DRAFT 8/4/97

StarTrack

Program Scale-Up Discussion Document

Goal:

To establish a third party environmental audit and certification system that improves environmental and public health protection at less cost to taxpayers and increases the public's understanding of a company's environmental performance.

Summary:

Star Track is an innovative environmental performance certification system that utilizes professional third-party auditors rather than EPA inspectors to assess, measure and report-on the environmental performance of companies, while at the same time encouraging companies to go beyond what environmental laws require.

Star Track increases substantially the amount of private sector attention and resources devoted to environmental compliance and management systems audits, as well as the reporting of detailed environmental performance information to the public and regulators. The program improves environmental quality by requiring participating companies to continuously improve their performance and by allowing EPA to shift resources to other, higher value added activities.

Modeled on the Securities and Exchange Commission's (SEC) system for ensuring the financial integrity and reliable reporting of public corporations, Star Track establishes an accounting and reporting system for environmental performance as well as the qualifications for third party certifiers. EPA and the States maintain an audit function to insure the integrity of the Star Track system.

Benefits:

- EPA is able to accurately and efficiently ensure environmental compliance at an increased number of companies.
- EPA is able to refocus resources previously used on inspecting and overseeing companies to other issues that may have a greater impact on the environment.
- The public is able to increase their access to meaningful data on a company's environmental performance.
- The regulated community is able to generate increased public recognition for their

environmental performance.

- The regulated community is able to receive the benefit of more efficient oversight, including permit reform, enforcement forbearance where appropriate, and simplified reporting.

- The regulated community is able to receive financial benefits derived from the increased environmental efficiency of their operations.

Structure:

The key elements of a full-scale Star Track Program are as follows:

1. Comprehensive Environmental Compliance Audit

StarTrack participants agree to conduct annual comprehensive compliance audits. The protocol for these audits is established by EPA. The identification of instances of non-compliance will result in the development of corrective action plans, including a schedule addressing required corrections and preventative actions.

2. Environmental Management Systems Audit

StarTrack participants agree to establish an Environmental Management System (EMS) and comprehensively audit their existing EMS annually in accordance with generally accepted EMS audit protocols (based on ISO 14001, but not precluding other appropriate management systems). Companies identify potential areas for improvement, and develop a prioritized implementation plan for addressing those areas.

3. Independent Third Party Review of Audits and Audit Findings by Qualified Auditors

Star Track companies retain a qualified, independent third party to review both the compliance status and EMS audits and certify their accuracy, providing a credible independent assessment of the Company's compliance status and environmental management system effectiveness.

4. Environmental Performance Report

On an annual basis, Star Track companies prepare an annual environmental report -- similar to annual financial reports -- that documents the company's environmental performance. This report is widely disseminated to regulators and the public.

5. Violation Disclosure / Assurance of System Integrity

Star Track companies must disclose all violations of environmental regulations. The disclosure of violations will be accompanied by either a final or proposed record of the corrective action taken. Star Track companies will receive the benefits of EPA's audit policy and potentially other enforcement discretion to be determined prior to full scale program implementation.

EPA and/or state agencies will periodically inspect Star Track companies through random audits. Companies found to be significantly out of compliance or found to have misrepresented their environmental performance will be subject to enforcement.

Management Framework for Star Track

A full-scale Star Track program would have the following functional elements:

- EPA approved protocols for compliance audits and EMS reviews.
- A licencing system for environmental auditors/certifiers, involving a standardized testing and accreditation program. Licencing criteria would include experience in environmental auditing and knowledge of federal, state, and local environmental regulatory requirements;
- A governing board to establish licencing criteria and to develop auditing and reporting guidelines, comprised of relevant stakeholders, including representatives from government, industry, the auditing / certifying sector, and public advocacy groups; and
- A federal / state quality assurance and oversight function, whereby EPA and its state partners would perform audits on a random sampling basis and as necessary in response to complaints and disputes.

Implementation Issues:

1. Alignment With Other Voluntary Programs

In order to be an effective tool, Star Track should align closely -- but not overlap -- with other voluntary programs offered by EPA. In particular, StarTrack should not provide the same benefits or cover similar topics as programs such as the Environmental Leadership Program (ELP) or Project XL.

In its current design, Star Track does not overlap with either of these programs, nor does it provide strikingly similar benefits.

ELP is targeted towards large companies that have demonstrated outstanding environmental performance, that deserve to be recognized for such performance, that have a superior EMS in place, and that are capable of undertaking environmental performance activities which will set a model for their sector. Star Track, on the other hand, is not a recognition / demonstration program as much as a functional program aimed towards compliance assurance. Additionally, while ELP targets those companies with effective EMSs, Star Track participants are offered the chance to either install an EMS or improve their current one, and are not expected to "break the mold."

2. Target Audience

Star Track could initially target a group of medium- to large- sized companies with significant impacts on the environment. For example, participation could be offered to the 2000 highest TRI reporters.

3. Start-Up / Interim Operation

Once they have expressed interest in the program, companies would be required to sign a letter of commitment to set measurable TRI chemical reduction targets, conduct compliance and EMS audits certified by a qualified third party, and prepare a public environmental performance report. However, it should be noted that the practical aspect of this effort -- contacting companies, reaching agreed reduction targets, etc. -- has the potential to be burdensome. Considering the difficulties experienced in other voluntary programs -- XL in particular -- there should be efforts made to streamline this process. Setting across-the-board, modest goals for TRI reductions and establishing audit guidance at the outset would be two suggestions for this.

In return, the companies would be given enforcement discretion for disclosed violations and public recognition for their accomplishments. An interim board could be established to develop auditing and reporting standards building upon the efforts of the New England StarTrack Program, described below. Ultimately, key objectives of the StarTrack system such as a shift of regulatory burden and public acceptance will not be realized until implementation of the formal licensing and accreditation components of a full-scale system.

4. Public Involvement / Support

Ensuring public acceptance of key interest groups is of the highest priority in establishing Star Track as a national program. The public should be engaged early on in the dialogue on any proposed national program. A significant resource commitment may be required to ensure active and meaningful participation of such groups. However, Star Track has met with strong support from environmental groups, the states, and industry in New England, and can enjoy similar support nationwide.

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Star Track in EPA's New England Office

1. Background

EPA's New England office, along with the New England states, is currently piloting key elements of the StarTrack third-party certification system. Starting with businesses selected through our regional Environmental Leadership Program, EPA is developing and field testing audit and certification guidance that define the scope and conduct of audits, the qualifications of auditors and certifiers, and the reporting requirements. StarTrack participants enter written agreements with EPA and the States which set out the program requirements and the recognition and enforcement discretion benefits.

2. Overview of Program Requirements

Under the current StarTrack program structure, a company agrees to:

- Conduct comprehensive environmental compliance and management system audits;
- Prepare and publish a comprehensive environmental performance report; and
- Have its audits reviewed and certified by an independent third party.

In the pilot mode, EPA and state compliance personnel observe audits to determine whether auditors and certifiers follow program guidelines and to evaluate whether the program meets overall expectations. Current participants include:

- Gillette Company, South Boston, MA
- E G & G Electro-Optics, Salem, MA
- Spalding Sports Worldwide, Chicopee, MA
- Texas Instruments Inc. Materials and Controls Group, Attleboro, MA
- International Paper Androscoggin Mill, Jay, ME
- Sanders, A Lockheed Martin Company, Nashua, NH
- Petroleum Heat and Power Co. Inc., Canton and E. Hartford, CT
- Whyco Chromium Co. Inc., Thomaston, CT
- Chesebrough-Ponds USA Co., Clinton, CT

3. Stakeholder Involvement

EPA's New England office and the New England states have held several formal and informal outreach events and meetings to describe the goals and objectives of the program, to identify stakeholder issues and concerns, and to develop and refine the program.

During the first year of StarTrack in New England, two participating companies invited representatives of environmental advocacy groups to observe their company audits under the StarTrack program. Both advocacy group representatives gave favorable marks to the integrity of the process. The New England StarTrack program will continue to seek meaningful and effective ways for stakeholders to evaluate the program as it develops.

4. Applicability to a National Program

Many, if not all of the elements of the regional program can be transferred to a national program. In fact, many of the program guidelines, compliance and EMS audit procedures, and reporting requirements would be used as the basis of the national program for at least the interim stage.

Daniel I. Werfel
01/13/98 05:51:45 PM

EW

Record Type: Record

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

cc: Donald R. Arbuckle/OMB/EOP, Elena Kagan/OPD/EOP
Subject: EEOC meeting

As mentioned earlier, we had spoke about sitting down with EEOC and looking at the major agency concerns and seeing what movement, if any, could/should be made in this rule. (Note: I will get each of you a copy of agency concerns received by OMB to date by tomorrow)

There is sentiment in OIRA that we should meet internally (OMB, DPC) first so we can iron stuff out before we meet with EEOC.

As this is on a fast track, I think we should look to do this by the end of the week.

I propose we meet internally Thursday afternoon (say 2:00, location TBA) and then with EEOC Friday afternoon (say 2:00, location TBA).

Let me know if anyone has a conflict.

Thanks.

Tom -
Did this meeting take place?
Elena

Message Sent To:

Mary L. Smith/OPD/EOP
Thomas L. Freedman/OPD/EOP
John F. Morrall III/OMB/EOP
Daniel J. Chenok/OMB/EOP
Susan M. Carr/OMB/EOP
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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

EEOC

January 12, 1998

MEMORANDUM

TO: Danny Wurfel
Desk Officer
Office of Management and Budget. OIRA

FROM: Ellen J. Vargyas
Legal Counsel Ellen
Equal Employment Opportunity Commission

SUBJECT: Budget Projections for Federal Sector Proposal

This is the draft we discussed. It is all, of course, preliminary and the result of a very fast turnaround. Give me a call at your earliest convenience and let's talk about how best to proceed.

EEOC's preliminary cost analysis

It is expected that the total number of formal complaints filed with agencies will actually decrease. Using as a base, the 26,410 complaints filed in FY 1996, it is projected that the net effect of all the proposed changes after full implementation is that the number of complaints filed per year will be approximately 23,000. Many more EEO concerns and inquiries will be resolved at the pre-complaint stage. All these will result in less staff and financial resources required at Federal agencies. Although there is a projection of eventual reduction in workload government-wide, the proposed amendments will result in the remaining workload being of more substantive and complex nature.

The Commission used the following assumptions:
26,410 complaints filed in FY 1996
6,000 (or 50% of 12,000 reprisal complaints per year) reduction because of elimination of spin-off complaints
2,600 or roughly 10% reduction because of elimination of fragmentation of cases
17,810 new base of calculation

+ 30 % increase because of new procedures and AJs' issuing final decisions
1.3 x 17,810 = 23,000
60% of complainants requesting hearing
.6 x 23,000 = 13,800 or approximately 14,000 requests for hearings per year
leaving 23,000 - 14,000= 9,000 complaints with agencies for final actions

Attorney Fees Available at Pre-complaint Stage

1. Government wide

    o Savings

        •Could result in an increase in cases resolved at precomplaint stage.

