approved by EPA. The courses are listed under (b). This approval is subject to the level of certification indicated after the course name. Courses are listed in alphabetical order and do not reflect a prioritization. Approvals for Region VII training courses and contact points for each, are as follows:

(1)(a) *Training provider.* Hall-Kimbrell Environmental Services, 4840 West 15th St., Lawrence, KS 66046. Attn: Alice Hart (913) 749–2381.

(b) *Approved courses.* Contractor/Supervisor (full from 8/17/87). Abatement Worker (full from 8/17/87). Project Designer (full from 8/17/87). Inspector/Management Planner (full from 8/17/87).

(2)(a) *Training provider.* Mahew Environmental Training Assoc., Inc. (META), P.O. Box 1961, Lawrence, KS 66044. Attn: Brad Mayhew (913) 842–6382.

(b) *Approved courses.* Contractor/Supervisor (contingent). Abatement Worker (contingent).

(3)(a) *Training provider.* The University of Kansas National Asbestos Training Center, 6600 College Blvd., Suite 315, Overland Park, KS 66211. Attn: Lani Himegarner (913) 491–0181.

(b) *Approved courses.* Contractor/Supervisor (contingent). Contractor/Supervisor (interim from 6/85–9/9/87). Abatement Worker (contingent).

Region VIII—Denver, CO

Regional asbestos coordinator. David Combs, [8AT–TS], EPA, Region VIII, 1 Denver Place, 999–18th St., Suite 1300, Denver, CO 80202–2413. (303) 564–1730, (FTS) 564–1742.

List of approved courses. The following training courses have been approved by EPA. The courses are listed under (b). This approval is subject to the level of certification indicated after the course name. Courses are listed in alphabetical order and do not reflect a prioritization. Approvals for Region VIII training courses and contact points for each, are as follows:

(1)(a) *Training provider.* Northern Engineering and Testing, Inc. 600 South 25th Street, P.O. Box 30615, Billings, MT 59107. Attn: Kathleen Smit (406) 248–9161.

(b) *Approved courses.* Asbestos worker (contingent).

(2)(a) *Training provider.* Rocky Mountain Center for Occupational and Environmental Health, Building 512, University of Utah, Salt Lake City, UT 84112. Attn: Jeffery Lee (801) 581–5710.

(b) *Approved courses.* Contractor/Supervisor (contingent).

Region IX—San Francisco, CA

Regional asbestos coordinator. Joanne Semones, [T–52], EPA, Region IX, 215 Fremont St., San Francisco, CA 94105. (415) 974–7290, (FTS) 454–7290.

List of approved courses. The following training courses have been approved by EPA. The courses are listed under (b). This approval is subject to the level of certification indicated after the course name. Courses are listed in alphabetical order and do not reflect a prioritization. Approvals for Region IX training courses and contact points for each, are as follows:

(1)(a) *Training provider.* Environmental Sciences, 375 S. Meyer, Tucson, AZ 85701. Attn: Dale Keyes (602) 577–1764.

(b) *Approved courses.* Inspector/Management Planner (full).

(2)(a) *Training provider.* University of California at Berkeley Pacific Asbestos Information Center, U.C. Extension, 2223 Fulton St., Berkeley, CA 94720. Attn: Debra Dobin (415) 643–7143.

(b) *Approved courses.* Contractor/Supervisor (full from beginning).

Region X—Seattle, WA

Regional asbestos coordinator. Walter Jasper, EPA, Region X, 1200 Sixth Ave., Seattle, WA 98101. (206) 442–2870, (FTS) 399–2870.

List of approved courses. The following training courses have been approved by EPA. The courses are listed under (b). This approval is subject to the level of certification indicated after the course name. Courses are listed in alphabetical order and do not reflect a prioritization. Approvals for Region X training courses and contact points for each, are as follows:

No approvals for Region X.

Dated: October 17, 1987.

Lee M. Thomas,

Administrator.

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federal register

Friday
October 30, 1987

Part IV

Department of the Interior

Minerals Management Service

30 CFR Parts 208 and 209
Sale of Federal Royalty Oil; Final Rule

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 208 and 209

Sale of Federal Royalty Oil

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: The Minerals Management Service (MMS) is issuing this final rulemaking to consolidate and revise regulations governing the sale of onshore and offshore Federal royalty oil. This final rule will establish uniformity within the regulatory text, provide industry with a more efficient and responsive Royalty-in-Kind (RIK) Program, and improve the Federal Government's administration of the RIK Program. The prior regulations, which are being replaced by this rulemaking, were developed from different statutory bases and consequently contained conflicting and overlapping requirements. This final rule, in combination with selective administrative changes, will ease the burden on all participants and improve the Federal Government's administration of the RIK Program.

EFFECTIVE DATE: December 1, 1987.

FOR FURTHER INFORMATION CONTACT: Dennis C. Whitcomb, Chief, Rules and Procedures Branch at (303) 231-3432, or James A. McNamee, Chief, Royalty-in-Kind Section at (303) 231-3605 in Lakewood, Colorado.

SUPPLEMENTARY INFORMATION: The principal authors of this final rule are James H. Mikelson, John W. Vidrik, and James A. McNamee of the Minerals Management Service, Lakewood, Colorado.

I. Background

Section 36 of the Mineral Lands Leasing Act of 1920 (common reference for the Act of February 25, 1920), as amended (30 U.S.C. 192), and sections 5 and 27 of the Outer Continental Shelf Lands Act (OCSLA) of August 7, 1953, as amended (43 U.S.C. 1334, 1353), authorize the Secretary of the Interior (Secretary) to sell royalty oil accruing to the United States from oil and gas leases issued pursuant to those Acts.

The MMS was established by Secretarial Order No. 3071 on January 19, 1982. Under that order and its subsequent amendments on May 10 and May 26, 1982, MMS was assigned responsibility for the RIK Program.

The MMS has completed a detailed review of the RIK Program. The review highlighted areas where changes should be considered and improvements could be made. One area identified as in need of revision was the regulations governing the sale of royalty oil in 30 CFR Parts 225, 225a, and 262 (subsequently recodified as 30 CFR Parts 208 and 209; see below).

In developing new RIK regulations, the principal objective was to establish one set of regulations for all royalty oil offered for sale under the RIK Program. The prior RIK regulations consisted of one set of regulations governing the sale of onshore royalty oil at 30 CFR Part 208 (formerly 30 CFR Part 225, which was recodified on August 5, 1983 (48 FR 35639)), issued pursuant to the authority in the Act of February 25, 1920, and a second set of regulations governing the sale of offshore royalty oil. The offshore regulations originally were issued by the Department of the Interior (DOI) at 30 CFR Part 225a, pursuant to the authority of the OCSLA. However, section 302(b) of the Department of Energy Organization Act, 42 U.S.C. 7152(b), transferred certain regulatory authorities over the sale of royalty oil to the Department of Energy (DOE), which issued regulations at 10 CFR Part 391.

Congressional repeal of section 302(b) of the DOE Organization Act in Pub. L. 97-100 and in Pub. L. 97-257 transferred the regulatory authority back to DOI from DOE. The DOE's 10 CFR Part 391 regulations were redesignated as DOI's 30 CFR Part 262 (48 FR 1181, January 11, 1983) and then redesignated as 30 CFR Part 209 (48 FR 35639, August 5, 1983).

The evolution of the prior regulations from different statutory bases, and from the different RIK Program objectives of two Federal agencies, adversely affected the wording of the text and the application of the regulations. Those inconsistencies, if left to continue, would have eventually led to further confusion and disruption in MMS's management of, and industry's participation in, the RIK Program.

In addition to the regulatory revisions, there were a number of administrative procedures reviewed by MMS. Improvements have been made to these procedures in order to streamline and simplify administrative functions within the RIK Program and make them more manageable for the Federal Government and less burdensome for industry. Regulatory and administrative changes are discussed below.

Notice of MMS's intent to revise the RIK regulations and make administrative improvements was first published in the **Federal Register** on November 10, 1982 (47 FR 50924), and comments were invited for a 60-day period ending January 10, 1983. Thirty-three responses were received by MMS from producers, refiners, and others interested in the RIK Program. The responses covered many topics, but the majority of the comments dealt with either (1) refiner eligibility requirements, (2) transportation or delivery issues, or (3) administrative fees.

On January 14, 1983, MMS also announced in the **Federal Register** (48 FR 1833) its intent to change the time periods for the sales of royalty oil. Some comments were also received from industry on this topic, although MMS had not solicited any at the time.

II. Summary of Rule Adopted

This final rule being adopted is substantially the same as the proposed rule. Therefore, discussion in the preamble to the proposed rule applies to the final rule. Based on comments received from the public to the proposed rule, certain changes were made. These changes are discussed below in sections III and IV, Comments Received on Proposed Rule—General and Specific by Section.

The final rule removes regulations at 30 CFR Parts 208 and 209 and consolidates and revises those regulations with a unified set of rules in 30 CFR Part 208 governing the sale of Federal royalty oil. This one set of regulations applies to sales of both onshore royalty oil and Outer Continental Shelf (OCS) royalty oil. The new regulations include regulatory changes to clarify definitions and administrative changes to improve the operational efficiency of the RIK Program.

III. Comments Received on Proposed Rule—General

The proposed rulemaking published January 20, 1987 (52 FR 2202), provided for a 30-day public comment period which ended February 19, 1987. General comments received during that time period are addressed in this section. Specific comments by section of the proposed rule are discussed below in section IV. The text of the adopted regulation has been changed to reflect comments, as appropriate.

Two commenters stated that the RIK Program is unnecessary because most areas have adequate supplies of crude oil at equitable prices available to small/independent refiners. One of these commenters stated that the Secretary must make a determination that small refiners lack access to equitably priced crude oil as a condition precedent to the implementation of the RIK Program. The commenters also stated that the methodology for, and subsequent findings of, the determination should be published for comment.

This rule is a codification of the statutes and policies pertaining to the taking of oil royalties in kind for sale to eligible refiners. It is neither an election nor notice of intent to take Federal royalties in kind. Such elections to take royalties in kind will be made on a regional basis following individual determinations by the Secretary that eligible refiners in that region do not have access to adequate supplies of crude oil at equitable prices. The determinations will be published in the **Federal Register** concurrent with, or included in, the "Notice of Availability of Royalty Oil", as provided in § 208.4(a). There is no requirement that MMS undergo a formal process for such determinations, and MMS does not plan to institute one.

One commenter was concerned that the rule will have a significant negative economic impact on the Nation's small refiners and that MMS would, therefore, be required to perform a regulatory analysis with published conclusions under the Regulatory Flexibility Act. Specific reasons for this comment were not given, although the commenter expressed concern about surety and administrative fee requirements in its other comments.

The MMS disagrees. The MMS believes, and several commenters concur, that the rule is an improvement over the current rules, especially as it concerns surety requirements. These and administrative fee requirements are discussed in more detail in section IV.

There were several administrative comments, one of which stated, in essence, that not all interested parties were familiar with the Auditing and Financial System (AFS) and that they would appreciate a description of its operation.

The AFS and its requirements are discussed in detail in MMS's "AFS Oil and Gas Payor Handbook." In addition, MMS conducts payor training classes at various times and locations. Payors interested in further information should contact their MMS Lessee Contact Branch representative. Refiners interested in further information should contact the MMS RIK Section Chief at (303) 231-3605.

One commenter stated that offshore royalty oil not purchased in a sale by offshore eligible refiners should be made available to onshore eligible refiners.

Generally, most of the offshore oil offered in a sale is taken. If it were not, the OCSLA at 43 U.S.C. 1353(b) would allow MMS to sell any excess by competitive bid. However, at this time, MMS has elected not to use the competitive bid procedures. Therefore, unless a refiner meets the OCSLA eligibility criteria, it will not be eligible to purchase offshore royalty oil.

One commenter called for 3-year contracts and suggested sanctions for early terminations.

The MMS plans to have 3-year terms for most contracts in the future, but does not support the idea of sanctions for early terminations because the conditions under which refiners operate are too variable. It should be noted that the administrative fees are nonrefundable and, therefore, the refiners have an investment in the form of the initial contract fee, which should serve as an incentive to maintain their contracts.

One commenter was concerned that the States' shares of the initial estimated billings for a month's supply of royalty oil would not be distributed to the States in accordance with 30 U.S.C. 191. The same commenter was concerned that there is no "date certain" for payments in the rule and that there is a 45-day delay in billings.

The MMS distributes the revenue from the estimated billings to the States in the same manner and within the same amount of time as it distributes revenue from the actual billings. One of the reasons for the initial estimated billing is to negate the effect of the 45-day delay in billing by effectively making revenues available at the same time whether royalties are paid in value or in kind. The 45-day delay cannot be shortened because of current AFS reporting and report processing requirements. The "date certain" for payments fluctuates depending on the nature of the bill and, therefore, cannot be specified in the rule. Normally, payments from the purchasers for the monthly billings are due at MMS on the last day of the month billed.

Finally, one commenter suggested that MMS add a provision to specifically provide for collections from a lessee for undervaluation of royalty oil taken in kind when such undervaluation is a result of a reporting error and the correct amount cannot be recouped from the purchaser. Alternatively, the commenter stated that MMS should be liable for the States' shares of undervalued royalty oil.

The MMS does not believe that such provisions are necessary because there are sufficient protections already in place in existing rules and regulations.

IV. Comments Received on Proposed Rule—Specific by Section

Section 208.2 Definitions

Five commenters responded to the specific request for comments as to whether or not onshore eligibility requirements should be modified to limit the class of eligible refiners to "small refiners" as that term was defined in section 3(4) of the Emergency Petroleum Allocation Act (EPAA) of 1973. All five stated that size criteria should be added to the independence criteria for onshore eligibility. There were no negative responses to this proposal, although one refiner commented that both onshore and offshore eligibility should be tied to the Small Business Administration (SBA) definition.

The MMS agrees that revising the onshore eligibility criteria to include the size determination contained in the EPAA would be beneficial in that it would limit the eligible class to those refiners that have the most need for the RIK Program. The necessary revisions have been made to subparagraph 208.2. The MMS was precluded from limiting the size for onshore eligibility to the SBA criteria by the *Plateu* decision (*Plateau, Inc.* v. *DOI*, 603 F.2d 161 (10th Cir. 1979)), but the EPAA limitation is considerably less restrictive than the SBA limitation. The SBA limit currently refers to refiners with no more than 45,000 barrels per day capacity, whereas the EPAA limit is 175,000 barrels per day. Therefore, more refiners would be eligible for royalty oil.

