints about the manner in which an original complaint was processed. In conjunction with this regulatory change, the Commission will issue a companion gui

dance in Management Directive 110 addressing the procedures agencies must follow to resolve allegations of dissatisfaction with the complaints process quickly. Individuals who are dissatisfied with the processing of a complaint will be advised to bring this dissatisfaction to the attention of the official responsible for the complaint, whether it be an investigator, an EEOC administrative judge, or the Commissions Office of Federal Operations on appeal. The allegation of dissatisfaction, and any appropriate evidence, will then be considered during the processing of the existing complaint. Proper handling of spin-off allegations is important to the Commission because it involves the overall quality of the complaints process. Individuals who do not follow the process set out in the Management Directive for allegations of dissatisfaction will have such complaints dismissed by the agency or by the Commission. The Commission also proposes to add a dismissal provision at section 1614.107(I) permitting an agency to dismiss a complaint where it finds a clear pattern of abuse of the EEO process through strict application of the criteria set forth in Commission decisions. The proposed section codifies the Commission's decision in *Buren v. USPS*, Request No. 05850299 (1985). The Commission has stated that it has the inherent power to control and prevent abuse of its processes, orders or procedures. It is within the Commission's purview to determine that either complainants or agencies are engaging in conduct that constitutes a scheme designed to frustrate the administrative process. The Commission also has recognized that dismissing complaints for abuse of process should be done only on rare occasions because of the strong policy in favor of preserving complainants' EEO rights whenever possible. *Kleinman v. Postmaster General*,

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Request No. 05940579 (1994). The Commission believes that evaluating complaints for dismissal for abuse of process requires careful deliberation and application of strict criteria. Agencies must analyze whether a complainant's prior behavior evidences an ulterior purpose to abuse the EEO process. Evidence of numerous complaint filings, in and of itself, is an insufficient basis for making such a finding. *Hook v. USPS*, Appeal No. 01953852 (1995). However, multiple filings combined with the nature of the subject matter of the complaints, lack of specificity in the allegations, and allegations involving matters previously raised may be considered in determining whether a complainant has engaged in a pattern of abuse of the EEO process. *Goatchery v. USPS*, Request No. 05950557 (1996). The Commission proposes to add the dismissal provision based on abuse of process because it believes that it will improve the efficiency and effectiveness of the EEO process. Fragmentation of Complaints. The Commission seeks public comment on whether regulatory changes are necessary to correct the problem of fragmented processing of EEO claims. A recurring problem found by the Federal Sector Workgroup was that many agencies do not distinguish between allegations in support of a legal claim and the legal claim itself. As a result, some claims involving a number of different allegations are fragmented or separated. What should be one legal claim then becomes a number of miscellaneous events, losing its character as a claim. A hypothetical example would be a harassment claim where a pattern of incidents are used to support a claim, but these separate incidents would not constitute a legally cognizable claim of discrimination. As a result of fragmentation, the number of discrimination complaints by federal employees is unnecessarily multiplied and cognizable claims are fragmented to such an extent that potentially valid claims become meaningless. The Commission plans to amend its Management Directive to address this problem and seeks comment on what, if any, regulatory changes are necessary to correct this problem. Hearings. The Commission proposes four changes to the hearings process. First, the Commission proposes to amend section 1614.108, by adding a new paragraph (g), providing that complainants who wish to have a hearing on their complaints after the 180-day period of investigation has expired would be required to submit requests for hearings directly to EEOC, rather than to their agencies, as is the current practice. Agencies will be required to inform complainants in their acknowledgment letters of the EEOC office and address where a request for hearing is to be sent. When requesting a hearing from EEOC, complainants will be required at the same time to send a copy of the request for a hearing to their agencies' EEO offices. Upon receipt of a request for hearing, EEOC would request that the agency provide copies of the complaint file to EEOC and, if not previously provided, the complainant. The Commission believes that the proposed change

will expedite the complaint process. In addition, the proposed change would alleviate concerns that agencies are not responding to requests for hearings quickly enough by allowing the parties to communicate directly with EEOC.

Second, the Commission proposes to specify in the regulation at section 1614.109(b) that administrative judges have the authority to dismiss complaints during the hearing process for all of the reasons contained in the dismissal section, 29 CFR 1614.107. Currently, administrative judges do not have the authority to dismiss complaints that are in the hearing process, but must refer complaints back to the agency for dismissal, where appropriate. The proposed change would eliminate duplicative and burdensome procedures. Third, the Commission proposes to add a provision permitting administrative judges to issue a final decision without a hearing where they determine, even though material facts remain in dispute, that there is sufficient information in the record to decide the case, that the material facts in dispute can be decided on the basis of the written record, that there are no credibility issues that would require live testimony in order to evaluate a witness demeanor and that the case lacks merit. A new paragraph 1614.109(f)(4) would contain this provision, which would supplement administrative judges' existing authority to issue summary judgment decisions currently contained in 29 CFR 1614.109(e). Finally, the Commission proposes to amend the regulation to provide that administrative judges issue final decisions on complaints that have been referred to them for a hearing. Complainants or agencies could appeal administrative judges' final decisions to EEOC. Agencies would continue to issue final decisions in cases where the complainants request an immediate final

decision without a hearing. )\$( The Commission believes that allowing agencies to reject or modify an administrative

