7/6/94

This package includes the following:

- Material on Federal Sector Enforcement from Nick Inzeo, for 7/7/94 briefing
- Deval Patrick's Briefing Material - Q:A's on affirm. action
  Institute for Justice Memo (opposition)
- Information on Royko articles
- EEOC/EEO Data

-CEO

Steve
Warnath

CLINTON LIBRARY PHOTOCOPY

MATERIAL ON EEOC'S FEDERAL SECTOR ADMINISTRATIVE RESPONSIBILITIES

Part 1614 - Current Federal Sector Administrative Process

- Summaries of Part 1614
- April 10, 1992 Federal Register -- see page 12634 for final rule on 29 CFR Part 1614

Part 1613 - Previous Regulations Governing Agency Processing of Discrimination Complaints

- Summaries of 29 CFR Part 1613
- Reasons for Changing the 1613 Process
- November 23, 1987 Report of House Committee on Government Operations, *Overhauling the Federal EEO Complaint Processing System: A New Look at a persistent Problem*

Proposed Federal Employee Fairness Act (FEFA) -

Legislation to amend Title VII, ADEA, and the Civil Service Reform Act to change the federal sector complaint process, principally by consolidating the majority of the process within the EEOC.

- Summaries of S. 404, FEFA '93 (Glenn Senate bill)
- October 27, 1993 Report of the Senate Committee on Governmental Affairs on the Federal Employee Fairness Act of 1993
- Summaries of H.R. 2721, FEFA '93, introduced by Chairman Major Owens
  * (this is the bill that is moving)
- Summaries of H.R. 1111, FEFA '93, introduced by Rep. Matthew Martinez
- April 9, 1992, Joint Oversight Hearing of House Ed & Labor Subcommittee on Employment Opportunities and the House Post Office and Civil Service Subcommittee on Civil Service on FEFA of 1992:
  - Statement of Chairman Matthew G. Martinez
  - Statement of coalition of interested civil rights groups

Part 1614 - Nutshell Summary

Part 1614's goal is to promote greater administrative fairness in the investigation and consideration of federal sector EEO complaints by limiting to 180 days the amount of time a complaint is solely in the agency's domain. The result should be a faster and fairer process. Part 1614 replaces the stratified format of part 1613 with a more user-friendly organizational scheme consisting of six subparts. While not completely overhauling part 1613 because of statutory constraints, part 1614 introduces substantial changes. An agency must now conduct within 180 days a complete and thorough investigation. A hearing must also be conducted with findings, conclusions, and remedies decided within 180 days. Reassignment under the Rehabilitation Act has become an affirmative requirement. Finally, exhaustion requirements and a limitations period is established for ADEA complainants to bring them in line with Title VII.

Part 1614 - Executive Summary

29 C.F.R. Part 1614, the federal sector equal employment opportunity complaint processing regulations, makes fundamental changes to the existing system under part 1613 while adhering to the statutory mandate of Title VII's section 717. The objective of part 1614 is to promote greater administrative fairness in the investigation and consideration of federal sector EEO complaints. The regulations seek to accomplish that goal by limiting to 180 days the length of time in which the complaint is within the sole jurisdiction of the agency. The result should be a faster administrative process less dominated by the agency. A summary of the key changes implemented by part 1614 follows.

Part 1614 retains the initial framework of the part 1613 complaint processing procedures. The complainant must first seek counseling from the discriminating agency and then file a complaint with that agency. The agency must accept or reject the complaint and, if accepted, conduct a complete and fair investigation within 180 days from the filing of the complaint. Part 1614 continues to incorporate the counseling function because of its significant contribution in informally resolving disputes at an early stage. (Approximately eighty percent of counseling contacts do not mature into complaints.) The initial agency process is retained to comply with the statutory framework. Part 1614 eliminates the informal adjustment and proposed disposition stages of part 1613.

After the agency completes its investigation, the complainant may request either a hearing by an EEOC administrative judge or an immediate final decision by the employing agency. The administrative judge must conduct a hearing, issue findings of fact and conclusions of law, and order an appropriate remedy within 180 days. To ensure thorough and fair investigations by the discriminating agency, the regulation permits the use of adverse inferences and summary dispositions for some or all issues in a complaint. After the final decision of the agency is issued, the complainant may appeal to the Commission within 30 days. Either party may request reconsideration by the Commission or seek judicial review.

Part 1614 differs organizationally from the current complaint processing system to facilitate greater understanding by both those who file complaints and those administering its provisions. The current system under part 1613, discretely organized according to the type of discrimination complaint at issue, consists of separate subparts for the processing of Title VII, age, class, mixed, and handicapped complaints, all of which lead to a lot of unnecessary confusion. Part 1614 seeks to eliminate the redundancy and cross-referencing caused by part 1613's awkward structure by consolidating the procedures as much as possible. Thus, its six subparts concern agency processing of complaints generally (Subpart A), provisions applicable to particular complaints (Subpart B), related procedures (Subpart

C), appeals and civil actions (Subpart D), remedies and corrective action (Subpart E), and other matters of general applicability (Subpart F).

Part 1614 - Summary

Organization

Part 1614 is structured into six subparts:

Subpart A:	Agency programs promoting equal employment opportunity, and procedures for processing individual and class complaints of discrimination and retaliation
Subpart B:	Additional provisions on processing certain types of complaints (Age, Equal Pay, Rehabilitation Act, and class)
Subpart C:	Explains relationship among EEO process, negotiated grievance procedure and MSPB appeals
Subpart D:	EEOC appeals and the right to file civil actions under each EEOC administered statute
Subpart E:	EEOC's policy on remedies and relief for discrimination
Subpart F:	Miscellaneous provisions applying to EEO programs

Coverage

Applies to all complaints of discrimination including those under the Equal Pay Act.

Affirmative Programs

Each agency shall maintain a continuing affirmative program to promote equal employment opportunity and to identify and eliminate discriminatory practices and policies. Part 1614 outlines specific objectives and tasks that agencies must achieve -- from appraisal and communication to reasonable accommodation and reassignment.

Pre-complaint Processing

As with part 1613, a person believing they have been retaliated or discriminated against on basis of race, color, religion, sex, national origin, age, or handicap **must**, under part 1614, (1) seek counseling from the alleged discriminating agency prior to filing a complaint, and, (2) file a written complaint with that agency if an informal resolution was not reached. Part 1614 extends from 30 to 45 days the time limit during which an employee or applicant must generally contact a counselor after the discriminatory event or personnel action occurs. An agency may permit counseling up to 180 days after the discriminatory event

based on several factors, e.g., (1) the individual was not notified of the time limits or otherwise aware of them, or (2) he or she did not know and reasonably should not have known that the matter or personnel action that occurred was discriminatory. Counseling beyond 180 days shall only be permitted in situations where the late filing of a private sector charge would be justified by facts indicating the appropriateness of waiver, estoppel or equitable tolling.

Ordinarily, counseling must be completed within 30 days unless both parties agree to a maximum extension of an additional 60 days. In cases where an employee or applicant elects to use alternative dispute resolution procedures available as part of the agency's counseling function, counseling must be completed within 90 days. If the matter has not been informally resolved, the individual shall be informed in writing at the conclusion of the counseling period of the right to file a discrimination complaint.

Agency Processing of Individual Complaints

An agency must acknowledge receipt of a properly filed complaint in writing and conduct a complete and fair investigation within 180 days from the filing date of the complaint. With the complainant's consent, agencies may extend processing for up to an additional 90 days. In developing a complete and impartial factual record, agencies may use any fact-finding methods that efficiently and thoroughly address the matters at issue. During the 180-day period, agencies' responsibilities are limited to investigation, settlement attempts and issuance of a notice of final action. Part 1614 eliminates the informal adjustment and proposed disposition stages of part 1613.

After the agency completes its investigation within 180 days from the filing of the complaint or within any allowable period of extension, the agency shall notify the complainant that he or she can request a hearing by an EEOC administrative judge within 30 days or, alternatively, an immediate final decision by the employing agency. If the complainant requests a final decision or the 30-day period lapses without the individual requesting a hearing, the agency will have 60 days to issue the decision.

If the complainant requests a hearing, an administrative judge shall oversee discovery, conduct a hearing, issue findings of facts and conclusions of law, and, where a finding of discrimination is made, order an appropriate remedy. To insure complete, fair investigations being conducted by agencies within the 180-day limit, the regulation prescribes the use of adverse inferences and permits both parties to obtain findings of fact and conclusions of law without a hearing, a type of summary disposition, for some or all issues in a complaint. The use of adverse inferences and summary dispositions will provide

incentives for agencies to conduct complete, fair investigations within the 180-day period. The administrative judge must decide the case within 180 days unless he or she makes a written determination that good cause exists for enlarging the normal 180-day period.

By keeping the hearing stage at the agency level as part of the investigatory process, the agency retains the same opportunity that it now has under part 1613 to issue a final decision provided it does so within 60 days of receipt of the administrative judge's findings and conclusions. The final decision shall consist of findings by the agency on the merits of each issue in the complaint, appropriate relief if discrimination is found, and contain notice of the complainant's appellate rights and time limits. The administrative judge's findings, conclusions, and relief ordered shall become the agency's final decision if the agency does not issue its own decision within 60 days. After the final decision of the agency is issued, or the findings and conclusions become final, the complainant may appeal to the Commission by filing an appeal with the EEOC within 30 days.

Appellate Processing by EEOC

Where an agency dismisses all or part of a complaint, a dissatisfied complainant may file an expedited appeal with the EEOC to guard against undue delays in complaint processing because of an improper dismissal. The EEOC may determine that a dismissal was improper, reverse the dismissal, and remand the matter back to the agency for completion of the investigation.

A complainant, member or agent of a class, or a dissatisfied grievant may appeal to the EEOC from a final decision or from a decision of an agency to dismiss an allegation in a complaint. Except for mixed case complaints, any dismissal of a complaint or portion of a complaint or any final decision may be appealed to the Commission within 30 days from a complainant's receipt of a dismissal or final decision. Any grievance decision may also be appealed within 30 days of a receipt of a decision.
The Commission will examine the record, may supplement it, draw adverse inferences when appropriate, and issue decisions. Either party may request reconsideration by the Commission of an OFO decision, or the appellant can file a civil action in federal court.

The Rehabilitation Act

Based on the plain language of § 501 of the Rehabilitation Act, part 1614 specifies that the legislative and judicial branches are not covered under that Act. Current users of illegal drugs, with some exceptions, are now excluded from the definition of an individual with handicap under § 512 of the Americans with

Disabilities Act.

Part 1614 prescribes reassignment as a special affirmative requirement under section 501. The reassignment obligation would not be a component of the statute's reasonable accommodation requirement under section 504. The agency should consider reassignment whenever an employee with handicaps can no longer perform his or her job and must reassign such an employee whenever the circumstances described in the regulation are met.

Opting Out of Class Complaints

Part 1614 eliminates the opting out provisions contained in part 1613 that preserved the individual's right to file his or her own complaint or lawsuit. All class members will receive notice that the class complaint has been filed and notice of any settlement or decision on the class complaint. If they do not wish to participate in the class or to file a claim for individual relief, they do not have to do so. Those wishing to participate will have the opportunity to object to any proposed settlement and to file claims for individual relief if discrimination is found.

Election of Remedies

Employees of agencies subject to 5 U.S.C. § 7121(d) and covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure must elect initially to pursue a matter that is both grievable and allegedly discriminatory either through the negotiated grievance procedure or under part 1614, but not both. An aggrieved employee who files a complaint under part 1614 may not thereafter file a grievance on the same matter. Likewise, an aggrieved employee who files a grievance alleging discrimination may not thereafter file a complaint on the same matter under part 1614. A grievant maintains the right to appeal to EEOC from a final grievance decision.

Agencies not subject to § 7121(d) may, but need not, hold a complaint in abeyance during the processing of a grievance on the same matter provided they notify the complainant. This provision was added in consultation with the U.S. Postal Service which estimates it may reduce the number of charges that will require processing by 2,000 or more a year. If agencies elect not to hold the complaint in abeyance, the normal time limits apply and the agency must issue a notice of final action on the complaint within 180 days.

An aggrieved person may initially file a mixed case complaint with an agency under part 1614 or an appeal on the same matter with the MSPB pursuant to 5 C.F.R. 1201.151, but not both. When a mixed case appeal is dismissed by the MSPB for jurisdictional

reasons, an individual is allowed to file an EEO complaint provided they obtain counseling within 45 days from the notice of MSPB's dismissal. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and it is dismissed by MSPB for jurisdictional reasons, the agency shall give the individual the right to elect between a hearing by an administrative judge or an immediate final decision by the agency. Individuals who have received a final decision from MSPB on a mixed case appeal or on the appeal of a final decision on a mixed case complaint may petition EEOC to consider that decision.

ADEA

When an individual has not filed a notice of intent to sue but has pursued a complaint through the administrative process, the courts have split on the issue of the correct statute of limitations applicable to ADEA lawsuits by federal employees. EEOC believes that the limitations period applicable to civil actions under Title VII should be borrowed for federal sector ADEA lawsuits. That period is now 90 days as a result of the recently enacted Civil Rights Act of 1991. Besides applying to Title VII, it also applied the 90-day period to suits brought under sections 501 and 505(a) of the Rehabilitation Act, and ADEA suits brought by private sector and state and local government employees who have filed a charge with the Commission under ADEA.

Those persons who elect to use the notice provision as the prerequisite to suit in U.S. district court must give EEOC not less than 30 days' notice in writing of their intent to file such an action. Such notice must be filed within 180 days of the occurrence of the alleged unlawful practice.

Part 1614 provides that a complainant exhausts administrative remedies under the ADEA either (1) 180 days after filing a complaint if the agency has not issued a decision and an appeal has not been taken, (2) after a final decision by the agency, (3) 180 days after filing an appeal with the EEOC, if EEOC has not issued a decision, or (4) after EEOC issues a decision on appeal.

Remedies

Part 1614 leaves unchanged part 1613's standard that full relief should be provided to an individual when discrimination is found unless the record contains clear and convincing evidence that the individual would also have not been selected even in the absence of discrimination. It is important to distinguish this regulation from the Supreme Court's decision in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) which held that an employer can avoid **liability**, and hence any relief, in a mixed motive case upon showing by a preponderance of the evidence that the same determination would have been made even absent discrimination.

Part 1614 provides that interest on back pay may be awarded to federal applicants or employees who prevail in discrimination claims, and that while attorney's fees awards provisions shall apply to allegations of discrimination or retaliation prohibited by Title VII and the Rehabilitation Act, they do not apply under ADEA. The Civil Rights Act of 1991 amends Title VII's § 717 to provide for the payment of interest on back pay; this waiver of sovereign immunity authorizes EEOC to award interest in Title VII and Rehabilitation Act cases.

Federal Register

Friday
April 10, 1992

Part IV

Equal Employment Opportunity Commission

29 CFR Part 1614

Federal Sector Equal Employment Opportunity; Rule and Proposed Rule

to the Commission except where it is alleged that § 1614.107(d) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(d), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

(d) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(a) or may file a civil action as specified at § 1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 20 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 20 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

§ 1614.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.

(a) *Who may file.* Individuals who have received a final decision from the MSPB on a mixed case appeal or on the appeal of a final decision on a mixed case complaint under 5 CFR part 1201, subpart E and 5 U.S.C. 7702 may petition EEOC to consider that decision. The EEOC will not accept appeals from MSPB dismissals without prejudice.

(b) *Method of filing.* Filing shall be made by certified mail, return receipt requested, to the Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, DC 20036.

(c) *Time to file.* A petition must be filed with the Commission either within 30 days of receipt of the final decision of the MSPB or within 30 days of when the decision of a MSPB field office becomes final.

(d) *Service.* The petition for review must be served upon all individuals and parties on the MSPB's service list by certified mail on or before the filing with the Commission, and the Clerk of the MSPB, 1120 Vermont Ave., NW., Washington, DC 20419, and the petitioner must certify as to the date and method of service.

§ 1614.304 Contents of petition.

(a) *Form.* Petitions must be written or typed, but may use any format including a simple letter format. Petitioners are encouraged to use EEOC Form 573, Notice Of Appeal/Petition.

(b) *Contents.* Petitions must contain the following:

(1) The name and address of the petitioner;

(2) The name and address of the petitioner's representative, if any;

(3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race, color, religion, sex, national origin, age or handicap;

(4) A copy of the decision issued by the MSPB; and

(5) The signature of the petitioner or representative, if any.

§ 1614.305 Consideration procedures.

(a) Once a petition is filed, the Commission will examine it and determine whether the Commission will consider the decision of the MSPB. An agency may oppose the petition, either on the basis that the Commission should not consider the MSPB's decision or that the Commission should concur in the MSPB's decision, by filing any such argument with the Office of Federal Operations and serving a copy on the petitioner within 15 days of receipt by the Commission.

(b) The Commission shall determine whether to consider the decision of the MSPB within 30 days of receipt of the petition by the Commission's Office of Federal Operations. A determination of the Commission not to consider the decision shall not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(c) If the Commission makes a determination to consider the decision, the Commission shall within 60 days of the date of its determination, consider the entire record of the proceedings of the MSPB and on the basis of the evidentiary record before the Board as supplemented in accordance with paragraph (d) of this section, either:

(1) Concur in the decision of the MSPB; or

(2) Issue in writing a decision that differs from the decision of the MSPB to the extent that the Commission finds that, as a matter of law:

(i) The decision of the MSPB constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in 5 U.S.C. 7702(a)(1)(B); or

(ii) The decision involving such provision is not supported by the evidence in the record as a whole.

(d) In considering any decision of the MSPB, the Commission, pursuant to 5 U.S.C. 7702(b)(4), may refer the case to the MSPB for the taking of additional evidence within such period as permits the Commission to make a decision within the 60-day period prescribed or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

(e) Where the EEOC has differed with the decision of the MSPB under § 1614.305(c)(2), the Commission shall refer the matter to the MSPB.

§ 1614.306 Referral of case to Special Panel.

If the MSPB reaffirms its decision under 5 CFR 1201.162(a)(2) with or without modification, the matter shall be immediately certified to the Special Panel established pursuant to 5 U.S.C. 7702(d). Upon certification, the Board shall, within five days (excluding Saturdays, Sundays, and Federal holidays), transmit to the Chairman of the Special Panel and to the Chairman

decision for which reconsideration was sought.

§ 1614.408 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final decision on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final decision has not been issued;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

§ 1614.409 Civil action: Equal Pay Act.

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

§ 1614.410 Effect of filing a civil action.

Filing a civil action under § 1614.408 or § 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

Subpart E—Remedies and Enforcement

§ 1614.501 Remedies and relief.

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, as explained in appendix A of part 1613 of this chapter, which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1) (i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(b) An agent may appeal the agency decision accepting or dismissing all or a portion of a class complaint, or a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and both may appeal a final decision on a petition pursuant to § 1614.204(g)(4).

(c) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB or if 5 U.S.C. 7121(d) is inapplicable to the involved agency.

(d) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with § 1614.504.

§ 1614.402 Time for appeals to the Commission.

(a) Except for mixed case complaints, any dismissal of a complaint or a portion of a complaint or any final decision may be appealed to the Commission within 30 days of the complainant's receipt of the dismissal or final decision. Any grievance decision may be appealed within 30 days of receipt of a decision referred to in § 1614.401(c). In the case of class complaints, any final decision received by an agent, petitioner or an individual claimant may be appealed to the Commission within 30 days of its receipt. Where a complainant has notified the EEO Director of alleged noncompliance with a settlement agreement in accordance with § 1614.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 30 days of receipt of an agency's determination.

(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

§ 1614.403 How to appeal.

(a) The complainant, agent, grievant or individual class claimant (hereinafter complainant) 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 complainant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what he or she is appealing.

(b) The complainant shall furnish a copy of the appeal to the agency's EEO Director (or whomever is designated by the agency in the dismissal or decision) at the same time that he or she files the appeal with the Commission. In or attached to the appeal to the Commission, the complainant must certify the date and method by which service was made on the agency.

(c) If a complainant does not file an appeal within the time limits of this subpart, the appeal will be untimely and shall be dismissed by the Commission.

(d) Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the agency within 30 days of filing the appeal. Following receipt of the appeal and any brief in support of the appeal, the Director, Office of Federal Operation, will request the complaint file from the agency. The agency must submit the complaint file and any agency statement or brief in opposition to the appeal to the Director, Office of Federal Operations, within 30 days of receipt of the Commission's request for the complaint file, which has been made by certified mail. A copy of the agency's statement or brief must be served on the complainant at the same time.

§ 1614.404 Appellate procedure.

(a) On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all written statements and briefs from either party. The Commission may supplement the record by an exchange of letters or memoranda, investigation, remand to the agency or other procedures.

(b) If the Office of Federal Operations requests information from one or both of the parties to supplement the record, each party providing information shall send a copy of the information to the other party.

§ 1614.405 Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c) and 1614.410. The decision shall be based on the preponderance of the evidence. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her or her civil action rights, and be transmitted to the complainant and the agency by certified mail, return receipt requested.

(b) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.408 unless:

(1) Either party files a timely request for reconsideration pursuant to § 1614.407; or

(2) The Commission on its own motion reconsiders the case.

§ 1614.406 Time limits. [Reserved]

§ 1614.407 Reconsideration.

(a) Within a reasonable period of time, the Commission may, in its discretion, reconsider any decision of the Commission issued under § 1614.405(a) notwithstanding any other provisions of this part.

(b) A party may request reconsideration of any decision issued under § 1614.405(a) provided that such request is made within 30 days of receipt of a decision of the Commission or within 20 days of receipt of another party's timely request for reconsideration. Such request, along with any supporting statement or brief, shall be submitted to the Office of Review and Appeals and to all parties with proof of such submission. All other parties shall have 20 days from the date of service in which to submit all other parties, with proof of submission, any statement or brief in opposition to the request.

(c) The request or the statement or brief in support of the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have substantial precedential implications.

(d) A decision on a request for reconsideration by either party is final and there is no further right by either party to request reconsideration of the

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*—(1) *Awards of attorney's fees or costs.* The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a notice of final action or a decision, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs (including expert witness fees) incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of a written complaint and after the complainant has notified the agency that he or she is represented by an attorney, except that fees allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* (i) When the agency or the Commission awards attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees (including expert witness fees), as appropriate, to the agency within 30 days of receipt of the decision unless a request for reconsideration is filed. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing.

(ii) (A) If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 days of the agency's receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs due within 30 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice of Appeal/Petititon and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. This amount may be reduced or increased in consideration of the following factors, although ordinarily many of these factors are subsumed within the calculation set forth in this paragraph (e)(2)(ii)(B): The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the attorney's preclusion from other employment due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in cases of exceptional success should any of these factors be used to enhance an award computed by the formula set forth in this paragraph (e)(2)(ii)(B).

(C) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

§ 1614.502 Compliance with final Commission decisions.

(a) Relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency except as provided in § 1614.405(b). Failure to implement ordered relief shall be subject to judicial enforcement as specified in § 1614.503(g).

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration, when the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of this paragraph (b) shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds its decision after reconsideration.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reconsideration, that the relief it provides is temporary or conditional.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision unless otherwise ordered in the decision.

§ 1614.503 Enforcement of final Commission decisions.

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision,

efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) *Commission notice to show cause.* The Commission may issue a notice to the head of any federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(f) *Certification to the Office of Special Counsel.* Where appropriate and pursuant to the terms of a memorandum of understanding, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(g) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

§ 1614.504 Compliance with settlement agreements and final decisions.

(a) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. A final decision that has not been the subject of an appeal or civil action shall be binding on the agency. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints under § 1614.106 or § 1614.204, as appropriate, rather than under this section.

Subpart F—Matters of General Applicability

§ 1614.601 EEO group statistics.

(a) Each agency shall establish a system to collect and maintain accurate employment information on the race, national origin, sex and handicap(s) of its employees.

(b) Data on race, national origin and sex shall be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If the employee still refuses to provide the information, the agency must make visual identification and inform the employee of the data it will be reporting. If an agency believes that information provided by an employee is inaccurate, the agency shall advise the employee about the solely statistical purpose for which the data is being collected, the need for accuracy, the agency's recognition of the sensitivity of the information and the existence of procedures to prevent its unauthorized disclosure. If, thereafter, the employee declines to change the apparently inaccurate self-identification, the agency must accept it.

(c) The information collected under paragraph (b) of this section shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information on the race, national origin or sex of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel record.

(d) Each system is subject to the following controls:

(1) Only those categories of race and national origin prescribed by the Commission may be used;

(2) Only the specific procedures for the collection and maintenance of data that are prescribed or approved by the Commission may be used;

(3) The Commission shall review the operation of the agency system to insure adherence to Commission procedures and requirements. An agency may make an exception to the prescribed procedures and requirements only with the advance written approval of the Commission.

(e) The agency may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program. An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.

(f) Data on handicaps shall also be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If an employee who has been

appointed pursuant to special appointment authority for hiring individuals with handicaps still refuses to provide the requested information, the agency must identify the employee's handicap based upon the records supporting the appointment. If any other employee still refuses to provide the requested information or provides information which the agency believes to be inaccurate, the agency should report the employee's handicap status as unknown.

(g) An agency shall report to the Commission on employment by race, national origin, sex and handicap in the form and at such times as the Commission may require.

§ 1614.602 Reports to the Commission.

(a) Each agency shall report to the Commission information concerning pre-complaint counseling and the status, processing and disposition of complaints under this part at such times and in such manner as the Commission prescribes.

(b) Each agency shall advise the Commission whenever it is served with a federal court complaint based upon a complaint that is pending on appeal at the Commission.

(c) Each agency shall submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to:

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

§ 1614.603 Voluntary settlement attempts.

Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the allegations resolved.

§ 1614.604 Filing and computation of time.

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is delivered in person or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

§ 1614.605 Representation and official time.

(a) At any stage in the processing of a complaint, including the counseling stage § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

(d) Unless the complainant states otherwise in writing, after the agency has received written notice of the name, address and telephone number of a representative for the complainant, all official correspondence shall be with the representative with copies to the complainant. When the complainant designates an attorney as representative, service of documents and decisions on the complainant shall be made on the attorney and not on the complainant, and time frames for receipt of materials by the complainant shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the agency.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

§ 1614.606 Joint processing and consolidation of complaints.

Compaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter, or two or more complaints of discrimination from the same complainant, may be consolidated by the agency or the Commission for joint processing after appropriate notification to the parties. The date of the first filed complaint controls the applicable timeframes under subpart A of this part.

§ 1614.607 Delegation of authority.

An agency head may delegate authority under this part, to one or more designees.

[FR Doc. 92-7811 Filed 4-9-92; 8:45 am]

BILLING CODE 6750-06-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commission seeks public comment on requiring, as part of 29 CFR 1614.108(a), published elsewhere in this separate part of today's issue of the **Federal Register**, that investigations be conducted by a certified department or agency. It is the Commission's intention to study whether certification or some other oversight provision is necessary. If such an oversight method is considered necessary, the Commission will promulgate a final regulation on this issue in the future.

DATES: Written comments on the proposal must be received on or before January 2, 1993. The Commission proposes to consider any comments received and thereafter may adopt final regulations.

ADDRESSES: Comments should be submitted to the Office of the Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507. Copies of comments submitted by the public will be available for review at the Commission's library, room 6502, 1801 L Street, NW., Washington, DC between the hours of 9:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Nicholas M. Inzeo, Associate Legal Counsel, Thomas J. Schlageter, Assistant Legal Counsel or Kathleen Oram, Senior Attorney, at (202) 663-4670, FTS 989-4670 or TDD (202) 663-7026. This notice is also available in the following alternative formats: large print, braille, audio tape and electronic file on computer disk. Requests for this notice in an alternative format should be made to the Office of Equal Employment Opportunity at (202) 663-4395, FTS 989-4395 or TDD (202) 663-4399.

SUPPLEMENTARY INFORMATION: In a separate rule published elsewhere in this separate part of today's issue of the **Federal Register** the Commission adopted final regulations establishing a new complaint process for complaints of discrimination filed by federal employees. That regulation requires agencies against which a discrimination complaint is filed to conduct a fair and complete investigation within 180 days of the filing of the complaint. The Commission is seeking public comment on whether to require, additionally, that investigations and agency processing be conducted by agencies certified by the Commission.

One of the major objections to the federal sector process has been the conflict of interest in having agencies investigate themselves and be responsible for making all decisions throughout the fact finding process. The comments on the NPRM suggested the use of adverse inference and summary disposition as methods to reduce the unfairness of the process. The Commission has accepted those comments. At the same time, the Commission seeks public comment on other methods to reduce or eliminate the real and perceived unfairness of having agencies responsible for the entire fact finding process.

The impetus for a certification, or any oversight, process is the delay that is common in processing charges under part 1613. That delay by the agency, at least in part, creates the appearance of unfairness in the process.

The Commission seeks public comment on a proposal that investigations be conducted only by agencies that are certified by the Commission. Agencies would be certified based upon their performance (to include the performance of any contractors under their direction). The Commission would consider the timeliness of investigations, the completeness of investigative files, the extent to which agency decisions are upheld by the Commission on appeal and the training provided to those individuals performing functions under the process.

This proposal would give the Commission the authority to review the performance of agencies and take effective action against any agency that demonstrates after an opportunity to correct deficiencies that it does not process complaints expeditiously and fairly. Standards for certification would be developed based on the timeliness and fairness factors mentioned above and a process for certification would be established through Management Directives. In light of the changes made to the complaint process by part 1614, the Commission seeks comment on whether additional methods of oversight are necessary.

The Commission hereby publishes this notice of proposed rulemaking for public comment. Any method of increased oversight suggested by a comment will be considered by the Commission. Commenters are encouraged to explain any proposed method in as much detail as possible.

List of Subjects in 29 CFR Part 1614

Equal employment opportunity, Government employees.

For the Commission.

Evan J. Kemp, Jr.,

Chairman.

[FR Doc. 92-8075 Filed 4-9-92; 8:45 am]

BILLING CODE 6750-06-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN 3046-AA11

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: This rule revises the way that federal agencies and EEOC will process administrative complaints and appeals of employment discrimination filed by federal employees and applicants for federal employment. The new regulation will enable quicker, more efficient processing of complaints and promote impartial, fair and early resolution of complaints.

EFFECTIVE DATE: This part will become effective on October 1, 1992.

FOR FURTHER INFORMATION CONTACT: Nicholas M. Inzeo, Associate Legal Counsel, Thomas J. Schlageter, Assistant Legal Counsel or Kathleen Oram, Senior Attorney, at (202) 663-4670, FTS 989-4670 or TDD (202) 663-7026. This regulation is also available in the following alternative formats: large print, braille, audio tape and electronic file on computer disk. Requests for this regulation in an alternative format should be made to the Office of Equal Employment Opportunity at (202) 663-4395, FTS 989-4395 or TDD (202) 663-4399.

SUPPLEMENTARY INFORMATION: Pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (1978), Executive Order 12144, 44 FR 37193 (1979) and Executive Order 12106, 44 FR 1053 (1979), all responsibility for the administration and enforcement of equal opportunity in federal employment that was previously vested in the Civil Service Commission and the Secretary of Labor, was transferred to the Equal Employment Opportunity Commission (EEOC). EEOC is authorized to issue rules, regulations, orders and instructions pursuant to title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(b); the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(b); the Rehabilitation Act, of 1973, 29 U.S.C. 794a(a)(1); the Fair Labor Standards Act 29 U.S.C. 201 *et seq.*, Executive Order 10067, 43 FR 28967 (1978) and Executive Order 11478, 34 FR 12985 (1969), as amended by Executive Order 12106. Pursuant to the foregoing authorities, the EEOC published a Notice of Proposed Rulemaking, 54 FR 45747 (1989), proposing a restructured complaint process for newly-filed federal sector EEO complaints that would be located at 29 CFR part 1614 ("part 1614"). The existing complaint process, located at 29 CFR part 1613 ("part 1613"), was created by the Civil Service Commission in 1972, 37 FR 22717 (1972), and subsequently transferred to EEOC. It has been criticized in the Supreme Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), as well as by U.S. General Accounting Office audit reports, a report of the Assistant Secretaries for Management Group, and the House Employment and Housing Subcommittee's Report, "Over-hauling the Federal EEO Complaint Processing System: A New Look at a Persistent Problem," H.R. Rep. No. 456, 100th Cong., 1st Sess. (1987). The proposal to adopt part 1614 constituted EEOC's response to these critical commentaries.

EEOC received 56 comments on proposed part 1614 during the comment period. Thirty-six were submitted by federal agencies or components of federal agencies, eight were submitted by private individuals, six were submitted by civil rights organizations and professional associations, five were submitted by federal employee unions and one was submitted by a member of Congress. The comments are analyzed below in two sections. First, the major features of the new part are discussed along with the comments on them. Then, the comments on individual sections are discussed in a section-by-section analysis.

On November 21, 1991, President Bush signed the Civil Rights Act of 1991, Public Law No. 102-166 (1991). That law made a number of statutory changes affecting the processing of administrative complaints and notices of rights that agencies and the Commission are required by these regulations to give the complainants. The Commission has included in this final rule those provisions of the Act affecting administrative processing and notification of rights.

