system; and (7) the maximum containment laboratory has special engineering and design features to prevent microorganisms from being disseminated to the environment.

Building

A structure that contains the requisite components necessary to support a facility that is designed according to the required biosafety level. The building can contain one or more facilities conforming to one or more biosafety level.

Confirmed Exposure

Any mishap with a BDP agent in which there was direct evidence of an actual exposure such as a measurable rise in antibody titer to the agent or a confirmed diagnosis of intoxication or disease.

Etiologic Agents

Any viable microorganism, or its toxin which causes or may cause human disease, including those agents listed in 42 CFR 72.3 of the Department of Health and Human Services regulations, and any agent of biological origin that poses a degree of hazard similar to those agents.

Facility

An area within a building that provides appropriate protective barriers for persons working in the facility and the environment external to the facility, and outside of the building.

HEPA Filter

A filter which removes particulate matter down to submicron sized particles from the air passed through it with a minimum efficiency of 99.97 percent. While the filters remove particulate matter with great efficiency, vapors and gases (for example, from volatile chemicals) are passed through without restriction. HEPA filters are used as the primary means of removing infectious agents from air exhausted from engineering controls and facilities.

Human Lethal Dose

The estimated quantity of a toxin that is a minimum lethal dose for a 70 kilogram individual based upon published data or upon estimates extrapolated from animal toxicity data.

Commander or Institute Director

The commander or institute director of an Army activity conducting RDTE with BDP etiologic agents, or the equivalent, at a research organization under contract to the BDP.

Institution

An organization such as an Army RDTE activity (institute, agency, center, and so forth) or a contract organization such as a school of medicine, or research institute that conducts RDTE with BDP etiologic agents.

Laboratory

An individual room or rooms within a facility that provide space in which work with etiologic agents can be performed. It contains all of the appropriate engineering features and equipment required at a given biosafety level to protect personnel working in it and the environment external to the facility.

Large-Scale Operations

Research or production involving viable etiologic agents in quantities greater than 10 liters of culture.

Maximum Containment Area

An area which meets the requirements for a BL–4 facility. The area may be an entire building or a single room within the building. See chapter 7 for details.

Molded Masks

Formed masks that fit snugly around the mouth and nose and are designed to protect against a nontoxic nuisance level of dusts and powders. These do not require approval by NIOSH or MSHA. Masks made of gauze do not qualify.

Potential Accidental Exposure

Any accident in which there was reason to believe that anyone working with a BDP agent may have been exposed to that agent, yet no measurable rise in antibody titer or diagnosis of intoxication or disease was made. However, the high probability existed for introduction of an agent through mucous membranes, respiratory tract, broken skin, or the circulatory system as a direct result of the accident, injury, or incident.

Resource Conservation Recovery Act of 1976 Listed Hazardous Waste

The waste materials listed by the Environmental Protection Agency under authority of the RCRA for which the agency regulates disposal. A description and listing of these wastes is located in 40 CFR part 261.

Suite

An area consisting of more than one room, designed to be a functional unit in which entire operations can be facilitated. Suites may contain a combination of laboratories or animal holding rooms and associated support areas within a facility that are designed to conform to a particular biosafety level. There may be one or more suites within a facility.

Toxin

Toxic material of etiologic origin that has been isolated from the parent organism.[1]

Kenneth L. Denton,

Army Federal Register Liaison Officer.

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BILLING CODE 3710–08–M

[1] The publication "Bacterial Toxins: a Table of Lethal Amounts," (Gill, D.M. (1982) Microbiological Reviews, *46*:86–94) contains a useful table of mammalian toxicities of numerous toxins.

federal register

Friday
April 10, 1992

Part IV

Equal Employment Opportunity Commission

29 CFR Part 1614

Federal Sector Equal Employment Opportunity; Rule and Proposed Rule

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN 3046-AA11

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

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

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

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

SUPPLEMENTARY INFORMATION: Pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (1978), Executive Order 12144, 44 FR 37193 (1979) and Executive Order 12106, 44 FR 1053 (1979), all responsibility for the administration and enforcement of equal opportunity in federal employment that was previously vested in the Civil Service Commission and the Secretary of Labor, was transferred to the Equal Employment Opportunity Commission (EEOC). EEOC is authorized to issue rules, regulations, orders and instructions pursuant to title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(b); the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(b); the Rehabilitation Act, of 1973, 29 U.S.C. 794a(a)(1); the Fair Labor Standards Act 29 U.S.C. 201 *et seq.*, Executive Order 12067, 43 FR 28967 (1978) and Executive Order 11478, 34 FR 12985 (1969), as amended by Executive Order 12106.

Pursuant to the foregoing authorities, the EEOC published a Notice of Proposed Rulemaking, 54 FR 45747 (1989), proposing a restructured complaint process for newly-filed federal sector EEO complaints that would be located at 29 CFR part 1614 ("part 1614"). The existing complaint process, located at 29 CFR part 1613 ("part 1613"), was created by the Civil Service Commission in 1972, 37 FR 22717 (1972), and subsequently transferred to EEOC. It has been criticized in the Supreme Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), as well as by U.S. General Accounting Office audit reports, a report of the Assistant Secretaries for Management Group, and the House Employment and Housing Subcommittee's Report, "Over-hauling the Federal EEO Complaint Processing System: A New Look at a Persistent Problem." H.R. Rep. No. 456, 100th Cong., 1st Sess. (1987). The proposal to adopt part 1614 constituted EEOC's response to these critical commentaries.