judges' findings of fact and conclusions of law is fundamentally unfair. This is particularly true because those cases have been referred to a neutral third party, an EEOC administrative judge, to hear the dispute. Historically, agencies have rejected or modified a majority of administrative judges' findings of discrimination, but have adopted nearly all findings of no discrimination. The Commission believes that the proposed change will address the perception of unfairness and conflict of interest in agencies deciding complaints of discrimination against them. In addition, this proposal eliminates a layer of review and permits decision making at an earlier stage, central goals of the National Performance Review. Of those federal agencies that commented on the draft regulation when the regulation was coordinated under Executive Order No. 12067 (1978), some supported the proposal to make the decision of the administrative judge final. A number of agencies opposed it, however, chiefly arguing that the Commission did not have authority to allow administrative judges to issue final decisions, while some agencies believed that the administrative judge could only issue a final decision if the hearing was the first level of an appeal to the Commission. The Commission believes that it has broad authority to restructure the discrimination complaint process for federal employee complaints and that administrative judges can issue decisions as proposed. Section 717(b) authorizes the Commission to issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. 42 U.S.C. 2000e-16(b). Such broad language has been interpreted by the courts to

constitute a delegation of legislative rulemaking authority. E.g., *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973); *Public Utilities Commission of California v. United States*, 355 U.S. 534, 542 (1958).

In 1972 Congress gave this rulemaking authority to the Civil Service Commission, which was the predecessor to the EEOC in having responsibility for enforcing the employment discrimination laws in the federal sector. In so doing, Congress made it clear that it was granting the Commission complete authority to restructure the complaint process to ensure protection of the interests of all parties involved in the process. It explained: 8000` One feature of the present equal employment opportunity program which deserves special scrutiny by the Civil Service Commission is the complaint process. The procedure under the present system, intended to provide for the informal disposition of complaints, may have denied employees adequate opportunity for impartial investigation and resolution of complaints.

8000` Under pres

ent procedures, in most cases, each agency is still responsible for investigating and judging itself. Although provision is made for the appointment of an outside examiner, the examiner does not have the authority to conduct an independent investigation, and his conclusions and findings are in the nature of recommendations to the agency head whomake the final agency det

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HearingsBeforeaSubcommitteeoftheCommitteeonGovernmentOperations,Reo  
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h+&\* □ClassComplaints□ □□TheFederalSectorWorkgroupidentifiedaseriesofconce  
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onhasundertakenapilotprograminwhichalldesicionsonclasscertificationwillbemadece  
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epossibleoperationalchanges. □□TheCommissionproposesfourregulatorychangestothecl  
asscomplaintproceduresfoundat29CFR1614.204. TheCommissionproposesstorevisesection  
1614.204 (b) toprovidethatacomplainantmaymoveforclasscertificationatananyreasonable  
pointintheprocesswhenitbecomesapparentthatthereareclassimplicationsraisedinanin  
dividualcomplaint. Ifacomplainantmovesforclasscertificationaftercompletingcounse  
ling, thecomplainantwillnotberequiredtoreturntothecounselingstage. Someagencieswh  
ocommentedonthisproposalwhenitwascoordinatedunderExecutiveOrder12067supportedth  
echangebutaskedthattheregulationdefine reasonablepointintheprocessandindicatewh  
atcriteriawouldbeusedtodeterminethatatacomplainthasclassimplications. Someagencies  
opposedthechange, arguingthatitwouldentailadditionalinvestigativecostsandinvitea  
busebycomplainantsseekingtobypass thecounselingprocessbymakingfrivolousclassalle  
gations. Theymaintainedthatacomplainantshouldhaveto electbetweena classoranindivid  
ualclaimattheprecomplaintstage. Othersobjectedonlytoeliminatingcounseling, asthat  
itshowthecomplainantisinformedofhisorherrightsandresponsibilitiesasclassagent.  
□□TheCommissionbelievesthattheproposedchangeisanimportantsteptowardremovingunne  
cessarybarrierstoclasscertificationofcomplaintsthatareproperlyofaclassnature. Th  
e h+&\* Commissionhasconsistentlyrecognizedthatitsdesicionsonclasscertification  
ustbeguidedbythefactthatacomplainanthasnohadaccess topre certification discovery i  
nthesame manner andtothesame extent as a Rule 23 plaintiff. Similarly, oftenanindividual  
omplainantwillnothavereason toknowatthecounselingstage thatthechallengedactionact  
uallyreflectsanagency policy or practice generally applicable to a class of similarly situ  
ated individuals. The Commission intends that reasonable point in the process be interpret  
ed to allow a complainant to seek class certification when he or she knows or should know that th  
ecomplainthasclassimplications, i.e., it potentially involves questions of fact common  
oaclass and is typical of the claims of a class. Normally, this point would be no later than the  
nd of discovery at the hearing stage. It would be the responsibility of the agency or administr  
ative judge, as appropriate, to ensure that the class agent is advised of his or her obligation  
satthistime. The Commission believes it would be impracticable and unproductive to require  
thecomplainant to return to counseling at this stage. □□The Commission proposes to amend sec  
tion 1614.204 (d) to provide that administrative judges would issue final decisions on wheth