In the *Plateau* decision, the Court of Appeals held that, for sales of onshore royalty oil pursuant to the Act of February 25, 1920, DOI could not limit eligible refiners to those that meet the SBA criteria. The Court of Appeals, in reviewing the legislative history of 30 U.S.C. 192, indicated what the proper scope of the limitation should be:

> In explaining the purpose of the bill, the Senator (O'Mahoney) identified "small refiners" as those "who do not own and operate their own producing leases." (91 Cong. Rec. 1760 (1945)) . . . . The Secretary of the Interior, in expressing his views on the bill to the committee, had objected to the word "smaller" as being too indefinite . . . . The basic distinction drawn by the Secretary echoed the one recognized by Senator O'Mahoney: The Secretary differentiated between "integrated companies" and refiners "not having their own source of supply for oil . . . ." The version of the bill ultimately enacted defined the targeted refineries as those "not having their own source of supply for crude oil." (603 F.2d at 163.)

The MMS believes that the revised definition at § 208.2 for onshore eligiblity is consistent with the intent of the statute and the *Plateau* decision.

One commenter recommended the addition of a definition for "preference eligible" refiner and another proposed that the definition of "independent refiner" be clarified. The latter commenter also recommended that "refinery capacity" be more clearly defined.

The MMS agrees with the first two comments, and has incorporated these suggestions within § 208.2. The MMS will, however, defer the question of refinery capacity. Because there are currently no capacity certification procedures in place, there is no certain method for determining capacity. The MMS does not wish to establish an arbitrary method, and will, therefore, continue to accept the capacity data submitted by refiners, subject to review, until further notice.

One commenter requested clarification of the definition of "oil" as it pertains to condensate; specifically, whether or not liquids derived from a processing facility would be exempt from the RIK Program.

The MMS does not intend to include in the RIK Program liquids that are recovered by means of a manufacturing process. The liquids intended to be excluded from the RIK Program are those that would meet the definition of natural gas liquids (those liquefiable hydrorcarbons that are recovered through the processing of natural gas). Any liquid hydrocarbons which meet the definition of oil, and thus are to be treated as oil under the applicable statutes, may be included regardless of whether they are recovered at the lease or at a point remote from the lease (such as reseparation facility at the inlet of a gas plant).

One commenter stated without elaboration that the definition of lessee could result in undue burdens on an operator, particularly in OCS operations. The same commenter stated that it must be made clear in the definition that "royalty oil" does not include "working interest" oil (commenter's term) as described under section 8(b)(7) of the OCSLA. This commenter also stated that oil taken in kind should be prorated among the various working interests if only a portion of the available royalty oil is taken in kind from a large jointly owned property.

The definition of lessee contained in this rule is consistent with that in the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701, and is used for that reason. The definition of royalty oil is not meant to encompass oil set aside for small refiners under section 8(b)(7) of the OCSLA. Section 8(b)(7) oil, commonly referred to as "20 percent set-aside" oil, is not royalty oil and has no bearing on this rule. If the Federal Government's royalty oil is taken in kind, that does not relieve the lessee of its obligation also to make oil available in accordance with section 8(b)(7). Likewise, if a lessee is selling production in accordance with section 8(b)(7), that does not limit the Secretary's discretion also to take royalty oil in kind. Finally, any requirement that all working interest owners have a pro rata share of royalty oil provided under this rule is an administrative matter among the owners and should be a function of the applicable agreement(s) among them.

Section 208.4 Royalty Oil Sales to Eligible Refiners

One of the commenters stated that the proposal is premature and should be withdrawn pending completion of the 30 CFR Part 206 rulemaking, and another stated that it was inappropriate to refer to 30 CFR Part 206 when it is being revised and is open for public comment. In related comments, several commenters proposed various methods of valuation for royalty oil taken in kind, ranging from using the same methods currently in 30 CFR Part 208 and 30 CFR Part 209 to using competitive bidding. The options included using the highest posted price, using an average of posted prices, and using averages of values reported by the operators. One commenter specifically recommended that MMS retain the definitions of "market value" and "fair market value" because of statutory restraints. This commenter states that the value of royalty oil taken in kind could not be tied directly to the value of royalties paid in value.

The MMS agrees that the method for determining the value of offshore royalty oil taken in kind is limited by the provisions of the OCSLA. Therefore, MMS has added the definition of fair market value at § 208.2 and provided for its use in the valuation of offshore royalties taken in kind in § 208.4(b)(2). The only restriction in the statutes for onshore RIK valuation, however, is that the royalties be sold at not less than "market value," a term which is not defined in the statutes. The MMS is of the opinion that it will be operating within the intent of the pertinent legislation if onshore royalties taken in kind are valued the same as royalties paid in value and, therefore, MMS will value it in accordance with the provisions of 30 CFR Part 206. This practice should not affect, or be affected by, the rulemaking procedure for 30 CFR Part 206. It is important to note that the value for onshore royalty oil will be the same whether royalties are taken in kind or paid in value and, therefore, the refiners will not be able to negotiate their own prices with the lessees for the royalty oil, which was a concern of some of the commenters.

One commenter stated that lessees have no obligation or right to value royalties taken in kind and that it is the responsibility of MMS to determine value.

The MMS agees that it has the responsibility to make final determinations of value, but this is also true when royalties are paid in value. The lessees or payors will have no more value-reporting responsibilities placed on them as a result of this rule than they would have if they reported in value. The lessees or payors will report the same values for royalty oil taken in kind that they would report if they were paying the royalties in value.

The MMS specifically requested comments on whether the use of an auction technique for the disposal of royalty oil would be desirable. One commenter supported auctions with established floor prices and another stated that it would be an effective means of determining true market value. Eight commenters opposed auctions, however, with most voicing strong oppostion. The consensus was that auctions would be counter to the underlying purpose of the RIK Program because the resultant prices received for the royalty oil would not be equitable.

The MMS agrees with the opposition comments at this time. Therefore, MMS does not anticipate conducting auctions in the foreseeable future.

Several commenters addressed the issue of administrative fees, but none voiced outright opposition. Two stated that the fees should be determined on the basis of volume rather than number of leases, one stated that they should be the same for all refiners, and one stated that the initial contract fees should be enough to cover 50 percent of the costs of the RIK Program. In a related comment, one commenter pointed out that the administrative fee will result in an increase in the price charged for the RIK oil. This comment was made as a statement of fact and not a protest.

The proposed methodology for the recoupment of RIK Program administration costs is intended to reflect MMS's actual administrative efforts. Although certain costs are incurred in fairly equal amounts for all contracts, contracts that involve a greater number of leases entail greater administrative effort. The costs are not related to volume, nor are the efforts for all contracts the same. The initial contract fee is the same for all contracts because of the similarity of certain administrative costs, but the variable fees cannot be equal because of the reasons mentioned above. Finally, the fees are not additional royalties or bonuses and are not accounted for as such. They are necessary to recover the administrative costs of the RIK Program. Such fees are not shareable with the States pursuant to 30 U.S.C. 191.

One commenter stated that interim sale decisions should be made on a case-by-case basis and that the documentation required by interested refiners should not be more extensive than that required for normal secretarial determinations of need.

The MMS is not precluding interim sales altogether and will consider each case separately. However, such sales would only be held in the event substantial amounts of royalty oil become available between sales. This would not include oil previously offered and not taken in a sale or taken and then turned back after a sale. The documentation requirements would not be excessive, but the refiners would have to convince MMS that there is an immediate need.

Section 208.5 Notice of Royalty Oil Sale

One commenter stated that participation in reallocations of oil should be voluntary. The MMS concurs and has clarified this requirement in the adopted rule.

The MMS asked for comments as to whether or not geographic preferences should be granted in sales of offshore royalty oil as well as sales of onshore royalty oil. Six commenters specifically favored the proposal, and one did not. One other commenter stated that any refiner that qualified under the SBA size-determination criteria should be allowed to participate in sales involving Gulf of Mexico OCS leases regardless of location.

The MMS believes that geographic preference for both onshore and offshore sales is desirable and has changed the rule where applicable. The determination as to which applicants for a given sale will be considered for preference eligibility will be made prior to, and published in, the applicable "Notice of Availability of Royalty Oil." The specific criteria for preference eligibility may not be the same for each sale, but MMS anticipates that eligible applicants directly and substantially involved in the crude oil market for the given area will generally be included in the class.

Section 208.7 Determination of Eligibility

One commenter recommended a change in the lottery procedures used during royalty oil sales and proposed a new section giving such procedures for inclusion in the rule. Other commenters also mentioned that the current lottery procedure results in inequitable allocations, the effects of which are compounded by the procedure used for determining administrative fee distribution.

The MMS is exploring ways to improve the sale procedures. However, MMS believes that it should maintain flexibility in this regard and, therefore, not address specifics in the rule. The MMS will publish specific procedures for each sale in the applicable "Notice of Availability of Royalty Oil." The MMS will also attempt to provide more information concerning leases offered in sales, as requested by one commenter.

Three commenters mentioned that MMS should retain flexibility concerning contract suspensions and exclusions of nonoperating refineries from sales because of the possibility of "force majeure" occurrences.

Contract suspensions and exceptions to the policy of excluding nonoperating refineries pursuant to the provisions of paragraph 208.7(g) are administratively burdensome to MMS, operators, and payors. Contract suspensions will not be allowed except as provided in § 208.17.

One commenter recommended that MMS add a section specifically excluding refiners that owe under previous contracts.

The MMS concurs and has added § 208.7(h) to the final rule. The restriction has been expanded to encompass all delinquent balances by affiliated entities. However, if a purchaser or affiliated entity has appealed a billing and posted a surety in accordance with the contract terms and applicable MMS regulations and orders, the balance will not be considered delinquent.

One commenter stated that the total capacities of all affiliated refineries should be used in determining eligibility. This is MMS policy.

Section 208.8 Transportation and Delivery

Six commenters voiced serious concern over the provisions of proposed § 208.8(e). Most were concerned that MMS could establish inaccessible delivery points and then require the operators to designate alternate delivery points at operator or lessee expense. One of the commenters stated that MMS should bear the cost of transportation if the delivery point is not on or adjacent to the lease and another stated that operators are not legally obligated to incur any delivery costs for RIK oil.

The concern created by the proposed rule is apparently the result of unclear provisions, and MMS has rewritten § 208.8 in an attempt to clarify this and other matters discussed below. Onshore leases typically contain the provision that royalty oil taken in kind must be delivered by the lessee on or adjacent to the lease at no cost to the lessor in tanks provided by the lessee. If this can be accomplished, there should be no problem providing the royalty oil to the purchaser. However, in instances where onshore oil flows directly from the wellhead into a closed pipeline system or is otherwise inaccessible on or adjacent to the lease, the operator must designate an alternate delivery point and deliver the royalty oil to that point at the operator's or lessee's own expense. This provision merely implements onshore lease provisions.

The offshore leases which allow MMS to designate onshore delivery points also provide for payment of certain transportation costs to such points, and this is provided for in § 208.8(b). The MMS designated onshore delivery point will generally be the first onshore point at which the price of the royalty oil, including transportation costs, may be established and at which the purchaser will be able to exchange or take delivery of the oil. An onshore delivery point for offshore royalty oil will not necessarily be a location where there is physical access to the oil. This has been clarified in the definition at § 208.2. The costs of transportation occurring prior to the designated delivery point will be included in the price of the royalty oil billed to the purchaser. The MMS will reimburse the lessee for the reasonable costs of transportation to the designated delivery point in an amount not to exceed the transportation allowance determined pursuant to 30 CFR Part 206. Beyond the designated delivery point, transportation costs or exchanges of oil and related transportation costs will be the sole responsibility of the purchaser.

In related comments, five commenters stated that the provisions of 30 CFR Part 206 do not require MMS approval of transportation costs and that operators should be reimbursed for 100 percent of the costs associated with transporting the royalty oil to the designated delivery point. One commenter objected to referring to 30 CFR Part 206 while it is in the rulemaking process. Three commenters stated that the method and timing of transportation reimbursements should be addressed in this rule.

The use of the phrase "approved by MMS" in the proposed § 208.8(c) was inappropriate and it has been changed to "determined pursuant to 30 CFR Part 206" in the final rule at § 208.8(b). The question of whether or not 100 percent of the costs should be reimbursed is outside of the context of this rule and should be addressed in the rulemaking process for 30 CFR Part 206. Likewise, discussions of the method and timing of transportation reimbursements are beyond the scope of this rulemaking. These procedures are addressed in proposed 30 CFR Part 206 and the "AFS Oil and Gas Payor Handbook." The MMS does not consider it inappropriate to refer to 30 CFR Part 206 in this rule because references pertain to whatever version of that rule is in effect. In addition, nothing contained in this rule should prejudice the rulemaking process for 30 CFR Part 206.

One commenter stated that refunds of transportation costs for OCS RIK are outside the purview of sections 10(a) and 10(b) of the OCSLA. The same commenter stated that refunds stemming from adjustments for OCS RIK should not trigger OCSLA restraints.

The MMS is planning to propose regulations in the near future relating to a variety of section 10 issues, including those identified by the commenter.

Section 208.9 Agreements

Two commenters stated that purchasers should not have to pay bonuses other than quality differentials for oil exchanged for royalty oil in closed delivery systems. Another commenter suggested that it is unfair for MMS to pass the risk and responsibility for quality differentials to the lessee and that MMS should bill on the basis of quality delivered and then settle with the lessee on any difference. Another stated that MMS should require that quality differential agreements be in place prior to deliveries.