Major Features

A. Organization

Part 1614 is organized differently than part 1613. Part 1613 contains separate subparts for each type of complaint, e.g., title VII complaints, mixed case complaints, age complaints, class complaints, handicap complaints, and old mixed case complaints. Part 1614 attempts to avoid repetition and extensive cross-referencing by consolidating the complaint processing procedures as much as possible. The new part is organized into six subparts. Subpart A concerns the agencies' programs for promoting equal employment opportunity and the procedures for agency processing of individual complaints of discrimination. Subpart B provides additional provisions that are applicable to the processing of particular types of complaints (i.e., ADEA, Equal Pay Act, Rehabilitation Act, class). Subpart C explains the relationship between the EEO process and the negotiated grievance process and between the EEO process and appeals to the Merit Systems Protection Board. Subpart D describes appeals to EEOC and the right to file civil actions under each statute administered by EEOC. Subpart E sets forth EEOC's policy on remedies and relief when discrimination has occurred. Subpart F contains miscellaneous provisions of general applicability to agency EEO programs. The overwhelming majority of comments addressing this issue supported the revised organization.

B. Pre-complaint Processing

As under part 1613, a person who believes he or she has been retaliated against or discriminated against on the basis of race, color religion, sex, national origin, age, or handicap must first seek counseling under part 1614 from the alleged discriminating agency and file a written complaint with that agency. Proposed part 1614 contained the same 30-day time limit for contacting a counselor as the existing part 1613 but invited comments on whether that time period should be enlarged. Many of the non-agency commenters advocated lengthening the time period to as much as 180 days arguing that 30 days was insufficient to reflect, secure advice or realize the impact of a discriminatory action, that the relatively short period was screening out many meritorious complaints and that there should be a symmetry between the private sector time limit for filing a charge and the federal sector time limit for contacting a counselor. Most, but not all, of the agency commenters suggested retaining the 30-day limit reasoning that the existing liberal extension provision adequately protects the rights of federal employees and applicants and that any lengthening of the time period would introduce further delays, undermine quick resolution and result in faded memories, lost documents and unavailable witnesses.

We do not believe that the analogy between the private sector filing period and the federal sector counseling time limit is apt. Private employees must actually file a complaint within 180 days, not just contact an EEOC office

about doing so. Private employees may have to travel many miles or use the mail to file a charge with EEOC while federal employees only have to contact a counselor by telephone or often merely visit a counselor who is located in the same work place in order to comply with the time limit. Moreover, a comparison of private sector charge filings and federal sector complaint filings indicates that federal employees file complaints at a rate three times greater than private sector employees file charges. Further, the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened. Therefore, we believe a significant lengthening of the pre-complaint period is not justified. Nonetheless, some potential complainants may not be able to comply with the 30-day limit for valid reasons. Consequently, EEOC has decided to modify the time limits for seeking counseling.

Part 1614 provides that an employee or applicant must generally contact a counselor within 45 days of the discriminatory event but also requires an agency to extend the time limit for contacting a counselor when warranted by the circumstances. The reasons for extending the 45-day time period are identical to those in current § 1613.214(a).

In addition, proposed part 1614 limited the time spent in counseling to 30 days with the possibility of an extension for an additional 60 days if agreed to by both parties. Many agency commenters noted that counseling presented a very important opportunity to resolve complaints and that agencies with formal dispute resolution procedures needed more than 30 days to use them. In order to encourage and accommodate such voluntary efforts, part 1614 now provides that the counseling period will be 90 days where an agency has an established dispute resolution procedure available during counseling and the employee or applicant chooses to use it. We believe that the 60-day extension provision applicable in all other situations will accommodate voluntary settlement efforts whenever both parties agree to it without unduly delaying further processing

C. Agency Processing of Individual Complaints

As under part 1613, part 1614 requires an agency to acknowledge receipt of a complaint and, if it is properly filed, investigate it. As proposed, part 1614 eliminated the informal adjustment and proposed disposition stages of part 1613 and postponed the hearing to the appellate stage, *i.e.*, until after the agency had issued its notice of final action. It also required the agency to complete its investigation and issue a notice of final action on a complaint within 180 days of its filing. Because agencies' responsibilities in the 180-day period were limited to investigation, settlement attempts and issuance of a notice of final action, agencies were expected to complete investigations within that time limit. One major reason for proposing part 1614 was to eliminate the time delays and backlogs frequently associated with part 1613 agency complaint processing by limiting agency processing to 180 days and by reducing the number of decision making levels.

Some agencies and non-agency commenters doubted that agencies could complete investigations within 180 days and speculated that agencies may decide not to investigate, causing complainants to inundate EEOC with appeals. We believe that agencies can complete investigations within 180 days and that agencies will have sufficient incentive to investigate complaints. The most recent federal sector statistics reported by the agencies to EEOC indicate that the average time it takes an individual complaint to reach the proposed disposition stage under part 1613 is 180 days or less in a majority of the agencies. Since under part 1614 the proposed disposition and informal adjustment are being eliminated from the agency process, agencies should be able to complete the investigation under part 1614 in the same amount of time it takes to reach the proposed disposition stage under part 1613. This indicates that the 180-day time frame can be met.

A number of agencies, and some other commenters, raised questions about or objected to EEOC conducting reimbursable supplemental investigations and hearings on appeal. Some agencies indicated that they would not agree to sign a memorandum of understanding permitting EEOC to recover reimbursements, and would oppose any effort by EEOC to collect reimbursements. The questions and objections have led EEOC to revise the regulation and retain the traditional distinction between the complaint and appellate process, i.e., that factual development through investigation and hearing will occur at the complaint level and review by EEOC will occur at the appellate level. Commenters uniformly saw the hearing process as an appropriate method of developing a complete and fair record.

The final regulation retains the requirement that investigations be completed within 180 days. In order to insure that complete and fair investigations will be conducted within the 180-day limit, the regulation relies on the use of adverse inferences by the Commission and its administrative judges, and permits both parties to obtain findings of fact and conclusions of law without a hearing, a type of summary disposition, for some or all issues in a complaint. The summary disposition process will encourage agencies to develop a complete investigation in order to save resources.

As under part 1613, agencies will still want to have the first opportunity to resolve a complaint and investigation is necessary to determine the likelihood of success and potential liability before a settlement offer is made. The use of adverse inference and summary disposition is designed to enable the Commission to achieve the goal that it sought to achieve in proposed part 1614 by providing for remands or supplemental investigations on appeal, *i.e.*, a method to assure that agencies will conduct a complete and fair investigation of complaints within the 180-day timeframe. As under proposed part 1614, the agency is required to complete the investigation within 180 days unless it has secured the agreement of the complainant to extend processing for up to an additional 90 days.

The new part allows agencies a large degree of flexibility in the investigation of complaints. The agency may use a variety of investigative and dispute resolution methods to complete complaint processing within 180 days. The agency can use an exchange of letters or position papers, interrogatories, investigation, fact-finding conference or any other method or combination of methods that will lead to the development of a complete factual record.

Complainants dissatisfied with the agency's dismissal of all or part of the complaint can immediately appeal from the agency's dismissal, and the Commission will establish an expedited appeals process to insure that complaint processing is not unduly delayed by an improper dismissal. Where an appeal from a partial dismissal is filed, and the dismissal is reversed by EEOC's Office of Federal Operations (OFO), the matter will be sent back to the agency for completion of the investigation. The time frame for completing the investigation of the accepted portion of the complaint will be stayed pending a decision on the appeal. Agencies may, but are not required to, investigate during this time period.

When an agency accepts a complaint and later determines that there are

reasons for dismissal of a complaint, *e.g.*, failure to cooperate or to accept full relief, there is no time limit placed on the agency (other than the requirement to complete the investigation within 180 days) as to when the dismissal must occur. The complainant retains the right to appeal such dismissals and, if the complainant prevails on the appeal, the complaint will be remanded to the agency with instructions to complete the investigation within a prescribed period of time. By providing for an appeal from a dismissal or partial dismissal, the Commission seeks to design an administrative process that operates efficiently. When, on appeal, the dismissal of a portion of a complaint is upheld but the remainder of the complaint is to be processed administratively, the Commission does not intend to force the complainant to proceed to court on the dismissed portion at that time. Instead, the Commission believes that the complainant can wait until a final decision is issued by the agency or the Commission on the merits of the remainder of the complaint.

Complainants may request a hearing after 180 days has elapsed from the filing of the complaint. Within 180 days from the filing of the complaint, the agency must compete its investigation and provide a copy of the complaint file to the complainant. The complainant will be notified at that time that he or she can request a hearing by an EEOC administrative judge or, alternatively, an immediate final decision by the employing agency. While the regulation requires that the complaint file and the notice be given to the complainant, the agency is also encouraged, but not required, to prepare a summary or report of investigation and also provide that to the complainant. If the complainant requests a final decision or the 30-day period elapses without the individual requesting a hearing, the agency will have 60 days to issue the decision. Where a hearing is requested, it will be conducted in the same manner as in proposed part 1614. The administrative judge will issue findings of fact and conclusions of law following the hearing and, where a finding of discrimination is made, an appropriate remedy will be ordered. Because the hearing will take place at the agency level, the agency will be given the same opportunity that it now has under part 1613 to issue a final decision, but must do so within 60 days of receipt of the administrative judge's findings and conclusions. The administrative judge's findings and conclusions will become the final decision if the agency does not issue its own decision within 60 days.

Under proposed part 1614, the administrative judge issued proposed findings of fact and conclusions of law that were reviewed by the Office of Review and Appeals (ORA), the predecessor of the new Office of Federal Operations, which either adopted, rejected or modified those findings and conclusions. Many of the civil rights organizations, employee unions, individual commenters and some of the agencies objected to the non-binding nature of the administrative judge's findings and conclusions and the automatic review of the administrative judge's findings and conclusions by ORA as unnecessary and time-consuming. Some suggested that these findings and conclusions should be final unless appealed further. The reason for having recommended findings and conclusions in the proposed provision was to ensure quality and consistency among the administrative judges' decisions. We believe that those concerns are adequately protected when the agency has the opportunity to modify or reject the findings and conclusions and the complainant has the opportunity to appeal the final decision to EEOC. Accordingly, part 1614 now provides that the administrative judge will issue findings and conclusions, which will become final unless the agency rejects or modifies them. After the final decision of the agency is issued, or the findings and conclusions become final, the complainant may appeal to the Commission by filing an appeal with the Office of Federal Operations (OFO) to obtain appellate review of the agency's final decision. Either party can seek reconsideration by the Commission of an OFO decision or the appellant can file a civil action in federal court. As under part 1613, decisions signed by the Executive Officer on behalf of the Commission will have precedential value.

Many commenters suggested that the Commission should place time limits on its processing of complaints. With the change in the process so that the hearing will remain at the agency level, rather than being part of a multi-step appellate process, the Commission believes that a 180-day time limit can be placed on the administrative judge's processing of a complaint. Section 1614.109(g) now provides that, within 180 days of receipt by the EEOC of a request for a hearing, an administrative judge will issue findings of fact and conclusions of law on the merits of the complaint.

D. Appellate Processing by EEOC

If the complainant wishes to pursue the matter beyond the agency level, he or she may file a civil action in federal district court or may appeal to the EEOC from the decision of an agency to dismiss an allegation in a complaint or from a final decision of the agency.

In proposed part 1614, EEOC would have reviewed the agency record when an appeal was filed to determine if the record was adequate for decision. If it was not, EEOC would have supplemented the agency investigation by various methods. It could have remanded part or all of the matter to the agency for further investigation and drawn an adverse inference if the agency failed to supplement the record within the time specified by EEOC or it could have referred the matter to an EEOC field office for investigation and required that the agency reimburse EEOC for the investigation. If an agency failed to develop an adequate record, the Commission could also have sent notice of this deficiency to an appropriate agency official or congressional committee or taken other appropriate action. Once EEOC had determined the record was complete, it would have notified the parties and the complainant would have had 15 days within which to request a hearing.

Many commenters objected to the delayed opportunity to request a hearing and the potentially time-consuming initial review of the record by EEOC, arguing that it imposed needless obstacles to obtaining a hearing and that the preliminary review was unnecessary if a hearing were held. Some agencies also objected to the preliminary review of the record by EEOC and some objected to the proposed reimbursement and reports to Congressional committees when inadequate records were produced by the agency.

In view of these comments, as explained above, we have revised the proposed appellate process to eliminate any reimbursable investigations at that stage and to move the hearing back to the agency level. This approach will permit all factual development to occur at the initial stages of a complaint and will eliminate any perceived obstacles to a hearing. As under part 1613, the Commission will retain the right to supplement the record of appeal. It is intended that this provision will be used only in rare instances to avoid a miscarriage of justice. The right to a hearing after an investigation is intended to permit the parties to put all relevant information in the record. The

right to a hearing also puts the burden on the parties to ensure that the record is complete. The Commission does not intend its revised authority to supplement the record to substitute for the parties' responsibilities to develop the record.

By shortening the agency processing time, providing the right to discovery at hearings, and, when appropriate, independently reviewing the agency's decision, EEOC has attempted to eliminate unnecessary delays and to correct any perceived conflict of interest or unfairness in the current part 1613 practice of agency self-investigation.

E. Coverage of The Rehabilitation Act

In a change from § 1613.701(b), § 1614.103 eliminates coverage of units in the legislative and judicial branches and restricts the coverage of part 1614, for purposes of the Rehabilitation Act, to military departments as defined in 5 U.S.C. 102, executive agencies as defined in 5 U.S.C. 105, the U.S. Postal Service, the Postal Rate Commission and the Tennessee Valley Authority. This definition of EEOC's charge processing jurisdiction is based on the plain language of section 501 of the Rehabilitation Act, which limits coverage to departments, agencies and instrumentalities in the executive branch, and brings the regulation into conformity with a recent decision of a United States Court of Appeals. In *Judd* v. *Billington*, 863 F.2d 103 (D.C. Cir. 1988), the court held that section 791 of the Rehabilitation Act "applies only to employees in the executive branch. See 29 U.S.C. 791(b)." 863 F.2d at 105. A couple of commenters urged us not to abide by this decision. The Commission, however, already acknowledged and adopted the *Judd* decision in *Faucette* v. *Kennickell*, Request No. 05880886 (March 1, 1989). Because the Commission already decided this issue, we are not reversing that decision by regulation.

The former Civil Service Commission had authority to issue regulations covering competitive positions in legislative and judicial branch agencies, 5 U.S.C. 7153; however, that authority passed, not to EEOC, but to the Office of Personnel Management in 5 U.S.C. 7203. EEOC has requested that the Office of Personnel Management issue a regulation under section 7203 extending regulatory coverage of the Rehabilitation Act to competitive positions in the legislative and judicial branches. The Office of Personnel Management has responded by stating that it does not believe it has authority under the Rehabilitation Act to issue such a regulation. In addition, EEOC has asked the Interagency Committee on Handicapped Employees to recommend a legislative change to section 501 of the Rehabilitation Act to provide competitive employees of legislative and judicial branch agencies with a remedy under the Rehabilitation Act.

F. Reassignment Under The Rehabilitation Act

The EEOC has taken the position that, under certain circumstances, an agency is required by section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, and EEOC's implementing regulations to reassign an employee as a reasonable accommodation. *Ignacio* v. *United States Postal Service*, Petition No. 03840005 (Sept. 4, 1984), *upheld*, 30 M.S.P.R. 471 (Spec. Panel 1986). The courts have not embraced this position. Congress intended the federal government to be a model employer of the handicapped and EEOC believes that reassignment of employees with disabilities who can no longer perform in their positions because of a disability is a necessary component of that responsibility. EEOC, therefore, proposed a new § 1614.203(g) imposing a duty to reassign employees with handicaps, in appropriate circumstances, as part of an agency's affirmative action obligation under section 501.

It should be noted that the recently enacted Americans with Disabilities Act of 1990, which prohibits private employers from discriminating on the basis of disability when making employment decisions, includes a provision identifying reassignment as a reasonable accommodation when an employee is no longer able to perform a job. EEOC sees this as a clear expression of the intent of Congress on the issue of reassigning workers with disabilities and believes the federal government, in its role as model employer, should do no less.

The Supreme Court has recognized a distinction in the Rehabilitation Act's civil rights provisions between nondiscrimination and affirmative action. In *Southeastern Community College* v. *Davis*, 442 U.S. 397, 410 (1979), the court contrasted the "evenhanded treatment of qualified handicapped persons" required by section 504 with the "affirmative efforts to overcome the disabilities caused by handicaps" required by section 501 and noted the requirements of the latter section for affirmative action program plans that describe how the special needs of handicapped employees are being met. The Court reiterated in *Alexander* v. *Choate*, 469 U.S. 287, 300 n.20 (1985), the distinction between the nondiscriminatory reasonable accommodations required by section 504 and the affirmative action required by section 501 to effect substantial changes, adjustments and modifications in existing personnel practices. Section 501 requires each agency to submit an affirmative action program plan for the hiring, placement and advancement of handicapped individuals including a description of the extent to which and methods whereby the special needs of handicapped individuals are being met.

EEOC can require that agencies utilize reassignment as a method of meeting the special needs of handicapped employees. As a special affirmative action requirement, the reassignment obligation would not be a component of the statute's reasonable accommodation requirement. Because this is a new provision implementing the affirmative action requirements of section 501 only, the case law interpreting reasonable accommodation would be inapplicable. Thus, cases involving reassignment would rely on this new provision and not the reasonable accommodation regulation or case law in determining the proper legal standards for such reassignments under section 501.

The majority of the individual commenters, civil rights organizations and employee unions agreed with the proposal. The majority of agency commenters objected to the proposal on the basis that it exceeded EEOC's authority, was inconsistent with the case law and was impractical, and that the language of the proposed regulation was inconsistent with the language in the preamble describing its operation.

As stated above, EEOC believes that reassignment deriving from an agency's affirmative action obligation is consistent with the statute, the applicable case law and EEOC's authority to issue implementing regulations. The case law cited by the agencies involved the issue of reasonable accommodation, often under section 504 of the Rehabilitation Act, and in many cases was premised on a reading of EEOC's regulations that the courts found did not specifically require reassignment. The cited case law was not on point and does not, in our opinion, provide persuasive support for the objections raised.

Any difference in language between the preamble and the proposed regulation is explained by the purposes of these parts of the NPRM. The requirement is that agencies reassign employees with handicaps in the circumstances indicated. The agency should consider reassignment whenever an employee with handicaps can no

actions are generally brought under subsection (b)(2) of rule 23. *Homes* v. *Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983). A prerequisite of a "(b)(2)" class is that the defendant "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The right to opt out of such a class would be inconsistent with the prerequisite of a (b)(2) class that relief is appropriate for the class as a whole. Some courts have permitted class members to opt out of a (b)(2) class but only at the settlement or relief stage. *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir. 1986). In *Cox*, the court held that it would be an abuse of discretion for a district court to permit a right to opt out at the certification stage, i.e., before the class is identified or before the merits of the class claim are considered or resolved.

Permitting class members to opt out would make the class action mechanism less effective. It would make possible the repeated litigation of pattern and practice issues, a consequence that the class action procedure was designed to prevent. *Cox*, 784 F.2d at 1554. Use of an opt out procedure at the commencement of a class action "force(s) class members to take a stand against their employers in order to stay in a controversial lawsuit." *Cox*, 784 F.2d at 1554–55. It also discourages settlement by making it impossible to resolve all claims at once and would subject the defendant to the risk that class members will settle only the questionable claims and opt for separate treatment of the stronger claims. *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981). An opt out provision is thus inconsistent with the Title VII goal of encouraging settlement of claims.

Even though the opt-out provision is eliminated from the regulation, all class members will still receive notice that the class complaint has been filed and notice of any settlement or decision on the class complaint. If they do not wish to participate in the class complaint. If they do not wish to participate in the class or to file a claim for individual relief, they do not have to do so. Those who wish to participate will have the opportunity to object to any proposed settlement and to file claims for individual relief if discrimination is found. EEOC believes that class members' rights are sufficiently protected by the notice provisions and that the opt-out provision is both inconsistent and unnecessary.

The comments were unanimously in favor of this revision.

H. Negotiated Grievance Procedure.

Under 29 CFR 1613.219, employees of agencies covered by 5 U.S.C. 7121(d) must elect initially to pursue a matter that is both grievable and allegedly discriminatory either through the negotiated grievance procedure or through the EEO complaint process, but not both. This regulatory provision also states that allegations of discrimination by employees of agencies not subject to 5 U.S.C 7121(d) will not be subject to an election and should be processed as complaints under part 1613. Part 1614 continues this processing distinction between agencies that are and are not covered by 5 U.S.C. 7121(d).

In view of the dual filing and processing responsibilities that can arise in agencies that are not covered by 5 U.S.C. 7121(d), however, EEOC proposed to toll the new 180-day processing limit for such complaints. One agency objected to the mandatory nature of the section and suggested that it may be in the parties' interests to process the complaint even though a grievance has been filed. One employee union objected that the employee in agencies not covered by 5 U.S.C. 7121(d) has a right to dual processing. EEOC believes that dual processing is, in most cases, wasteful and confusing and that temporarily holding the complaint in abeyance is an appropriate response to such a situation. If the employee is not satisfied with the result of the grievance process, the compliant can be pursued after the grievance procedure has terminated. We also recognize that there may be some individual circumstances where holding the complaint in abeyance would not be appropriate. Therefore, we have revised the section to permit rather than require agencies not subject to 5 U.S.C. 7121(d) to hold complaints in abeyance. Whenever an agency does so, it must notify the complainant. If the agency chooses not to hold the complaint in abeyance, the normal time limits are not tolled and the agency must issue a notice within 180 days.

I. ADEA Statute of Limitations.

The Commission proposed in § 1614.410 to address the absence of an explicit statute of limitations period in section 15 of the Age Discrimination in Employment Act, 29 U.S.C. 633a, which creates a right of action against federal agencies for violations of the ADEA. The proposed regulation addressed the situations when the complainant filed an administrative complaint and a notice of intent to sue. The absence of an express limitations period in a statute does not mean that there is no time limitation for filing suits under that statute. *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). When a statute is silent, courts borrow a limitations period from a closely analogous statute. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

When an individual has not filed a notice of intent to sue but has pursued the complaint through the administrative process, the courts have split on the issue of the correct statute of limitations applicable to ADEA lawsuits by federal employees. One court found that two- and three-year limitations period for private sector ADEA cases was the most analogous limitations period for federal sector ADEA cases. *Weirsema* v. *Tennessee Valley Authority*, 41 Fair Empl. Prac. Cas. (BNA) 1588 (E.D. Tenn. 1986). *But see Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (the Court held that the federal sector provisions of the ADEA are self-contained and looked to title VII rather than the private sector provisions of the ADEA for guidance in interpreting the ADEA's federal sector provisions). Other courts have borrowed the title VII limitations period as the most analogous. *Lavery* v. *Marsh*, 918 F.2d 1022 (1st Cas. 1990); *Matthews* v. *U.S. Postal Service*, 49 Fair Empl. Prac. Cas. (BNA) 311 (N.D.N.Y. 1989); *Carraway* v. *Postmaster General of the United States*, 678 F. Supp. 125 (D. Md. 1988); *Strazdos* v. *Baker*, 689 F. Supp. 310 (S.D.N.Y. 1988); *DiCamillo* v. *U.S. Postal Service*, No. 87–6028 (D. Conn. April 22, 1988); *Ramachandran* v. *U.S. Postal Service*, No. CV–86–7690 WDK (C.D. Cal. April 15, 1987). *aff'd*, No. 87–6028 (9th Cir. May 26, 1988); *Healy* v. *U.S. Postal Service*, 677 F. Supp. 1284 (E.D.N.Y. 1987); *White* v. *Department of the Air Force*, No. CA–3–87–1452–R (N.D. Tex. Oct. 14, 1987). *See also Rivera* v. *U.S. Postal Service*, 830 F.2d 1037, 1039 (9th Cir. 1987) (dismissing ADEA claims for failure to file within 30 days), cert. denied, 108 S. Ct. 1737 (1988). Three courts have refused to borrow the 30-day limitations period of title VII for ADEA actions without stating what limitations period should be borrowed. *Coleman* v. *Nolan*, 693 F. Supp. 1544 (S.D.N.Y 1988); *Wetzel* v. *U.S. Postal Service*, No. 87–4–CIV–5 (E.D.N.C. Aug. 14, 1987); *Tkac* v. *Veterans Administration*, 610 F. Supp. 1075 (W.D. Mich. 1985). Two courts applied the six-year statute of limitations contained in 28 U.S.C. 2401(a) to a federal sector ADEA suit. *Lubniewski* v. *Lehman*, 891 F.2d 216 (9th Cir. 1989); *Marks* v. *Turnage*, 46 Fair Empl. Prac. Cas. (BNA)

longer perform his or her job but must reassign such an employee whenever the circumstances described in the regulation are met. Although the preamble characterized this as "consideration," it explained the process of reassignments and required that they be made whenever the agency discovers during its "consideration" that the circumstances described in the regulation apply.

Some agencies with multiple components within the same commuting area and the Office of Personnel Management argued that it would be impractical and extremely difficult to reassign employees from one agency component to another where such components have separate personnel authority. As a result of these comments, we have revised the section to only require reassignment within the part(s) of the agency located in the same commuting area that share the same personnel appointing authority. We have also clarified that only funded vacancies need be considered, i.e., vacancies that the agency intended to fill.

The Commission has added a sentence to the reassignment section distinguishing between vacancies that have been posted and those that have not. The Commission believes that such distinction is necessary to deal with the expectations of other individuals who have applied or are planning to apply for vacancies that have been posted. Thus, when a notice or announcement seeking applications for a specific vacancy has been posted prior to the time the agency has determined that the nonprobationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, the agency is not obligated by this section to reassign the individual to that position. It must consider the individual on an equal basis with those who have already applied for the position. Under this circumstance, however, the obligation to reassign under this section still applies to any funded vacancies that have not been posted. Thus, when consideration for a posted vacancy does not result in selection of the individual, the agency is obligated under this section to consider the individual for other appropriate vacancies.

Some commenters also raised objections to the requirement for reassignment to a lower graded position where no vacancy at the employee's grade level exists. Some unions, civil rights organizations and individual commenters argued that without any limitations, agencies could offer the lowest-graded vacant position and undermine the requirement. In order to meet this concern, the revised section requires reassignment to the highest available vacancy below the employee's current grade, when no vacancy exists at the current grade. Reassignment to a higher-graded position is not required under this section.

Agencies objected that they could only place an employee in a lower graded position pursuant to adverse action procedures and, therefore, could not comply with this requirement. A few agencies also objected that the reassignment requirement in this section would prevent eligible employees from retiring on disability. The purpose of this reassignment requirement is to aid those employees with handicaps who want to continue employment with their agencies. The requirement to reassign only arises when an employee is unable to perform his or her position because of a handicap, i.e., in those situations when an agency is proposing to remove or downgrade an employee for inability to perform his or her job. If an employee is unable to perform his job and declines an offer made in compliance with this section, the agency has completely fulfilled its obligation under this section; the agency should not and cannot cite this section as authority for a non-consensual reassignment. We do not believe that this section conflicts with the rights of employees or the obligations of agencies under applicable disability retirement systems. The Office of Personnel Management did not raise any such objection in their comments on this section. On the contrary, EEOC patterned this section on the statutory and regulatory requirements applicable to the disability retirement provisions under the Civil Service Retirement System and the Federal Employees Retirement System.

The proposed section exempted the Postal Service from the requirement insofar as it might otherwise be required to reassign an employee to a position in a different craft or to make any other reassignment that would be inconsistent with the terms of a collective bargaining agreement covering an employee. This exemption for the Postal Service was included in order to be consistent with the reassignment requirements of the federal disability retirement schemes at 5 U.S.C. 8337 and 5 U.S.C. 8451. Some commenters questioned why a cross-craft reassignment should not be required if such a reassignment was consistent with applicable collective bargaining agreements. If such a reassignment is permitted by the applicable agreements and otherwise consistent with this section, we agree that it should be required. Accordingly, we have revised the section to require reassignment in the Postal Service unless prohibited by applicable collective bargaining agreements. This exception recognizes the rights of Postal Service employees under their collective bargaining agreements, but the exception is limited to the Postal Service. Labor relations at the Postal Service are governed by the National Labor Relations Act, while most other federal agencies are governed by the federal service labor relations provisions of the Civil Service Reform Act. Unlike Postal Service employees who have legitimate expectations based on seniority, other federal employees do not have such expectations because, under the Civil Service Reform Act, federal agencies retain the right to hire and assign employees in accordance with applicable laws, 5 U.S.C. 7106, and are subject to government-wide regulations such as these, 5 U.S.C. 7117.

We would like to emphasize some of the basic provisions of this section that some of the commenters misunderstood. The duty to reassign an employee with handicaps only arises when the employee is no longer able to perform because of the handicap; an employee with handicaps can be discharged or disciplined without reassignment if the discharge is based upon conduct or performance that is not due to the handicap, if the conduct or performance is so egregious to warrant discharge even despite the presence of a handicap, or if the employee does not adhere to the terms of a rehabilitation agreement. The employee also must be able to perform another position with or without accommodation. The duty to provide an accommodation in the reassigned position is, of course, subject to the undue hardship limitation. Therefore, if the individual cannot perform any available position without an accommodation and any necessary accommodation would impose an undue hardship on the agency, the agency has no further obligation under this section. The Commission believes that the undue hardship concept should apply to the reassignment provision as it does to the reasonable accommodation provision.

G. Opting Out of Class Complaints

The Commission proposed to delete the opting out provisions contained in § 1613.605(b). The class complaint regulations were based on rule 23 of the Federal Rules of Civil Procedure. See 41 FR 8081 (1976); 42 FR 11807 (1977). Rule 23 governs class action lawsuits. Employment discrimination class

82 (N.D. Ill. 1988). Another court, while ot reaching the issue, discussed the sue and indicated its belief that the x-year limitations period should apply. *ornholdt* v. *Brady*, 869 F.2d 57 (2d Cir. 989).

We find the reasoning of the cases pplying the two- or three-year mitations period of the private sector DEA provisions or the six-year mitations period of 28 U.S.C. 2401(a) to e unpersuasive and believe that the use f those limitations periods would be consistent with the administrative ocess that Congress intended to be ilized for federal sector ADEA mplaints. The most closely analogous atute to the federal sector provisions the ADEA is section 717 of title VII. OC believes that the limitations riod applicable to civil actions under le VII should be borrowed for federal ctor ADEA lawsuits.

Although there are differences tween the federal sector provisions of le VII and the ADEA, courts have vertheless looked to Title VII for alogous procedures to use in federal ployees' ADEA lawsuits. *E.g.*, *hman* v. *Nakshain*, 453 U.S. 156 (1981) in title VII action, plaintiff is not titled to trail by jury); *Ellis* v. *United tes Postal Service*, 784 F.2d 835, 838 h Cir. 1986) (as in Title VII action, the y proper defendant in the ADEA suit he head of the federal agency); *Smith Office of Personel Management*, 778 d 258, 262 (5th Cir. 1985) (like title VII, ADEA does not allow recovery of npensatory damages). The use of erent statutes of limitations for eral sector title VII and ADEA cases ld lead to attempts to split nplaints alleging that a single action ates both statutes or to premature arture from the administrative cess in order to timely file a lawsuit he ADEA issue.

wo of the Circuit Court decisions, *nholdt* and *Lubniewski*, reach the clusion that the six-year limitations od should apply. These courts gave rationales for their conclusions. , they concluded that Congress e not to make the limitations period ADEA suits the same as that for title uits because the congressional mittee considering the extension of ADEA to federal employees deleted day limitations period from the bill out explanation. We do not believe an unexplained omission should be trued as a specific rejection.

condly, these courts interpreted C's ADEA regulations as being stent with this conclusion because egulations do not state that the ations period for ADEA suits is 30 and because the regulation defining the limitations period for title VII suits is not incorporated by EEOC's ADEA regulations. We do not believe that such an inference necessarily flows from these regulations. Most importantly, the courts did not consider the effect of the CSRA or the anomalous results of their opinions, i.e., that one lawsuit resulting from one incident or event alleging violations of title VII and the ADEA would be governed by different limitations periods. In our opinion, these two courts reached erroneous conclusions and the subsequent decision in *Lavery* v. *Marsh*, 918 F.2d 1022 (1st Cir. 1990), convincingly rebuts and rejects the reasoning of *Lubniewski* and *Bornholdt*.

In *Lavery*, the court found title VII to be a natural source for borrowing a statute of limitations as "the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace * * *." *Oscar Mayer & Co.* v. *Evans*, 441 U.S.750, 756 (1979). Although there are minor differences between the federal sector provisions of each statute, the court was persuaded that they are essentially similar and that the many courts that have borrowed the 30-day limit from title VII were correct. The court was unwilling to ascribe deliberateness to Congress' omission of the 30-day limitations period in section 633a and concluded that the legislative history relied on the *Bornholdt* and *Lubniewski* courts was ambiguous and shed no light on congressional intent. The court also noted that borrowing the six-year period of 28 U.S.C. 2401(a) would be inappropriate since there are other relevant statutory provisions more specifically geared to the claim at issue. The court found that the 30-day limitations period in the CSRA provided further evidence that Congress did not intend to adopt the six-year provision. Finally, the court noted that a statute of limitation is a limited waiver of sovereign immunity and, without a clear manifestation from Congress that it intended such a radically longer limitations period (6 years), it refused to impute such an intent.

In section 114 of the Civil Rights Act of 1991, Public Law No. 102–166 (1991), Congress amended section 717 of title VII to increase the period of time for an individual to file suit in court from 30 days to 90 days after receipt of a final agency or Commission decision. That 90-day period will also apply to suits brought under sections 501 and 505(a) of the Rehabilitation Act. Section 115 of the Act amended section 7 of the ADEA to provide a similar 90-day suit period for employees of state and local governments and private sector employees who have filed a charge with the Commission under the ADEA. These legislative amendments make those suit periods consistent with the 90-day suit period under section 706 of title VII and incorporated into the Americans with Disabilities Act. The Commission believes it is most appropriate to borrow this 90-day period in order for there to be a uniform limitations period for all claims of employment discrimination.