        •Fewer cases to be investigated, hearing to be defended and final decisions to write.

    o Expenses

        •Increased cost at the pre-complaint stage of the process.

2. EEOC

    o Savings

        •Reduction in hearings to be conducted.

        •Reduction in appeals filed.

- Reduction in mailing and other administrative processing of appeals.

o Expenses

- None expected.

Alternative Dispute Resolution Programs
Regulations require use of new alternative dispute resolution programs for the EEO pre-complaint process and encourages its use at all stages of the process.

1. Government wide

o Savings

- Cost of processing complaints through full adjudicative process
- Fewer agency staff resources - OGC, EEO offices, deciding officials, agency heads
- Use of ADR lessens the increase in costs of complaint processing to the agencies
- Increase at the front end in attorney costs
- Offset by reduced attorney fees further in the process because of ADR resolutions
- Variety of ADR techniques allows agencies to select most effective

o Expenses - Costs will be offset by savings from existing resources

- Establishing new ADR programs
- Training participating staff in new ADR techniques
- Training programs for managers and supervisors on ADR

2. EEOC

o Savings -- Will occur following first 2 years of implementation

•Reduction in hearings to be conducted.

•Reduction in appeals filed.

• Reduction in mailing and other administrative processing of appeals.

•Reduction in cost of processing complaints through full adjudicative process

•Reduction in administrative support costs to monitor and respond to written and telephonic inquiries regarding Federal agency complaints and processing

o Expenses

•None expected

Elimination of Final Agency Decision With Request For AJ Final Decision

1. Government wide

o Savings -- Federal agencies will issue fewer Final Agency Decisions.

• 7000 less final agency decisions

• 20 hours per FAD / 140,000 hours divided by 2087

• Approximately 70 FTEs saved

• Complainants will get more AJ rulings from EEOC.

• The number of complaints filed will increase approximately 30% to approximately 23,000 complaints.

• With administrative judges issuing final decisions, there would be approximately 9000 cases, as compared to 16000 current, for which hearings are not requested and for which the agencies would take the final actions in closing the cases.

•General Counsels' offices and Agency Head level staff will have fewer final agency decisions to review o Expenses

- None expected.

2. EEOC

o Savings

- None expected.

o Expenses

- The number of requests for hearings are approximately 40% of receipts.

- This percentage will increase to 60%.

- Based upon 23,000 complaints filed, there will be an initial increase in hearings from 11,198 in FY 1997 to approximately 15,000 in FY 1999, and a decreasing volume over the next two years leveling off at approximately 12,000 per year beginning in FY 2001.

- Agencies can appeal AJ final decision.

- 1st year training costs for EEOC increase of $180,000

Elimination of Abuse of Process

1. Government wide

o Savings

- Reduction in the cost of complaint processing at all stages of the complaint process.

- Federal agency staff time lessened due to calls and contacts which pull staff away from meritorious complaints.

o Expenses

- None expected

2. EEOC

o Savings

• Complainants consume a disproportionate amount of EEOC staff time to deal with frivolous matters, taking time away from meritorious complaints.

• Savings on administrative staff resources dedicated to responding to inquires from complainants who abuse process.

o Expenses

•None expected

Elimination of Spin-off Complaints

1. Government wide

o Savings

• 12,000 complaints were filed per year alleging reprisal.

• Approximately 50% raised complaint processing issues.

• Thus, at agency level, complaints filed may be reduced by about 6,000 claims.

• Over time will result in fewer agency appeals from AJ's decisions.

o Expenses

• None predicted

2. EEOC

o Savings

• Elimination of all staff resources dedicate to processing appeals on spin off complaints

• Reduction in administrative costs associated with appellate process and responding to inquiries regarding processing of spin off complaints.

o Expenses

• Complexity of the cases will be increased because these spin-off issues must be decided by the AJ within the underlying complaint and this may impact on processing time.

Elimination of Fragmentation of Cases

1. Government wide

o Savings

•Reduce the number of complaints

•Reduction in costs at all processing levels. No hard data on number of such complaints currently being filed.

• Estimate that they represent as many as 10% of complaints filed are fragmented.

o Expenses

• None expected.

2. EEOC

o Savings

•Reduced number of appeals filed

•Reduced staff time in response to client inquiries

•Reduced staff resources for monitoring agency compliance with appellate decisions and responding to inquiries regarding complaint processing.

o Expenses

• None expected

Offers of Resolution

Costs and savings generated from this revision should offset each other.

1. Government wide

   o Savings

   • Agencies will no longer have to expend time determining what constitutes full relief

   • Agencies will not have to defend against appeals filed from dismissals for failure to accept an offer of full relief

   o Expenses

   • Agencies will have to continue processing cases which would have been dismissed for failure to accept an offer of full relief

1. EEOC

   o Savings

   • Will eliminate appeals from dismissals for failure to accept offers of full relief

   • Will eliminate decisions by AJ s on what constitutes full relief in cases that are at hearing

   o Expenses

   • AJ s will have to continue processing hearings where bona fide offers of resolutions are rejected

Class Complaints

There are four proposed revisions--permitting class issues to be raised at any reasonable point; giving AJS authority to issue final decisions on class certification; requiring AJ approval of settlement agreements; and changing the burden of proof at the relief stage.

1. Government wide

   o Savings

   • Saving to agencies since they will no longer have to issue final decisions.

• Realized expenditures since processing of class complaints involve less ressources than processing individual complaints.

o Expenses

• None projected since fewer individual complaints may be filed

2. EEOC

o Savings

• None expected

o Expenses

•More AJ s needed to handle class certification and investigations to comply with processing time requirements of regulations.

•No direct cost increases.

• Complexity of the work of AJ s will increase because they will have to approve settlement offers.

• Processing time for AJs may be longer. We estimate that AJ cases processed under the new procedures will require 15% additional time because of increased complexity, offset by 5% resulting from increased ability to issue decisions without a hearing.

Elimination of Request To Reconsider (RTR)

1. Government wide (FY-1997: 1119 RTR's filed in EEOC by agencies and appellants)

o Savings

• No staff time, generally legal staff, rearguing legal issues (resulting in a savings on salaries)

• Less government cost for complainants attorneys fees for work when complainant prevailed

• Savings on mailing and copies

- Less processing time may result in reduced staff level and less record keeping such as tracking open complaints.
- Likely to result in reduction of backpay awards and interest in that the time between the discriminatory act and the final order awarding backpay will be shortened.
- Federal agencies' legal staff will not have to respond to requests.
- Savings would be a minimum of 22 FTEs.

o Expenses

- None

2. EEOC

o Savings

- FY-1997: resolved 705 RTRs
- Staff resources of about 6 attorneys, 2 supervisors, 1 secretary at appellate, Commissioners' staff, and Executive Secretariat.
- Less office space and storage space
- Mailing: acknowledgments, files, decisions
- Supplies: copying, computer, paper
- Elimination of compliance monitoring for all decisions issued from RTR level
- Number of inquiries on status of RTR reduced

o Expenses

- None predicted
- Potential for increase in customer inquiries
- Commission can reopen on its own motion projected at a very minimum.

Clearly Erroneous Standard of Review

1. Government wide

   o Savings

   • Over time could result in less agency appeals from to AJ's decisions.

   • More precise legal arguments; avoid lengthy agency's presentation.

   o Expenses
   • None predicted

2. EEOC

   o Savings

   • Potential for less attorney time at appellate level

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Daniel I. Werfel
01/20/98 05:43:56 PM

Record Type: Record

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

cc:
Subject: EEOC Update

You will soon be receiving a marked up copy of the EEOC rule. This is the latest version of the rule that EEOC has just sent us.

At quick glance it appears that EEOC has agreed to make just about every change that was recommended at the 1/16 meeting and was recommended in the OMB memo sent to EEOC on 1/16. (Note: The only major issue that EEOC did not agree to was a change in the standard of review on appeal. In the latest version of the rule the standard for issues of fact remains "clearly erroneous." However, they have added language to the preamble that indicates that this standard "does not preclude meaningful review of factual findings." (see page 28)

What we need in the short term is to know whether anyone has any remaining issues with what was decided at Friday's meeting. Please see my last email for a run down of the issues still remaining. (Remember, EEOC has now agreed to all of the changes on the table after friday's meeting except the standard of review.) Or if there are any other outstanding issues that need to be addressed. Let me know by Wednesday at 2:00 P.M.

In the slightly longer term, send me comments, if any, on how the new version of the rule incorporates those changes. Let me know by Friday C.O.B.

Thanks for everything.

Message Sent To:

Julie A. Fernandes/OPD/EOP@EOP
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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

OFFICE OF LEGAL COUNSEL

FAX TRANSMITTAL COVER SHEET

DATE: 1/21/98

PLEASE DELIVER TO:

NAME: Danny Werfel

AGENCY/OFFICE/DEPT:

FAX #: 395-6974

TELEPHONE #:

THIS MESSAGE IS BEING SENT BY:

NAME Ellen Vargyas

TELEPHONE #: (202) 663-4637

THIS MESSAGE HAS 46 PLUS THIS COVER SHEET.

This Fax # is (202) 663-4639

REMARKS:

IF YOU HAVE ANY PROBLEMS RECEIVING THIS TELECOPY MESSAGE, PLEASE CALL THE FOLLOWNG # IMMEDIATELY, (202) 663-4637 THANK YOU.

Draft1/19/98

[Billing Code 6570-06]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission (EEOC)

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Equal Employment Opportunity Commission is proposing revisions to its federal sector complaint processing regulations to implement recommendations made by the Chairman's Federal Sector Workgroup. The Commission proposes to require that agencies establish or make available alternative dispute resolution (ADR) programs during the EEO pre-complaint process. The Commission proposes revisions to the counseling process, the bases for dismissal of complaints, and procedures for requesting a hearing. The Commission also proposes to provide administrative judges with the authority to issue dismissals and final decisions on complaints. The Commission proposes a number of changes to the class complaint procedures, including authorizing administrative judges to issue final decisions on class certification and requiring that administrative judges determine whether a settlement agreement is fair and reasonable. The Commission proposes changes to the appeals procedures to provide agencies the right to appeal an administrative judge's final decision, to revise the appellate briefing schedule, to establish different standards of review for agency final decisions and administrative judges' final

decisions, and to eliminate the right to request reconsideration of a decision on appeal. Finally, the Commission proposes to amend the remedies section of the regulation to permit administrative judges to award attorney's fees and to provide for payment of attorney's fees for all services provided by an attorney throughout the equal employment opportunity (EEO) process, including counseling.

DATES: Comments on the notice of proposed rulemaking must be received on or before [60 days after Federal Register publication date].