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

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

Major Features

A. Organization

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

B. Pre-complaint Processing

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

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

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

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

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

C. Agency Processing of Individual Complaints

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

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

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

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

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

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

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

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

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

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

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

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

D. Appellate Processing by EEOC

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

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

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

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

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

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

E. Coverage of The Rehabilitation Act

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

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

F. Reassignment Under The Rehabilitation Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. Opting Out of Class Complaints

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

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

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

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

The comments were unanimously in favor of this revision.

H. Negotiated Grievance Procedure.

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

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

I. ADEA Statute of Limitations.

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

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

382 (N.D. Ill. 1988). Another court, while not reaching the issue, discussed the issue and indicated its belief that the six-year limitations period should apply. *Bornholdt* v. *Brady*, 869 F.2d 57 (2d Cir. 1989).

We find the reasoning of the cases applying the two- or three-year limitations period of the private sector ADEA provisions or the six-year limitations period of 28 U.S.C. 2401(a) to be unpersuasive and believe that the use of those limitations periods would be inconsistent with the administrative process that Congress intended to be utilized for federal sector ADEA complaints. The most closely analogous statute to the federal sector provisions of the ADEA is section 717 of title VII. EEOC believes that the limitations period applicable to civil actions under title VII should be borrowed for federal sector ADEA lawsuits.

Although there are differences between the federal sector provisions of Title VII and the ADEA, courts have nevertheless looked to Title VII for analogous procedures to use in federal employees' ADEA lawsuits. *E.g.*, *Lehman* v. *Nakshain*, 453 U.S. 156 (1981) (as in title VII action, plaintiff is not entitled to trail by jury); *Ellis* v. *United States Postal Service*, 784 F.2d 835, 838 (7th Cir. 1986) (as in Title VII action, the only proper defendant in the ADEA suit is the head of the federal agency); *Smith* v. *Office of Personel Management*, 778 F.2d 258, 262 (5th Cir. 1985) (like title VII, the ADEA does not allow recovery of compensatory damages). The use of different statutes of limitations for federal sector title VII and ADEA cases could lead to attempts to split complaints alleging that a single action violates both statutes or to premature departure from the administrative process in order to timely file a lawsuit on the ADEA issue.

Two of the Circuit Court decisions, *Bornholdt* and *Lubniewski*, reach the conclusion that the six-year limitations period should apply. These courts gave two rationales for their conclusions. First, they concluded that Congress chose not to make the limitations period for ADEA suits the same as that for title VII suits because the congressional committee considering the extension of the ADEA to federal employees deleted a 30-day limitations period from the bill without explanation. We do not believe that an unexplained omission should be construed as a specific rejection.

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

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

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

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

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

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

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

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

J. Exhaustion of Remedies Under the ADEA

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

K. Clear and Convincing Evidence Standard

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

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

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

L. Interest

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

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

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

Section by Section Analysis

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

Section 102(b)(3)

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

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

Section 103(a)

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

Section 103(b)(4)

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

Section 103 (c) and (d)

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

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

Section 105(b)

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

Section 105(e)

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

Section 105(f)

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

Section 107

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

Section 107(a)

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

Section 107(b)

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

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

Section 107(e)

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

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

Section 107(g)

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

Section 107(h)

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

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

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

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

Section 108

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

Section 108(e)

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

Section 108(e) and (f)

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

Section 109

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

Section 109(e)

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

Section 109(f)

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

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

Section 201(c)

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

Section 202

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

Section 203(a)(6)

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

Section 203(d)

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

Section 204

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

Section 203(h)

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

Section 204(d)(3)

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

Section 204(k)(3)

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

Section 301

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

Section 301(b)

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

Section 302(b)

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

Section 305(a)

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

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

Section 402

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

Section 403(a)

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

Section 403(b)

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

Section 403(d)

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

Section 404

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

Section 405(b)

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

Section 406

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

Section 407

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

Subpart E

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

Section 501(b)

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

Section 501(c)(1)

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

Section 501(d)

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

Section 502(b)

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

Section 606

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

Section 607

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

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

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

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

List of Subjects in 29 CFR Part 1614

Equal employment opportunity, Government employees.

For the Commission,

Evan J. Kemp, Jr.,

Chairman.

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

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

Subpart A—Agency Program To Promote Equal Employment Opportunity

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

Subpart B—Provisions Applicable to Particular Complaints

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

Subpart C—Related Processes

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

Subpart D—Appeals and Civil Actions

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

Subpart E—Remedies and Enforcement

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

Subpart F—Matters of General Applicability

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

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

Subpart A—Agency Program To Promote Equal Employment Opportunity

§ 1614.101 General policy.

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

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

§ 1614.102 Agency program.

