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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	Maximum Weight Standards and Title VII (1 page)	n.d.	P5
002. letter	Elizabeth M. Thornton to Maria Echaveste (10 pages)	12/2/1993	P5

COLLECTION:

Clinton Presidential Records
 Domestic Policy Council
 Stephen Warnath (Civil Rights)
 OA/Box Number: 9593

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [2]

ds70

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Divider Title: _____ E _____

EEOC's Pilot Mediation Program for the Private Sector

Background

- In an effort to find new methods of addressing its rapidly growing charge caseload, EEOC approved a proposal to launch a pilot Alternate Dispute Resolution (ADR) program on May 5, 1992.
- A contract to conduct the pilot program in ADR of 300 employment discrimination charges was awarded on September 29, 1992 to the Center for Dispute Settlement (CDS) in Washington, D.C. Under the joint supervision of CDS and EEOC, pilot ADR programs were conducted in EEOC's Philadelphia, New Orleans, and Houston District Offices, and the Washington, D.C. Field Office.
- Actual mediation of the charges began April 1, 1993. Pilot programs included charges filed under Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act based on issues of discipline, discharge and/or terms and conditions of employment.
- Preparatory work included the development of educational materials for use by charging parties and respondents, training of mediators, training of EEOC staff on the mediation process, and educational meetings for interested parties and organizations.
- CDS oversaw a formal evaluation of the ADR pilot program. In addition, EEOC conducted its own ongoing evaluations; results of both began to be evaluated at the end of the contract (March, 1994).

Preliminary Findings

- 267 charges were mediated and 17 settled before the scheduled mediation
- Of the 267 mediated charges, 139, or 52%, reached settlement terms
 - Over 50% provided for financial payment
 - 17% involved changing the employee's work situation
 - 22% contained provisions to alter workplace practices or policies
- 79% of charges entering into the mediation were discharge issues
- Overall processing time for charges mediated was 67 days.

- Charging parties were much more willing to embrace ADR than were respondents. Of the 920 charging parties offered mediation, 796 of them, or 87%, accepted the offer. The respondents involved in all 796 cases were offered mediation -- only 309, or 39%, accepted. Before many employers would accept an offer of mediation, the process had to be explained to various officials, i.e. Human Resources staff, in-house counsel, and outside counsel. EEOC, therefore, spent a great deal of time securing company.

Follow-up

- Based on its evaluation of the pilot program, the Commission will decide whether to adopt ADR permanently as a charge resolution option. Issue to be considered in that determination include:
 - A determination of the dollar cost of ADR
 - The effect of mediation on EEOC's role as a law enforcement agency
 - Does ADR effectively address issues of employment discrimination?
 - The efficiency and timeliness that can be maintained through ADR
 - The effect of different charge issues on ADR efficiency and settlement rates
 - The degree to which ADR can be incorporated effectively as a method of charge resolution
- The Office of Program Operations will likely postpone a recommendation on the future of ADR until new leadership is on board.

EEOC's ADR Activities with Federal Agencies

Current

- EEOC assists federal agencies with technical advice as to whether their ADR efforts conform with federal sector EEO regulations
- EEOC will provide training to EEOC attorneys in ADR mediation, so that EEOC can offer "neutral" services on a reimbursable basis to federal agencies which have incorporated established ADR programs into their EEO complaint procedures.

Revised 6/15/94

Statement Regarding Effect of April 26, 1994, Supreme Court Decision that the Civil Rights Act of 1991 Does Not Apply Retroactively to Cases Arising Prior to Passage of the Act on Nov. 21, 1991.

Since April 1993, the EEOC has taken the position that the full scope of remedies available to victims of discrimination under Section 102 of the Civil Rights Act of 1991 (the Act) is applicable to cases arising prior to or pending on Nov. 21, 1991 -- the effective date of the Act. On Tuesday, April 26, 1994, the Supreme Court ruled in Landgraf v. USI Film Products that Section 102 of the Act is not retroactive and, therefore, compensatory and punitive damages are not available in cases arising prior to the Act's passage.

The decision clearly does not reflect the position advanced by the Commission and the Department of Justice in the amicus brief filed in the case. While the issue was pending before the Court, the Commission issued interim guidance to deal with the charges and litigation in which compensatory and punitive damages may have been applicable. The effect of the Landgraf decision on the EEOC's caseload is as follows.

Federal Sector EEO Complaint Processing

The Commission stayed that portion of appellate orders concerning compensatory damages until the decision in Landgraf was rendered. Between April 1, 1993 and April 25, 1994, 44 appellate decisions were issued that included orders concerning compensatory damages for pre-Act conduct. During this period, the EEOC issued a total of 6,363 appellate decisions. Complainants in those 44 cases will now be advised that compensatory damages are not available due to the Court's decision. (Punitive damages were never available in federal sector EEO complaints.)

Private Sector Title VII Enforcement

Private sector charges filed under Title VII prior to November 21, 1991, in which EEOC determined that compensatory and punitive damages were warranted were either successfully conciliated or conciliation attempts failed. Pursuant to Commission policy, those in which conciliation failed were considered for litigation. EEOC district offices report that litigation recommendations on all such charges have been submitted to the General Counsel. There are no remaining charges in the enforcement process affected by Landgraf.

- continued -

The Office of General Counsel (OGC), which conducts all litigation approved by the Commission, reports that there are 73 cases of a total of 521 in active litigation that will or may be affected by the Landgraf decision. OGC reports 12 lawsuits which were stayed solely pending disposition of Landgraf. These cases will now be dismissed in their entirety or go forward relative to those claims that post-date the Act.

Of the remaining 61 cases in pending litigation, compensatory and punitive damages may have been sought, but no determination regarding relief has yet been made. These cases will proceed without claims for the disallowed damages.

Regarding any future cases considered by the Commission for litigation, compensatory and punitive damages will not be sought for pre-Act conduct.

5/6/94-11:45 (revised)

The EEOC's Activity on the Issue of
Retroactivity of the Civil Rights Act of 1991

1. The Civil Rights Act of 1991 was signed into law on November 21, 1991. Because the act was unclear as to whether it was to apply retroactively, EEOC developed policy guidance in order to advise the field offices how to proceed. The new guidance, issued on December 27, 1991, interpreted the damages provisions in section 402(a) of the act not to apply to pending cases or pre-act conduct, following Supreme Court precedent in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result").
2. Following issuance of the policy guidance, six circuits (the Fifth, Sixth, Seventh, Eighth, Eleventh and the District of Columbia) issued rulings determining that the act should not be applied retroactively. However, the Ninth Circuit created a clear split in ruling that the act is retroactive. The Ninth Circuit based its conclusion on a "plain language" analysis of the act, without considering the Supreme Court decisions in Bowen, supra, or Bradley v. Richmond School Board, 416 U.S. 696 (1974).
3. The Supreme Court subsequently granted certiorari in two cases, Landgraf v. USI File Products, No 92-757 (Fifth Circuit) & Rivers v. Roadway Express, No. 92-938 (Sixth Circuit), to resolve the split.
4. In April 1993, the Acting Solicitor General requested EEOC's views on whether to present an amicus brief in the two cases and, if so, what position to take. EEOC's General Counsel presented a recommendation to the Commissioners to send a memorandum to the Acting Solicitor General recommending in favor of amicus participation.
5. A March 26, 1993 vote on the recommendation resulted in Chairman Kemp and Vice Chairman Silberman approving the recommendation of the General Counsel. Commissioners Gallegos, Cherian and Tucker agreed instead to amend the recommendation to reverse the Commission's position on the retroactivity of the damages portion of the act and to rescind the Commission's policy guidance issued on December 27, 1991.

Despite the three votes in favor of amending the General Counsel's recommendation, outgoing Chairman Evan Kemp, Jr. ruled the motion procedurally improper by memorandum of March 29, 1993. Newly designated Chairman Tony Gallegos called for a vote on this issue to cure any possible concerns. On April 13, 1993 the

recommendation as modified by the three Commissioners was approved by majority vote of the Commission and a revised memorandum was sent to the Solicitor General.

6. On April 30, 1993, the Commission and the Department of Justice jointly filed an amicus curiae brief in two cases currently before the U.S. Supreme Court: Landgraf v. USI Film Products and Rivers v. Railway Express, Inc. These two cases present the question of whether Sections 101 and 102 of the Civil Rights Act of 1991 apply to cases that were pending on the date of enactment, as well as to cases filed after the date of enactment challenging pre-enactment conduct. Both EEOC and Justice have argued in their joint amicus curiae brief that Sections 101 and 102 of the Act do have retroactive effect.

A footnote in the amicus brief states that the December 1991 policy guidance did not purport to explain an area in which the EEOC has expertise (i.e. Title VII); instead, it represented the EEOC's analysis of the Supreme Court's decisions on retroactivity.

8. The Commission then considered developing interim guidance to the field offices for pending cases. Ultimately, the Commission approved and issued interim instructions to the Office of Program Operations and the Office of Federal Operations, dated June 2 and October 6, 1993 respectively, setting forth the policy and procedures to be followed by EEOC staff in seeking compensatory and punitive damages for charges of discrimination involving pre-Act conduct. The interim guidance remained in effect until the United States Supreme Court handed down its decision in Landgraf v. USI Film Products, No. 92-757 (S. Ct. April 26, 1994).

9. As a result of Landgraf, the Commission is now deliberating on guidance that will rescind its interim instructions and direct field offices not to seek compensatory damages for any violation involving pre-act conduct to conform with the decision in Landgraf. Henceforth, compensatory damages will not be sought for any violation involving pre-Act conduct. See Landgraf v. USI Film Products, No. 92-757 (S. Ct. April 26, 1994).

10. Additionally, the proposed guidance will instruct field offices that if issues arise requiring resolution of whether sections of the Civil Rights Act of 1991 other than 102 are retroactive, which the decision in Landgraf clearly did not address, these cases should be flagged and sent to Field Management Programs or the Office of Federal Operations, respectively, for further guidance.

Office of the Chairman
Equal Employment Opportunity Commission
May 19, 1994

BRIEF SUMMARY

Case: Garcia et al. v. Spun Steak Company
Supreme Court No. 93-1222
Brief of the United States as Amicus Curiae
Filed 6/1/94

Background

The employees of Spun Steak Company, a producer of processed meats, are predominantly Spanish-speaking with a range of English fluency, including some who speak no English at all. After an incident during which two employees allegedly taunted a non-Hispanic employee in both English and Spanish, Spun Steak instituted a policy requiring that only English be spoken during work. Two employees and the union sued alleging discrimination on the basis of national origin. On cross motions for summary judgment, the district court held that the policy had a greater impact on Hispanic employees, that the company had to show a business justification, and that plaintiffs had pointed out a number of alternatives to the English-only rule. The court then enjoined further maintenance of the rule. On appeal, the Ninth Circuit reversed by a two-to-one vote, holding that plaintiffs had failed to establish a prima facie case of discrimination. The court emphasized that plaintiffs had failed to show a significant impact in light of the fact that the company's bilingual employees could comply with the rule. In so holding, the court rejected the EEOC's Guideline as wrong. The full Ninth Circuit subsequently rejected the suggestion for rehearing en banc, with Judge Reinhardt dissenting.

Argued

In a brief filed by the Solicitor General, we argued that review by the Supreme Court was warranted because of the errors in the court of appeals' decision, because of the significance of the issue to national origin minorities, and because of the importance to the EEOC of having a single nationwide standard on English-only rules. The brief emphasized that the EEOC's position on such rules is entitled to substantial deference because that position is a longstanding and consistent one, has been subjected to notice and comment review, and is consistent with Title VII principles. Criticizing the court of appeals' view that there was no discriminatory impact because employers may define privileges such as speaking narrowly, the brief emphasized that even privileges of employment may not be offered in a discriminatory fashion. The brief also noted that a rule with which one can comply nonetheless may be one of the most objectionable discriminatory rules. Finally, the brief argued that plaintiffs need not show a "significant" adverse impact to state a prima facie case of discrimination. Even if a significant impact were required, that standard would be met in this case because being deprived of the ability to speak the language in which one communicates most effectively has a significant adverse impact.

(1) There is widespread confusion concerning the extent of accommodation under the *Hardison* decision.

(2) The religious practices of some individuals and some groups of individuals are not being accommodated.

(3) Some of those practices which are not being accommodated are:

—Observance of a Sabbath or religious holidays;

—Need for prayer break during working hours;

—Practice of following certain dietary requirements;

—Practice of not working during a mourning period for a deceased relative;

—Prohibition against medical examinations;

—Prohibition against membership in labor and other organizations; and

—Practices concerning dress and other personal grooming habits.

(4) Many of the employers who testified had developed alternative employment practices which accommodate the religious practices of employees and prospective employees and which meet the employer's business needs.

(5) Little evidence was submitted by employers which showed actual attempts to accommodate religious practices with resultant unfavorable consequences to the employer's business. Employers appeared to have substantial anticipatory concerns but no, or very little, actual experience with the problems they theorized would emerge by providing reasonable accommodation for religious practices.

Based on these findings, the Commission is revising its Guidelines to clarify the obligation imposed by section 701(j) to accommodate the religious practices of employees and prospective employees.

PART 1606—GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

Sec.

1606.1 Definition of national origin discrimination.

1606.2 Scope of Title VII protection.

1606.3 The national security exception.

1606.4 The bona fide occupational qualification exception.

1606.5 Citizenship requirements.

1606.6 Selection procedures.

1606.7 Speak-English-only rules.

1606.8 Harassment.

AUTHORITY: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

SOURCE: 45 FR 85635, Dec. 29, 1980, unless otherwise noted.

§ 1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general title VII principles, such as disparate treatment and adverse impact.

§ 1606.2 Scope of Title VII protection.

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. The title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by title VII (collectively referred to as "employer").

§ 1606.3 The national security exception.

It is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements stated in section 703(g) of title VII.¹

¹See also, 5 U.S.C. 7532, for the authority of the head of a federal agency or department.

Continued

§ 1606.4

§ 1606.4 The bona fide occupational qualification exception.

The exception stated in section 703(e) of title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed.

§ 1606.5 Citizenship requirements.

(a) In those circumstances, where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by title VII.²

(b) Some State laws prohibit the employment of non-citizens. Where these laws are in conflict with title VII, they are superseded under section 708 of the title.

§ 1606.6 Selection procedures.

(a)(1) In investigating an employer's selection procedures (including those identified below) for adverse impact on the basis of national origin, the Commission will apply the *Uniform Guidelines on Employee Selection Procedures* (UGESP), 29 CFR part 1607. Employers and other users of selection procedures should refer to the UGESP for guidance on matters, such as adverse impact, validation and record-keeping requirements for national origin groups.

(2) Because height or weight requirements tend to exclude individuals on the basis of national origin,³ the user is expected to evaluate these selection procedures for adverse impact, regardless of whether the total selection process has an adverse impact based on national origin. Therefore,

ment to suspend or remove an employee on grounds of national security.

²See *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 92 (1973). See also, E.O. 11935, 5 CFR 7.4; and 31 U.S.C. 699(b), for citizenship requirements in certain Federal employment.

³See CD 71-1529 (1971), CCH EEOC Decisions 16231, 3 FEP Cases 952; CD 71-1418 (1971), CCH EEOC Decisions 16223, 3 FEP Cases 580; CD 74-25 (1973), CCH EEOC Decisions 16400, 10 FEP Cases 260. *Davis v. County of Los Angeles*, 566 F. 2d 1334, 1341-42 (9th Cir., 1977) vacated and remanded as moot on other grounds, 440 U.S. 625 (1979). See also, *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

29 CFR Ch. XIV (7-1-91 Edition)

height or weight requirements are identified here, as they are in the UGESP,⁴ as exceptions to the "bottom line" concept.

(b) The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin. However, the Commission does not consider these to be exceptions to the "bottom line" concept:

(1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent,⁵ or inability to communicate well in English.⁶

(2) Training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education, or which require an individual to be foreign trained or educated.

§ 1606.7 Speak-English-only rules.

(a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.⁷ Therefore, the

⁴See Section 4C(2) of the *Uniform Guidelines on Employee Selection Procedures*, 29 CFR 1607.4C(2).

⁵See CD AL68-1-155E (1969), CCH EEOC Decisions 16008, 1 FEP Cases 921.

⁶See CD YAU9-048 (1969), CCH EEOC Decisions 16054, 2 FEP Cases 78.

⁷See CD 71-446 (1970), CCH EEOC Decisions 16173, 2 FEP Cases, 1127; CD 72-0281 (1971), CCH EEOC Decisions 16293.

Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) *Notice of the rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

§ 1606.8 Harassment.

(a) The Commission has consistently held that harassment on the basis of national origin is a violation of title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin.⁹

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects

an individual's employment opportunities.

(c) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of national origin regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

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 - A. Need for Uniformity—Issuing Agencies
 - B. Purpose of Guidelines
 - C. Relation to Prior Guidelines
- 1607.2. Scope
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 - B. Employment Decisions

⁹See CD CL68-12-431 EU (1969), CCH EEOC Decisions 16085, 2 FEP Cases 295; CD 72-0621 (1971), CCH EEOC Decisions 16311, 4 FEP Cases 312; CD 72-1561 (1972), CCH EEOC Decisions 16354, 4 FEP Cases 852; CD 74-05 (1973), CCH EEOC Decisions 16387, 6 FEP Cases 834; CD 76-41 (1975), CCH EEOC Decisions 16632. See also, Amendment to Guidelines on Discrimination Because of Sex, § 1604.11(a) n. 1, 45 FR 7476 sy 74677 (November 10, 1980).

EXECUTIVE ORDERS

1-202. The authority described in Section 624(d)(6) of the Act shall be exercised by the Inspector General, Foreign Service, only with the specific consent of the Secretary of State and in accordance with regulations prescribed by the Secretary of State which, whenever practical, afford the head of any agency whose programs are subject to audit, review or inspection pursuant to such Section a reasonable opportunity to take corrective action before any suspension takes effect.

1-3. Administrative Matters.

1-301. The Secretary of State shall provide for the appropriate transfer of offices, entities, property, and records of the Office of the Inspector General, Foreign Assistance to the Office of the Inspector General, Foreign Service.

1-302. This Executive Order is effective July 1, 1978.

JIMMY CARTER

THE WHITE HOUSE,
June 29, 1978.

No. 12067

June 30, 1978, 43 F.R. 28967

PROVIDING FOR COORDINATION OF FEDERAL EQUAL EMPLOYMENT OPPORTUNITY PROGRAMS

By virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 FR 19807), it is ordered as follows:

1-1. Implementation of Reorganization Plan.

1-101. The transfer to the Equal Employment Opportunity Commission of all the functions of the Equal Employment Opportunity Coordinating Council, and the termination of that Council, as provided by Section 6 of Reorganization Plan Number 1 of 1978 (43 FR 19807), shall be effective on July 1, 1978.

1-2. Responsibilities of Equal Employment Opportunity Commission.

1-201. The Equal Employment Opportunity Commission shall provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. It shall strive to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the Federal departments and agencies having responsibility for enforcing such statutes, Executive orders, regulations and policies.

1-202. In carrying out its functions under this order the Equal Employment Opportunity Commission shall consult with and utilize the special expertise of Federal departments and agencies with equal employment opportunity responsibilities. The Equal Employment Opportunity Commission shall cooperate with such departments and agencies in the discharge of their equal employment responsibilities.

1-203. All Federal departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this order and shall furnish the Commission such reports and information as it may request.

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1-3. Specific Responsibilities.

1-301. To implement its responsibilities under Section 1-2, the Equal Employment Opportunity Commission shall, where feasible:

(a) develop uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity;

(b) develop uniform standards and procedures for investigations and compliance reviews to be conducted by Federal departments and agencies under any Federal statute, Executive order, regulation or policy requiring equal employment opportunity;

(c) develop procedures with the affected agencies, including the use of memoranda of understanding, to minimize duplicative investigations or compliance reviews of particular employers or classes of employers or others covered by Federal statutes, Executive orders, regulations or policies requiring equal employment opportunity;

(d) ensure that Federal departments and agencies develop their own standards and procedures for undertaking enforcement actions when compliance with equal employment opportunity requirements of any Federal statute, Executive order, regulation or policy cannot be secured by voluntary means;

(e) develop uniform record-keeping and reporting requirements concerning employment practices to be utilized by all Federal departments and agencies having equal employment enforcement responsibilities;

(f) provide for the sharing of compliance records, findings, and supporting documentation among Federal departments and agencies responsible for ensuring equal employment opportunity;

(g) develop uniform training programs for the staff of Federal departments and agencies with equal employment opportunity responsibilities;

(h) assist all Federal departments and agencies with equal employment opportunity responsibilities in developing programs to provide appropriate publications and other information for those covered and those protected by Federal equal employment opportunity statutes, Executive orders, regulations, and policies; and

(i) initiate cooperative programs, including the development of memoranda of understanding between agencies, designed to improve the coordination of equal employment opportunity compliance and enforcement.