Further support for borrowing the title VII limitations period is found in the Civil Service Reform Act (CSRA) and its legislative history. The CSRA provides a 30-day limitations period for federal employee to file suit when a claim of age discrimination is based on an action that is appealable to the MSPB, i.e., a mixed case involving a claim of age discrimination. 5 U.S.C. 7703(b)(2). This may indicate that Congress intended or understood that the 30-day limitations period from title VII applied as well to ADEA lawsuits. See S. Rep. No. 969, 95th Cong., 2d Sess. 63, reprinted in 1978 U.S. Code Cong. & Admin. News 2723, 2785 ("Under the anti-discrimination laws an employee has 30 days from the final agency action to initiate a de novo court proceeding"). The CSRA also constitutes another analogous statute of limitations that is available for borrowing, but the Commission does not believe that its 30-day provision would be consistent with the 90-day limitations period applicable to title VII complaints. In addition, the period for private sector ADEA charges was changed by the Civil Rights Act to the same 90-day period. As a result, we believe 90 days to be the appropriate limitations period.

The agency and non-agency commenters agreed that borrowing the title VII limitations period was the best time period for suits based on administrative complaints although some doubted that EEOC had authority to establish a statute of limitaions and recommended that we await legislative action. EEOC is not attempting to legislate a statute of limitations. At the present time there is no guidance for ADEA litigants and the case law is far from unanimous. As the agency charged with enforcing and administering the ADEA, it is entirely appropriate for EEOC to inform federal employees about their rights and to provide the best available information. Based upon established case law and the ADEA, EEOC believes that courts using the title VII period have made the more persuasive case and applied the statute of limitations that best serves the purposes of the ADEA. By proposing this regulation and coordinating it within the Executive Branch, the Commission has also achieved the advantage that the

public will know the consistent position of the Executive Branch. We believe that stating our opinion and analysis of this issue in the regulations is consistent with our responsibility and will prove helpful to litigants and to those courts who have not considered or who have occasion to reconsider the issue.

In proposed part 1614, EEOC proposed that the limitations period applicable to suits brought under title VII and the CSRA be borrowed and applied to suits brought under section 15 of the ADEA by individuals who have filed administrative complaints. Where, however, an individual files a notice of intent to sue, EEOC proposed that the two- or three-year limitations period applicable to private sector ADEA lawsuits be used, because the notice of intent to sue procedure clearly comes from the private sector ADEA process, and adopting that limitations period for this purpose is consistent with the case law on borrowing statutes of limitation.

Some commenters objected to our proposal of the two- or three-year statute of limitations for those persons who choose to file notice of intent to sue rather than file an administrative complaint. They argued that *Nakshian* precludes use of this limitations period, that it is too short and that we should await legislative action. In light of these comments, we have decided to eliminate any discussion in the regulation of the appropriate limitations period for bringing suit after giving notice of intent to file and merely caution potential plaintiffs to file as soon as possible after the expiration of the required waiting period.

J. Exhaustion of Remedies Under the ADEA

In § 1614.409(b), EEOC proposed to address the exhaustion of remedies problem raised by the decisions in *Purtill* v. *Harris*, 658 F.2d 134, 137 (3d Cir. 1981), cert. denied, 462 U.S. 1131 1983; *Bunch* v. *United States*, 548 F.2d 336, 340 (9th Cir. 1977), and other cases. These cases hold that once a federal complainant under the Age Discrimination in Employment Act initiates administrative procedures, he or she must exhaust these procedures before filing a civil action. As the agency responsible for interpretation and enforcement of the ADEA in the Federal sector, EEOC believes that a complainant exhausts administrative remedies either (1) 180 days after filing a complaint (the time period during which the agency is required to conduct a complete investigation) if the agency has not issued a decision, (2) after a final decision by the agency, (3) 180 days after filing an appeal with the EEOC, if EEOC has not issued a decision, or (4) after EEOC issues a decision on an appeal. This exhaustion requirement is the same as the title VII exhaustion requirement and will permit those complainants alleging age discrimination as well as title VII discrimination to bring the entire complaint to court at the same time. All comments received on this issue agreed with the proposal.

K. Clear and Convincing Evidence Standard

Currently, 29 CFR 1613.271 states that full relief should be provided to an individual when discrimination is found unless the record contains clear and convincing evidence that the individual would not have been selected in the absence of discrimination. During the public comment and interagency coordination of the 1987 amendments to part 1613, published at 52 FR 41919 (1987), commenters suggested that the burden of proof be changed from "clear and convincing evidence" to "a preponderance of the evidence" standard. Subsequently, the Supreme Court issued its decision in *Price Waterhouse* v. *Hopkins*, 109 S.Ct. 1775 (1989), in which it held that an employer can avoid liability, and hence any relief, in a mixed motive case upon showing by a preponderance of the evidence that the same determination would have been made even absent discrimination. Proposed § 1614.501 contained the same clear and convincing evidentiary standard as § 1613.271 but EEOC invited comment on whether the Supreme Court's decision required any change to that standard.

Some agency commenters argued that *Hopkins* required a change to preponderance of the evidence. Other agency commenters and most non-agency commenters believe that no change was necessary because *Hopkins* concerned proof at the liability stage while the regulation concerns proof at the relief stage and because the *Hopkins* decision itself cited and distinguished our regulation on this basis. We agree that the *Hopkins* decision does not require a change in the regulation. *Hopkins* relates solely to liability in mixed motive cases; its does not affect the standards of proof applicable to liability or relief in single motive cases. We recognize that the regulation will be applied most often to determining whether class members are entitled to individual relief after a class finding of discrimination, but it is also applicable to individual cases where there has been a finding of discrimination.

We also believe that *Hopkins* only applies to contemporaneous mixed motive cases, i.e., those cases where both motives or reasons were actually known and actually affected the decision. If an agency proves by clear and convincing evidence that it had some legitimate reason for taking the action in question or not selecting the complainant but only discovered that reason after the actual decision was made, it would not escape liability. It may succeed, however, in limiting the amount of relief.

L. Interest

In the process of developing proposed part 1614, EEOC considered proposals to require payment of interest on back pay in discrimination cases and to provide for awards of attorney's fees in Age Discrimination in Employment Act cases. The Assistant Attorney General, Office of Legal Counsel, at the Department of Justice advised us, however, of his opinion that the Back Pay Act of 1966, 5 U.S.C. 5596, does not serve as a waiver of sovereign immunity for those purposes. Therefore, we provided in proposed § 1614.501 that interest on back pay may not be awarded to federal applicants or employees who prevail in discrimination claims. Proposed § 1614.501(e) remained unchanged from its counterpart in part 1613; that is, the attorney's fees awards provisions shall apply to allegations of discrimination or retaliation prohibited by title VII and the Rehabilitation Act.

Some commenters suggested that the Department of Justice's opinion is incorrect and that EEOC should award interest on back pay and attorney's fees on ADEA complaints. EEOC asked the Attorney General to reconsider the Assistant Attorney General's opinion. The Attorney General forwarded the Commission's request to the Assistant Attorney General who notified the EEOC that he was adhering to the conclusion of his earlier memorandum. We note that the Court of Appeals for the District of Columbia recently ruled against the Justice Department's position, finding that the Back Pay Act waived soverign immunity for the award of interest on backpay in employment discrimination cases. *Brown* v. *U.S. Department of the Army*, 918 F.2d 214 (1990). A few commenters also noted that the proposal went too far when it stated that interest may never be paid on back pay awards under part 1614 since sovereign immunity has been waived for some agencies, e.g., the Postal Service. Further, section 114 of the Civil Rights Act of 1991, Public Law No. 102–166 (1991), amends section 717 of title VII to provide for the payment of interest on back pay. Consequently, the

regulation provides for payment of interest where sovereign immunity has been waived.

Section by Section Analysis

In addition to the structural changes and significant issues noted above, we considered comments seeking numerous changes to the proposed regulations and have adopted many of them. The public comments contained hundreds of comments of an editorial nature or of minimal general interest. We considered all comments and made many changes to the regulations based on those comments. We have not detailed every change or decision not to make a change in this analysis. We list below, on a section by section basis, those comments and changes that require explanation or are of general public interest.

Section 102(b)(3)

Some agencies believed that they were restricted in appointing Special Emphasis Program Managers to those listed in the regulation. The Office of Personnel Management commented on the provision and suggested that it be changed to provide designation of such program managers as may be required by OPM or the particular agency. We changed the provision to make clear that agencies are permitted to appoint Special Emphasis Program Managers as may be necessary, in addition to those listed as examples in the regulation.

Other commenters objected to the provision in the regulation that the EEO Director be under the immediate supervision of the head of the agency. That provision has been in the federal sector regulations since 1972. Moreover, section 1614.607 permits that individual to delegate that authority. Ultimate responsibility would remain, though, with the higher official.

Section 103(a)

In editing the final rule, we state in this section that complaints alleging retaliation prohibited by title VII, the ADEA, the Rehabilitation Act and the Equal Pay Act are considered to be complaints of discrimination for purposes of this part. (As indicated in § 1614.101(b), a complaint of retaliation can be predicated on opposing practices made unlawful by these statutes as well as participating in administrative or judicial proceedings under those statutes.) The change is purely editorial in nature and does not affect the coverage of retaliation as a prohibited practice under the statutes and the regulations. Whenever any regulation in this part speaks of a complaint of discrimination, the reference should also be read to include a complaint of retaliation.

Section 103(b)(4)

An agency requested that we define "unit of the legislative and judicial branches" for purposes of coverage under this part, and recommended that only competitive service positions in these units be covered. We have concluded that the question is best left for case by case analysis and decision and, therefore, decline to include a definition in the regulation.

Section 103 (c) and (d)

The Commission has reviewed its proposed regulation in light of *Equal Employment Opportunity Commission* v. *Arabian American Oil Co.*, 111 S.Ct. 1227 (1991). The Commission believes, as did the Civil Service Commission, that the statutes prohibiting discrimination in federal employment, insofar as they are unaffected by treaty obligations, apply to federal employees overseas. The legislative history of the statutes clearly envisions coverage of overseas employees, and there is no possibility of conflict with foreign laws. This conclusion is bolstered by Congress' specific coverage of overseas employment in section 109 of the 1991 Civil Rights Act.

In response to a comment received during the public comment period, the Commission included an explicit exemption from this Part for uniformed members of the military departments listed in 5 U.S.C. 102. The exclusion is consistent with *Johnson* v. *Hoffman*, 424 F. Supp. 490 (E.D. Mo. 1977), *aff'd sub nom., Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978).

Section 105(b)

A commenter suggested that we provide that the written notice of rights and responsibilities required by this section may be sent to the aggrieved person immediately following the initial counseling session if the counseling session took place over the telephone. The section requires counselors to advise individuals in writing of their rights and responsibilities at the initial counseling session. We agree with the comment and intend the section, as written, to cover providing the notice immediately following the counseling session in those circumstances.

Section 105(e)

We received a number of comments on the provision for extending the counseling session for an additional period of no more than 60 days, upon agreement between the aggrieved person and the counselor. Several commenters requested that the section be changed to allow for extensions with the approval of the EEO Director; another commenter asked if the agency must agree if the complainant requests an extension. We are clarifying the section by replacing "counselor" with "agency." The section now requires that both the complainant and the agency (through the EEO Office, not the counselor) must agree to an extension.

Section 105(f)

An agency inquired whether the provision for an extension applied only to a department- or agency-wide alternative dispute resolution (ADR) process, or included local ADR procedures. The regulation is written broadly to cover any ADR procedure, whether it is local or agency-wide.

Section 107

We have changed the title of this section from "Rejections or Cancellations of Complaints" to "Dismissals of Complaints." The change simplifies the section.

Section 107(a)

This section provides for dismissal of complaints for failure to state a claim or stating a claim that is pending before or has been decided by the agency or EEOC. In response to a comment regarding class complaints and this section, we note that if an agency accepts an administrative judge's recommendation to accept a class complaint, individual complaints concerning the class allegations filed before or after acceptance of the class complaint by class members are subsumed into the class complaint, and should not be dismissed. The Commission believes such a provision is necessary to preserve individual rights when the class complaint is dismissed without a determination binding the individual.

Section 107(b)

In response to a comment, we have added the clause "and is not like or related to the matter(s) brought to the attention of a Counselor" to clarify dismissal of complaints or issues that have not been raised with a Counselor. The Commission agrees with the line of cases following the holding in *Sanchez* v. *Standard Brands*, 431 F.2d 455 (5th Cir. 1970), that bases of discrimination (e.g., race, sex, age, handicap) can be changed or added during the complaint process. We have added a provision for remanding like or related issues for counseling and other appropriate action

when such an issue is raised at a later time. The agency retains the authority to dismiss any such issue for the reasons delineated in this section.

Section 107(e)

We have rewritten this section providing for dismissals of complaints that allege discrimination as to proposed personnel actions to include dismissals of allegations of proposals to take personnel actions or any preliminary steps to a personnel action. We intend the section to require dismissal of complaints that allege discrimination in any preliminary steps that do not, without further action, affect the person; for example, progress reviews or improvement periods that are not a part of any official file on the employee. If the individual alleges, however, that the preliminary step was taken for the purpose of harassing the individual for a prohibited reason, the complaint cannot be dismissed under this section because it has already affected the employee.

One agency suggested that mootness be explicitly added to the regulation. We have adopted that suggestion and included the explicit provision in this subsection. While mootness could also be classified under failure to state a claim, it is added to this subsection to permit it to be raised throughout the complaint process, since mootness can occur throughout the process.

Section 107(g)

We have clarified the intent of this section. It provided that an agency could dismiss for failure to cooperate when the complainant failed to "satisfy" a written request to provide information or to proceed. We understand that some complaints have been dismissed because agencies believed that a complainant did not fully satisfy a given request. This result was never intended. The provision has now been modified to state that a dismissal is only appropriate on this basis when the complainant fails to respond to such a written request or his or her response does not address the agency's request.

Section 107(h)

One agency requested that delegation of authority under this section for certification of offers of full relief be expanded. The section only allows certification to designees reporting directly to the EEO Director or the Chief Legal Officer. We purposely do not provide for further delegation of authority for certification of offers of full relief because we anticipate that agencies will use the procedure infrequently and we do not believe that delegation below the level for which the regulation provides is necessary or advisable.

We also want to clarify how the dismissal for failure to accept full relief operates. If an agency makes a certified offer of full relief and the complainant rejects it, the agency shall dismiss the complaint. The individual can appeal this dismissal to EEOC. If EEOC finds that the relief offered by the agency was not full relief, EEOC will issue an appellate decision reversing the dismissal. The decision will remand the complaint to the agency to be processed further in accordance with the normal procedures unless a revised offer of full relief complying with EEOC's determination is made within a stated period of time. If EEOC finds that the relief offered by the agency was full relief, it will affirm the agency's dismissal of the complaint and the complainant can file a civil action for a determination of his or her rights. If EEOC affirms the agency's dismissal, the agency has the authority to re-offer the relief but it is not required to do so.

We have lengthened the time provided in the section for complainants to consider certified offers of full relief from 15 days to 30 days to enable complainants to seek legal advice on the sufficiency of the offer of full relief. As discussed in the EEOC Management Directive, with each offer of full relief the agency must attach a copy of the EEOC pamphlet describing the remedies that may be available to the individual. Further information appears in the EEOC Management Directive.

Many commenters expressed concern generally with the provisions in Subpart A that referenced management directive instructions. We have retained those provisions. We would like to clarify that the management directive will not contain instructions regarding internal structure of agency EEO programs and personnel. We do not believe it is appropriate to include the management directive instructions in the regulation itself. Consistent with statute and Executive order, the Commission issues regulations, and instructions in management directives. It would not serve the purpose of these regulations to include the interpretations and instructions of management directives in the regulations. Management directives will contain instructions and guidance that is nonregulatory in nature.

Section 108

The investigative provisions combine some of the provisions of §§ 1614.106 and 1614.405 of the proposed rule.

Section 108(e)

One of the intelligence agencies requested a provision for a unilateral extension of the 180 day agency processing time of 45 days to allow for sanitization of the files. We have added a sentence in the section providing that intelligence agencies may unilaterally extend for up to 30 days to sanitize a file, provided they notify the complainant of the extension.

Section 108(e) and (f)

A number of agencies asked for clarification regarding processing of complaints where some, but not all, issues are accepted for investigation. In part 1613, complaints are split between rejected issues and issues accepted for investigation. Complainants may appeal the rejected issues independently of the rest of the complaint. Part 1614 will operate similarly, but will not provide for splitting of complaints. Under part 1614 agencies will notify complainants of the issues that are accepted and those that are dismissed. If the complainant wishes to pursue any of the dismissed issues, the complainant would have to appeal the dismissal within 30 days of receipt of the dismissal. When an appeal is filed, the time limit for processing the remainder of the complaint will be suspended until a final Commission decision is issued.

Section 109

The hearing provisions are taken substantially from § 1614.406 of the proposed regulation.

Section 109(e)

This provision was formerly in proposed section 1614.406(c). One commenter suggested that the provision for statements setting forth material facts believed not to be in genuine dispute in this section should include a requirement that they be filed at least 15 days before the hearing. The administrative judge can set time limits for submission of statements, as well as for discovery, as part of his or her control over the hearing process. We decline, therefore, to provide time limits in the regulation.

Section 109(f)

One agency and several other commenters suggested that the hearing section in proposed § 1614.406(d) contain a provision requiring transcripts of hearings. We have added this section to provide, as in part 1613, for transcripts of hearings, to be arranged for and paid for by the agencies. Agencies currently budget for and receive appropriations for transcripts,

while EEOC does not. The requirement that agencies continue to do so under part 1614 is consistent with current practice.

Section 201(c)

We moved this section covering exhaustion of Administrative remedies under the Age Discrimination in Employment Act from proposed § 1614.410 to 201(c). The proposed rule contained two separate sections on civil action rights, one for the ADEA (§ 1614.410) and one for title VII and the Rehabilitation Act (§ 1614.409). We have consolidated the two sections to simplify the regulation and make it clear that the civil action rights under the three statues are the same. Consequently, we moved the ADEA exhaustion of administrative remedies section to § 1614.201. We did not make any changes to the substance of the section.

Section 202

Several agencies commented on our inclusion of Equal Pay Act complaints in part 1614. Part 1613 did not cover Equal Pay Act complaints, but they were processed by EEOC district offices in accordance with a management directive. Equal Pay Act complaints against all federal agencies, including the Postal Service, the Tennessee Valley Authority and the Postal Rate Commission, will now be processed in accordance with part 1614 in the same manner as all other federal sector complaints covered by this part. We believe inclusion of Equal Pay Act complaints in this part is warranted because any Equal Pay Act complaint is also a title VII sex discrimination complaint.

Section 203(a)(6)

One commenter requested that the definition of qualified individual with handicaps include a requirement for meeting policy-based criteria as well as experience and education criteria. We did not change the regulation because we believe that the requirement that an applicant or employee be able to perform the essential functions of the position in question includes meeting legitimate policy-based criteria. The phrase "essential functions" includes agency-established norms of personal demeanor and conduct in addition to job performance standards.

Section 203(d)

In response to comments, we have made two changes to this section prohibiting the use of employment tests or other selection criteria that tend to screen out qualified individuals with handicaps. We included the phrase "or other examining authority" in section 203(d)(1)(ii) for those agencies that are not under OPM authority. Consistent with this change, we added a provision in the same subparagraph to make clear that OPM must show that no alternative tests are available for those tests it develops and that other agencies must make that showing for tests they have authority to develop. One commenter asked whether a limited appointment is a test. This section applies to tests or other selection criteria and limited appointments are not selection criteria. As a result, limited appointments are not covered by this provision.

Section 204

As we noted under section 107(a), if an agency accepts an administrative judge's recommendation to accept a class complaint, individual complaints concerning the class allegations filed by class members before or after acceptance of the class complaint are subsumed within the class complaint, and should not be dismissed.

Section 203(h)

A new subsection (h) has been added to incorporate the amendments to the Rehabilitation Act made by section 512 of the Americans with Disabilities Act. That provision excludes current users of illegal drugs from the definition of the term individual with handicap(s). The Commission intends this subsection to be interpreted in a manner consistent with § 1630.3(a)–(c) of the Commission's regulations implementing title I of the Americans with Disabilities Act, 29 CFR 1630.3(a)–(c), with the corresponding sections of the Interpretive Guidance accompanying those regulations, and with this section.

Section 204(d)(3)

When an allegation contained in a class complaint was not raised in counseling, but the failure to raise it is satisfactorily explained under this section, the allegation will be referred to a counselor and then will be consolidated with the original class complaint.

Section 204(k)(3)

The 45-day time limit in this section defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member.

Section 301

This section provides that election between the negotiated grievance process and the EEO complaint process occurs upon filing of a written complaint. Election does not occur when an aggrieved person contacts a counselor because counseling provides the person with information that allows him or her to decide which process to elect.

Section 301(b)

In response to a request for clarification, this section applies both to complainants who are covered by collective bargaining agreements that do not permit allegations of discrimination to be raised in the negotiated grievance procedure and complainants who are not covered by collective bargaining agreements. In other words, the election provision of section 301(a) applies when 5 U.S.C. 7121(d) applies and when the complainant is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in the negotiated grievance procedure.

Section 302(b)

This section provides for election between filing a mixed case appeal with MSPB or a mixed case complaint in the EEO process. A commenter requested that agencies be required to inform employees of the right to elect among three processes, an MSPB appeal, the section 7121(d) grievance procedure or an EEO complaint. Counselors must inform employees of the three options and the election requirements. We added clarification at the end of the section for those instances in which a person files a mixed case appeal with MSPB and MSPB dismisses the appeal as nonjurisdictional. If the individual filed the mixed case appeal instead of a mixed case complaint, agencies are required to inform the individual that he or she may contact a counselor within 45 days and that the filing of the mixed case appeal will be deemed to be the date the individual initially contacted the counselor. If the individual filed the appeal with MSPB from an agency's final decision on the mixed case complaint without a hearing, the agency shall issue the notice required by § 1614.108(f) and give the individual the choice between a hearing and an immediate decision.

Section 305(a)

An agency noted that the 15-day filing deadline for oppositions to petitions to EEOC from MSPB decisions on mixed case appeals in this section runs from the date of service of the petition while most other such deadlines run from receipt. We have left the date of service provision unchanged because the statute

requires that the Commission determine within 30 days whether to consider the MSPB decision. 5 U.S.C. 7702(b)(2).

Section 402

The time limits for filing appeals has been clarified by adding a new subsection indicating when the time limits begin to run. Consistent with the recent decision in *Irwin* v. *Veterans Administration*, 111 S.Ct. 453 (1990), where a complainant is represented by an attorney of record, the time for appeal begins to run from the day when the attorney receives the final decision. Where the complainant is not represented by an attorney, the time period for appeal begins to run from the day that the complainant receives the final decision. Section 1614.605 has been revised to be consistent with this provision.

Section 403(a)

Commenters expressed concern regarding the provision in this section for filing a supporting statement or brief with the notice of appeal. We have revised the regulation to provide in section 403(d) that any supporting statement or brief must be filed within 30 days of the date the appeal was filed. This section does not require that a supporting statement or brief be filed, it merely provides an opportunity for such a filing. If no supporting statement or brief is filed, then OFO will decide the case based on the existing records.

Section 403(b)

This section contains a requirement that complainants serve the agency with the appeal and supporting statement or brief when they file it with the EEOC. We note that failure to serve the agency will not result in automatic dismissal of the appeal.

Section 403(d)

The agency's requirement to submit the complaint file and any statement of position it chooses to submit has been modified to provide that the submission will occur after receipt of a request for the file by the Office of Federal Operations. With the modification, the agency will be able to refer to the appeal number assigned to the appeal.

Section 404

A commenter suggested that if a record is found to be inadequate in a grievance, it should be remanded to the agency. While EEOC believes that the supplementation or remand provision will be used infrequently, either may be used when a discrimination issue in a negotiated grievance is appealed to EEOC.

Section 405(b)

OFO employs the "de novo" standard of review when issuing decisions on appeals. A credibility determination of an administrative judge that is based on the demeanor or tone of voice of the witness, however, will be accepted by OFO unless OFO finds that the determination was clearly erroneous, e.g., where documents or other objective evidence contradicts the witness' story or the story itself is so internally inconsistent or implausible that a reasonable factfinder would not credit it. *See Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985).

Section 406

We have placed this section in reserve and titled it "Time Limits." Many commenters noted that the Commission had not placed time limits on itself in the appeal section and expressed concern that the absence of such limits was inequitable and could result in delays at the EEOC. Because we have changed the appellate process from the proposed part 1614, we do not propose an appellate time limit at this time. The section will remain reserved, though, in case it is necessary to impose a time limit in the future.

Section 407

In editing the final rule, we have removed the term reopen from this section and renamed the section "Reconsideration." The change is purely editorial in nature; we determined that reconsideration naturally includes reopening and that use of both terms is unnecessary. The Commission has not changed the procedure in the section, but has simplified its appellation.

Subpart E

We have similarly editorialized subpart E, changing the titles of the subpart and of its sections. We received some comments requesting clarification of the terms remedial action and corrective action, among other things. The changes are not substantive, but merely editorial in nature and are intended to simplify and clarify the terms used in the subpart. Subpart E is renamed Remedies and Enforcement. Its sections are renamed Remedies and Relief, Compliance with Final Commission Decisions, Enforcement of Final Commission Decisions and Compliance with Settlement Agreements and Final Decisions. Section 1614.504 in the proposed part 1614 has been included in its entirety in § 1614.503.

Section 501(b)

We deleted the second reference to the clear and convincing standard in the middle of the section because it is redundant. The first reference to the standard in the section applies also to the back pay provision. We also changed the word "made" to "declined" in the last paragraph of section 501(b)(1) in order to make the section internally consistent. As correctly stated elsewhere in section 501, an agency's back pay liability is cut-off when an unconditional offer of reinstatement is declined, not when it is made. *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 238–39 (1982).

Section 501(c)(1)

An agency requested that in this section, which covers relief involving an employee, the Commission address the situation where an employee voluntarily leaves the agency before a discrimination finding is made. We have considered the question and concluded that it cannot be addressed in the regulation. There are some instances in which an employee's voluntarily leaving the agency would cut off the nondiscriminatory placement obligation and further back pay liability, but that would not hold true for all cases. We have replaced the term "retroactive promotion" with "nondiscriminatory placement" to more faithfully adhere to the Commission's remedies policy and to § 1614.501(a).

Section 501(d)

Several agencies raised objections to the requirement that agencies carry the burden of proving failure to mitigate. Case law places the failure to mitigate burden upon employers. E.g., *Sellers* v. *Delgado Community College*, 839 F.2d 1132, 1139 (5th Cir. 1988); *Edwards* v. *School Bd., City of Norton, Va.*, 659 F.2d 951, 959 (4th Cir. 1981); *U.S.* v. *Lee Way Motor Freight, Inc.*, 20 Fair Empl. Prac. Cas. (BNA) 1345, 1358 (10th Cir. 1979); *Sprogis* v. *United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975). Moreover, evidence of failure to mitigate is easily obtained during the agency investigation or during discovery associated with the hearing.

Section 502(b)

Two commenters stated that the requirement of temporary or conditional restoration in the event of a request for reconsideration is unprecedented, would be extremely disruptive and exceeds EEOC's authority. The requirement is currently found in § 1613.237 and the EEOC has decided to retain it for reasons of equity.

instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;

(4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national, origin, age or handicap, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;

(9) Reassign, in accordance with § 1614.203(g), nonprobationary employees who develop physical or mental limitations that prevent them from performing the essential functions of their positions even with reasonable accommodation;

(10) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(11) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(12) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(13) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(14) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

(b) In order to implement its program, each agency shall:

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Appraise its personnel operations at regular intervals to assure their conformity with its program, this part 1614 and the instructions contained in the Commission's management directives;

(3) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head;

(4) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(5) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation; and

(6) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

(c) Under each agency program, the EEO Director shall be responsible for:

(1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in § 1614.101 and the agency program;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and to improve the agency's program for equal employment opportunity;

(4) Providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are fairly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with this part.

(d) Directives, instructions, forms and other Commission materials referenced in this part may be obtained in accordance with the provisions of 29 CFR 1610.7 of this chapter.

§ 1614.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of handicap) or the Equal Pay Act (sex-based wage discrimination) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority; and

(4) All units of the legislative and judicial branches of the Federal Government having positions in the

Section 606

We received a number of comments asking how the timeframes of subpart A will work when complaints are consolidated under this section. We have added a sentence stating that the date of the first filed complaint controls the applicable timeframe.

Section 607

We have removed proposed § 1614.607 governing severance of issues because part 1614 does not provide for it. Section 1614.607 now covers delegation of authority. Many agencies objected to the proposed delegation section and requested a broader delegation of authority. We have changed the delegation of authority section to mirror the current practice under part 1613, providing delegation from the agency head to one or more designees.

EEOC believes that this new complaint process will provide more efficient resolution of federal sector employment discrimination complaints while, at the same time, ensuring administrative fairness.

Complaints filed under 29 CFR part 1613 will be processed under the procedures of this part, except that for purposes of computing time, references in the regulations to performing certain actions from the date of filing the complaint shall be interpreted to mean from the effective date of these regulations. The Commission encourages agencies to use the period prior to October 1, 1992, to complete processing on all pending complaints, especially including those complaints filed prior to January 1, 1992. In addition, the provision in § 1614.108 requiring that investigations be completed within 180 days from the filing of the complaint shall require agencies to complete investigations of complaints filed under part 1613 within one year of the effective date of these regulations. If, in any complaint filed under part 1613, the complainant has requested a decision without a hearing or has not notified the agency whether a hearing is requested within the applicable time limit, the agency will treat those actions as requests for an immediate decision from the agency and, in accordance with § 1614.110, the agency shall issue a final decision within 120 days of the effective date of these regulations. The time period for investigating and issuing final decisions on complaints filed under part 1613 is longer than for those filed under part 1614 to permit agencies to eliminate any inventory of such complaints that may exist while at the same time implementing these new regulations.

These regulations have been coordinated with affected federal agencies pursuant to Exec. Order No. 12067 and have been reviewed by the Office of Management and Budget pursuant to Exec. Order No. 12291. The Commission hereby publishes its final rule.

List of Subjects in 29 CFR Part 1614

Equal employment opportunity, Government employees.

For the Commission,

Evan J. Kemp, Jr.,

Chairman.

For the reasons set forth in the preamble, title 29, chapter XIV of the Code of Federal Regulations is amended by adding part 1614 to read as follows:

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

Subpart A—Agency Program To Promote Equal Employment Opportunity

1614.101 General policy.
1614.102 Agency program.
1614.103 Complaints of discrimination covered by this part.
1614.104 Agency processing.
1614.105 Pre-complaint processing.
1614.106 Individual complaints.
1614.107 Dismissals of complaints.
1614.108 Investigation of complaints.
1614.109 Hearings.
1614.110 Final decisions.

Subpart B—Provisions Applicable to Particular Complaints

1614.201 Age Discrimination in Employment Act.
1614.202 Equal Pay Act.
1614.203 Rehabilitation Act
1614.204 Class complaints.

Subpart C—Related Processes

1614.301 Relationship to negotiated grievance procedure.
1614.302 Mixed case complaints.
1614.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.
1614.304 Contents of petition.
1614.305 Consideration procedures.
1614.306 Referral of case to Special Panel.
1614.307 Organization of Special Panel.
1614.308 Practices and procedures of the Special Panel.
1614.309 Enforcement of Special Panel decision.
1614.310 Right to file a civil action.

Subpart D—Appeals and Civil Actions

1614.401 Appeals to the Commission.
1614.402 Time for appeals to the Commission.
1614.403 How to appeal.
1614.404 Appellate procedure.
1614.405 Decisions on appeals.
1614.406 Time limits. [Reserved]
1614.407 Reconsideration.
1614.408 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.
1614.409 Civil action: Equal Pay Act.
1614.410 Effect of filing a civil action.

Subpart E—Remedies and Enforcement

1614.501 Remedies and relief.
1614.502 Compliance with final Commission decisions.
1614.503 Enforcement of final Commission decisions.
1614.504 Compliance with settlement agreements and final decisions.

Subpart F—Matters of General Applicability

1614.601 EEO group statistics.
1614.602 Reports to the Commission.
1614.603 Voluntary settlement attempts.
1614.604 Filing and computation of time.
1614.605 Representation and official time.
1614.606 Joint processing and consolidation of complaints.
1614.607 Delegation of authority.

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e–16; E.O. 10577, 3 CFR, 1954–1958 Comp., p.218; E.O. 11222, 3 CFR, 1964–1965 Comp., p.306; E.O. 11478, 3 CFR, 1969 Comp., p.133; E.O. 12106, 3 CFR, 1978 Comp., p.263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p.321.

Subpart A—Agency Program To Promote Equal Employment Opportunity

§ 1614.101 General policy.

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)) or the Rehabilitation Act (29 U.S.C. 791 *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

§ 1614.102 Agency program.

(a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:

(1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the

(1) the complainant has the right to appeal the final decision or dismissal of all or a portion of a complaint; and

(2) The agency is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the period.

§ 1614.107 Dismissals of complaints.