If a determination is made by the Secretary to take royalties in kind, with delivery of royalty oil to participating RIK refiners, affected lessees are required to provide the same quality of royalty oil to the purchasers that was produced from the leases. If a lessee is unable to provide the royalty portion of actual production from the lease, the lessee must provide crude oil to the purchaser which is equivalent in volume or value to the royalty oil to which the purchaser is entitled. This situation may arise, for example, on offshore royalties when the lease is the royalty measurement point but MMS has designated an onshore delivery point. In instances where a quality differential exists between the royalty oil to which a purchaser is entitled (and for which it is billed) and the oil which actually is delivered, the difference must be resolved between the purchaser and the operator. Historically, lessees and RIK purchasers have been able to resolve any quality differential issues between themselves. The MMS policy is to not be involved in third-party agreements unless requested or in cases where they conflict with terms of royalty oil contracts or regulations governing the RIK Program. Section 208.9(a) provides for the submittal of agreements to MMS relating to the method and costs of delivery of royalty oil, or oil exchanged for it, to the refinery. This requirement pertains to quality differential agreements as well, and the paragraph has been changed accordingly.

Two commenters offered definitions of what constitutes "processing" of crude oil. One was a variation of the "Mandatory Oil Import" definition previously codified at 10 CFR 213.27. The other recommended that MMS state in § 208.9(c) that oil must be processed "into refined petroleum products" and that MMS use the definition of that term which is at section 3(5) of the Emergency Petroleum Allocation Act. The MMS has adopted this latter suggestion and has made the revision in § 208.9(c) and added a modified definition in 208.2.

Section 208.10 Notices

One commenter stated that the notification of termination in § 208.10(c) should be required in all cases. Two others requested 60-day and 45-day notices of termination, respectively.

The MMS policy is to give notices of termination as far in advance as possible, preferably at least 30 days. To require a 30-day notice in all cases would unduly restrict MMS's flexibility in those rare instances where immediate termination is required for unforeseen reasons. Future contracts will contain provisions requiring the refiner to provide 45-day notices of termination in most cases. The MMS will notify operators as soon as possible upon such notice, thereby giving notice more than 30 days prior to the effective termination date.

One commenter stated that the notice required at § 208.10(a) should be in writing and should specify delivery points. Another stated that there should be a prohibition in regard to changing delivery points.

It is MMS's policy to give all notices concerning the election to take or terminate royalty oil in kind both by telephone and in writing. It is also MMS's policy to specify delivery points for offshore oil in the letters notifying operators of elections to take royalty oil in kind. The rule has been clarified to reflect this policy. The MMS does not generally change delivery points without the concurrence of the operator, but it must maintain the ability to do so in cases where the lease provisions allow MMS to designate a delivery point.

One commenter recommended that the word "lessee" in the first sentence of § 208.10(d) be changed to "operator."

The MMS concurs and has changed "lessee" to "operator" wherever it appeared in § 208.10.

Section 208.11 Surety Requirements

Three commenters stated that the surety costs are excessive and that the letter of credit term should be reduced. Three others stated that the requirements are a real improvement but hoped that the requirements could be reduced even further by streamlining the reporting and billing process.

The MMS has studied the surety requirements extensively and believes that the proposed requirements are as low as they can be and still provide the necessary protection. There was some confusion as to how long a letter of credit must be in effect following contract termination. The MMS has therefore added a sentence to § 208.11(b) allowing a clause in each letter of credit specifically limiting such time period to 6 months. The requirements cannot be reduced further unless the reporting and billing period is reduced, which is not possible within the framework of AFS unless MMS increases the amount of the initial estimated payment. This would be counter-productive.

Section 208.13 Reporting requirements

One commenter requested a provision that would require purchasers to provide sureties to operators because the operators are responsible for overdeliveries. In related comments, four commenters stated that the liabilities, including interest, that may be incurred by the payors for underbillings as a result of reporting errors are unfair and punitive. Generally, these commenters feel that the operator's only obligation is to transfer royalty oil taken in kind to the purchaser and that the operator has no duty to be a guarantor of the value or receipt of such royalty oil.

The MMS cannot agree that purchasers should be made to provide sureties to cover the possibilities of overdeliveries. It also does not consider holding the payors responsible for their reporting errors to be unfair or punitive. The payors are responsible for correct reporting of royalties whether taken in kind or paid in value. It follows that they should also be responsible to ensure that deliveries of RIK oil are correct. It is interesting that most of these same commenters oppose the requirement in § 208.13(a) for reporting royalty oil entitlements and deliveries on Form MMS-4071. This requirement was added to protect the operators and payors as well as the purchasers and MMS. The MMS's experience in reconciliations of royalty oil contracts over the past 3 years has shown that payor reporting on Form MMS-2014 often has not matched entitlements and/or deliveries. The requirement is an attempt to provide a means to catch these errors, as much as is possible without a full audit, before the payors become liable for the resultant losses of revenue. In summary, MMS believes that the provisions for reporting and for liability in cases of reporting or delivery errors are necessary to protect all parties whenever possible, and they will be retained in the final rule.

Three commenters stated that purchasers should be paid interest by MMS when overbilled. Another comment on interest was that working interest owners should be paid interest on "underpayments from eligible refiners for late payments on any excess oil delivered."

The MMS currently does not have legal authority to pay interest on overbillings. However, this issue is being reviewed outside of the context of this rule. If there is a change in MMS's interest payment authority, it will be implemented in the RIK Program to the extent it is applicable. Regarding the latter comment, it is the working interest owner's responsibility to ensure that the correct volumes of royalty oil are made available to the purchaser, and any problems related to overdeliveries are matters to be handled between the owner and the purchaser.

Operators and other interested parties should note that § 208.8(c) of the final rule provides for deliveries to be made not later than the last day of the calendar month immediately following the month in which the oil was produced. This provision should provide time to review production and other records sufficiently to allow for the determination of proper deliveries in a timely manner.

One commenter stated that the provisions of §§ 208.12(b) and 208.13(b) appear to allow MMS to charge double interest.

These paragraphs address separate issues. Section 208.12(b)(i) of the final rule provides for interest payments by RIK purchasers for late payments of invoices. Subparagraph (ii) of this paragraph provides for interest payments by RIK payors for underreported royalty oil. These latter charges may be assessed as a result of late or underreporting, or after an adjustment to a previously reported line is reported by the payor and billed or is billed by MMS as a result of reconciliation, audit, or other procedures. For example, if an operator underreports RIK delivered volumes to MMS, and as a result MMS does not bill the RIK purchaser for the underreported volume, then MMS will bill the RIK purchaser for the value of the underreported volumes, but will bill the operator for interest. The interest will be calculated on the net adjustment from the time the original amount would normally have been due to the time the adjusted amount was paid. Section 208.13(b) interest assessments are related to the amounts which are unrecoverable from a purchaser or surety due to payor error and are, therefore, the responsibility of the payor. Interest will be assessed from the time payment originally would have been due from the purchaser to the time the debt is satisfied by the payor.

Section 208.14 Civil Criminal Penalties

One commenter stated in regard to § 208.14 that civil penalties must be in respect to the source of the oil involved and to the proper statute. The MMS agrees.

Section 208.17 Suspensions for National Emergencies

One commenter stated that operators should receive 60-day notices in suspensions.

Any suspension under this section would be made in the event of a national emergency and would probably be made without any prior notice.

V. Procedural Matters

Executive Order 12291 and Regulatory Flexibility Act

The impact of the final rule is primarily limited to a small portion of the oil industry. In addition, the final rule primarily consolidates and clarifies existing regulations. Although some changes were adopted, they have a minor economic effect. Therefore, the Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Paperwork Reduction Act of 1980

The information collection requirements contained in 30 CFR 208.3 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and have been assigned clearance number 1010-0042.

National Environmental Policy Act of 1969

The Department of the Interior has determined that this final rule is categorically excluded from the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The exclusion is found in the Department's Manual at 516 DM6, Appendix 2, Part 2.4B(1) (a), (b), and (k).

List of Subjects

30 CFR Part 208

Government contracts, Mineral royalties, Petroleum, Public lands-mineral resources, Small businesses.

30 CFR Part 209

Continental shelf, Government contracts, Mineral royalties, Petroleum allocation, Public lands—mineral resources, Small businesses.

Date: October 2, 1987.

J. Steven Griles,

Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, Title 30, Subchapter A of the Code of Federal Regulations is amended as set forth below.

Subchapter A—Royalty Management

30 CFR Part 208 is revised to read as follows:

PART 208—SALE OF FEDERAL ROYALTY OIL

Subpart A—General Provisons

Authority: 30 U.S.C. 181 *et seq.*; 30 U.S.C. 351 *et seq.*; 30 U.S.C. 1701 *et seq.*; 43 U.S.C.

1301 *et seq.*; 43 U.S.C. 1331 *et seq.*; 43 U.S.C. 1801 *et seq.*; and 31 U.S.C. 9701.

§ 208.1 General

The regulations in this part govern the sale of royalty oil by the United States to eligible refiners. The regulations apply to royalty oil from leases on Federal lands onshore and on the Outer Continental Shelf (OCS).

§ 208.2 Definitions.

"Allotment" means the quantity of royalty oil that DOI determines is available to each eligible refiner that has applied for a portion of the total volume of royalty oil offered in a given royalty oil sale.

"Application" means the formal written request to DOI on Form MMS-4070 by an eligible refiner interested in purchasing a quantity of royalty oil from the approximate volume announced by DOI in a given "Notice of Availability of Royalty Oil."

"Area" or "Region" means the geographic territory having Federal oil and gas leases over which MMS has jurisdiction, unless the context in which those words are used indicates that a different meaning is intended.

"Delivery point" means the point where the lessor, in accordance with lease terms, directs the lessee to deliver royalty oil to a purchaser. Title to the royalty oil, or to the quantity thereof in a commingled stream, passes from the Federal Government to the purchaser at this designated point, which is specified in the royalty oil contract. For onshore leases, the delivery point will be on or adjacent to the lease, except as provided in § 208.8(a) of this part. In instances where an onshore delivery point is designated for offshore royalty oil, such point generally will be the first onshore point where the price of the oil, including transportation costs, can be determined and where the purchaser can either exchange or take delivery of the oil. The Government does not guarantee physical access to the oil at such point.

"Director" means the Director of MMS, who is responsible for its overall direction, or his or her delegate(s).

"DOI" means the Department of the Interior, including the Secretary or his or her delegate(s).

"Eligible refiner" means a refiner of crude oil that meets the following criteria for eligibility to purchase royalty oil:

(1) For the purchase of royalty oil from onshore leases, it means a refiner that qualifies as a small and independent refiner as those terms are defined in sections 3(3) and 3(4) of the Emergency Petroleum Allocation Act, 15 U.S.C. 751 et seq., except that the time period for determination contained in section 3(3)(A) would be the calendar quarter immediately preceding the date of the applicable "Notice of Availability of Royalty Oil." A refiner that, together with all persons controlled by, in control of, under common control with, or otherwise affiliated with the refiner, inputs a volume of domestic crude oil from its own production exceeding 30 percent of its total refinery input of crude oil is eligible to participate in royalty oil sales under this Part. Crude oil received in exchange for such refiner's own production is considered to be that refiner's own production for purposes of this section.

(2) For the purchase of royalty oil from leases on the OCS, it means a refiner that qualifies as a small business enterprise under the rules of the Small Business Administration (13 CFR 121.3-9(a)(1)).

"Entitlement" means the volume of royalty oil from the Federal Government's share of production from a Federal lease which a purchaser is entitled to receive under a royalty oil contract.

"Exchange agreement" means a written agreement between the purchaser and another person for the exchange of royalty oil purchased under this Part for other oil on a volume or equivalent value basis.

"Fair market value" means the value of oil—(1) Computed at a unit price equivalent to the average unit price at which oil was sold pursuant to a lease during the period for which any royalty or net profit share is accrued or reserved to the United States pursuant to such lease, or

(2) If there were no such sales, or if the Secretary finds that there were an insufficient number of such sales to equitably determine such value, computed at the average unit price at which oil was sold pursuant to other leases in the same region of the OCS during such period, or

(3) If there were no sales of oil from such region during such period, or if the Secretary finds that there are an insufficient number of such sales to equitably determine such value, at an appropriate price determined by the Secretary.

"Federal lease" means a contractual agreement with the Federal Government which authorizes the exploration, development, and production of oil and gas on Federal lands onshore or on the OCS.

"Interim sale" means a sale conducted as a result of substantial additional royalty oil becoming available in a specific area prior to the scheduled expiration date of royalty oil contracts in effect for that area.

"Lessee" means any person to whom the United States issues a lease, or any person who has been assigned an obligation to make royalty or other payments required by the lease.

"MMS" means the Minerals Management Service of the Department of the Interior.

"Notice of Availability of Royalty Oil" means a notice published by DOI in the **Federal Register** (and in other printed media when appropriate, such as a newspaper or magazine of general or specialized circulation) to advise interested parties of the availability of royalty oil for purchase by eligible refiners and the approximate volume of royalty oil available to the applicants.

"OCS" means the Outer Continental Shelf, as defined in 43 U.S.C. 1331(a).

"OCSLA" means the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq., as amended by 43 U.S.C. 1801 et seq.).

"Oil" means a mixture of hydrocarbons that existed in the liquid phase in natural underground reservoirs and remains liquid at atmospheric pressure after passing through surface separating facilities and is marketed or used as such. Condensate recovered in lease separators or field facilities is considered to be oil.

"Operator" means any person, including a lessee, who has control of or who manages operations on an oil and gas lease site on Federal onshore lands or on the OCS.

"Payor" means any person responsible for reporting royalties from a Federal lease or leases on Form MMS-2014.

"Person" means any individual, firm, corporation, association, partnership, consortium, or joint venture.

"Preference eligible refiner" means an eligible refiner with at least one operating refinery which is located within the area designated as the preference eligible area in the "Notice of Availability of Royalty Oil." A refiner may be deemed to be a preference eligible refiner if it owns a refinery located in the preference eligible area which is not operational if the refiner meets the requirements of § 208.7(g) of this part.

"Purchaser" means anyone who acquires royalty oil sold by DOI under the Federal Government's Royalty-in-Kind (RIK) Program and who has a contractual obligation under an agreement to purchase royalty oil.

"Reallocation" means an offering of royalty oil previously allocated in a specific sale but subsequently turned back to MMS. A reallocation would only be made if substantial amounts of royalty oil are turned back.

"Refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), refined lubricating oils, or diesel fuel.

"Royalty oil" means that amount of oil that DOI takes in kind in partial or full satisfaction of a lessee's royalty or net profit share obligations as determined by whatever lease interest the lessee holds under an applicable mineral leasing law.

"Secretary" means the Secretary of the Department of the Interior or his/her delegate(s).