era class complaint will be accepted (or certified) or dismissed. Currently, administrative judges make recommendations to agencies on acceptance or dismissal. The Commission particularly invites comment on this proposal. Agencies who commented on this proposal when it was coordinated under Executive Order 12067 said they either supported or opposed it for the same reason: they gave with respect to the proposal for administrative judges to issue final decisions on individual complaints. Some agencies said they supported it only if the agency is given the right to appeal a certification decision. Under the Commission's proposal, an agency would have such a right under section 1614.401(b), which provides that an agency may appeal an administrative judge's final decision. The Commission also seeks public comment on whether to make administrative judges' decisions on the merits final in class cases, consistent with the proposal to eliminate final agency decisions in section 1614.109(h). In addition, the Commission proposes to amend section 1614.204(g)(2) to require that administrative judges must approve class settlement agreements pursuant to the fair and reasonable standard, even when no class member has asserted an objection to the settlement. Several agency commenters under Executive Order 12067 supported this proposal while others disagreed, arguing that it would add an unnecessary layer of review and that adequate safeguards exist in section 1614.204(g)(4), which gives dissatisfied class members the right to petition to vacate a settlement, and 1614.204(a)(2), which requires the class agent to fairly and adequately represent the class. The Commission believes this proposed change is necessary to protect the interests of the class. As one agency commenter noted, class agents sometimes seek to settle their individual claims without full regard for the interests of the class. The change would make the regulations consistent with the practice in federal courts where the court must approve any settlement of a class case under a fair and reasonable standard. Finally, the Commission proposes to amend section 1614.204(1)(3) to clarify the burdens of proof applicable to individual class members who believe they are entitled to relief. The proposed change would make explicit that the burdens enunciated in *Teamsters v. United States*, 431 U.S. 324 (1977), apply. In *Teamsters*, the Court stated that where a finding of discrimination has been made, there is a presumption of discrimination as to every individual who can show he or

she is a member of the class and was affected by the discrimination during the relevant period of time. Agencies then would be required to show by clear and convincing evidence that a class member is not entitled to relief, as is provided currently in section 1614.501(b), (c).

Appeals  In addition to the proposal to allow complainants or agencies to appeal administrative judges' final decisions, noted above, the Commission proposes to revise the briefing schedules for appeals to EEOC, to add a provision permitting the Office of Federal Operations to sanction parties for failure to comply with the regulations, to change the standard of review for some appeals, and to eliminate the right to request reconsideration of appeals decisions. The Commission proposes to amend section 1614.403 of the regulations to require that complainants submit any statement or brief in support of an appeal of dismissal of a complaint to EEOC within 30 days of receipt of the dismissal. Any statement or brief in support of an appeal of a final decision on a complaint would have to be submitted to EEOC within 30 days of filing the notice of appeal. Statements or briefs in opposition to appeals would have to be served on the opposing party within 30 days of receipt of a statement or brief in support of an appeal. The Commission will strictly apply appellate time frames. The Commission believes that 30 days is sufficient time to file briefs in procedural cases (cases that are dismissed by the agency or the administrative judge) because those cases usually do not raise substantive legal issues. On the other hand, appeals of final decisions on the merits of cases generally raise legal issues or require a thorough review of the record and warrant additional time to formulate arguments to support the appeals. In connection with the briefing schedule changes, the Commission proposes to amend the

regulation to require agencies to submit the complaint file to EEOC within 30 days of notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

The Commission proposes to amend section 1614.404 to add a paragraph authorizing the Office of Federal Operations to take appropriate action where a party to an appeal fails without good cause to comply with the appellate procedures or to respond fully and in a timely fashion

to request for information. The proposal would allow the Office of Federal Operations to draw an adverse inference that requested information a party failed to provide would have reflected unfavorably on that party, to consider the matter to which the requested information pertains to be established in favor of the opposing party, to issue a decision fully or partially in favor of the opposing party, or to take such other actions as appropriate. The Commission proposes to amend section 1614.405 of the regulation to provide that decisions on appeal from final decisions by administrative judges after a hearing will be based on a clearly erroneous standard of review, but review of all other decisions will be based on a *de novo* standard of review. Under the clearly erroneous standard of review, no new evidence will be considered on appeal unless the evidence was not reasonably available during the hearing process. The clearly erroneous standard of review is the normal appellate standard of review where findings of fact are given deference by the reviewing authority and questions of law are reconsidered *de novo*. Applying the *de novo* standard of review to administrative judges' final decisions after hearing would be an inefficient use of EEOC's limited resources. In addition, since EEOC's Office of Federal Operations did not see and hear the witnesses, it would not be in a position to second-guess the administrative judge during the appellate process, especially with respect to credibility determinations based on a witness's demeanor. Finally, the Commission proposes to amend sections 1614.405 and 1614.407 to eliminate the right of agencies and complainants to request reconsideration of decisions issued by the Office of Federal Operations at the initial appellate level. Reconsideration is an extra layer of review that is duplicative and time-consuming but that does little to improve the complaints process. The Commission denies the majority of requests for reconsideration, whether in procedural or merits cases. The purpose of this change is to enable the Commission to direct more resources to decisionmaking at the first appellate level, focusing on policy issues it deems important and developing a consistent body of decisional law on those issues. This proposal would effectuate one of the central goals of the National Performance Review by eliminating an unnecessary layer of review and permitting decisionmaking at an earlier stage. The Commission will retain its discretion to reconsider any decision on its own motion under section 1614.407(a). Most agency commenters who commented on this proposal when it was coordinated under Executive Order 12067 opposed this change. They urged retention of the right to request reconsideration as a safeguard for agencies against mistakes and inconsistencies by the Office of Federal Operations. It would be unfair to deny agencies this last opportunity for recourse, they maintained, particularly if administrative judges' decisions are made final and given greater deference. They argued the change would unjustifiably tip the balance in favor of complainants, who have the right to seek *de novo* review in federal court while agencies do not. Several commenters also argued in favor of preservation of the right to request reconsideration of at least those decisions involving important legal issues or having a significant impact on agency policies