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

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

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

instructions contained in the Commission's Management Directives;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1614.103 Complaints of discrimination covered by this part.

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

(b) This part applies to:

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

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

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

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

competitive service, except for complaints under the Rehabilitation Act.

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

(d) This part does not apply to:

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

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

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

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

§ 1614.104 Agency processing.

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

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

§ 1614.105 Pre-complaint processing.

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

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

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

(b) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing after an investigation by the agency, election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

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

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

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

(f) Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

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

§ 1614.106 Individual complaints.

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

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

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

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

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

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

§ 1614.107 Dismissals of complaints.

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

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

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

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

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

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

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

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

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

§ 1614.108 Investigation of complaints.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1614.109 Hearings.

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

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

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

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

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

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

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

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

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

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

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

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

(v) Take such other actions as appropriate.

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

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

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

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

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

§ 1614.110 Final decisions.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, or within 60 days of receiving the findings and conclusions of an administrative judge, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final decision shall contain notice of the right to appeal to the Commission, the name and address of the agency official upon whom an appeal should be served, notice of the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the decision.

Subpart B—Provisions Applicable to Particular Complaints

§ 1614.201 Age Discrimination in Employment Act.

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

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

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

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

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

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

§ 1614.202 Equal Pay Act.

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

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

§ 1614.203 Rehabilitation Act.

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

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

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

(iii) Is regarded as having such an impairment.

(2) *Physical or mental impairment* means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1614.204 Class complaints.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) The administrative judge's written recommendation to the agency on whether to accept or dismiss a complaint and the complaint file shall be transmitted to the agency and notification of that transmittal shall be sent to the agent. The administrative judge's recommendation to accept or dismiss shall become the agency decision unless the agency accepts, rejects or modifies the recommeded decision within 30 days of the receipt of the recommended decision and complaint file. The agency shall notify the agent by certified mail, return receipt requested, and the administrative judge of its decision to accept or dismiss a complaint. At the same time, the agency shall forward to the agent copies of the administrative judge's recommendation and the complaint file. The dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under subpart A or that the complaint is also dismissed as an individual complaint in accordance with § 1614.107. In addition, it shall inform the agent of the right to appeal the dismissal of the class complaint to the Office of Federal Operations or to file a civil action and include EEOC Form 573, Notice Of Appeal/Petition.

(e) *Notification.* (1) Within 15 days of accepting a class complaint, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

(2) Such notice shall contain:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subpart C—Related Processes

§ 1614.301 Relationship to negotiated grievance procedure.

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

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

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

§ 1614.302 Mixed case complaints.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1614.304 Contents of petition.

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

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

(1) The name and address of the petitioner;

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

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

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

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

§ 1614.305 Consideration procedures.

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

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

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

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

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

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

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

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

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

§ 1614.306 Referral of case to Special Panel.

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

of the EEOC the administrative record in the proceeding including—

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

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

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

§ 1614.307 Organization of Special Panel.

(a) The Special Panel is composed of:

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

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

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

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

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

§ 1614.308 Practices and procedures of the Special Panel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1614.309 Enforcement of Special Panel decision.

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

§ 1614.310 Right to file a civil action.

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

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

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

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

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

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

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

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

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

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

Subpart D—Appeals and Civil Actions

§ 1614.401 Appeals to the Commission.

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

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

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

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

§ 1614.402 Time for appeals to the Commission.

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

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

§ 1614.403 How to appeal.

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

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

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

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

§ 1614.404 Appellate procedure.

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

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

§ 1614.405 Decisions on appeals.

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

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

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

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

§ 1614.406 Time limits. [Reserved]

§ 1614.407 Reconsideration.

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

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

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

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

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

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

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

decision for which reconsideration was sought.

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

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

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

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

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

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

§ 1614.409 Civil action: Equal Pay Act.

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

§ 1614.410 Effect of filing a civil action.

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

Subpart E—Remedies and Enforcement

§ 1614.501 Remedies and relief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1614.502 Compliance with final Commission decisions.

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

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

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

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

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

§ 1614.503 Enforcement of final Commission decisions.

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

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

efforts shall be undertaken to obtain compliance.

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

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

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

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

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

§ 1614.504 Compliance with settlement agreements and final decisions.

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

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

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

Subpart F—Matters of General Applicability

§ 1614.601 EEO group statistics.

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

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

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

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

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

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

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

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

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

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

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

§ 1614.602 Reports to the Commission.

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

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

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

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

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

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

§ 1614.603 Voluntary settlement attempts.

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

§ 1614.604 Filing and computation of time.

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

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

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

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

§ 1614.605 Representation and official time.

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

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

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

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

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

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

§ 1614.606 Joint processing and consolidation of complaints.

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

§ 1614.607 Delegation of authority.

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

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

BILLING CODE 6750-06-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of Proposed Rulemaking.

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

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

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

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

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

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

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

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

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

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

List of Subjects in 29 CFR Part 1614

Equal employment opportunity, Government employees.

For the Commission.

Evan J. Kemp, Jr.,

Chairman.