1-302. The Equal Employment Opportunity Commission shall assist the Civil Service Commission, or its successor, in establishing uniform job-related qualifications and requirements for job classifications and descriptions for Federal employees involved in enforcing all Federal equal employment opportunity provisions.

1-303. The Equal Employment Opportunity Commission shall issue such rules, regulations, policies, procedures or orders as it deems necessary to carry out its responsibilities under this order. It shall advise and offer to consult with the affected Federal departments and agencies during the development of any proposed rules, regulations, policies, procedures or orders and shall formally submit such proposed issuances to affected departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall use its best efforts to reach agreement with the agencies on matters in dispute. Departments and agencies shall comply with all final rules, regulations, policies, procedures or orders of the Equal Employment Opportunity Commission.

1-304. All Federal departments and agencies shall advise and offer to consult with the Equal Employment Opportunity Commission during the development of any proposed rules, regulations, policies, procedures

EXECUTIVE ORDERS

or orders concerning equal employment opportunity. Departments and agencies shall formally submit such proposed issuances to the Equal Employment Opportunity Commission and other interested Federal departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall review such proposed rules, regulations, policies, procedures or orders to ensure consistency among the operations of the various Federal departments and agencies. Issuances related to internal management and administration are exempt from this clearance process. Case handling procedures unique to a single program also are exempt, although the Equal Employment Opportunity Commission may review such procedures in order to assure maximum consistency within the Federal equal employment opportunity program.

1-305. Before promulgating significant rules, regulations, policies, procedures or orders involving equal employment opportunity, the Commission and affected departments and agencies shall afford the public an opportunity to comment.

1-306. The Equal Employment Opportunity Commission may make recommendations concerning staff size and resource needs of the Federal departments and agencies having equal employment opportunity responsibilities to the Office of Management and Budget.

1-307. (a) It is the intent of this order that disputes between or among agencies concerning matters covered by this order shall be resolved through good faith efforts of the affected agencies to reach mutual agreement. Use of the dispute resolution mechanism contained in Subsections (b) and (c) of this Section should be resorted to only in extraordinary circumstances.

(b) Whenever a dispute which cannot be resolved through good faith efforts arises between the Equal Employment Opportunity Commission and another Federal department or agency concerning the issuance of an equal employment opportunity rule, regulation, policy, procedure, order or any matter covered by this Order, the Chairman of the Equal Employment Opportunity Commission or the head of the affected department or agency may refer the matter to the Executive Office of the President. Such reference must be in writing and may not be made later than 15 working days following receipt of the initiating agency's notice of intent publicly to announce an equal employment opportunity rule, regulation, policy, procedure or order. If no reference is made within the 15 day period, the decision of the agency which initiated the proposed issuance will become effective.

(c) Following reference of a disputed matter to the Executive Office of the President, the Assistant to the President for Domestic Affairs and Policy (or such other official as the President may designate) shall designate an official within the Executive Office of the President to meet with the affected agencies to resolve the dispute within a reasonable time.

1-4. Annual Report.

1-401. The Equal Employment Opportunity Commission shall include in the annual report transmitted to the President and the Congress pursuant to Section 715 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-14), a statement of the progress that has been made in achieving the purpose of this order. The Equal Employment Opportunity Commission shall provide Federal departments and agencies an opportunity to comment on the report prior to formal submission.

1-5. General Provisions.

1-501. Nothing in this order shall relieve or lessen the responsibilities or obligations imposed upon any person or entity by Federal equal employment law, Executive order, regulation or policy.

EXECUTIVE ORDERS

1-502. Nothing in this order shall limit the Attorney General's role as legal adviser to the Executive Branch.

JIMMY CARTER

THE WHITE HOUSE,
June 30, 1978.

No. 12068

June 30, 1978, 43 F.R. 28971

PROVIDING FOR TRANSFER TO THE ATTORNEY GENERAL OF CERTAIN FUNCTIONS UNDER SECTION 707 OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

By virtue of the authority vested in me as President of the United States by the Constitution and laws of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 FR 19807), in order to clarify the Attorney General's authority to initiate public sector litigation under Section 707 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-6), it is ordered as follows:

1-1. Section 707 Functions of the Attorney General.

1-101. Section 5 of Reorganization Plan Number 1 of 1978 (43 FR 19807) shall become effective on July 1, 1978.

1-102. The functions transferred to the Attorney General by Section 5 of Reorganization Plan Number 1 of 1978 shall, consistent with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, be performed in accordance with Department of Justice procedures heretofore followed under Section 707.

JIMMY CARTER

THE WHITE HOUSE,
June 30, 1978.

No. 12069

June 30, 1978, 43 F.R. 28973

RELATING TO CERTAIN POSITIONS IN LEVEL IV OF THE EXECUTIVE SCHEDULE

By the authority vested in me as President of the United States of America by Section 5317 of Title 5 of the United States Code, Section 1 of Executive Order No. 11861, as amended, placing certain positions in level IV of the Executive Schedule, is further amended by deleting "Deputy Under Secretary, Department of Transportation" in subsection (9) and inserting in lieu thereof "Administrator, Research and Special Programs Administration, Department of Transportation".

JIMMY CARTER

THE WHITE HOUSE,
June 30, 1978.

No. 12070

June 30, 1978, 43 F.R. 28977

ADJUSTMENT OF COST OF LIVING ALLOWANCES

By the authority vested in me as President of the United States of America by Section 5941 of Title 5 of the United States Code, and in order

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(e) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

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AUTHORITY: Secs. 709 and 713, Civil Rights Act of 1964 (78 Stat. 265) as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261); 42 U.S.C. 2000e-8, 2000e-12.

SOURCE: 43 FR 38295, 38312, Aug. 25, 1978, unless otherwise noted.

GENERAL PRINCIPLES

§ 1607.1 Statement of purpose.

A. Need for uniformity—Issuing agencies. The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. Purpose of guidelines. These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. Relation to prior guidelines. These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

§ 1607.2 Scope.

A. Application of guidelines. These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended

by the Equal Employment Opportunity Act of 1972 (hereinafter "title VII"); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to section 717 of title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. Employment decisions. These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. Selection procedures. These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection proce

dures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. Limitations. These guidelines apply only to persons subject to title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. Indian preference not affected. These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

§ 1607.3 Discrimination defined: Relationship between use of selection procedures and discrimination.

A. Procedure having adverse impact constitutes discrimination unless justified. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. Consideration of suitable alternative selection procedures: Where two

or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

§ 1607.4 Information on impact.

A. Records concerning impact. Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in paragraph B of this section, in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample

is appropriate in terms of the applicant population and adequate in size.

B. Applicable race, sex, and ethnic groups for recordkeeping. The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. Evaluation of selection rates: The "bottom line." If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components:

(1) Where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) of this paragraph, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths ($\frac{4}{5}$) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse

impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. Consideration of user's equal employment opportunity posture. In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

(Approved by the Office of Management and Budget under control number 3046-0017)

(Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 38295, 38312, Aug. 25, 1978, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1607.5. General standards for validity studies.

A. Acceptable types of validity studies. For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. Criterion-related, content, and construct validity. Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. Guidelines are consistent with professional standards. The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, DC, 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. Need for documentation of validity. For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. Accuracy and standardization. Validity studies should be carried out under conditions which assure insofar

as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period. In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. Method of use of selection procedures. The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. Cutoff scores. Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. Use of selection procedures for higher level jobs. If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants

are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. Interim use of selection procedures. Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided:

(1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. Review of validity studies for currency. Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, in-

cluding the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

§ 1607.6 Use of selection procedures which have not been validated.

A. *Use of alternate selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

§ 1607.7 Use of other validity studies.

A. *Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user, when the following requirements are met:

(1) *Validity evidence.* Evidence from the available studies meeting the standards of section 14B below clearly demonstrates that the selection procedure is valid;

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence.* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy paragraphs (1) and (2) of this paragraph B. above but do not contain an investigation of test fairness, and it

is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

C. Validity evidence from multiunit study. If validity evidence from a study covering more than one unit within an organization satisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. Other significant variables. If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

§ 1607.8 Cooperative studies.

A. Encouragement of cooperative studies. The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. Standards for use of cooperative studies. If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

§ 1607.9 No assumption of validity.

A. Unacceptable substitutes for evidence of validity. Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual re-

ports of its validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. Encouragement of professional supervision. Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

§ 1607.10 Employment agencies and employment services.

A. Where selection procedures are devised by agency. An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to device and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. Where selection procedures are devised elsewhere. Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or serv-

ice should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

§ 1607.11 Disparate treatment.

The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

§ 1607.12 Retesting of applicants.

Users should provide a reasonable opportunity for retesting and recon-

sideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

§ 1607.13 Affirmative action.

A. Affirmative action obligations. The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. Encouragement of voluntary affirmative action programs. These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

§ 1607.14 Technical standards for validity studies.

The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with

these guidelines. See sections 6 and 7 above.

A. Validity studies should be based on review of information about the job. Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. Technical standards for criterion-related validity studies. (1) *Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors

which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparison of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are

those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors remain the same, the greater the magnitude of the relationship (e.g., correlation coefficient) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection

instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard; cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job perform-

ance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these

guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below), an investigation of fairness requires the following:

(i) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies—(1) Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by

a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid.

and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of per-

formance which differentiate among levels of job performance.

D. Technical standards for construct validity studies—(1) Appropriateness of construct validity studies. Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by

empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4) *Use of construct validity study without new criterion-related evidence—(a) Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of subparagraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work

behavior(s) in the two jobs are the same.

DOCUMENTATION OF IMPACT AND VALIDITY EVIDENCE

§ 1607.15 Documentation of impact and validity evidence.

A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO-1, et seq., reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see § 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact—(a) Collection of information on impact.* Users of selection procedures other

than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the "four-fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is suffi-

cient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence—(a) Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation re-

ports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word "(Essential)" is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading "Source Data" in sections 15B(11) and 15D(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. Criterion-related validity studies. Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis or review of job information.* A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Es-

sential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential).

(4) *Job titles and codes.* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures.* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential).

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by

which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercially available selection procedures are studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less than perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined to be fair to the

group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure comparability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These

records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(13) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. Content validity studies. Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study.* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the rela-

tionship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should

be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of reliability should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and complete-

ness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described,

and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and

the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

E. Evidence of validity from other studies. When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies.*—a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were de-

terminated to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

f. *Evidence of validity from cooperative studies.* Where a selection procedure

has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

g. *Selection for higher level job.* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

h. *Interim use of selection procedures.* If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

(Approved by the Office of Management and Budget under control number 3046-0017)

(Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 38295, 38312, Aug. 25, 1978, as amended at 46 FR 63268, Dec. 31, 1981]

DEFINITIONS

§ 1607.16 Definitions.

The following definitions shall apply throughout these guidelines:

A. *Ability.* A present competence to perform an observable behavior or a

behavior which results in an observable product.

B. Adverse impact. A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. Compliance with these guidelines. Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. Content validity. Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. Construct validity. Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. Criterion-related validity. Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. Employer. Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontractor covered by Executive Order 11246, as amended.

H. Employment agency. Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. Enforcement action. For the purposes of section 4 a proceeding by a Federal enforcement agency such as a

lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. Enforcement agency. Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. Job analysis. A detailed statement of work behaviors and other information relevant to the job.

L. Job description. A general statement of job duties and responsibilities.

M. Knowledge. A body of information applied directly to the performance of a function.

N. Labor organization. Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. Observable. Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. Race, sex, or ethnic group. Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. Selection procedure. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. Selection rate. The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. Should. The term "should" as used in these guidelines is intended to

connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. Skill. A present, observable competence to perform a learned psychomotor act.

U. Technical feasibility. The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. Unfairness of selection procedure. A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. User. Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or moni-

tor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. Validated in accord with these guidelines or properly validated. A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. Work behavior. An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledge, skills, and abilities are not behaviors, although they may be applied in work behaviors.

APPENDIX

§ 1607.17 Policy statement on affirmative action (see section 13B).

The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve

as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the em-

ployment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within

the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

Harold R. Tyler, Jr.,
Deputy Attorney General and Chairman
of the Equal Employment Coordinating Council.

Michael H. Moskow,
Under Secretary of Labor.

Ethel Bent Walsh,
Acting Chairman, Equal Employment
Opportunity Commission.

Robert E. Hampton,

Chairman, Civil Service Commission.
Arthur E. Flemming,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.

Richard Albrecht,
General Counsel,
Department of the Treasury.

§ 1607.18 Citations.

The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

Section —, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR — (August 25, 1978).

The short form citation is:

Section —, U.G.E.S.P. (1978); 43 FR. — (August 25, 1978).

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR part 60-3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows:

Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR —, (August 25, -978); 29 CFR part 1607, section 6A.

**PART 1608—AFFIRMATIVE ACTION
APPROPRIATE UNDER TITLE VII OF
THE CIVIL RIGHTS ACT OF 1964,
AS AMENDED**

Sec.

- 1608.1 Statement of purpose.
- 1608.2 Written interpretation and opinion.
- 1608.3 Circumstances under which voluntary affirmative action is appropriate.
- 1608.4 Establishing affirmative action plans.
- 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.
- 1608.6 Affirmative action plans which are part of Commission conciliation or settlement agreements.
- 1608.7 Affirmative action plans or programs under State or local law.
- 1608.8 Adherence to court order.
- 1608.9 Reliance on directions of other government agencies.
- 1608.10 Standard of review.
- 1608.11 Limitations on the application of these guidelines.
- 1608.12 Equal employment opportunity plans adopted pursuant to section 717 of Title VII.

AUTHORITY: Sec. 713 the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 78 Stat. 265.

SOURCE: 44 FR 4422, Jan. 19, 1979, unless otherwise noted.

§ 1608.1 Statement of purpose.

(a) *Need for Guidelines.* Since the passage of title VII in 1964, many employers, labor organizations, and other persons subject to title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor

organization, or other person subject to title VII, or as a result of conciliation efforts under title VII, as amended, or under other Federal, State, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of title VII. Any uncertainty as to the meaning and application of title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of title VII litigation. The Commission believes that it is now necessary to clarify and harmonize the principles of title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of title VII.

(b) *Purposes of title VII.* Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women.

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Harassment Guidelines

I. Issue

What are the standards for determining whether workplace conduct constitutes unlawful harassment on the basis of race, color, religion, gender, national origin, age or disability?

II. Background

- A. On October 1, 1993, the Commission issued Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993). The Guidelines set forth standards for determining whether conduct rises to the level of unlawful harassment under the anti-discrimination statutes, and standards for determining whether an employer should be held liable for such harassment.
- B. The Guidelines were drawn from existing caselaw, Commission Decisions, the Sexual Harassment Guidelines, the National Origin Guidelines, and the Commission's Policy Statement on Current Issues of Sexual Harassment.
- C. The Notice and Comment period expired on November 30, 1993. The Commission received 86 comments during that period which OLC is in the process of reviewing, analyzing and incorporating.
- D. Following expiration of the Notice and Comment period, a number of individuals published op-ed pieces suggesting that the Guidelines were intended to bar all religious expression from the workplace. Following publication of these pieces, thousands of individuals have written to EEOC expressing concern about the inclusion of religion in the Guidelines. OLC is presently reviewing these comments and is considering whether inclusion of religion in the Guidelines violates the First Amendment's guarantee of free exercise.
- E. Commission staffers have held meetings with members of groups representing interests of the religious right and various civil rights groups to enable these groups to express their views on whether religion should be included in the Guidelines. In addition, OCLA and OLC have conducted a number of briefings on the Hill for congressional staffers. In preparation for those meetings on the Hill, OLC produced a Fact Sheet as well as a number of memoranda on the First Amendment issue.
- F. On May 13, 1994, the Commission extended the comment period on the Proposed Guidelines for another thirty day period. This second comment period will close on June 13, 1994.

- G. On June 9, 1994, a Subcommittee of the Senate Judiciary Committee conducted hearings on the Proposed Guidelines, focusing on the advisability and permissibility of the Guidelines' coverage of religious harassment. Commission staff testified at this hearing, as well as business people and individuals representing religious organizations and civil rights groups.
- H. Elements of the Guidelines drawing considerable response:
1. Whether the Guidelines conflict with the First Amendment's guarantees of free speech and freedom of religion.
 2. Whether the Commission should apply the "reasonable person in the same or similar circumstances" test as opposed to a "reasonable person" test in determining whether conduct may be considered harassment. Whether application of this reasonable person standard comports with Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993), which was decided subsequent to the issuance of the Proposed Guidelines.
 3. Whether the Proposed Guidelines should be consolidated with the Sexual Harassment Guidelines, 29 C.F.R. § 1604.11.
 4. Whether a "knew or should have known" standard should be applied in considering employer liability for acts of non-employees.
 5. Whether a single epithet may constitute harassment.
 6. How to define more precisely the terms "agent" and "immediate and appropriate corrective action."

III. Options

- A. Modify/clarify Guidelines and add specific examples in Question & Answer format.
- B. Take religion out of the Guidelines.
- C. Issue no Guidelines

Retroactivity of the Civil Rights Act of 1991

I. Issue

To what extent can provisions of the Civil Rights Act of 1991 be applied in pending cases following the Supreme Court's April 1994 decisions that the sections of that Act authorizing damages and reversing the prior Patterson decision are prospective only?

II. Background

- A. In April 1994, the Supreme Court decided that Sections 101 and 102 of the Civil Rights Act of 1991 -- which respond to the Court's prior decision in Patterson v. McLean Credit Union and authorize damages and jury trials, respectively -- could not be applied in cases challenging pre-Act conduct. See Landgraf v. USI Film Products, 62 U.S.L.W. 4255 (U.S. Apr. 26, 1994) (Section 102), and Rivers v. Roadway Express, Inc., 62 U.S.L.W. 4271 (U.S. Apr. 26, 1994) (Section 101).
- B. The Court rejected arguments that there was clear Congressional intent to make the entire statute retroactive and stated that it would apply a presumption against statutory retroactivity except in limited circumstances, such as the enactment of new procedural rules. In Rivers, the Court also rejected arguments that Congress intended to restore pre-Patterson law in pending cases. The decisions leave unclear the extent to which other provisions of the Act can be applied to pending cases.
- C. OLC has completed and circulated among other headquarters offices a draft enforcement guidance on the appropriate treatment of these other provisions. Most of these provisions respond to Supreme Court cases decided in 1989. The draft guidance takes the positions, among others, that:
1. Section 105, which codifies the disparate impact theory of discrimination, can be applied to pre-Act conduct because it was clearly intended to be restorative of the law predating the Supreme Court's Wards Cove decision;
 2. Sections 106 and 107, which prohibit norming of test scores and impose liability in "mixed motive" cases (contrary to the Supreme Court's Price Waterhouse decision), create new liabilities for employers and thus cannot be applied to pre-Act conduct;
 3. Section 108, which responds to Martin v. Wilks, can be applied to all post-Act challenges to consent decrees, regardless of the date on which those decrees were entered;

4. Section 112, which overturns Lorance v. AT&T Technologies, can be applied in all cases in which post-Act injury is alleged, as well as in those cases in which the date for challenging adoption of a pre-Act seniority system had not lapsed by November 21, 1991;
5. Section 113, which authorizes expert witness fees, can be applied in cases challenging pre-Act conduct to the extent that the fees were incurred post-Act;
6. Section 114, which modifies the statute of limitations and authorizes interest for federal employees, can be applied in cases challenging pre-Act conduct, with some restrictions; and
7. Section 115, which eliminates the two/three year statute of limitations for ADEA suits and replaces it with a 90-day suit filing period identical to Title VII suits, can generally be applied in cases challenging pre-Act conduct that were viable on the Act's effective date.

D. The retroactivity issue has always been a controversial one and the Commission's prior treatment of the issue reflects that controversy.

1. In December 1991, the Commission issued a policy guidance concluding that the damages provisions of the 1991 Civil Rights Act were prospective only -- a position now adopted by the Supreme Court, albeit for different reasons than those stated in the Commission's guidance. The rationale of the guidance lent itself to the interpretation that the Commission would find the entire Act to be prospective only.
2. The guidance, which had been drafted by OLC at the explicit direction of former Chairman Kemp, was heavily criticized by civil rights groups. It was finally rescinded by the Commission in April 1993; and the Commission participated in amicus briefs to the Supreme Court arguing that Sections 101 and 102 of the Act should be retroactive.
3. Between issuance and rescission of the guidance, the Commission directed OLC to prepare numerous drafts of guidances taking different positions on the retroactivity of other provisions of the Act. Although the Commission ultimately approved documents that effectively treated both Sections 108 and 112 as retroactive, it has never issued policy on the appropriate treatment of the other sections.

Affirmative Action

I. Issues

The issue of affirmative action is controversial, and there are differing interpretations of what affirmative action means. Furthermore, there is disagreement within the Commission as to whether or not policy should be issued.