"Section 6 lease" means an oil and gas lease originally issued by any State and currently maintained in effect pursuant to section 6 of the OCSLA.

"Section 8 lease" means an oil and gas lease originally issued by the United States pursuant to section 8 of the OCSLA.

§ 208.3 Information collection.

The information collection requirements contained in this Part have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3504(h). The forms and approved OMB clearance numbers are as follows:

Form No.	Name and filing date	OMB No.
MMS-4070	Application for the Purchase of Royalty Oil (due prior to the date of sale in accordance with the instructions in the "Notice of Availability of Royalty Oil").	1010-0042
MMS-4071	Semiannual Report of Royalty-in-Kind Oil Entitlements and Deliveries (due from the lease operator 7 months after the first month of sale and semiannually thereafter).	1010-0042

The information is being collected by MMS to meet congressionally mandated accounting and auditing responsibilities relating to Federal mineral royalty management. The information will be used to determine a refiner's eligibility to purchase royalty oil and to timely and accurately account for such purchases. Form MMS-4070 is required to obtain a benefit and Form MMS-4071 is mandatory.

§ 208.4 Royalty oil sales to eligible refiners.

(a) *Determination to take royalty oil in kind.* The Secretary may evaluate crude oil market conditions from time to time. The evaluation will include, among other things, the availability of crude oil and the crude oil requirements of the Federal Government, primarily those requirements concerning matters of national interest and defense. The Secretary will review these items and will determine whether eligible refiners have access to adequate supplies of crude oil and whether such oil is available to eligible refiners at equitable prices. Such determinations may be made on a regional basis. The determination by the Secretary shall be published in the **Federal Register** concurrent with or included in the "Notice of Availability of Royalty Oil" required by 30 CFR 208.5.

(b) *Sale to eligible refiners.* (1) Upon a determination by the Secretary under paragraph (a) of this section that eligible refiners do not have access to adequate supplies of crude oil at equitable prices, the Secretary, at his or her discretion, may elect to take in kind some or all of the royalty oil accruing to the United States from oil and gas leases on Federal lands onshore and on the OCS. The Secretary may authorize MMS to offer royalty oil for sale to eligible refiners only for use in their refineries and not for resale (other than under an exchange agreement).

(2) All sales of royalty oil from onshore leases will be priced at the royalty value that would have been determined for that oil pursuant to 30 CFR Part 206 had the royalties been paid in value rather than taken in kind. All sales of royalty oil from OCS leases will be priced at the fair market value of the oil including associated transportation costs to the designated delivery point, if applicable.

(3) An eligible refiner must have a representative at a sale in order to participate. The Secretary may, at his or her discretion, establish purchase limitations and withhold any royalty oil from any offering.

(4) The MMS will recover the administrative costs of the RIK Program through the collection of administrative fees. The fees will consist of an initial nonrefundable contract fee for each executed contract and a monthly variable charge applied to each lease under contract. The amount of the initial contract fee shall be determined prior to a sale and published in the "Notice of Availability of Royalty Oil." The initial contract fee will be payable in equal installments due at the end of the first and second months of the contract. These contract fees will be applied against the RIK Program's administrative costs, and the remainder of the administrative costs will be recovered through the monthly variable charges per lease, which will be billed and payable concurrently with the monthly actual billings for royalty oil. The rate per lease will be determined by dividing the remaining recoverable administrative costs by the total number of leases under contract. The rate may change depending upon whether total administrative costs change and/or whether the number of leases taken in kind changes from one month to another. In instances where production from a lease is sold on a percentage basis to two or more purchasers, each percentage portion of the lease will be considered a separate lease for purposes of administrative fee determination.

(c) Upon a determination by the Secretary under paragraph (a) of this section that eligible refiners do have access to adequate supplies of crude oil at equitable prices, MMS will not take royalties in kind from oil and gas leases for exclusive sale to such refiners. Such determinations may be made on a regional basis.

(d) *Interim sales.* The MMS generally will not conduct interim sales. However, interim sales may be held at the discretion of the Secretary if substantial addition royalty oil becomes available. The potentially eligible refiners, individually or collectively, must submit documentation demonstrating that adequate supplies of crude oil at equitable prices are not available for purchase. Although sufficient documentation must be submitted, it is not mandatory for each potentially eligible refiner to participate in a submission of such documentation to be determined eligible. The documentation must be submitted to MMS for a determination as to whether an interim sale is needed.

§ 208.5 Notice of royalty oil sale.

If the Secretary decides to take royalty oil in kind for sale to eligible refiners, MMS will issue a "Notice of Availability of Royalty Oil" specifying the manner in which the sale is to be effected, the approximate quantity of royalty oil to be offered, information required in applications, the closing date for the receipt of applications for royalty oil, and other general administrative details concerning the application, allocation, and contract award process for the royalty oil. The Notice will describe generally the terms under which the royalty oil contracts will be awarded and will specify which applicants will be deemed preference eligible refiners in the sale proceedings. The Notice will also contain guidelines for reallocation procedures in the event substantial quantities of royalty oil sold in that specific sale are subsequently turned back to MMS. Only those purchasers that hold ongoing contracts from that specific sale will be allowed to participate in any reallocation, which would be voluntary, and then only if they continue to meet eligibility requirements as set forth in 30 CFR 208.2 and 208.7. If a reallocation is held prior to the effective date of the contracts as specified in the "Notice of Availability of Royalty Oil", all eligible refiners that selected a lease or leases in that specific sale would be allowed to participate, pursuant to the procedures in the Notice.

§ 208.6 General application procedures.

(a) To apply for the purchase of royalty oil, an applicant must file a Form MMS-4070 with MMS in accordance with the instructions in the "Notice of Availability of Royalty Oil" and in accordance with any instructions issued by MMS for the completion of Form MMS-4070. The applicant will be required to submit a letter of intent from a qualified financial institution stating that it would be granted surety coverage for the royalty oil for which it is applying. The letter of intent must be submitted with Form MMS-4070.

(b) In addition to any other application requirements specified in the Notice, the following information is required on Form MMS-4070 at the time of application:

(1) Name and address of the applicant, the location of the applicant's refinery or refineries, and disclosure of the applicant's affiliation with any other persons.

(2) The capacity of the applicant's refineries in barrels of crude oil throughput per calendar day and a tabulation for the past 12 months of oil processed for each refinery, identified as to source (from own production or from other sources).

(3) Identification of any Government royalty oil contracts under which the applicant is currently receiving royalty oil.

(4) Identification of the locations (area/region and State) where the applicant proposes to purchase royalty oil, the volume of oil requested, and the specific refineries in which the oil will be refined.

(5) A certification from the applicant that it is an eligible refiner for the purchase of Government royalty oil, as defined in § 208.2 of this Part.

§ 208.7 Determination of eligibility.

(a) The MMS will examine each application and may request additional information if the information in the application is inadequate. An application received after the close of the application period will be rejected. If additional information is requested by MMS, it must be received by the time specified or the application will be rejected.

(b) After the close of the application period and the receipt of any additional requested information, MMS will determine which applicants may participate in the royalty oil sale and the quantity of royalty oil which each applicant is authorized to purchase.

(c) When applications are filed by two or more eligible refiners for the same royalty oil, the oil will be allocated among such applicants on an equitable basis as determined by MMS. Preference eligible refiners will be given priority in the allocation procedures in sales and subsequent reallocations of royalty oil.

(d) No eligible refiner shall be awarded contracts for volumes of royalty oil that, when added to volumes of other Federal royalty oil being received, are in excess of 60 percent of the combined refinery capacity of that refiner.

(e) The MMS may exclude any section 6 lease from a royalty oil sale.

(f) If two or more eligible refiners are related through common ownership or control or otherwise affiliated, only one of them shall be entitled to an allotment of royalty oil from a specific sale.

(g) Any applicant whose refinery is not in operation during the 60-day period prior to the date of the royalty oil sale shall not be entitled to participate in the sale unless such applicant self-certifies and demonstrates to the satisfaction of MMS that it will begin operations by the first month in which oil becomes available under a royalty oil contract. If operations do not begin by that month, MMS will terminate the contract.

(h) Applicants or purchasers that have delinquent balances with MMS as of the date of a royalty oil sale or subsequent reallocation will not be allowed to participate in that sale or reallocation. If a person which is controlled by, in control of, under common control with, or otherwise affiliated with an applicant or purchaser has such delinquent balances, the applicant or purchaser will not be allowed to participate in a royalty oil sale or reallocation. To the extent a purchaser or affiliated person has appealed a billing and posted a surety in accordance with the contract terms and applicable MMS regulations or other law, the balance shall not be considered delinquent.

(i) A purchaser must meet the eligibility criteria on the date of contract issuance. However, a change in a purchaser's eligibility status during the term of the contract will not affect the purchaser's right to continue that contract until its term expires, including any extensions thereof.

§ 208.8 Transportation and delivery.

(a) The lessee shall deliver royalty oil from onshore leases to the purchaser at a point on or adjacent to the lease pursuant to the terms of the lease. If the purchaser does not have access to its onshore royalty oil entitlement at facilities on or adjacent to the lease, the operator of the lease must designate an alternate delivery point at no additional cost to the purchaser or the Government. The purchaser must have physical access to the oil at the alternate delivery point and such point must be approved by MMS.

(b) The lessee shall deliver royalty oil from section 8 offshore leases issued after September 1969 at a delivery point to be designated by MMS. The lessee shall deliver royalty oil from section 8 offshore leases issued before October 1969 or from section 6 leases at a delivery point to be designated by the lessee. If the delivery point is on or immediately adjacent to the lease, the royalty oil will be delivered without cost to the Federal Government as an undivided portion of production in marketable condition at pipeline connections or other facilities provided by the lessee, unless other arrangements are approved by MMS. If the delivery point is not on or immediately adjacent to the lease, MMS will reimburse the lessee for the reasonable cost of transportation to such point in an amount not to exceed the transportation allowance determined pursuant to 30 CFR Part 206. The MMS will include such transportation costs in the price charged for the oil taken in kind to reflect the value of the oil at the delivery point. Arrangements for delivery of the royalty oil from, or exchange of the oil at, the delivery point, and related transportation costs, are the responsibility of the purchaser of the royalty oil. In addition, quality differentials between the royalty oil to which a purchaser is entitled and the oil which is made available at the delivery point are matters to be resolved between the purchaser and the operator.

(c) When the purchaser has physical access to the royalty oil at the delivery point, the lessee shall deliver such oil in marketable condition at pipeline connections or other facilities designated by MMS. If the lessee is unable to provide the royalty portion of actual production from the lease, the lessee must provide crude oil to the purchaser which is equivalent in volume or value to the royalty oil to which the purchaser is entitled. The lessee will deliver the royalty oil to the purchaser during normal operating hours and in reasonable quantities and intervals. The lessee will make available and the purchaser will accept delivery of the royalty oil entitlement no later than the last day of the calendar month immediately following the calendar month in which the oil was produced. Failure to accept deliveries shall constitute grounds for the termination of the contract.

(d) Upon termination of deliveries under a royalty oil contract, the transportation allowance and delivery point designation authorized by this section no longer will remain in effect.

§ 208.9 Agreements.

(a) A purchaser must submit to MMS two copies of any written third-party agreements, or two copies of a full written explanation of any oral third-party agreements, relating to the method and costs of delivery of royalty oil, or crude oil exchanged for the royalty oil, from the point of delivery under the contract to the purchaser's refinery. In addition, the purchaser must submit copies of agreements pertaining to quality differentials which may occur between leases and delivery points.

(b) A purchaser may not sell royalty oil which it purchases pursuant to this Part except for purposes of an exchange for other crude oil on a volume or equivalent value basis.

(c) Royalty oil purchased under this part, or crude oil received in exchange for such royalty oil, must be processed into refined petroleum products in the purchaser's refinery.

§ 208.10 Notices.

(a) The MMS shall notify each operator, by certified mail, of the Secretary's decision to take royalty oil in kind. This notice shall be mailed at least 45 days in advance of the effective date of delivery and will specify delivery points for offshore oil for OCS leases issued after September 1969.

(b) Deliveries of royalty oil may be partially terminated only with the written approval of the Director, MMS.

(c) Before terminating the delivery of royalty oil taken in kind, MMS, if possible, will notify each operator by certified mail of the change in requirements at least 30 days in advance of the effective date.

(d) After MMS notification that royalty oil will be taken in kind, the operator shall be responsible for notifying each working interest on the Federal lease. As soon as practicable after the date of each royalty oil sale, MMS will publish in the **Federal Register** a notice of the leases from which royalty oil will be taken, the purchasers of the royalty oil, and the leases from which royalty oil deliveries will be discontinued on terminated contracts.

(e) A purchaser cannot transfer, assign, or sell its rights or interest in a royalty oil contract without written approval of the Director, MMS. If the purchaser changes ownership or its assets are sold or liquidated for any reason, it cannot transfer, assign, or sell its rights or interest in the royalty oil contract without written approval of the Director, MMS. Without express written consent from MMS for a change in ownership, the royalty oil contract shall be terminated. The successor company must meet the definition of an eligible refiner in § 208.2 of this part for MMS to consider assignment of the royalty oil contract.

§ 208.11 Surety requirements.

(a) The eligible purchaser, prior to execution of the contract, shall furnish MMS a surety, acceptable to MMS, in an amount equal to the estimated value of royalty oil which could be taken by the purchaser in a 99-day period, plus related administrative charges. The MMS may increase the amount of the surety when necessary to protect the Government's interest or may decrease the amount of the surety where necessary or appropriate to further the purposes of the RIK Program.

(b) If a letter of credit is furnished as surety, it must be effective for a 9-month period beginning the first day the royalty oil contract is effective, with a clause providing for automatic renewal monthly for a new 9-month period. The purchaser or its surety company may elect not to renew the letter of credit at any monthly anniversary date, but must notify MMS of its intent not to renew at least 30 days prior to the anniversary date. The MMS may grant the purchaser 45 days to obtain a new surety. If no replacement surety is provided, MMS will terminate the contract effective at least 6 months prior to the expiration date of the letter of credit. Notwithstanding the above provisions, the letter of credit also may contain a clause providing for automatic termination 6 months after the royalty oil contract terminates.