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

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federal register

Friday,
April 10, 1992

Part V

Pension Benefit Guaranty Corporation

29 CFR Part 2610
Payment of Premiums; Proposed Rule

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2610

RIN 1212-AA58

Payment of Premiums

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: This is a proposed amendment to the Pension Benefit Guaranty Corporation's regulation on Payment of Premiums (29 CFR part 2610). Comments on the existing regulation by premium payers in recent years and studies by PBGC staff have persuaded the PBGC that the regulation can be simplified to reduce the public burden of compliance and the PBGC's burden of administration. The proposed amendment would make a number of simplifying changes suggested by those comments and studies.

For example, the proposed amendment would replace the existing alternative calculation method with a new simplified filing method using tables of adjustment factors instead of formulas (and would place restrictions on the new method's use by large plans). The definition of the term "participant" in the regulation would be changed to agree with that used for the Form 5500 series annual report. The proposed amendment would also defer the final filing due date (so that it would be closer to the extended Form 5500 due date), raise the number of participants a plan must have in order to be required to make the early premium payment (so that fewer plans would have to file twice a year), and eliminate both penalties and interest on early payments that equal at least a definitely determinable amount (so that both estimates and special safe harbor rules would be unnecessary). It would also accelerate the early filing due date to an earlier date in the premium payment year and widen the scope of the early payment to cover the variable rate, as well as the flat rate, portion of the premium.

DATES: Comments on the proposed amendment must be received on or before May 26, 1992.

ADDRESSES: Comments may be mailed to the Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington DC, 20006-1860, or delivered to suite 7200 at that address between 9 a.m. and 5 p.m. on business days. Written comments will be available for public inspection at the PBGC's Communications and Public Affairs Department, suite 7100 at the same address, between 9 a.m. and 4 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or Deborah C. Murphy, Attorney, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington DC 20006-1860; 202-778-8850 (202-778-1958 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Background

Section 4006 of the Employee Retirement Income Security Act of 1974 ("ERISA") sets forth the premium rates to be charged by the Pension Benefit Guaranty Corporation ("PBGC"). Section 4007 of ERISA makes the premiums payable "at the time, and on an estimated, advance, or other basis, as determined by the [PBGC]," and provides for the imposition of interest and penalties on premiums not timely paid. Pursuant to these provisions and to section 4002(b)(3) of ERISA, the PBGC has issued its regulation on Payment of Premiums (29 CFR part 2610). The regulation and related forms and instructions describe in detail how to compute and pay premiums, interest, and penalties.

Under section 4006, the multiemployer plan premium for a premium payment year beginning after September 26, 1988, is $2.60 per participant. The single-employer plan premium for a premium payment year beginning after 1987 is composed of a flat rate per capita assessment and a variable rate assessment that is based on the value of a plan's unfunded vested benefits and is also determined on a per-participant basis. The flat rate assessment (for post-1990 years) is $19 per participant.

The basic formula for the variable rate assessment for each participant (for post-1990 years) is $9 for each $1,000 (or fraction thereof) of a plan's unfunded vested benefits (determined as of the last day of the year before the premium payment year) with that product divided by the number of participants in the plan as of that same date. This variable rate assessment is subject to a statutory ceiling of $53 per participant, resulting in a maximum per participant premium of $72.

The formula for computing the variable rate assessment is based, in large part, on the determination of the plan's unfunded vested benefits, defined by statute as the amount that would be the plan's "unfunded current liability" (within the meaning of ERISA section 302(d)(8)(A)) as of the close of the preceding plan year, subject to two qualifications, viz., that only vested benefits are taken into account in the calculation, and that the interest rate used in valuing vested benefits must equal 80% of the annual yield on 30-year Treasury securities for the month preceding the month in which the plan year begins.

The premium regulation provides two methods for determining the amount of a plan's unfunded vested benefits. Under the "general rule" (§ 2610.23(a)), an enrolled actuary must determine the amount of the plan's unfunded vested benefits as of the last day of the plan year preceding the premium payment year based on the plan's provisions and population as of that date, and must certify that the determination was made in a manner consistent with generally accepted actuarial principles and practices. Under the "alternative calculation method" (§ 2610.23(c)), the plan administrator must calculate the amount of the plan's unfunded vested benefits based on certain data from the plan's Form 5500 Schedule B for the plan year preceding the premium payment year, using formulas specified in the regulation. The regulation also provides a number of exemptions and special rules regarding the variable rate portion of the premium.

While the current premium regulation exhibits a degree of complexity, much of this is simply a reflection of the complexity inherent in the statute's variable rate premium provisions, as well as the PBGC's desire to reduce compliance burdens and costs as much as possible by providing options, exemptions, and special rules to simplify or, in some cases, eliminate calculation requirements. Nevertheless, PBGC staff studies have identified a number of possible simplifying changes that would be implemented by this proposed amendment. The PBGC envisions making these proposed changes effective generally for premium payment years beginning after 1992, contingent on implementation of a new computerized premium accounting system by the end of 1992. The proposed changes are discussed below.

General Provisions

The premium regulation is divided into three subparts. Subpart A (General Provisions) contains rules that apply generally to both single-employer and multiemployer plans for all plan years (although some of these rules are more limited in scope or take different forms depending on the plan year involved). Subpart B currently contains rules

governing only single-employer plans for plan years beginning after 1987; the rules in Subpart C currently cover single-employer plans for plan years beginning before 1988 and multiemployer plans for all plan years.