II. Background

- A. The term "affirmative action" has become a political issue. Critics deride it as quotas and mandatory preferences for minorities and women. Supporters view affirmative action as a positive and necessary method of remedying historical discrimination.
- B. There is a draft enforcement guidance that addresses the standards for voluntary affirmative action plans established in Johnson v. Transportation Dept., Santa Clara County California. Those standards are as follows:
 - 1. A voluntary affirmative action plan must be designed to eliminate a manifest imbalance in traditionally segregated job categories. An employer must show that there is a significant disparity between the representation of a targeted group in the employer's workforce and in the relevant labor pool.
 - 2. A voluntary affirmative action plan cannot unnecessarily trammel the rights of non-targeted groups. The plan cannot absolutely bar the opportunities of non-targeted groups.
 - 3. A voluntary affirmative action plan must be temporary and not intended to maintain a racial balance.

Minority Recruitment

I. Issue

Is it permissible under Title VII for employers and/or employment agencies (including college placement offices and bar association referral services) to engage in certain focused recruitment and referral practices designed to assist employers in meeting their voluntary affirmative action objectives?

This is a politically sensitive issue -- one that involves a legitimate desire among many employers and employment agencies to increase employment opportunities for minorities and women (and improve their own EEO profiles), but that also involves a balancing of the rights and interests protected by Title VII.

II. Background

- A. The term "minority recruitment" is shorthand for a variety of practices targeting both minorities and women. These include, among others, exclusively recruiting, interviewing, and referring minority and female candidates; holding minority-only or female-only job fairs and recruitment dinners; sponsoring minority and female clerkship or internship programs; and maintaining minority and female resume books.
- B. The Commission's existing position is that, under general Title VII principles, practices targeting only minority and female candidates or excluding non-minority or male candidates in order to serve affirmative action goals may run afoul of Title VII. This position is reflected in EEOC Compliance Manual Section 631, pertaining to employment agencies, and in several Commission decisions from the mid- to late-1970's.
- C. As a legal matter, minority recruitment practices are potentially violative of several Title VII provisions. With respect to employment agencies, the principal hurdle is Section 703(b). That section makes it unlawful, absent a BFOQ, for an agency to fail or refuse to refer or to classify or refer for employment on the basis of an individual's protected status. Additionally, Section 704(b) prohibits an employment agency from printing or publishing or causing to be printed or published any employment notice or advertisement indicating a preference based on such status, again absent a BFOQ.

With respect to employers, Section 703(a) makes it unlawful to "limit, segregate, or classify" applicants for employment in any way which would deprive or tend to deprive them of employment opportunities on the basis of their protected status.

- D. This issue involves a tension between competing concerns. On the one hand, employers seek to use these recruiting techniques as a means of correcting for historical discrimination and increasing the representation of minorities and females in their work forces. On the other hand, however, these practices may violate Title VII.

- E. We are considering drafting policy for the Commission on the issue of minority recruitment. That document will propose the position that minority recruitment is permissible under Title VII if undertaken as part of a valid affirmative action plan and if simply one component of an overall non-restrictive recruitment and hiring process.

Speak-English-Only Rules

I. Issue

In 1993, the Ninth Circuit issued a decision in Garcia v. Spun Steak Company, that conflicts with Commission policy on speak-English-only rules.

II. Background

- A. The Commission's existing policy on this issue is stated in the Commission's Guidelines on Discrimination Because of National Origin, at 29 C.F.R. Section 1606.7, and in EEOC Compliance Manual Section 623.
- B. It is the Commission's position that, where such rules are applied at all times in the workplace, they presumptively violate Title VII and will be closely scrutinized. Where they are applied only at certain times, they may be lawful if the employer can show that they are justified by business necessity.
- C. The Commission's position is based on "administrative notice" that an individual's primary language is often an essential national origin characteristic, and that prohibiting an employee from speaking in his/her primary language at work disadvantages the employee on the basis of his/her national origin. That is, the Commission presumes that such rules have adverse impact. Such rules may also create a hostile working environment.
- D. In Garcia v. Spun Steak Company, the Ninth Circuit upheld the employer's speak-English-only rule and declined to defer to the Commission's Guidelines, noting its disagreement with certain aspects of the Commission's position. In particular, the court held that plaintiffs have to prove adverse impact, not merely assert it.
- E. After the Ninth Circuit denied the plaintiffs' petition for rehearing and the suggestion for rehearing en banc, plaintiffs (represented by the ACLU) filed a petition for certiorari with the Supreme Court. The Supreme Court has not yet decided whether to grant cert. The Court has, however, requested the Government's views on this issue. EEOC submitted a draft brief to the Solicitor General in April 1994, and the Government's brief was filed in June 1994.
- G. There is no need for the Commission to modify its position on this issue unless and until the Supreme Court issues a decision on Spun Steak that is at odds with our existing position. Otherwise, the Ninth Circuit's decision affects only field offices in that jurisdiction. In all other circuits, the EEOC's position is unaffected.

After-Acquired Evidence

I. Issue

Can an employer avoid liability for proven discrimination where it discovered after-the-fact a legitimate justification for the adverse action? For example, if an employer fires an individual due to his race, but discovers after-the-fact that the individual had lied on his original job application about his educational credentials, can the employer avoid liability for the discrimination?

II. Background

A. We addressed this issue in Section III(C)(3) of the Commission's Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory. In that guidance, we stated the following:

1. An employer cannot avoid liability for discrimination where it produces evidence of an after-the-fact justification.
2. However, where the employer proves that a justification discovered after-the-fact would have induced it to take the same adverse action, it will not be required to reinstate the complainant or to pay the portion of back pay or compensatory damages accruing after the date that the legitimate basis for the adverse action was discovered.
3. An after-the-fact justification will not shield an employer from liability for punitive damages where the employer's discriminatory action was undertaken with malice or reckless indifference to the victim's rights.

B. Since the Enforcement Guidance was drafted, there have been numerous court cases involving after-acquired evidence, and the issue has received some attention in the press. Two circuits have held that the plaintiff is entitled to no relief at all where an after-the-fact justification is established, but others have taken positions similar to that of the Commission.

C. On May 23, 1994 the Supreme Court agreed to review McKennon v. Nashville Banner Publishing Co., an ADEA case involving after-acquired evidence of wrongdoing. In McKennon, the Sixth Circuit held that after-acquired evidence is a complete bar to recovery where the employer can show it would have fired the employee on the basis of the evidence.

Uniform Guidelines on Employee Selection Procedures (UGESP)

I. Issue

Are revisions necessary or appropriate?

II. Background

- A. UGESP has long been a lightning rod for controversy between those who question its dictate that employers generally validate tests that have disparate impact and those who believe that it represents a necessary and appropriate way to implement Title VII, particularly in light of the renewed vitality given to the disparate impact cause of action by the Civil Rights Act of 1991.
- B. Independent of this fundamental disagreement, there have been numerous suggestions, discussed informally among Commission staff, for necessary revisions to UGESP to account for case law and statutory developments. Among the changes that have been discussed are:
- a. Modification of Section 1607.4(C), which generally exempts an employer whose "total selection process" has no impact. This is inconsistent with Connecticut v. Teal, 457 U.S. 440 (1982), which barred a "bottom line" defense.
 - b. Modification of Section 1607.4(D), which adopts the "4/5 rule" or "80% rule" for assessing impact. That rule has been widely criticized by courts; on the other hand, UGESP sets the rule as a first cut rule of thumb, and does not preclude more sophisticated statistical calculations of impact.
 - c. Modification of those sections (among them Sections 1607.6 and 1607.14) that arguably could be read to permit norming as a means to eliminate impact, in violation of Section 106 of the 1991 Civil Rights Act.
 - d. Updates to ensure consistency of the Guidelines with current standards of the American Psychological Association.
- C. Modifications to UGESP could, however, create significant logistical and other problems.
- a. Commission cannot change the Guidelines unilaterally. They were adopted in 1978 by four agencies.

- b. Opening any of the provisions to modification may mean that other provisions will be challenged as well.
- D. In addition, it is unclear that modification of the actual language of the Guidelines is necessary to address some of the above-identified problems. Problems with sections on the 4/5 rule and those authorizing norming can perhaps be better addressed through a policy guidance that would provide gloss on the proper application of these sections.
- E. Draft Compliance Manual section and draft Commission decision on calculations of impact under UGESP were prepared in the mid-1980s but never issued. No document addressing validation standards or business necessity was ever prepared based on assumption that field would not be involved in analyzing validation evidence.

Section 106 of 1991 Civil Rights Act

I. Issues

Section 106 provides that it is unlawful "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment related tests [used in selecting individuals for employment or promotion] on the basis of race, color, religion, sex or national origin." How should this provision be interpreted? What sorts of tests are covered by this section? What sorts of scoring devices are prohibited?

II. Background

- A. It is clear from the legislative history that Congress enacted Section 106 in order to halt the practice of "race norming." Norming is a practice by which test scores are calculated to reflect percentile rankings within each candidate's class. The issue was originally fueled by debates over the use of subgroup norming in the Department of Labor's General Aptitude Test Battery (GATB). The Department of Labor decided to adopt this practice based on studies showing that racial differences in test performance on GATB were much larger than differences in job performances. Subgroup norming compensated for this discrepancy. However, many news articles lambasted the practice.
- B. We have completed and circulated among other headquarters offices a draft enforcement guidance on whether Section 106 prohibits an employer from choosing a scoring technique that applies to candidates of all classes, such as banding, where the choice is motivated by a desire to increase the number of protected class members who score high enough to be considered for employment. Pursuant to instructions from a Commissioner, this document has not yet been submitted to the full Commission.

The draft guidance sets forth the position that:

1. Section 106 does not prohibit any scoring techniques in which all candidates are subject to the same scoring standards, even if the purpose or effect of a certain technique is to benefit protected class members.
2. If an employer utilizes a scoring technique that produces adverse impact, and if an alternative scoring technique would be equally effective and would produce less adverse impact, then the employer is required to switch to the second technique.

- C. We have been responding to numerous phone calls and letters regarding the meaning of Section 106. Most of the questions have concerned gender normed physical fitness tests.
- D. We have been analyzing whether Section 106 prohibits gender normed physical fitness or personality tests, and whether it prohibits race norming of all cognitive ability tests. We have not yet drafted guidance, due to the earlier instructions. Questions we're considering include:
 - 1. Whether gender norming of physical fitness tests falls outside the scope of Section 106, based on an argument that such tests are simply measurements of physical traits that must take into account the different physiology of men and women, and based on the fact that there is no indication Congress ever intended to prohibit gender normed physical fitness tests.
 - 2. Whether it constitutes "adjustment" or "alteration" of test scores where psychologists consider gender in analyzing data from personality tests.
 - 3. Whether a test must be valid according to UGESP standards in order to come under purview of Section 106. Basis for this argument would be that "employment related" means "job related" as the term is used in adverse impact theory. This interpretation may allow for class-based norming of cognitive ability, physical fitness and personality tests where it is shown that in the absence of norming, the tests do not satisfy UGESP since they do not predict job performance equally for different classes.
 - 4. Whether Section 106 simply bars all protected class-based score adjustments of any test used in the employment process.
- E. We have met with Department of Justice officials to discuss the lawfulness of gender normed physical fitness tests and, in particular, the soundness of a model physical abilities test for law enforcement designed by the FBI and various specialists.
- F. We attended a workshop on Section 106 at the annual conference of the Society for Industrial and Organizational Psychology. At that conference, a meeting was arranged for our benefit in which we were able to ask panelists from the workshop and other experts on employment tests numerous questions about cognitive ability, physical ability and personality tests.

See document on UGESP.

G. We have had ongoing discussions with persons in EEOC headquarters offices who are also deliberating on these issues.

Disparate Impact

I. Issue

The Commission has never addressed Section 105 of the Civil Rights Act of 1991, which deals with the disparate impact theory. Moreover, except for UGESP, the Commission lacked comprehensive guidance on disparate impact theory before the 1991 Act. See document on UGESP.

II. Background

- A. Existing policy on disparate impact is largely episodic: a two-page (somewhat outdated) summary of adverse impact theory in Section 604 of Compliance Manual, and discussions of particular types of impact challenges in the context of, e.g., conviction and arrest records, veterans' preferences, height and weight requirements, citizenship and residency requirements, and speak-English only rules. None of these materials gives general standards for processing impact charges, and all substantially predate Civil Rights Act.
- B. Guidance on Section 105 would help address criticism made by civil rights groups that Commission has failed to issue sufficient guidance on the Civil Rights Act. Sections 105 and 106 are the two significant sections enforced by the Commission on which we have yet to provide any policy.
- C. Guidance would thus be useful on several issues, including: means of determining adverse impact; the definition of "job related and consistent with business necessity" under Section 105; and when proposed alternative employment practices should be treated as substitutes for the practice responsible for the impact.
 1. As to determinations of adverse impact, questions include types of statistics to be used (e.g., labor force or applicant pool statistics); the status of UGESP's 80% rule; and the circumstances in which charging parties should, under Section 105, be relieved of the obligation to identify the particular practice responsible for the impact.
 - Field offices have available computer software that permits them to make impact calculations, so guidance on means of calculation may not be urgent.
 2. With regard to business necessity, issues to be addressed include how to reconcile sometimes differing language in pre-

Wards Cove Supreme Court disparate impact cases; the relationship between "business necessity" and UGESP validation standards; and the relationship between "business necessity" under Title VII and under the ADA.

3. As to alternative employment practices, some basic questions are how comparable a proposed alternative must be in achieving an employer's goal; the role of cost in assessing comparability; and the meaning of Section 105 provision that, for liability, respondent must "refuse to adopt" plaintiff's proposed alternative.

Waivers under Title VII

I. Issues

Should the Commission issue policy on waivers under Title VII? What position should the Commission take with respect to the requirements for valid waivers? Should the ADEA elements be applied or should the more general contract principles? The Commission does not have any policy on waivers under Title VII.

II. Background

- A. The issue of waivers (or releases) under Title VII has been the subject of numerous Attorney of the Day calls and some inquiries from the public. It is likely to receive more attention as employers seek ways to avoid liability, particularly for damages.
- B. Currently, the circuits that have addressed the issue require that waivers be knowing and voluntary. Some courts apply the factors used in ADEA waiver cases to decide whether a Title VII waiver is knowing and voluntary, such as whether the employee received consideration for the waiver, how much time the employee was given to consider the waiver, and whether the employee had the benefit of legal counsel. Other courts apply general contract principles in determining whether a release was knowing and voluntary. In addition, a release of Title VII claims will not violate public policy if the claims arose prior to the execution of the release. However, prospective claims may not be waived.
- C. Although many courts have addressed this issue, a Commission policy could reconcile the differences among the courts and provide guidance to employers on this issue of growing concern. Consideration should also be given to assuring that employees as well as employers are informed of their rights and are able to make informed decisions about waivers.

Guidelines on Discrimination Because of Religion

I. Issue

What is the nature of an employer's duty to reasonably accommodate an employee's religious beliefs?

II. Background:

- A. On September 23, 1993, the Commission issued a Notice of Proposed Rulemaking (NPRM) proposing to amend the Commission's Guidelines on Discrimination Because of Religion. This was undertaken in light of the Supreme Court's decision in Ansonia Board of Education v. Philbrook.
- B. Section 1605.2(c)(2) of the existing Guidelines provides that where there is more than one method of religious accommodation available which does not cause undue hardship, the employer must offer the accommodation which least disadvantages the individual's employment opportunities. In light of Ansonia, the proposed revision states that the accommodation offered by the employer must be reasonable, but it need not be the accommodation preferred by the employee or prospective employee.
- C. The comment period closed on November 22, 1993. The Commission received six comments. One comment in particular expressed concern that the proposed revision goes further than the Supreme Court did in "invalidating" the existing Guidelines. The commentator suggested language that might be substituted for the proposed revision, with a view to recapturing the original thrust of that section and precluding an employer from offering an accommodation that unnecessarily adversely affects an employee's job opportunities.
- D. We are currently making revisions pursuant to the comments. One modification we are considering would retain the point that an employer's statutory obligation does not extend to providing any accommodation the employee prefers, but highlight the need to preserve an employee's job opportunities and status.
- E. Because of the controversy regarding inclusion of religious harassment in the Proposed Harassment Guidelines, it may be advisable for the Commission to move forward at a later date with the amendment to its Guidelines on Discrimination Because of Religion.

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- P1 National Security Classified Information [(a)(1) of the PRA]
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- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Commission Use of Testers

I. Issue

In 1990, the Commission announced that it will accept charges of discrimination filed by testers, individuals who apply for employment for the sole purpose of uncovering unlawful employment discrimination. The Commission has not yet decided, however, whether this agency should itself use testers to target respondents for the issuance of systemic charges, or to investigate charges of discrimination.

II. Background

A. We have drafted a memorandum to the Commissioners examining legal and practical issues that may arise if EEOC undertakes testing. The memorandum includes, among others, the following points:

1. Testing can be an invaluable technique for rooting out discrimination in hiring and employment agency referral, which often is not easily detected.
2. However, testing can be resource intensive. For example, the Commission would have to devote resources for training testers and for manufacturing resumes and other credentials. Furthermore, if the Commission enters into arrangements with outside groups to send out testers, it would have to pay for this service.
2. Many federal agencies are currently undertaking, or are considering undertaking, the use of testers to uncover violations of the statutes they enforce.
3. EEOC has the authority to utilize testers as one means to investigate charges or to target respondents for the issuance of systemic charges.
4. In response to likely arguments that it is improper for this agency to engage in deceptive "undercover" investigatory practices, we can point out that Congress and the courts have recognized the effectiveness of Government testing. Furthermore, there is nothing improper about the Government using an efficacious method for rooting out statutory violations that poses no threat to law-abiding entities.

B. We have had ongoing contact with staff in other federal and state agencies with regard to those agencies' tester activities.

Adverse Inference

I. Issues

The Commission has previously stated that it will draw an adverse inference against a respondent as to evidence sought when the respondent knowingly destroys or knowingly fails to maintain records in order to defeat the purposes of the anti-discrimination statutes. Among the additional questions to be addressed:

- A. Can an adverse inference be drawn if a respondent has destroyed or failed to maintain records that it is required to keep, but there was no bad faith?
- B. How should the adverse inference rule be applied in charge investigations?

II. Background

We have drafted an enforcement guidance addressing the above questions, but we have not yet submitted it to the Commissioners. The draft guidance makes the following points:

- A. If a respondent violated EEOC's regulations by failing to keep records but this violation was inadvertent, the charging party should not be the one who is forced to bear the consequences. Therefore, the charging party is entitled to a presumption that the contents would have been unfavorable to the employer. However, if the failure to keep records was due to inadvertent reasons beyond the respondent's control, such as a fire, no adverse inference rule would be applied.
- B. If a respondent fails to insure the preservation of records after it has received official notice of a charge which contains an admonition as to the Commission's recordkeeping requirements, the failure to preserve records will be deemed to have been in bad faith.
- C. Where it is determined that the adverse inference rule should be applied, the Commission will infer that the missing records would have contained evidence unfavorable to the respondent. If, with this inference, a prima facie case of discrimination can be made and the employer's justification for its action rebutted, then "cause" will be found.

Issue: Preemployment Disability-Related Inquiries and Medical Examinations Under the ADA

Description:

OLC's "Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act" concerns the ADA's restrictions on an employer's use of preemployment disability-related inquiries and medical examinations. The ADA is unique among federal civil rights laws in that it flatly prohibits disability-related inquiries and medical examinations at the pre-offer stage of the hiring process. Such inquiries and examinations are permitted after an individual has been offered employment, but before s/he has started work. Over the past several years, the Commission has received more questions on this topic than on any other ADA issue. The Guidance provides detailed information and instructions for investigators to use in determining whether an inquiry is disability-related and whether an examination is medical. The document also provides guidance concerning the use of such inquiries and examinations at the post-offer stage.

Status:

In preparing the Guidance, OLC staff reviewed the ADA's legislative history and relevant articles and publications. OLC also had a series of meetings with knowledgeable groups and individuals to learn about a number of substantive topics covered in the Guidance, including psychological examinations, polygraph examinations, drug tests, applicant pools, and confidentiality issues. The document was approved by the Commission on May 19, 1994, for interim use by EEOC staff while it is being coordinated under E.O. 12067. Currently, comments from the affected agencies are being reconciled.

Major Controversial Issues:

The Guidance addresses the following major controversial issues:

- definitions of "disability-related" inquiry and "medical" examination;
- whether a covered entity can ask questions concerning an applicant's:
 - need for reasonable accommodation;
 - lawful drug use when a test for unlawful drug use is given; and
 - disability in connection with voluntary affirmative action programs, and in connection with affirmative action required by state or local law;

- whether a covered entity can require:
 - physical fitness tests, and
 - psychological tests; and
- whether bona fide offers must be limited to current vacancies, and how entering employees must be taken from a pool of offerees.

Other Key Points:

A number of other key issues were addresses in the Guidance, including the permissibility of questions concerning the following:

- ability to perform job functions;
- impairments;
- attendance;
- drug and alcohol use;
- certifications and licenses;

The Guidance also addresses the permissibility of the following tests:

- physical agility tests;
- polygraph tests; and
- drug and alcohol tests.