(c) All sureties must be in a form acceptable to MMS and must include such other specific requirements as MMS may require to adequately protect the Government's interests.

(d) Sureties under this section must be either surety bonds or irrevocable letters of credit from financial institutions acceptable to MMS.

§ 208.12 Payment requirements.

(a) All payments to MMS by a purchaser of royalty oil will be due on the date and at the location specified in the contract, or, if there is no contractual provision, as specified by MMS. The purchaser shall tender all payments to MMS in accordance with 30 CFR 218.51. Payments made by a payor pursuant to the requirements of paragraph (b) of this section and § 208.13(b) also shall be tendered in accordance with 30 CFR 218.51.

(b)(1) Payments from a purchaser of royalty oil not received by MMS when due, or that portion of the payment less than the full amount due, will be subject to a late payment charge equivalent to an interest assessment on the amount past due for the number of days that the payment is late at the underpayment rate applicable under section 6621 of the Internal Revenue Code of 1954.

(2) The MMS may assess interest to a payor for any underpayments which are the result of the payor's late or underreporting, or for adjustments reported by the payor, or made as a result of audit, reconciliation, or other procedures. The interest for late payment and underpayment will be assessed pursuant to 30 CFR 218.54.

(c) If payment for royalty oil is not received by the due date specified in the contract, a notice of nonreceipt will be sent to the purchaser by certified mail. If payment is not received by MMS within 15 days from the date of such notice, MMS may cancel the contract and collect under the surety.

(d) If the purchaser disagrees with the amount of payment due, it must pay the amount due as computed by MMS, unless the purchaser appeals the amount and posts acceptable surety pursuant to the provisions of 30 CFR Part 243. The MMS may, at its discretion, waive the appeal surety requirements if it determines that the contract surety is sufficient protection for an amount under appeal.

§ 208.13 Reporting requirements.

(a) In addition to any other applicable royalty reporting requirements, the lessee/operator shall provide to MMS a semiannual report, by lease, of the monthly entitlements and actual deliveries of royalty oil to purchasers on Form MMS-4071, "Semiannual Report of RIK Oil Entitlements and Deliveries."

(b) If MMS underbills a purchaser under a royalty oil contract because of a payor's underreporting or failure to report on Forms MMS-2014 pursuant to 30 CFR 210.52, the payor will be liable for payment of such underbilled amounts, plus interest, if they are unrecoverable from the purchaser or the surety related to the contract.

§ 208.14 Civil and criminal penalties.

Failure to abide by the regulations in this part may result in civil and criminal penalties being levied on that person as specified in sections 109 and 110 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1719–20, and regulations at 30 CFR Part 241. Civil penalties applicable under the OCSLA and the Mineral Leasing Act of 1920 may also be imposed.

§ 208.15 Audits.

Audits of the accounts and books of lessees, operators, payors, and/or purchasers of royalty oil taken in kind may be made annually or at such other times as may be directed by MMS. Such audits will be for the purpose of determining compliance with applicable statutes, regulations, and royalty oil contracts.

§ 208.16 Appeals.

Except as provided in § 208.12(d) of this part, orders or decisions issued under the regulations in this part may be appealed as provided in 30 CFR Parts 243 and 290.

§ 208.17 Suspensions for national emergencies.

The Secretary of the Department of the Interior, upon a recommendation by the Secretary of Defense or the Secretary of Energy and with the approval of the President, may suspend operations under these regulations and suspend royalty oil contracts during a national emergency declared by the Congress or the President.

PART 209—[REMOVED]

30 CFR Part 209 is removed.

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Friday
October 30, 1987

Part V

Equal Employment Opportunity Commission

29 CFR Part 1613

Equal Employment Opportunity in the Federal Government; Complaints of Discrimination; Final Rule

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1613

Equal Employment Opportunity in the Federal Government; Complaints of Discrimination

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: The Equal Employment Opportunity Commission proposed to revise its regulations on equal employment opportunity in the federal government. 51 FR 29482 (August 18, 1986). The amendments included numerous changes in the investigative, hearing and agency decisionmaking process, and changes in the appellate process. This rule adopts in regulatory form the Commission's Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination. In addition, this rule adopts comprehensive changes to the existing federal sector discrimination complaint process as set out below.

EFFECTIVE DATE: November 30, 1987. The provisions of §§ 1613.215(a)(3), 1613.283, 1613.513, 1613.604(i) and 1613.643 shall apply where the civil action was filed after the effective date of these regulations.

FOR FURTHER INFORMATION CONTACT: Nicholas M. Inzeo, Assistant Legal Counsel, at 634–6592.

SUPPLEMENTARY INFORMATION: The Equal Employment Opportunity Commission issued a Notice of Proposed Rulemaking, 51 FR 29482 (August 18, 1986), proposing, *inter alia*, comprehensive changes in the investigation of discrimination complaints in the federal sector and in the appellate and enforcement procedures used by the Commission. In addition, the Commission proposed to incorporate the Policy Statement on Remedies and Relief for Individual Cases of Discrimination into its regulations on equal employment opportunity in the federal sector. The proposal to incorporate the Policy Statement generated a good deal of comment. After a careful review of the comments, the Commission has decided to incorporate the Policy Statement into its regulations. At this time the Commission is issuing comprehensive final regulations and is adopting the Policy Statement as Appendix A to the regulations. A summary of the comments received and changes made to the regulations is set out below.

The proposed amendment to § 1613.212 would permit employees and applicants to bring a complaint against any agency they believe engaged in discriminatory conduct. There were no comments criticizing this approach, but a number of commenters suggested clarification of the regulation to make it clear that the complaint must be filed with the agency alleged to have committed the discrimination. The words "by that agency" have been added to make this clarification.

A new § 1613.213(b) is added to require notice to aggrieved persons of the election of remedies required by 5 U.S.C. 7121(d) so that they can make informed choices.

A number of issues were addressed by the commenters in relation to § 1613.214. There was general agreement about the provisions concerning time limits for filing complaints. A number of commenters sought more detail in the provision concerning official time. The Commission has supplied more detail on this issue in a management directive. The standard for official time, reasonableness, remains the same. In response to comments, the regulation now provides for official time to "prepare" complaints, rather than the prior language of "present" complaints.

The provision dealing with disqualification if there is conflict of interest has been revised in response to comments. Commenters sought more guidance on the meaning of conflict of interest and wanted to include "conflict of position" in the regulation. The regulation now permits disqualification when representation would conflict with the representative's duties. As an example, a counselor could not serve as a representative for either party.

One commenter raised the question of rights of the alleged discriminating officials in relation to this section. Comments were raised elsewhere suggesting that the alleged discriminating official be given more rights in this process. The Commission does not agree with those comments. The central purpose of the complaint processing system is to determine when discriminatory conduct has occurred, not to provide rights to those who took the actions. The discrimination complaint process does not determine the rights of those who have taken the actions, and therefore, the Commission believes it is unnecessary and wasteful to build in regulatory rights in that process for those individuals. All references to the concept of an "alleged discriminating official" have been eliminated from the regulations.

Section 1613.215 was proposed to state new grounds for rejection or cancellation of complaints including cancellation for failure to accept full relief. A number of commenters suggested expanding and clarifying the reason for rejection of complaints. The Commission agrees and has redrafted subsection (a) to require rejection or cancellation in seven instances. Claims currently pending before an agency or that have been decided by the agency or the court are added as bases for rejection. A non-mixed case complaint that alleges that an agency is proposing to take action that may be discriminatory is to be rejected under § 1613.215(a)(2). Section 1613.215 does not apply to mixed cases, however; mixed case complaints on proposals are governed by § 1613.406. The Commission rejects the comment that "frivolous" complaints be rejected. The term is too vague to permit wholesale cancellation of complaints. Cancellation of a complaint where a civil action is filed was supported by the comments, but some commenters wanted the complaint processing resumed if the court rejected the complaint or if the court allegations did not contain all the allegations of the administrative complaint. The Commission is not adopting those comments because they are contrary to the purpose of the regulatory provision, i.e., they would permit administrative and judicial processing to occur together. The provision adopted by the Commission is closely analogous to its private sector complaint processing regulation. See 29 CFR 1601.28(a)(3). Subsection 1613.215(a)(4) has been amended to refer specifically to 29 CFR 1613.214. Subsection 1613.215(a)(6) permits agencies to issue final agency decisions along with a dismissal for failure to prosecute. If, on appeal , the reasons for failure to prosecute are not upheld and the complainant had requested a hearing, then the complaint will be remanded to the agency for a hearing.

A number of comments were raised about the dismissal for failure to accept complete relief. The final regulation adopts a comment from a number of agencies, i.e., that the certification of full relief be made by the Director of EEO rather than by the General Counsel. No requirement is placed on the agency to admit discrimination in its settlement offer. The provision is intended to apply to the full panoply of employment decisions, not just nonselection. The provision on complete relief has been modified to make explicit reference to § 1613.271 where the regulations include the Commission's Policy Statement. The new provision also adopts language similar to that in § 1613.221(c) that the agency decision whether to discipline need not be included in a settlement offer of full relief. The approach of § 1613.221(c) has worked well in the federal sector and the Commission has decided to retain that approach.

One agency questioned whether § 1613.216 should require that comparative information be maintained in the complaint file by name. The Commission believes that comparative evidence, whether it be of an individual or a group, is of such importance that a complete identification should be made in the complaint file. A complete identification will ensure that the information is accurate.

The settlement provisions of § 1613.217 raised a number of comments. Some commenters wanted the regulations to permit the complainant to accept an offer of settlement and unilaterally sever the issue of attorney's fees, or require agencies to always offer backpay and attorney's fees in a settlement. The Commission believes that the settlement process is a voluntary one. The decision of whether an agency will settle, and on what terms, is left to the discretion of the agency.

A number of commenters suggested that the regulation identify an individual to receive allegations of noncompliance with a settlement and time limits for filing allegations and appeals. The Commission agrees and has added those provisions to subsection (b). Some commenters questioned why reinstatement of a complaint can be a resolution for an alleged breach of a settlement. If the facts demonstrate that the parties reasonably did not have the same understanding of the agreement, then reinstatement of the complaint could be the most appropriate result.

In response to the comments on § 1613.218, the Commission made a number of clarifying revisions. Three significant changes were made. First, the authority of Administrative Judges, in response to a party's request, to order production of evidence or witnesses was clarified. Second, the regulation provides parties an opportunity to explain nonproduction before an unfavorable order is issued. If a party's explanation demonstrates that it has not acted in bad faith, an adverse inference would not be drawn. Third, the regulation provides the parties an opportunity to present arguments why a hearing should be conducted on a complaint. Most commenters agreed that hearings should be closed since it is part of the investigation of the complaint.

Section 1613.219 is added to address the election between the negotiated grievance process and this process, and § 1613.231 continues to indicate that a person may appeal to EEOC from a decision of an agency head or designee on a negotiated grievance.

In response to comments from agencies about the time limit in § 1613.220(d) to issue decisions, the Commission is extending the time to 60 days. Additional requirements are placed on the agency in § 1613.221. This time starts upon "receipt" of the file, rather than upon "submission" as the proposed regulation provided.

The proposed changes to § 1613.221 received very little comment. Clarifying changes were made to subsections (b)(2) and (b)(3). The preponderance of evidence standard is the one used by the courts and is appropriate for the administrative process. Requiring agencies to explain why a recommended decision has been rejected or modified will permit the Commission's Office of Review and Appeals (ORA) to more expeditiously review agency decisions.

Some commenters questioned the Commission's authority in § 1613.235 to reopen an appellate decision at any time. Such authority would be exercised only in an extreme situation to avoid injustice. Some commenters suggested that the grounds for reopening be clarified. The Commission retains these standards because experience has shown that the grounds have not been too broadly or too narrowly interpreted.

Upon coordination of proposed § 1613.239, the Commission has made two changes. The wording of subsection (b) was changed. The Commission intends to work closely with the Office of Special Counsel to obtain enforcement of Commission orders. Subsection (c) was eliminated at the suggestion of the General Accounting Office. A suggestion to move § 1613.240 to follow § 1613.233 was not adopted to avoid the perception that § 1613.240 only applied to § 1613.233.

A number of questions, comments and objections concerning the remedial provisions of the Commission's Policy Statement were raised in the context of § 1613.271 and Appendix A. We address the concerns raised about each remedial provision. It should be noted that the Policy Statement applies to private sector and federal sector charges, but contains the admonition that the remedies are to be applied "in appropriate circumstances." Where caselaw dictates that certain remedies not be available, then the Policy Statement should not be read to require those remedies. Prejudgment interest is not available, unless a statute has waived sovereign immunity. *Nagy* v. *Postal Service*, 773 F.2d 1190 (11th Cir. 1985).

The posting requirement is not redundant of notices already required in the federal workplace. It is a general notice of law enforcement activity, like that required by the National Labor Relations Board or the Federal Labor Relations Authority, that dispels the chilling effect that discrimination has on the exercise of employee's rights, assures employees that the status quo has changed, reminds employees of their right to seek relief under the statutes enforced and bolsters the entitlement of complainants to the relief obtained. Notices of a general nature need not name complainants or otherwise impinge on their privacy interests. With the consent of the complainant, the notice can include the name of the complainant.

The requirement of corrective, curative or preventive action will permit the Commission to recommend that discipline be considered by the agency. The Commission will not discipline, or order discipline of, employees directly, but will work closely with the Office of Special Counsel of the Merit Systems Protection Board, which is the established mechanism for taking disciplinary action against employees who engage in a prohibited personnel practice. When an agency does not adequately explain its reason for not taking discipline the Commission will refer the matter to the Special Counsel.

Many commenters objected to the requirement of nondiscriminatory placement. For all the reasons explained below, the Commission believes that nondiscriminatory placement, as a presumptive remedy, unless extraordinary circumstances exist, is the appropriate standard. The remedial provisions of the National Labor Relations Act, after which the remedial provisions of section 717 of Title VII and section 15 of the ADEA are patterned, have long been interpreted to require nondiscriminatory placement, even in those instances where it causes the displacement of an incumbent employee. The nondiscriminatory placement remedy, as enunciated in the Commission's Policy Statement, applies only to individual cases of discrimination and is available only to victims of discrimination.