The proposed amendments would make a minor change to the general organization of the premium regulation by transferring the rules governing multiemployer plan premiums for premium payment years beginning after 1987 from subpart C to subpart B. This would avoid duplication (in subparts B and C) of several provisions that apply to both single-employer and multiemployer plans for post-1987 years only, consolidate current (that is, post-1987) rules in subpart B, and permit most filers to ignore subpart C completely. A minor rewording of § 2610.1(a) would reflect this organizational change; §§ 2610.21 and 2610.31 would be correspondingly reworded.

Similarly, § 2610.22 (Premium rates) would be revised to include multiemployer as well as single-employer premium rate rules for the post-1987 period. Existing § 2610.22(b) (dealing with new and newly covered plans) would be redesignated as § 2610.22(c); a new § 2610.22(b) would be added to set forth the multiemployer premium rates (now found in § 2610.33(a)(1)); and § 2610.22(d) would be modified to reflect the difference between the refund rules for multiemployer plans (currently set forth in § 2610.33(d)) and those for single-employer plans, which form the subject of existing § 2610.22(d). (The provision in existing § 2610.22(c), that the prescribed premiums are payable for short as well as normal plan years, is considered obvious and would simply be removed.)

In addition, the variable rate premium cap reduction rules that make up most of existing § 2610.22(a)(3)—and that apply only to premium payment years beginning before 1993—would be moved to a new paragraph (§ 2610.22(f)) at the end of the section because they would no longer be of current interest to most premium payers. The special rule for new and newly covered plans (moved to § 2610.22(c)) would be modified to refer to both the single-employer and multiemployer premium rate provisions (in § 2610.22(a) and new § 2610.22(b) respectively), and the parallel rule in § 2610.33(b)(2) covering multiemployer plans only would be deleted.

The penalty waiver rule now in § 2610.8(b)(5) would be moved to § 2610.8(b)(4). This rule, which waives penalties accruing within 30 days after the date of a PBGC bill that is paid within the 30-day period, would be reworded to make its effect clearer.

(Other organizational changes, relating to substantive rule revisions, are discussed below in the context of those revisions.)

Definition of "Participant"

The wording of the PBGC's definition of "participant" in § 2610.2 (Definitions) for the purpose of filing and paying PBGC premiums has differed for several years from the wording of the definition prescribed in the instructions for Form 5500. (For example, the definition in the 1990 instructions for Form 5500 excludes "nonvested former employees who have incurred the break in service period specified in the plan," while the corresponding exclusion in existing § 2610.2 applies to "a non-vested former employee who has incurred a break in service the greater of one year or the break in service period specified in the plan." (Emphasis added.)) The difference in wording, coupled with uncertainty about how the two definitions might be interpreted for purposes of the two different filings, has caused concern for many plan administrators that the participant count for PBGC premiums may differ from the Form 5500 participant count in certain cases.

The amendment would redefine the term "participant" for premium payment years beginning after 1992 while retaining the existing definition for premium payment years beginning before 1993 (including those with premium filing dates in 1993). To accommodate the change, § 2610.2 would be reorganized to place most of the defined terms in a new paragraph (a) and the new and old definitions of "participant" in new paragraphs (b) and (c) (respectively). In paragraph (a), definitions would be added for the terms "Form 5500" and "single-employer plan."

The new definition of "participant" in § 2610.2(b) would simply adopt the definition prescribed for purposes of the Form 5500. This change would allow most premium payers to use the same participant count determined for the Form 5500 without having to worry that the difference in definitions might make the count wrong for premium purposes. Since the Form 5500 definition may change (as it has in the past), § 2610.2(b) would refer specifically to the Form 5500 applicable to the plan year preceding the premium payment year. In general, premiums are based on the participant count for the last day of the plan year preceding the premium payment year. New and newly covered plans, and certain plans involved in mergers and spinoffs, base their premiums on the participant count as of the first day of the premium payment year, but it would be impossible to wait for the issuance of the Form 5500 for the premium payment year and still pay premiums on time. (For new plans, and newly covered plans that were not required to file Form 5500 for the plan year preceding the premium payment year, the definition the plan would use would be the one for the Form 5500 that would have been used for a plan year beginning one year before the first day of the premium payment year.)

For purposes of determining whether a plan is a "large plan" required to make an early premium payment, the participant count comes from the prior year's premium filing. For premium payment years beginning after 1993, this would generally be the same as the participant count on the Form 5500 for the year before the prior year. For example, to determine whether a plan is a "large plan" for the 1994 premium payment year, the plan administrator would note the number of participants for whom premiums had to be paid for the 1993 plan year; since that plan year would have been covered by the new definition of "participant," the participant count for premium purposes would probably have been the same as that on the 1992 Form 5500. (Exceptions would occur where, for example, a plan used the special rule for mergers and spinoffs in § 2610.10 and counted participants as of a date other than the Form 5500's participant count date.)