The document also includes a discussion of confidentiality issues.

Issue: Definition of the Term "Disability" Under the ADA

Description:

A draft EEOC Compliance Manual section entitled "Definition of the Term Disability" sets forth the analytical framework for determining whether an individual has a "disability" as defined by the ADA. The ADA protects a qualified individual who: (1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. Determining whether a charging party is protected by the ADA often requires more extensive analysis than does the determination of whether a person is protected by other nondiscrimination statutes that the EEOC enforces. This Compliance Manual section will provide investigators with needed guidance and instructions for determining whether a charging party meets the ADA definition of "disability."

Status:

The draft Compliance Manual section should be submitted to the Commission for final approval in July 1994.

In preparing the draft, staff reviewed the legislative history to the ADA, researched Rehabilitation Act case law, and, where necessary, consulted medical texts or experts. The draft section was circulated for comment to the Office of General Counsel, the Office of Program Operations, the Office of Federal Operations, and the various subdivisions of OLC. All comments were incorporated or reconciled. Similarly, the draft was discussed by the Special Assistants and their comments were incorporated. On October 5, 1993, OLC circulated the draft to other federal agencies for interagency coordination pursuant to Executive Order 12067. On May 24, 1994, the draft was circulated to EEOC District, Area, and Local Office Directors for comment. The comments of the federal agencies and EEOC Field Office Directors are being incorporated or reconciled as appropriate.

Major Controversial Issues:

The draft Compliance Manual section addresses the following major controversial issues:

- the circumstances under which obesity and genetic defects may be impairments;
- whether procreation is a major life activity;
- how to determine whether an individual is substantially limited in the major life activity of working or is regarded as such; and
- how to determine whether an individual meets the third, "regarded as," part of the definition of "disability."

Other Key Points:

The draft Compliance Manual section also addresses a number of other key issues, including the following:

- the distinction between an impairment and a condition, such as a physical characteristic or a personality trait, that is not an impairment; and
- the factors relevant to determining whether an impairment is substantially limiting.

Issue: ADA and Employer Provided Health Insurance

Description:

In the "Interim Enforcement Guidance on the application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance," issued on June 8, 1993, the Commission stated its intention to issue final, more comprehensive guidance on the impact of the ADA on employer provided health insurance. Final Guidelines to fulfill this pledge are under development. The Guidelines will be published in the Code of Federal Regulations after a period of notice and comment by the public and coordination with other federal agencies under Executive Order 12067. The Guidelines will be issued for use by EEOC investigators, employers, and the public.

The interplay between the ADA and employer provided health insurance is both complex and unique. Employer provided health insurance plans typically make health-related distinctions, some of which may be based on disability. The ADA, on the other hand, prohibits discrimination on the basis of disability, but permits insurance practices that are not a "subterfuge" to evade its purposes, even if those practices result in limitations on individuals with disabilities. The final Guidelines will provide much requested information regarding the legality, in light of ADA, of various health insurance practices.

Status:

The Guidelines are in the initial drafting stage. Common health insurance practices and potential ADA issues relating to those practices are being identified and studied. In addition, OLC has had several meetings with knowledgeable groups and individuals to learn about insurance practices and principles.

Major Controversial Issues:

The Guidelines will address the following major controversial issues:

- whether insurance limits on substance abuse programs disability-based distinctions; and if so, whether such limits justifiable under the ADA; and
- how the Commission should analyze charges challenging the application of a health insurance plan's exclusion of coverage of "experimental" treatments to a particular disability-based treatment.

Other Key Points:

The Guidelines will also address a number of key issues, including the following:

- what is a disability-based health insurance plan distinction;
- what does "subterfuge" mean;
- whether an "uninsurable" individual can ever be refused admission to an employer's health insurance plan;
- whether "late entrants" can be refused admission to an employer's health insurance plan;
- how does the ADA affect "voluntary" and/or "mandatory" wellness programs and practices;
- whether an insurance limit on infertility treatments is a disability-based distinction;
- whether an exclusion from coverage of treatment of morbid obesity is a disability-based distinction; and
- whether an exclusion from coverage for hearing aids is a disability-based distinction.

Note: The outcome of current congressional efforts to reform the nation's health care system may affect the substance of the Guidelines.

Issue: Reasonable Accommodation and Undue Hardship Under the ADA

Description:

A draft Compliance Manual section entitled "Reasonable Accommodation and Undue Hardship" concerns a covered entity's obligation to provide reasonable accommodation to a qualified individual with a disability. The Compliance Manual section will be issued for use by EEOC investigators after internal coordination, coordination with other federal agencies under Executive Order 12067, and approval by the Commission.

Central to the protections afforded by the ADA is the requirement that an employer make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The obligation to provide reasonable accommodation is ongoing and applies to all aspects of employment. The Compliance Manual section provides detailed guidance for investigators to use when confronted with issues related to the duty to provide reasonable accommodation and/or the undue hardship defense.

Status:

In preparing the draft, OLC staff reviewed the ADA's legislative history, and relevant articles and publications. The draft served as the basis for lecture materials and instruction provided to field investigators during the ADA Training held in Dallas, Texas. The draft is being reviewed at the supervisory level within OLC in preparation for distribution and circulation for comment by the Office of General Counsel, Office of Program Operations, Office of Federal Operations, and the various subdivisions of OLC.

Major Controversial Issues:

The draft Compliance Manual section addresses the following major controversial issues:

- when is an employee not required to notify an employer of the need for an accommodation;
- when is a nexus established between a disability and the right to an accommodation; and
- the parameters of an employer's duty to explore reassignment as an effective accommodation.

Other Key Points:

The draft Compliance Manual section also addresses a number of other key issues, including the following:

- when documentation of the need for reasonable accommodation may be required by an employer;
- when, and if, the duty to provide reasonable accommodation extends beyond the work site; and
- which resources of a covered entity may be considered in evaluating an undue hardship defense.

Issue: Definition of the Term "Qualified Individual with a Disability" Under the ADA

Description:

A draft EEOC Compliance Manual section entitled "Definition of the Term Qualified Individual with a Disability" sets forth the analytical framework for determining whether an individual is a "qualified individual with a disability" as defined by the ADA. The ADA protects "qualified individuals with disabilities" from discrimination on the basis of disability. Thus, unlike other nondiscrimination statutes, the ADA expressly requires individuals alleging discrimination to be "qualified." Determining whether an individual satisfies the definition of a "qualified individual with a disability" often requires a lengthy analysis and often depends on the merits of the charge. This Compliance Manual section will explain to investigators how to determine whether a charging party satisfies this definition.

Status:

The draft Compliance Manual section is being revised pursuant to comments received from other Headquarters offices.

The draft is based on the statute, the legislative history to the ADA, and Rehabilitation Act case law. OLC circulated the draft section for comment by the Office of General Counsel, the Office of Program Operations, the Office of Federal Operations, and the various subdivisions of OLC. The comments are being considered and, where appropriate, are being incorporated into the draft.

Major Controversial Issues:

The draft Compliance Manual section addresses the following major controversial issues:

- how to determine whether a qualification standard is job-related and consistent with business necessity;
- must a person meet the definition of a "qualified individual with a disability" to raise an ADA claim;
- how to analyze conduct-related matters; and
- how to assess whether employment of an individual would pose a direct threat to the health or safety of the individual or others in the workplace.

Other Key Points:

The draft Compliance Manual section also addresses a number of other key issues, including how to:

- identify a position's essential functions; and
- evaluate blanket exclusionary criteria that screen out a class of individuals with disabilities.

Issue: **Workers' Compensation and the ADA**

A draft document entitled "Enforcement Guidance on Workers' Compensation and the ADA" explains the application of ADA principles to employment decisions and procedures regarding on-the-job injury or illness and workers' compensation. The Enforcement Guidance will be issued for use by EEOC investigators. The purpose of this guidance is to point out the differences between ADA and workers' compensation standards and to clarify employers' ADA obligations in this context.

Status:

This document is in the initial drafting stage.

Major Controversial Issues:

The draft Guidance addresses the following major controversial issue:

- whether an employer may reserve "light duty" jobs exclusively for employees injured on the job.

Other Key Points:

The draft Guidance also addresses a number of other key issues, including the following:

- whether, and for what purposes, a state workers' compensation law may be considered a law that "provides greater or equal protection for the rights of individuals with disabilities" than that afforded by the ADA; and
- what are an employer's reasonable accommodation obligations with respect to an employee with a disability caused by an occupational injury who has not yet sufficiently recovered to perform the essential functions of his/her original job.

Issue: The ADA and Psychiatric Disability

Description:

The Commission has received a consistently high number of ADA charges involving psychiatric disabilities. Such charges often involve particularly complex ADA issues that existing guidance does not address. Although EEOC typically does not issue disability-specific policy documents, there is a need for centralized guidance for EEOC investigators on these complex issues. Statements about ADA policy in this document, however, will apply to all disabilities, not just to psychiatric disabilities.

Status:

OLC staff has reviewed the ADA legislative history, Rehabilitation Act case law, and relevant articles and publications. The document is now in the initial drafting stage.

Major Controversial Issues:

The document will address the following major controversial issues:

- whether stress disorders are covered by the ADA;
- how should disability-related conduct, performance, and attendance problems be analyzed with respect to reasonable accommodation and discipline;
- whether assigning a new supervisor, or monitoring an employee's compliance with a medication regimen, are required reasonable accommodations; and
- how should questions about direct threat and the fear of violence in the workplace by an individual with a psychiatric disability be analyzed.

Other Key Points:

The document will also address a number of other key issues, including the following:

- how to substantiate the existence of psychiatric impairments for purposes of EEOC investigations;
- whether some psychiatric impairments, such as schizophrenia or bi-polar disorder, are inherently substantially limiting, as is AIDS;
- whether psychiatric impairments that are episodic in nature, because they remit and later may intensify, are substantially limiting;

- when, and to whom, should an employee disclose his/her psychiatric disability, and what information should s/he provide in requesting reasonable accommodation;
- how to analyze allegations that an employee was prevented by his/her psychiatric disability from asking for an accommodation and disclosing the disability; and
- how disability-related conduct, performance, and attendance problems should be analyzed with respect to reasonable accommodation and discipline.

Issue: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA

Description:

The ADA prohibits employers from asking disability-related inquiries and requiring medical examinations of employees unless those inquiries/examinations are "job-related and consistent with business necessity." However, the ADA allows employers to continue to offer voluntary employee health programs. The Commission has received a large number of questions on this topic from the public and from investigators. OLC plans to draft an Enforcement Guidance providing detailed instructions for investigators to use in analyzing such post-employment inquiries/examinations.

Status:

OLC is outlining the legal issues that will be included in this Enforcement Guidance. OLC staff is reviewing the ADA's legislative history, relevant publications, and applicable Rehabilitation Act case law. OLC staff plans to meet with knowledgeable experts to learn about a number of substantive topics, such as voluntary wellness programs and fitness-for-duty examinations.

Major Controversial Issues:

The Guidance will address the following major controversial issues:

- guidance on when the "post-employment" period begins (e.g., Is it after the employee actually starts work or after s/he is put on the payroll? When an employee applies for a promotion/transfer, what is her/his status with regard to the new position? How do the rules work in the union "hiring hall" context);
- definition of "job-related and consistent with business necessity" in connection with disability-related inquiries and medical examinations of employees;
- definition of "voluntary employee health program;" and
- guidance on confidentiality issues (e.g., Can an employer get information from a voluntary wellness program?).

Other Key Points:

The Guidance will also address a number of other key issues, including the following:

- guidance on inquiries/examinations necessary for the reasonable accommodation process;
- guidance on "fitness for duty" and "return-to-work" examinations; and

- guidance on inquiries/examinations required by other laws (i.e., federal, state, or local).

Issue: ADA and Federal Health Care Reform

Description:

Under the ADA, employers are prohibited from unlawfully discriminating against qualified individuals with disabilities in employment benefits, including employer-provided health insurance. Congress is currently considering various legislative proposals for a major reform of the nation's health care system, including changes that could affect employer provided health insurance for individuals with disabilities. There are a number of areas of potential overlap, tension, and/or conflict between the ADA and these various health care reform proposals. OLC staff believes that Commission involvement in the health care reform legislation process would help minimize these potential conflicts.

Status:

The Commission has contacted the Office of Management and Budget requesting the opportunity to comment on health care reform legislation. However, OMB apparently has not responded to our request.

Major Controversial Issues:

Among the areas of potential tension between health care reform and the ADA are the following:

- whether individuals with disabilities could challenge managed care decisions that are permitted by the final health care reform law under the ADA;
- whether, if an employer provides benefits beyond the health care reform law's basic benefits package, individuals with disabilities could challenge such additional benefits as discriminatory under the ADA; and
- whether disability-based benefit distinctions or exclusions specifically permitted by the health care reform law could be challenged under the ADA.

Issue: The ADA and Addictions

Description:

An Enforcement Guidance will provide EEOC investigators with the framework for resolving ADA issues that arise in the context of addictions. This area warrants particular attention because of the statute's unique treatment of drug addiction and the complex coverage issues that addictions raise. For example, although it is clear that alcoholism is a disability, it is not clear whether addiction to other substances, such as nicotine, is a disability.

Further, the ADA excludes from coverage individuals currently engaging in the illegal use of drugs when the employer acts on the basis of the use. The statute, however, does not exclude individuals who are not currently using drugs illegally and have a record of addiction or are erroneously regarded as being addicted to drugs. Determining whether an individual is currently engaging in the illegal use of drugs, whether an employer has acted on the basis of that use, and whether a person has a record of an addiction, or is regarded as having an addiction usually will involve lengthy analysis. The Enforcement Guidance will provide investigators with a central resource for analyzing these and other addiction-related issues.

Status: In the early stages of development.

Major Controversial Issues:

The Guidance will address the following major controversial issues:

- whether addiction to nicotine is a "disability"; and
- what "current" illegal use of drugs means.

Other Key Points:

The Guidance will also address a number of other key points, including the following:

- the circumstances under which an addiction is a substantially limiting impairment;
- how to analyze claims that an individual poses a direct threat because of the risk of recidivism; and
- how to evaluate qualification standards, such as sobriety standards, that may screen out an individual on the basis of an addiction.

Issue: Employment Agencies and the ADA

Description:

A document entitled "Enforcement Guidance on Employment Agencies and the ADA" will explain how ADA principles apply to employment agencies, including temporary employment agencies. There are unique ADA issues that arise in this context, especially where a temporary agency acts as the employer. It is important to address these issues as it has been suggested by some that businesses are increasingly utilizing temporary employment services as a way to circumvent federal labor laws that apply in a direct employment setting. The Commission recently has been targeting employment agencies as widespread patterns of discrimination under Title VII and the ADEA have been uncovered. Similar concerns exist about discrimination against individuals with disabilities.

Status:

OLC staff have discussed various issues that have arisen in systemic litigation against temporary employment agencies. As a result the staff recognized that there was a need for a separate enforcement guidance to cover issues unique to employment agencies. The document is at the initial consideration stage.

Major Controversial Issues:

The document will address the following major controversial issues:

- what constitutes a bona fide offer of employment by a temporary employment agency for purposes of determining when it may conduct preemployment disability-related inquiries and medical examinations; and
- whether an employment agency may disclose clients' confidential medical information obtained through preemployment medical examinations and inquiries to prospective employers.

Other Key Issues:

The document also address a number of other key points, including the following:

- whether an employment agency that prevents a qualified individual with a disability from entering into an employment relationship may be liable under the interference provision of the ADA;
- what practices of employment agencies constitute limiting, segregating, and classifying on the basis of disability; and

• whether an employment agency and/or an employer is obligated to provide reasonable accommodations.

Issue: Are Retirees Covered Under the ADA?

Description:

The Commission has received numerous inquiries and several charges that raise the issue of whether retired employees are protected by the ADA. Most of these inquiries and charges concern challenges or potential challenges to post-retirement changes in retiree health or disability retirement plans.

Preliminary research indicates that the legislative history of the ADEA is fairly clear that that statute is not intended to protect retirees. However, it does not appear that the legislative histories of either the ADA or Title VII (on which the ADA is patterned) address the question of retirees. Nor has this issue been addressed in Title VII case law.

Status:

OLC has begun researching this issue.

Major Controversial Issues:

To resolve this issue, the Commission will have to consider several major controversial issues, including the following:

- whether retirees are "employees" within the meaning of the ADA;
- whether retirees are "individuals with disabilities" within the meaning of the ADA;
- whether retirees are "qualified individuals with disabilities" within the meaning of the ADA; and
- whether retiree health benefits and disability retirement benefits are "fringe benefits available by virtue of employment" within the meaning of the Commission's ADA regulations (29 C.F.R. § 1630.4(f)).

Issue: Theories of Discrimination Under the Americans with Disabilities Act

Description: This Compliance Manual Section is being drafted to provide EEOC Investigators with guidance on the theories of discrimination that they will apply in their analysis of charges arising under the Americans with Disabilities Act (ADA). Specifically, the document discusses in detail how the theories of disparate treatment and impact, as developed under Title VII, will apply in the analysis of certain charges under the ADA. The document also contains a comprehensive discussion of the theory of reasonable accommodation, which derives from the precedential framework of Section 504 of the Rehabilitation Act. Other theories applicable under the ADA, such as Retaliation, Interference with ADA Rights, and Prohibited Medical Examinations and Inquiries are discussed in an introductory overview. Additional guidance on these theories will be forthcoming in future enforcement guidance documents or is already available (Section 614 of the Compliance Manual discussing retaliation under Title VII).

Status: This Compliance Manual Section is currently in draft form undergoing review within the Office of Legal Counsel, prior to being circulated to other offices within the Commission for comment.

Key Points:

Some of the more difficult issues raised or addressed in this compliance manual section are as follows:

- Explicitly Discriminatory Criteria (e.g., no diabetic truck drivers) will be analyzed under disparate treatment theory, but the "job-related and consistent with business necessity" defense will apply
- The "job-related and consistent with business necessity" defense applicable under either impact or treatment theory is defined in terms of essential functions (exclusionary criteria pertaining to marginal functions cannot meet this standard) and health and safety-related qualification standards (which must meet the direct threat standard). Other than referring to Section 504 precedent generally, the defense has been otherwise left undefined, awaiting a case-by-case approach
- Imposition of liability under adverse impact theory where the employer can prove that the exclusionary criteria was job-related and consistent with business necessity and that there was no request for accommodation until a charge was filed, at which time the employer was immediately willing to make reasonable accommodation

Employee Benefits under the ADEA

I. Issue:

Should the Commission issue regulatory guidance?

II. Background:

In Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), the Supreme Court interpreted the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 et seq., with regard to the legality of employee benefit plans, and rejected longstanding EEOC interpretations relating to employee benefits.

The Court determined that employee benefit plans were exempt from the purview of the ADEA as long as such plans were not a method for discriminating in non-fringe benefit aspects of employment.

The effect of the Betts decision was to permit virtually any age-based differential in treatment in the area of fringe benefits.

For example, an employer could decide to deny sick leave or vacation pay for persons over the age of 50, as long as the decision was not taken to force such persons to retire or to retaliate for prior EEO activity. Under Betts, employees would have had to prove that the benefit plan was designed to discriminate in a non-fringe benefit area.

Congress overruled Betts by way of the Older Workers Benefit Protection Act of 1990 (OWBPA).

Title I of OWBPA, dealing with employee benefits, for the most part restored the law to its pre-Betts state. Title II of OWBPA enacted specific rules for determining the legality of waivers of ADEA rights (see below).

III. Status:

While the Commission solicited public comment on OWBPA issues in 1992, the previous Administration decided not to issue regulatory guidance under OWBPA, despite comments made by then Chairman Roybal of the House Select Committee on Aging urging the Commission to issue guidance for the benefit of older workers and employers.

The Office Legal Counsel has been called upon to provide informal guidance to the public on a daily basis in the three and one-half years since the date of enactment.

Recently, approval has been sought from OMB for the Commission to engage in negotiated rulemaking on OWBPA, should the Commission choose to proceed in that manner. Alternatively, the Commission could publish a Notice of Proposed Rulemaking (NPRM), the more traditional way of developing regulatory guidance.

The Office of Legal Counsel has developed an options paper and draft NRPM in case the Commission wishes to go forward with rulemaking.

IV. Major Unresolved questions:

- What types of voluntary early retirement incentive (ERI) plans would be lawful under the ADEA as amended by OWBPA? In the Cipriano case in 1987, the Commission took the position that an ERI would be permitted to cut off benefits at a certain age, as long as each employee is given the chance to participate at least once. AARP has criticized the Commission's position frequently. Arguably, the Cipriano rationale has been made obsolete by OWBPA.
- To what extent can severance pay be offset by pension benefits?
- Are employers permitted to terminate retiree health coverage when the retiree becomes eligible for Medicare?
- Are disability retirement plans permitted to offer greater lifetime benefits to younger employees than to older employees? State and local governments have been trying for three years to get the Commission to provide guidance on this issue. It is possible that a large number of public employer plans will have to be rewritten as the result of the OWBPA amendments.