or programs beyond the case at hand. We plan to consider these comments during the public comment period. Elimination of

the reconsideration process is an important component of the proposed federal sector reforms. It will provide the resources to improve the timeliness and quality of the Commission's Office of Federal Operations decisions across the board. The availability of reconsideration has significantly enhanced the overall decisionmaking process. Many requests are simply a reargument of previously unsuccessful positions. They are sometimes used only to delay the finality of an adverse decision. The overwhelming majority of requests are denied. For example, in fiscal year 1997, requests for reconsideration resulting in a reversal of an order on the merits occurred in about 4% of the cases. For fiscal years 1996, 1995, 1994 and 1993, the figures were 5%, 2%, 2% and 3%, respectively. To the extent agencies have legitimate complaints about erroneous Office of Federal Operations decisions, the Commission believes the appropriate remedy is to seek to improve the quality and consistency of the decisionmaking process as a whole. The concern expressed by some agencies about the length of time the Office of Federal Operations takes to issue decisions also will be alleviated by the shift in resources and priorities this change will accomplish. Although the agencies view it as unfair that, unlike complainants, they cannot go to court if they are dissatisfied with the administrative process, this is a true cost of a decision on reconsideration. This inherent aspect of the process does not outweigh the need for finality and the value of a more streamlined process. Some agencies have argued that reconsideration is an important step to ensure full consideration of the agency position in cases involving significant legal issues or broader consequences for agency policies

and programs. This is a valid need that can be met by providing for greater Commission involvement in Office of Federal Operations decisions of that h+&\* nature. It is incumbent upon the agency to identify and thoroughly address such policy or legal issues in its brief at the appeal stage (rather than waiting for reconsideration, as sometimes occurs now) so that the Commission can give the case the level of scrutiny warranted. Finally, the Commission will retain its authority to reconsider, within a reasonable time, any decision on its own motion. 29 CFR 1614.407 (a); Kleinman v. United States Postal Service, EEOC Request No. 05930493 (1993) (Commission has the authority to reopen decision on its own motion to correct error). Attorneys Fees

The Commission proposes to amend the attorneys fees section of the regulation to authorize administrative judges to award attorneys fees in cases where a hearing is requested. Currently, administrative judges decide the entitlement to attorneys fees. Agencies, however, calculate the amount of the award. The Commission believes that administrative judges are in a better position to assess the reasonableness of the fees request, because they have heard the evidence and can assess the complexity of the case as presented by the attorney as a basis for the award. Moreover, because administrative judges are neutral third parties to the dispute, their attorneys fees calculations will not be perceived as biased in favor of one party or the other.

In addition, the Commission proposes to amend section 1614.501 (e) (1) (iv) to provide that an award of attorneys fees may include compensation for the time spent during the counseling period including any ADR process. The Commission believes that the current regulation, which limits attorneys fees award to fees for work performed after a formal complaint is filed could serve as a disincentive to participate in alternative dispute resolution, which often occurs during the counseling period, or otherwise settle a case during counseling.

During interagency coordination of the proposed rule, many agencies expressed opposition to this proposal to provide for attorneys fees awards for pre-complaint activities, arguing that providing for attorneys fees will formalize the informal counseling process and make it more legalistic and adversarial. The Commission proposes the change, in part, to make the EEO complaint remedies consistent with the remedies available to federal employees in other forums. The Office of Personnel Management's (OPM) Back Pay Act regulations provide for the payment of attorneys fees without a temporal restriction in cases correcting unjustified or unwarranted personnel actions. 5 CFR 550.807. In other words, OPM's regulations provide for full attorneys fees, including cases resolved during the informal stage (first step) of the grievance process. Likewise, the Merit System Protection Boards (MSPB) regulations do not contain any restriction on attorneys fees. 5 CFR 1201.37. The Commission does not believe that federal employees who have been discriminated against should receive a lesser remedy than federal employees who prevail in grievances and MSPB appeals.

In addition to the proposed changes outlined above, the Commission proposes to amend section 1614.103 (b) of the regulation to include the Public Health Service Commissioned Corps and the National Oceanic and Atmospheric Administration Commissioned Corps in the coverage of Part 1614. This inclusion is consistent with prior Commission decisions and with the determination of the Solicitor General that Commissioned Corps members are covered by federal sector antidiscrimination statute s.

Regulatory Procedures

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Executive Order 12866 ) \$( In promulgating this notice of proposed rulemaking, the Commission has adhered to the

regulatory philosophy and applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. In addition, the Commission has determined that this regulatory action is not significant as defined by Executive Order 12866, and is therefore not subject to review by the Office of Management and Budget. Regulatory Flexibility Act

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In addition, the Commission also certifies under 5 U.S.C. 605 (b), enacted by the Regulatory Act (Pub. L. 96354), that this rule will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to employees and agencies and departments of the federal government. For this reason, a regulatory flexibility analysis is not required. Paperwork Reduction Act

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

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Age discrimination, Equal employment opportunity, Government employees, Individuals with disabilities, Race discrimination, Religious discrimination

, Sex discrimination. For the Commission h+&\* Chairman Accordingly, fort asonset forth in the preamble, it is proposed to amend chapter XIV of title 29 of the Code of Federal Regulations as follows: PART 1614 [AMENDED] 1. The authority citation for FR Part 1614 continues to read as follows: \$ Authority: 29 U.S.C. 206 (d), 633a, 791 and 794a; 42 U.S.C. 2000e16; E.O. 10577, 3CFR,