A presumptive entitlement to nondiscriminatory placement is consistent with the Supreme Court's decisions that backpay and retroactive seniority are presumptive remedies that can be denied only for reasons that would not frustrate the goals of eradicating discrimination and providing make-whole relief. It would not be consistent with the goals of eradicating discrimination to routinely deny nondiscriminatory placement merely because the employer had filled the position. In the Commission's view, the balance of equities is with the victim of discrimination who would have had the position but for the discrimination, rather than the employee who obtained the position as a result of the employer's discrimination, although the primary burden of the remedy must be borne in all instances by the employing agency, rather than innocent third parties.

The presumption of nondiscriminatory placement is supported by the current regulations, by caselaw and by the practice of other federal sector enforcement agencies. Section 1613.271(a)(1) has, without qualification, required reinstatement of victims of discrimination. In *Parks* v. *Dunlop*, 517 F.2d 785 (5th Cir. 1975), the Department of Justice, representing the government in defense of an employment discrimination suit, conceded that nondiscriminatory placement was an appropriate remedy. The court in *Griffiths* v. *Hampton*, 12 Empl. Prac. Dec. (CCH) ¶ 11,038 (D.D.C. 1976), found that denial of the presumptive nondiscriminatory placement remedy would be inconsistent with the purposes of the statute. The practice of the Merit Systems Protection Board and the Federal Labor Relations Authority has also been to use a presumptive placement remedy. As Appendix A demonstrates, the agency's obligation to provide nondiscriminatory placement is satisfied by an offer of the position denied or by the offer of a substantially equivalent position.

It is assumed that agencies will, when possible, prefer to offer a substantially equivalent position rather than displacing an incumbent to make way for a victim of discrimination, since such displacement would require a new placement of two persons, the victim and the person displaced. Such a preference is consistent with the Remedies Policy, which seeks to ensure that the victim is made whole, but does not forbid agencies from accomplishing that objective in the least disruptive manner possible.

Clarifying changes have been made to § 1613.271 and Appendix A. Remedies available to an applicant for employment are clarified in subsection (b), and subsection (a) has been amended to make clear that Appendix A is designed to provide a fuller explanation of the remedial provisions. The attorney's fee provision is changed to clearly permit calculation of fees by first arriving at a lodestar figure and to explicitly apply to Rehabilitation Act claims. The parenthetical in subsection (1)(b) of the appendix was changed to reflect the absence of an upper age limit.

In response to comments, the Commission has changed §§ 1613.283 and 1613.513 to require termination of a complaint if a civil action is filed involving that complaint. The provision continues to be mandatory to assure that dual administrative and judicial processing not occur.

A number of changes were made to the subpart on class complaints to conform their requirement to the individual complaint regulations. Section 1613.609(d), providing for a fairness hearing for settlement of class complaints, received only a few comments. Clarifying changes were made to subsection (d) to specify who receives a petition and to specify that the Administrative Judge will make a recommendation on the petition.

There are a number of matters of uncertainty concerning the relationships among federal agencies, the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and the Special Counsel, as they relate to the section 1613 regulations. These matters will be addressed separately in the near future.

List of Subjects in 29 CFR Part 1613

Equal employment opportunity, Government employees.

For the Commission.

Clarence Thomas,

Chairman.

Accordingly, 29 CFR Part 1613 is amended as follows:

PART 1613—[AMENDED]

1. The authority citation for Part 1613 is revised to read as follows:

Authority: 42 U.S.C. 2000e–16; 29 U.S.C. 633a; 29 U.S.C. 791 and 794a; 29 U.S.C. 206(d); E.O. 10577, 3 CFR 218 (1954–1958 Comp.); E.O. 11222, 3 CFR 306 (1964–1965 Comp.); E.O. 11478, 3 CFR 133 (1969 Comp.); E.O. 12106, 44 FR 1053 (1978); Reorg. Plan No. 1 of 1978, 43 FR 19807 (1978) unless otherwise noted. The authority citations for all subparts of Part 1613 are deleted and the textual authority citations, except in subpart D, are deleted.

2. Section 1613.211 is revised to read as follows:

§ 1613.211 General.

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, national origin, age or handicapping condition comply with the principles and requirements in §§ 1613.212 through 1613.222, except where excluded in § 1613.514.

3. Section 1613.212(a) is revised to read as follows:

§ 1613.212 [Amended]

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or handicapping condition. A complaint may also be filed by an organization for the aggrieved person with that person's consent.

* * * * *

4. Section 1613.213 is amended by revising the first sentence of paragraph (a), by redesignating paragraphs (b) and (c) as paragraphs (c) and (d), and by adding new paragraph (b) as follows:

§ 1613.213 [Amended]

(a) The agency shall require that an aggrieved person who believes that he or she was discriminated against because of race, color, religion, sex, national origin, age or handicapping condition consult with an Equal Employment Opportunity Counselor to try to resolve the matter. * * *

(b) Upon initial contact or as soon thereafter as possible, the Equal Employment Opportunity Counselor shall inform each aggrieved person of the possible applicability of 5 U.S.C. 7121(d) to the alleged discriminatory action. The Equal Employment Opportunity Counselor shall communicate the substance of § 1613.219 concerning the election of remedies to each aggrieved person.

* * * * *

5. Section 1613.214 is revised to read as follows:

§ 1613.214 Filing and processing of complaint.

(a) *Time limits.* (1) An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if:

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the date of receipt of the notice of the right to file a complaint.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge, in writing, to the complainant or representative receipt of the complaint and advise the complainant in writing of all administrative rights and of the right to file a civil action as set forth in § 1613.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

(b) *Representation and official time.* (1) At the stage in the processing of a complaint, including the counseling stage under § 1613.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

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

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

4. Section 1613.215 is revised to read as follows:

§ 1613.215 Rejection or cancellation of complaint.

(a) The agency head or designee shall reject or cancel a complaint:

(1) That fails to state a claim under § 1613.212 or that states the same claim that is pending before or has been decided previously by the agency;

(2) That alleges that an agency is proposing to take action that may be discriminatory;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party;

(4) That is filed untimely, unless the agency extended the time limits in accordance with § 1613.214(a)(4);

(5) That the complainant elected to pursue under a negotiated grievance procedure as identified in § 1613.219;

(6) That the complainant has failed to prosecute. The agency may cancel an allegation or a complaint for failure to prosecute only after it has provided the complainant with a written request, that includes a notice of the proposed cancellation, to provide certain information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within 15 calendar days of its receipt. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available; or

(7) If the complainant refuses within 15 calendar days of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's Director of Equal Employment Opportunity, or a designee reporting directly to the Director, has certified in writing that the agency's written offer of relief constitutes full relief. An offer of full relief under this subsection is the appropriate relief in § 1613.271. The offer need not contain the decision whether disciplinary action is necessary, but the basis for the decision shall be recorded separately from the complaint file.

(b) The agency head or designee shall transmit the decision to reject or cancel a complaint by letter to the complainant and the complainant's representative. The decision letter shall inform the complainant of the right to appeal the decision to the Commission, the time limit for filing an appeal with the Commission, and the complainant's right to file a civil action as described in § 1613.281.

5. Section 1613.216 is revised to read as follows:

§ 1613.216 Investigation.

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant and witnesses, and copies of, or extracts from records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a written authorization:

(1) To investigate all aspects of complaints of discrimination,

(2) To require all employees of the agency to cooperate with him in the conduct of the investigation, and

(3) To require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

(c) The Commission may assume responsibility for the investigation of any portion or all of an agency's complaints upon the execution of a memorandum of understanding to this effect with the agency. The agency shall reimburse the Commission for all expenses incurred in connection with the investigation. The Commission shall forward to the agency upon completion of the investigation the investigative file and the recommended proposed disposition. The agency shall adopt as its proposed disposition of the complaint the Commission's recommended disposition unless within 30 days after the agency receives the investigative file and recommended disposition the complaint has been informally adjusted in accordance with § 1613.217(a), or the agency has notified the complainant of its own proposed disposition in accordance with § 1613.217(c).

6. Section 1613.217 is revised to read as follows:

§ 1613.217 Adjustment of complaint and offer of hearing.

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant, or the complainant's representative if there is one, a copy of the investigative file promptly after receiving if from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief. Where the parties agree on an adjustment of the complaint, but cannot agree on whether attorney's fees or costs should be awarded or on the amount of attorney's fees or costs, the issue of the award of attorney's fees or costs or the amount which should be awarded may be severed and shall be the subject of a final decision under § 1613.221(d). The decision of whether to award attorney's fees or costs or of the amount to be awarded may be the subject of an appeal to the Commission under the provisions of §§ 1613.231 through 1613.240.

(b) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement, the complainant shall notify the Director of Equal Employment Opportunity, in writing, of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Upon receipt of the complainant's written allegation of noncompliance with the settlement agreement, the agency shall have thirty (30) calendar days in which to resolve the matter and to respond to the complainant, in writing, concerning the matter. If, after thirty (30) calendar days from the date of the agency's receipt of the complainant's written allegations of noncompliance with the settlement agreement, the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement. The complainant may file such an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 20 days of receipt of an agency's determination. Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it may deem necessary or it may direct that an investigation or hearing on the matter be conducted, as may be appropriate. If the Commission determines that agreement has not been complied with and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Complaints that alleged reprisal or further discrimination violate a settlement agreement shall be processed as individual complaints under § 1613.214 rather than under this section.

(c) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing:

(1) Of the proposed disposition of the complaint,

(2) Of the right to a hearing, unless a recommended decision is issued under § 1613.218(g), and decision by the agency head or designee if he/she notifies the agency in writing within 15 calendar days of the receipt of the notice that he/she desires a hearing, and

(3) Of the right to a decision by the head of the agency or designee without a hearing.

(d) If the complainant fails to notify the agency of his/her wishes within the 15-day period prescribed in paragraph (c) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (c) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and the representative which shall inform the complainant of the right of appeal to the Commission and the time limit applicable to such an appeal and of the right to file a civil action as described in § 1613.281. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency or designee for decision under § 1613.221.

7. Section 1613.218 is revised to read as follows:

§ 1613.218 Hearing.

(a) Administrative Judge. The hearing shall be conducted by a Commission Administrative Judge with an appropriate security clearance, except in instances where the Commission finds it is practical to delegate this responsibility to a complaints examiner or Administrative Judge from another agency who shall not be an employee of the agency in which the complaint arose. (For purposes of this paragraph, the Department of Defense is considered to be a single agency.) When the Commission does not provide the Administrative Judge, it will supply the agency with the name of an Administrative Judge from another agency with an appropriate security clearance who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) Arrangement for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 1613.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the Administrative Judge in making a recommended decision on the complaint), to the Administrative Judge who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the Administrative Judge determines that further investigation is needed, the Administrative Judge shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 1613.216 apply to any further investigation by the agency on the complaint. The Administrative Judge shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the Administrative Judge to have a direct connection with the complaint. Hearings are part of the investigative process and are thus closed to the public.

(2) The Administrative Judge shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the Administrative Judge shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policies or practices relevant to the complaint shall be received in evidence. The complainant and the agency, or the representative of either shall be given the opportunity at the hearing to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of Administrative Judge. In addition to the other powers vested in the Administrative Judge in accordance with this subpart, the Administrative Judge is authorized to:

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof and receive relevant evidence;

(4) Order the production of documents, records, comparative data, statistics, affidavits or the attendance of witnesses;

(5) Limit the number of witnesses whose testimony would be unduly repetitious; and

(6) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. In cases of repeated or flagrant contumacious conduct or misbehavior by a representative, the Administrative Judge may refer the matter to the Commission, and the Commission may, after giving the representative an opportunity to respond to the allegations of misconduct, suspend or disqualify the representative from further representational activity and report the misconduct to other appropriate authorities.

(e) If the complainant or agency in bad faith refuses or fails without adequate explanation to respond fully and in timely fashion to requests made or approved by the Administrative Judge for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the Administrative Judge:

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

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

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

(4) To take such other actions as deemed appropriate.

(f) Witnesses at hearing. The Administrative Judge shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when the Administrative Judge determines that the appearance of an employee is necessary. The Administrative Judge may also request the appearance of an employee of any federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The Administrative Judge shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the Administrative Judge and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the Administrative Judge. If the explanation is inadequate, the Administrative Judge shall so advise the agency and it shall make the employee available as a witness at the hearing. If the explanation is adequate, the Administrative Judge shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee at another time or through written interrogatory. An employee of an agency shall be in a duty status during the time he/she is made available as a witness.

(g) If the Administrative Judge determines that there are no issues of material fact, the Administrative Judge may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue a recommended decision without holding a hearing. The recommended decision will conform to § 1613.218(i) in all other aspects.

(h) Record of hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the Administrative Judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the Administrative Judge shall make the document available to the agency representative for reproduction.

(i) Findings, analysis, and recommendations. The Administrative Judge shall transmit to the head of the agency or designee:

(1) The complaint file (including the record of the hearing),

(2) The findings and analysis of the Administrative Judge with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and

(3) The recommended decision of the Administrative Judge on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose.

The Administrative Judge shall notify the complainant of the date on which this was done. In addition, the Administrative Judge shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

8. Section 1613.219 is revised to read as follows:

§ 1613.219 Relationship to grievance procedures.

(a) Allegations of discrimination on grounds of race, color, religion, sex, national origin, age or handicapping condition may be raised under a grievance procedure by employees in agencies that are subject to the provisions of 5 U.S.C. 7121(d) and who are covered by a collective bargaining agreement that provides for allegations of discrimination to be raised in the negotiated grievance procedure. Allegations of discrimination by employees not covered by such a negotiated grievance procedure or by employees of agencies not subject to 5 U.S.C. 7121(d) shall be processed as complaints under § 1613.214 *et seq.*

(b) In cases where a person is covered by a negotiated grievance procedure permitting allegations of discrimination, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect the forum in which to pursue the matter: either the process described in this part or a negotiated grievance procedure. An aggrieved employee who files a grievance in writing with an agency whose negotiated agreement with an employee organization permits the acceptance of grievance which allege discrimination prohibited by this subpart, may not thereafter file a complaint on the same matter under the provisions of this subpart irrespective of whether the grievance has raised an allegation of discrimination within the negotiated grievance procedure. Any such complaints filed after a grievance has been filed on the same matter shall be rejected without prejudice to the complainant's rights to proceed through the negotiated grievance process, including the complainant's right to request the Commission to review a final decision as provided in 5 U.S.C. 7121(d) and at § 1613.231(b). The agency decision letter rejecting such a complaint shall advise the complainant of the right to appeal the agency decision to the Commission. An election, pursuant to this paragraph, to proceed under this Part is indicated only by the filing of a formal complaint, in writing. Use of the pre-complaint process as described in § 1613.213 does not constitute an election for the purposes of this section.