ADEA Waivers

I. Issue:

Should the Commission issue regulatory guidance?

II. Background:

In 1986 and 1987, several circuits issued decisions upholding the validity of the waiver of ADEA rights.

In 1987, the Commission issued regulations that set out the minimum requirements for valid waivers.

Many members of Congress and groups such as AARP, believed that the Commission should not have issued regulations, and on three occasions Congress passed legislation forbidding the Commission from enforcing the regulations.

OWBPA set out specific standards for determining the legality of ADEA waivers.

III. Status:

Same as for Title I of OWBPA.

IV. Major Unresolved questions:

- Should EEOC permit challenges to facially valid waivers when the CP has not tendered back the consideration?
- Does the prohibition against prospective waivers affect pre-dispute arbitration agreements?
- Must persons with pending claims of age discrimination receive something more in exchange for a waiver than is tendered to persons who do not have pending claims?

Police and Firefighters

I. Issue:

What action will Congress take regarding the use of maximum hiring and mandatory retirement ages for police and firefighters?

II. Background:

Prior to 1987, the Commission had routinely challenged age-based hiring and retirement practices with regard to police and fire fighting positions.

1986 amendments to the ADEA eliminated mandatory retirement for almost all employees.

At the same time, Congress enacted a temporary exemption permitting age limitations for the hiring and discharge of state and local public safety employees (firefighters, police and other law enforcement officers including correctional officers).

The exemption went into effect on January 1, 1987, and expired on December 31, 1993. Many state and local jurisdictions have taken full advantage of the temporary exemption and have used maximum hiring and mandatory retirement ages.

These limitations vary from place to place with maximum hiring ages set anywhere from 25 to 40 and mandatory retirement ages from 45 to 60.

The Commission and the Department of Labor completed a study to determine whether physical and mental tests are valid measurements of the ability and competency of public safety employees to perform the requirements of their jobs.

The Congressionally mandated study, performed by Pennsylvania State University's Center for Applied Behavioral Sciences, found that gradual deficits in abilities and sudden incapacitating events (e.g., heart attacks) are only marginally associated with age. It also concluded that there are practical tests that are better predictors of job performance than age.

III. Status:

Legislation filed to reinstate the exemption for police and firefighters (H.R. 2722) was passed by the House of Representatives in 1993 but was not acted upon by the Senate. We have been informed that the House bill has been attached to the Administration's crime bill. The Commission took the position in 1993 that the public safety officer legislation was not appropriate. Recently the Administration recommended that the exemption be reinstated for a four-year period during which further study of the issues would be undertaken.

IV. Unresolved questions:

The Commission and the Penn State study have been criticized by police and fire departments for several reasons. We do not believe that these criticisms are valid. Note that the concerns expressed are largely unrelated to legal arguments that would justify discriminating on the basis of age. The departments claim that:

- The Commission was to develop specific tests that departments could use without fear of challenge (i.e., "safe harbor" tests). The Commission's position is that it was required to determine whether tests are currently available to measure public safety officer job performance, and to identify standards that such tests should satisfy. The Penn State Study accomplished these things.
- Public safety will be imperiled by permitting officers to work longer. Of course, under the ADEA, an employer is never prohibited from discharging a person who cannot do the job, as long as the discharge is performance-based, not age-based.
- Current pension systems that frequently permit a full retirement benefit after 20 years would be eliminated. No data has been presented to validate this concern.
- Costs will rise as tests are challenged in court and workers compensation and disability claims rise. No data has been presented to validate this concern.

Compulsory Arbitration of ADEA claims

I. Issue:

Should the Commission issue guidance on the topic of binding arbitration? Specifically, can an employee, as a condition of employment, be required to agree to binding arbitration of all ADEA claims?

II. Background:

In Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 (1991), the Supreme court held that a claim under the Age Discrimination in Employment Act (ADEA) can be subjected to compulsory arbitration pursuant to an arbitration clause set forth in a registration application with the New York Stock Exchange.

Gilmer was decided on the basis of pre-OWBPA law. Arguably, the OWBPA prohibition on prospective waivers of rights may be at issue in a Gilmer setting, since the right to bring a private action and the right to a jury trial are waived by an employee subject to compulsory arbitration.

III. Status:

The Office of Legal Counsel is preparing an Enforcement Guidance on compulsory arbitration. In addition, Congress is considering the possibility of reversing Gilmer legislatively.

IV. Unresolved questions:

- Assuming that compulsory binding arbitration is permissible in the securities industry, can the Gilmer holding be extended by employers to require all employees to submit their civil rights claims to arbitration?
- Would compulsory arbitration adversely affect enforcement of civil rights laws by private individuals? (Nothing in Gilmer would prevent the Commission from investigating and litigating a civil rights violation).
- How would OWBPA apply to arbitration issues:
 - Is an arbitration agreement required as a condition of employment a prohibited waiver of future rights.
 - What consideration must be offered in exchange for an arbitration agreement (something more than the offer of a job?)

Reductions-in-Force

I. Issue:

How can an employer conduct a reduction-in-force (RIF) without violating the rights of older workers? Should the Commission issue policy guidance in this area?

II. Background:

In the past ten years, American businesses have begun to reevaluate their personnel needs, tending toward "leaner" workforces, eliminating redundant positions and firing less productive employees.

A significant minority of the RIFs have been used to rid companies of older, higher paid, workers.

Unlike the typical discharge scenario, an employee dismissed (or otherwise adversely treated) during a RIF is generally not being terminated for poor performance or misconduct, but rather primarily because of the RIF itself.

The focus in RIF cases generally is drawn to:

(1) how individuals were selected for the terminations resulting from the decision to implement a RIF;

(2) how the affected employees and other members within the protected age group were treated in comparison with similarly situated younger employees; and

(3) whether methods utilized for selecting which employees will be terminated during a RIF may have a disparate impact on members within the protected age group. (NOTE: The Supreme Court has not yet ruled on the validity of the disparate impact theory under the ADEA although the weight of circuit law and the Commission's position has been for years that the disparate impact theory can be used under the ADEA).

III. Status:

The Office of Legal Counsel is preparing an Enforcement Guidance on this issue. The only guidance available is section 1625.7(f) of the Commission regulations, which states that it is not permissible to differentiate based upon the average cost of employing older workers as a group (except in the area of employee benefits).

IV. Unresolved question:

An employer in a RIF usually wishes to accomplish the maximum in cost savings with its personnel decisions. Since, in general, the most expensive employees

are older employees (whose higher salaries are often based upon cost-of-living or longevity increases), maximum cost savings can be achieved by firing the most senior employees.

In its recent decision in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993), the Supreme Court's rationale raised a serious question of whether firing the highest paid employees would actually constitute age discrimination.

The Hazen Paper decision also raised a question of whether the Court would validate the disparate impact theory under the ADEA.

Disparate Impact under the ADEA

I. Issue: Should the Commission amplify its existing regulatory guidance in section 1625.7(d) of our regulations, reaffirming the Commission's belief that disparate impact is a valid theory under the ADEA?

II. Background:

Discrimination can result from neutral employment policies and practices, which are applied uniformly to all employees and applicants, but which have the effect of disproportionately excluding or otherwise disparately affecting certain groups.

Both the Commission, in its regulations, and numerous appellate courts have applied the disparate impact theory to cases arising under the ADEA. On the other hand, the Supreme Court has not spoken on the issue. In the recent Hazen Paper decision, several justices expressed the view that there are substantial arguments against the application of disparate impact to the ADEA.

III. Status:

The Commission has not issued guidance on the issue of disparate impact and the ADEA in recent years. Since the Supreme Court may decide at any time to address the issue, the Commission may wish to develop more detailed policy guidance (either by way of regulation or less formal guidance) to reinforce our litigation position.

IV. Unresolved problems:

- Under what standards should ADEA disparate impact be judged?
- Do the provisions of section 105 of the Civil Rights Act of 1991 (CRA 91) apply also to ADEA cases?
- Is the Wards Cove decision applicable to ADEA cases?
- What is the role of the "reasonable factor other than age" defense in section 4(f)(1) of the ADEA in shifting the burden of proof to the employer?
- Should Congress go forward with legislation to clarify the applicability of disparate impact (and other CRA 91 provisions) to the ADEA?

Apprenticeship

I. Issue:

Should the Commission continue to permit apprenticeship programs to set a maximum age limit for participation?

II. Background:

In 1969, the Department of Labor issued a regulatory interpretation finding no coverage of apprenticeship programs under the ADEA.

In September 1980 the EEOC voted to rescind and replace the original DOL interpretation on apprenticeship programs, but after much public debate, the Commission voted in September 1981 to republish intact the DOL interpretation exempting apprenticeship programs from the ADEA.

In July 1987, the Commission revisited the issue based upon a petition for rulemaking filed by the Gray Panthers, and again voted to retain the existing interpretation excluding apprenticeship programs from coverage under the ADEA.

III. Status:

No action has been taken since 1987 on this issue. We raise the issue simply because members of Congress and the public have, over the past fifteen years, expressed strong disagreement with the policy.

IV. Unresolved question:

- How should the Commission balance the competing interests involved in apprenticeship plans:
- Traditionally, apprenticeship plans have been used to train young persons entering the job market for the first time with skill that will last a lifetime.
- Over the past ten years, however, more and more older workers have become unemployed due to economic forces and corporate restructuring. The need for new job skills and retraining makes it imperative that such individuals also be able to change careers.
- Over the past ten years, more and more older women, who spent their twenties and thirties raising families, have entered the workforce. Denying apprenticeship training to such individuals also raises serious issues.

Issue: Anti-Discrimination Laws and the Family and Medical Leave Act of 1993

Description:

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees to 12 weeks of unpaid leave every 12 months for the birth of a child, treatment of the employee's own serious health condition, or other enumerated reasons. The FMLA overlaps with Title VII (as to pregnancy and childbirth leave) and with the ADA (as to leave for treatment of disabling serious health conditions). Without question, the overlap between the ADA and the FMLA raises the more numerous and difficult coordination issues. Although the ADA and the FMLA both require leaves of absence for employees with certain medical conditions, the laws differ significantly in their underlying philosophies and their regulatory schemes. These differences generate a variety of ADA coordination issues which OLC has been exploring with the Department of Labor, Wage & Hour Division (DOL), the agency charged with implementation of the FMLA.

Status and Key Issues:

OLC began coordination efforts in March 1993 by commenting on an NPRM for the FMLA rule. In May 1993, OLC responded to a request for comments on DOL issues papers, and on a draft of the FMLA interim final rule. OLC representatives also met with DOL staff to discuss ADA and FMLA issues. DOL published its FMLA interim final rule in June 1993, but did not resolve all of the coordination issues raised by OLC.

OLC submitted written comments to DOL on the interim final FMLA rule in December 1993. See attachment. These comments addressed several novel policy issues:

- How do employers and employees determine the terms and conditions of medical leave when the employer is covered by both the ADA and the FMLA? The ADA and the FMLA differ as to the terms and conditions of leave. From the employee's perspective, the FMLA may be preferable in some ways, but the ADA may be preferable in others. (For example, the FMLA always requires continued health insurance during leave, but the ADA could help an employee avoid a reassignment allowed under the FMLA.) This issue was of particular concern to the Women's Legal Defense Fund. EEOC's written comments to DOL identified this issue for further consideration without recommending a particular solution.
- FMLA's 12-week ceiling on leave per 12-month period does not limit the amount of unpaid leave available as a reasonable accommodation under the ADA. As long as an undue hardship is not imposed on the employer, leave in excess of 12 weeks may be given under the ADA. [Page 2 of EEOC's 12/2/93 Comments]

- Employers evaluating whether leave in excess of 12 weeks would be an undue hardship need not disregard the cost and disruption of FMLA leave already taken by employees. [Page 2]
- FMLA's standard of "substantial and grievous economic injury," the threshold for not reinstating a key employee after FMLA leave, should be clearly distinguished from ADA "undue hardship" and should be higher than ADA "undue hardship." [Pages 5-6]
- ADA confidentiality requirements are broader than FMLA's, and the ADA standards should control for employee medical information. There also is a question about whether employers must keep separate ADA and FMLA medical files, or may keep one confidential medical file for records pertinent to both laws. [Pages 6-7]

DOL expects to publish the final FMLA rule by August, 1994. OLC then plans to finalize an Enforcement Guidance on certain ADA and Title VII issues as they relate to the FMLA.

Issue: Proposed 29 C.F.R. Part 1640: Procedures for Complaints and Charges of Employment Discrimination Arising Under Section 504 of the Rehabilitation Act and Title I of the ADA

Description: Section 107(b) of the Americans with Disabilities Act (ADA) requires that the Department of Justice (DOJ), and the Equal Employment Opportunity Commission (the Commission or EEOC) issue coordination regulations setting forth procedures governing the processing of complaints that fall within the overlapping jurisdiction of both Title I of the ADA and Section 504 of the Rehabilitation Act of 1973 to ensure that such complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards. DOJ and EEOC published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on April 21, 1992.

Under the draft Final Rule, individual complaints solely alleging employment discrimination filed with the appropriate Section 504 agencies will ordinarily be referred to EEOC for processing, unless the charging party specifically requests Section 504 processing. The Section 504 agencies, however, will retain for processing any complaints that allege (i) a pattern or practice of discrimination in employment, or (ii) discrimination in both employment and in other services or practices of a respondent that are covered by Section 504. EEOC will process any charge that it receives and has jurisdiction over. If the same charge is filed with both a Section 504 agency and EEOC, EEOC will generally take the lead in individual cases, while the Section 504 agency would take the lead otherwise, with the deferring agency later reviewing the other agency's finding.

The draft Final Rule tracks the language of the Rehabilitation Act Amendments of 1992 (the Amendments), which require the application of Title I standards in making a determination of discrimination in Section 504 employment cases.

For convenience and clarity in processing complaints, the draft Final Rule also restates the provisions established by the Department's Title II rule at 28 CFR 35.171 for coordinating the processing of complaints against public entities (i) that fall within the jurisdiction of Title II and Title I (but are not covered by Section 504), 28 CFR 35.171 (b) (2), and (ii) that are covered by Title II, but not Title I (whether or not they are also covered by Section 504), 28 CFR 35.171 (b) (3). This inclusion of Title II procedures is intended to make the Final Rule a comprehensive, user friendly document that will provide maximum assistance to Section 504 agencies attempting to resolve complaints that fall within the overlapping jurisdiction of Section 504, and either or both Title I and Title II of the ADA.

Status: Section 107(b) requires that the final regulation be issued by January 26, 1992 (a parallel coordination regulation

governing the overlap of Title I of the ADA and Section 503 of the Rehabilitation Act was jointly issued with the Department of Labor on January 24, 1992). Despite attempts to meet this deadline, Department of Justice's workload, at least in part pertaining to other ADA statutory deadlines, as well as the many layers of review inherent in their organizational structure, resulted in numerous delays.

After the public comment period ended on May 21, 1992, the Commission and the Department of Justice reviewed the public and agency comments that were submitted, and made substantial revisions to the proposed rule pursuant to the urging of a number of agencies. On June 21, 1993, following approval by the Assistant Attorney General for Civil Rights and the Commission, a draft Final Rule was circulated to affected Federal Agencies for comment pursuant to Executive Order 12067. While these comments were being reviewed in August and September 1993 by both EEOC staff and DOJ/Civil Rights Division (DOJ/CRD) staff, the Department of Justice's Office of Legal Counsel (which had undergone a staff change since approving an earlier draft of the document) made numerous editorial changes on the June 21 draft. Since then, EEOC and DOJ/CRD staff have been attempting to resolve and/or implement these changes, as well reconciling comments made by the Federal agencies. While the changes demanded by Department of Justice's Office of Legal Counsel did not result in significant substantive modification, they were numerous and extremely time consuming to implement. EEOC sent a revised draft Final Rule to Department of Justice on January 13, 1994. In early April, DOJ/CRD returned another revised draft to EEOC, simultaneously submitting a copy to their Office of Legal Counsel for approval.

At this point, the revised draft final rule has been submitted to the Commission for their approval for submission to the Federal Register for publication. Simultaneously, the revised draft final rule has been submitted to the Assistant Attorney General for Civil Rights. At such time as he approves it, the document will be forwarded to the Attorney General for signature. Other offices at the Department of Justice that review regulations have already informally approved the document and thus, they are not expected to comment further during the final review process. We hope to accomplish publication in July 1994.

Issue: Alternatives for Interpreting the Relationship Between Title I of the Americans with Disabilities Act and the National Labor Relations Act with Respect to Confidentiality and Reasonable Accommodations that are Inconsistent with the Terms of the Collective Bargaining Agreement

Description: The Office of Legal Counsel has identified two major issues to be resolved concerning the relationship between the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq., (NLRA) and Title I of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12111, et seq., (ADA). First, what limitations, if any, do the confidentiality provisions of the ADA impose on the employer's duty under the NLRA to provide the union information necessary for bargaining over reasonable accommodation? Second, when should it be considered an undue hardship for an employer to provide a reasonable accommodation that is inconsistent with the terms of the applicable collective bargaining agreement?

From April until August 1992, the staff from the Office of General Counsel (OGC) of the National Labor Relations Board (NLRB) and the Office of Legal Counsel of the EEOC engaged in a series of discussions with a view toward entering into a substantive memorandum of understanding (MOU) resolving these and other issues. The OGC of the NLRB subsequently indicated that he could not enter into a substantive MOU because issues of first impression were to be adjudicated by the Board, not resolved through policymaking. We eventually entered into a procedural MOU that provides for consultations between the agencies on issues within the jurisdiction of the other agency and to avoid duplication in charge processing. See Attachment

We drafted an enforcement guidance on the substantive issues after discussions broke off with the NLRB. However, upon further consideration and in response to comments received on the draft, we decided to develop an options paper presenting alternatives for resolving the two major issues.

Status: The options paper has been circulated to other headquarters offices for comment. The paper recommends that we publish the alternative interpretations for resolving the two major issues application of Title I in the context of collective bargaining as an Advanced Notice of Proposed Rulemaking (ANPRM). This would allow public comment on the specific arguments that have been made so far and would invite additional suggestions for resolving the two issues. The paper further recommends that input meetings be held to provide an opportunity for full public participation in the process. A Notice of Proposed Rulemaking would then be published for notice and comment and ultimately a final rule would be issued. Additional, less controversial, issues pertaining to the relationship between these two laws would be addressed as an amendment to the Interpretive Appendix to Title I of the ADA.

Recently, it has been reported that the Chairman of the NLRB has indicated an interest in utilizing the rulemaking process to provide guidance to employers and unions on their obligations under the NLRA. In response, the Chairman of the EEOC has written to the Chairman of NLRB to invite the Board to reopen discussions if the Board now believes it is possible to address the substantive issues in a joint document. We are awaiting the Chairman's response.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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[Equal Employment Opportunity Commission Confirmation Briefing Materials] [2]

ds70

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

MEMORANDUM OF UNDERSTANDING BETWEEN
THE GENERAL COUNSEL OF THE
NATIONAL LABOR RELATIONS BOARD
AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The General Counsel of the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC) enter into this agreement in order to establish a procedure for coordinating the enforcement of Title I of the Americans with Disabilities Act (ADA) and Section 8 of the National Labor Relations Act (NLRA).

1. When a charge is filed with a Regional Office of the NLRB alleging that the duty to bargain under Section 8(a)(5), Section 8(b)(3) and/or Section 8(d) of the NLRA was breached by either an employer or a union, and the resolution of that charge would require an interpretation of the charged party's duties under the ADA, the General Counsel will, upon completion of the investigation, consult with the EEOC's Office of Legal Counsel regarding the applicability of the ADA.

2. When a charge is filed with a field office of the EEOC alleging discrimination by either an employer or a union in violation of the ADA, and the resolution of that charge would require an interpretation of the charged party's duties under the NLRA, the EEOC will, upon completion of the investigation, consult with the NLRB's Associate General Counsel, Division of Advice regarding the applicability of the NLRA.

3. EEOC and the NLRB shall share any information relating to the employment policies and practices of a respondent, employer or union that may assist each agency in carrying out its responsibilities under this agreement. Such information shall include, but is not limited to, complaints, charges, and investigative files.

4. (a) When the NLRB receives information obtained by EEOC, it shall observe the confidentiality requirements of section 706(b) and section 709(e) of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-5(b) and 2000e-8(e)), as incorporated by section 107(a) of the ADA, as would EEOC, except in cases where the Board receives the same information from a source independent of EEOC. Questions concerning the confidentiality requirements of Title I shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel, EEOC.

(b) NLRB documents which are shared during this process constitute part of the Agency's investigative files compiled for law enforcement purposes. In the event that any of the parties to the EEOC proceeding, or any other persons, request permission to inspect or copy any of these documents, apart from documents that are already in the public domain (such as pleadings), EEOC will resist the demand for their production. Consistent with the Freedom of Information Act, the NLRB would not produce affidavits or other non-public evidentiary materials while a case is pending.