ADDRESS: Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507. As a convenience to commentators, the Executive Secretariat will accept comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll free number.) Only comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by call the Executive Secretariat staff at (202) 663-4078 (voice) or (202) 663-4077(TDD). (These are not toll free numbers.) Copies of comments submitted by the public will be available for review at the Commission's Library, room 6502, 1801 L Street, N.W., Washington, D.C. between the hours of 9:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Nicholas M. Inzeo, Deputy Legal Counsel, Thomas J. Schlageter, Assistant Legal Counsel or Kathleen Oram, Senior Attorney, Office of Legal Counsel, 202-663-4669 (voice), 202-663-7026 (TDD). 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 EEOC's Publications Center at 1-800-669-3362.

SUPPLEMENTARY INFORMATION:

Introduction

As part of an ongoing effort to evaluate and improve the effectiveness of the Equal Employment Opportunity Commission's operations, the Chairman established the Federal Sector Workgroup to review the federal sector equal employment opportunity process. The Workgroup was composed of representatives from offices throughout the Commission. The Workgroup focused on the effectiveness of the EEOC in enforcing the statutes that prohibit workplace discrimination in the federal government, namely: section 717 of Title VII of the Civil Rights Act of 1964, which prohibits discrimination against applicants and employees based on race, color, religion, sex and national origin; section 501 of the Rehabilitation Act of 1973, which prohibits employment discrimination on the basis of disability; section 15 of the Age Discrimination in Employment Act, which prohibits employment discrimination based on age, and the Equal Pay Act, which prohibits sex-based wage discrimination.

The Workgroup's review evaluated the Commission's administrative processes governing its enforcement responsibilities in the federal sector and developed recommendations to improve its effectiveness. In addition, the review sought to implement the goals of Vice President Gore's National Performance Review (NPR), including eliminating unnecessary layers of review, delegating decision-making authority to front-line employees, developing partnership between management and labor, seeking stakeholder input when making decisions, and measuring performance by results.

The Federal Sector Workgroup issued a report entitled "The Federal Sector EEO Process.....Recommendations for Change" in May 1997. The report contains numerous recommendations for changing the federal sector complaint process, including changes to the Part 1614 regulations, changes to EEOC's Management Directive 110 which contains additional guidance and instructions on the federal complaint process, and changes to EEOC's internal procedures.

EEOC spent over a year and a half in the development of the federal sector NPRM. During that time period, EEOC consulted extensively with all stakeholders in the federal sector process, very much including the other federal agencies. On April 22, 1996, prior to the development of any recommendations, the EEOC's Federal Sector Working Group held a meeting with federal EEO and Civil Rights personnel organized by the President of the Council of Federal and Civil Rights Executives. At that time the Council supported EEOC's interest in making the Administrative Judge decisions final and eliminating FADs following those decisions. On May 21, 1996, then-Chairman Casellas wrote to the EEO Directors of all departments and agencies requesting their written comment on a number of subjects related to the federal sector complaint process. We received comments from 27 agencies, all of which were fully considered in developing the recommendations contained in the Working Group's report. On September 26, 1997, the Working Group held a briefing for EEO Directors on the Working Group's recommendations.

ADDED

The Commission coordinated this proposed regulation with all federal agencies pursuant to Exec. Order No. 12067 (1978). A number of comments were received from agencies, which included helpful suggestions to improve the proposed regulation as well as criticisms of essential elements of the proposals. The Commission has included a discussion of its proposal, the rationale for the changes, as well as the criticisms of the agencies, but prefers to decide whether or how to make changes to this proposal after the benefit of public comment. Federal agencies are, of course, the entities whose conduct would be regulated by these proposals and making decisions based only on their input, without having the opportunity to consider the input of other stakeholders, including complaining parties and their representatives, would be insufficient. The Commission will seriously consider the agency comments in conjunction with the public comments. The Commission has made certain limited changes, principally in the form of added clarifications, pursuant to agency comments. The Commission will retain the comments received from the agencies during the coordination period in the rulemaking file and will consider and address those comments in the final rule.

changed

added

In proposing these changes, the Commission seeks to serve two different, yet intertwined purposes: first, to ensure that the process for federal employee complaints is fair and is perceived to be fair, and second, to make the process more efficient by eliminating unnecessary layers, dealing expeditiously with meritless claims and by delegating authority to front-line employees.

added

Alternative Dispute Resolution

The Commission proposes to amend section 1614.102 to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. The required pre-complaint ADR program would be in addition to the provisions in the current regulation that encourage the use of ADR at all stages of the complaint process. Agencies would be free to develop the programs that best suit their particular needs. While many agencies have adopted the mediation model as their ADR initiative, other resolution techniques would be acceptable, provided that they conform to the core principles set forth in EEOC's policy statement on ADR, which will be contained in Management Directive 110. Although ADR is believed to be most effective at the early stages of a dispute, agencies may continue their ADR efforts at any stage in the process, including after the formal complaint has been filed. An effective ADR program will serve both goals set out by the Commission. By resolving complaints early on, ADR will make the process more efficient. ADR will also serve to make the process fairer, by giving complainants an alternative to the counseling process that has been criticized by agency officials and employee representatives. added

The Commission also proposes changes to section 1614.105, which covers pre-complaint processing, to require that counselors advise aggrieved persons that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation. If a matter is not resolved during ADR or during traditional counseling activities, the counselor will conduct a final interview and the aggrieved person may file a formal complaint. As noted above, agencies would be free to establish the type of ADR program they offer during the counseling period as long as it is consistent with the ADR program core principles set out by EEOC. Before aggrieved persons make a choice between counseling and ADR, they will have an initial counseling session in which counselors must fully inform them about their rights and the choice between the counseling process and the ADR program. changed Counselors must also inform aggrieved persons that if the ADR process does not result in a resolution of the dispute, they will receive a final interview and have the right to file a formal complaint. If the aggrieved person chooses to participate in the agency's ADR program, the role of the counselor would be limited to advising that person of his or her rights and responsibilities in the EEO complaint process, as set forth currently in section 1614.105(b). Counselors would not be required, in those instances, to attempt to resolve the dispute, but would not be precluded from doing so, if they believe a matter could be resolved quickly.

Many agencies who submitted comments on the draft revisions when it was coordinated under Exec. Order No. 12067 (1978) welcomed Alternative Dispute Resolution (ADR) at the pre-complaint process stating that ADR would result in an early resolution of many cases and create a positive view of the EEO process. A number of agencies suggested that not all cases are appropriate for ADR. Rather, these agencies requested that they should have the flexibility to establish what type of matter or circumstance would be eligible for ADR. Several agencies also requested that consideration be given to the practical difficulties of creating an ADR program, and accordingly, that ample time be provided to them to obtain the necessary expertise, personnel and funds for ADR.

Under the proposed regulations, agencies would be free to develop ADR programs that would best serve their particular needs and unique circumstances. The EEOC encourages creativity and flexibility in establishing ADR programs. This would certainly encompass an array of ADR programs. Agencies with limited funds and resources could use the services, in whole or in part, of another agency, a volunteer organization or other resources to provide for their ADR programs. Keeping with our emphasis on flexibility, an agency could exclude circumstances or matters that it believes are not appropriate for its ADR program. change The Commission does not anticipate that ADR will be used in connection with every complaint. For example, agencies may exclude class allegations from its ADR program. added As circumstances and needs change within a particular agency, it could modify its ADR program. However, it is essential that all agency

ADR programs comply with the spirit of the EEOC's policy statement on the following core principles of ADR:

- Provide for an impartial and independent forum for the parties to discuss their dispute;
- Allow both parties to develop a realistic assessment of their own as well as other party's procedural and substantive alternatives;
- Promote trust by the parties in the forum thereby facilitating the discussion of each party's perceptions;
- Ensure that the legal rights are preserved;
- Have the support of upper level management in order to be effective;
- Ensure that the parties willingly and voluntarily agree to the resolution of the dispute; and
- Ensure the confidentiality of the parties.

The Federal Sector EEO Process....Recommendations for Change. (Report) (EEOC May 1997)(released October 1, 1997) at 47-48. Management Directive 110 (MD 110) will further provide further information and amplify these core principles .

Some agencies urged that the regulations should clarify the precise roles and responsibilities of the person responsible for conducting ADR during the pre-complaint process and the EEO counselor, for example, whether the mediator or counselor will complete the counselor's report if mediation or other means of ADR fails. These concerns and other questions raised by the agencies about how ADR and EEO counseling will coexist will be explained in MD 110. Each agency will have discretion to develop its own procedures in accordance with the regulation and MD 110. With this flexibility, there will most likely not be uniformity among agencies in the precise roles and responsibilities of EEO counselors and persons conducting ADR activities.

Dismissals

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

During coordination of EEOC's proposals pursuant to Executive Order 12067, some agencies agreed with EEOC's position that full relief dismissals have become rare since compensatory damages became available to federal employees. Other agencies recommended that

EEOC revise the procedure to permit an independent review and certification of full relief offers by EEOC, arguing that certification of offers by EEOC would minimize the risk complainants must now take in determining on their own whether an agency's offer constitutes full relief. Finally, many agencies simply disagreed with the proposal to eliminate the full relief dismissal provision, arguing that they continue to use it in some cases. As noted above, without certification of full relief offers by EEOC, complainants are in the unfortunate position of trying to evaluate whether the agencies they believe discriminated against them have truly offered them all the relief they would be entitled to in a federal court, and jeopardizing their whole case if they decide in error. The Commission has determined that it would not be a wise use of our limited resources at this time to create a certification procedure for full relief offers. In response to agency comments, though, as more fully explained below, the Commission has added a provision permitting agencies to make an "offer of resolution" in a case. The offer of resolution is similar, but not identical, to the procedure under Rule 68 of the Federal Rules of Civil Procedure for an offer of judgment. Hence, for all of the reasons set forth above, the Commission proposes eliminating the regulatory provision permitting agencies to dismiss complaints for failure to accept a certified offer of full relief.

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The Commission proposes to add dismissal provisions permitting agencies to dismiss complaints for two reasons. First, the Commission proposes to permit agencies to dismiss complaints that allege dissatisfaction with the processing of a previously filed complaint (commonly called spin-off complaints). EEOC's regulations at 29 CFR Part 1613, which were superseded by 29 CFR Part 1614 in 1992, expressly permitted complainants to file separate complaints alleging dissatisfaction with agencies' processing of their original complaints. 29 CFR

1613.262 (1991). The procedure resulted in the filing of multiple spin-off complaints. The Commission recognized the need to limit these complaints, and did not include the Part 1613 provision in Part 1614. Guidance was provided in Management Directive 110. Complainants continued, however, to file spin-off complaints. Any alleged unfairness or discrimination in the processing of a complaint can--and must--be raised during the processing of the underlying complaint and there is ample authority to deal with such complaints in that process. There is no provision in either the regulations or the management directive permitting the filing of a separate complaint on this issue. Any attempt to file a separate complaint should be dismissed. The Commission proposes to add the dismissal provision permitting dismissal of spin-off complaints to ensure that a balance is maintained between fair and nondiscriminatory agency processing of complaints and the need to eliminate multiple filing of burdensome complaints about the manner in which an original complaint was processed.