The agency shall dismiss a complaint or a portion of a complaint:

(a) That fails to state a claim under § 1614.103 or § 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(c) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(d) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(e) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(f) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(g) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available; or

(h) If, prior to the issuance of the notice required by § 1614.108(f), the complainant refuses within 30 days of receipt of an offer of settlement to accept an agency offer of full relief containing a certification from the agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint. An offer of full relief under this subsection is the appropriate relief in § 1614.501.

§ 1614.108 Investigation of complaints.

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c)(1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an 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 notify the complainant that the investigation has been completed, 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 before an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

§ 1614.109 Hearings.

(a) When a complainant requests a hearing, the agency shall request that the Commission appoint an administrative judge to conduct a

competitive service, except for complaints under the Rehabilitation Act.

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

(d) This part does not apply to:

(1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section;

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

(4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or

(5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

§ 1614.104 Agency processing.

(a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in §§ 1614.105 through 1614.110 and in § 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.

(b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their rights.

§ 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing after an investigation by the agency, 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 pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the agency has an established dispute resolution procedure under paragraph (f) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the Counselor's attention. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint 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.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

§ 1614.106 Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by § 1614.105 (d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) The agency shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed. Such acknowledgement shall also advise the complainant that:

§ 1614.110 Final decisions.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, 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, or within 60 days of receiving the findings and conclusions of an administrative judge, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final decision shall contain notice of the right to appeal to the Commission, the name and address of the agency official upon whom an appeal should be served, notice of the right 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, Notice of Appeal/Petition, shall be attached to the decision.

Subpart B—Provisions Applicable to Particular Complaints

§ 1614.201 Age Discrimination in Employment Act.

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, Federal Sector Programs, 1801 L St., NW., Washington, DC 20507 within 180 days of the occurrence of the alleged unlawful practice.

(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

(c) When an individual has filed an administrative complaint alleging age discrimination that is not a mixed case, administrative remedies will be considered to be exhausted for purposes of filing a civil action:

(1) 180 days after the filing of an individual complaint if the agency has not issued a final decision and the individual has not filed an appeal or 180 days after the filing of a class complaint if the agency has not issued a final decision;

(2) After the issuance of a final decision on an individual or class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal if the Commission has not issued a final decision.

§ 1614.202 Equal Pay Act.

(a) In its enforcement of the Equal Pay Act, the Commission has the authority to investigate an agency's employment practices on its own initiative at any time in order to determine compliance with the provisions of the Act. The Commission will provide notice to the agency that it will be initiating an investigation.

(b) Complaints alleging violations of the Equal Pay Act shall be processed under this part.

§ 1614.203 Rehabilitation Act.

(a) *Definitions.* (1) *Individual with handicap(s)* is defined for this section as one who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) Has a record of such an impairment; or

(iii) Is regarded as having such an impairment.

(2) *Physical or mental impairment* means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, respiratory, genitourinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) *Major life activities* means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) *Has a record of such an impairment* means has a history of, or has been classified (or misclassified) as having, a mental or physical impairment that substantially limits one or more major life activities.

(5) *Is regarded as having such an impairment* means has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or has none of the impairments defined in paragraph (a)(2) of this section but is treated by an employer as having such an impairment.

(6) *Qualified individual with handicaps* means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(i) Meets the experience or education requirements (which may include passing a written test) of the position in question; or

(ii) Meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.

(b) The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified individual with physical or mental handicaps.

(c) *Reasonable accommodation.* (1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

(2) Reasonable accommmodation may include, but shall not be limited to:

(i) Making facilities readily accessible to and usable by individuals with handicaps; and

(ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(3) In determining whether, pursuant to paragraph (c)(1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:

(i) The overall size of the agency's program with respect to the number of

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 shall remand any such issue for counseling in accordance with § 1614.105 for such other processing as ordered by the administrative judge.

(b) *Discovery.* The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(c) *Conduct of hearing.* Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(d) The procedures in paragraphs (d)(1) through (3) of this section apply to hearings of complaints:

(1) The complainant, an agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the administrative judge deems necessary.

(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(e) *Findings and conclusions without hearing.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue findings and conclusions without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue findings and conclusions without holding a hearing.

(f) *Record of hearing.* The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

(g) *Findings and conclusions.* Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing findings of fact and conclusions of law, within 180 days of a request for a hearing being received by EEOC, an administrative judge shall issue findings of fact and conclusions of law on the merits of the complaint, and shall order appropriate 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 findings and conclusions to the parties by certified mail, return receipt requested. Within 60 days of receipt of the findings and conclusions, the agency may reject or modify the findings and conclusions or the relief ordered by the administrative judge and issue a final decision in accordance with § 1614.110. If an agency does not, within 60 days of receipt, reject or modify the findings and conclusions of the administrative judge, then the findings and conclusions of the administrative judge and the relief ordered shall become the final decision of the agency and the agency shall notify the complainant of the final decision in accordance with § 1614.110.

means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, but does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of federal law. This exclusion, however, does not exclude an individual with handicaps who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(2) Except that it shall not violate this section for an agency to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (h)(1)(i) and (ii) of this section is no longer engaging in the illegal use of drugs.

§ 1614.204 Class complaints.

(a) *Definitions.* (1) A *class* is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age or handicap.

(2) A *class complaint* is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

(3) An *agent of the class* is a class member who acts for the class during the processing of the class complaint.

(b) *Pre-complaint processing.* An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105.

(c) *Filing and presentation of a class complaint.* (1) A class complaint must be signed by the agent or representative and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.

(2) The complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint.

(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

(d) *Acceptance or dismissal.* (1) Within 30 days of an agency's receipt of a complaint, the agency shall: Designate an agency representative who shall be any of the individuals referenced in § 1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or agency to submit additional information relevant to the complaint.

(2) The administrative judge may recommend that the agency dismiss the complaint, or any portion, for any of the reasons listed in § 1614.107 or because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2).

(3) If the allegation is not included in the Counselor's report, the administrative judge shall afford the agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the administrative judge shall recommend that the agency dismiss the allegation. If the explanation is satisfactory, the administrative judge shall refer the allegation to the agency for further counseling of the agent. After counseling, the allegation shall be consolidated with the class complaint.

(4) If an allegation lacks specificity and detail, the administrative judge shall afford the agent 15 days to provide specific and detailed information. The administrative judge shall recommend that the agency dismiss the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the administrative judge shall advise the agent how to proceed on an individual or class basis concerning these allegations.

(5) The administrative judge shall recommed that the agency extend the time limits for filing a complaint and for consulting with a Counselor in accordance with the time limit extension provisions contained in §§ 1614.105(a)(2) and 1614.604.

(6) When appropriate, the administrative judge may recommend that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

(7) The administrative judge's written recommendation to the agency on whether to accept or dismiss a complaint and the complaint file shall be transmitted to the agency and notification of that transmittal shall be sent to the agent. The administrative judge's recommendation to accept or dismiss shall become the agency decision unless the agency accepts, rejects or modifies the recommeded decision within 30 days of the receipt of the recommended decision and complaint file. The agency shall notify the agent by certified mail, return receipt requested, and the administrative judge of its decision to accept or dismiss a complaint. At the same time, the agency shall forward to the agent copies of the administrative judge's recommendation and the complaint file. The dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and 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 include EEOC Form 573, Notice Of Appeal/Petition.

(e) *Notification.* (1) Within 15 days of accepting a class complaint, 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.

(2) Such notice shall contain:

(i) The name of the agency or organizational segment, its location, and the date of acceptance of the complaint;

(ii) A description of the issues accepted as part of the class complaint;

(iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members; and

(iv) The name, address and telephone number of the class representative.

employees, number and type of facilities and size of budget;

(ii) The type of agency operation, including the composition and structure of the agency's work force; and

(iii) The nature and the cost of the accommodation.

(d) *Employment criteria.* (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:

(i) The agency demonstrates that the test score or other selection criterion is job-related for the position in question and consistent with business necessity; and

(ii) OPM or other examining authority shows that job-related alternative tests, or the agency shows that job-related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.

(2) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skill (except where those skills are the factors that the test purports to measure).

(e) *Preemployment inquiries.* (1) Except as provided in paragraphs (e)(2) and (e)(3) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is an individual with handicaps or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the essential functions of the job, or the medical qualification requirements if applicable, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Office of Personnel Management may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(2) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that: all entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for individuals with handicaps.

(3) To enable and evaluate affirmative action to hire, place or advance individuals with handicaps, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if:

(i) The agency states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action; and

(ii) The agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(4) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that:

(i) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that an applicant is eligible under special appointing authority for the disabled;

(ii) Supervisors and managers may be informed regarding necessary accommodations;

(iii) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(iv) Government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for individuals with handicaps shall be provided information upon request; and

(v) Statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

(f) *Physical access to buildings.* (1) An agency shall not discriminate against applicants or employees who are qualified individuals with handicaps due to the inaccessibility of its facility.

(2) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968 (42 U.S.C. 4151 et seq.) and the Americans with Disabilities Act of 1990 (42 U.S.C. 12183 and 12204).

(g) *Reassignment.* When a nonprobationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. 8337 or 5 U.S.C. 8451. If the agency has already posted a notice or announcement seeking applications for a specific vacant position at the time the agency has determined that the nonprobationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then the agency does not have an obligation under this section to offer to reassign the individual to that position, but the agency must consider the individual on an equal basis with those who applied for the position. For the purpose of this paragraph, an employee of the United States Postal Service shall not be considered qualified for any offer of reassignment that would be inconsistent with the terms of any applicable collective bargaining agreement.

(h) *Exclusion from definition of "individual(s) with handicap(s)".* (1) The term "individual with handicap(s)" shall not include an individual who is currently engaging in the illegal use of drugs, when an agency acts on the basis of such use. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs"

§ 1614.501 shall apply. The agency shall also, within 60 days of the issuance of the final decision finding no class-wide discrimination, issue the acknowledgement of receipt of an individual complaint as required by § 1614.106(d) and process in accordance with the provisions of subpart A of this part, each individual complaint that was subsumed into the class complaint.

(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 class-wide discrimination in its final decision. The period of time for which the agency finds class-wide 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.

Subpart C—Related Processes

§ 1614.301 Relationship to negotiated grievance procedure.

(a) When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in § 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The dismissal of such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in § 1614.106 and for appeal to the Commission contained in § 1614.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

§ 1614.302 Mixed case complaints.

(a) *Definitions*—(1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

(b) *Election.* An aggrieved person ma initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an actio that is appealable to the MSPB and whc has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appea with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in tha forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor withir 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) *Dismissal.* (1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(d) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable

(f) *Obtaining evidence concerning the complaint.* (1) The administrative judge notify the agent and the agency representative of the time period that will be allowed both parties to prepare their cases. This time period will include at least 60 days and may be extended by the administrative judge upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) If mutual cooperation fails, either party may request the administrative judge to rule on a request to develop evidence. If a party fails without good cause shown to respond fully and in timely fashion to a request made or approved by the administrative judge for documents, records, comparative data, statistics or affidavits, and the information is solely in the control of one party, such failure may, in appropriate circumstances, caused the administrative judge:

(i) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(ii) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(iii) To exclude other evidence offered by the party failing to produce the requested information;

(iv) To recommend that a decision be entered in favor of the opposing party; or

(v) To take such other actions as the administrative judge deems appropriate.

(3) During the period for development of evidence, the administrative judge may, in his or her discretion, direct that an investigation of facts relevant to the complaint or any portion be conducted by an agency certified by the Commission.

(4) Both parties shall furnish to the administrative judge copies of all materials that they wish to be examined and such other material as may be requested.

(g) *Opportunity for resolution of the complaint.* (1) The administrative judge shall furnish the agent and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(2) The complaint may be resolved by agreement of the agency and the agent at any time as long as the agreement is fair and reasonable.

(3) If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the agent and the agency.

(4) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the relief, if any, to be granted by the agency. A resolution shall bind all members of the class. Within 30 days of the date of the notice of resolution, any member of the class may petition the EEO Director to vacate the resolution because it benefits only the class agent or is otherwise not fair and reasonable. Such a petition will be processed in accordance with § 1614.204(d) and if the administrative judge finds that the resolution is not fair and reasonable, he or she shall recommend that the resolution be vacated and that the original class agent be replaced by the petitioner or some other class member who is eligible to be the class agent during further processing of the class complaint. An agency's decision that the resolution is not fair and reasonable vacates any agreement between the former class agent and the agency. An agency decision on such a petition shall inform the former class agent or the petitioner of the right to appeal the decision to the Office of Federal Operations and include EEOC Form 573, Notice of Appeal/Petition.

(h) *Hearing.* On expiration of the period allowed for preparation of the case, the administrative judge shall set a date for hearing. The hearing shall be conducted in accordance with 29 CFR 1614.109 (a) through (f).

(i) *Report of findings and recommendations.* (1) The administrative judge shall transmit to the agency a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class and any individual relief, where appropriate, with regard to the personnel action or matter that gave rise to the complaint.

(2) If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall recommend appropriate relief.

(3) The administrative judge shall notify the agency of the date on which the report of findings and recommendations was forwarded to the agency.

(j) *Agency decision.* (1) Within 60 days of receipt of the report of findings and recommendations issued under § 1614.204(i), the agency shall issue a final decision, which shall accept, reject, or modify the findings and recommendations of the administrative judge.

(2) The final decision of the agency shall be in writing and shall be transmitted to the agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the administrative judge.

(3) When the agency's final decision is to reject or modify the findings and recommendations of the administrative judge, the decision shall contain specific reasons for the agency's action.

(4) If the agency has not issued a final decision with 60 days of its receipt of the administrative judge's report of findings and recommendations, those findings and recommendations shall become the final decision. The agency shall transmit the final decision to the agent within five days of the expiration of the 60-day period.

(5) The final decision of the agency shall require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination.

(6) A final decision on a class complaint shall, subject to subpart D of this part, be binding on all members of the class and the agency.

(7) The final decision shall inform the agency of the right to appeal or to file a civil action in accordance with subpart D of this part and of the applicable time limits.

(k) *Notification of decision.* The agency shall notify class members of the final decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 days of the transmittal of its final decision to the agent.

(l) *Relief for individual class members.* (1) When discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual relief, including an award of attorney's fees and costs, to the agent in accordance with § 1614.501.

(2) When class-wide discrimination is not found, but it is found that the class agent is a victim of discrimination,

of the EEOC the administrative record in the proceeding including—

(a) The factual record compiled under this section, which shall include a transcript of any hearing(s);

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal brief(s) filed, before the Board and the Commission.

§ 1614.307 Organization of Special Panel.

(a) The Special Panel is composed of:

(1) A Chairman appointed by the President with the advice and consent of the Senate, and whose term is 6 years;

(2) One member of the MSPB designated by the Chairman of the Board each time a panel is convened; and

(3) One member of the EEOC designated by the Chairman of the Commission each time a panel is convened.

(b) *Designation of Special Panel member*—(1) *Time of designation.* Within five days of certification of the case to the Special Panel, the Chairman of the MSPB and the Chairman of the EEOC shall each designate one member from their respective agencies to serve on the Special Panel.

(2) *Manner of designation.* Letters of designation shall be served on the Chairman of the Special Panel and the parties to the appeal.

§ 1614.308 Practices and procedures of the Special Panel.

(a) *Scope.* The rules in this subpart apply to proceedings before the Special Panel.

(b) *Suspension of rules in this subpart.* In the interest of expediting a decision, or for good cause shown, the Chairman of the Special Panel may, except where the rule in this subpart is required by statute, suspend the rules in this subpart on application of a party, or on his or her own motion, and may order proceedings in accordance with his or her direction.

(c) *Time limit for proceedings.* Pursuant to 5 U.S.C. 7702(d)(2)(A), the Special Panel shall issue a decision within 45 days of the matter being certified to it.

(d) *Administrative assistance to Special Panel.* (1) The MSPB and the EEOC shall provide the Panel with such reasonable and necessary administrative resources as determined by the Chairman of the Special Panel.

(2) Assistance shall include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the EEOC shall be responsible for all administrative costs incurred by the Special Panel and, to the extent practicable, shall equally divide the costs of providing such administrative assistance. The Chairman of the Special Panel shall resolve the manner in which costs are divided in the event of a disagreement between the Board and the EEOC.

(e) *Maintenance of the official record.* The Board shall maintain the official record. The Board shall transmit two copies of each submission filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings.* (1) The parties shall file the original and six copies of all submissions with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. One copy of each submission shall be served on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be by mail or by personal delivery during normal business hours (8:15 a.m.–4:45 p.m.). Due to the short statutory time limit, parties are required to file their submissions by overnight delivery service should they file by mail.

(4) The date of filing shall be determined by the date of mailing as indicated by the order date for the overnight delivery service. If the filing is by personal delivery, it shall be considered filed on that date it is received in the office of the Clerk, MSPB.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, briefs shall be filed with the Special Panel within 15 days of the date of the Board's certification order. Due to the short statutory time limit responsive pleadings will not ordinarily be permitted.

(h) *Oral argument.* The parties have the right to oral argument if desired. Parties wishing to exercise this right shall so indicate at the time of filing their brief, or if no brief is filed, within 15 days of the date of the Board's certification order. Upon receipt of a request for argument, the Chairman of the Special Panel shall determine the time and place for argument and the time to be allowed each side, and shall so notify the parties.

(i) *Post-argument submissions.* Due to the short statutory time limit, no post-argument submissions will be permitted except by order of the Chairman of the Special Panel.

(j) *Procedural matters.* Any procedural matters not addressed in this subpart shall be resolved by written order of the Chairman of the Special Panel.

§ 1614.309 Enforcement of Special Panel decision.

The Board shall, upon receipt of the decision of the Special Panel, order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board shall apply. These regulations are set out at 5 CFR part 1201, subpart E.

§ 1614.310 Right to file a civil action.

An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

Subpart D—Appeals and Civil Actions

§ 1614.401 Appeals to the Commission.

(a) A complainant may appeal an agency's final decision, or the agency's dismissal of all or a portion of a complaint.

SUMMARY
29 C.F.R. PART 1613

Under the President's Reorganization Plan No. 1 of 1978, responsibility for equal employment opportunity in the federal government was transferred from the Civil Service Commission to the Equal Employment Opportunity Commission. Existing Civil Service Commission regulations at 5 C.F.R. Part 713 were not rewritten, but merely adopted by EEOC and redesignated at 29 C.F.R. Part 1613. Part 1613 governs agency processing of complaints of discrimination. Individual complaints are investigated by the employing agency, with hearing and appeal rights to EEOC. There is no time limit within which the agency must complete its investigation or issue a final decision on the complaint. An employee may elect among the EEO, the MSPB or grievance process; decisions of the latter two on discrimination issues are subject to EEOC review. Class complaints are not investigated by the agency, but proceed to hearing before EEOC, with appeal rights to EEOC. Aggrieved employees or applicants have the right to file a civil action, which terminates administrative processing.

EXECUTIVE SUMMARY
29 C.F.R. PART 1613

Under the President's Reorganization Plan No. 1 of 1978, responsibility for equal employment opportunity in the federal government was transferred from the Civil Service Commission to the Equal Employment Opportunity Commission. Existing Civil Service Commission regulations at 5 C.F.R. Part 713 were not rewritten, but merely adopted by EEOC and redesignated at 29 C.F.R. Part 1613. Consequently, Part 1613 is organized according to the type of discrimination at issue.

Part 1613 sets out agency regulations for processing complaints of discrimination. Before filing a formal complaint of discrimination, a federal employee must undergo precomplaint counseling, during which time a counselor will meet with the complaining party and agency officials to attempt informal resolution. If no settlement is reached, the complaining party may file a formal complaint of discrimination which will be investigated by the agency itself. Following the investigation, a period is again set aside during which another attempt is made at informal resolution. Failing settlement, a proposed disposition is issued and the complainant may request a hearing, or a final decision be issued by the agency, from which the Complainant may appeal to the Office of Federal Operations.

Although the hearing is nonadversarial, the parties may be represented by counsel, and evidence is introduced and conclusions of law are drawn. The Commission's administrative judge issues a recommended decision to the agency, and the agency then issues a final decision. This final decision (or one requested by the complainant without a hearing) may be appealed to the Office of Federal Operations, which will again weigh the evidence and draw conclusions of law.

There is no time limit in which the agency must complete its investigation or issue a final decision. If however, 180 days elapse without the issuance of a final decision, the complainant has the right to file a civil action. The filing of the civil action will result in termination of further administrative processing.

A person cannot file both a mixed case complaint and a mixed case appeal; (s)he must elect the forum in which to proceed. Any MSPB decision on prohibited discrimination may be reviewed by EEOC. Similarly, most federal agency employees cannot file both a Part 1613 complaint and a grievance; they must elect the forum in which to proceed. The employee may appeal the issues of employment discrimination to EEOC.

A group of employees may file a class complaint of discrimination. There is no investigation following the formal complaint; instead, the complaint is forwarded to an administrative judge who will recommend if the class should be rejected or certified. If the class is certified, class members are given the opportunity to opt out, and the matter may proceed to a hearing with the remaining class members before an administrative judge, who conducts the hearing in the same manner as the individual complaint hearing.

29 C.F.R. PART 1613

Under the President's Reorganization Plan No. 1 of 1978, responsibility for equal employment opportunity in the federal government was transferred from the Civil Service Commission to the Equal Employment Opportunity Commission. Existing Civil Service Commission regulations at 5 C.F.R. Part 713 were not rewritten, but merely adopted by EEOC and redesignated at 29 C.F.R. Part 1613. With the exception of subpart D, "Processing Mixed Case Complaints," which was added in 1983, and an amendment in 1987 that clarified and modified various sections, the substance of these regulations remains unchanged.

Part 1613 governs agency processing of complaints of discrimination, the appeal process, and remedial actions. It has separate subparts for processing Title VII, ADEA, and Rehabilitation Act complaints, and for processing individual, mixed case and class complaints. Because the substance of Title VII, the ADEA and the Rehabilitation Act is not at issue, this memo will focus on the procedures for processing complaints under any of these statutes.

A person who believes (s)he has been discriminated against because of race, color, religion, sex, national origin, age or handicapping condition must, within 30 days of the occurrence of the alleged discriminatory event, consult with an equal employment opportunity counselor to try to resolve the matter, The counselor must make whatever inquiry (s)he believes necessary to seek a solution of the matter. After 21 days, the counselor must inform the person in writing of his or her right to file a complaint of discrimination. The complainant must file the complaint within 15 days.

INDIVIDUAL COMPLAINTS

The agency must accept the complaint for investigation or reject it. If a complaint (or an allegation in a complaint) is rejected, the complainant may appeal the rejection to the Commission or file a civil action. If the complaint is accepted for processing, the agency must investigate the facts surrounding the alleged discriminatory event. The investigation must include a thorough review of the circumstances under which the alleged discrimination occurred and a comparison of the members of the complainant's group with other employees in the organizational segment in which the alleged discrimination occurred.

Following the investigation, the agency must give the complainant a copy of the investigative file, and provide an opportunity for the complainant to discuss the investigative file with appropriate officials. If the parties are unable to settle the matter, the agency will issue a proposed disposition of the complaint and will offer the complainant a hearing or a final

decision by the agency. If the complainant fails to act upon these offers within 15 days, the agency may adopt the proposed disposition as its final decision.

If the complainant chooses a hearing before an administrative judge, the administrative judge reviews the investigative file and will remand the matter to the agency if further investigation is needed. If further investigation is not needed, the administrative judge may determine that there are no issues of material fact and issue a recommend decision without holding a hearing. If a hearing is necessary, the administrative judge will receive relevant evidence and order the production of documents. The administrative judge then issues a recommended decision which is binding on the agency unless the agency issues its own final decision within 60 days.

Within 20 days of receipt, the complainant may appeal the final agency decision to EEOC. There is no right to a hearing on appeal. If EEOC orders corrective action, the agency must report the corrective action it has taken. Within 30 days, either party can move to reopen the case; the Commission can move to reopen the case at any time. A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction.

A Title VII or Rehabilitation Act complainant has the right to file a civil action 180 days from the date (s)he filed the formal complaint, 180 days of the date of filing an appeal with the Commission, within 30 days of receipt of the notice of final action taken by the agency, or within 30 days of receipt of the Commission's final action. The regulations do not indicate the statute of limitations for filing a civil action under the ADEA. The filing of a civil action by a complainant terminates administrative processing.

The regulation does not contain any time limits in which the agency must complete its investigation of the complaint or issue its final agency decision.

MIXED CASES AND GRIEVANCES

A complainant cannot file both a mixed case complaint and a mixed case appeal; (s)he must elect the forum in which to proceed. A complainant who files a mixed case complaint is not entitled to a hearing before an EEOC administrative judge. If no agency decision is issued within 120 days, or if the complainant is dissatisfied with the agency's decision on the mixed case complaint, (s)he may appeal the matter to the MSPB. If the complainant is dissatisfied with MSPB's decision on the issue of prohibited discrimination, (s)he may petition the Commission for review. Any dispute between the Commission and the MSPB is certified to a Special Panel for decision.

Employees of certain agencies cannot file both an EEO complaint and a grievance on the same matter; they must elect the forum in which to proceed. An aggrieved employee who files a grievance in writing with an agency whose negotiated agreement with an employee organization permits the acceptance of grievances which allege discrimination prohibited by Part 1613 may not thereafter file a complaint on the same matter under Part 1613. The employee may appeal issues of employment discrimination to the EEOC from the decision of the agency, of the arbitrator on the grievance, or of the Federal Labor Relations Authority on exceptions to the arbitrator's award.

CLASS COMPLAINTS

A group of employees may file a class complaint of discrimination if 1) the class is so numerous that a consolidated complaint of the members is impractical, 2) there are questions of fact common to the class, 3) the claims of the agent are typical of the claims of the class, and 4) the agent will fairly and adequately protect the interests of the class. Unlike individual complaints, there is no investigation following the formal complaint; instead, the complaint is forwarded to an administrative judge who recommends if the class should be rejected or certified. The agency must issue a final decision (from which the class agent may appeal) on the administrative judge's recommendation. If the agency accepts the administrative judge's recommendation certifying the class, all class members are notified of their right to opt out, and the remainder of the the class can proceed to a hearing on the merits. After receiving evidence on the facts, the administrative judge issues a recommended decision which, like the individual complaint, is binding on the agency unless the agency issues its own final decision within 60 days.

A class member may submit a written claim for a remedy within 30 days of notification of the agency's final decision. If the agency disagrees with the member's entitlement to remedial relief, the agency will submit the issue to the administrative judge who issues a recommended decision on the individual claim.

If the complaint is settled, any class member who believes that the settlement is unfair or unreasonable may, within 30 days, notify the agency that the settlement of his/her opinion on the matter and petition that (s)he be substituted as class agent. If a new class agent is substituted, the prior resolution is vacated, and the agent may engage in new settlement negotiations.

A class agent may file a civil action within the same time limits as set out for individual complaints, and like the individual complaint, filing a civil action terminates administrative processing.

Reasons for changing the 1613 Process

1. The process was too complicated and too cumbersome. Complainants were required to know too much about a process that could be very complicated; it was impossible for anyone outside the EEO area to understand the pitfalls that awaited the complainant.

There was too much back-and-forth in the process. There were too many decision points where decisions could cause a case to go in one of many different directions.

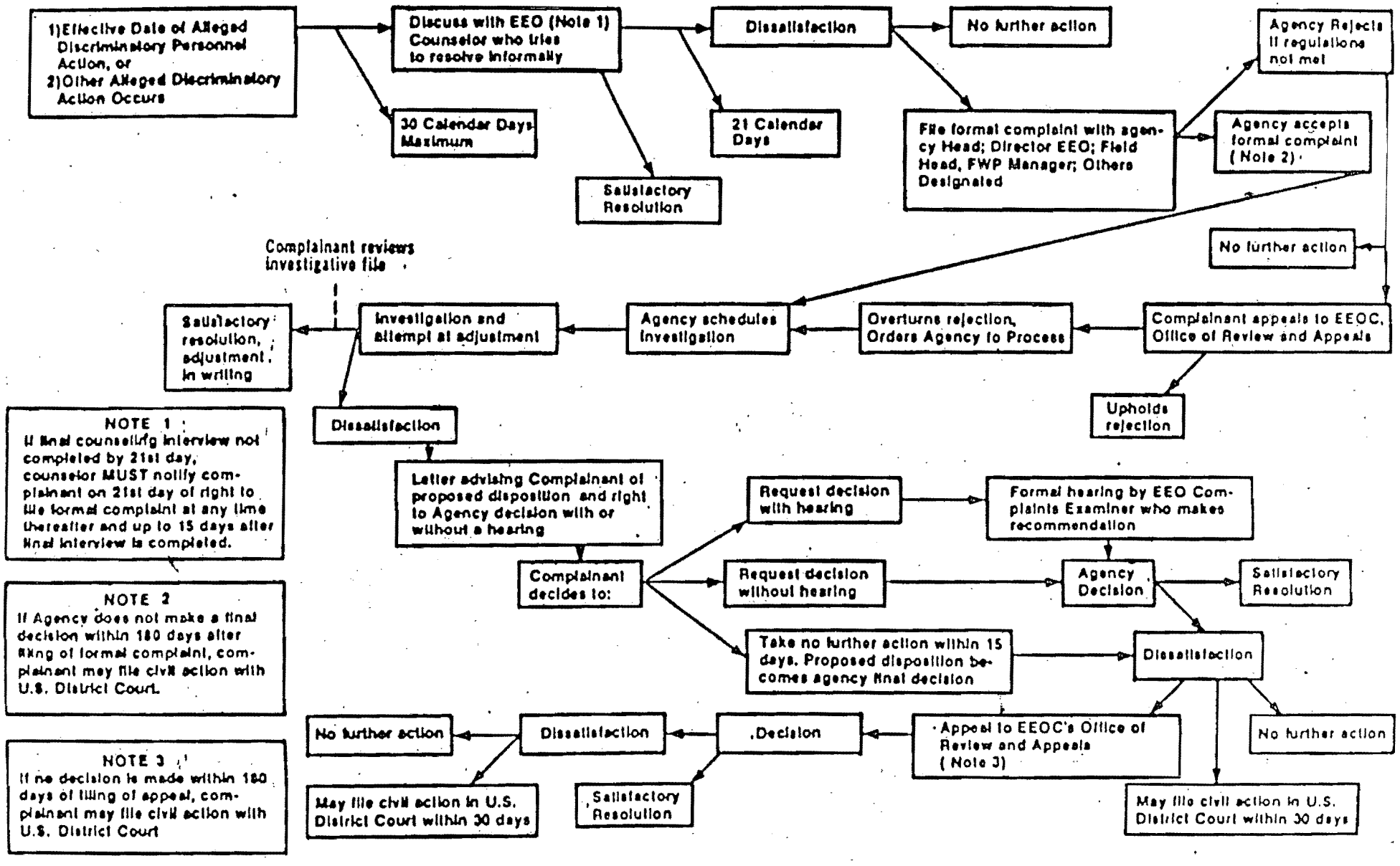
2. The process was not fair - the fox was in the henhouse. Many objected to the absolute control that agencies had during counseling and during investigation. There was no mechanism to oversee what agencies were doing in the counseling or investigative stages. Agencies could reject complaints even if they knew the grounds for rejection were not proper, agencies rejected AJ decisions that found discrimination but accepted those that found no discrimination.

3. The process took too long - there was no timely resolution of complaints.

Prior to 1987, complaints about agencies letting complaints languish in counseling were numerous. While the 1987 amendments to 1613 reduced the number of complaints about eternal counseling, it did not eliminate the problem. Complaint investigation at too many agencies took too long. Every year more than a dozen agencies reported an average complaint processing time of over 1,000 days for merits decisions. Delays

also exacerbated the unfairness in the system - agencies did not have any deadline for moving a case and used delays as a means to ignore some complaints.

PROCEDURES FOR PROCESSING INDIVIDUAL COMPLAINTS OF DISCRIMINATION



Union Calendar No. 287

100th Congress, 1st Session - - - - - - - - - - - House Report 100-456

OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM

TWENTY-NINTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

NOVEMBER 23, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, November 23, 1987.

Hon. JIM WRIGHT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's twenty-ninth report to the 100th Congress. The committee's report is based on a study made by its Employment and Housing Subcommittee.

JACK BROOKS, *Chairman.*

CONTENTS

	Page
I. Introduction	1
II. Background	2
III. Findings and conclusions	3
IV. Recommendations	5
V. Discussion	6
A. The fox in the henhouse, or the accused as judge and jury	6
B. Justice delayed is justice denied	7
C. The backlog grows steadily higher	10
D. Why the delays?	10
E. No big stick at EEOC	11
F. Resources needed for a centralized system	12
G. The interminable regulatory process	13
VI. Conclusion	13

Union Calendar No. 287

100TH CONGRESS 1st Session | HOUSE OF REPRESENTATIVES | REPORT 100-456

OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM

NOVEMBER 23, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

TWENTY-NINTH REPORT

BASED ON A STUDY BY THE EMPLOYMENT AND HOUSING SUBCOMMITTEE

On November 10, 1987, the Committee on Government Operations approved and adopted a report entitled "Overhauling the Federal EEO Complaint Processing System: A New Look at a Persistent Problem." The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

In response to numerous reports of excessive delays and inequitable procedures in handling Federal employees' equal employment opportunity (EEO) complaints, the Employment and Housing Subcommittee conducted an investigation and held a series of hearings beginning in 1985.[1] The hearings examined EEO complaint processing by individual agencies and by the Equal Employment Opportunity Commission (EEOC).