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 9541958 Comp., p. 218; E.O. 11222, 3CFR, 19641965 Comp., p. 306; E.O. 11478, 3CFR, 1969 Comp., p. 133; E.O. 12106, 3CFR, 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3CFR, 1978 Comp., p. 321.  
 2. Section 1614.102 is amended by redesignating paragraphs (b) (2) through (b) (6) as paragraphs (b) (3) through (b) (7), and by adding paragraph (b) (2) to read as follows: 1614.102 Agency program. (b) (2) Establish or alternative dispute resolution program for the equal employment opportunity precomplaint process. 3. Section 1614.103 is amended by deleting the word "and" at the end of paragraph (b) (3), deleting the period at the end of paragraph (b) (4), adding the word "and" at the end of paragraph (b) (4) and adding paragraphs (b) (5) and (b) (6) to read as follows: 1614.103 (b) Complaints of discrimination covered by this part. (b) (5) Public Health Service Commissioned Corps, except when in time of war or national emergency, the President declares the Corps to be a military service in accordance with 42 U.S.C. 217; (b) (6) The National Oceanic and Atmospheric Administration Commissioned Corps. 4 Section 1614.105 is amended by redesignating paragraph (b) as paragraph (b) (1), revising

8  
 the first sentence of paragraph (b) (1), adding paragraph (b) (2), revising the first sentence of paragraph (d) and revising paragraph (f) to read as follows: 1614.105 (b) (1) At the initial counseling session, Counselors must advise individuals orally and in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with 1614.108 (f), election rights pursuant to 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to 1614.201 (a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in precomplaint counseling) may be alleged in a subsequent complaint filed with the agency. (b) (2) Counselors shall advise aggrieved persons that they may choose between participation in the alternative dispute resolution program offered by the agency and the counseling activities provided for in paragraph (c) of this section. h+&\* (d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative dispute resolution procedure in accordance with paragraph (b) (2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency EEO officer to request counseling. (f) Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b) (2) of this section, the precomplaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued. 5. Section 1614.106 is amended by adding a sentence after the first sentence of the introductory text of paragraph (d) to read as follows: 1614.106 (d) Individual complaints. (d) Agency shall advise the complainant in the acknowledgment of the EEO Office and its address where a request for a hearing shall be sent. 6. Section 1614.107 is amended by removing paragraph (h) and adding new paragraphs (h) (1) and (i) to read as follows: 1614.107 (h) Dismissal of complaints. (h) (1) That alleges dissatisfaction with the processing of a previously filed complaint; or (i) Where the agency strictly applies the criteria set forth in Commission decisions and finds a clear pattern of misuse of the EEO process. 7. Section 1614.108 is amended by revising paragraph (f) and adding a new paragraph (g) to read as follows: 1614.108 (f) Investigation of complaints. (f) Within 180 days from the filing of the complaint, within the time period contained in order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing and

final decision from an administrative judge or may receive an immediate final decision pursuant to 1614.110 from the agency with which the complaint was filed. (g) Where the complainant has received the notice required in paragraph (f) of this section or at any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing by submitting a request for a hearing directly to the EEOC office indicated in the agency acknowledgment letter. The complainant shall send a copy of the request for a hearing to the agency EEO office. Upon receipt of a request for a hearing, EEOC will request that the agency provide copies of the complaint file to EEOC and, if not previously provided, the complainant. 8. Section 1614.109 is amended by revising paragraph (a), redesignating paragraphs (b) through (g) as paragraphs (c) through (h), adding a new paragraph (b), revising the introductory text of paragraph (e) (3), in paragraph (e) removing the phrases "findings and conclusions" and adding, in their place, the words "final decisions", adding a new paragraph (f) (4), and revising paragraph (h) to read as follows: 1614.109 Hearings. (a) When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the agency has not had an opportunity to address, the administrative judge may remand any such issue for counseling in accordance with 1614.105 or for such other processing as ordered by the administrative judge. (b) Dismissals. Administrative judges shall dismiss complaints or portions of complaints pursuant to section 1614.107 of this part. (e) (3) When the complainant, or the agency against which a complaint is filed, or its employees fail with due diligence to respond fully and in a timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances: (f) (4) Where the administrative judge determines, even though material facts remain in dispute, that there is sufficient information in the record to decide the case, that the material facts in dispute can be decided on the basis of the written record, that there are no credibility issues that would require live testimony in order to evaluate witness demeanor and that the case lacks merit, the administrative judge may issue a final decision without a hearing. (h) Final decisions by administrative judges. Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a final decision, within 180 days of receipt by EEOC of a request for a hearing, an administrative judge shall issue a final decision on the complaint, and shall order appropriate remedies and relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the final decision to the parties by certified mail, return receipt requested. The final decision shall contain notice of the right of either party to appeal to the Commission, notice of the right of the complainant to file a civil action in Federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573 shall be attached to the decision. 9. Section 1614.110 is amended by revising the title and first sentence to read as follows: 1614.110 Final decisions by agencies. Within 60 days of issuing notification that a complainant has requested an immediate

decision from the agency, or within 60 days of the end of the 30 day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, the agency shall issue a final decision. \*\*\*