In conjunction with this regulatory change, the Commission will issue companion guidance in Management Directive 110 addressing the procedures agencies must follow to resolve allegations of dissatisfaction with the complaints process quickly. Individuals who are dissatisfied with the processing of a complaint will be advised to bring this dissatisfaction to the attention of the official responsible for the complaint, whether it be an investigator, an EEOC administrative judge, or the Commission's Office of Federal Operations on appeal. The allegation of dissatisfaction, and any appropriate evidence, will then be considered during the processing of the existing complaint. Proper handling of spin-off allegations is important to the Commission because it involves the overall quality of the complaints process. Individuals who do not follow the process set out in the Management Directive for allegations of dissatisfaction will have such complaints dismissed by the agency or by the Commission. The procedure to be used will ensure that any evidence of discrimination or improper handling will be considered as part of the claim before the agency or Commission without unnecessarily adding complaints to the system. dkl

The Commission also proposes to add a dismissal provision at section 1614.107(I) permitting an agency to dismiss a complaint where it finds a clear pattern of abuse of the EEO process through strict application of the criteria set forth in Commission decisions. The proposed section codifies the Commission's decision in Buren v. USPS, Request No. 05850299 (1985). The Commission has stated that it has the inherent power to control and prevent abuse of its processes, orders or procedures. It is within the Commission's purview to determine that either complainants or agencies are engaging in conduct that constitutes a scheme designed to frustrate the administrative process. The Commission also has recognized that dismissing complaints for abuse of process should be done only on rare occasions because of the strong policy in favor of preserving complainants' EEO rights whenever possible. Kleinman v. Postmaster General, Request No. 05940579 (1994). The Commission believes that evaluating complaints for dismissal for abuse of process requires careful deliberation and application of strict criteria. Agencies must analyze whether a complainant's prior behavior evidences an ulterior purpose to abuse the EEO process. Evidence of numerous complaint filings, in and of itself, is an insufficient basis for making such a finding. Hooks v. USPS, Appeal No. 01953852 (1995). However, multiple filings combined with the nature of the subject matter of the complaints, lack of specificity in the allegations, and allegations involving matters previously raised may be considered in determining whether a complainant has engaged in a pattern of abuse of the EEO process. Goatcher v. USPS, Request No. 05950557 (1996). The Commission proposes to add the dismissal provision based on abuse of process, as well as the dismissal for spin off complaints, because it believes that they will improve the efficiency and effectiveness of the EEO process. In addition, dealing summarily with abusive complaints will make the process fairer for agencies that must process complaints and for complainants who raise bona fide allegations by focusing resources on bona fide allegations. changed added

Offer of Resolution

The Commission proposes to add a provision to the hearings procedures permitting agencies to make offers of resolution to complainants as long as they are made at least 30 days prior to the hearing. Offers of resolution must be in writing and must explain to the complainant the possible consequences of failing to accept the offer. Complainants will have 30 days to consider the offer and decide whether to accept it. If a complainant fails to accept an offer of resolution, and the decision on the complaint is not more favorable than the offer, then, except where the interest of justice will not be served, the complainant will not receive payment from the agency of attorney's fees or costs incurred after the date of rejection or the expiration of the 30-day period of the offer of resolution. Failure to accept an offer of resolution will not preclude an agency from making other offers of resolution or either party from seeking to negotiate a settlement of the complaint at any time. added

The Commission proposes the offer of resolution procedure, in part, in response to comments from the agencies requesting that the failure to accept a certified offer of full relief dismissal provision be retained or modified. The Commission wishes to encourage resolution of complaints at all times in the complaint process and believes the proposed offer of resolution provision will provide incentive for agencies and complainants to resolve complaints during the hearing process. The Commission seeks comment on the offer of resolution proposal, particularly on the interest of justice exception to the preclusion of costs and fees. The Commission believes that the interest of justice standard in the proposal will apply to those situations in which an administrative judge determines that it would be unfair to preclude payment of attorney's fees and costs.

Fragmentation of Complaints

The Commission seeks public comment on whether regulatory changes are necessary to correct the problem of fragmented processing of EEO claims. A recurring problem found by the Federal Sector Workgroup was that many agencies do not distinguish between allegations in support of a legal claim and the legal claim itself. As a result, some claims involving a number of different allegations are fragmented or separated. What should be one legal claim then becomes a number of miscellaneous events, losing its character as a claim. A hypothetical example would be a harassment claim where a pattern of incidents are used to support a claim, but the separate incidents would not constitute a legally cognizable claim of discrimination. As a result of fragmentation, the number of discrimination complaints by federal employees is unnecessarily multiplied and cognizable claims are fragmented to such an extent that potentially valid claims become meaningless. The Commission plans on amending its Management Directive to address this problem and seeks comment on what, if any, regulatory changes are necessary to correct this problem.

Partial Dismissals

The Commission proposes changes to the regulations to eliminate interlocutory appeals of partial dismissals of complaints. Currently, where an agency dismisses part of a complaint, but not the entire complaint, the complainant has the right to immediately appeal the partial dismissal to EEOC. The Commission provided for interlocutory appeals of partial dismissals in Part 1614, hoping to streamline the process and avoid holding two or more hearings on the same complaint. Multiple hearings could have occurred absent an interlocutory appeal when EEOC reversed an agency's partial dismissal after a hearing was held on the rest of the complaint. The Commission believes that this result can be accomplished without the unintended delays of complaints or fragmentation of complaints that may have resulted from the current provision.

The Commission proposes to amend section 1614.401 to remove the right to immediately appeal the dismissal of a portion of a complaint. In addition, the Commission proposes to add a paragraph to the dismissals section, section 1614.107, explaining how to process complaints where a portion of the complaint, but not the entire complaint, meets one or more of the standards for dismissal contained in that section. In those circumstances, the agency will document the file with its reasons for believing that the portion of the complaint meets the standards for dismissal and will investigate the remainder of the complaint. If the complainant requests a hearing from an administrative judge, the administrative judge will evaluate the reasons given by the agency for believing a portion of the complaint meets the standards for dismissal before holding the hearing. If the administrative judge believes that all or a part of the agency's reasons are not well taken, the entire complaint or all of the portions not meeting the standards for dismissal will continue in the hearing process. The parties may conduct discovery to develop a record for all portions of the complaint continuing in the hearing process. The administrative judge's decision on the partial dismissal will become part of the final decision on the complaint, which either party may appeal to EEOC, in accordance with proposed section 1614.401. Where a complainant requests a final decision from the agency without a hearing, the agency will issue a decision addressing all claims in the complaint, including its rationale for dismissing claims, if any, and its findings on the merits of the remainder of the complaint. The complainant may appeal the agency's final decision, including any partial dismissals, to the EEOC.

Hearings

The Commission proposes four changes to the hearings process. First, the Commission proposes to amend section 1614.108, by adding a new paragraph (g), providing that complainants who wish to have a hearing on their complaints after the 180 days period for investigation has expired would be required to submit requests for hearings directly to EEOC, rather than to their agencies, as is the current practice. Agencies will be required to inform complainants in their acknowledgment letters of the EEOC office and address where a request for hearing is to be sent. When requesting a hearing from EEOC, complainants will be required at the same time to send a copy of the request for a hearing to their agencies' EEO offices. Upon receipt of a request for hearing, EEOC would request that the agency provide copies of the complaint file to EEOC and, if not previously provided, the complainant. The Commission believes that the proposed change will expedite the complaint process. Complainants will communicate directly with EEOC with copies to their agency, rather than through their agency whose only function was to serve as a conduit for getting the request to EEOC. In addition, the proposed change would alleviate concerns that agencies are not responding to requests for hearings quickly enough by allowing the parties to communicate directly with EEOC. added

Second, the Commission proposes to specify in the regulation at section 1614.109(b) that administrative judges have the authority to dismiss complaints during the hearing process for all of the reasons contained in the dismissal section, 29 CFR 1614.107. Currently, administrative judges do not have the authority to dismiss complaints that are in the hearing process, but will remand a complaint back to the agency for dismissal, where appropriate. The proposed change would eliminate an unnecessary layer by giving theadministrative judge the authority to dismiss without the need for remanding the complaint to the agency.

Third, the Commission proposes to add a provision permitting administrative judges to issue a final decision without a hearing where they determine, even though material facts remain in dispute, that there is sufficient information in the record to decide the case, that the material facts in dispute can be decided on the basis of the written record, that there are no credibility issues that would require live testimony in order to evaluate a witness' demeanor and that the case lacks merit. A new paragraph 1614.109(f)(4) would contain this provision, which would supplement administrative judges' existing authority to issue summary judgment decisions currently contained in 29 CFR 1614.109(e). While the decision is like a dismissal in that it will result in a ruling against the complainant, it is set out as a separate subsection because it will be an adjudication on the merits of the complaints.

Finally, the Commission proposes to amend the regulations to provide that administrative judges issue final decisions on complaints that have been referred to them for a hearing. Complainants or agencies could appeal administrative judges' final decisions to EEOC. Agencies would continue to issue final decisions in cases where the complainants request an immediate final decision without a hearing.

The Commission believes that allowing agencies to reject or modify an administrative judge's findings of fact and conclusions of law leads to an unavoidable conflict of interest. This is

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particularly true because those cases have been referred to a neutral third party, an EEOC administrative judge, to hear the dispute. Historically, agencies have rejected or modified a majority of administrative judges' findings of discrimination, but have adopted nearly all findings of no discrimination. In fiscal year 1996, Commission administrative judges issued 3,083 decisions, of which 284, or 9.2%, found discrimination. Agencies accepted only 101 of those decisions and rejected 178, or 62.7%. Conversely, of the 2,799 findings of no discrimination, agencies rejected only four or 0.1%. The Commission does not have available current information containing the percentage of agency decisions it accepts or rejects on appeal following administrative judge decisions. ~~The Commission will seek to collect this information.~~ added The Commission believes that the proposed change will address the perception of unfairness and conflict of interest in agencies deciding complaints of discrimination against them. In addition, this proposal eliminates a layer of review and permits decision-making at an earlier stage, central goals of the National Performance Review, thus making the process more efficient.

Of those federal agencies that commented on the draft regulation when the regulation was coordinated under Exec. Order No. 12067 (1978), some supported the proposal to make the decision of the administrative judge final. A number of agencies opposed it, however, chiefly arguing that the Commission did not have authority to allow administrative judges to issue final decisions, while some agencies believed that the administrative judge could only issue a final decision if the hearing was the first level of an appeal to the Commission. The Commission believes that it has broad authority to restructure the discrimination complaint process for federal employee complaints and that administrative judges can issue decisions as proposed.