At the subcommittee hearings in October 1985, June 1986, and June 1987, the EEOC itself was the focus. At the September 1986 hearing, the problems of four executive departments were examined. Witnesses at the hearings included individuals who had been severely frustrated by the system in pursuing discrimination

[1] "Processing EEO Complaints in the Federal Sector—Problems and Solutions," October 8, 1985; June 17, 1986; September 25, 1986; and June 25, 1987.

charges against Federal agencies, civil rights advocates, current and former EEOC officials, and officials of other agencies.

In 1986 the subcommittee sponsored an extensive survey of the EEO complaint system for Federal workers by the Washington Council of Lawyers. Representatives of the Washington Council of Lawyers testified at the subcommittee's June 1987 hearing about the results of their study of four Federal agencies, which included a survey of some 350 personnel, interviews with officials, and a statistical analysis. Their report, herein called "Lawyers Report," is reprinted as an appendix to the June 1987 hearing record.

II. Background

In 1978 Congress acceded to Reorganization Plan No. 1, which transferred from the then-existing Civil Service Commission (CSC) to EEOC the responsibility for handling Federal employees' EEO complaints. EEOC continued the CSC procedure of delegating to agencies the responsibility for investigating and deciding discrimination charges made by their own employees.

This system, which has been the subject of repeated congressional and General Accounting Office criticism, as well as almost a decade of planning for changes, remains basically unchanged. Briefly, it provides for the following steps:

An applicant or an employee who believes he/she has been discriminated against takes the problem to an agency EEO counselor, who attempts to resolve it.

Should the counselor's efforts fail, the person may file a formal complaint, which the agency investigates. Upon completing its investigation, the agency makes the case records available to the complainant and attempts to settle the matter.

Should the attempt at settlement fail, the agency presents the complainant with a proposed disposition of the case. The complainant requests a final agency decision or, if not satisfied with the proposal, can ask for a hearing before an EEOC complaints examiner, now called an Administrative Judge.

If a hearing is requested, the case is sent to EEOC. A complaints examiner then holds a hearing on the matter and issues a recommended decision to the agency.

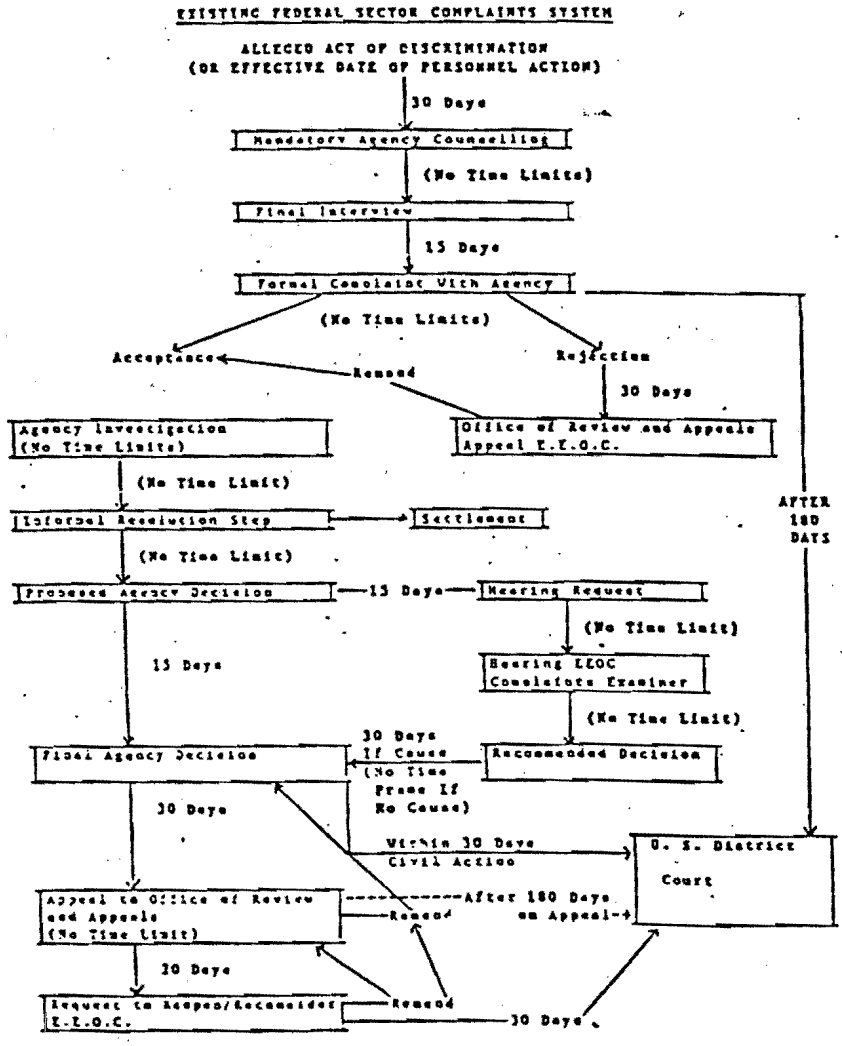
The agency then issues a decision that may or may not agree with the recommendations made by EEOC's complaints examiner.

If the complainant is not satisfied with the agency decision, he/she may appeal that decision to EEOC's Office of Review and Appeals (ORA), which issues the final decision. However, EEOC is not empowered to require agencies to comply with its final decisions.

If the complainant or the agency is not satisfied with ORA's decision, either party can request reconsideration by EEOC's commissioners.

A complainant may file a civil action in Federal district court 180 days after filing the complaint with the agency or within 30 days of receiving the final agency decision.

The following diagram illustrates the complex procedures and the various time limitations:



III. Findings and Conclusions

The committee is compelled to agree with the statement of EEOC Chairman Clarence Thomas (testimony before the subcommittee in 1985, repeated in 1986) that ". . . the current system . . . is ineffective, unnecessarily time-consuming, and ten times more costly than the processing of private employer charges." (I Tr. 63; II Tr. 28.) [2] Similarly, the GAO concluded in 1983 that the system "is nei-

[2] Roman numeral I preceding a transcript (Tr.) reference refers to the printed record of the Oct. 8, 1985 subcommittee hearing. Roman numeral II refers to the June 17, 1986, hearing.

Continued

ther effective nor efficient." ["Problems Persist in the EEO Complaint Processing System for Federal Employees," GAO/FPCD-83-21, p. 26.]

1. The decentralized system under which agencies investigate and act on discrimination charges against themselves is a clear conflict of interest. With "the fox in charge of the henhouse," the system lacks credibility with employees. Fundamental fairness—and, importantly, the perception of fairness—require that an independent third party be the adjudicator of discrimination complaints.

2. Intolerable delays in completing action on employee EEO complaints plague the system at every stage. Most agencies, including the EEOC itself, fail to meet regulatory timeframes. Government-wide, the average time for closure of all cases was 349 days in Fiscal Year 1985. Even worse, the average time for decision on the merits by all agencies was 630 days. The worst agencies were the Departments of Education at 1,709 days, Justice 1,615 days, and Treasury at 1,229 days. Additional delays at the Office of Review and Appeals (ORA) of EEOC present a special problem.

3. The inventory of complaints on hand in the agencies rose from 13,700 in Fiscal Year 1982 through Fiscal Year 1985 to over 19,000. Obviously, the increasingly clogged pipelines contribute to delays and to the frustration of aggrieved Federal workers.

4. There are no incentives or pressures on agencies to meet regulatory deadlines or to expedite any stage of the complaint processing.

5. Part-time or collateral assignments and inadequate training of many EEO personnel underscore the low priority given to the EEO mission by agencies.

6. The system is unnecessarily complex, leading to duplication of efforts, delays, frustration, and loss of morale for EEO staffs as well as complainants.

7. The EEOC, operating under Title VII of the Civil Rights Act of 1964, lacks power to enforce its rulings vis-a-vis other Federal agencies. At the end of an administrative process, which may last 6 or 7 years, an employee may be forced to hire an attorney at his or her own expense in order to go to district court for a judgment to compel compliance by the agency with an EEOC decision. The role of the Justice Department in such a lawsuit poses many problems

8. Since it assumed the Federal sector responsibility in 1979, EEOC has recognized that major changes in the system were required, but it has not yet succeeded in promulgating new regulations to effect such changes. During the past 4 years the subcommittee has heard much testimony from EEOC officials about intentions, drafts, coordination, and re-drafts. Yet at the end of Fiscal Year 1987 we are still far from a revamped Federal EEO complaint processing system.

9. If EEOC is to assume centralized or Government-wide responsibility for processing Federal employee complaints, it will require a sizable increase in staff and budget (a major portion of which could be transferred from the agencies relinquishing the tasks). Ad-

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Roman numeral III refers to the Sept. 25, 1986, hearing. Roman numeral IV refers to the June 25, 1987, hearing.

ditional training for personnel from counselors to Administrative Judges is also essential.

10. A widespread lack of mutual respect and trust between EEOC and many agencies exacerbates the problems of the current system and further delays development of an improved system.

11. Union contracts with the U.S. Postal Service permit workers to file complaints with both the EEO system and the personnel grievance system that leads to the Merit Systems Protection Board (MSPB). This results in a large number of charges that are outside the jurisdiction of Title VII and the EEO system clogging the pipeline and, above all, unnecessarily burdening the the Office of Review and Appeals (ORA) at EEOC.

IV. Recommendations

A. The processing of Federal employees' EEO complaints must be removed from the agencies and centralized in an independent body. Despite persistent criticisms of EEOC's operations in both the public and private sectors, it is clearly the logical and appropriate agency to assume this role. To establish a new entity solely for Federal sector problems would be duplicative and inefficient.

The years of delay in revamping the structure via regulations and the power of OMB to obstruct such regulatory changes show us that congressional action is essential. Reluctance to amend Title VII, while understandable, should no longer block legislation that is necessary for Federal employees to obtain justice.

EEOC must be given clearcut authority to enforce its decisions vis-a-vis other agencies. It is intolerable that an employee can go through a lengthy and complex administrative process, obtain a favorable ruling against the agency, and still be denied relief because that agency chooses not to comply with the EEOC decision. At the very minimum EEOC should be empowered to represent such an employee in district court, should it be necessary to seek a court order enforcing the EEOC decision.

EEOC's administrative judges should have authority to determine whether a hearing is necessary to develop a record adequate to support an adjudication of the case. Judges may consider the information developed during counseling at the agency, material presented at a formal or informal fact-finding meeting held by the judge, data obtained by discovery or investigation authorized by the judge, or evidence adduced at a hearing when the judge deems such to be appropriate.

An appeal to the EEOC (presumably functioning through its ORA staff) by either party should be permitted.

A carefully devised transition plan is essential to avoid overwhelming EEOC with an impossible new workload. Phasing in of the new system could be based on groups of agencies, stage of complaints, or a combination of factors.

The revised statute and implementing regulations must include reasonable deadlines for each stage of complaint processing. Congress must commit adequate resources to permit EEOC to comply with those deadlines. We are convinced that after an appropriate transition period there will be a considerable net saving to the government as OMB transfers funds from agency EEO operations to a

single agency with the advantages of greater expertise and economies of scale.

Precomplaint counseling of employees should remain a responsibility of the employing agencies. The first step for an employee with a job discrimination problem should be close to the worksite and readily accessible. The current statistics which show that over 75 percent of counseling contacts do *not* lead to formal complaints underscore the importance of this step.

However, the role and skills of the counselors must be strengthened. Wherever the size of an agency component justifies it, a full-time counselor should be employed in lieu of the current part-time assignments. Counselors require more initial and updating training. Settlements should be encouraged and facilitated at the counseling stage without, necessarily, a finding of wrongdoing.

The current limitation of 21 days for completion of the counseling process should be maintained, with a written report to the employee by this deadline. Employees should be free to file a formal complaint with EEOC within 15 days of receiving such a report.

B. Administrative judges at EEOC are largely at a classification/pay grade lower than similar officials in other agencies, primarily because their decisions are only recommendations to the agencies. Under a revised statute their decisions would be binding on agencies. The judges' grade should be made equal to others with final decision authority.

Without awaiting other changes in the system, EEOC should move promptly to increase support personnel or equipment available to administrative judges. This can be a cost-effective means of expediting the judges' output.

C. Negotiations with the Postal Service unions are required in order to eliminate the option of "double filing" of complaints under both the grievance and EEO systems. Postal workers have no inherent right to "two bites at the apple" when other Federal workers do not.

V. Discussion

A. THE FOX IN THE HENHOUSE, OR THE ACCUSED AS JUDGE AND JURY

The system of agency self-investigation and decisionmaking is so obviously contrary to normal methods of handling adversary charges that it has been criticized repeatedly by Congress, GAO, civil rights advocates, attorneys and, above all, by complainants who are victimized by it. The system discourages employees from filing complaints as well as discouraging (even intimidating) others from acting as representatives or witnesses for complainants.

The Council of Lawyers study discovered that agency EEO personnel, both counselors, investigators, and even decisionmaking officials, feel pressures to find no discrimination. Some agencies require additional steps and more work to justify findings of discrimination. EEO staff are faced with "difficult demands on them to act as advocates or loyal employees of their agencies and yet give EEO claimants who challenge their agencies' practices a fair shake." (Lawyers Report, Summary p. 6.)

In many instances alleged discriminating officials themselves are involved in various stages of counseling and complaint processing.

Such involvement reduces the likelihood of a settlement that may be viewed as an admission of guilt. Some EEO personnel and agency attorneys reported feeling themselves to be defenders of the agency and adversaries of the complainant. The Lawyers Report concluded: "A significant number of the survey respondents and interviewees viewed the dual responsibilities with which the agencies are endowed—to defend against and to adjudicate discrimination complaints—as creating an intractable conflict of interest that substantially impedes the operation and effectiveness of the EEO administrative process." (Pp. 25-26.)

B. JUSTICE DELAYED IS JUSTICE DENIED

Annual reports issued by EEOC (usually 2 years late) give a shocking picture of the tortuous, snail-like processing of Federal employees' EEO complaints. The bleak statistics have been brought to life for the committee by a continuing flow of individual tales, several of them presented in moving testimony at the subcommittee's hearings.

A State Department political analyst told the subcommittee about her "4½ year nightmare." Jenifer Noyon was fired the day after she filed a complaint of sexual harassment. During the lengthy investigation, a Department attorney reviewing the case admitted that she "wore two hats," representing management and complainants. After State found no discrimination, Ms. Noyon requested an EEOC hearing. The hearing and decision, which found in her favor, took an additional 18 months. The department rejected the EEOC recommendation. Ms. Noyon appealed to EEOC's Office of Review and Appeals, which did not even assign the case for review until some 17 months elapsed. At that point, 4½ years after her termination, Ms. Noyon testified:

> My decision to pursue this case was not an easy one. At . . . the start of the process, a Deputy Assistant Secretary of State warned me that I could ruin my career. I have not been able to find work with the Department of State or other Government agencies and will not be able to do so as long as the case is unresolved. I have been forced to work outside my field in a field that does not make use of my previous training. [With a doctorate, she had to work as a real estate salesperson.] The legal costs have run into tens of thousands of dollars and my lost income is much higher than that. It has been a terrible emotional burden on myself and my family. (II Tr. 5-6)

Eventually there was a happy outcome: In November 1986 the ORA found in Ms. Noyon's favor and the State Department complied with the EEOC order, including reemployment, back pay, attorneys fees, etc.

No outcome was reported by a General Services Administration (GSA) employee, Alex J. Eucare, who spoke for a group of seven career workers who considered themselves as "team players" and filed a class complaint of age discrimination in June 1980. A technical question of timeliness of filing was settled *three times*, delaying consideration of the issues until late 1987. As the clock ticked on, most of the group retired or transferred to other agencies. Mr.

Eucare concluded: "If you feel aggrieved, it is wiser and safer to remain silent. The GSA Office of Civil Rights . . . offers only a siren song luring innocents to the EEOC labyrinth of regulations." (III Tr. 13)

He described the impact of the long drawn-out complaint to the subcommittee:

> There has been a human cost to all of us during this process. A cost measured in added stress and lost dollars. Progress in our careers suffered. Lost were all the career-enhancing opportunities. Some of us were harassed from our jobs, some put on the shelf, others given grade assignment under inexperienced supervisors. We became to GSA not unlike Biblical lepers—not acceptable. (II Tr. 7)

Delay is particularly harmful to complainants in age discrimination cases. Time runs out on them, while agencies can hope that these older workers will retire, move away, or die.

In October 1985 the president of the National Treasury Employees Union, Robert M. Tobias, testified before the subcommittee about sex, race, and age discrimination charges made by a "Mrs. A." in 1980 when she was 69. She sought counseling in July 1980 and filed a formal complaint on October 31, 1980. The agency investigated the matter in 1981 but did not issue its proposed disposition, finding against her, until July 1984. She then requested an EEOC hearing, which was held in September 1985.

Mr. Tobias said that "Mrs. A., now 74, continues to work, is not in the best of health and could conceivably die before the case is finally resolved." (I Tr. 127) In fact, she died of heart failure 2 days after Christmas 1985. On April 11, 1986, the EEOC issued its recommended finding of no discrimination.

Official agency reports reveal the persistent nature of these inordinate delays. For those agencies that had 20 or more closures of cases by agency decision on the merits (i.e., excluding those closed through rejection, cancellation, withdrawal or settlement), the record of the past 5 years was:

Agencies With 20 or More Closures

Median number of days to closure on the merits:	
Fiscal Year:	
1981	716
1982	684
1983	833
1984	569
1985	845
Slowest of these agencies in 1985 were (days):	
Department of Education	1,709
Department of Justice	1,615
Department of Treasury	1,229
Department of the Interior	1,113
Environmental Protection Agency	1,125
Veterans Administration	1,110
Department of Agriculture	1,105

Even closure for reasons short of action on the merits took lengthy periods of time. For agencies with 20 or more closures in Fiscal Year 1985, the median time to *reject* a complaint was 129 days, with EPA taking 1,119 days and the Education Department 951 days.

Although agencies are, theoretically, encouraged to settle complaints as soon as possible after filing, it took a median time of 555 days in Fiscal Year 1985 for these agencies to close cases by settlement, with the Small Business Administration taking 1,570 days, EPA 837 days, and the State Department 738 days. Significantly, the EEOC stated: "Settlement occurred an average of 9.3 months after the complaints were filed in the Federal sector, compared to 4 months after the complaints were filed in the private sector." [EEOC: Report on Pre-Complaint Counseling and Complaint Processing by Federal Agencies for Fiscal year 1985, p. 24.]

Reports have reached the committee of seemingly endless delays at every stage of the complex process. Although the informal counseling stage is supposed to be completed within 21 days, there are cases where many months were consumed with repeated requests for counseling or with assignment of a succession of counselors. The agency investigation, intended to lead to a proposed disposition within 180 days, can take years. The regulation authorizes EEOC to take over a case that is not concluded in 75 days, but it virtually never does so (29 CFR 1613.220(c)). The EEOC Chairman testified that ". . . EEOC has reserved the right to take over a complaint investigation if an agency does not complete the investigation within 75 calendar days. EEOC may also require agencies to expedite processing in other ways. Notwithstanding, agencies are not bound by any time frames and the Commission does not presently reinvestigate the complaints." (III Tr. 7.)

Complainants who request an EEOC hearing before final agency action face additional waits for assignment of a hearing examiner, the holding of the hearing, and finally the examiner's recommended decision (which may even arrive after a court decision makes it moot). Some agencies have complained that much of their apparent delays is caused by excessive time in this EEOC segment of the process, over which they have no control. Unfortunately, EEOC does not keep record of the time elapsing between requests for hearings, holding of hearings, and issuance of recommended decisions.

After all of this expenditure of time and effort, agencies are free to reject the EEOC recommendation. In 1985 agencies rejected over 45 percent of 235 findings of discrimination, while they accepted 95 percent of 1,307 findings of no discrimination.

Employees who appeal agency decisions to EEOC's Office of Review and Appeals (ORA) encounter additional delays. Severe problems of staffing and management plagued ORA for several years, although recent improvements give some basis for encouragement.

Small wonder, then, that the views of countless Federal workers and practitioners of EEO law were echoed by EEOC Chairman Clarence Thomas. At the June 1987 subcommittee hearing Thomas was asked: "[I]s the message to Federal workers that if you can afford to hire an attorney you're better off doing so and going to court right away?" He replied: "The amount of time that it takes for that process to end and then be reviewed by EEOC admittedly—I think there is enough blame to go around for everybody—it takes too long. If there is a way to circumvent that process—and that includes going to Federal court—until that is corrected, then I

would have to suggest that that would be the best way to go." (IV Tr. 75.)

C. THE BACKLOG GROWS STEADILY HIGHER

The statistics showing the Government-wide trend in complaint filing, case closing and number remaining in inventory are self-evident:

Governmentwide	Complaints on hand at end of reporting period	Rate of inventory growth or reduction	
		Number	Percent
Fiscal year:			
1981	15,802	2,068	15
1982	14,989	(859)	(5.4)
1983	16,259	1,000	6.5
1984	17,366	871	5.3
1985	19,051	1,049	5.8

From the beginning of Fiscal Year 1981 to the end of Fiscal Year 1985 the Government-wide inventory of complaints grew by 5,317, an increase of 38.7 percent. Complaints filed rose from 13,525 in Fiscal Year 1981 to 19,386 four years later. While a number of agencies managed to reduce their backlogs or inventories, 25 agencies reported an inventory growth rate of more than 10 percent during FY 1986.

D. WHY THE DELAYS?

Clearly, the agencies are not devoting adequate resources to the EEO program to reduce backlogs and delays. The Lawyers Report found that participants reported that their agencies gave low priority and attention to the EEO operation. They revealed that delays in the process were demoralizing to the staff as well as to the complainants.

In addition to counselors, who are almost always on a part-time or collateral duty status, many investigators and others involved in the EEO process are part-time. Thus they find difficulty in carrying out EEO assignments which usually have less career significance than their primary duties.

It was suggested by some EEO staff and by complainants' attorneys that complainants are held to strict deadlines at each stage of the process, but the agencies have wider latitude. If they, too, were held to time limits, such as the 180-day requirement for reaching a proposed disposition, and penalized for failure to comply with such limits, the entire process would move more expeditiously.

Above all, the numerous steps in this duplicative and complex system lead inevitably to a lengthy process. When added steps are required for a finding of discrimination, the time stretches even farther. In the words of the EEOC Chairman Thomas, it is a "Rube Goldberg design . . . unfair to both the Federal employee and the American taxpayer," (IV Tr. 45.)

E. NO BIG STICK AT EEOC

Executive Order 11478 states; "Section 5 . . . The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission . . ." Unfortunately, this order has not been fully complied with. The question of EEOC's power to compel compliance by Federal agencies with its final orders was discussed at length at subcommittee hearings. EEOC Chairman Thomas stated: "We have no compliance authority in the statute . . ."(I Tr. 87.)

In August 1985, the 11th Circuit Court issued a decision in *Moore* v. *Devine* (767 F.2d 1541) stating that EEOC decisions favorable to a Federal employee were not final adjudications, were not binding on Federal agencies, and thus would have to be relitigated de novo in the district court. That would require an employee to prove his or her entire case again in Federal court when the agency refuses to take the corrective action ordered by EEOC. This decision was termed "a major setback" to improving the complaint processing system by the then ranking minority member of the subcommittee, Howard Nielson (I Tr. 3). Chairman Thomas commented that ". . . this is a classic example of why EEOC has to be totally independent." (I Tr. 57.)

Following this hearing, then Subcommittee Chairman Frank and Ranking Minority Member Nielson wrote to the President expressing their concerns with the implications of the *Moore* v. *Devine* decision and recommended:

> The simplest and most expeditious solution to this problem would be an Executive Order directing all Federal agencies to comply with final decisions of the EEOC in Federal employee discrimination complaint cases. Therefore, we recommend and urge your prompt action to issue such an Executive Order.
>
> We believe the Federal government should be a model employer, and such an Executive Order would be a major step toward providing Federal employees with protection of their civil rights equivalent to that of private sector workers.

The White House replied that ". . . existing enforcement mechanisms adequately protect the legitimate rights of Federal employees to secure relief from unlawful discrimination. . . ." However, the Justice Department at the urging of EEOC and the Lawyers' Committee for Civil Rights Under Law petitioned the Circuit Court to revise or clarify its decision. On January 30, 1986, the Court modified its earlier decision and held that a final EEOC order that is favorable to a Federal employee claiming discrimination is binding upon district courts, and that the district court should not independently determine the merits of an employee's claim in a trial de novo. (*Moore* v. *Devine* 780 F.2d 1559.) The Court noted that that its prior ruling would "undercut the utility of administrative dispute resolution provided [for Federal employees]."

Unfortunately, this decision did not resolve all issues of agency compliance, although ORA maintains that it has achieved "almost 100 percent compliance." (IV Tr. 86.) At the June 1987 hearing

Subcommittee Chairman Lantos strongly urged Chairman Thomas to ask the President to express to Federal agencies his strong support for EEOC decisions as a means of gaining "a great deal of clout." (IV Tr. 51.) Thomas' response was that such support from the top would be helpful for public relations, but that legislative change was required, as well as increased resources, to resolve the issue. (IV Tr. 52.)

F. RESOURCES NEEDED FOR A CENTRALIZED SYSTEM

At his first appearance before the Employment and Housing Subcommittee in 1985 and repeatedly since then, Chairman Thomas has stated that before recommending that EEOC be given responsibility for a centralized system he has two conditions or prerequisites: "One, that we are guaranteed the resources to do it upfront; two, that we have control of personnel coming into our agency, and we don't get other agencies' castoffs and problems." (I Tr. 57.) He is especially concerned that mandatory transfers of personnel to accompany the transfer of function from the agencies would impact seriously on the EEOC staff, leading to reductions in force and otherwise almost paralyzing operations for months. However, the subcommittee heard testimony from a former top EEOC official, Horace G. Bussell, who participated in the 1979 transfer of the program from the Civil Service Commission. Bussell testified, ". . . at that time, the Chair preferred, just as this present Chair prefers, to be able to select his or her own people. So they preferred slots rather than bodies . . . I didn't have the feeling that we are taking the dregs of the [other] organization." (IV Tr. 80.)

Chairman Thomas has estimated that EEOC would require $30 to $50 million added to its $169,520,000 Fiscal Year 1987 appropriation. This would provide for 1,000 to 1,200 employees in addition to the current 3,000. (II Tr. 55.)

OMB estimates that over 2,100 persons are employed in the Federal Government as EEO specialists and over 1,100 perform EEO investigations either full-time or as a collateral duty. (II Tr. 50.) How many of these positions or individuals would be transferred to EEOC cannot presently be estimated, nor can the net saving to the Government. This is especially true because many EEO staff are not carried as a line item but are included in other functional areas in their agencies' budgets.

The Lawyers Report is replete with evidence of the need for increased training of agency EEO personnel. For example, both counselors and complainants agreed that counselors lack adequate knowledge of discrimination law and regulations and are deficient in skills needed to advise complainants or achieve settlements. There are problems, too, with the quality and consistency of investigations. (IV Tr. 110–114.) The Council of Lawyers did not survey or interview EEOC staff, but complaints about their competence and efficiency are widespread in relation to both the private and Federal sector programs. EEOC has recently undertaken extensive training programs that, hopefully, will improve the quality of work.

G. THE INTERMINABLE REGULATORY PROCESS

Improvements, both major and minor, in the Federal EEO system have been under discussion at EEOC ever since it assumed this responsibility in 1978. In 1979–80 EEOC conducted a pilot program under which a centralized, expedited method of processing complaints was tested with highly successful outcomes. A plan to transfer to EEOC the resources necessary to proceed with full-scale centralization was, unfortunately, cancelled by the Office of Management and Budget in December 1980.

In March 1983 Chairman Thomas testified at a congressional hearing that EEOC would shortly develop regulations to revamp the system.[3] A year later the Employment and Housing Subcommittee heard that EEOC regulations for a centralized system were written and moving ahead.[4] In September 1984 the Commission considered but rejected such draft regulations. In June 1985 Mr. Thomas wrote to the subcommittee that "The proposed regulations have been submitted to OMB for coordination." In September of that year he said that the regulations had not yet been coordinated with individual commissioners but were under "informal consideration at OMB." (I Tr. 133–134.) In June 1986 he testified that ". . . proposed regulations have been coordinated with the other commissioners' officies. . . . No formal discussions have been held with the OMB . . ." (II Tr. 31–32.) At that hearing the Associate Director of OMB, Wendy L. Gramm, also tested and indicated willingness to pursue informal review of the draft. (II Tr. 58.) At the June 1987 hearing Mr. Thomas reported on ". . . a preliminary staff draft proposal, not yet approved by the Commission. . . ." (IV Tr. 46.) As of October 1987 the informal submission remains at OMB with no progress in sight.

In the absence of a major restructuring of the complaint processing system, the Commission has worked on an extensive set of amendments to the existing Section 1613 of the regulations. First submitted to OMB in August 1983, these amendments were not approved in toto by the Commission until September 25, 1987. In late October they remained at OMB. If finally approved, these changes will make a number of improvements but will not overcome the underlying problems of the system.[5]

IV. Conclusion

The current system for processing EEO complaints filed by Federal employees is an embarrassment to the Federal Government. It is a system that Rube Goldberg would have been proud of. It lacks all appearance of fairness because agencies investigate and decide charges against themselves. It is unnecessarily complex and inordinately lengthy. Needed changes in the system are beyond the scope of regulations and executive action.

Therefore, Congress must act to centralize the formal complaint process in EEOC, to empower EEOC to enforce its rulings, and to

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[3] March 9–10, 1983, hearing before the Civil Service Subcommittee, House Committee on Post Office and Civil Service, p. 507.

[4] April 25, 1984, hearing on "Contracting Out EEO Complaints," p. 61.

[5] The revised Section 1613 regulations were published in the Federal Register on October 30, 1987, to be effective November 30, 1987.

provide EEOC with the resources it requires to process Federal EEO complaints in an efficient and equitable manner.

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Nutshell Summary of S. 404 :
Federal Employee Fairness Act of 1993

The proposed bill amends Title VII, ADEA and the Civil Service Reform Act (CSRA) to change the federal sector complaint process. Individuals alleging discrimination must file a complaint within 180 days of the discriminatory event. Agencies must conciliate claims and offer counseling throughout the administrative process, although an employee's participation in both functions is voluntary. After attempted conciliation, an employee may elect to proceed administratively using EEOC, MSPB or negotiated grievance procedures. An administrative judge shall issue a determination on the complaint after a hearing using discovery within the judge's discretion and order necessary relief within 210 or 270 days from the filing of the complaint, the longer period applying to class complaints. Either party may appeal the administrative judge's determination to EEOC, and EEOC shall issue its decision within 150 days. The ADEA is amended to allow for administrative complaints using Title VII procedures, but there is no exhaustion requirement. The CSRA is amended to place the election requirement in section 717 of Title VII.

Executive Summary of S. 404 :
Federal Employee Fairness Act of 1993

The proposed bill overhauls the federal sector complaint process by making significant changes to Title VII, ADEA and the Civil Service Reform Act (CSRA).

The proposed bill requires agencies to make counseling available to employees throughout the administrative process, but counseling is not mandatory. It requires agencies to use alternative dispute resolution (ADR) procedures to conciliate claims during a 30 or 60 day period, although participation in ADR programs is voluntary. If conciliation proves unsuccessful, the employee has 90 days to elect to pursue administrative remedies available through EEOC, MSPB or negotiated grievance procedures. The employee may also elect at this point to file a civil action in an appropriate U.S. district court.

S. 404 substantially revises the complaint processing methods currently used by the EEOC and its administrative judges. At the pre-hearing stage, the respondent Federal entity's role is limited to providing relevant information, documents and testimony necessary for the hearing. An administrative judge is appointed by the EEOC to issue a determination on the complaint and order necessary relief within 210 or 270 days from the filing of a complaint, the longer period applying to class complaints. While a respondent would no longer be authorized to unilaterally modify or vacate a determination by an administrative judge, any party may appeal an initial determination to EEOC. The EEOC shall affirm, modify or reverse the findings of the administrative judge within 150 days of receiving the request.

A complainant may file a de novo lawsuit in U.S. district court within 90 days of receiving notice of the right to request an administrative determination. Otherwise, an employee may file suit where the applicable time limit for an administrative judge's determination or EEOC's decision on appeal has expired until 90 days after receiving a decision by the administrative judge or EEOC. A prevailing non-Federal party may collect reasonable attorney's and expert fees, costs and interest. Any amount awarded must be paid from the respondent Federal entity's appropriated funds. A complainant or EEOC may bring suit to enforce a settlement agreement, an administrative judge's order, or an order of the Commission.

The bill amends the ADEA to allow employees to file complaints with EEOC using Title VII procedures. It continues to allow employees to bypass the administrative process provided they give EEOC at least 30 days notice of their intent to sue and the suit is brought within 2 years after the alleged violation.

The CSRA is amended to place the election requirement in section 717 of Title VII. The current mixed case scheme and special panel procedures have been deleted.

Summary of S. 404 :
Federal Employee Fairness Act of 1993

The Federal Employee Fairness Act of 1993 proposes to amend sections 701 and 717 of Title VII of the Civil Rights Act of 1964, section 15 of the Age Discrimination in Employment Act of 1967, and sections 7121 and 7702 of the Civil Service Reform Act of 1978. The proposed effect on each of these statutes is summarized below.

Proposed Amendments to Title VII

Alternative Dispute Resolution (ADR)

Although S. 404 requires agencies to use alternative dispute resolution processes to conciliate each claim alleged in a complaint, a complainant's participation in ADR is voluntary and does not affect his rights. ADR procedures take place during a 30-day period beginning on the date respondent receives the complaint, and may be extended an additional 30 days with the complainant's consent to enable the parties to enter into a settlement agreement or otherwise resolve the complaint. If the ADR procedures require a conciliator, the conciliator shall be appointed by the EEOC.