10. Section 1614.204 is amended by revising paragraph (b), removing the words "recommend" that the agency from paragraphs (d) (2), (d) (3), (d) (4), and (d) (5), removing the word "recommend" and replacing it with the word "decide" in paragraph (d) (6), revising paragraph (d) (7), paragraph (e) (1), paragraph (g) (2) and paragraph (l) (3) to read as follows: 1614.204 Class complaints. (b) Precomplaint processing. An employee who wishes to file a class complaint must seek counseling and be counseled in accordance with 1614.105. A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. If a complainant moves for class certification after completing the counseling process contained in 1614.105, no additional counseling is required. (d)

□\*\*\* X □□(7)□` □The administrative judge shall transmit this or her decision to accept ismissa 0" complaint to the agency and the agent. The dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint or that discrimination will be processed under subpart A or that the complaint is also dismissed as an individual

complaint in accordance with 1614.107. In addition, it shall inform the agent of the right to )\$( appeal the dismissal of the class complaint to the Office of Federal Operations or to file a civil action and shall include EEOC Form 573, Notice of Appeal/Petition.

□□(e)(1)□` □Within 15 days of receiving notice that the administrative judge has accepted a class complaint or a reasonable time frame specified by the administrative judge, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint. □\*\*\*□□(g)□` □\*\*\* □□(2)□` □The complaint may be resolved by agreement of the agency and the agent at any time as long as the administrative judge finds the agreement to be fair and reasonable. □\*\*\*□□(1)□` □\*\*\* H □□(3)□` □When discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of receipt of notification by the agency of its final decision. The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the agency found classwide discrimination in its final decision. Where a finding of discrimination against a class has been made, there shall be a presumption of discrimination as to each member of the class. The agency must show by clear and convincing evidence that any class member is not entitled to relief. The period of time for which the agency finds classwide discrimination shall begin not more than 45 days prior to the agent's initial contact with the Counselor and shall end not later than the date when the agency eliminates the policy or practice found to be discriminatory in the final agency decision. The agency shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits. 11. □□Section 1614.401 is amended by redesignating paragraphs (b) through (d) as paragraphs

8 (c) through (e) and adding a new paragraph (b) to read as follows: □1614.401□` □Appeal to the Equal Employment Opportunity Commission. □□□\*\*\*□□(b)□` □A complainant or an agency may appeal an administrative judge's final decision or H an administrative judge's dismissal of all or a portion of a complaint. 12. □□Section 1614.403 is revised to read as follows: H □1614.403□` □How to appeal. □□(a)□` □The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P. O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The appellant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed. □□(b)□` □The appellant shall furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the

appellant must certify the date and method by which service was made on the opposing party. )\$( ( □□(c)□` □If an appellant does not file an appeal within the time limit of this subpart, the

appeal will be untimely and shall be dismissed by the Commission. □□(d)□` □Where an appellant appeals a dismissal, any statement or brief in support of the appeal must be submitted to the Office of Federal Operations within 30 days of receipt of the dismissal. Where an appellant appeals a final decision, any statement or brief in support of the appeal must be submitted within 30 days of filing the notice of appeal. □□(e)□` □The agency must submit the complaint file to the Office of Federal Operations □ within 30 days of notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency. □□(f)□` □Any statement or brief in opposition to an appeal must be submitted to the H Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal. 13. □□Section 1614.404 is amended by adding a new paragraph to read as follows: □1614.404□` □

Appellate procedure. \*\*\*\*\* (c) When either party to an appeal fails without good cause to comply with the requirements of this section or to respond fully and in a timely fashion to requests for information, the Office of Federal Operations shall, in appropriate circumstances: (1) Draw an adverse inference that the requested information would have been reflected unfavorably on the party refusing to provide the requested information; (2) Consider the matter to which the requested information or testimony pertains to be established in favor of the opposing party; (3) Issue a decision fully partially in favor of the opposing party; or (4) Takes such other actions as appropriate. 14. Section 1614.405 is amended by revising the third sentence and adding a new fourth sentence to paragraph (a) and revising paragraph (b) to read as follows: 1614.405 (a) The decision on an appeal from a final decision based on a de novo

8 review, except that the decision on an appeal from a final decision by an administrative judge issued pursuant to 1614.109 (h) shall be based on a clearly erroneous standard of review. (b) A decision issued under paragraph (a) of this section is final within the meaning of p 1614.408 unless the Commission on its own motion reconsider the case. There is no right either party to request reconsideration. 15. Section 1614.407 is removed and sections 1614.408 through 1614.410 are redesignated H sections 1614.407 through 1614.409. 16. Section 1614.501 is amended by revising the last sentence of the introductory text of paragraph (e) (1), and revising paragraph (e) (1) (iv) to read as follows: 1614.501 Remedies and relief. X \*\*\*\*\* (e) Attorneys Fees or costs. \$X" (1) In a final decision the agency, administrative judge, or Commission may award the applicant or employee reasonable attorneys fees or costs (including expert witness fees) incurred in the processing of the complaint. \*\*\*\*\* (iv) Attorneys fees shall be paid for all services performed by an attorney, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission. Written submissions to the agency that are resigned by their representatives shall be deemed to constitute notice of representation. 17. Section 1614.605 is amended by revising the second sentence of paragraph (d) to read as follows: 1614.605 Representation and official time. \*\*\*\*\* (d) ~~~ documents submitted by the complainant designating an attorney as representative, service of ~~~ documents to the attorney and the complainant, but time for receipt of materials shall be computed from the time of receipt by the attorney. \*\*\*\*\*

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Andrea Kane ( CN=Andrea Kane/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:30-DEC-1997 18:03:31.00

SUBJECT: Update on TANF Financial Reports

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

CC: Laura Emmett ( CN=Laura Emmett/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TEXT:

Based on conversation with HHS folks this afternoon, they will definitely delay posting on web until Monday (unless we require them to delay further). This means they can include data as of 12/31. They may not get any new state reports in tomorrow, but at least we'll have given them the benefit of the doubt. Of the 9 states who have not reported yet, at least 5 definitely should have reported by now. The situation for the other 4 is a bit less clear since they did not start TANF until after 1/1/97 so the rules and timing for them is a little different. HHS regional offices were supposed to be following up to find out where the reports are.