Section 717(b) of the Civil Rights Act of 1964 authorizes the Commission to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." 42 U.S.C. § 2000e-16(b). Such broad language has been interpreted by the courts to constitute a delegation of legislative rulemaking authority. E.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); Public Utilities Commission of California v. United States, 355 U.S. 534, 542-43 n. 4 (1958). changed

In 1972 Congress gave this rulemaking authority to the Civil Service Commission, which was the predecessor to the EEOC in having responsibility for enforcing the employment discrimination laws in the federal sector. In so doing, Congress made it clear that it was granting the Commission complete authority to restructure the complaint process to ensure protection of the interests of all parties involved in the process. It explained:

> One feature of the present equal employment opportunity program which deserves special scrutiny by the Civil Service Commission is the complaint process. The procedure under the present system, intended to provide for the informal disposition of complaints, may have denied employees adequate opportunity for impartial investigation and resolution of complaints.
>
> Under present procedures, in most cases, each agency is still responsible for investigating and judging itself. Although provision is made for the appointment of an outside examiner, the examiner does not have the authority to conduct an independent investigation, and his conclusions and findings are in the nature of recommendations to the agency head who makes the final agency determination on whether there is, in fact, discrimination in that particular case. The only appeal is to the Board of Appeals and Review in the Civil Service Commission.
>
> The testimony before the Labor Subcommittee reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees. Complainants have indicated skepticism regarding the Commission's record in obtaining just resolution of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impairing any

> future hope of advancement. **The new authority given to the Civil Service Commission in the bill is intended to enable the Commission to reconsider its entire complaint structure and the relationships between the employee, agency, and Commission in these cases.**

S. Rept. No. 92-415 (1971), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, 410 at 423 (1972) (emphasis added).

In 1979, the authority for enforcement of the federal employee complaint process was transferred from the Civil Service Commission to EEOC. In proposing this transfer, the President stated:

> Transfer of the Civil Service Commission's equal employment opportunity responsibilities to EEOC is needed to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in state and local government; (2) Federal agencies meet the same standards as are required of other employers; and (3) potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized....The Civil Service Commission has in the past been lethargic in enforcing fair employment requirements within the Federal government.

Hearings Before a Subcommittee of the Committee on Government Operations, Reorganization Plan No. 1 of 1978 (Equal Employment Opportunity), at 6-7 (1978). In its report on the Plan, the Office of Management and Budget found that "The Civil Service Commission is expected to be lawmaker, prosecutor, judge and jury on employment discrimination in the Federal workforce. Organizational deficiencies like these inevitably lead to less rigorous compliance." Hearings, Reorganization Plan No. 1 of 1978 at 186. In addition, OMB found that "[t]he Civil Service Commission's regulations concerning the filing of class action complaints are highly restrictive." Hearings, Reorganization Plan No. 1 of 1978 at 193. The type of organizational conflict of added interest that the Commission seeks to eliminate in this proposal, where an agency both takes an action and then serves as the final decisionmaker on the complaint, has been of concern for years.

By proposing these changes, the EEOC is doing precisely what the Congress envisioned would be done, i.e., the Commission is reconsidering the complaint structure and the relative positions of the employee, the agency and the Commission. The language of section 717, its legislative history, and the transfer of that responsibility to EEOC under Reorganization Plan No 1 of 1978 all confirm that the EEOC has been given the broadest possible authority to restructure the complaints process for individual and class complaints.

Those agencies that assert that EEOC lacks the authority to change its regulations to make administrative judges' decisions final, or that it can only be done as part of an appellate procedure, rely on section 717(c), 42 U.S.C. § 2000e-16(c). Section 717(c) provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination,...or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit, until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706,....

This language, which permits a federal employee to file suit against the agency alleged to have discriminated, waives the government's sovereign immunity from suit. Chandler v. Roudebush, 425 U.S. 849 (1976); Brown v. GSA, 425 U. S. 820 (1976). Nothing in this statutory language limits EEOC's ability to issue regulations under subsection 717(b) or to structure the administrative process to enhance its effectiveness and fairness. The language delineates when, under the procedures that existed at that time, an individual could file suit in court. There is no indication that Congress also intended to codify any parts of the existing administrative procedures by the language of this sentence. Indeed, the legislative history of section 717 demonstrates that Congress expected the then-Civil Service Commission to make significant changes to the complaint process. The importance of administrative flexibility to improve the complaint process was reaffirmed in 1978 when the President transferred the responsibilities for federal employee complaints to EEOC.

Class Complaints

The Federal Sector Workgroup identified a series of concerns with the class complaint process. It found that despite studies indicating that class-based discrimination may continue to exist in the federal government, recent data reflect that very few class complaints are filed or certified at the administrative level. Only a very small number of cases are brought as class actions and those that are filed generally result in a denial of class certification. While an effective administrative process for class complaints offers several advantages over litigation in federal court, including informality, lower cost, and the speed of resolution, the Workgroup found there is a perception the current process does not adequately address class-based discrimination in the federal government. As a result, complainants often have elected to pursue their complaints in federal court.

Class actions play a particularly vital role in the enforcement of the equal employment laws. They are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices. The courts have long recognized that class actions "are powerful stimuli to enforce Title VII," providing for the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). The class action device exists, in large part, to vindicate the interests of civil rights plaintiffs. *See* 5 James W. Moore, Moore's Federal Practice § 23.43[1][a], at 23-191 (3d ed. 1997).

These same policies apply with equal force in the federal sector. Accordingly, we propose several changes to strengthen the class complaint process. The purpose of these changes is to ensure that complaints raising class issues are not unjustifiably denied class certification in the administrative process and that class cases are resolved under appropriate legal standards consistent with the principles applied by federal courts. Where a class of individuals have been affected by a policy or practice, it is far more efficient to address those concerns in one action rather than requiring numerous individual complaints. These proposed changes seek to make the class complaint process fairer by allowing individuals to seek class certification at any reasonable stage in the process. The class implications of a complaint may not be apparent until the complainant receives the investigative file or information in discovery that would indicate that the agency has acted in a way that will have implications for a class. In addition, to further address the concerns identified by the Workgroup, the Commission has undertaken a pilot program in which all decisions on class certification will be made centrally by the Complaint Adjudication Division of its Office of Federal Operations to explore possible operational changes.

The Commission proposes four regulatory changes to the class complaint procedures found at 29 CFR 1614.204. The Commission proposes to revise section 1614.204(b) to provide that a complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications raised in an individual complaint. If a complainant moves for class certification after completing counseling, the complainant will not be required to return to the counseling stage. Some agencies who commented on this proposal when it was coordinated under Executive Order 12067 supported the change but asked that the regulation define "reasonable point in the process" and indicate what criteria would be used to determine that a complaint has class implications. Some agencies opposed the change, arguing that it would entail additional investigative costs and invite abuse by complainants seeking to bypass the counseling process by making frivolous class allegations. They maintained that a complainant should have to elect between a class or an individual claim at the pre-complaint stage. Others objected only to eliminating counseling, as that it is how the complainant is informed of his or her rights and responsibilities as class agent.

The Commission believes that the proposed change is an important step toward removing unnecessary barriers to class certification of complaints that are properly of a class nature. The Commission has consistently recognized that its decisions on class certification must be guided by the complainant's lack of access to pre-certification discovery; this is different from the situation of a Rule 23 plaintiff who does have access to pre-certification discovery on class issues. changed Similarly, often an individual complainant will not have reason to know at the counseling stage that the challenged action actually reflects an agency policy or practice generally applicable to a class of similarly situated individuals. The Commission intends that "reasonable point in the process" be interpreted to allow a complainant to seek class certification when he or she knows or should know that the complaint has class implications, i.e., it potentially involves questions of fact common to a class and is typical of the claims of a class. Normally, this point would be no later than the end of discovery at the hearing stage. It would be the responsibility of the agency or administrative judge, as appropriate, to ensure that the class agent is advised of his or her obligations at this time. The Commission believes it would be impracticable and unproductive to require the complainant to return to counseling at this stage.

The Commission proposes to amend section 1614.204(d) to provide that administrative judges would issue final decisions on whether a class complaint will be accepted (or certified) or dismissed. Currently, administrative judges make recommendations to agencies on acceptance or dismissal. The Commission particularly invites comment on this proposal. Agencies who commented on this proposal when it was coordinated under Executive Order 12067 said they either supported or opposed it for the same reasons they gave with respect to the proposal for administrative judges to issue final decisions on individual complaints. Some agencies said they supported it only if the agency is given the right to appeal a certification decision. Under the Commission's proposal, an agency would have such a right under section 1614.401(b), which provides that an agency may appeal an administrative judge's final decision. The Commission also seeks public comment on whether to make administrative judges' decisions on the merits final in class cases, consistent with the proposal to allow administrative judges to issue final decisions in section 1614.109(h). change

In addition, the Commission proposes to amend section 1614.204(g)(2) to require that administrative judges must approve class settlement agreements pursuant to the "fair and reasonable" standard, even when no class member has asserted an objection to the settlement. Several agency commenters under Executive Order 12067 supported this proposal while others disagreed, arguing that it would add an unnecessary layer of review and that adequate safeguards exist in section 1614.204(g)(4), which gives dissatisfied class members the right to petition to vacate a settlement, and 1614.204(a)(2), which requires the class agent to fairly and adequately represent the class. The Commission believes this proposed change is necessary to protect the interests of the class. As one agency commenter noted, class agents sometimes seek to settle their individual claims without full regard for the interests of the class. The change would make the regulations consistent with the practice in federal courts where the court must approve any settlement of a class case under a fair and reasonable standard.

Finally, the Commission proposes to amend section 1614.204(l)(3) to clarify the burdens of proof applicable to individual class members who believe they are entitled to relief. The proposed change would make explicit that the burdens enunciated in Teamsters v. United States, 431 U.S. 324 (1977), apply. In Teamsters, the Court stated that where a finding of discrimination has been made, there is a presumption of discrimination as to every individual who can show he or she is a member of the class and was affected by the discrimination during the relevant period of time. Agencies then would be required to show by clear and convincing evidence that any class member is not entitled to relief, as is provided currently in section 1614.501(b), (c).