If the parties fail to settle the complaint during the applicable ADR period, the respondent Federal entity must notify the complainant in writing, before the ADR period expires, that the employee has 90 days from receipt of such notice to make a written request with the EEOC for (1) a hearing on the claim before an EEOC administrative judge, (2) a determination by the MSPB if the claim is within the MSPB's jurisdiction, or (3) a determination under grievance procedures for claims not appealable to MSPB. A complainant may not pursue further administrative or judicial remedies until the applicable ADR period has expired.

Administrative Complaint Process

The proposed bill requires agencies to make counseling available throughout the administrative process to an employee who believes a Federal entity has discriminated against him, but such counseling is not mandatory. An agency must also assist an employee in naming the proper respondent in his complaint, and inform the employee of all applicable procedures and deadlines.

Under the proposed bill, an employee is obligated to file his complaint of discrimination with the Federal entity where the discrimination allegedly occurred or any other entity of the Federal Government, including the EEOC, within 180 days of the discriminatory event. Within 3 days after receiving the complaint, the respondent must notify the Commission of the complaint and the identity of the aggrieved employee. Within 10

days after receiving the complaint, the respondent must transmit the complaint to the Commission.

EEOC Administrative Judge Process

If, at the conclusion of the ADR process described above, the complainant files a request with EEOC for a hearing before an administrative judge, EEOC must transmit a copy of the request to the respondent and appoint an administrative judge to make a determination on the claim. Should the complainant elect to have his claim determined by MSPB or through grievance procedures, EEOC must transmit complainant's request to the appropriate agency. After receiving a copy of complainant's request for an administrative determination by the EEOC or the MSPB, the respondent must transmit a copy of all documents and information relevant to the claim to the appropriate agency.

A respondent must collect and preserve all documents and information relevant to a claim of discrimination, in accordance with rules issued by the Commission, from the time a complaint is received until all available administrative and judicial proceedings are concluded. A person who is alleged to have participated in the discrimination or who, as the complainant's supervisor, is alleged to have been aware of the discrimination but failed to take reasonable action to stop the discrimination may not fulfill the recordkeeping requirements or conduct any investigation relating to the complaint.

Upon determining that the respondent has failed to produce all relevant information in response to the complaint without good cause shown, the administrative judge shall require the respondent to provide any additional necessary information and documents and to correct any inaccuracies in the information and documents received.

An administrative judge may dismiss any frivolous claim contained in the complaint, or a complaint failing to state a claim for which relief can be granted. If a claim or complaint is dismissed by the administrative judge, the employee has 90 days from the date such notice is received either to request that the EEOC review the dismissal or to commence a civil action in U.S. district court. For those claims not dismissed, the administrative judge shall conduct a hearing and make a determination on the merits of each nonfrivolous claim including those appealable to the MSPB which arise from the factual circumstances of the complaint. Following a determination that an employee was subject to discrimination, the administrative judge shall notify the person who engaged in discrimination of the allegations raised in the complaint. The written determination of the administrative judge must generally be issued within 210 days from the filing of an individual complaint, or 270 days after the filing of a class complaint, and

may not be reviewed, modified or vacated by the respondent Federal entity.[1] Unless a civil action is brought within the 90 day period, any party may bring an appeal, requesting that EEOC review the determination of the administrative judge, and affirm, reverse or modify such determination generally within 150 days of receiving the request.[2]

Discovery is available to the same extent as in a civil action within the discretion of the administrative judge. Any party failing to respond completely and timely to a discovery request made or approved by the administrative judge, when the request for information or a witness is within the control of the party failing to respond, may be subject to sanctions deemed appropriate by the administrative judge. For example, the administrative judge may draw adverse inferences concerning information or testimony withheld and consider those matters to be established in favor of the opposing party, exclude evidence offered by a party failing to respond, grant relief to the employee, or take any other action considered appropriate.

Subpoenas shall be issued by the administrative judge to compel the production of information or the attendance of witnesses from the alleged discriminating Federal entity. Subpoenas shall be issued by the Commission to compel the production of information or the attendance of witnesses from other Federal and non-Federal entities. Jurisdiction is vested in the U.S. district court system to enforce non-compliance with subpoenas issued in EEOC administrative proceedings.

Remedies - Administrative Process

The administrative judge is authorized to award any and all relief contained in section 706 (g) and (k) of Title VII including equitable relief for intentional discrimination, reasonable attorney's fees for a prevailing non-Federal party, and costs.

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[1] The time limit for an administrative judge to issue an order will not begin to run until 30 days after the administrative judge is assigned to the case if he or she certifies in writing that the 30 day period is necessary to complete the administrative record. The bill also contains provisions for an additional 30 day extension of the time limit and for further extension by the Commission if manifest injustice would occur without the extension.

[2] The bill provides an additional 30 days for the EEOC to issue its determination where it certifies in writing that an extension is necessary because of unusual circumstances that prevented the Commission from complying with the initial 150 day time limit.

The administrative judge shall decide whether the claim may be maintained as a class proceeding, and, if so, establish the relevant members of the class to the proceeding.

An EEOC administrative judge may request that a member of the Commission stay a personnel action by the respondent against the employee, such stay to exist for a maximum of 45 days, or for any period deemed appropriate by the full Commission.

Referral to Special Counsel

An order by the administrative judge or Commission finding intentional unlawful discrimination shall be referred to the Special Counsel within 30 days of the issuance of the order. The Special Counsel shall thereafter conduct an investigation and may initiate disciplinary proceedings against any person identified as engaging in intentional unlawful discrimination.

Recordkeeping and Rulemaking

Each respondent Federal entity shall submit a report to the EEOC by October 1 of each year describing the resolution of complaints during the preceding year, and the measures taken by respondent to lower the average number of days necessary to resolve such complaints. By December 1 of each year, EEOC shall submit to Congress a report summarizing the information reported by all respondents.

Within 1 year after the date of enactment of the Act, EEOC shall issue rules to assist Federal entities in complying with section 717(d) of Title VII, as amended by the Act. The rules shall establish a uniform written official notice to facilitate compliance with section 717, and requirements relating to a respondent Federal entity's collecting and preserving documents and information.

The EEOC, in coordination with Federal intelligence agencies, shall issue regulations to ensure the protection of classified and national security information used in administrative proceedings. The regulations must ensure that complaints bearing upon classified information must only be handled by personnel with appropriate security clearances.

Suit Rights

An employee may file a lawsuit in U.S. district court for de novo review of a complaint within 90 days of receiving notice from the respondent Federal entity that the employee may request an administrative determination by the EEOC, MSPB or under a negotiated grievance procedures. Moreover, an employee may commence a civil action in U.S. district court where the

applicable time period for the administrative judge's determination or EEOC's decision on appeal has expired until 90 days after receiving the administrative judge's determination or EEOC's decision. When a lawsuit is timely filed, the administrative judge's or Commission's jurisdiction over the case ceases.

Remedies - Civil Actions

The proposed bill allows a prevailing party in a civil action, except for a Federal entity, to collect reasonable attorney's and expert fees, costs, and interest. Any amount awarded must be paid from funds made available to the Federal entity by appropriation or otherwise.

A prevailing party or the Commission may bring a civil action in an appropriate U.S. district court to enforce (1) a settlement agreement, (2) the order of an administrative judge if not subject to further administrative or judicial review, or (3) an order by the Commission if not subject to further judicial review.

Effective Date

Although the proposed effective date of the Act is January 1, 1994, the amendments to section 717 of Title VII apply only to complaints filed on or after the effective date of the Act.

Proposed Amendments to the ADEA

The proposed bill amends section 15 of the Age Discrimination in Employment Act by allowing federal employees to file a complaint with EEOC using the same procedures as those under Title VII. Under the ADEA, the EEOC and its administrative judges are vested with broad authority to award legal or equitable relief to an individual as will effectuate the purposes of the ADEA. An individual alleging age discrimination may also bypass the administrative process entirely, and commence a civil action in an appropriate U.S. district court provided that EEOC is given at least 30 days notice of the intent to file suit and the suit is brought within 2 years after the alleged violation.

Proposed Amendments to Grievance Procedures

The bill proposes to amend section 7121 of the Civil Service Reform Act to delete the current provision requiring election between a statutory procedure and the negotiated grievance procedure. The bill places the election requirement currently found in section 7121(d) into section 717 of Title VII. Thus, actions appealable to MSPB or covered under laws administered by the EEOC may be raised under negotiated grievance procedures

provided that the employee makes such an election under section 717 of Title VII.

An employee or applicant who is affected by an action appealable to MSPB and who alleges that a basis for the action was discrimination prohibited by a statute or regulation enforced by EEOC shall file a complaint with EEOC and elect to pursue the negotiated grievance, MSPB or EEOC procedures. The bill proposes to eliminate the current mixed case scheme in which complainants may request EEOC review of MSPB decisions and vice versa. It also eliminates the special panel procedures currently found in section 7702. If an employee elects to follow EEOC procedures and his complaint is dismissed by the EEOC, the employee shall have 90 days to pursue the action through negotiated grievance or MSPB procedures.

An employee may commence within 120 days of a final decision on his or her grievance a civil action in an appropriate U.S. district court. If a final decision has not been made on an employee's grievance after 120 days following the election, an employee may file a civil action in an appropriate U.S. district court within an additional 120 days.

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103D CONGRESS
1st Session

SENATE

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FEDERAL EMPLOYEE FAIRNESS ACT OF 1993

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

together with

ADDITIONAL VIEWS

TO ACCOMPANY

S. 404

TO AMEND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 TO IMPROVE THE EFFECTIVENESS OF ADMINISTRATIVE REVIEW OF EMPLOYMENT DISCRIMINATION CLAIMS MADE BY FEDERAL EMPLOYEES, AND FOR OTHER PURPOSES

OCTOBER 27 (legislative day, OCTOBER 13), 1993.—Ordered to be printed

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FEDERAL EMPLOYEE FAIRNESS ACT OF 1993

OCTOBER 27 (legislative day, OCTOBER 13), 1993.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 404]

The Committee on Governmental Affairs, to which was referred the bill (S. 404) to amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

CONTENTS

		Page
I.	Summary of Purpose	1
II.	Background and Need for Legislation	2
III.	History of S. 404	13
IV.	Committee Vote	14
V.	Section-by-Section Analysis	30
VI.	Matters to be Discussed Under Senate Rules	36
VII.	CBO Cost Estimate	37
VIII.	Additional Views of Senators Roth, Cohen, and Cochran	39
IX.	Additional Views of Senator Stevens	43
X.	Changes in Existing Law	44

I. SUMMARY AND PURPOSE

The purpose of S. 404 is to amend Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967

to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees by removing the adjudication of equal employment opportunity (EEO) claims from the agency against which the claim is made and placing the adjudication of such claims at the Equal Employment Opportunity Commission (EEOC). This proposal is to be achieved by providing an equitable time frame for the processing of such claims; providing various procedures designed to increase due process to the complainant in the adjudication of EEO claims; simplifying the procedures for the filing of adverse action claims based on discrimination; and requiring the referral of recommendations to the Office of Special Counsel (OSC) for prosecution under section 1215 of title 5 United States Code for disciplinary actions against employees found to have discriminated.

II. Background and Need for Legislation

Prior to introduction of the bill, Chairman John Glenn of the Committee on Governmental Affairs requested an investigation by the U.S. General Accounting Office (GAO) which conducted a two-year investigation into the processing of EEO complaints by the EEOC and the Federal agencies. A series of public hearings were held in response to the GAO findings. On May 16, 1991 the Honorable Evan Kemp, Chairman of the EEOC, testified on behalf of the EEOC regarding regulations implementing the new EEOC procedures, affirmative action plans filed by federal agencies with the EEOC, and the promotion, retention and recruitment of women and minorities in federal agencies.

The General Accounting Office also released the results of their report. The panel of GAO personnel testifying before the Committee on Governmental Affairs included Mr. Bernard Ungar Director, Federal Human Resources Management Issues, Mr. Clifford Douglas and Joseph Sellers, Esq. Executive Director of the Washington Lawyers Committee for Civil Rights Under Law testified regarding the barriers faced by women and minorities in attempting to break the "glass ceiling." Jane Christiansen, President of the National Federally Employed Women organization also testified on the barriers to promotions for women in the Federal sector, particularly, beyond the GS–15 level.

On October 23, 1991, testimony was presented by a panel of former and current federal employees who had filed EEO complaints and who were knowledgeable concerning systemic problems within the process. Penny Patterson an inspector with the Department of the Treasury's Bureau of Alcohol, Tobacco, and Firearms and Ms. Loretta Thomas, an auditor with the Department of Treasury, are both current employees of the Federal Government and offered testimony on problems they have experienced with the EEO complaint system. Former FBI agent, Mr. Donald Rochon, and former Department of the Navy EEO counselor, Ms. Virginia Delgado, testified concerning the wrongful discrimination they suffered because of race and gender bias, respectively. Professor David Kairys of the Temple University School of Law also testified regarding the legal processes involved in the EEO complaint system. Mr. Bernard Ungar of the GAO also gave the Committee an updated report on the results of their continuing investigation.

On May 26, 1993, testimony was presented by Senator Barbara Mikulski (D–Maryland), a cosponsor of S. 404. The GAO, represented by Nancy R. Kingsbury, accompanied by Barney Gomez, Cecelia Porter and Douglas Sloane also testified. Additionally, a panel of current federal employees testified regarding their experiences with the EEO complaint process system. This panel included the following witnesses: Diana Miller of the Department of Army; Suzane Doucette of the FBI; Marilyn Hudson of the Department of Justice, U.S. Attorney Office for Eastern Tennessee; Curtis Cooper and Internal Affairs supervisor at the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury; and Sandra Hernandez, Special Agent, Bureau of Alcohol, Tobacco and Firearms of the Department of Treasury. These witnesses eloquently related their personal stories of delay and denial of justice and retaliation by their agency as a result of entering the EEO complaint process. The consensus of this panel was that the federal EEO complaint process is fraught with unfairness, since an accused agency is allowed to investigate itself.

S. 404 as amended by the Committee, would improve the effectiveness of administrative review of employment discrimination claims. The bill requires agencies to make counseling on the EEO process available to complainants throughout the process and to establish a voluntary alternative dispute resolution process but specifies that failure to accept such arbitration or counseling is not a bar to the filing of a complaint.

The bill requires the complainant to file with the agency or EEOC within 180 days after the discriminatory event. It grants the agency 30 days commission to attempt to conciliate the claim before it allows the complainant to request review or file a civil action.

S. 404, as reported by the Committee:

Grants the Commission the power to stay personnel actions if necessary to carry out the purposes of the act. In addition, the Commission is granted subpoena power to compel the production of documents information or witnesses by federal or non-federal entities or employees.

Requires the agency to provide all relevant information to the Commission and to grant the complainant a reasonable amount of official time to prepare for an administrative or civil court proceeding related to the claim. The administrative judge (AJ) of the Commission is required to determine if the record is complete and accurate, and may within his or her discretion impose sanctions upon the agency for failure to provide information within its control. The AJ shall require the agency to obtain or correct any necessary information.

Permits parties to conduct discovery to the extent deemed appropriate by the AJ and permits the AJ to impose sanctions on parties who fail to comply to requests for information.

Provides for dismissal of frivolous claims and an opportunity for a hearing on nonfrivolous claims reasonably expected to arise from the facts on which the complaint is based. It requires the AJ to issue a decision within 210 days and provides for reasonable extensions of time in specified circumstances. It makes the order of the AJ final and enforceable with respect

to any part of relief granted which is not appealed. H.R. 3613 permits the complainant to appeal the AJ decision to the Commission or to civil court within 90 days of notice from the AJ.

Requires the Commission to affirm, reverse or modify the applicable provision of the order of the AJ within 150 days after receipt of request for review if supported by substantial evidence. It requires that the findings of fact of the AJ are conclusive unless the commission determines that they are clearly erroneous.

Allows the complainant to file a civil suit seeking de novo review within 90 days of the Commission's decision and notice. It also allows the complainant to file seeking de novo review where the commission has failed to act within 300 days of the initial filing or within 180 days after the timely request for appellate review by the commission.

Authorizes the AJ and the Commission to award reasonable attorney fees and other litigation expenses as a court has authority to award under section 706(k) of title VII of the Civil Rights Act of 1964. It allows the Commission or the complainant who prevails on a claim to bring a civil action in district court to enforce settlements or orders of the AJ or the Commission that are not on appeal. It requires any award under this section to be paid by the Federal entity that violated the act.

Requires the AJ, the Commission, or the court to make a finding identifying the person(s) who intentionally committed the wrongful discrimination. Where liability is found for intentional discrimination, it requires the deciding authority to transmit to the Office of Special Counsel (OSC), a copy of the decision and the record for investigation pursuant to 5 U.S.C. section 1214.

A. AN EFFECTIVE EEO PROCESS IS CRITICAL TO THE FUTURE OF THE FEDERAL GOVERNMENT

An effective EEO process will be increasingly critical to the operation of the Federal Government. Workforce projections for the future of America show women and minorities will become an expanding force in the workplace. Indeed, Civil Service 2000, a 1988 study by the Hudson Institute found that non-whites, women, and immigrants will make up more than 80% of applicants for Federal employment by the year 2000. In 1991, the Department of Labor issued Workforce 2000 which found that in the year 2000 the workforce will be more diverse; it will include more women, more minorities and will require more technological skills.

In October, 1992, the U.S. Merit Systems Protection Board issued its report, "A Question of Equity: Women and the Glass Ceiling in Federal Government." Findings of the report include the following:

> Women do confront inequitable barriers to advancement in their Federal careers. These barriers take the form of subtle assumptions, attitude, and stereotypes which affect how managers sometimes view women's potential for advancement and, in some cases, their effectiveness on the job.

Contrary to conventional wisdom, women are not promoted at a lower rate than men at the GS/GM level and above, but rather face obstacles to advancement at lower levels in the pipeline. Women in Professional occupations are promoted at a lower rate than men at two critical grades, GS 9 and GS 11. As these grades are the gateway through which one must pass in moving from the entry level to the senior level, this disparity has the effect of reducing the number of women eligible for promotion in higher graded jobs. Results from a governmentwide survey of employees currently in grades GS 9–15 and the SES confirm that women at these levels have been promoted, on average, less often than men who have comparable amounts of formal education and experience, and who entered Government at the same grade levels as the women.

Given current trends, the percentage of Professional and Administrative jobs held by women will grow from 34 percent in 1990 to 42 percent by 2017. But even by 2017 women will remain significantly underrepresented in senior levels, holding less than one-third of senior executive positions. Unless action is taken, a dramatic increase in the representation of women in higher graded jobs will be precluded both by the slow process of advancement into higher graded jobs in general, and by the lower rate of promotion encountered by women.

Women receive performance appraisals that are as good as or better than men's, and women surveyed expressed just as much commitment to their jobs and career advancement as men. However, there is evidence to suggest that women are often perceived to be less committed to their jobs than men. Particularly susceptible to this misperception are women in the first 5 years of their careers and, throughout their careers, women with children, who are promoted at an even lower rate than women without children.

A significant minority of women in grades GS 9 and above believe they often encounter stereotypes that cast doubts on their competence, and that attribute their advancement to factors other than their qualifications.

Minority women appear to face a double disadvantage. Their representation at top levels is even less than that of nonminority women, and minority women currently in grades GS 9 and above have been, on average, promoted less often than nonminority women with the same qualifications.

The General Accounting Office examined the existence of a glass ceiling in the federal workforce. The Governmental Affairs Committee's review of workforce demographics for 1990 from the Office of Personnel Management Annual Report found:

While men constitute 50% of the current federal workforce, they make up 81% of the General Schedule (GS) 13–15 levels, and 88% of the Senior Executive Service (SES), the highest positions in Federal Government.

Women constitute 75% of the GS 1–6 levels (mostly clerical and entry level positions), and only 11.1% of SES positions.

Minorities and women constitute 84% of the GS 1–6 levels.

Africian Americans are 25% of the GS 1–6 levels, but only 6.5% of the GS 13–15 levels, and 4.7% of SES positions.

The average grade level for men is approximately three full grades above the average grade level for women; 10.3 for men 7.3 for women.

Since May 1991, the General Accounting Office (GAO) has issued a series of five reports on the government's equal employment opportunity efforts. The GAO's work in this area is important and instructive to understanding how to effectively manage the changing workforce. In its November 1991 report, GAO pointed out that even though the Federal Government has made progress towards a federal workforce that is reflective of the Nation's diverse population, some distance remains to be covered. In addition, the affirmative action planning process has lacked priority, agencies vary in their success in achieving representation and the discrimination complaint process is often reported in need of repair. GAO maintains that these areas where further improvement is necessary point to the need for continued application of a strong federal affirmative action employment program.

Meanwhile currently in the Federal Government, women and minorities are hitting a "glass ceiling" in their efforts to obtain high level positions. The glass ceiling is defined as those artificial barriers based on attitudinal or organizational bias that prevent qualified individuals from advancing upward in their organization. A 1991 Labor Department study indicates the clear presence of a glass ceiling in the private sector. Although there is no single answer to the glass ceiling dilemma, a fair and effective mechanism to redress wrongful discrimination in the workplace is essential to eliminate the glass ceiling.

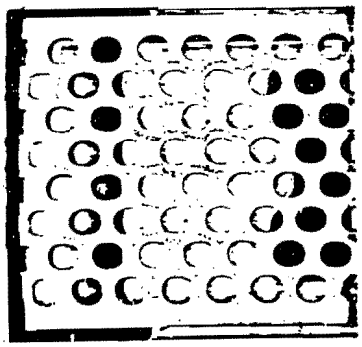
As Gregory Lewis wrote in the May/June 1988 issue of Public Administration Forum, in an article submitted to the Governmental Affairs Committee:

> Women and minorities made progress toward greater representation * * * the pace was not rapid. It will take another 30 years at this rate before women and minorities fill half the positions at GS–13 and above, and unexplained salary differences will still remain.

In conclusion, while statistical analysis indicates that some progress has been made, the glass ceiling remains readily apparent. Testimony before the numerous Committees of Congress who have held oversight hearings on this issue, including the House Committee on Government Operations, House Committee on Post Office and Civil Service, and the Senate Committee on the Judiciary, as well as the Senate Committee on Governmental Affairs, indicates that there are very real discriminatory practices and behavior that contribute to such ceilings. Such practices may include: subjectivity in selection process, denial of equal opportunities to acquire the requisite experience and skill, and exclusion of minorities and women from professional developmental tracks.

Attorney Joseph Sellers in testimony before Senate Committee on Governmental Affairs on May 16, 1991 stated:

> As the workforce changes, strong affirmative action progresses, and a fair and effective mechanism to redress discriminatory practices will continue to be essential to the elimination of injustices in the workforce. Given that, in the Federal Government, the process established to remedy discrimination is controlled by the agencies that are alleged to have discriminated, the fact that the glass ceiling and discriminatory behavior remains after 20 years is not surprising.

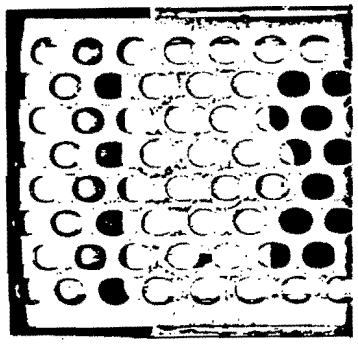


B. THE CURRENT EEO PROCESS

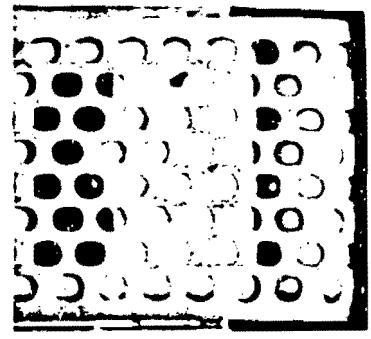
1. History of the Federal sector EEO process: Legislation mandating equal opportunity in Federal employment was first enacted under section 717 of title VII of the Civil Rights Act of 1964 (P.L. 88–352; 78 Stat. 253). A prohibition against discrimination by the Federal Government had been recognized judicially under the due process clause of the Fifth Amendment in 1954 under *Bolling* v. *Sharpe*, 347 U.S., 497, and President Eisenhower had issued an Executive order banning discrimination in employment by the Federal Government in Executive Order 10590 issued January 19, 1955.

Passage of the 1964 Civil Rights Act followed a decade of public protest over racial discrimination in such areas as voting rights, public accommodations and facilities, education, and housing, as well as employment. Title VII mandated equal employment opportunity for workers in both the public and private sectors. In 1972, statistical studies presented to Congress showed that minorities and women continued to be denied access to large numbers of Government jobs, particularly in higher grade levels. In addition, testimony critical of the complaint procedure claimed that it was weighted in favor of the agency and that the appeals process lacked adequate remedies.

The Equal Employment Opportunity Act of 1972 (P.L. 92–261; 86 Stat. 103), amending the Civil Rights Act, addressed these problems by emphasizing the ban on discrimination in Federal employment on the basis of race, color, religion, sex, or national origin and by requiring Federal departments and agencies to develop and carry out affirmative action plans to redress racial discrimination. The Civil Service Commission was authorized to enforce this policy within the Federal service, and individual Federal employees were granted the right to bring civil action in Federal court after exhausting their agency's administrative remedies. In 1978, all functions related to equal employment opportunity in Federal Government employment were transferred from the Civil Service Commission to the Equal Employment Opportunity Commission under Reorganization Plan No. 1.



In his message to Congress transmitting the plan, President Jimmy Carter cited the need for a "unified, coherent Federal structure to combat job discrimination in all its forms." Also cited by the President was "the confusion and ineffective enforcement for employees, regulatory duplication, and needless expense for employ-



ees" brought on by fragmentation of authority among 18 governmental units and the need for uniform standards and standardized data collection procedures. (Public Papers of the Presidents of the United States. Jimmy Carter. Message to Congress Transmitting Reorganization Plan No. 1 of 1987. February 23, 1978. Washington, U.S. Govt. Print Off., p. 400.)

2. The current EEO process provides for the following steps:

An applicant or an employee who believes he/she has been discriminated against takes the problem to an agency EEO counselor, who attempts to resolve it.

Should the counselor's efforts fail, the person may file a formal compliant, which the agency investigates. Upon completing its investigation, the agency makes the case records available to the complainant and attempts to settle the matter.

Should the attempt at settlement fail, the agency presents the complainant with a proposed disposition of the case. The complainant requests a final agency decision or, if not satisfied with the proposal, can ask for a hearing before an EEOC administrative judge (AJ).

If a hearing is requested, the case is sent to the EEOC. An AJ then holds a hearing on the matter and issues a recommended decision to the agency.

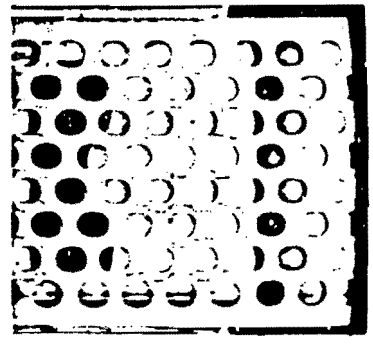
The agency then issues a decision that may or may not agree with the recommendations made by the EEOC's AJ.

If the complainant is not satisfied with the agency decision, he/she may appeal that decision to the EEOC's Office of Review and Appeals (ORA), which issues the final decision. However, EEOC is not empowered to require agencies to comply with its final decisions.

If the complainant or the agency is no satisfied with ORA's decision, either party can request reconsideration by the EEOC's commissioners.

A complainant may file a civil action in Federal district court 180 days after filing the complaint with the agency or within 30 days of receiving the final agency decision.

C. SPECIFIC CRITICISMS OF THE PROCESS AND THE LEGISLATIVE SOLUTIONS



1. Conflict of Interest

The EEOC has long been dissatisfied with the regulatory procedures contained within 29 CFR 1613. The agency, after negotiated rulemaking with several federal agencies, promulgated a new rule on October 1, 1992 to deal with procedural delays, published as 29 CFR 1614.

Although a slight improvement from the existing rules, the new rules do not adequately address solutions to an equal employment opportunity complaint process that is fraught with conflict of interest and insufferable delay. However, reaching that small level of success was difficult and time-consuming. S. 404 is needed to eliminate unnecessary delays in the complaint process system.

Washington Council of Lawyers Study: A study of EEO officials on the effect of the agency adjudicating the claim against itself was conducted by the Washington Council of Lawyers, a non-partisan,

voluntary bar association. This study, done in 1987, was submitted to the Committee on Governmental Affairs as a supplement to testimony offered by Attorney Joseph Sellers when he testified before the Committee on October 26, 1991.

According to Mr. Sellers, the survey of 350 EEO counselors in four federal agencies found an overwhelming majority of the EEO counselors believed that the conflict inherent in the federal EEO complaint process impaired its function. They indicated that they often had little clout to deal with the issue when the alleged discriminator held a higher position in the agency. Additionally, the EEO counselors reported that in situations where they concluded that discrimination had occurred, scrutiny of their decision and their job performance greatly increased. Such actions created an incentive for some EEO counselors to find that the agency had engaged in no discrimination.

EEO officers reported that witnesses against the agency often feel intimidated by supervisors. In some situations, the alleged discriminating official, who often views settlement as a concession of wrongdoing and opposes it for that reason, must approve the offer. At one agency, the general counsel has exclusive authority to accept or reject a complaint. That same general counsel also defends against the complainant at the hearing illustrating the dual role of the agency to defend against and to adjudicate discrimination complaints.

In addition, the study noted that most often the EEO functions are a collateral duty for the counselor or investigator, making it difficult to find the time to address each case adequately. The survey found a general lack of agency commitment to the EEO process. EEO activities had difficulty competing with programmatic priorities of the agency for staff and resources.

Finally, the study concluded that: "Even if one could eliminate the actual conflict, one can never eliminate the perception without an independent third party decision maker."

2. Inequitable delays

In the current process, short time limitations are imposed on the Federal employees. Section 1614 of the CFR, effective October 1, 1992, has given the agency time limits. However, the Committee feels that the time limits of S. 404 are more reasonable. Critical is the fact that the agency is still permitted to investigate itself. Additionally, an agency can control time by extending the time limits.

At every Congressional hearing on the current EEO process, the message from civil servants is clear—delays discourage employees from using the process. There are delays at the agency stage as well as at the Commission. Most agencies fail to meet regulatory time frames. Government-wide, the average time for decision on the merits by all agencies was 526 days. The worst agency was the National Security Agency which took an average of 1,467 days in FY 90 to close its cases. At the Department of State it took an average of 1,134 days to close its cases in FY 90.

Delays occur because there are no incentives for or pressures on agencies to meet regulatory deadlines or to expedite any stage of the complaint processing. Current procedures, internal to the agen-

cy, are as easily used to delay resolution as they are to mediate disputes.

The Commission is authorized to take over cases not completed within 75 days [29 CFR 1613.220(c)], but never does. The Commission may also require agencies to expedite processing in other ways but virtually never does. However, promises to do so abound in testimony on the federal sector regulations which went into effect in October of 1992. Given no action on the part of the Commission to expedite the process even after intense Congressional criticism over the last 20 years, the Committee is skeptical that the newest promises will yield more timely results.

The time delays can have a serious adverse effect on the civil servant. In essence, the complainant has been exhausted before the administration process has been exhausted.

Testimony from civil servants and their advocates revealed that short time frames lead to an increased filing of unsupported claims as complainants must file quickly just to preserve the claim. An employee must make a decision based on information available within the 30 day timeframe and may not have had time to fully consider all aspects of the claim. In addition, the discriminatory impact of an event may not be realized until after the current 30 day filing period has lapsed.

The result is that meritorious complaints are washed out unfairly and prematurely. Clearly, this process is not fair to employees. The effect of an employment practice may be far-removed from the initiation of the unlawful activity. Under the current 30-day time limitation, complaints regarding recent actions by the agency may be barred because the policy adopting the action was implemented before the unlawful effects of the policy were felt.

The consequences of the decision to file an EEO claim may be grave. The EEO process depletes complainants of financial and emotional resources. In addition, retaliation for the filing of an EEO complaint can and frequently does occur making the decision to file a serious one. In FY 1990 over ⅓ of EEO complaints were based on retaliation for use of the EEO process.

The 180 day period in S. 404 will provide sufficient time to allow employees time to file a complaint. It will give the complainant enough time to consult with an advisor or attorney to determine whether they have claims under Title VII and to determine the steps required to prosecute such cases resulting in the filing of fewer frivolous complaints.

Short time frames penalize the complainant for seeking an administrative remedy.

3. Investigations

The Committee found that the agency's ability to control the information upon which a decision is based allows the agency to control the outcome of the decision. Complainants essentially can only take information for their case from an investigation developed by the agency.

The Governmental Affairs Committee confirmed in its investigation that where agencies are concerned, there was usually a lack of consistency and quality in investigations. Two-thirds of investigators surveyed said they would not routinely obtain the SF 171,

a personnel form, frequently critical to the defense that a person was not qualified for the job. Almost half of the investigators did not usually ask the complainant and the alleged discriminator to respond to each other's statements. This allows little opportunity to resolve inconsistencies. A significant number of EEO officials who relied on the investigations found them insufficiently probing. Additionally, investigators feel that, as a result of their lack of authority, they find it difficult to arrange meetings with witnesses and employees accused of discrimination.