HHS is substantially revising the narrative part of report based on our comments and will be sending revised version by COB tomorrow. We'll look at it again and make sure we can live with what's in there to be posted on web Monday. HHS' notion is to post the data early and often, rather than waiting until its all perfect--the idea is that these are works in progress and there is some benefit to the system, and to HHS' credibility, to get the information out quickly.

Let me know if you have concerns with this or want to discuss further.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Andrea Kane ( CN=Andrea Kane/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:30-DEC-1997 13:17:10.00

SUBJECT: TANF Financial Reports

TO: Laura Emmett ( CN=Laura Emmett/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

HHS plans to post a summary of the states' TANF Financial Reports on the web. They have shared a draft with us that they hoped to post tomorrow. They do not plan to do a press release or make a big deal about the data. They do plan to share information with the Hill and state organizations. The data is very preliminary and definitely subject to change. After reviewing it and conferring with Cynthia, we recommend delaying for about a week for the following reasons.

The report reflects data as of 12/19, from 41 states. As you may recall, states were required to submit their first quarterly report on 11/14, but could not be penalized as long as they report by 12/31. It doesn't make a lot of sense to post the report missing data from 10 states if they plan to submit by 12/31 (or already have). I have a call in to HHS to see if they know the status of the remaining states.

Spending on work activities looks fairly low though there are some explanations (primarily that 97 was a transition year and many states also spent JOBS money for work activities during this year). It would look higher with the remaining states factored in. Also, several states who have submitted did not break down information on work activities--HHS is following up to find out why. Given that this includes CA, this really skews spending on work activities.

By waiting a few days, HHS could include the remaining states (or at least those who report by 12/31) and get clarification from the states who did not provide specific data on work activities.

HHS' narrative needs substantial revisions to clarify the data presented. Bottom line is that the advantages of posting the data immediately seem to be far outweighed by the advantages of waiting a few days.

FYI, 11 states report spending on separate state programs, ranging from 2% to 50% of state funds expended. Hawaii is at 50%, Colorado at 27%.

I have a conference call scheduled with ACF folks late this afternoon and I will walk through both our specific comments and suggestions on the report and suggest the delay. In the event Olivia is not happy with delaying, she may call you.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Julie A. Fernandes ( CN=Julie A. Fernandes/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:31-DEC-1997 09:25:53.00

SUBJECT: MLK day and service

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Diana Fortuna ( CN=Diana Fortuna/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

CC: Laura Emmett ( CN=Laura Emmett/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TEXT:

FYI. The meeting yesterday with Cabinet Affairs, PIR and National Service Corporation went well. The folks from the Corporation are going to coordinate with Bibb and Audrey to link Cabinet and Board members to service projects on the 19th, likely both MLK grant sites and other Americorps sites. By the end of next week, the Corporation is going to get us a more comprehensive list of all Americorps sites where service could happen on the day (right now, we only have the list of MLK grant sites). Also, the Corporation is going to try to identify key sites (a sort of top 10 or 20 list) where it would be most helpful to have a Cabinet presence (because of a link to a member of Congress who might be helpful for purposes of Americorps reauthorization next year)/

Andrew Mayock (from Chief of Staff's office) was also present, and stated that he wanted to get White House staff involved also in serving on the day. Julie from the Corporation is going to check on the capacity at the various D.C. service sites.

Talking points on service for the Cabinet and Board members are being coordinated by Stacey and the Corporation. Also, the PIR is going to put together a one-page questionnaire for all who participate in service on the 19th that will allow them to do a preliminary evaluation of whether the site is a "promising practice" for purposes of the PIR compilation.

That's it. Happy New Year.

julie

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jennifer L. Klein ( CN=Jennifer L. Klein/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:31-DEC-1997 09:43:50.00

SUBJECT: REMINDER

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TEXT:

Just a reminder to call Mike Smith and Gene this morning before everyone disperses for New Years. Thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Steven M. Mertens ( CN=Steven M. Mertens/OU=OMB/O=EOP [ OMB ] )

CREATION DATE/TIME:31-DEC-1997 13:59:03.00

SUBJECT: Revised INS Organizational Write-up for FY 99 Budget

TO: Julie A. Fernandes ( CN=Julie A. Fernandes/OU=OPD/O=EOP@EOP [ OPD ] )

READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP@EOP [ OPD ] )

READ:UNKNOWN

CC: Kenneth L. Schwartz ( CN=Kenneth L. Schwartz/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: David J. Haun ( CN=David J. Haun/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

CC: Michael Deich ( CN=Michael Deich/OU=OMB/O=EOP@EOP [ OMB ] )

READ:UNKNOWN

TEXT:

Elena/Julie: Here is the revised draft of INS' organizational structure in the immigration chapter of the President's Budget. The write up reflects comments and revisions received from DPC, NSC and OMB -- and builds off the INS draft submitted on 12/23. We believe that this draft also reflect the discussion and agreement reached at the 12/22 meeting with Commissioner Meissner. We have not shared this revised draft outside the EXOP. With your concurrence on this draft, we would appreciate you sharing this with INS to gain their agreement so we can finalize language for the budget chapter.