Appeals

In addition to the proposal to allow complainants or agencies to appeal administrative judges' final decisions, noted above, the Commission proposes to revise the briefing schedules for appeals to EEOC, to add a provision permitting the Office of Federal Operations to sanction parties for failure to comply with the regulations, to change the standard of review for some appeals, and to eliminate the right to request reconsideration of appeals decisions. The Commission proposes to amend section 1614.403 of the regulations to require that complainants submit any statement or brief in support of an appeal of dismissal of a complaint to EEOC within

30 days of receipt of the dismissal. Any statement or brief in support of an appeal of a final decision on a complaint would have to be submitted to EEOC within 30 days of filing the notice of appeal. Statements or briefs in opposition to appeals would have to be served on the opposing party within 30 days of receipt of a statement or brief in support of an appeal. The Commission will strictly apply appellate time frames. Currently, complainants have 30 days after filing the notice of appeal to submit a statement or brief. The Commission believes that 30 days is sufficient delete time to file briefs in procedural cases (cases that are dismissed by the agency or the administrative judge) because those cases usually do not raise voluminous factual issues. On the other hand, appeals of final decisions on the merits of cases generally require a thorough review of the record change and warrant additional time to formulate arguments to support the appeals. In connection with the briefing schedule changes, the Commission proposes to amend the regulation to require agencies to submit the complaint file to EEOC within 30 days of notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

The Commission proposes to amend section 1614.404 to add a paragraph authorizing the Office of Federal Operations to take appropriate action where a party to an appeal fails without good cause shown to comply with the appellate procedures or to respond fully and in timely fashion to a request for information. The proposal would allow the Office of Federal Operations to draw an adverse inference that requested information a party failed to provide would have reflected unfavorably on that party, to consider the matters to which the requested information pertains to be established in favor of the opposing party, to issue a decision fully or partially in favor of the opposing party, or to take such other actions as appropriate.

The Commission proposes to amend section 1614.405 of the regulations to provide that decisions on appeal from final decisions by administrative judges after a hearing will be based on a clearly erroneous standard of review, but review of all other decisions will be based on a de novo standard of review. Under the clearly erroneous standard of review, no new evidence will be considered on appeal unless the evidence was not reasonably available during the hearing process. The clearly erroneous standard of review is the normal appellate standard of review where findings of fact are given deference by the reviewing authority and questions of law are considered de novo. It should be emphasized that the clearly erroneous standard does not preclude meaningful review of factual findings. However, applying the de novo standard of review to the factual findings in administrative judge's final decisions after hearings would be an inefficient use of EEOC's limited resources. In addition, since EEOC's Office of Federal Operations did not see and hear the witnesses, it would not be in a position to second-guess the administrative judge during the appellate process, especially with respect to credibility determinations based on a witness' demeanor. Factual findings based on documentary evidence are more susceptible to review in the appellate process.

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Finally, the Commission proposes to amend sections 1614.405 and 1614.407 to model its reconsideration process after the process used by the Merit Systems Protection Board (MSPB). Reconsideration is an extra layer of review that is duplicative and time-consuming but that does little to improve the complaints process. The Commission denies the majority of requests for reconsideration, whether in procedural or merits cases. The purpose of this change is to enable the Commission to direct more resources to decision-making at the first appellate level, focusing on policy issues it deems important and developing a consistent body of decisional law on those

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issues. Restructuring the reconsideration process will permit the Commissioners to become more involved in the initial appellate decision. This proposal would also effectuate one of the central goals of the National Performance Review by eliminating an unnecessary layer of review and permitting decision-making at an earlier stage. The Commission will retain its discretion to reconsider any decision under section 1614.407(a), and would use this authority to avoid a miscarriage of justice. added

Most agency commenters who commented on this proposal when it was coordinated under Executive Order 12067 opposed this change. They urged retention of the right to request reconsideration as a safeguard for agencies against mistakes and inconsistencies by the Office of Federal Operations. It would be unfair to deny agencies this last opportunity for recourse, they maintained, particularly if administrative judges' decisions are made final and given greater deference. They argued the change would unjustifiably tip the balance in favor of complainants, who have the right to file suit in federal court and receive a *de novo* review. As they noted, agencies do not have the right to any court review if dissatisfied with a Commission decision. changed Several commenters also argued in favor of preservation of the right to request reconsideration of at least those decisions involving important legal issues or having a significant impact on agency policies or programs beyond the case at hand.

We plan to consider these comments during the public comment period. Elimination of the reconsideration process is an important component of the proposed federal sector reforms. It will provide the resources to improve the timeliness and quality of the Commission's Office of Federal Operations decisions across the board. The availability of reconsideration has not significantly enhanced the overall decision-making process. Many requests are simply a reargument of previously unsuccessful positions. They are sometimes used only to delay the finality of an adverse decision. The overwhelming majority of requests are denied. For example, in fiscal year 1997, requests for reconsideration resulting in a reversal of an order on the merits occurred in only seven instances or about 4% of the cases. For fiscal years 1996, 1995, 1994 and 1993, the figures were 5%, 2%, 2% and 3%, respectively. change

To the extent agencies have legitimate complaints about erroneous Office of Federal Operations decisions, the Commission believes the appropriate remedy is to seek to improve the quality and consistency of the decision-making process as a whole. The concern expressed by some agencies about the length of time the Office of Federal Operations takes to issue decisions also will be alleviated by the shift in resources and priorities this change will accomplish. Although the agencies view it as unfair that, unlike complainants, they cannot go to court if they are dissatisfied with the administrative process, the Commission does not believe that this argument supports adding another layer to the process. Even if there is a reconsideration process, complainants will still have the right to obtain court review while agencies will not. This inherent aspect of the process does not outweigh the need for finality and the value of a more streamlined process. Some agencies have argued that reconsideration is an important step to ensure full consideration of the agency position in cases involving significant legal issues or broader consequences for agency policies and programs. This is a valid need that can be met by providing for greater Commission involvement in Office of Federal Operations decisions of that nature. It is incumbent upon the agency to identify and thoroughly address such policy or legal issues in its brief at the appellate stage so that the Commission can give the case the level of scrutiny warranted. Finally, the Commission will retain its authority to reconsider, within a reasonable

change

Deletion

time, any decision. 29 CFR 1614.407(a); Kleinman v. United States Postal Service, EEOC Request No. 05930493 (1993) (Commission has the authority to reopen decision on its own motion to correct error). By patterning this proposed provision after MSPB's regulation at 5 C.F.R. 1201.118, the Commission intends to import the practice developed by MSPB, which recognizes appellate decisions as final and binding but permits parties to seek MSPB reconsideration to avoid a miscarriage of justice. added

Attorney's Fees

The Commission proposes to amend the attorney's fees section of the regulations to authorize administrative judges to calculate reasonable attorney's fees in cases where a hearing is changed requested. Currently, administrative judges decide the entitlement to attorney's fees. Agencies, however, calculate the amount of the award. The Commission believes that administrative judges are in a better position to render an impartial decision on the reasonableness of the fees request. changed They have heard the evidence and can assess the complexity of the case as presented by the attorney as the basis of the award. Moreover, because administrative judges are neutral third parties to the dispute, their attorney's fees calculations will not be perceived as biased in favor of one party or the other. This proposal has been questioned by some agencies because administrative judges generally have not issued such awards previously. In light of these added concerns, the Commission will issue guidance to administrative judges on the calculation of reasonable attorney's fees.

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

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

added

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

In proposing these changes, the Commission wishes to reiterate its intention to monitor the federal employee complaint process and to propose changes that may become necessary to correct problems that may develop. In order to better monitor the system, the Commission will examine the data that it maintains on complaints and appeals to ensure that appropriate information about appeals from final decisions, attorney's fees awarded and other costs exists.

added

Regulatory Procedures

Executive Order 12866

In promulgating this notice of proposed rulemaking, the Commission has adhered to the regulatory philosophy and applicable principles of regulation set forth in section 1 of Executive Order 12866,. Regulatory Planning and Review. This regulation has been designated as a significant regulation and reviewed by OMB consistent with the Executive Order.

changed

Regulatory Flexibility Act

In addition, the Commission also certifies under 5 U.S.C. § 605(b), enacted by the Regulatory Act (Pub. L. 96-354), that this rule will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to employees and agencies and departments of the federal government. For this reason, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

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

List of Subjects in 29 CFR Part 1614

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

For the Commission

Paul M. Igasaki
Chairman

Accordingly, for the reasons set forth in the preamble, it is proposed to amend chapter XIV of title 29 of the Code of Federal Regulations as follows:

PART 1614--[AMENDED]

1 The authority citation for 29 CFR Part 1614 continues to read as follows:

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

2. Section 1614.102 is amended by redesignating paragraphs (b)(2) through (b)(6) as paragraphs (b)(3) through (b)(7), and by adding paragraph (b)(2) to read as follows:

§ 1614.102 Agency program.

* * * * *

(b) * * *

(2) Establish or make available an alternative dispute resolution program for the equal employment opportunity pre-complaint process.

3. Section 1614.103 is amended by deleting the word "and" at the end of paragraph (b)(3), deleting the period at the end of paragraph (b)(4), adding the word "; and" at the end of paragraph (b)(4) and adding paragraphs (b)(5) and (b)(6) to read as follows:

§ 1614.103 Complaints of discrimination covered by this part.

(b) * * *

(5) The Public Health Service Commissioned Corps, except when in time of war or national emergency, the President declares the Corps to be a military service in accordance with 42 U.S.C. 217;

(6) The National Oceanic and Atmospheric Administration Commissioned Corps.

4. Section 1614.105 is amended by redesignating paragraph (b) as paragraph (b)(1), revising the first sentence of paragraph (b)(1), adding paragraph (b)(2), revising the first sentence of paragraph (d) and revising paragraph (f) to read as follows:

§ 1614.105 Pre-complaint processing.

* * * * *

(b)(1) At the initial counseling session, Counselors must advise individuals orally and in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with § 1614.108(f), election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to §

1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. * * *

(2) Counselors shall advise aggrieved persons that they may choose between participation in the alternative dispute resolution program offered by the agency and the counseling activities provided for in paragraph (c) of this section.

* * * * *

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. * * *

* * * * *

(f) Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

5. Section 1614.106 is amended by adding a sentence after the first sentence of the introductory text of paragraph (d) to read as follows:

§ 1614.106 Individual complaints.

* * * * *

(d) * * * The agency shall advise the complainant in the acknowledgment of the EEOC office and its address where a request for a hearing shall be sent. * * *

6. Section 1614.107 is amended by redesignating paragraphs (a) through (h) as paragraphs (1) through (8) of paragraph (a), redesignating the introductory text as paragraph (a) and revising it, removing paragraph (a)(8) and adding new paragraphs (a)(8) and (9) and paragraph (b) to read as follows: changed

§ 1614.107 Dismissals.

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint: changed

* * * * *

(8) That alleges dissatisfaction with the processing of a previously filed complaint; or

(9) Where the agency strictly applies the criteria set forth in Commission decisions and finds a clear pattern of misuse of the EEO process.

(b) Where the agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those allegations will not be investigated, and shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until a final decision is issued on the remainder of the complaint. added

7. Section 1614.108 is amended by revising paragraph (f) and adding a new paragraph (g) to read as follows:

§ 1614.108 Investigation of complaints.

* * * * *

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing and final decision from an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed.