However, the 1993 premium payment year would be a special case, because the number of participants for whom premiums were payable for 1992 (the prior plan year) might be different than the 1991 Form 5500 participant count (even if the dates were the same). This is because the 1992 plan year would not have been covered by the new "participant" definition—so the 1992 participant count for premium purposes would not necessarily have agreed with the participant count on the 1991 Form 5500. Thus, although the amount of premium due for the 1993 premium payment year would be based on the 1992 Form 5500 participant count, the plan's "large plan" or "small plan" filing status for the 1993 year (based on the number of participants for whom premiums were payable for 1992) might be different than if it were based directly on the 1991 Form 5500 participant count.

Miscellaneous Filing Rules

The amendment would revise § 2610.4 to provide expressly for modification of

the premium filing address in the PBGC's Annual Premium Payment Package. This would allow the PBGC to change the address quickly if necessary before completion of the formal procedure of amending the regulation.

Section 2610.5 would be revised to liberalize slightly the rule about when a premium filing or payment is considered to have been made. This rule is used to determine whether a premium filing is timely, when interest on a late payment stops accruing, etc. The current rule, which would be retained in § 2610.5(b) for premium payment years beginning before 1993, is that filings are deemed made when mailed, as evidenced by a legible U.S. Postal Service postmark, or three days before receipt by the PBGC if they do not contain a legible U.S. Postal Service postmark.

In new § 2610.5(a)(1), the proposed rule would increase the assumed transit time (between when a filing is received and when it is deemed to have been sent) from three days to five and make it applicable to all filings, including those with legible U.S. Postal Service postmarks. It would also make clear that the PBGC would accept other evidence of the date of mailing besides legible postmarks.

In addition, new § 2610.5(a)(2) would clarify that where a filing is received on the first business day following a period of one or more non-business days (Saturdays, Sundays, or holidays), it would be deemed received on the first day of the non-business period—i.e., the earliest day when it might have been received but for the non-business period.

Application of the transit time assumption to filings with legible U.S.P.S. postmarks would eliminate an anomaly under the existing rule. Currently, a filing mailed one day late with a legible U.S.P.S. postmark would be considered late even if it were received the next day, whereas a filing mailed a day late bearing a legible postage meter postmark (but no U.S.P.S. postmark) would be considered timely if it arrived the following day.

The new rule would be effective only for filings and payments for premium payment years beginning after 1992; thus the current rule would continue to apply (for example) to filings due in 1993 for the 1992 premium payment year.

In subpart B of the regulation, the amendment would simplify the certification that is required of fully insured plans taking advantage of the exemption from the variable rate premium under § 2610.24(a)(3). Currently, the plan administrator must certify to the plan's satisfaction of the requirements of section 412(i) of the Internal Revenue Code and regulations thereunder throughout the plan year preceding the premium payment year or (for new or newly covered plans) throughout the premium payment year up to the premium due date.

The PBGC has reconsidered these provisions in light of the general principle that liability for the variable rate premium is determined as of a single "snapshot date," rather than on the basis of a plan's status over on extended period of time. Consistent with that general principle, the PBGC has decided that the certification required of a section 412(i) plan administrator under § 2610.24(a)(3) should be limited to the "snapshot date." (This certification as of the premium "snapshot date" would be relevant only for premium purposes, and would not govern the plan's status under section 412(i) and the regulations thereunder.) Such a change would also avoid the current rule's implication that the plan administrator of a new or newly covered plan must either wait until the premium due date to file, or certify to the status of the plan for a period of time that is still in the future when the certification is made.

Since § 2610.24(e) automatically corrects § 2610.24(a) "snapshot dates" for new or newly covered plans, amended § 2610.24(a)(3) would no longer have to include an explicit special provision for such plans.

Short Plan Year Credits

The amendment would supplement the special refund rule in § 2610.22(d) with a new special credit rule for short plan years of new and newly covered plans and plans that change their plan years. Under the existing premium regulation, the refund rule in §§ 2610.22(d) and 2610.33(d) is the only mechanism available to such a plan for recovering a prorated portion of the premium for the short year. The plan must prepare and submit a refund request, and the PBGC must process the request and issue the refund. Under proposed new § 2610.22(e), these two burdens would be eliminated. The plan would simply compute the credit, in the same manner as a refund under § 2610.22(d), and claim it on its premium payment form. (The refund rule under § 2610.22(d)—with some rewording to make it applicable to multiemployer as well as single-employer plans and to clarify its operation—would remain as an option.)

A new or newly covered plan would be allowed to take the credit against the short first year's premium; a plan that changed its plan year could take the credit against the premium for the following full-length year. The difference in treatment reflects differences between the two classes of plans. For a new or newly covered plan, it is the beginning of the plan year—the portion before the plan becomes effective for premium purposes—that generates the credit, and the plan knows from the start how long its first plan year will be. In contrast, changes in plan year are typically made after the beginning of what will turn out to be the short year (and often after the short year is over), and it is the end of the plan year—the portion overlapped by the following full year—that generates the credit. (By the same token, the credit rule would not apply to final short years (of terminating plans described in § 2610.22(d) (3) and (4)) because the date of the short year's end would not generally be known until it arrived and because there would be no following year's premium to apply the credit to.)