9. Section 1613.220 is amended by removing the word "monthly" in the first sentence of paragraph (c) and by revising paragraphs (b) and (d) to read as follows:

§ 1613.220 Avoidance of delay.

* * * * *

(b) The head of the agency or designee shall cancel a complaint if the complainant fails to prosecute the complaint without undue delay by following the procedures for cancelling a complaint under § 1613.215.

* * * * *

(d) When the Administrative Judge has submitted a recommended decision it shall become a final decision binding on the agency 60 calendar days after the receipt of the complete complaint file and the recommended decision by the agency unless the agency has already issued a final decision. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the Administrative Judge under § 1613.218(i) and a copy of the hearing record and also shall notify him in writing of the right to appeal to the Commission and the time limits applicable to such an appeal and of the right to file a civil action as described in § 1613.281. The agency shall provide the Administrative Judge with a copy of its final decision on each complaint on which a recommended decision has been issued.

10. Section 1613.221 is revised to read as follows:

§ 1613.221 Decision by head of agency or designee.

(a) The head of the agency or designee shall make the decision of the agency on a complaint based on the preponderance of evidence in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing, shall reflect the date of its issuance, and shall be transmitted to the complainant and his or her representative either by certified mail, return receipt requested, or by any other method which enables the agency to show the date of receipt.

(2) When the Administrative Judge has issued a recommended decision on the complaint under § 1613.218(g) or (i)(3), the decision letter shall transmit a copy of such recommended decision and a copy of the hearing record if a hearing was held. The decision of the agency shall adopt, reject, or modify the decision recommended by the Administrative Judge. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejecting or modifying the findings of fact or conclusions of law made by the Administrative Judge.

(3) When there has been no hearing and no recommended decision under § 1613.218(g), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall:

(1) Advise the complainant and his or her representative that any request for attorney's fees or costs must be documented and submitted within 20 calendar days of receipt,

(2) Require remedial action to be taken in accordance with § 1613.271,

(3) Review the matter giving rise to the complaint to determine whether disciplinary action is appropriate and

(4) Record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be recorded in the complaint file.

(d) When the final agency decision provides for an award of attorney's fees or costs, the amount of these awards shall be determined under § 1613.271(c). In the unusual situation in which the agency determines not to award attorney's fees or costs to a prevailing complainant, the agency shall set forth in its decision the specific reasons for denying the award.

(e) The decision letter shall inform the complainant of his or her right to appeal the decision of the agency to the Commission, and shall include the text of § 1613.233 (a) or (b), as appropriate. The decision letter shall also inform the complainant of his or her right to file a civil action in accordance with § 1613.281, and of the time limits applicable to such an appeal.

11. Section 1613.222 is revised to read as follows:

§ 1613.222 Complaint file.

The agency shall establish a complaint file. Except as provided in § 1613.221(c), this file shall contain all documents pertinent to the complaint.

(a) The complaint file shall include copies of:

(1) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under § 1613.213(a);

(2) The written report of the Equal Employment Opportunity Counselor on whatever precomplaint counseling efforts were made with regard to the complainant's case;

(3) The complaint;

(4) The investigative file,

(5) If the complaint is withdrawn by the complainant, a written statement of the complainant or representative to that effect;

(6) If adjustment of the complaint is arrived at under § 1613.217, the written record of the terms of adjustment;

(7) If no adjustment of the complaint is arrived at under § 1613.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of the right to a hearing and documentation of the attempt to adjust the complaint;

(8) If decision is made under § 1613.217(d), a copy of the letter to the complainant transmitting that decision,

(9) If a hearing was held, the record of the hearing, together with the Administrative Judge's findings, analysis and recommendations, if any, made to the head of the agency or designee,

(10) If the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by the Director to the head of the agency or designee,

(11) If decision is made under § 1613.221, a copy of the letter transmitting the decision of the head of the agency or designee, and

(12) Proof of the date of receipt of final agency decision, as required under § 1613.221(b)(1).

(b) The complaint file shall not contain any document that has not been made available to the complainant or the complainant's designated physician under 5 CFR 294.401.

12. Section 1613.231 is revised to read as follows:

§ 1613.231 Right to appeal to the Commission.

(a) A complainant may appeal to the Commission the decision of the head of the agency or designee:

(1) To reject or cancel the complaint or any portion for reasons covered by § 1613.215; or

(2) Under the circumstances set forth in § 1613.217(b); or

(3) On the merits of the complaint, under §§ 1613.217(d), 1613.220(d) or 1613.221, or on the award of attorney's fees or costs.

(b) A complainant may appeal to the Commission on issues of employment discrimination raised in a negotiated grievance procedure covered by § 1613.219(a), where the agency's negotiated labor-management agreement permits such issues to be raised. A complainant may appeal the decision:

(1) Of the agency head or designee on the grievance;

(2) Of the arbitrator on the grievance; or

(3) Of the Federal Labor Relations Authority (FLRA) on exceptions to the arbitrator's award.

A complainant may not appeal under this subsection, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration or is before the FLRA. Any appeal prematurely filed in such circumstances shall be dismissed without prejudice.

13. Section 1613.234 is revised to read as follows:

§ 1613.234 Appellate procedures and finality.

(a) *Procedures.* On behalf of the Commission, the Office of Review and Appeals shall review the complaint file and all relevant written representations submitted by either party. The Office may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. There is no right to a hearing before the Office or the Commission upon appeal. The Office or the Commission shall issue a written decision setting forth its reasons for the decision and shall send copies to the complainant, the complainant's designated representative, and the agency. When corrective action is ordered, the agency shall report within the time specified to the Office that the corrective action has been taken.

(b) *Finality.* A decision issued under this section is final within the meaning of §§ 1613.281 and 1613.641 unless:

(1) Within 30 days of receipt a decision issued under paragraph (a) of this section, either party files a timely request to reopen pursuant to § 1613.235, or

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

14. Section 1613.235 is revised to read as follows:

§ 1613.235 Reopening and reconsideration.

(a) The Commission may, in its discretion, reopen and reconsider any decision of the Commission notwithstanding any other provisions of this part.

(b) Parties may request reopening or reconsideration provided that such request is made within 30 days of receipt of a decision issued pursuant to § 1613.234 or within 20 days of receipt of another party's timely request to reopen. Such requests shall be submitted to the Office of Review and Appeals. The request shall contain arguments or evidence which tend to establish that:

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

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

(3) The decision is of such exceptional nature as to have effects beyond the actual case at hand.

(c)(1) The party requesting reopening or reconsideration shall submit copies of the request and supporting documents to all other parties and their representatives at the time of the request along with proof of such submission.

(2) Any argument in opposition to the request to reopen or cross request to reopen shall be submitted to the Office of Review and Appeals and to the requesting party within 20 days of receipt of the request to reopen along with proof of such submission.

(d) A decision on a request to reopen by either party is final and there is no further right by either party to request reopening.

§ 1613.236 [Removed].

15. Section 1613.236 is removed.

16. A new § 1613.237 is added to Part 1613 to read as follows:

§ 1613.237 Corrective action.

(a) Corrective action ordered by the Office of Review and Appeals or the Commission is mandatory and binding on the agency except as provided in § 1613.234(b). Failure to implement ordered relief shall be subject to judicial enforcement as specified in § 1613.239(c).

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

(1) Service under the temporary or conditional restoration provisions of this paragraph shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, provided the Commission—

(i) Upholds its decision after reopening the case, or

(ii) Refuses to reopen.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reopening, that the remedial action it takes is temporary or conditional.

(c) When no request for reopening is filed within 30 days of receipt of the decision, or when a request to reopen is denied, the agency shall execute the action ordered and there is no further right to delay implementation of the ordered relief. The corrective action shall be completed not later than sixty (60) days after the decision becomes final.

17. A new § 1613.238 is added to Part 1613 to read as follows:

§ 1613.238 Enforcement of final decisions.

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

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

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

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

18. A new § 1613.239 is added to Part 1613 to read as follows:

§ 1613.239 Enforcement action by the Commission.

(a) *Notice to show cause.* The Commission may issue a notice to the Head of any federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the Head of the agency or representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons why compliance has not been effectuated.

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

(c) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit its report of corrective action, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to section 717 of Title VII, section 15 of the Age Discrimination in Employment Act, or section 505 of the Rehabilitation Act, and to seek judicial review of the agency's refusal to implement corrective action pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the Mandamus Statute, 28 U.S.C. 1361, or commence de novo proceedings pursuant to the appropriate statutes.

19. A new § 1613.240 is added to Part 1613 to read as follows:

§ 1613.240 Computation of time.

With respect to time periods specified in this subpart:

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

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

20. Section 1613.261 is revised to read as follows:

§ 1613.261 Freedom from restraint, interference, coercion and reprisal.

It is unlawful to restrain, interfere, coerce or discriminate against complainants, their representatives, witnesses, Directors of Equal Employment Opportunity, Equal Employment Opportunity Officers, Investigators, Counselors and other agency officials with responsibility for processing discrimination complaints because of involvement with a discrimination charge during any stage in the presentation and processing of a complaint, including the counseling stage under § 1613.213, or because an individual filed a charge of discrimination, testified, assisted or participated in any manner with an investigation, proceeding or hearing or because of any opposition to an unlawful employment practice under this part.

21. Section 1613.262 is revised to read as follows:

§ 1613.262 Review of allegations of reprisal.

(a) An individual who alleges a violation of § 1613.261 may have the allegation reviewed as an individual complaint of discrimination under §§ 1613.211 through 1613.283.

(b) When a complainant alleges a violation of § 1613.261 in connection with the filing of a prior discrimination complaint and the prior complaint is in process at the agency when the allegation is made, the complainant may request the agency to consolidate the reprisal allegation with the prior complaint. If the prior complaint is at the hearing stage of the complaint process under § 1613.218, the complainant may request the Administrative Judge to consolidate the allegation with the complaint at the hearing. The agency or Administrative Judge may grant the request. *Provided*, that the request is made within 30 calendar days of:

(1) The act that forms the basis of the allegation,

(2) The effective date of the alleged discriminatory personnel action, or

(3) The date the complainant knew or should reasonably have known that § 1613.261 has been violated.

The agency or the Administrative Judge may exercise discretion and deny the request and require the allegation to be processed under § 1613.262(a).

22. Section 1613.271 is revised to read as follows:

§ 1613.271 Remedial actions.

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

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

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

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

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

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

(b) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Backpay, computed in the same manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer of employment is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by 5 CFR 550.805, from the date he would have been appointed until the date the offer was made, subject to the limitation of paragraph (b)(4) of this section. The agency shall inform the applicant, in its offer of employment, of his right to this award in the event the offer is declined.

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

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) Backpay under this paragraph for complaints under Title VII or the Rehabilitation Act may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant.

(c) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by 5 CFR 550.805, unless the record contains clear and convincing evidence that the employee would not have been promoted or employed at a higher grade, even absent discrimination. The backpay liability under Title VII or the Rehabilitation Act may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date the employee would have been promoted.

(2) If the record contains clear and convincing evidence that, although discrimination existed at the time selection for promotion was made, the employee would not have been promoted even absent discrimination, the agency shall eliminate any discriminatory practice and ensure it does not recur.

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

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

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

(d) Attorney's fees or costs—(1) Awards of attorney's fees or costs. The provisions of this subpart relating to the award of attorney's fees or costs shall apply to allegations of discrimination or retaliation prohibited by section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, and sections 501 and 505 of the Rehabilitation Act, 29 U.S.C. 791 and 794a. In a decision by an agency, under §§ 1613.217, 1613.220(d), 1613.221 or 1613.612 or by the Commission, under §§ 1613.234, 1613.235, 1613.262, 1613.631 or 1613.632, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs incurred in the processing of the complaint or charge.

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

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

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

(iv) Attorney's fees shall be paid only for services performed after the filing of the complaint required in § 1613.214 and after the complainant has notified the agency that he/she is represented by an attorney, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency which are signed by the representative shall be deemed to constitute notice of representation.

(2) Amount of awards. When a decision of the agency, under §§ 1613.217(c), 1613.220(d), 1613.221 or 1613.612 or of the Commission, under §§ 1613.234, 1613.235, 1613.262, 1613.631 or 1613.632 provides for an award of attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees, as appropriate, to the agency within 20 days of receipt of the decision. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing. If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 calendar days of receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs within 30 calendar days of receipt of the statement and affidavit. Such decision shall include the specific reasons for determining the amount of the award.

(i) The amount of attorney's fees shall be calculated in accordance with the existing caselaw using following standards:

(A) The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate.

(B) This amount may be reduced or increased in considering the following factors, although ordinarily many of these factors are subsumed within the calculation set forth above: The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in some cases of exceptional success shall any of these factors be used to enhance an award computed by the formula set forth in paragraph (d)(2)(i)(A).

(ii) The costs which may be awarded are those authorized by 28 U.S.C. 1920 to include—

(A) Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case;

(B) Fees and disbursements for printing and witnesses; and

(C) Fees for exemplification and copies of papers necessarily obtained for use in the case.

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

23. Section 1613.283 is revised to read as follows:

§ 1613.283 Effect on administrative processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

24. Section 1613.513 is revised to read as follows:

§ 1613.513 Effects on administrative processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

25. Section 1613.521 is revised to read as follows:

§ 1613.521 Appeal to the Commission.

Except for the requirements in § 1613.234 that the decision of the Office of Review and Appeals contain a notice of the right to file a civil action in accordance with § 1613.282, §§ 1613.231 through 1613.240 of this part shall apply to this subpart.

26. Section 1613.601(a) is revised to read as follows:

§ 1613.601 Definitions.

(a) A "class" is a group of employees, former employees, or applicants for employment who, it is alleged, have been, are being, or may be, adversely affected by an agency personnel management policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age or handicapping condition.