However, after a case is closed, the NLRB is willing to release some case file documents pursuant to a request under limited circumstances. Accordingly, before releasing or disclosing information from any of the materials disclosed to it, EEOC will obtain the permission of the General Counsel of the NLRB pursuant to 29 C.F.R. Section 102.118.

5. When an unfair labor practice charge is filed by an individual with a disability alleging that his/her collective bargaining representative has failed to fairly represent him/her, and that individual has also filed a charge with the EEOC alleging that, by the same conduct, the collective bargaining representative has violated the ADA, the NLRB will conduct a preliminary investigation. If the charge is clearly nonmeritorious, the NLRB, absent withdrawal, will dismiss it. In all other cases, the NLRB will defer the case for a reasonable period, pending the completion of the investigation by the EEOC. If EEOC finds cause to believe that the ADA has been violated and successfully conciliates the charge, and further proceedings are not necessary to effectuate the purposes of the NLRA, the NLRB will seek a withdrawal of the charge before it. Absent such withdrawal, the NLRB will dismiss. If conciliation fails, the NLRB will consult with the EEOC and will determine whether to defer the case for a further period or to resume its processing of the case. If the EEOC finds no cause to believe that discrimination has occurred, the NLRB will resume processing of the unfair labor practice charge.

6. Where the NLRB has deferred an unfair labor practice charge under paragraph 5. above, EEOC will not defer such charges to the State FEP agency.

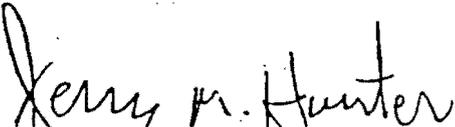
7. When an unfair labor practice charge is filed by an individual with a disability alleging that his/her collective bargaining representative has failed to fairly represent him/her regarding accommodating his/her disability in the workplace, and that disabled individual has not filed a charge with the EEOC alleging that the collective bargaining representative has violated the ADA, the NLRB will notify the charging party in writing of the right to file such a charge under the ADA. The NLRB will then process the charge in the normal course. However, if the charging party or EEOC notifies the NLRB of the filing of a charge with the EEOC, then the NLRB will process the charge in accordance with paragraph 5. above.

8. If a charge is filed by an individual without a disability, alleging that an accommodation provided to an individual with a disability has violated the NLRA, the procedure in paragraph 1. above will be followed.

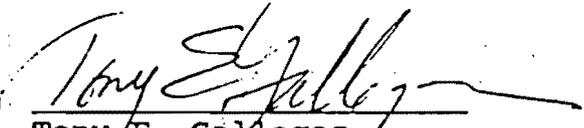
9. The parties to this agreement will engage in periodic consultations in order to review its implementation.

10. (a) This agreement may be modified at any time, provided that such modification is by mutual consent and in writing.

(b) This agreement may be terminated by either party upon 30 days written notice of the other party.



Jerry M. Hunter
General Counsel
National Labor Relations
Board



Tony E. Gallegos
Chairman
Equal Employment
Opportunity Commission

DATE: 11/16/93

DATE: 11/16/93

Issue: Proposal to Issue Prototype Employment Regulations for Federally Conducted Programs and Activities and Federally Assisted Programs and Activities Under Section 504 to Reflect the 1992 Amendments to the Rehabilitation Act of 1973

Description: The Rehabilitation Act Amendments of 1992, P.L. 102-569, ("the Amendments") were enacted into law on October 29, 1992. The Amendments include several provisions intended to make the Rehabilitation Act of 1973 ("the Act") consistent with the standards set forth in the Americans with Disabilities Act (ADA). The Amendments replace the term "handicap" with the term "disability" throughout the Act. The Amendments also exclude certain conditions from the definition of impairment or individual with a disability, thus making the Rehabilitation Act definitions consistent with the ADA definitions. The Amendments also make Title I standards generally applicable to employment cases arising under the Rehabilitation Act. Specifically, section 506 of the Amendments amends Section 504 of the Act by adding the following provision:

(D) The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

The issue of whether the Amendments should be applied retroactively to cases pending on the date of enactment will be now be decided in light of the Supreme Court's recent decisions on the retroactivity of the Civil Rights Act of 1991. See Landgraf v. UFI Film Products, 62 U.S.L.W. 4255 (U.S. Apr. 26, 1994); Rivers v. Roadway Express, Inc., 62 U.S.L.W. 4271 (U.S. Apr. 26, 1994).

As the lead agency on issues related to equal employment opportunity in employment pursuant to Executive Order 12067, it would be appropriate for EEOC to issue prototype employment regulations for (a) Federally Assisted Programs or Activities under Section 504 and (b) Federally Conducted Programs or Activities under Section 504. Affected Federal Agencies could then adopt and issue these regulations either verbatim or with appropriate tailoring.

One possible approach would be to draft a very brief regulation that simply incorporates by reference the ADA regulations set forth at 29 CFR Part 1630, as well as other relevant sub-regulatory guidance issued by the Commission.

Status: These regulations are still in the planning stage. We have been informed that the Department of Justice is preparing to circulate to affected Federal Agencies an updated and revised prototype regulation governing the services aspect of Section 504.

Key Points:

- The Rehabilitation Act Amendments of 1992 amend the substantive Section 504 standards governing employment to conform to the ADA
- Proposal to issue prototype employment regulations for both Section 504 Federally Conducted Activities and Programs and Federally Assisted Activities and Programs
- One approach to the prototype regulations would be to incorporate the ADA regulations by reference

Issue: Review of Coordination Rule (29 C.F.R. Part 1690) Under Executive Order 12866

Background:

Executive Order 12866, titled "Regulatory Planning and Review," was signed by President Clinton on September 30, 1993 as part of the initiative to reinvent government. It directs agencies to review existing significant regulations to determine whether they should be modified or eliminated in order to implement the President's goals of reducing regulatory burdens and enhancing interagency coordination and government-wide consistency on regulatory matters. Pursuant to the Executive Order and its own workplan, EEOC designated the rule at 29 C.F.R. Part 1690 for review in FY 94. Titled "Coordination of Federal Equal Employment Opportunity Programs," this rule was published in 1980 pursuant to EEOC's obligations and authority under Executive Order 12067 to advise and consult with federal agencies about new rules and other issuances concerning equal employment opportunity.

Status:

EEOC designated this rule for review on April 7, 1994, and staff has prepared a memorandum summarizing a preliminary review and proposed revisions to the rule. Staff is now preparing a workplan for revising the rule.

Key Revisions:

OLC proposes a revision to 29 C.F.R. Part 1690 with a preamble explaining how the revised rule advances the President's regulatory goals in Executive Order 12866.

- The Preamble will explain that, rather than becoming outdated, the rule's interagency coordination procedures are now particularly timely in light of the President's emphasis on government-wide coordination and regulatory consistency. The Preamble also will show how this rule, in practice, has resulted in increased clarity and consistency in several new federal rules, for example the DOT alcohol testing rules.
- The revised rule will clarify that Executive Order 12067 requires federal agencies to coordinate all rules and issuances that affect or overlap the employment discrimination statutes, even those that are not EEO statutes on their face. Examples are the DOT alcohol testing rules, and the FHWA driver certification rules, both of which raised ADA issues.
- The revised rule will include, for the first time, separate procedures for EEOC review of technical assistance materials

and other documents prepared pursuant to contracts or grants from other federal agencies. Since passage of the ADA, EEOC has received many such documents for review.

- The revised rule will emphasize the importance of early consultation with EEOC, as soon as a rule is reviewed by a responsible agency official.

[3195-01]

Executive Order 12067

June 30, 1978

Providing for Coordination of Federal Equal Employment Opportunity Programs

By virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 FR 19807), it is ordered as follows:

1-1. Implementation of Reorganization Plan.

1-101. The transfer to the Equal Employment Opportunity Commission of all the functions of the Equal Employment Opportunity Coordinating Council, and the termination of that Council, as provided by Section 6 of Reorganization Plan Number 1 of 1978 (43 FR 19807), shall be effective on July 1, 1978.

1-2. Responsibilities of Equal Employment Opportunity Commission.

1-201. The Equal Employment Opportunity Commission shall provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. It shall strive to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the Federal departments and agencies having responsibility for enforcing such statutes, Executive orders, regulations and policies.

1-202. In carrying out its functions under this order the Equal Employment Opportunity Commission shall consult with and utilize the special expertise of Federal departments and agencies with equal employment opportunity responsibilities. The Equal Employment Opportunity Commission shall cooperate with such departments and agencies in the discharge of their equal employment responsibilities.

1-203. All Federal departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this order and shall furnish the Commission such reports and information as it may request.

1-3. Specific Responsibilities.

1-301. To implement its responsibilities under Section 1-2, the Equal Employment Opportunity Commission shall, where feasible:

(a) develop uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity;

(b) develop uniform standards and procedures for investigations and compliance reviews to be conducted by Federal departments and agencies under any Federal statute, Executive order, regulation or policy requiring equal employment opportunity;

THE PRESIDENT

(c) develop procedures with the affected agencies, including the use of memoranda of understanding, to minimize duplicative investigations or compliance reviews of particular employers or classes of employers or others covered by Federal statutes, Executive orders, regulations or policies requiring equal employment opportunity;

(d) ensure that Federal departments and agencies develop their own standards and procedures for undertaking enforcement actions when compliance with equal employment opportunity requirements of any Federal statute, Executive order, regulation or policy cannot be secured by voluntary means;

(e) develop uniform record-keeping and reporting requirements concerning employment practices to be utilized by all Federal departments and agencies having equal employment enforcement responsibilities;

(f) provide for the sharing of compliance records, findings, and supporting documentation among Federal departments and agencies responsible for ensuring equal employment opportunity;

(g) develop uniform training programs for the staff of Federal departments and agencies with equal employment opportunity responsibilities;

(h) assist all Federal departments and agencies with equal employment opportunity responsibilities in developing programs to provide appropriate publications and other information for those covered and those protected by Federal equal employment opportunity statutes, Executive orders, regulations, and policies; and

(i) initiate cooperative programs, including the development of memoranda of understanding between agencies, designed to improve the coordination of equal employment opportunity compliance and enforcement.

1-302. The Equal Employment Opportunity Commission shall assist the Civil Service Commission, or its successor, in establishing uniform job-related qualifications and requirements for job classifications and descriptions for Federal employees involved in enforcing all Federal equal employment opportunity provisions.

1-303. The Equal Employment Opportunity Commission shall issue such rules, regulations, policies, procedures or orders as it deems necessary to carry out its responsibilities under this order. It shall advise and offer to consult with the affected Federal departments and agencies during the development of any proposed rules, regulations, policies, procedures or orders and shall formally submit such proposed issuances to affected departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall use its best efforts to reach agreement with the agencies on matters in dispute. Departments and agencies shall comply with all final rules, regulations, policies, procedures or orders of the Equal Employment Opportunity Commission.

1-304. All Federal departments and agencies shall advise and offer to consult with the Equal Employment Opportunity Commission during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity. Departments and agencies shall formally submit such proposed issuances to the Equal Employment Opportunity Commission and other interested Federal departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall review such proposed rules, regulations, policies, procedures or orders to ensure consistency among the operations of the various Federal departments and agencies. Issuances related to internal management and administration are exempt from this clearance process. Case handling procedures unique to a single program also are exempt, although the Equal Employment Opportunity Commission may review such procedures in order to assure maximum consistency within the Federal equal employment opportunity program.

1-305. Before promulgating significant rules, regulations, policies, procedures or orders involving equal employment opportunity, the Commission and affected departments and agencies shall afford the public an opportunity to comment.

1-306. The Equal Employment Opportunity Commission may make recommendations concerning staff size and resource needs of the Federal departments and agencies having equal employment opportunity responsibilities to the Office of Management and Budget.

1-307. (a) It is the intent of this order that disputes between or among agencies concerning matters covered by this order shall be resolved through good faith efforts of the affected agencies to reach mutual agreement. Use of the dispute resolution mechanism contained in Subsections (b) and (c) of this Section should be resorted to only in extraordinary circumstances.

(b) Whenever a dispute which cannot be resolved through good faith efforts arises between the Equal Employment Opportunity Commission and another Federal department or agency concerning the issuance of an equal employment opportunity rule, regulation, policy, procedure, order or any matter covered by this Order, the Chairman of the Equal Employment Opportunity Commission or the head of the affected department or agency may refer the matter to the Executive Office of the President. Such reference must be in writing and may not be made later than 15 working days following receipt of the initiating agency's notice of intent publicly to announce an equal employment opportunity rule, regulation, policy, procedure or order. If no reference is made within the 15 day period, the decision of the agency which initiated the proposed issuance will become effective.

(c) Following reference of a disputed matter to the Executive Office of the President, the Assistant to the President for Domestic Affairs and Policy (or such other official as the President may designate) shall designate an official within the Executive Office of the President to meet with the affected agencies to resolve the dispute within a reasonable time.

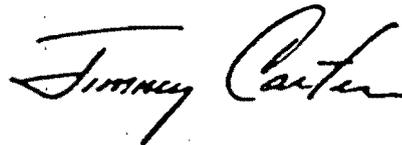
1-4. Annual Report.

1-401. The Equal Employment Opportunity Commission shall include in the annual report transmitted to the President and the Congress pursuant to Section 715 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-14), a statement of the progress that has been made in achieving the purpose of this order. The Equal Employment Opportunity Commission shall provide Federal departments and agencies an opportunity to comment on the report prior to formal submission.

1-5. General Provisions.

1-501. Nothing in this order shall relieve or lessen the responsibilities or obligations imposed upon any person or entity by Federal equal employment law, Executive order, regulation or policy.

1-502. Nothing in this order shall limit the Attorney General's role as legal adviser to the Executive Branch.



THE WHITE HOUSE.
June 30, 1978.

[FR Doc. 78-18686 Filed 6-30-78; 4:23 pm]

FEDERAL REGISTER, VOL. 43, NO. 129—WEDNESDAY, JULY 4, 1978

Federal Register

Tuesday
October 14, 1980

Part V

**Equal Employment
Opportunity
Commission**

Coordination of Federal Equal
Employment Opportunity Programs; Final
Regulations

PART 1690—PROCEDURES ON INTERAGENCY COORDINATION OF EQUAL EMPLOYMENT OPPORTUNITY ISSUANCES

Subpart A—General

Sec.

- 1690.101 Subject.
- 1690.102 Purpose.
- 1690.103 Supersession.
- 1690.104 Authority.
- 1690.105 Policy intent.
- 1690.106 Scope.
- 1690.107 Definitions.

Subpart B—Responsibilities

- 1690.201 Responsibilities.

Subpart C—Policies and Procedures

- 1690.301 Notification to EEOC during development of issuances.
- 1690.302 Issuances proposed by EEOC.
- 1690.303 Consultation with affected agencies.
- 1690.304 Coordination of proposed issuances.
- 1690.305 Nondisclosure of proposed issuances.
- 1690.306 Formal submission in absence of consultation.
- 1690.307 Temporary waivers.
- 1690.308 Notice of unresolved disputes.
- 1690.309 Interpretation of the order.

Subpart D—Reporting Requirements

- 1690.401 Reporting requirements.

Authority: Sec. 715 of Title VII of the Civil Rights Act of 1964, as amended. (42 U.S.C. 2000e-14); Reorganization Plan No. 1 of 1978. 43 FR 19807; E.O. 12067, 43 FR 28967.

Subpart A—General

§ 1690.101 Subject.

Procedures on Interagency Coordination of Equal Employment Opportunity Issuances.

§ 1690.102 Purpose.

These regulations prescribe the means by which review and consultation shall occur between the Equal Employment Opportunity Commission and other Federal agencies having responsibility for enforcement of Federal statutes, Executive Orders, regulations and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. Subsequent regulations will expand on standards for the coordination of specific matters referenced or alluded to herein.

§ 1690.103 Supersession.

None. These regulations are the first in a series of instructions issued by EEOC pursuant to its authority under Executive Order 12067.

§ 1690.104 Authority.

These regulations are prepared pursuant to the Equal Employment

Opportunity Commission's obligation and authority under Section 1-303 and 1-304 of Executive Order 12067 (Providing for Coordination of Federal Equal Employment Opportunity Programs) 43 FR 28967, July 5, 1978. (These regulations will also appear as EEOC Management Directive No. 1000).

§ 1690.105 Policy Intent.

These procedures will govern the conduct of such agencies in the development of uniform standards, guidelines and policies for defining discrimination, uniform procedures for investigations and compliance reviews and uniform recordkeeping and reporting requirements and training programs. These procedures will also facilitate information sharing and programs to develop appropriate publications and other cooperative programs. The goals of uniformity and consistency are to be achieved with the maximum participation and review on both an informal and formal basis by the relevant Federal agencies and, finally, by the public.

§ 1690.106 Scope.

These regulations apply to Federal agencies having equal employment opportunity program responsibilities or authority other than equal employment responsibilities for their own Federal employees or applicants for employment. Its provisions do not apply to issuances related to internal management or administration of the agency.

§ 1690.107 Definitions.

(a) "Affected Agency" means any agency whose programs, policies, procedures, authority or other statutory mandates (including coverage of groups of employers, unions, State and local governments or other organizations mandated by statute or Executive Order) indicate that the agency may have an interest in the proposed issuance.

(b) "Agencies" means those Executive and independent agencies, agency components, regulatory commissions, and advisory bodies having equal employment opportunity program responsibilities or authority other than equal employment opportunity responsibilities for their own Federal employees.

(c) "Consultation" means the exchange of advice and opinions on a subject occurring among the EEOC and affected agencies before formal submission of the issuance.

(d) "Formal Submission" means the transmittal of a written, publication-ready document by the issuing agency to the EEOC and other affected agencies for at least 15 working days from date of receipt. The formal submission shall take place before the publication of any issuance as a final document.

(e) "Internal or Administrative Documents", pursuant to 1-304 of the Order, may include, but are not limited to forms for internal audit and recordkeeping; forms for performance and program evaluation; internal directives dealing with program accountability; routine intra-agency budget forms; intra-agency agreements; correspondence which does not transmit significant new policy interpretations or program standards having an impact upon other Federal agencies; tables of organization; and other documents setting forth administrative procedures for the conduct of programs. Internal or administrative documents do not include compliance manuals, training materials, publications or any other internal documents setting forth procedures for the resolution of complaints, standards of review or proof, or any other policies, standards or directives having implications for non-Federal employees.

(f) "Issuance" refers to any rule, regulation, guideline, order, policy directive, procedural directive, legislative proposal, publication, or data collection or recordkeeping instrument. It also includes agency documents as described above, or revisions of such documents, developed pursuant to court order. "Issuance" does not include orders issued to specific parties as a result of adjudicatory-type processes.

(g) "Order" means Executive Order 12067 (Providing for Coordination of Federal Equal Employment Opportunity Programs).

(h) "Public Announcement" means the publication of a document in final form in the Federal Register or to any other promulgation for general agency or public reference.

(i) "Significant Issuance" means any issuance which the public must be afforded an opportunity to comment upon. In determining whether an issuance is significant, the EEOC shall apply the following criteria:

(1) The type and number of individuals, businesses, organizations, employers, labor unions, or State and local governments affected;

(2) The compliance and reporting requirements likely to be involved;

(3) The impact on the identification and elimination of discrimination in employment;

(4) The relationship of the proposed issuance to those of other programs and agencies.

Subpart B—Responsibilities

§ 1690.201 Responsibilities.

(a) The Director of the Office of Interagency Coordination (OIC) is responsible for coordinating the consultation and review process with other agencies on any issuances covered by the Order.

(b) All Federal agencies shall advise and offer to consult with the EEOC during the development of any proposed issuances, concerning equal employment opportunity which affect the obligations of employers, labor organizations, employment agencies or other Federal agencies.

(c) The Equal Employment Opportunity Commission shall advise and offer to consult with the affected Federal agencies during the development of any proposed issuances concerning equal employment opportunity which affect the obligations of employers, labor organizations, employment agencies or other Federal agencies.

Subpart C—Policies and Procedures

§ 1690.301 Notification to EEOC during development of issuances.

(a) Agencies shall notify the Commission whenever they intend to develop a significant issuance or an issuance affecting other agencies so that potential duplication, overlap, or inconsistency with the proposed issuances of other agencies can be identified before substantial agency time and resources have been expended. The requirement for consultation applies whether or not the agency plans to publish the issuance in the Federal Register for public comment.

(b) Whenever an agency of the Federal government (initiating agency) develops a proposed issuance which will require consultation among the affected agencies, a responsible official of that agency or agency component shall initiate consultation by submitting an early draft of the appropriate documents, preferably after review at the first or second supervisory level, to the chair of the EEOC (ATTN: Director, OIC). The submission shall be made prior to the point that the issuance is deemed final and ready for publication and shall indicate the appropriate office or person responsible for development of the issuance.