Under the proposed new credit rule, the credit could be taken against the premium for a premium payment year beginning after 1992. Accordingly, it would apply to a new or newly covered plan's short first year beginning after 1992 (since the credit would be taken against that same year's premium). For a plan changing plan years, the new rule would permit a credit to be taken against the premium for a full plan year beginning after 1992 with respect to an immediately preceding short year.

Simplified Filing Method

The alternative calculation method ("ACM") for unfunded vested benefits, provided for in current § 2610.23(c), is an easier, though less accurate, method of calculating the amount of unfunded vested benefits ("UVBs")—on which the variable rate premium is based—than the general rule described in § 2610.23 (a) and (b). Whereas the general rule prescribes standards for the actuarial determination of UVBs from basic data, the ACM provides formulas (and optional tables of substitution factors that may be used in place of one expression in one of the formulas) for calculating UVBs from data reported on Form 5500 Schedule B for the prior year.

Both the general rule and the ACM yield values for UVBs as of the last day of the plan year preceding the premium payment year, the "snapshot date" for computing the variable rate premium. The Schedule B data on which the ACM is based, however, are as of the first, not the last, day of that prior year. In addition to other adjustments that may be necessary, therefore, the ACM must "bring forward" the data to the end of the prior year. Rather than bring each figure forward separately, the ACM uses the data to calculate UVBs as of the first

day of the prior year, then brings just the UVB figure forward by adding interest.

The ACM begins with the values of the current liability for vested benefits reported on Schedule B as of the beginning of the plan year preceding the premium payment year. In § 2610.23(c)(1), it increases those benefit values to reflect accruals for active participants during that plan year. Then, in § 2610.23(c)(2), it adjusts the benefit values to account for any difference between the current liability interest rate (or rates) actually used to determine them (the "Funding Interest Rate(s)") and the interest rate prescribed by the statute and § 2610.23(b)(1) for premium purposes (the "Premium Interest Rate"). The adjusted vested benefit values are added together to give a single figure reflecting all adjusted vested benefits as of the first day of the plan year preceding the premium payment year.

In § 2610.23(c)(4), the ACM begins with the asset value reported on Schedule B as of the beginning of the plan year preceding the premium payment year and increases that value to reflect contributions made since the beginning of the preceding plan year. The result is an adjusted value of assets as of the beginning of that year. The difference between adjusted vested benefits as of the beginning of the year before the premium payment year and the adjusted asset value as of the same date is the UVBs as of that date. Finally, in § 2610.23(c)(5), the ACM adjusts that UVB figure by adding interest (at the Premium Interest Rate) from the first day of the year before the premium payment year (i.e., the day as of which the UVBs were calculated) to the end of that year (i.e., the day before the beginning of the premium payment year). This in effect produces a value of UVBs as of the last day of the plan year preceding the premium payment year.

Small plans (which, for this purpose, means those paying premiums for fewer than 500 participants) use this UVB value directly as the basis for determining the amount of the variable rate premium. Under § 2610.23(d), however, large plans (those paying premiums for 500 or more participants) must correct this UVB value for any significant events, as defined in § 2610.23(d), that may have occurred during the prior year (i.e., between the date of the Schedule B data and the premium "snapshot date"). (The same significant events must be taken into account under the general rule.)

The PBGC introduced the ACM, when the variable rate premium was first added to ERISA, in response to its concern that the method described in the statute for determining UVBs (which is tracked by the general rule in the regulation) would be quite expensive and time-consuming to apply, especially for smaller plans. The ACM was designed for ease of use, with the thought that it would give small plan administrators a way to calculate variable rate premiums from Form 5500 Schedule B data without the services of an actuary. Indeed, the PBGC expected most plans, including large plans, to use the ACM routinely and to resort to the more difficult general rule only when unusual circumstances made it apparent that the general rule results would be much more favorable than the ACM results.

Of course, achieving simplicity meant sacrificing accuracy. The ACM was devised on the basis of the soundest actuarial principles and most effective actuarial techniques available to be an unbiased surrogate for the general rule both in the aggregate and for most plans individually. However, the PBGC recognized that UVBs (and thus premiums) calculated with the ACM would vary from what they would be under the general rule, and would in some cases be substantially different. Weighing the expected magnitude of premium variations under the ACM against the perceived need for relief from the burdens of the general rule, the PBGC concluded that the risks arising from the ACM's inaccuracy were acceptable.

Having reassessed these considerations in connection with its premium simplification efforts, the PBGC now believes that the balance has shifted. On the one hand, the major premium increase in 1991 means that the effect on premiums of any given variation in UVBs is half again as great as it was in 1988. On the other hand, a number of actuarial consulting firms report that many large plans that expect to pay variable rate premiums routinely calculate them under both the ACM and the general rule and pay the smaller amount, thus suggesting that general rule determinations are considerably less burdensome than the PBGC initially feared, at least for larger plans. Accordingly, there now appears to be cause for concern that the PBGC may be exposed to possibly significant revenue loss in individual cases where the ACM is selected over the general rule specifically because the former yields a lower premium than the latter.