4. Mixed cases

S. 404 amends title 5 U.S.C. section 7702, to revamp what is known as the "mixed case" procedure. "Mixed case" procedures are those in which an employee alleges that the prohibited personnel action to be appealed was based on illegal discrimination. The Committee found that the last 14 years have shown serious delays resulting from this complex procedure creating inequitable results for the employee. In addition, the development of discrimination case law may be adversely affected by the requirement that the MSPB make the initial determination in the "mixed cases".

Currently, an employee alleging a prohibited personnel practice under section 7702 of Title 5 must first appeal to the MSPB. After the MSPB final decision, the employee can then petition the EEOC for review on the issue of discrimination. If the MSPB and the EEOC disagree, a special panel is convened to make the final decision. Only 3 cases have gone to the special panel in 14 years. An employee may also use the negotiated grievance procedure in a mixed case.

In S. 404, the employee does not bounce between the two forums but section 4(b) requires the employee to choose either the MSPB, the EEOC, or the negotiated grievance procedure. Once a forum is chosen the employee must stay within that forum with one exception: If the EEOC dismisses the claim of discrimination, the employee has 20 days to file with the MSPB on the adverse action aspect of the complaint but may not raise the discrimination issue previously decided by EEOC. In addition, uniformity is maintained through a provision requiring the MSPB to follow EEOC substantive case law on the issue of discrimination. If EEOC is the chosen forum, EEOC must follow MSPB case law on the adverse action issue.

D. THE IMPOSITION OF SANCTIONS FOR DISCRIMINATORS

Under the current EEO process, employees who illegally discriminate are not punished for their behavior. In some cases, these employees are protected by the agency and the system. Discriminating employees are backed by a system that protects and insulates them from the consequence of discriminatory acts.

The Committee on Governmental Affairs hearings revealed that at times, even when egregious discriminatory behavior is found by the Commission, victims of discrimination do not feel that those employees and supervisors guilty of illegal discrimination receive sufficient punishment for their behavior. There is no clear message from the agency that discrimination will not be tolerated. On the contrary, some victims allege that agencies protect, even promote

managers who discriminate against and punish the victims. In testimony offered by Ms. Virginia Delgado there was a clear demonstration that although the Federal District Court rules that her supervisor created a "hostile" work environment, he was never disciplined. In fact, he was promoted. Former FBI special agent Don Rochon, in testimony before the Governmental Affairs Committee on October 23, 1991 stated "although there was no doubt that other agents clearly violated the law in harassing me, it was equally clear that the agency (Department of Justice) expressed no desire to take action against them even after the court ruled in my favor."

In testimony presented to the Committee on May 26, 1993, Ms. Diana Miller, a civil engineer from Pittsburgh, Pennsylvania who is employed by the U.S. Army Corps, told of an incident of sexual harassment by her supervisor. Ms. Miller's supervisor admitted that her description of his unwelcome and offending sexual advances was accurate. However, the legal staff at the agency moved very quickly to defend the actions of the supervisor and the legal officer stated to Governmental Affairs Committee staff that the supervisor should not be transferred because he was harder to replace than Ms. Miller would be. In fact, the legal staff seemed more intent on punishing Ms. Miller for reporting the incident than on punishing the supervisor for committing the act.

Such testimony prompted the Committee on Governmental Affairs to investigate more thoroughly the issue of sanctions against those found guilty of illegal discriminatory practices.

In 1988, the Commission signed a memorandum of understanding (MOU) with the Office of Special Counsel (OSC) in order to facilitate the referral of cases in which the Commission recommended that the agency consider discipline of the discriminating employee for prosecution under title 5, U.S.C., section 1215. Under title 5, U.S.C. section 1214, the OSC may bring action against an employee before the Merit Systems Protection Board (MSPB). Since 1988, the Commission has referred one case to OSC. OSC declined to prosecute.

The Committee requested from the Commission a copy of all cases since the 1988 MOU in which the Commission found discrimination. The Commission provided the Governmental Affairs Committee with eleven cases. Of those eleven, the Commission actually recommended that the agency consider discipline in seven cases.

Between 1988 and 1990, AJs found discrimination in 985 cases and the Commission found discrimination in 697 cases. Most cases recommended training of the discriminating employee. In seven cases, the AJ or the Commission recommended that the agency consider discipline of the person accused of discrimination. Of those seven cases, two discriminators actually received a sanction beyond sensitivity training. Based on the number of times the Commission found intentional discrimination in the last three years alone, an individual who illegally discriminates can anticipate a sanction for his or her illegal behavior 1% of the time.

The Committee finds that under the current scenario, employees who discriminate do not experience any serious consequence for their discriminatory behavior and the system has virtually no de-

terrent effect. The sanctions provisions in this bill are necessary to provide a deterrent effect.

In March of 1992 the General Accounting Office (GAO) prepared a fact sheet for the Committee on agencies' costs for discrimination complaint counseling and complaint processing. The fact sheet showed the actual and the estimated dollar costs for providing complaint processing FY 1991. The costs were reported by 13 civilian cabinet departments and 3 Department of Defense agencies.

A matter of cost

Together, these agencies reported a total cost of about $139 million for complaint counseling and processing, most of which was for counseling individuals (about $40 million) and performing original investigations of formal complaints of discrimination ($39 million). Most of the reported costs were estimates. The agencies also broke the costs down into steps in the process. Among GAO's conclusion:

Agencies spent $38 million to investigate complaints
Agencies spent $40 million on counseling
Agencies spent $11 million for proposed dispositions
Agencies spent $4.2 million on final agency decisions.

The EEOC has estimated that it will need $25 million to cover the cost of the new responsibilities it will undertake. The agencies will be losing some of their current EEO processing responsibilities and the Committee anticipates savings from this. For example, three activities the agencies will no longer perform include: 1) reviewing to accept/reject formal complains, 2) preparing proposed and/or final decisions and 3) issuing final agency decisions.

In the GAO report, approximately $24.9 million of the cost of agency EEO activities may not be erased, but will be diminished. The $38 million currently spent by the agencies to investigate complains is particularly significant because while some investigative authority may remain at the agency, most will be done at the EEOC. Even if a marginal reduction in the GAO estimate of $139 million is experienced, it will be more than enough to make the bill budget neutral if not provide for tax savings.

The Committee urges that adequate time be allowed for transferring adequate resources to the EEOC to implement this Act. The Office of Management and Budget and the Congress should be given enough time to transfer individual agency EEO operation funds and FTE slots from other agencies to the EEOC, during the appropriations process.

III. History of S. 404

On February 18, 1993, Senator John Glenn, along with cosponsoring Senators Ted Stevens, (R-Alaska), Barbara Mikulski, (D-Maryland), Paul Simon (D-Illinois), Dennis DeConcini (D-Arizona), Harris Wofford (D-Pennsylvania), Daniel Akaka (D-Hawaii), Russell Feingold (D-Wisconsin), Kent Conrad (D-North Dakota), John McCain (R-Arizona), Carol Moseley-Braun (D-Illinois), Joseph Lieberman (D-Connecticut), Carl Levin (D-Michigan). Additionally, Senators Barbara Boxer (D-California), John Rockefeller IV (D-West Virginia), and Paul Sarbanes (D-Maryland) have been added as cosponsors.

Executive Summary of H.R. 2721

The proposed bill amends Title VII, the ADEA, the Rehabilitation Act of 1973 and Title V of the U.S. Code to change the federal sector complaint process. The effective date is Jan. 1, 1997. The EEOC must issue regulations within 1 year of enactment. Aggrieved individuals must file a complaint within 180 days. The respondent agency must provide counseling and have a voluntary alternative dispute resolution process available to the complainant. Where the respondent agency has an ADR process approved by the EEOC, there is a mandatory 20-day conciliation period, during which the complainant and an agency representative must meet once. The agency must notify the complainant in writing that he or she may, within 90 days, request a determination by the MSPB, the EEOC, through the negotiated grievance process, or file a civil action. The agency is required to collect and preserve information relevant to the complaint throughout the administrative and judicial process.

When the EEOC process is chosen, an AJ reviews the information collected by the respondent agency. A complainant or an AJ may request that a member of the Commission stay a discriminatory personnel action for 45 days (extendable). The AJ may order the respondent to produce information, issue subpoenas to compel the production of documents or information, or the attendance of witnesses, and issue adverse inferences against either party for failure to produce documents or information. The AJ may dismiss frivolous claims prior to hearing. The AJ must make a determination on all claims not dismissed, after an opportunity for a hearing, within 210 days of the date the complaint was filed (760 days for class complaints). Either party may appeal the AJ decision to the EEOC within 90 days. On appeal, the EEOC must accord substantial deference to the AJ's findings of fact, and shall affirm the AJ's determination if it is supported by a preponderance of the evidence and in accordance with the law. The appeal decision must be rendered by the EEOC within 150 days.

The complainant may file a civil action within 90 days of receiving: notice of right to request an administrative determination; the AJ's determination; or the EEOC decision on appeal. The complainant may also file suit 20 days after the expiration of the time for an AJ or EEOC determination if no decision has been rendered. The filing of a civil action terminates the administrative process. A complainant may file a civil action to enforce settlement agreements, AJ and EEOC orders. The EEOC may determine that a federal employee who fails to comply with an AJ or EEOC order may not be paid a salary during the period of non-compliance. Where discrimination is found, a copy of the order shall be sent to the Office of Special Counsel for a determination as to whether disciplinary action is appropriate.

The ADEA is amended to provide that age discrimination complaints are processed like other complaints filed under section 717 of Title VII, while preserving the right to bypass the administrative process and file suit after giving notice to the EEOC. Title V is amended to eliminate mixed-case procedures, and provides that a complainant must elect either the MSPB process, the grievance process, or the Title VII process, by filing a complaint under Section 717 of Title VII.

A total workload of 45,730 complaints and 16,117 appeals is projected in the first year of enforcement. AJs are estimated to process an average of 65 complaint resolutions per year under the new procedures, and appeals attorneys are estimated to process 130 decisions per year. Total cost impact is estimated at $98,194,450 above current EEOC federal sector expenditures with a one-year implementation period, or $69,927,878 above current expenditures with a three-year implementation period.

Summary of H.R. 2721:
The Federal Employee Fairness Act of 1994

The proposed bill amends Section 717 of Title VII, Section 15 of the ADEA, Section 505 of the Rehabilitation Act of 1973, and Sections 7121 and 7702 of the Civil Service Reform Act. Under the proposed process, respondent agencies would no longer have the authority to investigate complaints of employment discrimination brought against them. The proposal also eliminates the current mixed-case processing scheme, and requires that an election be made initially under Section 717 of Title VII to have an administrative determination of a complaint made by either the EEOC, the MSPB, or under a negotiated grievance process.

Title VII

Agency Process: Aggrieved individuals must file a complaint within 180 days. Complaints may be filed with the EEOC, the respondent agency, or any other federal agency. A complaint against an agency in the intelligence community must, however, be filed with the respondent agency. If the complaint is filed with an agency other than the EEOC, the agency must send a copy of the complaint to the EEOC within 10 days of receipt. If the complaint was not initially filed with the respondent agency, the EEOC must transmit a copy of the complaint to the respondent agency within 10 days of receipt. The respondent agency is required to collect and preserve documents and information relevant to the complaint throughout the administrative and judicial process. The EEOC must issue rules concerning an agency's duty to collect and preserve documents and information within 1 year of enactment.

The respondent agency must inform the complainant of the applicable procedures and deadlines, must make reasonable efforts to conciliate each complaint, and must have a voluntary alternative dispute resolution (ADR) process available to the complainant. Where the respondent agency has an ADR process approved by the EEOC, there is a mandatory 20-day conciliation period, during which the complainant or representative must request and offer to meet once with an agency representative. The EEOC must issue rules and guidelines concerning ADR and conciliation processes within 1 year of enactment.

The agency with which the complaint is filed must notify the complainant in writing that he or she may, within 90 days of receipt of such notice, request a determination by the EEOC, by the MSPB, through the negotiated grievance process, or file a civil action. Where an EEOC-approved ADR process is in place, such a request may not be made until after the expiration of the 20-day conciliation period.

A stay of a personnel action (either already taken or about to be taken) may be requested by an employee at the conciliation stage. A stay request would be filed with the EEOC, which must appoint an AJ to review the request. The respondent agency is allowed to comment to the EEOC on the stay request.

Complaints must be dismissed if a grievance has already been filed on the same matter under 5 U.S.C. § 7121(d).

EEOC AJ Process: When a complainant requests that the EEOC make a determination, the EEOC sends a copy of the complaint to the respondent and must appoint an AJ within 10 days. The respondent must send copies of the documents and information it has collected to the AJ within 5 days of notification that a request for a determination by an AJ has been made. The AJ reviews the information collected by the respondent agency. If the AJ finds that the agency has failed to produce the relevant documents and information, the AJ may impose sanctions, including an adverse inference, and require the respondent to obtain additional documents or information. After examining the information submitted by the respondent, the AJ shall dismiss frivolous complaints, complaints which have not complied with the mandatory conciliation provision (where applicable), and complaints which fail to state a claim for which relief can be granted. Such dismissals are appealable to the Commission within 90 days, or may be the basis of a civil action by the complainant.

The AJ may issue subpoenas to compel the production of documents, information, or the attendance of witnesses, and may issue sanctions, including adverse inferences, against either party for failure to produce documents or information. The AJ may also request that a member of the Commission stay a discriminatory personnel action for 45 days (extendable). The respondent agency is allowed to comment to the EEOC on the stay request.

The AJ must make a determination on all claims not dismissed, after an opportunity for a hearing, within 210 days of the date the complaint was filed (760 days for class complaints). Discovery may be conducted by a party to the extent deemed appropriate by the AJ. During the hearing, the AJ must ensure that the record is developed for a full and fair determination of the complaint. A transcript of the hearing, paid for by the respondent agency, shall be provided upon request of either party or the AJ.

EEOC Appeal Process: Either party may appeal the AJ decision to the EEOC within 90 days of receipt. When the EEOC receives an appeal, it will transmit a copy of the request to the parties and the AJ. The AJ must send the record of the proceeding to the EEOC within 7 days of receiving such notification. After providing the

parties an opportunity to file briefs on the appeal, the EEOC must issue an order either affirming, reversing or modifying the AJ decision within 150 days. On appeal, the EEOC must accord substantial deference to the AJ's findings of fact, and shall affirm the AJ's determination if it is supported by a preponderance of the evidence and in accordance with the law.

Civil Actions: The complainant may file a civil action in district court for de novo review of a complaint within 90 days of receiving: notice of right to request an administrative determination; the AJ's determination; or the EEOC decision on appeal. The complainant may also file suit 20 days after the expiration of the time for an AJ or EEOC determination if no decision has been rendered. The filing of a civil action terminates the administrative process.

A complainant may file a civil action in district court to enforce a settlement agreement, an AJ order (which is not the subject of an administrative appeal or a de novo law suit), and an EEOC order (which is not the subject of a de novo law suit).

Remedies and Other Provisions: The respondent agency must pay amounts awarded from its own funds, with interest. Payment of awards, however, should not be made out of funds appropriated for salaries and expenses. An agency must provide paid administrative leave to complainants, and those participating for the benefit of complainants, for both administrative and civil actions. Where discrimination is found, but the respondent demonstrates under the evidentiary standard in 5 U.S.C. § 1221(e) that it would have taken the same action absent the discrimination, the court may grant declaratory and injunctive relief, attorney's fees and costs, but shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment. The EEOC may determine that a federal employee who fails to comply with an AJ or EEOC order may not be paid a salary during the period of non-compliance. Where discrimination is found, a copy of the order shall be sent to the Office of Special Counsel for a determination as to whether disciplinary action is appropriate.

ADEA and CSRA

ADEA: The bill amends Section 15 of the ADEA to provide that a federal employee or applicant alleging discrimination may file a complaint in accordance with Section 717 of title VII. The amendment preserves the current option for the ADEA complainant to bypass the administrative process and file suit in district court so long as 30 days notice is given to the EEOC of intent to file suit. Such civil action must be filed within 2 years of the alleged discriminatory event.

CSRA: Under Section 7121 of Title V, an employee may file a grievance, but, as noted, filing such a grievance requires the dismissal of a subsequently filed complaint under Title VII. Section 7702 of Title V is amended to eliminate mixed-case procedures, and provides that a complainant must elect either the MSPB process, the grievance process, or the Title VII process, by filing a complaint under Section 717 of Title VII. There is no provision for EEOC review of MSPB decisions, or vice versa. The agency making a determination pursuant to this election must apply the substantive law of the agency that administers the law under which the complaint is brought. If the EEOC process is selected and the EEOC dismisses the complaint as frivolous, for failure to comply with mandatory conciliation requirements, or for failure to state a claim, the complainant may raise matters which do not involve discrimination under the grievance or MSPB process within 20 days.

Miscellaneous Provisions

Regulations: The bill provides that the EEOC must issue regulations within 1 year of enactment to assist agencies with the provision that the collect and preserve documents and information throughout the administrative and judicial process, and to establish a uniform notice for actions filed under Section 717 of Title VII. The EEOC must issue guidelines and standards on ADR within 180 days of the date of enactment. The EEOC must publish in the Federal Register, within 21 months of the date of enactment, the names of entities of the Federal government which provide ADR processes approved by the EEOC. The EEOC must also issue rules to ensure the protection of classified information and national security information in administrative proceedings under Title VII. OPM, in consultation with EEOC, must publish guidelines for maintaining personnel records. The EEOC must issue rules establishing a program and procedures to foster voluntary settlement of claims (no time period given for publication).

Report to Congress: EEOC must include information concerning employee participation in ADR programs and the effectiveness of such programs in its annual report to Congress. Agencies are required to provide information to the EEOC so that it can make such reports.

Effective Date: The bill provides for an effective date of January 1, 1997. The amendments will apply only to complaints filed on or after the effective date.

Budget

The bill indicates that it is the sense of Congress that there should be an increase in funding to the EEOC because of the additional administrative responsibility imposed upon the EEOC.

A total workload of 45,730 complaints and 16,117 appeals is projected in the first year of enforcement. AJs are estimated to process an average of 65 complaint resolutions per year under the new procedures, and appeals attorneys are estimated to process 130 decisions per year. Total cost impact is estimated at $98,194,450 above current EEOC federal sector expenditures with a one-year implementation period, or $69,927,878 above current expenditures with a three-year implementation period. These figures are based upon projected clerical and support staff, computer and equipment needs, overhead and staff training costs. They do not include other budget considerations, such as added infrastructure costs and other operational costs, such as mailing and travel expenses, which are difficult to estimate at this time. The Office of Communications and Legislative Affairs has additional information and charts which provide more specific information concerning the impact of this legislation upon the EEOC.

H.R. 1111: The Federal Employee Fairness Act of 1993

The proposed bill amends Title VII, the ADEA, and the Civil Service Reform Act (CSRA) to change the federal sector complaint process. It gives aggrieved individuals 180 days in which to file a complaint and requires the agency to attempt conciliation. The employee then elects a determination by MSPB, grievance procedure or EEOC, as appropriate. In the EEOC process, an AJ supervises discovery, can impose sanctions for inadequate records, can request a Commissioner to stay a personnel action, conducts a hearing, and issues a decision within 210 days of filing (270 for class complaints). Either party can appeal the AJ's decision to the Commission. The Commission must accept the AJ's findings of fact unless clearly erroneous and affirm if the determination is supported by substantial evidence. A decision must be issued within 150 days. Either the complainant or EEOC can bring suit to enforce a settlement, an AJ's determination, or an EEOC appellate decision. The bill also amends the ADEA to provide that complaints of age discrimination will be processed administratively and civil action can be filed in accordance with § 717 of Title VII.

Executive Summary of H.R. 1111:
The Federal Employee Fairness Act of 1993

The proposed bill amends Title VII, the ADEA, and the Civil Service Reform Act (CSRA), to change the federal sector complaint process.

It gives aggrieved individuals 180 days in which to file a complaint. The agency must attempt conciliation and, if unsuccessful, must notify the individual of the right to request a determination by MSPB, grievance procedure, or EEOC, as appropriate. It must collect and preserve information throughout the administrative and judicial processes, in accordance with EEOC regulations.

If the individual selects the EEOC process, an AJ reviews the records collected by the agency, and can impose sanctions if they are inadequate. He can request that a Commission member issue a stay of a personnel action. He supervises discovery, conducts a hearing, and issues a decision within 210 days of filing (270 in class complaints). Either party can appeal the AJ's decision to EEOC, which must accept his findings of fact unless clearly erroneous and affirm if the determination is supported by substantial evidence, and must issue a decision within 150 days.

The individual can file suit within 90 days of receiving (1) notice of the right to request an administrative determination, (2) the AJ's determination, or (3) EEOC's decision. The individual also can file suit 300 days after requesting and AJ determination or 180 days after appealing to EEOC if no determination or decision has issued. Finally, the individual or EEOC can bring suit to enforce a settlement, an AJ's determination, or an EEOC appellate decision.

The bill requires interest on back pay awards, requires agencies to pay awards from agency funds and to provide official time or paid leave to complainants during the administrative and judicial process, and requires discipline of persons found to have discriminated. It requires EEOC to issue regulations within one year that define the agency's duty to preserve and collect documents and that prescribe uniform written notices required under § 717 of Title VII.

The bill amends the ADEA to provide that complaints of age discrimination will be processed administratively and that civil actions can be filed in accordance with § 717. It retains the current notice of intent to sue, as an alternative to filing an administrative complaint, but requires that such a suit be filed not less than 30 days after giving notice or more than two years after the discrimination occurred.

The bill amends the CSRA to delete the Special Panel and mixed case procedures, and provides for processing of such complaints under § 717.

Summary of H.R. 1111: The Proposed Federal Employee Fairness Act of 1993

The Federal Employee Fairness Act of 1993 proposes to amend § 717 of Title VII of the Civil Rights Act of 1964, § 15 of the Age Discrimination in Employment Act of 1967 and §§ 7121 and 7702 of the Civil Service Reform Act of 1978. The most significant changes are proposed in the amendments to § 717 of Title VII, which are explained below. The bill proposes to amend the Age Discrimination in Employment Act to provide that complaints by federal employees or applicants will be processed in accordance with § 717 of Title VII. The Civil Service Reform Act amendments alter the election mechanisms for federal employees (among EEO complaint, grievance or MSPB appeal) and eliminate much of the current mixed case scheme.

Proposed Amendments to Title VII:

Agency Process: In the proposed bill, a federal employee or applicant (complainant) must file a complaint alleging discrimination with the head of the agency where the alleged discrimination occurred or with the EEOC within 180 days after the alleged discrimination occurred. The respondent agency has 30 days (extended to 60 with the complainant's consent) to conciliate the complaint.[1] If conciliation does not result in resolution of the complaint, the respondent must give written notice to the complainant that he or she has 90 days either to file with EEOC a request for a determination by MSPB or by negotiated grievance procedure[2] or by an EEOC administrative judge, or to file a civil action for de novo review in district court. The bill also requires that the respondent agency collect and preserve documents and information relevant to the complaint throughout the administrative and judicial process in accordance with regulations issued by EEOC.

EEOC Administrative Judge Process: When a complainant requests a determination by an EEOC administrative judge, EEOC will send a copy of the complaint to the respondent and appoint an administrative judge. The respondent must send copies of the relevant documents and information it has collected to either the

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[1] The bill contains a general provision requiring agencies to make counseling available to those employees who choose to notify the agency that they believe discrimination has occurred and to establish a voluntary alternative dispute process. Neither counseling nor mediation are required, however, as part of the formal complaint process. Conciliation is proposed in place of the counseling stage required by the current regulatory system.

[2] If the complainant requests a determination by MSPB or through the negotiated grievance procedure, EEOC must send the complaint to the appropriate agency for determination.

MSPB or the EEOC, depending on the complainant's election. The administrative judge will determine if the information supplied by the respondent is complete and accurate and, unless good cause is shown, will impose sanctions if it is not. If an administrative judge determines that reasonable grounds exist to believe a stay of a personnel action is necessary, he or she may request that a member of the Commission issue a stay of 15 days (with possible extensions of 30 days or more).

The bill provides that administrative judges will dismiss frivolous claims and complaints that fail to state a claim under Title VII. If a complaint is not dismissed, the proposed bill provides opportunity for discovery by either party to the extent the administrative judge believes it necessary, with sanctions imposed for a party's failure to respond. The bill also provides an opportunity for a hearing. It provides for hearing transcripts upon request by either party or the administrative judge, the cost to be borne by the respondent. The bill gives administrative judges authority to control hearings, and gives administrative judges and the EEOC subpoena authority. Within 210 days of the filing of the complaint (or 270 for class complaints), the administrative judge must issue a written order determining the merits of each claim.[3] The administrative judge's determination will contain findings of fact and conclusions of law and will provide notice of the right to sue, or to appeal the determination to the Commission.

The bill provides individuals with 180 days to file a complaint and 90 days to decide whether to pursue it through the EEOC, MSPB or grievance process. It allows an EEOC AJ 210 days (270 in class complaints) to review the record, impose sanctions, process requests for stays, supervise discovery, hold a hearing, and issue a decision, and allows the Commission 150 days (with a possible 30 day extension) to issue a decision on appeal. Additional time frames include: 10 days for EEOC to transmit complaints to agencies; 15 days for non-respondent agencies to transmit complaints to EEOC; three days for respondent agenices to inform EEOC of complaints; 10 days for transmittal of complainant's request for MSPB or grievance determination by EEOC; seven days for transmittal of the record of hearing by an AJ when an appeal is filed.

<u>EEOC Appeal Process</u>: Either party may appeal an administrative judge's determination within 90 days of its receipt if the complainant has not filed a suit in district

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[3] The time limit for an administrative judge to issue an order will not begin to run until 30 days after the administrative judge is assigned to the case if he or she certifies in writing that the 30 day period is necessary to complete the administrative record. The bill also contains provisions for an additional 30 day extension of the time limit and for further extension by the Commission if manifest injustice would occur without the extension.

court. The bill provides for enforcement of interim relief if an appeal or lawsuit relates to only part of a case. When the EEOC receives a timely appeal, it will send copies to the other party and the administrative judge. The administrative judge then must transmit the hearing record and information submitted by the respondent to the Commission. After allowing the parties to submit briefs, the EEOC will issue an order affirming, reversing or modifying the administrative judge's order within 150 days of receiving the appeal (with a possible extension of an additional 30 days). The administrative judge's determination will be affirmed if supported by substantial evidence and his or her findings of fact will be conclusive unless the Commission determines they are clearly erroneous. The Commission will provide the complainant with a notice of right to sue in addition to the order on appeal.

Suit Rights: The bill provides that a complainant may file a lawsuit in district court for de novo review of a complaint within 90 days of receiving: (1) notice from the agency that the complainant may file a request for an administrative determination by EEOC, MSPB or through the negotiated grievance procedure, or (2) an administrative judge's determination, or (3) the Commission's order on appeal. In addition, a complainant has exhausted administrative remedies and may file a lawsuit in district court during the period beginning 300 days after requesting an administrative judge's determination and ending when the administrative judge issues such determination or during the period beginning 180 days after filing an appeal and ending when EEOC issues an order on appeal. When a lawsuit is timely filed, the administrative judge's or Commission's jurisdiction over the case terminates.

In addition, the bill provides that a prevailing complainant or the EEOC may bring a lawsuit in district court to enforce a settlement agreement, an administrative judge's order (if it is not appealed and if no de novo lawsuit has been filed) or the Commission's order on appeal (if no de novo lawsuit has been filed).

Remedies and Other Provisions: The proposed bill provides for interest on back pay. It provides that amounts awarded against a respondent will be paid by funds made available to that respondent by appropriation or otherwise. It also provides for official time for the complainant for the administrative complaint and paid leave for the complainant for time spent on a civil action (to be defined by EEOC in regulations). The bill requires that a respondent discipline an individual found by EEOC or a court to have engaged in unlawful discriminatory conduct and provides for referral to the Office of Special Counsel of cases where EEOC finds that the sanctions imposed were inadequate.

Proposed Amendments to the Age Discrimination in Employment Act and the Civil Service Reform Act:

ADEA: The bill proposes to amend § 15 of the ADEA to provide that a federal employee or applicant alleging discrimination prohibited by the ADEA shall file a complaint and a civil action in accordance with § 717 of Title VII of the Civil Rights of 1964, as amended. The bill also amends the provision in § 15 covering notices of intent to sue to require that if a complainant does not file an administrative complaint, he or she may file a lawsuit not less than 30 days after filing a notice of intent to sue with the EEOC and not more than two years after the alleged violation occurred. (The notice of intent to sue proposal eliminates the current requirement that the complainant file the notice within 180 days of the alleged discrimination, and adds a two year statute of limitations.)

CSRA: The bill proposes to amend § 7121 of the Civil Service Reform Act to delete the current provision requiring election between the EEO process and the negotiated grievance procedure. The bill places the election requirement currently found in § 7121(d) into § 717 of Title VII.

Under the bill all federal employment complaints will come to EEOC after the respondent conciliates for 30 days (extended to 60 days with the complainant's consent), with the complainant electing among three processes, the administrative and judicial procedures provided for in §§ 7701 and 7703, a negotiated grievance procedure under § 7121 or an EEO complaint under § 717 of Title VII, when he or she sends the complaint to EEOC. The bill proposes to eliminate the current mixed case scheme in which complainants may request EEOC review of MSPB decisions and vice versa. The bill eliminates the Special Panel procedures currently found in § 7702. Proposed new § 7702 provides that an employee must raise a mixed case (an appealable action involving an allegation of discrimination) with EEOC and then elect among the three processes noted above. If the complainant elects the EEO process and EEOC dismisses the case as frivolous or for failure to state to state a claim, the complainant will have 90 days to raise the matter with the MSPB or under the negotiated grievance procedure absent the allegations of discrimination.

Miscellaneous Provisions:

Regulations: The bill provides that EEOC must issue regulations within one year of enactment to assist agencies with the provision that they collect and preserve documents and information throughout the administrative and judicial process, and to establish a uniform written official notice to be used to comply with § 717 of Title VII.

Effective Date and Application: The bill provides for an effective date of January 1, 1994. The amendments will apply to complaints filed on or after the effective date.

MAJORITY MEMBERS:
MATTHEW G. MARTINEZ, CALIFORNIA, CHAIRMAN
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NITA M. LOWEY, NEW YORK
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BILL BARRETT, NEBRASKA

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
B-346-C RAYBURN HOUSE OFFICE BUILDING
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SUBCOMMITTEE ON HUMAN RESOURCES

STATEMENT OF CHAIRMAN MATTHEW G. MARTINEZ

JOINT OVERSIGHT HEARING OF EDUCATION AND LABOR SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES AND POST OFFICE AND CIVIL SERVICE SUBCOMMITTEE ON CIVIL SERVICE REGARDING HR 3613, The Federal Employee Fairness Act of 1992

April 9, 1992
2175 Rayburn HOB
Beginning at 10:00 AM

Good morning. I would like to thank Chairman Sikorski and Chairman Perkins for scheduling this important hearing and for their leadership on behalf of federal employees in supporting this legislation. In addition, I take special pleasure in thanking today's witnesses who come before us to describe their painful experiences.

What is striking about the unusual public attention this bill has received, and the reason I bring it up today, is the fact that the country is openly discussing the issue of work place discrimination and harassment in a way it never has before. From the conversations I've had it is very apparent that people realize job discrimination and harassment on the job is a reality in America.

What is also striking is that federal employees are vividly aware that the very system currently in place to adjudicate harassment claims is so completely outdated and ineffective that most choose not to use it. It was pointed out to me that even Anita Hill, a successful attorney, decided not to pursue her claim through this system.

For the last several years, Chairman Sikorski and I have worked to revamp this system. We jointly convened several hearings to hear from experts from the Equal Employment Opportunities Commission, interested labor and civil rights groups, and victims of this inequitable and archaic system.

As a result of these hearings, we introduced HR 3613 on October 22, 1991, with the full support of over 32 of our colleagues. Currently there are nearly 70 other Members who have now signed on. The bill also has the support of organizations like American Federation of Government Employees, National Treasury Employee Union, National Federation of Federal Employees, Washington Lawyers Committee on Civil Rights Under Law, Blacks in Government, and Federally Employed Women.

At the time of introduction, this reform package was the first real proposal to revise the procedures governing the processing of equal employment opportunity claims since 1972, when

the protections of Title VII of the Civil Rights act were extended to federal employees and the Executive Branch. Since that time however, the EEOC has approved revisions of the regulations. These new rules are known as the Part 1614 regulations.

I am not going to go into great detail about the bill and the 1614 regulations here today. But I would like to point out several differences between the two approaches.

First, THE BILL WOULD TAKE FEDERAL AGENCIES OUT OF THE BUSINESS OF JUDGING THEMSELVES. Currently federal agencies, and other federal units of government, are responsible for investigating and ruling on discrimination cases brought against them. In addition, they are free to reject the findings of the Equal Employment Opportunities Commission, an independent agency chartered to investigate discrimination claims.

The bill would end this inequity caused when the fox guards the hen house by transferring agency adjudicating to the EEOC.

Second, THE BILL ELIMINATES DUPLICATION IN THE PROCESSING OF DISCRIMINATION CLAIMS. Each agency is required to keep their own equal employment opportunity staff. Currently there are over 120 different agencies and units of government that are covered by the existing system.

The bill would greatly enhance the accountability for managing the processing of discrimination claims by placing principle responsibility in ONE AGENCY AND NOT MANY AGENCIES. The agencies would, however, still retain critical responsibilities for counseling complainants, attempting to resolve the claims and gathering relevant records.