(g) Where the complainant has received the notice required in paragraph (f) of this section or at any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing by submitting a request for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The complainant shall send a copy of the request for a hearing to the agency EEO office. Upon receipt of a request for a hearing, EEOC will request that the agency provide copies of the complaint file to EEOC and, if not previously provided, the complainant.

8. Section 1614.109 is amended by revising paragraph (a), redesignating paragraphs (b) through (g) as paragraphs (d) through (i), adding new paragraphs (b) and (c), revising the introductory text of paragraph (e)(3), in paragraph (e) removing the phrases "findings and

changed

conclusions" and adding, in their place, the words "final decisions", adding a new paragraph (f)(4), and revising paragraph (h) to read as follows:

§ 1614.109 Hearings.

(a) When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the agency has not had an opportunity to address, the administrative judge may remand any such issue for counseling in accordance with § 1614.105 or for such other processing as ordered by the administrative judge.

(b) Dismissals. Administrative judges shall dismiss complaints or portions of complaints pursuant to section 1614.107 of this part.

* * * * *

(c) Offer of resolution. Any time after appointment of an administrative judge but more than 30 days prior to the hearing, the agency may make an offer of resolution of the complaint to the complainant. The offer of resolution shall be in writing and shall include a notice explaining the possible consequences of failing to accept the offer. The complainant shall have 30 days from receipt of the offer of resolution to accept or reject it. If the complainant fails to accept an offer of resolution, and the final decision on the complaint is not more favorable than the offer, then, except where the interest of justice would not be served, the complainant shall not receive payment from the agency of attorney's fees or costs incurred after the date of rejection or the expiration of the 30-day period of the offer of resolution. An acceptance of an offer must be in writing and will be timely if postmarked or received within the 30-day period. Where a complainant fails to accept an offer of resolution, an agency may make other offers of resolution or either party may seek to negotiate a settlement of the complaint at any time.

(e) * * *

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

* * * * *

(f) * * *

(4) Where the administrative judge determines, even though material facts remain in dispute, that there is sufficient information in the record to decide the case, that the material facts in dispute can be decided on the basis of the written record, that there are no credibility issues that would require live testimony in order to evaluate a witness' demeanor and that the case lacks merit, the administrative judge may issue a final decision without a hearing.

* * * * *

(h) Final decisions by administrative judges. Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a final decision, within 180 days of receipt by EEOC of a request for a hearing, an administrative judge shall issue a final decision on the complaint, and shall order appropriate remedies and relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the final decision to the parties by certified mail, return receipt requested. The final decision shall contain notice of the right of either party to appeal to the Commission, notice of the right of the complainant to file a civil action in Federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573 shall be attached to the decision.

9. Section 110 is amended by revising the title and first and second sentence to read as follows: changed

§ 1614.110 Final decisions by agencies.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part.* * * changed

10. Section 1614.204 is amended by revising paragraph (b), removing the words "recommend that the agency" from paragraphs (d)(2), (d)(3), (d)(4), and (d)(5), removing the word "recommend" and replacing it with the word "decide" in paragraph (d)(6), revising paragraph (d)(7), paragraph (e)(1), paragraph (g)(2) and paragraph (l)(3) to read as follows:

§ 1614.204 Class complaints.

* * * * *

(b) Pre-complaint processing. An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105. A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. If a complainant moves for class certification after completing the counseling process contained in § 1614.105, no additional counseling is required.

* * * * *

(d) * * *

(7) The administrative judge shall transmit his or her decision to accept or dismiss a complaint to the agency and the agent. The dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under subpart A or that the complaint is also dismissed as an individual complaint in accordance with § 1614.107. In addition, it shall inform the agent of the right to appeal the dismissal of the class complaint to the Office of Federal Operations or to file a civil action and shall include EEOC Form 573, Notice of Appeal/Petition.

(e) (1) Within 15 days of receiving notice that the administrative judge has accepted a class complaint or a reasonable time frame specified by the administrative judge, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

* * * * *

(g) * * *

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

* * * * *

(l) * * *

(3) When discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of receipt of notification by the agency of its final decision. The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the agency found class-wide discrimination in its final decision. Where a finding of discrimination against a class has been made, there shall be a presumption of discrimination as to each member of the class. The agency must show by clear and convincing evidence that any class member is not entitled to relief. The period of time for which the agency finds class-wide discrimination shall begin not more than 45 days prior to the agent's initial contact with the Counselor and shall end not later than the date when the agency eliminates the policy or practice found to be discriminatory in the agency decision. The agency shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits. Deletion

11. Section 1614.401 is amended by redesignating paragraphs (b) through (d) as paragraphs (c) through (e) and adding a new paragraph (b) to read as follows:

§ 1614.401 Appeals to the Commission.

* * * * *

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

12. Section 1614.403 is revised to read as follows:

§ 1614.403 How to appeal.

(a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The appellant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.

(b) The appellant shall furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party.

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

(d) Where an appellant appeals a dismissal, any statement or brief in support of the appeal must be submitted to the Office of Federal Operations within 30 days of receipt of the dismissal Where an appellant appeals a final decision, any statement or brief in support of the appeal must be submitted within 30 days of filing the notice of appeal.

(e) The agency must submit the complaint file to the Office of Federal Operations within 30 days of notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

(f) Any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal.

13. Section 1614.404 is amended by adding a new paragraph (c) to read as follows:

§ 1614.404 Appellate procedure.

* * * * *

(c) When either party to an appeal fails without good cause shown to comply with the requirements of this section or to respond fully and in timely fashion to requests for information, the Office of Federal Operations shall, in appropriate circumstances:

(1) Draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

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

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

(4) Take such other actions as appropriate.

14. Section 1614.405 is amended by revising the third sentence and adding a new fourth sentence to paragraph (a) and revising paragraph (b) to read as follows:

§ 1614.405 Decisions on appeals.

(a) * * * The decision on an appeal from a final decision shall be based on a de novo review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to § 1614.109(h) shall be based on a clearly erroneous standard of review. * * * changed

(b) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.408 unless the Commission reconsiders the case. Deletions

15 Section 1614.407 is removed and sections 1614.408 through 1614.410 are redesignated sections 1614.407 through 1614.409.

16. Section 1614.501 is amended by revising the last sentence of the introductory text of paragraph (e)(1), and revising paragraph (e)(1)(iv) to read as follows:

§ 1614.501 Remedies and relief.

* * * * *

(e) Attorney's Fees or costs --

(1) * * * In a final decision, the agency, administrative judge, or Commission may award the applicant or employee reasonable attorney's fees or costs (including expert witness fees) incurred in the processing the complaint.

* * * * *

(iv) Attorney's fees shall be paid for all services performed by an attorney, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

EEOC

Civil Rights

Daniel I. Werfel
01/12/98 01:15:04 PM

Record Type: Record

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

cc: Donald R. Arbuckle/OMB/EOP

Subject: EEOC passback

This is just a reminder any OMB/DPC comments on the rule should be fowarded to me no later than COB Wed. 1/14.

I hope to forward "EOP" concerns to EEOC at that time.

FYI: I attached below my concerns to date. Note that these concerns don't necessarily address the major concerns the agencies have been voicing about the rule. If you recall, we had decided at the briefing that we would handle review of the rule in two ways: 1) once we have all the agency concerns here officially we would sit down with EOP - EEOC and see what the best way is to address the agency concerns; 2) a memo of separate (or similar if that is the case) concerns from EOP would be sent to EEOC. (or a phone call if a memo is unnecessary)

Budget Concerns: Please provide OMB with an analysis of the potential costs and savings of this rule. In other words, (provision by provision) what was the federal government spending before this rule, and what does EEOC project the federal government will be spend after this rule? Also, (provision by provision) what was the EEOC spending before this rule, and what will the EEOC be spending after this rule?

Concerns with the Preamble:

1. Page 4, third paragraph. Should the language spell out more clearly the Commission's intention not only to wait for public comment, but the willingness to make changes to the proposed rule before it goes final?

2. Alternative Dispute Resolution (ADR), page 5, second paragraph. Should the rule spell out more clearly that the employee will still have a first/initial face to face contact with a counselor whether the employee chooses ADR or not?

3. ADR, page 6, second full paragraph. In terms of the sentence, "Keeping with our emphasis on flexibility, an agency could, within certain limitations, exclude circumstances or matters not appropriate for its ADR program." Should an example follow this sentence, for example if an agency is dealing with a case of quid pro quo sexual harassment, ADR may not be appropriate and these regulations would not require ADR for this situation or others where ADR are not appropriate. Note: It may also be useful to better spell out that the rule requires the existence of an ADR program, but does not require that it be utilized in every situation where a discrimination complaint arises.

4. Dismissals, page 7. Can EEOC provide some data on the incidence of dismissals for failure to accept a certified offer of full relief? In how many complaints that reach the hearing stage is a motion for such a dismissal made? In how many complaints that reach the hearing stage, does an EEOC decision on appeal that the agency did make a full offer preclude the employee from proceeding with the complaint or accepting the offer?

Note: The rule states that the rationale for this provision is that complainants are put in the unfortunate position of trying to evaluate whether the agencies they believe discriminated against them have truly offered them all the relief they would be entitled to in a federal court. Question 4 above is attempting to ascertain the incidence of these motions and how often employees are put in such a position.

5. Dismissals, page 9 - 10. Is there any standard of review that an AJ would consider in deciding to dismiss a spin-off complaint? What if the employee follows the process set out in the Management Directive for allegations of dissatisfaction during the initial complaint process but still has a legitimate allegation of dissatisfaction?

Note: Another way of thinking about this question is that we are trying to assess whether there will be any situations following this rule where an allegation of dissatisfaction of a prior complaint could survive? Or are AJ's directed by the provisions of this rule to dismiss such complaints merely because the nature of the complaint is that it is an allegation of dissatisfaction of a prior complaint?

6. Fragmentation of Complaints, page 11. In terms of the Commission's request for comment on whether regulatory changes are necessary on this issue, does the Commission expect to make any changes in this rule, i.e. when it goes final? If so, should it be made more clear in the preamble that the Commission may make changes to this NPRM that addresses this issue?

a) Typo - extra period at the end of the first full paragraph on page 11.

7. Hearings, page 12. In terms of requiring that hearing requests be submitted directly to EEOC, one of the Commission's rationale is that "the proposed change will expedite the complaint process." Precisely how will this change expedite the process? Should the preamble be revised to more specifically address this?

8. Hearings, page 12. In terms of giving AJs the authority to dismiss complaints without referring them back to the agency... please describe what the process is currently? Do agencies have any power to change an AJs ruling of a dismissal? If they have such a power, do they ever use it? What was the purpose or intent in the first place for having this set up so that dismissals would go back to the agency?

9. Hearings, page 12 - 13. In terms of the provision permitting AJs to "issue a final decision without a hearing" where they determine that they have sufficient information in the written record, etc. Does this apply only to dismissals or to any kind of "final decision." If it refers only to dismissals, can that be made more clear in the preamble?