* * * * *

27. Section 1613.602(a) is revised to read as follows:

§ 1613.602 [Revised]

* * * * *

(a) An employee or applicant who wishes to be an agent and who believes he/she has been discriminated against shall consult with an Equal Employment Opportunity Counselor within 30 calendar days of the matter giving rise to the allegation of individual discrimination, the effective date of a personnel action, or the date the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

* * * * *

28. Section 1613.603(b)(1) is amended by deleting the word "agency" and by revising § 1613.603 (c) and (g) to read as follows:

§ 1613.603 Filing and processing of a class complaint.

* * * * *

(c) The complaint must be filed not later than 15 calendar days after the agent's receipt of the notice of the right to file a complaint.

* * * * *

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

29. Section 1613.604 is revised to read as follows:

§ 1613.604 Acceptance, rejection or cancellation.

(a) Within 10 calendar days of an agency's receipt of a complaint, the agency shall forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to a Commission Administrative Judge except in instances where the Commission finds it more practical to delegate this responsibility to an Administrative Judge from another agency who is not an employee of the agency in which the complaint arose.

(b) The Administrative Judge may recommend that the agency reject the complaint, or a portion thereof, for any of the following reasons:

(1) It was not timely filed;

(2) It consists of an allegation identical to an allegation contained in a previous complaint filed on behalf of the same class which is pending in the agency or which has been resolved or decided by the agency;

(3) Failure to state a claim under this subpart;

(4) The agent failed to consult a Counselor in a timely manner;

(5) It lacks specificity and detail;

(6) It was not submitted in writing or was not signed by the agent;

(7) It does not meet the prerequisites of a class complaint under § 1613.601(b).

(c) If an allegation is not included in the Counselor's report, the Administrative Judge shall afford the agent 15 calendar days to explain whether the matter was discussed and if not, why he/she did not discuss the allegation with the Counselor. If the explanation is not satisfactory, the Administrative Judge may recommend that the agency reject the allegation. If the explanation is satisfactory, the Administrative Judge may refer the allegation to the agency for further counseling of the agent.

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

(e) The Administrative Judge may recommend that the agency extend the time limits for filing a complaint and for consulting with a Counselor when the agent, or his/her representative, shows that he/she was not notified of the prescribed time limits and was not otherwise aware of them or that he/she was prevented by circumstances beyond his/her control from acting within the time limit.

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

(g) The Administrative Judge may recommend that the agency cancel a complaint after it has been accepted because of failure of the agent to prosecute the complaint. This action may be taken only after the Administrative Judge has provided the agent a written request, including notice of proposed cancellation, that he/she provide certain information or otherwise proceed with the complaint, and the agent has failed to satisfy this request within 15 calendar days of receipt of the request.

(h) An agent must be informed by the Administrative Judge in a request under paragraph (c) or (d) of this section that his/her complaint may be rejected if the information is not provided.

(i) The head of the agency or designee shall terminate processing a class complaint of discrimination when the agent files a civil action in U.S. district court based on the same allegation of discrimination.

(j) The Administrative Judge's recommendation to the agency on whether to accept, reject, or cancel a complaint shall be transmitted in writing to the agency, the agent, and the agent's representative. The Administrative Judge's recommendation to accept, reject or cancel shall become the agency decision unless the agency rejects or modifies the decision within 30 calendar days of the receipt of the decision and complete complaint file. The agency shall notify the agent, the agent's representative, and the Administrative Judge of its decision to accept, reject, modify or cancel a complaint. Notice of a decision to reject or cancel shall inform the agent of the right to proceed with an individual complaint of discrimination, and to appeal the final agency decision on the matter to the Office of Review and Appeals and of his/her right to file a civil action.

30. Section 1613.606 is revised to read as follows:

§ 1613.606 Avoidance of delay.

The complaint shall be processed promptly after it has been accepted. To this end, the parties shall proceed with the complaint so that the complaint is processed without undue delay.

31. Section 1613.607(a) is revised to read as follows:

§ 1613.607 Freedom from restraint, interference, coercion and reprisal.

(a) It is unlawful to restrain, interfere, coerce or discriminate against agents, complainants, their representatives, witnesses, Directors of Equal Employment Opportunity, Equal Employment Opportunity Officers, Investigators, Counselors and other agency officials with responsibility for processing discrimination complaints because of involvement with a discrimination charge during any stage in the presentation and processing of a complaint, including the counseling stage under § 1613.602, or because an individual testifed, assisted or participated in any manner with an investigation, proceeding or hearing or because the individual opposed an unlawful employment practice under this Part.

* * * * *

32. Section 1613.608 is amended by deleting "an alleged discriminating official or" in paragraph (a) and by revising paragraph (b)(2) to read as follows:

§ 1613.608 [Amended]

* * * * *

(b) * * *

(2) If mutual cooperation fails, either party may request the Administrative Judge to rule on a request to develop evidence. If the agent or agency in bad faith refuses or fails without adequate explanation to respond fully and in timely fashion to a request made or approved by the Administrative Judge for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the Administrative Judge:

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

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

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

(iv) To take such other actions as the Administrative Judge deems appropriate.

* * * * *

33. Section 1613.609 is revised to read as follows:

§ 1613.609 Opportunities for resolution of the complaint.

(a) The Administrative Judge shall furnish the agent or his/her representative and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(b) At any time after acceptance of a complaint, the complaint may be resolved by agreement of the agency and the agent as long as the agreement is fair and reasonable.

(c) If resolution of the complaint is arrived at, the terms of the resolution shall be reduced to writing, and signed by the agent and the agency head or designee. A resolution may include a finding on the issue of discrimination, an award of attorney's fees or costs, and must include any corrective action agreed upon. Corrective action in the resolution must be consistent with law, Executive order, and Civil Service regulations, rules, and instructions. A copy of the resolution shall be provided to the agent.

(d) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the terms of corrective action, if any, to be granted by the agency. A resolution shall bind all members of the class except in cases where the resolution benefits only the class agent or is otherwise alleged to be unfair or unreasonable, in which case any member of the class may petition the Director of Equal Employment Opportunity within 30 calendar days of the date of the notice of resolution to replace the class agent. Such a petition will be processed according to § 1613.604, and if it is found that the resolution did not comply with § 1613.609(b) and that the petitioner satisfied the requirements of § 1613.601(b), the Administrative Judge will recommend that the petitioner will replace the original class agent and act for the class during processing of the class complaint. Acceptance of a petition under this subsection vacates any agreement between the former class agent and the agency. An agency decision on such a petition shall inform the agent and the petitioner of the right to appeal the decision to the Office of Review and Appeals.

(e) Any settlement agreement reached at any stage of the complaint process shall be binding on both parties. If the agent believes that the agency has failed to comply with the terms of a settlement agreement for reasons not attributable to acts or conduct of the agent, his/her representative or class members, the agent shall notify the Director of Equal Employment Opportunity, in writing, within 30 days of when the agent knew or should have known of the alleged noncompliance, or the alleged noncompliance with the settlement agreement. The agent may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Upon receipt of the agent's written allegation of noncompliance with the settlement agreement, the agency shall have thirty (30) calendar days in which to resolve the matter and to respond to the agent, in writing, concerning the matter. If, after thirty (30) calendar days from the date of the agency's receipt of the agent's written allegations of noncompliance with the settlement agreement, the agency has not responded to the agent, in writing, or if the agent is not satisfied with the agency's attempt to resolve the matter, the agent may petition the Commission's Office of Review and Appeals for a determination as to whether the agency has complied with the terms of the settlement agreement. The agent may file such an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 20 days of receipt of an agency's determination. Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it may deem necessary and may direct that an investigation or hearing on the matter be conducted, as may be appropriate.

If the Commission determines that the agreement has not been complied with, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement.

34. Section 1613.610 is revised to read as follows:

§ 1613.610 Hearing.

On the expiration of the period allowed for preparation of the case, the Administrative Judge shall set a date for a hearing. The hearing shall be conducted in accordance with § 1613.218.

35. Section 1613.612(a)(1) is amended by removing the phrase "30 calendar days" and inserting "60 calendar days" in its place.

§ 1613.614 [Amended]

36. Section 1613.614(e) is amended by removing the phrase "5 CFR 772.307(c)" and inserting "§ 1613.218" in its place.

37. Section 1613.631 is revised to read as follows:

§ 1613.631 Appeal to the Office of Review and Appeals.

(a) An agent may appeal to the Office of Review and Appeals the decision of the head of the agency or designee:

(1) To reject or cancel a complaint, or a portion thereof, for reasons covered by § 1613.604;

(2) Under the circumstances set forth in § 1613.609 (d) or (e);

(3) On the merits of the complaint;

(4) On the issue of attorney's fees and costs and corrective action; or

(5) The failure of an agency to implement its final agency decision.

(b) A claimant may appeal to the Office of Review and Appeals from a decision of the head of the agency or designee:

(1) To cancel or reject a claim for individual relief in accordance with § 1613.614 (f) and (g); and

(2) On the merits of the claim for individual relief including attorney's fees or costs.

(c) An appeal may be filed at any time after receipt of the agency's final decision, but not later than 20 calendar days after receipt of that decision except when the appellant shows that neither the appellant nor the appellant's representative was notified of the prescribed time limit and was not otherwise aware of it, or that the appellant or the appellant's representative was prevented by circumstances beyond the appellant's or representative's control from appealing within the prescribed time limit.

(d) An appeal shall be deemed timely if it is delivered in person or post-marked before the expiration of the filing period, or if, in the absence of a legible postmark, it is received by the Commission by mail within five days of the expiration of the filing period. The Office of Review and Appeal's review will be made upon the existing record to determine if the agency decision is in accord with applicable law, Executive order, or Civil Service regulations, rules, and instructions and is supported by substantial evidence.

38. Section 1613.632 is revised to read as follows:

§ 1613.632 Reopening and reconsideration by the Commissioners.

The Commissioners may reopen and reconsider any previous decision of a Commission office on their own motion or at the request of either party in accordance with provisions of § 1613.235.

39. Section 1613.643 is revised to read as follows:

§ 1613.643 Effect on administrative processing.

The filing of a civil action by an agent involving a complaint filed under this subpart terminates processing of that complaint. The filing of a civil action by a claimant involving a claim filed under this subpart, terminates processing of that claim.

Appendix A to Part 1613 is added to read as follows:

Appendix A to Part 1613—Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination

On September 11, 1984, the Equal Employment Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency's law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices. Predictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation, pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit and has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated. The remedy must be fashioned from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

(1) A requirement that all employees of respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular type of discrimination found or conciliated will not recur;

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

(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial elements are as follows:

(1) *Notice Requirement.*

All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or to union members if respondent is a labor organization), prepared by the agency on E.E.O.C. forms, specifically advising respondent's employees or members of the following:

(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.

(b) That Federal law requires that there be no discrimination against any employee or applicant for employment because of the employee's race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).

(c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

(d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred or is conciliating, or which the Commission or a court has found to have occurred.[1]

(e) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court.[2]

(2) *Corrective, Curative or Preventive Provisions.*

In appropriate circumstances, a remedy must provide that the respondent take corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or preventive measures may also be adopted in those situations where those measures are likely to prevent future similar violations.

Thus, where a policy or practice is discriminatory, the policy or practice must be changed. Similarly, if a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action so that the discriminatee or similarly situated employees not be subjected to similar discriminatory conduct. This corrective action may be accomplished, for example, by insulating employees from that individual for a period of time, or by requiring the respondent to discipline or remove the offending individual from personnel authority, or by requiring the respondent to educate the offender and other supervisors so that they may overcome their unlawful prejudices.

These and any other appropriate meausres, or any combination thereof, designed to meet this goal should be considered when negotiating settlements or drafting prayers for relief. This type of relief is not to be designed for punitive purposes. Rather, this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the chance of its recurrence.

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminatee's personnel files.

(3) *Nondiscrimatory Placement.*

Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another of respondent's employees ("Nondiscriminatory Placement"). The Nondiscriminatory Placement may take place by initial employment, reinstatement, promotion, transfer or reassignment and must occur without any prejudice to, or loss of, any employment—related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

[1] For example, the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case:

"XYZ, Inc. will not refuse to hire employees on the basis of their sex;

"XYZ, Inc. will not refuse to promote employees on the basis of their sex or their race; and

"XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment opportunity Commission."

[2] For example, employees could be notified of the relief obtained in the following way:

XYZ, Inc. will promote and make whole the employees affected by our conduct for any losses they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the position of shift supervisor and will be made whole for any loss in pay or benefits they may have suffered since the time that we failed to promote them to that position.

"XYZ, Inc. has adopted an equal employment opporunity policy and will ensure that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race."

If a Nondiscriminatory Placement position that the discriminatee should occupy no longer exists, then employment for which the discriminatee is qualified must be offered to the discriminatee in other areas of the respondent's operation. Finally, if none of the foregoing positions exist in which the discriminatee may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and that respondents not gain by their misconduct. Accordingly, the contention by a respondent that a discriminatee is no longer suitable for Nondiscriminatory Placement due to a loss of skills, a change in job content or some other reason is not an acceptable excuse for a respondent's failure to accomplish a Nondiscriminatory Placement of a discriminatee. The burden is upon the respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similiary, the burden is also on the respondent to demonstrate a contention that postdiscrimination conduct by a discriminatee renders the discriminatee unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job placement of another of the respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

(4) *Backpay.*

Each identified victim of discrimination is entitled to be made whole for any loss of earnings the discriminatee may have suffered by reason of the discrimination. Each individual discriminatee must receive a sum of money equal to what would have been earned by the discriminatee in the employment lost through discrimination ("Gross Backpay") less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted ("Net Interim Earnings"). The difference between Gross Backpay and Net Interim Earnings is Net Backpay Due. Interest should be computed on all Net Backpay Due. Net Backpay accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuations in working time, overtime rates, changing rates of pay, transfers, promotions, and other perquisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and the Age Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) *Cessation Provisions.*

All respondents must agree or be ordered to cease from engaging in the specific unlawful employment practices involved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including broad cessation language in an agreement or order which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of conciliation requires the agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this scope, conciliation must be actively pursued by the agency. In this regard, in all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counterproposals to the full range of remedies described in this policy may be considered if those compromises or counterproposals address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

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