(c) EEOC recognizes that subsequent intra-agency clearance activities may change the policies outlined in the

issuance and may add or delete items included in prior drafts. Therefore, during this period of policy development, an initiating agency shall be bound by the contents of drafts which precede the final draft.

(d) Except as provided in Section 1690.307, in no instance shall there be formal submission to the EEOC or the affected agencies without prior consultation pursuant to Section 1-304 of the Order.

(e) Where an agency issuance is related to the internal management or administration of the agency, the issuance is exempt from the consultation process under the Order. The initiating agencies will make the determination of what must be submitted. When the agencies are in doubt, EEOC will determine the extent to which a particular issuance is covered by this exemption.

§ 1690.302 Issuances Proposed by EEOC.

Whenever the EEOC proposes to develop a significant issuance or any issuance requiring consultation, the procedure outlined in these regulations, shall also apply, as set forth in Section 1-303 of the Order. The EEOC shall advise and consult with other affected agencies whenever it develops an issuance, in the same manner and to the same extent as other agencies are required to do in § 1690.301 above and other sections below.

§ 1690.303 Consultation with affected agencies.

At the start of consultation, the EEOC shall determine which other agencies would be affected by the proposed issuance, and the initiating agency shall consult with such agencies. Initiating agencies shall also consult with other agencies which claim that their internal equal employment opportunity or personnel programs are affected by proposed issuances otherwise directed at external equal employment opportunity efforts. Agencies may consult with any other agencies that they believe would be affected by the issuance. The consultation period shall be determined by the parties. During the consultation period, the EEOC shall seek to resolve any disputes with the initiating agency before publication.

§ 1690.304 Coordination of proposed issuance.

(a) *Procedure for publication of proposed issuance.* (1) If the initiating agency, after consultation with EEOC, proposes to publish the issuance for purposes of receiving comments from the public, it shall confer with EEOC and agree on a mutually agreeable

length of time, no less than 15 working days, during which the proposal shall be submitted to all affected Federal agencies pursuant to Section 1-304 of the Order. The period of review shall be sufficient to allow all affected agencies reasonable time in which to properly review the proposal.

(2) When an affected agency wishes an extension of the review period, it shall make such request of the initiating agency. If the initiating agency does not grant the request, the affected agency may then make that request of EEOC. EEOC may, at its discretion, grant the additional time requested, whereupon EEOC will inform the initiating agency which shall extend the review period. EEOC shall also inform the initiating agency of the reasons for the extension.

(3) After 15 working days, if the EEOC has not requested an extension of time or otherwise communicated the need for more time to review the proposal, the initiating agency may proceed to publication of the proposed significant issuance for public comment for at least 60 days.

(4) During this public comment period, certain issues may be submitted to employer and employee representatives for comment pursuant to Section 2(c) of Executive Order 12044 (Improving Government Regulations) which requires that agencies give the public an early and meaningful opportunity to participate in the development of significant regulations.

(b) *Procedure for publication of final issuance.* After the period for public comment has closed, the initiating agency shall then incorporate the changes it deems appropriate and forward to EEOC for review, a copy of the document as published, a copy of the document as amended, with changes highlighted, any staff analysis, and a list of commentors. EEOC or affected agencies may review and copy the comments received. The time needed to review these materials shall be agreed on by the EEOC and the initiating agency. After completion of this review, the initiating agency shall formally submit the proposed final issuance to all affected agencies for at least 15 working days prior to publication.

§ 1690.305 Nondisclosure of proposed issuances.

(a) In the interest of encouraging full interagency discussion of these matters and expediting the coordination process, the EEOC will not discuss the proposed issuances of other agencies at an open Commission meeting where disclosure of information would be likely to significantly frustrate implementation of a proposed agency action. The

Commission will make this determination on a case by case basis.

(b) Requests by the public for drafts of proposed issuances of another agency will be coordinated, in appropriate circumstances, with that agency and the person submitting the request shall be so notified. The decision made by that agency with respect to such proposed issuances will be honored by the Commission.

§ 1690.306 Formal submission in absence of consultation.

If an initiating agency has an issuance which was already under development on or before July 1, 1978, when Executive Order 12067 became effective, and on which there has been no consultation, the agency shall immediately notify the EEOC of the existence of such proposals and the following procedure shall apply:

(a) EEOC shall confer with the initiating agency and shall determine whether the proposal should be the subject of informal consultation and/or formal submission to other affected Federal agencies pursuant to Section 1-304 of the Order. This does not preclude the right of the agency to consult with any other agency it wishes.

(b) If the EEOC decides that informal consultation and/or formal submission is necessary, it shall confer with the proposing agency and agree on a mutually acceptable length of time for one or both (the informal consultation and/or formal submission).

(c) The period of formal submission shall be sufficient to allow all affected agencies time in which to properly review the proposal. While such period may be longer, in no instance may it be shorter than 15 working days.

§ 1690.307 Temporary waivers.

(a) In the event that the proposed issuance is of great length or complexity, the EEOC may, at its discretion, grant a temporary waiver of the requirements contained in § 1690.303 or § 1690.304. Such waivers may be granted if: (1) The period of consultation and thorough review required for these documents would be so long as to disrupt normal agency operations; or (2) the initiating agency is issuing a document to meet an immediate statutory deadline; or (3) the initiating agency presents other compelling reasons why interim issuance is essential.

(b) In the event of a waiver, the initiating agency shall clearly indicate that the issuance is interim, has been published pursuant to a waiver, and is subject to review. EEOC reserves the right, after publication, to review the document in light of the objectives of the

Order. The initiating agency may make substantive conforming changes in light of comments by EEOC and other affected agencies.

§ 1690.308 Notice of unresolved disputes.

(a) The disputes resolution mechanism in Section 1-307 of the Executive Order should be used only in extraordinary circumstances, and only when further good faith efforts on the part of the EEOC and the agency involved would be ineffective in achieving a resolution of the dispute. Before using the disputes resolution mechanism, the EEOC or the initiating agency must have fully participated in the coordination process, including giving notification to the EEOC and the affected agencies of its intention to publish in final within 15 working days.

(b) EEOC or the affected agency shall then send written notification of the dispute and the reasons for it to the EEOC and to the other affected agencies. Thereafter, but within the 15 day notice period, the EEOC or the affected agency may refer the dispute to the Executive Office of the President. Such reference may be made by the Chair of the EEOC or the head of the Federal agency. If no reference is made within 15 working days, the decision of the agency which initiated the proposed issuance will become effective.

§ 1690.309 Interpretation of the Order.

Subject to the dispute resolution procedures set forth above and in accordance with the objectives set forth in 1-201 and the procedures in 1-303 of the Order, the EEOC shall interpret the meaning and intent of the Order. EEOC also will issue procedural changes under the Order, as appropriate, after advice and consultation with affected agencies as provided for in these procedures.

Subpart D—Reporting Requirements

§ 1690.401 Reporting requirements.

The regulations do not establish reporting requirements other than the required notices of proposed rulemaking and formal and informal review.

(FR Doc. 80-21920 Filed 10-10-80; 8:46 am)
BILLING CODE 6570-06-01

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Divider Title: _____ H _____

Issue: EEOC's Policy Statement on Alternative Dispute Resolution

Description: The Administrative Dispute Resolution Act (ADRA), 5 U.S.C. 571-583, authorizes and encourages federal agencies to utilize alternative means of resolving disputes in lieu of formal adjudication or litigation. The alternatives suggested include settlement negotiations, conciliation, mediation, factfinding, minitrials and arbitration. Section 3 of the ADRA requires each agency to adopt a policy statement that examines alternative dispute resolution (ADR) in connection with the agency's informal and formal adjudications, rulemakings, enforcement actions, contract administration, and litigation brought by and against the agency. Section 3 also requires each agency to designate a senior official as its dispute resolution specialist, to be responsible for the policy and program implementing the ADRA.

The Chairman has designated the Legal Counsel as the dispute resolution specialist. The Legal Counsel has overall responsibility for providing guidance to the Commission on developing, coordinating, and implementing the agency's ADR initiatives. A Steering Committee, consisting of a representative from the offices of Inspector General, EEO, Management, Federal Operations, Program Operations, and General Counsel, has been formed to work with OLC on ADR.

Status: The Commission published a request for comments in the Federal Register on July 21, 1993. See attachment. Generally, all of the comments supported the use of ADR at EEOC. In coordination with the Steering Committee, Legal Counsel has drafted a policy statement on ADR and an accompanying Commission-wide action plan. See Attachment. The policy statement and Commission-wide action plan will be transmitted to the Commission for its consideration in the near future.

Key Points: The draft ADR Policy Statement affirms the Commission's commitment to the exploration of a range of alternative methods for resolving disputes in all of its activities, with an emphasis on private sector charge resolution. The major issues raised by the comments and addressed in the draft policy statement are that the Commission should:

- reject the concept of forced arbitration from the Supreme Court's Gilmer decision;
- encourage the use of ADR by private employers; and
- ensure that third-party neutrals are trained in EEO law.

The proposed 1994 action plan for the Commission includes 13 steps involving many diverse activities of the agency. These steps include:

- resumption of the internal EEO mediation pilot;

- providing guidance to the federal EEO community by adding a chapter on ADR to Management Directive 110;
- considering the Commission's mediation pilot for charge processing;
- continued adherence to ADR principles by agency counsel in litigation brought by or against the agency; and
- conducting the initial training of employees on ADR techniques.

filing deadline for the submission of refund applications for direct restitution by purchasers of Agway's refined petroleum products. 20 DOE at 89,027, 55 FR 26497.

We commenced accepting refund applications in the Agway refund proceeding on June 21, 1990, more than three years ago. While the initial deadline for such submissions was September 26, 1990, we have continued to liberally accept applications after the deadline. However, we have now concluded that eligible applicants have been provided with more than ample time to file. Therefore, we will not accept applications that are postmarked after July 26, 1993. All Applications for Refund from the Agway Consent Order fund postmarked after the final filing date of July 26, 1993, will be summarily dismissed. Any unclaimed funds remaining after all pending claims are resolved will be made available for indirect restitution pursuant to the Petroleum Overcharge Distribution and Restitution Act of 1986, 15 U.S.C. 4501.

Dated: July 14, 1993.

George B. Brennan,
Director, Office of Hearings and Appeals.
[FR Doc. 93-17320 Filed 7-20-93; 8:45 am]
BILLING CODE 6460-01-P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Use of Alternative Dispute Resolution and Negotiated Rulemaking Procedures

AGENCY: Equal Employment Opportunity Commission.
ACTION: Request for comments.

SUMMARY: The Administrative Dispute Resolution Act (ADRA) Public Law 101-552, codified at 5 U.S.C. 571-583 (1992) and the Negotiated Rulemaking Act (Reg-Neg), Public Law 101-648, 5 U.S.C. 561-570 (1992), encourage agencies to use alternative means of dispute resolution in administrative programs and negotiated rulemaking for prompt and more informal resolution of disputes and development of regulations. The Commission anticipates that alternative dispute resolution and negotiated rulemaking in some areas of its responsibility may be faster, less contentious and more economical than current procedures.

Pursuant to section 3(a) of the ADRA, the Commission intends to adopt a policy statement that addresses the use of "alternative means of dispute resolution and case management in the following areas: (1) formal and informal adjudications, (2) rulemakings, (3)

enforcement actions, (4) contract administration, and (5) litigation brought by or against the Commission.

Before adopting any such policy statement, however, the Commission is seeking comments from the public on the use of alternative dispute resolutions in any of the above referenced areas at the Commission. The Commission encourages a broad range of comments, from whether ADR is appropriate in the functional areas noted to whether specific types of ADR are appropriate for specific functional areas. All comments received will be carefully considered before any such policy statement is drafted and finalized.

DATES: Comments are due by September 20, 1993.

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, D.C. between the hours of 9:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Nicholas M. Inzeo, Associate Legal Counsel for Legal Services, at (202) 663-4640 or TDD (202) 663-7026. This notice is also available in the following 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 Publications Information Center at 1-800-669-3362.

SUPPLEMENTARY INFORMATION: In 1990, Congress passed the Administrative Dispute Resolution Act (ADRA), Public Law 101-552, and the Negotiated Rulemaking Act, Public Law 101-648. The ADRA encourages federal agencies to use mediation, conciliation, arbitration, negotiated rulemaking and other consensual methods of dispute resolution for the prompt and informal resolution of issues of controversy relating to administrative programs. The Reg-Neg Act sets forth criteria for the use of negotiated rulemaking in appropriate circumstances. Section 3 of the ADRA requires each agency to adopt a policy regarding the use of alternative dispute resolution and case management in a number of areas, including: (1) formal and informal adjudications; (2) rulemakings; (3) enforcement actions; (4) contract administration; and (5) litigation brought by or against the agency.

In enacting the ADRA, Congress expressed concern that administrative

proceedings have become too formal and lengthy, and asserted that alternative procedures may, in at least some instances, be faster, less contentious and more economical. ADR techniques, however, will not be appropriate in every situation; the statute indicates, for example, that ADR techniques should not be used for precedent setting cases, those where a formal record is essential and those bearing on significant policy questions.

The Reg-Neg Act amended the Administrative Procedure Act to establish a procedure for negotiating a proposed rule. In enacting the statute, Congress addressed concerns that traditional rulemaking procedures may discourage affected parties from communicating openly with each other and with federal agencies, and encourages them to assume extreme conflicting positions often resulting in costly and time-consuming litigation. While agencies have experimented with alternative techniques to avoid these consequences, the Reg-Neg statute codifies the negotiated rulemaking process.

In addition to the Administrative Dispute Resolution Act, both the Americans With Disabilities Act of 1990, Public Law 101-336, 42 U.S.C. 12101 *et seq.*, and the Civil Rights Act of 1991, Public Law 102-166, 42 U.S.C. 1981 note, explicitly encourage the use of alternative means of dispute resolution where appropriate and to the extent authorized by law. Congress's encouragement and emphasis on the utilization of alternate dispute resolution mechanisms in the labor dispute area along with reported ADR successes are sure to move more employers toward attempting to resolve internal disputes before they are brought in court or into EEOC's administrative programs. This support also encourages EEOC to look toward additive and alternative systems to provide the best and quickest law enforcement service to the public. Therefore, in undertaking the responsibilities of enforcing its two new statutes, the Commission believes that alternatives to its current charge resolution processes must be considered.

Alternative dispute resolution is not a new concept for the Commission. Title VII of the Civil Rights Act of 1964 requires that the Commission conciliate every charge when it makes a determination that reasonable cause exists to believe that discrimination has occurred. In addition, the Commission has undertaken other activities in the past to promote early, negotiated settlement of charges of discrimination, as well as efforts to encourage

alternative methods of resolving its own internal disputes. A few of these previous activities are set forth below.

Rapid Charge Processing

In 1977, EEOC established a rapid charge process, emphasizing early, negotiated no-fault settlements between charging party and respondent, on a pilot basis in three model offices. This process was extended to all district offices in 1979. Under the rapid charge process, Commission staff conducted a limited preliminary investigation, then scheduled a fact finding conference with the charging party and the respondent in which EEOC served as moderator/advisor, encouraging the parties to reach a settlement. If a settlement was reached, a no-fault agreement was signed by the parties and EEOC. EEOC made no decision on the merits of the case. If no settlement was reached, EEOC used the preliminary evidence and evidence received at the conference to either close the case with a determination, or return it for further investigation and regular charge processing.

A 1981 report by the General Accounting Office (GAO) found that rapid charge processing had improved charge processing from what it had been, and that, in most instances, rapid charge processing could be effective. However, GAO believed that in some instances EEOC overemphasized negotiated settlements.

Internal Complaint Resolution

In 1985 and 1986, EEOC developed materials and case studies for its managers, emphasizing ways to avoid or quickly resolve EEO complaints through improved communications and other actions. Many Commission managers believed that EEO complaints filed against EEOC as employer were due to poor communication between managers and employees, misunderstandings and other barriers. Top managers believed that small problems that could have been resolved quickly often developed into larger, irreconcilable issues, as the parties' positions hardened during lengthy EEO proceedings.

The ADRA requires that agencies consider alternative dispute resolution methods as vehicles for avoiding protracted administrative procedures and litigation. In developing an ADR policy, EEOC intends to explore the use of such techniques to the extent, and only to the extent, that they can improve and enhance the fairness, effectiveness and efficiency of its actions. EEOC intends to consider implementing or expanding the use of ADR techniques wherever such informal dispute

resolution methods have a likelihood of proving useful within the resources given to the Commission. The Commission has implemented pilot ADR procedures in several areas. In addition, the Commission believes that ADR is not appropriate in other areas. These areas are discussed below.

Enforcement—Charge Resolution

To study the potential impact of ADR in its enforcement and charge solution responsibilities, EEOC initiated a Pilot Mediation Program in four district offices in April 1993. In initiating this Pilot Program, the Commission sought to develop a permanent informal resolution system that will supplement, not replace, the current charge resolution system, be highly effective, and produce a greater number of amicable resolutions in a shorter time period, with a higher level of satisfaction than is achieved through existing procedures.

In the Pilot Mediation Program, professional mediators are mediating 75 cases in each of four district offices: Houston, New Orleans, Philadelphia and Washington, DC. Mediation is being offered in selected cases alleging discrimination in discharge, discipline and terms and conditions of employment under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Class action and equal pay charges are not eligible for mediation in the Pilot. Mediation occurs only where both the charging party and the respondent have voluntarily agreed to the process. Either party can opt out of mediation at any time. If an agreement is not reached during a 60-day mediation period, the case will be referred back to EEOC to continue the normal investigative process. Any agreement reached in a mediation will have the same force as any settlement reached through EEOC. Such agreements are enforceable in court. The Pilot Mediation Program is slated for completion in August 1993. A thorough analysis of the Pilot Program will be conducted at the conclusion of the Program.

ADA Training and Enforcement

In addition to the Pilot Mediation Program, EEOC emphasized the use of ADR to help resolve disputes arising under the Americans with Disabilities Act in a one-week training program conducted for 400 representatives of the disability community, under an EEOC contract with the Disability Rights Education and Defense Fund. Participants were trained on ADA substantive requirements are alternative

dispute resolution techniques. One hundred participants received additional training including intensive training on ADR techniques. These 100 persons serve as resources to EEOC field offices to help resolve EEOC complaints.

Adjudications

EEOC is considering an interim rule implementing sections 320 and 321 of the Civil Rights Act of 1991. Sections 320 and 321 provide for formal adjudication under the Administrative Procedure Act of complaints of discrimination brought by previously exempt state and local government employees and Presidential appointees. The interim rule would permit mediation by EEOC mediators of each complaint before the formal hearing, and the Commission will request comments on the interim rule.

In addition, in its recent regulations governing the processing of complaints of discrimination brought by federal employees, 29 CFR part 1614, EEOC has provided for an automatic extension of the pre-complaint counseling period when a complainant agrees to participate in an agency's established alternative dispute resolution program. The Commission also encourages agencies' use of ADR procedures during the investigative phase of the federal sector complaints process. Agencies have expressed considerable interest in efforts to train a cadre of expert mediators within the government who could be used by other agencies as neutrals, and other joint efforts to improve handling of federal sector EEO complaints.

Negotiated Rulemaking

When created in 1964 by Title VII of the Civil Rights Act of 1964, the Commission did not have the authority to issue substantive, or legislative, rules. When the Commission received the authority to enforce the Age Discrimination in Employment Act (ADEA), and most recently with the passage of the Americans with Disabilities Act (ADA), the Commission was given authority to issue regulations that have the force and effect of law. In carrying out these regulatory functions, the Commission has considered and will continue to consider whether to use Reg-Neg.

Contract Administration

EEOC has been party to only two contract disputes in the last 5 years, both of which were settled prior to the institution of formal proceedings. The Disputes Clause of the contract requires that disagreements be raised informally before any formal action is taken. In

In addition, the ADRA authorizes agencies to use ADR in the context of any particular dispute. The Commission would be free to consider ADR in the context of any specific dispute raised.

Internal Complaint Procedures

The Commission's Office of Equal Employment Opportunity conducted a six-month Alternative Complaint Resolution Program (ACRP) in 1991. Under this program, certain individuals who filed EEO complaints against EEOC as an employer were offered the option of participating in a 30-day mediation program as an alternative to the formal complaint process. The ACRP offered an expedited process, in which a neutral mediator conducted mediation and attempted to resolve the matter within 30 days. If agreement was reached by all parties, the formal complaint was withdrawn; if mediation was not successful in the 30-day period, the complaint returned to the investigative stage of the formal complaint process. The project used trained mediators from federal and local government agencies and a few EEOC attorneys with mediation training.

The Commission seeks comment on its use of ADR and negotiated rulemaking in all of its programs and activities. Particularly, the Commission seeks public comment on the following:

- (1) The particular pilot programs and proposals noted above, and whether any parts of them should or should not be adopted generally.
- (2) Other areas of EEOC's operations that might readily benefit from the use of ADR techniques.
- (3) Any areas of the Commission's operations in which ADR techniques should be limited or not used at all, and
- (4) Any other matter that will be of interest or assistance to the Commission in developing its policy.