10. Hearings, page 14, first full paragraph. Can the language be revised to indicate the "title" of the Congressional act which contains Section 717(b)? Thus, it would read... "Section 717(b) **of the** __________ authorizes the Commission to ....."

11. Hearings, page 15 - 16. The preamble includes an OMB finding that "The Civil Service Commission is expected to be lawmaker, prosecutor, judge and jury on employment discrimination in the Federal Workforce. Organizational deficiencies like these inevitable lead to less rigorous

compliance?" What point does this make? What is the rational for including this finding in this part of the analysis?

12. Class Complaints, page 20, first full paragraph. In terms of the sentence, "The Commission also seeks public comment on whether to make administrative judges' decisions on the merits final in class cases, consistent with the proposal to eliminate final agency decisions in section 1614.109(h)." Is it accurate to refer to 1614.109(h) as eliminating final agency decisions or is it more accurate to say that this provision establishes the authority for AJs to issue final decisions?

13. Appeals, page 23. In terms of the clearly erroneous standard of review for appeals from final decisions by AJs after a hearing...

a) The preamble states that this is the normal appellate standard of review where findings of fact are given deference by the reviewing authority.... Can the preamble be revised to provide examples of when the "normal appellate standard of review" is applied?

b) The preamble states this is the normal appellate standard of review where findings of fact are given deference by the reviewing authority *and questions of law are considered de novo.* What if there is a hearing, and the appellant wants to appeal based on a question of law and not a finding of fact? What would the standard of review be? If the standard is *de novo,* then doesn't the preamble need to clarify this? If the standard is "clearly erroneous" then what is the rationale for having such a standard for questions of law? (Note: The rule as drafted in 1614.405(a), page 38, indicates that there would be a "clearly erroneous" standard for any basis of appeal of a hearing.)

c) The preamble sites as one rationale for the "clearly erroneous" standard that the appellate judge "would not be in a position to second-guess the administrative judge during the appellate process, especially with respect to credibility determinations based on a witness' demeanor." Is this stating the point too strongly? Aren't there some cases, (e.g., when there is a "clearly erroneous" judgment made) where an appellate judge would second-guess an AJ's finding of fact?

14. Appeals, page 21 - 22. The preamble outlines the new timelines for taking certain actions in connection with an appeal. Please provide to OMB information on what the current time frames are for each of the new provisions.

15. Appeals, page 24 - 25. In terms of the reconsideration issue, the preamble states, "[Agencies] argued the change would unjustifiably tip the balance in favor of complainants, who have the right to seek *de novo* review in federal court while agencies do not." Does this imply that agencies could go to federal court with a review other than *de novo*? Can the agencies ever go to federal court? If not, can the language be revised to reflect this more clearly?

a) The preamble states as one of its rationales for eliminating reconsideration, the relatively small number of requests for reconsideration made in FY 1997. Given the other changes in this rule, e.g., final AJ decisions, won't the importance of reconsideration increase? Does EEOC expect the incidence of request to go up in light of other changes in this rule? Does EEOC expect the significance of this layer of review to increase in light of other changes in this rule?

b) In terms of the sentence, "Although the agencies view it as unfair that unlike complainants, they cannot go to court if they are dissatisfied with the administrative process, the same is true of a decision on reconsideration." What does this mean? Is this meant to say that cannot go to court following a decision on reconsideration as well? If so, is this a valid rationale for eliminating this layer of review?

c) One problem the preamble calls attention to is that agencies hold back identifying and thoroughly addressing policy and/or legal issues at the appellate stage and wait until reconsideration. How often does this occur? Does the EEOC have an alternative strategy for dealing with this other than the elimination of this layer of review?

16. Attorneys Fees, page 25 - 26. Can the preamble language be revised to state more clearly what the change will be in terms of calculation of the award? The preamble indicates that it is the current practice that AJs decide the entitlement of attorney's fees while agencies calculate the amount of the award. But does the preamble say precisely how this proposed rule will change that?

a) Is 1614.501(e)(1), page 39, clear on this as well? If EEOC does in fact intend to give AJs the power to calculate the award, should this provision be revised to more clearly spell this out? Note: Currently it merely indicates that the fees can be awarded and does not differentiate between entitlement and calculation.

17. Executive Order Section, page 27. Please revise this section to reflect that this rule is a significant regulatory action and has been reviewed by OMB consistent with Executive Order 12866.

<u>Concerns with the Reg Language</u>:

1. 1614.109(f)(4), page 33. Please clarify whether the AJ may issue a final decision without a hearing or simply dismiss a case without a hearing. In other words, can an AJ issue a final decision finding discrimination without a hearing?

2. 1614.204(g)(3), page 35 -36. Should this section, which contains several different provisions, be broken up into separate sections?

a) For example, where it says "The period of time for which the agency finds class-wide discrimination shall begin not more than 45 days prior to the agent's initial contact with the Counselor and shall end not later than the date when the agency eliminates the policy or practice found to be discriminatory in the final agency decision." What does this provision relate to? Are we still talking about the burden of proof and an agency challenging that a class member is not entitled to relief or are we now talking about a final agency determination of class-wide discrimination? Can this be made more clear? Once again, should the section be broken down into smaller sections?

3. 1614.404, page 37. Typo - It should read "paragraph **(c)**" (instead of the encircled c)

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5 4 0 6

Mary L. Smith
04/12/99 03:40:32 PM

Record Type: Record

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

cc: Laura Emmett/WHO/EOP, Leslie Bernstein/WHO/EOP
Subject: Update on status of EEOC federal sector rule

Here is an update, prepared by OIRA, on the status of the EEOC Federal Sector rule which is currently in final clearance at OMB. The two major issues, which are detailed below, center on: (1) the EEOC administrative judge (AJ) issuing a ruling and the agency only having the ability to accept or reject the AJ's decision but not to modify it. In this way, agencies will take final action on complaints referred to AJs by issuing a final order, but they will not introduce new evidence or write a new decision in the case. (2) the ability of obtaining interim relief after the AJ's decision but before the end of the administrative process.

OMB plans on meeting with EEOC later this week to go over its concerns, and thereafter plans on contacting the agencies about the rule and requesting that their general counsels or deputy secretaries contact OMB if they still have major concerns. I will also send around a copy of the proposed rule and all of the agency comments. Please let me know if you need anything else.

While the agencies may raise other issues, here is OMB's analysis of the major outstanding issues:

Overview of the Rule
EEOC's objective in issuing this final rule is to streamline, and make more fair, the process by which a federal employee pursues a discrimination complaint. The most significant provisions of the rule eliminate an agency's ability to reverse or amend decisions of the EEOC Administrative Judge (AJ). Under the current process, an complainant/employee can opt for a hearing with an AJ. The agency can then reverse or amend the AJ decision. The only options for the complainant/employee at that point is to accept the agency decision or appeal to the EEOC's Office of Federal Operations (OFO). The final rule would provide that in cases in which the agency does not agree with the decision of the AJ: (a) the agency issues a final order notifying the complainant that it will not fully implement the AJ decision; (b) the agency automatically files an appeal with the EEOC on behalf of that employee; and (c) in cases involving removals or separation of the employee, the agency would provide interim relief (i.e., retroactive restoration) consistent with the finding of the AJ pending a final decision from the AJ.

Other significant provisions of the rule: (a) require all agencies to make available an alternative dispute resolution (ADR) program for the pre-complaint process; (b) provide EEOC AJs with the authority to award attorney's fees and costs to winning complainants for services rendered prior to the filing of the formal complaint (e.g., during the counseling and ADR phases).

Views of the Stakeholders
During EEOC's development of the proposed rule, and following publication of the NPRM on 2/20/98, approximately 30 different Federal agencies expressed significant concerns with many of the provisions in the rule. The agencies are primarily concerned with the elimination of an agency's right to reverse or amend an AJ's decision. Agency arguments range from legal

(EEOC lacks the authority to eliminate this agency action) to policy (the AJ's lack the expertise to adjudicate these claims and agency amendments or reversals are a proper check and balance).

On the other side of the spectrum, OIRA has met with a Federal employees union and a member of the plaintiff's bar who feel that EEOC's proposed changes to the complaint process do not go far enough in limiting agency control in adjudicating cases in which the agency is accused of discrimination.

OIRA Analysis
OIRA agrees with EEOC that the current process of allowing the agency (or the "defendant" in discrimination cases) to amend or reverse the decision of the EEOC AJ may be legitimately perceived as inherently unfair. OIRA is further impressed by data provided by EEOC which demonstrates that agencies reverse a significant majority of AJ findings of discrimination, and that in a majority of those cases that are appealed to the EEOC, the result is a reversal of those agency decisions on appeal from the employee. However, OIRA does have some concerns with the provisions that would implement this change to the process.

The agency issues a final order notifying the complainant that it will not fully implement the AJ decision. As stated above, OIRA believes that this change will improve the fairness of the current process. Further, OIRA, upon consultation with DOJ, agrees with EEOC that a "final agency order" meets the legal requirement in Section 717(c) of Title VII that the agencies have some "final" action they can take following an AJ decision.

If the agency disagrees with the AJ, the rule as drafted would require the agency to automatically file an appeal with the EEOC on behalf of that employee. OIRA has two main concerns with this provision:

- Assume that the AJ rules in favor of the agency, finding that no discrimination occurred. However, the agency now wants to amend or not fully implement that decision because its review did uncover discrimination. Why would there necessitate an appeal to the Commission? EEOC's reg strategy appears to assume a certain outcome which may not in fact always occur.

- A separate provision in the rule contains the requirement for the agency to provide notice to the complainant with all final orders of a complainants right to appeal to EEOC. EEOC has not demonstrated that this notice requirement would be insufficient to allow an employee to exercise a right of appeal. A process in which the employee has the burden to file an appeal following an agency order may be more consistent with other processes of jurisprudence in the U.S.

- **In cases involving removals or separation, the agency would provide interim relief (i.e., retroactive restoration) consistent with the finding of the AJ.** OIRA has several concerns with this provision:

- This provision was not proposed or addressed at the NPRM stage. OIRA is believes that this substantial change to the process should go through a notice and comment process before becoming effective.

- Section 717(c) of Title VII requires some kind of "final" agency action following an AJ decision. An interim relief provision would basically render the "final" action by agencies as moot, and thus it is no longer clear that EEOC has fulfilled the Section 717(c) requirement.

- OIRA is sympathetic to the concerns voiced by agencies that this provision could create significant disruption in an agency's workforce when considering that that 33% of agency reversals are upheld on appeal to the EEOC, and that it traditionally takes a long period of time for EEOC to issue a final decision on appeal.

- Based on the above concerns, it is not clear why more traditional remedies of back pay and damages would not be sufficient to make an employee whole.

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