As I relayed to Julie, Michael believes the reference to the CIR in the first paragraph is useful. The CIR is the catalyst for the Administration's current restructuring effort and by prominently mentioning them we give some show of legitimacy to the CIR (which they are seeking from the Administration) and this minor stroking may help build CIR staff support for our proposed reorganization when it goes to the Hill.

Any questions/assistance, please let me know (54935). Thanks.

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS\_EXT:[ATTACH.D72]MAIL40780546S.316 to ASCII,  
The following is a HEX DUMP:

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```

**Organization and Structure:** The recent Commission on Immigration Reform (CIR) called for major changes in how the Federal Government sets and implements immigration policy. In particular, it urged a separation of the enforcement and benefit functions currently carried out by the INS.

The Administration has studied various proposals for reform, including the CIR recommendations, and has developed a plan to enhance immigration law enforcement and improve the delivery of immigration services and benefits. The plan aims to separate INS' enforcement and service operations in the field and through headquarters but keep the agency intact. This programmatic division will improve efficiency and effectiveness, while strengthening accountability, lines of authority, and leadership. To support these structural changes, the INS will also implement management and administrative improvements. The Administration's plan will also enhance coordination among Federal agencies involved in immigration and establish greater accountability within each agency. These reforms within the INS and across the government will support and sustain the progress made by the Administration over the last five years to enforce our immigration laws and fulfill the Nation's commitment to its immigration heritage.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Paul E. Begala ( CN=Paul E. Begala/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME:31-DEC-1997 12:22:01.00

SUBJECT: Family Medical Leave Act

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Jennifer L. Klein ( CN=Jennifer L. Klein/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Bruce N. Reed ( CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

Good Housekeeping magazine, as you may recall, is interested in associating themselves with one of the President's major goals: new ways to reconcile work and family.

After a few discussions and letters, Jurate Kaczikas from GH says they are interested specifically in endorsing a Presidential call to expand the Family and Medical Leave Act to ensure that families can take up to 24 hours of unpaid leave for school visits, children's doctor appointments, and elderly care. To illustrate this point, GH is going to propose "Daddy Goes to School Week", an idea based on "Take your Daughter to Work Day" in which fathers would be encouraged to visit their kids' schools.

I think the extended FMLA is a big winner for us, and we ought to take GH up on their offer of support and assistance. The Good Housekeeping Seal of Approval is something that can only help -- and make it harder for a Republican Congress to kill this proposal.

Jurate would like GH to host a luncheon with about 30 corporate execs in which they would express support for this policy. GH would also like the President to promote the extended FMLA and the Daddy Goes to School Week in a radio address.

What do you think? How should we proceed?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jeanne Lambrew ( CN=Jeanne Lambrew/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:31-DEC-1997 12:01:34.00

SUBJECT:

TO: ELENA (Pager) #KAGAN ( ELENA (Pager) #KAGAN [ UNKNOWN ] )

READ:UNKNOWN

TEXT:

please call jeanne re. medicare event. 6-5377

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jordan Tamagni ( CN=Jordan Tamagni/OU=WHO/O=EOP [ UNKNOWN ] )

CREATION DATE/TIME:31-DEC-1997 16:22:58.00

SUBJECT: Medicare Event

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

Any idea where we stand with this? I heard that it might be put off for a while -- true?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jordan Tamagni ( CN=Jordan Tamagni/OU=WHO/O=EOP [ UNKNOWN ] )

CREATION DATE/TIME:31-DEC-1997 16:38:21.00

SUBJECT: Re: Medicare Event

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

Thank you kindly.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jennifer L. Klein ( CN=Jennifer L. Klein/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:31-DEC-1997 14:30:56.00

SUBJECT: Re: Family Medical Leave Act

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

FYI. In response to my note to him about his opinion on possible FMLA expansions.

----- Forwarded by Jennifer L. Klein/OPD/EOP on 12/31/97  
02:19 PM -----

Paul E. Begala

12/31/97 12:36:37 PM

Record Type: Record

To: Jennifer L. Klein/OPD/EOP

cc:

Subject: Re: Family Medical Leave Act

Yes. Politically neither the 6 months extension nor the below-50 employees extension is nearly as appealing as the doctor-visit/teacher-conference extension.

One other wrinkle y'all ought to have on your radar screen: how 'bout changing Unemployment Compensation to allow parents to collect unemployment comp while they're out on FMLA leave?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jennifer L. Klein ( CN=Jennifer L. Klein/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:31-DEC-1997 16:39:42.00

SUBJECT: Re:

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TEXT:

That's a 25% credit, which is bigger than any business tax credit we've ever done (20% is the highest). If our assumptions are wrong about the number of businesses who use it are wrong, though, the number will be higher.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Russell W. Horwitz ( CN=Russell W. Horwitz/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:31-DEC-1997 17:57:07.00

SUBJECT:

TO: ELENA (Pager) #KAGAN ( ELENA (Pager) #KAGAN [ UNKNOWN ] )  
READ:UNKNOWN

TEXT:

pls call sperling's office for conf. call;62807

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jennifer L. Klein ( CN=Jennifer L. Klein/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:31-DEC-1997 15:44:20.00

SUBJECT:

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

After some maneuvering, Treasury thinks Kohl will be fine with their proposal (\$500 million). Just wanted to be sure you are fine with that.