EEOC will develop its ADR policy in full consultation with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service as required by section 3(a) of the ADRA. To this end, the Commission has designated its Legal Counsel as its ADR Specialist. The Legal Counsel serves as liaison with ACUS and FMCS and as coordinator of EEOC's ADR implementation.

Signed at Washington, DC, this 14 day of July, 1993.

For the Commission,

Ray E. Gallegos,
Chairman.

R Doc. 93-17321 Filed 7-20-93; 8:45 am
BILLING CODE 6770-01-0

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

July 14, 1993

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of this submission may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW, suite 140, Washington, DC 20037, (202) 857-3800. For further information on this submission contact Judy Boley, Federal Communications Commission, (202) 632-0276. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, (202) 395-4814.

OMB Number: 3060-0470

Title: Computer III Remand Proceeding: Bell Operating Company Safeguards, and Tier 1 Local Exchange Company Safeguards (CC Docket No. 90-623) and Implementation of Further Cost Allocation Uniformity (Memorandum Opinion and Order).

Action: Revision of a currently approved collection

Respondents: Businesses or other for-profit

Frequency of Response: Annually, quarterly and on occasion reporting requirements

Estimated Annual Burden: 90 responses; 300 hours average burden per response; 27,000 hours total annual burden

Needs and Uses: Local exchange carriers (LECs) are required to file a revised cost allocation manual by November 1, 1993, pursuant to the requirements contained in the attached Memorandum Opinion and Order (MO&O) according to the procedural specifications issued in Responsible Accounting Officer Letter No. 19 (RAO Letter 19). Section 64.903(a) codifies the requirement that local exchange carriers with annual operating revenues of \$100 million or more file a cost allocation manual. Section 64.903(b) requires that carriers update their cost allocation manuals at least quarterly, except that changes to the cost apportionment table and the description of time reporting procedures must be filed at least 60 days before the carrier plans to implement the changes. Proposed

changes in the description of time reporting procedures, the statement concerning affiliate transactions, and the cost apportionment table must be accompanied by a statement quantifying the impact of each change on regulated operations. Changes in the description of time reporting procedures and the statement concerning affiliate transactions must be quantified in \$100,000 increments at the account level. Changes in the cost apportionment table must be quantified in \$100,000 increments at the cost pool level. Section 64.904 codifies the independent auditor's certification requirement. The Commission strengthened the standard to be used by independent auditors in preparing their reports on carrier's cost allocation manual implementation and results by requiring that the independent auditors provide the same level of assurance in audits as they provide in a financial statement audit engagement. (Approved under OMB Control number 3060-0384). The cost allocation manuals should state that carriers have established sub-pools and should describe the sub-pools and the apportionment procedures used for the sub-pools. The Commission has also specified cost pools and allocators for ten part 32 accounts.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 93-17213 Filed 7-20-93; 8:45 am]

BILLING CODE 6712-01-M

[Report No. CL-93-121]

Common Carrier Public Mobile Services Information; New Transmittal Sheet for Phase 2 Unserved Area Applications

July 15, 1993.

Attached is a copy of Form FCC 464-A, "Transmittal Sheet for Phase 2 Cellular Applications for Unserved Areas." Applicants should use the FCC Form 464-A as the cover page for all phase 2 cellular applications for unserved areas. After September 1, 1993 phase 2 cellular applications for unserved areas without the Form 464-A will be returned as unacceptable for filing. The January 1992 version of the FCC Form 464, "Transmittal Sheet for Cellular Applications for Unserved Areas" will continue to be used for phase 1 cellular applications for unserved areas.

Items 1 through 4 must be completed on the FCC Form 464-A. Item 3 should

POLICY STATEMENT ON ALTERNATIVE DISPUTE RESOLUTION

I. PURPOSE

The Equal Employment Opportunity Commission believes that in many of its operations greater flexibility in using alternative means of resolving disputes, other than formal legal proceedings, may provide faster, less expensive, less contentious and more productive results. Therefore, in accordance with the requirements of the Administrative Dispute Resolution Act of 1990 (ADRA) (Public Law 101-552, codified at 5 U.S.C. sections 571-583), the Commission is adopting this statement of Alternative Dispute Resolution (ADR) Policy implemented by a Commission-wide Plan.

The Commission's Policy and Plan also respond to Congressional directives in the Negotiated Rulemaking Act of 1990 (Public Law 101-648, 5 U.S.C. sections 561-570) (commonly called "Reg-Neg"), and recent legislation expanding the Commission's jurisdiction and enforcement responsibilities that encourage the agency to consider alternative dispute resolution methods in rulemaking and complaint processing.

EEOC has utilized certain dispute resolution methods as part of its basic program functions. The statutes enforced by the Commission require that it attempt to settle and conciliate discrimination complaints before considering litigation, and EEOC routinely utilizes such procedures.¹ This policy statement represents a much broader commitment by the Commission to examine and consider use of a wide range of ADR mechanisms in all of its activities, and to utilize such mechanisms where appropriate, legal and effective.

II. BACKGROUND

A. ADRA Requirements

The Administrative Dispute Resolution Act (ADRA) authorizes and encourages federal agencies to utilize alternative means of resolving disputes in lieu of formal adjudication or litigation. The alternatives suggested include settlement negotiations, conciliation, mediation, factfinding, minitrials and arbitration.

¹In addition to regular use of conciliation and negotiation, the Commission has taken a number of special actions to explore and implement ADR techniques in its activities. These activities are described more fully in EEOC's Request for Public Comment on the use of ADR. 58 Fed. Reg. 39023 (July 21, 1993).

Section 3 of the ADRA requires that each federal agency adopt a policy statement which examines ADR in connection with the agency's informal and formal adjudications, rulemakings, enforcement actions, contract administration, litigation brought by or against the agency and other activities. Section 3 also requires each agency to designate a senior official as its dispute resolution specialist, to be responsible for the policy and program implementing the ADRA. This section further requires agencies to provide ADR training for its dispute resolution specialist and other staff involved in implementing the agency's ADR policy. Finally, Section 3 directs the agency to review its contract agreements, to determine whether such agreements should be amended to authorize and encourage use of ADR.

B. Other Legal Requirements Related to ADRA.

The principles and requirements of the ADRA are buttressed by numerous other legal requirements that apply to EEOC activities. Specifically:

1. Title VII and the ADEA

Both Title VII of the Civil Rights Act of 1964, (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA) contain conciliation provisions. Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), requires that the Commission endeavor to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion on every charge where it has made a determination of reasonable cause. In addition, Commission regulations authorize Commission personnel to seek to settle charges through negotiated settlements prior to a finding of reasonable cause. 29 C.F.R. section 1601.20.

Section 6 of the ADEA, 29 U.S.C. 626(d), similarly requires the Commission to promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

2. The ADA and the Civil Rights Act of 1991

The Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991 recently added more specific provisions encouraging EEOC to use ADR where appropriate. These identical ADR provisions state:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration is encouraged to resolve disputes arising under this Act...

See 42 U.S.C. 1981 note; 42 U.S.C. 12212

3. The Negotiated Rulemaking Act of 1990 ("REG-NEG") and Executive Order 12866

The Negotiated Rulemaking Act sets forth criteria for the use of negotiated rulemaking in appropriate circumstances and establishes a framework for the conduct of negotiated rulemaking by federal agencies. This framework includes bringing potentially adverse parties and interests together to participate in the initial formulation and drafting of regulations, so as to minimize later disputes that often result in costly and time-consuming litigation.

The "Reg-Neg" Act is supplemented by Executive Order 12866, 58 Fed. Reg. 51735 (October 4, 1993), which establishes the procedures to be followed by federal governmental agencies in promulgating regulations. The Presidential memorandum accompanying this Executive Order, dated September 30, 1993, directs each agency to identify at least one rulemaking which the agency will develop through negotiated rulemaking during the upcoming year or to explain why negotiated rulemaking is not feasible.

4. Executive Order 12778

Section 1 of Executive Order 12778, 56 Fed. Reg. 55195 (October 25, 1991), requires federal government attorneys to attempt to resolve disputes "expeditiously and properly before proceeding to trial." The Executive Order requires pre-filing notice of a complaint, attempt at conciliation, agreement to participate in settlement conferences and the use of appropriate ADR techniques other than binding arbitration.

5. Executive Order 12871

Executive Order 12871, 58 Fed. Reg. 52201 (October 6, 1993), requires agency heads to provide "systematic training of appropriate agency employees (including line managers, first line supervisors, and union representatives who are federal employees) in consensual methods of dispute resolution, such as alternative dispute resolution techniques and interest-based bargaining approaches."

6. National Performance Review

Finally, the Report of the National Performance Review, chaired by Vice President Al Gore, dated September 7, 1993, strongly encourages agencies to expand their use of ADR and Reg-Neg. (Report of the National Performance Review, pages 118 and 119).

C. Public Comment on the Use of ADR in EEOC Procedures

On July 21, 1993, the Commission published in the Federal Register a request for comments on the use of ADR and negotiated rulemaking at EEOC. 58 Fed. Reg. 39023. Sixteen comments were timely received. Generally, all of the comments supported the use of ADR. Three comments supported ADR in federal sector complaint processing. Thirteen comments addressed EEOC's use of ADR in processing private sector charges of discrimination. While the commentors generally supported the use of ADR in this area, several indicated their inability to respond further until additional information is available on the results of the Commission's 1993- 94 pilot ADR project.

One commentor strongly argued that whatever policy or program the Commission adopts must be designed to encourage, rather than discourage, companies and other parties to seek resolution of disputes. The Commission recognizes that both in the private and public sectors, current dispute mechanisms, mostly administrative and negotiated grievance procedures, are not resolving disputes as they once did. Generally, as a result, a number of disputes that in the past might have been resolved in a grievance process are now being filed in the EEO forum in order to provide greater rights to the employee.

Several commentors discussed the significance of Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991), to any ADR policy adopted by the Commission. In Gilmer, the Supreme Court held that an ADEA claim can be subjected to compulsory arbitration under an arbitration clause contained in a registration application with the New York Stock Exchange. The commentors believed that the compulsory nature of arbitration made it inappropriate for an ADR program. Under the ADRA, neither party to a dispute should be able to mandate use of a binding method of resolution. Any ADR program or project developed by the Commission will not permit a mandate for compulsory binding arbitration.

Several commentors stressed the importance of training as part of any ADR program, noting that the ADRA requires that the agency dispute resolution specialist and others responsible for implementing the Act be provided with training in the use of ADR methods. The Commission's ADR Policy and Plan strongly support this view. In addition, the Commission believes that any individual serving as a neutral must have training in the theories and practice of employment discrimination law. Therefore, as part of any ADR program or project, the Commission will specify minimum training requirements for Commission employees and for neutrals participating in the program or project.

III. Equal Employment Opportunity Commission Alternative Dispute Resolution Policy and Plan

A. Policy

The Equal Employment Opportunity Commission is firmly committed to the exploration of a range of alternative methods for resolving disputes in all of its activities, including formal and informal adjudications, rulemakings, enforcement actions, contract administration and litigation brought by or against the agency. The Commission is equally committed to the use of such methods where appropriate and feasible. The Commission believes that increased flexibility in using alternatives to formal legal proceedings may provide faster, less expensive, less contentious and more productive results in eliminating workplace discrimination and in all Commission operations.

The Commission recognizes that increased use of a range of alternative dispute resolution methods may be an important tool in processing discrimination charges, at a time when its charge workload is increasing at a record rate and budget restrictions prevent the hiring of sufficient additional staff. Accordingly, the Commission will continue to explore the expanded use of such techniques in its charge processing activities.

The Commission will consider all alternative dispute resolution procedures, especially conciliation, settlement negotiations, mediation, minitrials and arbitration. The Commission will also examine areas where negotiated rulemaking procedures may be effective in developing regulations under its various authorities.

Where necessary and as recognized by the ADRA, the Commission realizes that it will continue to seek appropriate legal remedies through litigation. Nothing in this policy statement should be construed as an abdication of the Commission's responsibility to pursue appropriate remedies for discrimination through full exercise of its enforcement powers.

In addition, the Commission recognizes that at times, disputes can be resolved between an employer and an employee before a charge is actually filed. The Commission recognizes that in those instances, ADR techniques may be used to resolve those disputes. The Commission wishes to emphasize, however, that the use of any pre-charge ADR techniques does not impact on one's ability to exercise any of his or her statutory rights, including the right to file a charge with the Commission.

While the Commission will seek to utilize ADR methods in all activities where feasible and appropriate, there are instances in which such use would not be appropriate. The Administrative Dispute Resolution Act (ADRA) recognizes that ADR should not be

used where there is a need to maintain established policies of special importance, where resolution of a dispute would have a significant effect on non-parties, where a full public record is important and where the agency must maintain continuing jurisdiction over a matter.

The Commission's use of ADR procedures in processing discrimination charges also must be governed by certain other restrictions, consistent with the provisions of the ADRA. These include:

Limits on Binding Arbitration

Arbitration may be a useful form of alternative dispute resolution. However, it is not appropriate under the ADRA, and will not be appropriate under the Commission's ADR policy, for any party to a dispute to mandate use of a binding method of arbitration.

Confidentiality

A confidentiality provision in the ADRA generally prohibits the disclosure of settlement communications in an ADR proceeding. Under this provision, where a neutral is requested to disclose protected documents in a subsequent proceeding, the parties must be advised of this request to enable them to voice any opposition they may have to that disclosure. ADRA also gives the parties the authority to agree to modify the confidentiality provisions. The Commission recognizes the importance of confidentiality in implementing any effective ADR program. In order to encourage participation in such programs, the Commission will include confidentiality provisions in all of its ADR programs or projects, and will notify the parties to the dispute of the protections offered by the confidentiality provision.

Priority for Training

The Commission believes that training both in the use of ADR techniques and in theories and practice of employment discrimination law are essential for successful use of ADR in resolving EEO disputes. Accordingly, any program or project that it initiates will specify minimum training requirements for Commission employees and for any individuals serving as neutrals in the dispute resolution process.

B. ADR Plan

The Commission's Legal Counsel has been designated the agency's ADR specialist and has been directed to draft the policy statement on the use of ADR in Commission processes. The Legal Counsel also has been assigned the responsibility to give ongoing

advice and guidance to the Commission on ADR issues and programs, including guidance on whether ADR should be utilized in a particular area or whether exceptions or other circumstances prevent such use. All ADR projects will be coordinated centrally through the Legal Counsel. The Legal Counsel has established a Steering Committee with members from all Commission headquarter's offices, to provide input to the Legal Counsel and each Office in developing and implementing projects.

In conjunction with this Policy Statement, the Legal Counsel has prepared an EEOC Order which spells out these responsibilities.

The Commission's commitment to ADR will be manifested through the development and implementation of an annual agency-wide ADR Action Plan. Under the auspices of the ADR Steering Committee, the Office of Legal Counsel (OLC) will develop the annual ADR Action Plan and identify which offices will work on each aspect or action step of the plan. OLC will be responsible for transmitting the annual agency-wide Action Plan to the Commission at the beginning of each fiscal year.

1994 ADR ACTION PLAN:

I. OVERVIEW

The Commission's 1994 action plan includes 13 steps, involving many diverse activities of the agency. These steps emphasize the initial training of employees on ADR techniques and include: resumption of the internal EEO mediation pilot; adding a chapter on ADR to Management Directive 110; consideration of the Commission's mediation pilot for charge processing, and continued adherence to ADR principles by agency counsel in litigation brought by or against the Commission. Implementing the thirteen action steps set forth below during 1994 will demonstrate the Commission's commitment to ADR and provide a solid foundation for future ADR programs.

II. ACTION STEPS

A. Training

Successful implementation of an ADR program will require that EEOC provide appropriate training on ADR to its employees. The Commission believes that education and training are essential parts of an ADR program and therefore will focus its initial efforts on training staff in ADR concepts.

The Commission believes that appropriate training of outside individuals who may participate in any Commission ADR initiatives in the future by serving as neutrals is also essential. Therefore, should the Commission decide to utilize outside neutrals, training in ADR and at least 16 hours of training on EEOC, its statutes and procedures will be required for any neutral participating in an EEOC ADR program.

ACTION STEP 1. OLC will be responsible for providing agency personnel with a basic education and training course on ADR. In developing this training program, OLC will confer with and coordinate this training with the Administrative Conference of the United States (ACUS) and the Federal Mediation and Conciliation Service (FMCS), the lead agencies implementing ADR in the federal government. OLC will also provide more specialized training and guidance on ADR to selected personnel, including Commission attorneys, as is deemed necessary.

B. Internal EEO Mediation Program

ACTION STEP 2. The Office of Equal Employment Opportunity

will work with the Office of Legal Counsel and the Office of Federal Operations to develop and implement a mediation program for processing internal EEO complaints. This program will be similar to and build on the 1991 pilot conducted by the EEO office.

C. Federal Sector ADR Initiatives

a. Federal Complaint Processing Regulations

The Commission's Federal Sector regulations contain an ADR provision. (29 C.F.R. §1614.105(f)). Other federal agencies continue to look to EEOC for guidance on federal EEO matters.

ACTION STEP 3. The Office of Legal Counsel, in consultation with the Office of Federal Operations, will recommend to the Commission amendment of the 1614 regulations to provide additional time to the parties during the investigative and hearing stages of the EEO process to allow parties to utilize an ADR procedure to resolve complaints. Currently, the regulations provide for this additional time only during the pre-complaint processing stage.

b. Management Directive 110

ACTION STEP 4. The Office of Federal Operations (OFO) will prepare and provide formal guidance on ADR in the federal EEO process to the entire federal EEO community by amending and adding a chapter on ADR to Management Directive 110.

c. Survey of Federal Agency ADR Efforts

ACTION STEP 5. OFO, in conjunction with the Administrative Conference of the United States (ACUS), will survey other federal agencies to ascertain what ADR efforts they have made to process EEO complaints, pursuant to the Commission's regulations at 29 C.F.R. Part 1614.

ACTION STEP 6. OFO will disseminate the results of this survey and any other relevant information obtained from the survey to all Federal agencies for use in their ADR programs.

D. Charge Processing

The Commission is committed to experimenting with ADR techniques in its basic charge processing activities. As the Commission continues to receive a record number of charges and as the budgetary restraints preclude EEOC from hiring sufficient staff to keep up with this increased workload, ADR may be an additional

tool which can assist in the processing of charges. Many of the charges received by EEOC present disputes and issues that possibly can be resolved short of a full administrative investigation or subsequent litigation. During FY 1993, the Commission received 87,942 charges to process, had a pending inventory of 73,000 charges remaining at the end of FY 1993, but had only 800 investigators. These circumstances dictate that the Commission consider various ADR techniques as possible means of assisting in the resolution of these charges.

ACTION STEP 7. At the conclusion of the current pilot ADR program, the Office of Program Operations will report its findings and make recommendations to the Commission regarding possible extension or adaptation of the pilot program and other possible ADR programs relating to charge processing.

E. Litigation Brought Against the Agency

In addition to fulfilling all of the responsibilities set forth in this Policy Statement and in the ADR Order, the Office of Legal Counsel will take the lead in exploring with agency managers the use of ADR in internal personnel and EEO cases.

ACTION STEP 8. OLC will recommend the use of ADR to resolve disputes with opposing parties unless the case falls within an exception to the use of ADR or other exceptional circumstances exist.

ACTION STEP 9. The Office of Legal Counsel will issue guidance to its attorneys on the use of court-ordered or administrative-ordered mediation in litigation and any other guidance deemed necessary to comport with the intent of ADRA and Executive Order 12778 on Civil Justice Reform.

F. Litigation Brought By the Agency

ACTION STEP 10. After conference with the Office of Legal Counsel, the Office of General Counsel will issue guidance to legal units on the use of court-ordered mediation in litigation and any other guidance deemed necessary to comport with the intent of ADRA and Executive Order 12778 on Civil Justice Reform.

G. Contracts

To date, EEOC has experienced few disputes in the contract and procurement area. Section 6(a) of ADRA amended the Contracts Disputes Act of 1976 to add an ADR provision. The amendment allows a contractor and a contracting officer to use any

alternative means of dispute resolution to resolve claims.

ACTION STEP 11. To facilitate the possible resolution of claims, the Office of Management (OM) should advise its contracting officers of this ADR provision. OM will work with the Office of Legal Counsel to identify the types of disputes that may arise and any necessary training for procurement staff.

ACTION STEP 12. OM will prepare guidance to advise persons raising a claim or dispute of this ADR provision.

H. ADR and Employee Disputes

The Commission believes that employers and unions are interested in using a variety of alternative dispute mechanisms because they may lead to higher grievance settlement rates, savings in cost and time, and more effective results when the parties themselves have a greater role in resolving the problems. EEOC is committed to working with its union in using ADR to resolve disputes whenever feasible.

ACTION STEP 13. The Office of Legal Counsel and the Office of Management will analyze current labor management dispute resolution mechanisms and report any recommendations to improve dispute resolution to the Chairman.