Third, THE BILL WOULD BRING SEVERAL TIME LIMIT PROVISIONS THAT CURRENTLY APPLY TO THE PRIVATE SECTOR TO FEDERAL EMPLOYEES. These time limitations would greatly streamline the process. For instance, the bill would extend the time within which discrimination claims can be filed from the current 30 days for the federal sector to 180 days, as is the case in the private sector.

Fourth, THE BILL ENSURES THAT A HEARING WILL BE BASED ON A COMPLETE AND FAIR RECORD. The conflict of interest of having agencies be responsible for investigation discrimination claims against them has often produced inaccurate or inadequate files on which to base fair decision.

The bill gives the EEOC the responsibility to ensuring that the record is complete and accurate. In addition, the administrative law judge responsible for adjudicating the case would have the authority to rule against or sanction an agency if the record is incomplete.

Fifth, THE BILL PROVIDES THE SAME PROCEDURAL IMPROVEMENTS TO VICTIMS OF AGE DISCRIMINATION. Federal employees currently have to follow a different adjudicative process if they want to bring a claim of age discrimination. The bill amends the Age Discrimination in Employment Act to adopt the same refinements the bill makes to claims processed through Title VII of the Civil Rights Act of 1964.

Sixth, THE BILL STREAMLINES THE PROCESS BY WHICH "MIXED CASES" ARE ADJUDICATED. Mixed cases, which involves the jurisdiction of both the Merit Systems Protection Board, currently are adjudicated in separate systems. The bill would give the claimant of a "mixed case" the option of pursuing their claim in either one, or both, of the relevant systems. The different claims would not automatically be separated.

Lastly, THE BILL ALLOWS CLAIMANTS FROM THE EEOC WHO FILE AGAINST THE EEOC TO HAVE THEIR CLAIMS HEARD BY AN OBJECTIVE PARTY. It is the current practice throughout the system that cases involving discrimination claims against parties

who would be responsible for gathering investigatory data would be contracted out to other agencies for investigation. The bill allows this practice to remain in tact for EEOC claimants, and such claims may be contracted out to another agency.

I am encouraged by the recent action of the EEOC and of Chairman Evan Kemp in taking some forceful action to reform this process. However, I am troubled by the regulations that have been approved. I will only outline a few primary concerns.

First, Part 1614 regulations do not fix the inequity of the fox guarding the hen house because EEOC decisions are not final. Agencies will still have veto power over decisions.

Secondly, Part 1614 regulations will not reduce any administrative burden on the part of the agencies because they will still be required to review and rule on EEOC decisions. The duplication of effort still exists.

Thirdly, although Part 1614 makes some improvements in the area time limits, these deadlines do not solve the inefficiency of the system because they are not enforceable by the EEOC. Agencies have no real incentive to meet these deadlines.

Fourth, while 1614 claims to make modifications, it merely compounds existing problems for the victim. The federal agency would continue to investigate itself, with an untenable process for reimbursement of EEOC intervention in investigations, and decisions would still be consensual by the agency itself. This is a preposterous abomination of due process.

In closing I would like to briefly touch on the issue of funding for this bill. I am aware of criticisms that the EEOC is already burdened by the new responsibility of the Americans with Disabilities Act, and the limited funds to handle those claims. However, the General Accounting Office (GAO) study released in March regarding what the Cabinet level agencies are currently spending on counseling and processing discrimination complaints reveals that the cost of this bill would be more than offset by cost savings on the part of agencies.

The study questioned 29 agencies about the costs associated with investigating, counseling and processing discrimination claims against them. The study found that these agencies are spending an estimated $139 million annual to handle these claims. When you understand that these agencies will no longer be charged with some of the responsibility they currently have, the possibility of tremendous savings becomes obvious.

As Chairman Kemp stated in his interview with the Washington Post on March 4, 1992, giving the EEOC the authority to make this system work lies with Congress. It is my earnest hope that we move quickly to enact this legislation. I think it has been far too long in refining this archaic system. Federal employees have been treated as second class citizens by this system and it should not be tolerated any longer.

I thank my colleagues again for their leadership in convening this important hearing. I know their constituents who are federal employees are likewise thankful. I look forward to hearing from these witnesses and will not delay their testimony any further.

Statement of

American Association of Retired Persons
American Federation of Government Employees
Blacks in Government
Federally Employed Women, Inc.
Federally Employed Women Legal & Education Fund
George Chuzi of Kalijarvi & Chuzi
IMAGE
Mexican-American Legal Defense & Education Fund
NAACP Legal Defense & Educational Fund, Inc.
National Federation of Federal Employees
National Treasury Employees Union
National Women's Law Center
Terris, Pravlik & Wagner
Washington Lawyers Committee for Civil Rights Under the Law
Women's Legal Defense Fund

Before

The Subcommittee on Employment Opportunities
of the
House Committee on Education and Labor

and

The Subcommittee on Civil Service
of the
House Committee on Post Office and Civil Service

April 9, 1992

We are pleased to appear before the Subcommittee on Employment Opportunities and the Subcommittee on Civil Service to comment upon the Federal Employee Fairness Act and upon the urgent need for such legislation. There should be no question that the existing administrative process, by which federal workers may challenge employment discrimination to which they have been exposed, is fundamentally flawed. This process was designed to cover workers in all protected categories -- race, color, sex, ethnicity, religion, age, and disability. Unfortunately, for years this system has poorly served the federal government and its employees. While we applaud the EEOC's efforts, spanning more than a decade, to address these problems, we must conclude that the regulations that its 29 C.F.R. § 1614 will fail to correct many of the existing flaws in this system.[1] While we believe that some provisions of the Federal Employee Fairness Act require reexamination, we fully support this Bill.

I. The Federal EEO Administrative Process Remains Fundamentally Flawed

We need not look far or hard to find compelling evidence that the existing EEO administrative process is riddled with defects. The Congress, including these subcommittees, has compiled an extensive record from a parade of witnesses, including victims and

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[1] These regulations, scheduled to become effective on October 1, 1992, will be codified at 29 C.F.R. § 1614 and have not yet been formally published. Therefore, we will refer to them as the § 1614 regulations and to the appropriate subparts.

professionals intimately acquainted with this process, which demonstrates that this system needs to be fundamentally overhauled. And, virtually every Chair of the EEOC since 1972, when the protections against employment discrimination were extended to federal employees,[2] has recognized that this system has fallen far short of the high expectations that Congress has had for this system. Not surprisingly, therefore, bipartisan support exists to refashion this system. At the hearing jointly held before these subcommittees on March 1, 1990, extensive evidence was presented for the record of the deficiencies of the federal sector EEO administrative process.[3] Since then, these subcommittees have also heard from victims of this process at hearings held on August 1, 1990 and November 20, 1991, at which time we were reminded of the high price that is daily paid in pain and suffering by those victims of discrimination for whom the noble promise of this system is really a cruel hoax.[4] And, years before then, the Subcommittee on Employment and Housing of the House Government Operations

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[2] The Age Discrimination in Employment Act (ADEA) was extended to federal employees in 1974. See Pub. L. 93-259, 88 Stat. 74 (1974).

[3] See Subcommittees on Employment Opportunities & Civil Service, Joint Oversight Hearing on Equal Employment Opportunity Commission's Proposed Reform of Federal Regulations, 101st Cong., 2d Sess. (1990) ("Joint Oversight Hearing").

[4] The first hearing was conducted on August 1, 1990 and the proceedings are reported in Subcommittees on Employment Opportunities & Civil Service, Joint Oversight Hearing on Equal Employment Opportunity Complaint Process, 101st Cong., 2d Sess. (1990). The second hearing was held on November 20, 1991 and the proceedings are reported in Subcommittees on Employment Opportunities & Civil Service, Joint Oversight Hearing on Victims of EEO Complaints Process, 102nd Cong., 1st Sess. (1991).

Committee conducted a series of four hearings on the shortcomings of this process.[5] Together, these hearing records and reports comprise hundreds of pages of documentation in painful detail of the extensive and entrenched problems that have for years undermined the legitimacy and effectiveness of this system.

In addition, the remarks of the Chairs of the EEOC, the agency entrusted with responsibility for administering this process, confirm that this system is badly in need of repair. Chairman Evan J. Kemp, Jr. testified two years ago before these subcommittees that:

> As a former federal employee who filed a complaint of discrimination against my agency, I know well the shortcomings of the current system from a complainant's point of view. The criticisms heard most often are:
>
> 1. The system is too complex; there are too many steps and pitfalls for the unwary;

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[5] The first hearing was conducted on October 8, 1985 and the proceedings are reported in Subcommittee on Employment and Housing, Processing EEO Complaints in the Federal Sector--Problems and Solutions, 99th Cong., 1st Sess. (1985). The second hearing was held on June 17, 1986 and its proceedings are reported in Subcommittee on Employment and Housing, Processing EEO Complaints in the Federal Sector--Problems and Solutions (Part 2), 99th Cong., 2d Sess. (1986). The third hearing was held on September 25, 1986 and its proceedings are reported in Subcommittee on Employment and Housing, Processing EEO Complaints in the Federal Sector--Problems and Solutions (Part 3), 99th Cong., 2d Sess. (1986). The fourth hearing was held on June 25, 1987 and its proceedings are reported in Subcommittee on Employment and Housing, Processing of EEO Complaints in the Federal Sector: Problems and Solutions, 100th Cong., 1st Sess. (1987) ("Fourth Hearing").

The findings and recommendations from these hearings were reported on November 23, 1987 and appear in Committee on Government Operations, Overhauling the Federal Complaint Processing System: A New Look at a Persistent Problem, H.R. Doc. NO. 100-456, 100th Cong., 1st Sess. (1987).

2. There is a perceived conflict of interest in having the accused agency control the development of the record;

3. There are inordinate delays to get to a final decision; and

4. There is a lack of sanctions against agencies for inadequate investigations and inexcusable delay.

These problems with the process disadvantage everyone involved, most particularly federal workers.[6]

Before him, Clarence Thomas, who was then Chairman of the EEOC, repudiated this administrative process. Chairman Thomas was asked: "[I]s the message to Federal workers that if you can afford to hire an attorney you're better off doing so and going to court right away?" He replied:

> The amount of time that it takes for that process to end and then be reviewed by EEOC admittedly -- I think there is enough blame to go around for everybody -- it takes too long. If there is a way to circumvent that process -- and that includes going to Federal court -- until that is corrected, then I would have to suggest that would be the best way to go.[7]

This fundamental lack of confidence from the Chairman of the agency charged with overseeing this process is a profound indictment of this system.

And, Eleanor Holmes Norton, who has been the Chair of the EEOC and is a now member of the Civil Service Subcommittee, commented at an earlier hearing before these Subcommittees that:

> The inherent conflicts of interest, the time delays, the complexity of the machinery, and the lack of sanctions have produced a situation in which government workers are not afforded the rights that are available to workers in

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[6] See Joint Oversight Hearing, at 7 (Statement of Evan J. Kemp, Jr.).

[7] Fourth Hearing, at 59-60.

> the private sector. The irony is that Federal employees are second-class citizens in a complaint system that is supposed to eliminate second-class status. . . . I cannot overestimate the urgency of change. It is appalling that the government allows for itself what it does not permit or countenance in the private sector.

Together, this documentation and these disturbing observations from Chairs of the EEOC spanning the political spectrum compel the conclusion that there are common and enduring problems afflicting the EEO complaints adjudication process which require an immediate legislative solution.

And, these problems, documented over more than a decade, continue to plague this system. Although there are many ways to demonstrate the currency of the defects in this system, two examples should suffice.

First, the pace at which complaints are adjudicated in this system continues to be intolerably slow. In Fiscal Year 1990, the most recent year for which data is publicly available from the EEOC, the average time consumed in adjudicating EEO claims on the merits was 526 days.[8] And, some agencies operated much more slowly than at even this unacceptable rate. The Department of Justice took 1083 days -- nearly three years -- to decide these claims on the merits[9], while the Department of Housing and Urban Development took 1002 days[10] and the Department of State took 1466 days to

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[8] See EEOC, Report on Pre-Complaint Counseling & Complaint Processing for FY 1990, at 39 (1990) ("EEOC Report for FY 1990").

[9] See id. at A-16.

[10] See id.

adjudicate these claims administratively.[11]

And, the pace has not improved over time. The average time to adjudicate claims on the merits in FY 1988 was 607 days and in FY 1983 was 524 days.[12] Although the intolerably slow speed with which these claims are processed has been recognized as a problem for years, the pace has not improved.

These time delays are simply intolerable, robbing the complaints processing system of any legitimacy as an effective means to resolve EEO claims. And, these delays are a product of a systems with many steps, administered by different staff at different stages, in which there have been no deadlines requiring the agencies to complete the processing of claims in a timely fashion. In addition, since the complaints processing is conducted separately at each agency, there are complaints adjudication systems operating simultaneously at nearly 120 agencies, some more efficiently than others, but none operate with any real accountability to the EEOC or to the Congress.

Second, the current system entrusts to the agencies the investigation and adjudication of the claims brought against them, creating the perception, and unfortunately the reality at times, of a serious and debilitating conflict of interest. Even though claimants may elect to have their claims tried before independent administrative judges at the EEOC, those judges issue decisions that are merely recommendations that the agencies are free to

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[11] See id. at A-17.

[12] See EEOC Report for FY-1989, at 34.

to findings that they hadn't discriminated than that they had committed discrimination.[15]

No legal system can achieve legitimacy, even if it had no other afflictions, with disparities in treatment of this enormity. It's not surprising, then, that complainants report an overwhelming desire to avoid this complaints adjudication process and either proceed through the negotiated grievance process, when they are covered by a collective bargaining agreement, or go to the courts at the earliest possible time. Few, however, have the benefit of legal representation or the resources to engage in protracted and expensive litigation. To most complainants, therefore, this process affords the only forum in which their claims of discrimination can be heard. And these victims deserve a level field.

Conflicts of interest and time delays are but two of the many shortcomings of the present EEO complaints adjudication systems through which federal employees with equal employment claims are required by statute to proceed. Other problems with the system range from the inadequacy of the factual records compiled by the agency-conducted investigations and the limited authority of administrative judges to compel the attendance of witnesses at hearings of these claims, to the overly complex and slow system for

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[15] Disparities of comparable magnitude have appeared every year for which this data has been published. In FY 1983, for example, agencies rejected 39.4% of the findings of discrimination while rejecting only 0.4% of the findings of no discrimination and in FY 1985, agencies rejected 45.5% of the findings of discrimination while rejecting only 1.3% of the findings of no discrimination. See EEOC Report for FY 1990, at 50-51.

reject or modify. Therefore, the agencies decide the cases that are brought against them, relying largely upon evidence obtained from investigations that the same agencies also conduct.

The extent of this conflict of interest can be measured by comparing the receptivity of the agencies to findings of discrimination, recommended by the EEOC administrative judges, with their receptivity to recommended findings of no discrimination. Agencies that approach discrimination claims with impartiality would be expected to treat these findings alike, rejecting and accepting these findings with comparable frequency. The reality, however, falls far short of this expectation. In Fiscal Year 1990, for example, executive agencies as a group rejected 60% of the recommended findings of discrimination while rejecting only 0.5% of the recommended findings of no discrimination.[13] This disparity is of a staggering significance. It reflects that executive agencies are nearly 120 times more willing to reject a finding of discrimination than a finding of no discrimination.

This problem too appears entrenched. Disparities of dramatic proportions have recurred each year for which the EEOC has made this data publicly available. In Fiscal Year 1989, for example, executive agencies rejected 58.5% of the findings of discrimination recommended by EEOC Administrative Judges while rejecting only 0.2% of the recommended findings of no discrimination.[14] In FY 1989, therefore, executive agencies were about 290 times more receptive

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[13] See EEOC Report for FY 1990, at 50-51.

[14] See EEOC Report for FY 1990, at 50-51.

the adjudication of EEO claims mixed with alleged civil service violations, to the frequent reluctance of agencies to punish managers whose conduct has been proved to be discriminatory. Together, these obvious weaknesses in the current system, and the broad, bipartisan consensus that this system poorly serves our government, should ring a clarion call for fundamental change.

II. The EEOC's New § 1614 Regulations Do Little to Remedy These Persistent Problems

Recently, the EEOC issued new rules that will supplant the existing system for adjudicating EEO complaints in the federal sector.[16] These regulations, which will be codified at 29 C.F.R. § 1614, have been under consideration and review at the EEOC for more than a decade.[17] While they may address some of the defects afflicting the administrative process, there is much that regulatory change, constrained as it is by political and statutory limitations, cannot change. Even the Chairman of the EEOC acknowledged last month, when the final version of the § 1614 regulations were issued, that the final solution to the problems afflicting this process must be addressed by Congress.[18] Accordingly, while we commend the EEOC for its efforts to address the faults of the complaints adjudication system, the regulations that it has issued are more noteworthy for the areas they do not,

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[16] The current system is governed by regulations found at 29 C.F.R. § 1613.

[17] Since these rules will appear at 29 C.F.R. § 1614, we will refer to them as the § 1614 regulations.

[18] See Priest, "EEOC Revises Bias, Disability Rules," The Washington Post (March 5, 1992).

and probably cannot, address than for the improvements that are accomplished.

The most significant development achieved by these new regulations is the establishment of fixed periods within which agencies must conduct investigations of EEO claims and within which Administrative Judges at the EEOC must issue their decisions.[19] In the past, only the complainant was subject to time limitations within which he or she was required to act, leaving the agency and the EEOC unconstrained by any time limitations within which each must perform its duties. These new rules will bring some measure of parity between the parties to act in a timely fashion and may speed up the processing of some claims. Change in these areas is a welcome development.

But, we remain concerned that even these modest improvements will have limited success. In order for these reforms, particularly the deadline for completing investigations, to have any significant impact, there must be an enforcement mechanism that will impose real consequences if an agency fails to act in a timely fashion. Only then will agencies devote the necessary resources and attention to the vigorous and expeditious completion of investigations.

As the teeth behind this time limitation, however, the regulations simply authorize Administrative Judges to draw adverse inferences from the absence of materials that should have been included within an unfinished investigation. But, Administrative

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[19] See 29 C.F.R. §§ 1614.108 (f), .109 (g).

Judges have had such authority in the past and failed to exercise it with the frequency that seems warranted. More importantly, the regulations continue, as Title VII requires, to entrust to the agencies the discretion to reject or modify the recommended decisions issued by Administrative Judges. Accordingly, the agencies may repudiate a judge's reliance upon such adverse inferences in rendering the recommended decision. The sanction that may be imposed for failing to conduct a proper and complete investigation in a timely fashion, therefore, lacks any real teeth as long as the agencies retain final decisionmaking authority. Since this time limitation for the completion of investigations is only as effective as the sanctions which may be imposed for noncompliance, we have little hope that real expedition will be achieved by this rule.[20]

While the regulations achieve other healthy changes, including a brief expansion of the time within which to initiate the complaints adjudication process and the more direct involvement by the Administrative Judges in overseeing discovery by the parties, they are modest departures from the cumbersome, ineffective system that is currently in use. Indeed, what is most striking about these new regulations is that they change little of consequence in the current system. As a press account issued at the time that the section 1614 regulations were issued confirms, the EEOC had more

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[20] Even if investigations are conducted more rapidly, the § 1614 regulations maintain the practice of the agencies investigating themselves, perpetuating a longstanding conflict of interest and leaving unaddressed the inadequacies of many investigations that agencies conduct.

ambitious plans for these rules but they foundered at the Office of Management and Budget.[21] Between the constraints imposed by the patchwork of statutes governing this system and the political hurdles that regulatory changes must surmount, it is not surprising that these new regulations leave the status quo largely intact.

III. The Federal Employee Fairness Act

The profound and intractable defects afflicting the current complaints adjudication process and the modest impact of the new EEOC regulations compel the conclusion that comprehensive reform of this system is needed and it is needed now. While some regulatory improvements in the system have occurred, many of the problems with the current system are rooted in a flawed structure that is created by statute. Accordingly, we believe that only legislation holds any promise of ultimately remedying the many defects of this system.

A list of these fundamental and persistent defects, which the EEOC's new regulations fail to address, confirms the need for legislation.

> 1. It is fundamentally unfair for agencies, against which EEO claims are pending, to investigate and adjudicate those claims themselves. Therefore, it is necessary for the factual development and the adjudication of these claims to be conducted by some other means.
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> 2. The investigations that the agencies have conducted have often created files that, although voluminous, omit information that is critical to the full and fair adjudication of the EEO claims. Therefore, it is necessary to devise another way to develop the facts with

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[21] See Priest, "EEOC Revises Bias, Disability Rules," The Washington Post (March 5, 1992).

which the parties may present their positions at hearings on the EEO claims.

3. The time period within which complainants may initiate the process for pursuing an EEO claim should be expanded to permit reflection and an opportunity to look into their suspicions of discrimination before any action is taken. The EEOC regulations expand from 30 to 45 days the time from the last discriminatory incident within which complainants must contact an agency counselor to begin pursuing a claim. This time period must be considerably expanded.

4. Deadlines are needed within which the agency, the EEOC, as well as the complainant must discharge their respective responsibilities within the complaints adjudication system. The deadlines established by the section 1614 regulations are a good start but fail to create any real incentive for agency compliance.

5. Although the Civil Rights Act of 1991 clearly provided for the award of compensatory damages to Title VII claimants who proved that their employers intentionally discriminated against them, the section 1614 regulations do not authorize Administrative Judges to award such relief. Legislation would clarify that the mandate of the Congress is reflected in that Act.

6. Employees whose claims encompass both an EEO claim and a challenge under the civil service rules, and who therefore present a "mixed case," are compelled to proceed before another agency, the Merit Systems Protection Board, and then may present their EEO claim to the EEOC. Where those agencies differ, the claim is submitted to a special panel. This system is enormously complex and time consuming and requires modification.

7. Too often, employees who commit discrimination do so with impunity, retaining their employment and sometimes reaping promotions instead of receiving punishment for illegal conduct. Legislation is needed to ensure that persons found to have committed discrimination are subject to appropriate sanctions.

8. There are several judicial interpretations given the statutes and rules governing this system that have warranted revision for years and which legislation must address.

We endorse the Federal Employee Fairness Act because it offers fundamental revisions to the current complaints processing system

and regard its approach as providing the best hope of transforming this system into one that will fairly and promptly address the federal sector claims of discrimination. While there are many facets of this legislation that warrant its commendation, several should be noted here.

First, we applaud the removal from the executive agencies of the responsibility for investigating and adjudicating complaints of discrimination.[22] For the first time since 1972, when Title VII coverage was extended to federal employees, the fox would no longer guard the chicken coop; the stain from the conflict of interest which inevitably taints the complaints adjudication system would finally be removed. The Act would entrust authority to issue final decisions, rather than simply recommendations, to the Administrative Judges of the EEOC.[23]

We also endorse the Act's consolidation of much of this complaints adjudication process into one agency, the EEOC, which operates independently of the other executive agencies against which EEO claims are lodged.[24] In addition, we expect that this centralization of the complaints adjudication process will yield

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[22] Since Title VII expressly entrusts final action on complaints of discrimination to the executive agencies, removal of this function from those agencies requires legislation. See 42 U.S.C. § 2000e-16 (c).

[23] Of course, either party should be entitled, and the Act provides for appeals from the judges' final decisions to the EEOC.

[24] Of course, the Act must afford employees of the EEOC with discrimination claims the opportunity, if they so choose, to have the factual development and adjudication of those claims conducted by another agency.

other significant benefits. We expect that the staff handling these claims can, and will, be regularly and properly trained.[25] The assignment of these functions to a single agency also should increase the accountability for the operation of this system to the Congress and the public. And, we are hopeful that the Act will create economies of scale which ensure that the complaints adjudication system can be fully and properly funded.

The General Accounting Office (GAO) has computed the costs associated with counseling and processing of discrimination complaints at 29 Federal agencies.[26] In a report issued last month, GAO concluded that those agencies alone expended $139 million on this complaints adjudication process.[27] Even modest reforms of the existing system will inevitably result in cost savings that will more than offset any new funds required to implement the Act.

Second, we endorse the Act's creation of a new system by which the facts relating to claims of discrimination, and the defenses to such claims, are discovered and collected. Under the current rules, the agencies conduct investigations of themselves, creating

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[25] Toward that end, we endorse any enhancement in the grade levels for Administrative Judges and other staff affiliated with the federal complaints adjudication system that will ensure that the EEOC can attract and retain qualified staff.

[26] There are about 90 Federal agencies that the GAO has not yet examined. The total cost of the complaints adjudication process throughout the Federal government is undoubtedly much higher.

[27] See GAO, Federal Workforce: Agencies' Estimated Costs for Counseling and Processing Discrimination Complaints (March, 1992).

another conflict of interest that the EEOC's section 1614 rules do not eliminate. The current process for conducting investigations also suffers from another serious defect that the Act addresses. Investigations often result in the compilation of files which, although voluminous, omit facts that in the preparation for the hearing the parties or the Administrative Judge discover are relevant and should have been collected. Moreover, the quality of the investigations vary significantly; some are conducted more vigorously than others.

The Act, as we understand it, would transfer the principal fact gathering responsibility from the agencies alone to the parties under the supervision of the Administrative Judge.[28] We applaud this approach since it entrusts this important responsibility to the parties who have the greatest interest in seeing it conducted properly. And, it permits the parties, with involvement from the judge who will hear the claim, to define the scope of the discovery and to identify the facts that are needed to prove and rebut the claims.

We understand that, when a complainant is unrepresented, the Act contemplates that the Administrative Judge will require that

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[28] We also believe, and the Act seems to recognize, that the agencies should continue to play an important role in the fact finding process. The agencies are necessarily more familiar with the documents created in connection with any challenged personnel action. It is important, therefore, that the agencies continue to have responsibility for the collection of documents relevant to proving, and rebutting, claims of discrimination. In addition, the agencies should retain, and we read the Act as providing, the opportunity for brief investigation of the allegations that may facilitate the conciliation of those claims.

the record be sufficiently developed and, if necessary, will identify the discovery needed by the complainant to ensure that a full and fair hearing is conducted. This provision for the discovery of facts where the complainant is unrepresented is critical to the protection of these rights guaranteed by the federal equal employment laws. We are hopeful that the discovery process provided by the Act will improve the quality of the factfinding upon which the hearings must rely.

Third, the Act expands the time period within which claimants must initiate the complaint process. Under current rules, claimants must initiate the process within 30 days of the last incident of discrimination that is alleged.[29] The EEOC's new regulations would extend that period to 45 days.[30] Employees in the private sector, however, are entitled to a minimum of 180 days within which to initiate the process available to them.[31] And, even more closely related, the Civil Rights Act of 1991 affords employees of the U.S. Senate 180 days before they must initiate the complaints adjudication process available to them.[32] Employees of executive agencies should be accorded, and the Act provides, the same time period of 180 days within which to initiate the complaint process. This additional time affords employees the opportunity to deliberate, to consult legal counsel, and to informally investigate

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[29] See 29 C.F.R. § 1613.214 (a)(1)(i).

[30] See 29 C.F.R. § 1614.105.

[31] See 42 U.S.C. § 20003-5 (e); 29 U.S.C. § 626(d).

[32] See Pub. L. No. 102-166, 105 Stat. 1071, (Nov. 1991).

the circumstances surrounding the incident that they may challenge.

Fourth, deadlines are needed within which the agency and the EEOC as well as the complainant will be obligated to complete the tasks assigned to them by the complaints adjudication system. Here, the EEOC's new regulations make a significant contribution, creating for the first time limitations applicable to the agencies and to the EEOC.[33] But, as we observed earlier, as long as the agencies retain final decisionmaking authority, they remain at liberty to reject any sanctions that an Administrative Judge might impose for noncompliance with the time deadlines. By entrusting the authority to render final decisions to the Administrative Judges, as well as prescribing the consequences that would flow from noncompliance with the deadlines, the Act would substantially increase the likelihood that the deadlines would be honored.

Fifth, the Civil Rights Act of 1991 expressly extends to employees of governments and the private sector alike the opportunity to recover compensatory damages for intentional discrimination prohibited by Title VII and the Americans With Disabilities Act.[34] In its new regulations, the EEOC has apparently failed to permit the award of such damages in the administrative process.[35] In the Civil Rights Act of 1991,

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[33] See 29 C.F.R. §§ 1614.105, .106, .108, .109, .110.

[34] See Pub. L. No. 102-66, 105 Stat. 1071, § 102 (a)(1) & (2)

[35] The EEOC's definition of remedies that comprise full relief does not include any reference to damages. 29 C.F.R. § 1614.501.

Congress failed to make any distinction between the award of damages in the courts and in the administrative process. Nor would such a distinction be wise. If damages cannot be awarded through the administrative process, this deficiency will quickly and dramatically diminish the value and attractiveness of this process to complainants. The availability of damages in the courts will create just the kind of incentive to proceed to that forum that this Act is designed to moderate. The same remedies must be available in the administrative and judicial forums. This Act should clarify Congress' intent to achieve such parity.

Sixth, the current system for handling mixed cases, by which claims of discrimination are joined with challenges arising under the civil service rules, is hopelessly complex and long. Employees, agency employers, and the administrative agencies involved in the mixed case procedure spend a great deal of time and effort attempting to resolve often simple cases, with inconclusive results. The central idea of the mixed case procedure, that the EEOC and Merit Systems Protection Board (MSPB) could both resolve the same case, with each having parity with the other, seems in retrospect to have been doomed from the start. This splitting of jurisdiction was rooted in uncertainty over how well the newly created institutions would do their jobs, and a mistrust of the ability of EEOC and MSPB to decide matters outside their own jurisdiction. Fortunately, these concerns have proven to be largely misplaced, and the track records of these decision-making entities provides a basis for employees to evaluate the appropriate

forum for a particular case.

To rectify the extraordinary delays and procedural confusion which now characterizes the processing of mixed cases, the Act permits employees to choose the forum -- MSPB, EEOC, or grievance arbitration -- in which they wish to proceed. Rather than have several different agencies engage in separate and time-consuming review of each other's decisions, the Act allows the chosen forum to decide all of the issues -- civil service, discrimination, or contractual -- presented to it in accordance with established case law.[36] At the end of the process, employees alleging discrimination retain the right to de novo review of that claim. The Act will resolve mixed cases far faster than under the old system, and allow for more consistency in the adjudication of discrimination claims.

Seventh, agencies are often reluctant to punish employees who are found by either an administrative or judicial forum to have committed discrimination. The witnesses who testified at an earlier hearing before these Subcommittees confirmed a suspicion which many have held that managers who commit discrimination are rarely punished. Not surprisingly, the failure to discipline proven discriminators breeds contempt, or at least disregard, for the EEO laws. Managers are left with the impression that they can commit discrimination with impunity and the employees they

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[36] Of course, the EEOC will be obligated to defer to the interpretations of civil service law construed by the MSPB, while the MSPB will be obligated to defer to the interpretations of equal employment laws given by the EEOC.

supervise become demoralized and reluctant to exercise their rights under the equal employment laws on the belief that no improvements will ensue. While some agencies are undoubtedly diligent in imposing penalties where the commission of discrimination has been proved, there are enough occasions when this does not occur to warrant a change.

The Act would create a system by which employees who are found in a final order, in either an administrative or judicial forum, to have committed discrimination would be subject to appropriate sanctions. Any such system, of course, must ensure that the proven discriminators are afforded whatever process they may be due to challenge the sanctions that are imposed. Whether or not the precise approach set forth in the Act is the optimal approach, some system is necessary to ensure that agencies are accountable for the treatment they afford employees found to have committed discrimination. Since agencies typically deny the existence of discrimination in their workforce, they may be reluctant to punish managers later found to have committed such conduct in an administrative or judicial proceeding that ruled against the agency. Accordingly, the Act should provide for a system by which agencies are obligated to consider and impose punishment appropriate to the nature and severity of the discriminatory conduct committed. And, the Act should require that the agencies be readily accountable for the decisions they render regarding such sanctions and that such decisions will be scrutinized to ensure they are supported by the record.

Eighth, the Act provides for a number of minor revisions to the existing complaints adjudication system, each of which addresses an important shortcoming. As an example, claimants who fail within the time allowed to name the head of their agency as the defendant in actions filed in the courts will have their case dismissed.[37] Simple lapses committed by unwary complainants, particularly those unable to retain legal counsel, therefore lead to draconian results. The Act should, and does, provide for amendment to this technical defect as it does for other such obstacles that have arisen in the interpretation and application of the federal equal employment laws.

IV. Conclusion

This year marks the twentieth anniversary of the amendment of Title VII that extended to federal employees the full protections against employment discrimination. The complaints adjudication system, which was created with the noble ambition that it afford an inexpensive, speedy and fair means of resolving EEO claims, has fallen far short of each of these goals. We have the benefit of an extensive record that documents the nature and extent of the entrenched defects in this system. And, we believe the Federal Employee Fairness Act offers the first opportunity for the

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[37] This result occurs because Title VII provides that the head of the agency shall be named as the defendant in judicial actions and requires that such actions be filed within 90 days of final agency action. See 42 U.S.C. § 2000e-16 (c), as amended by the Civil Rights Act of 1991. The failure to name the agency head, or otherwise put the agency head on notice of the action, within the 90 day allotted period has been grounds for dismissal of the action. See, e.g., Johnson v. Burnley, 887 F.2d 471 (4th Cir. 1989); Johnston v. Horne, 875 F.2d 1415 (9th Cir. 1989).

fundamental reform of this system that is so sorely needed. We urge these Subcommittees to revise the bill where it is needed and report it for passage in this Congress. We look forward to working with you in this important effort.