In addition, it appears that the ACM is not as easy to use as the PBGC initially thought. Adjustment of the Schedule B data under the ACM requires the use of formulas with several terms and factors, including expressions with negative and/or fractional exponents, that some small plan administrators evidently find daunting. Despite the ACM's ease of use in comparison to the general rule, the PBGC has received complaints about its complexity.

The PBGC proposes to address these problems by replacing the ACM with a simpler procedure and restricting the new procedure's use by large plans. The PBGC has devised a simplified filing method ("SFM") that is even easier to use than the ACM, with the hope that more small plan administrators will be able to use the SFM to compute premiums without the assistance of an actuary than appears to be the case with the ACM. The new SFM eliminates all of the existing ACM formulas and replaces them with tables of adjustment factors and simple arithmetical rules. Under the proposed amendment, the SFM would replace the ACM for all plan years beginning after 1992. However, as discussed in detail below, plans paying premiums for 500 or more participants would not be allowed to use the SFM if their UVBs as determined under the SFM were less than if they had used the general rule.

(The PBGC invites public comment regarding what proportion of plans of various sizes routinely determine UVBs under both the ACM and the general rule before they decide which method to use for paying premiums, whether they do it in all cases or only, for example, when an ACM calculation shows some amount of UVBs, and whether the general rule determinations made for this purpose are full final determinations on which a premium filing could be based or merely trial determinations that cost substantially less than full determinations and that are intended only as a basis for deciding whether full determinations should be made. Similarly, the PBGC invites comment regarding whether a significant number of plans that currently calculate UVBs under the ACM without making a general rule determination would encounter obstacles to timely filing (involving, e.g., general rule data collection) under the PBGC's proposed restriction on the use of the SFM by larger plans and what (if anything) might be done in the context of this proposed amendment to alleviate any such problems.)

Overview of the SFM

Like the ACM, the SFM would start from figures reported on Form 5500 Schedule B as of the beginning of the plan year preceding the premium payment year; add accruals and contributions for that year; correct for

any difference between the current liability interest rate(s) (the "Funding Interest Rate(s)") actually used and the required interest rate under § 2610.23(b)(1) (the "Premium Interest Rate"); and bring the resulting UVB figure forward to the end of the plan year preceding the premium payment year by adding interest at the Premium Interest Rate. Unlike the ACM, however, the SFM would use no formulas. Instead, it would provide two tables of factors for adjusting the Form 5500 vested benefit figures to reflect the difference between the Premium Interest Rate and the Funding Interest Rate and give additional simple arithmetic rules (involving only addition, subtraction, and multiplication) for making other adjustments to the Form 5500 figures and the resulting UVB figure. The factors in the tables would replace the ACM interest adjustment formula and related tables in current § 2610.23(c) (2) and (3). The additional simple arithmetical rules would replace the provision that adjusts assets for contributions under current § 2610.23(c)(4) and the formula in current § 2610.23(c)(5) that adjusts UVBs for the passage of time. The ACM adjustment for accruals in current § 2610.23(c)(1), which is now based on a percentage of vested benefits, would be replaced by an adjustment based on the amount of accruals reported on the Schedule B.

Perhaps the best way to introduce the proposed SFM is to work through an example showing how it would be used to compute UVBs in a simulated premium filing. Accordingly, assume that a small calendar year plan, for which the plan administrator is computing the 1993 variable rate premium using the SFM, has the following data on its Schedule B for 1992:

Item 6d (current liability for vested benefits as of 1/1/92)—
(i) (retirees and beneficiaries): $40,000;
(ii) (terminated vested participants): $10,000;
(iii) (active participants): $110,000;
Item 6e (increase in current liabilities for accruals in 1992): $8,000;
Item 7 (total employer and employee contributions for 1992): $10,000;
Item 8b (actuarial value of assets—assume as of 1/1/92): $100,000;
Item 12c(i) (current liability interest rates (Funding Interest Rates))—Pre-retirement: 8.0 percent; Post-retirement: 7.625 percent;
Item 12d (assumed retirement age): 62.

The interest rate required under § 2610.23(b)(1) (the Premium Interest Rate) that the plan administrator would use would be that for January 1993; assume that it is 7.91 percent. Finally, the plan administrator would have to refer to the tables of adjustment factors in proposed § 2610.23(c)(3). For convenience, a portion of each table is reproduced here; their use is explained as the example proceeds.

TABLE 1

[To be used when the Premium Interest Rate is less than the Funding Interest Rate]

Column A		Column B	Column C			
If the Funding Interest Rate minus the Premium Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60–61	for ages 62–63	for ages over 63
0.01	0.25	1.02	1.04	1.04	1.05	1.05
.26	.50	1.03	1.08	1.09	1.10	1.11
.51	.75	1.05	1.12	1.13	1.15	1.16

TABLE 2

[To be used when the Premium Interest Rate equals or exceeds the Funding Interest Rate]

Column A		Column B	Column C			
If the Premium Interest Rate minus the Funding Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60–61	for ages 62–63	for ages over 63
0.00	0.25	1.00	1.00	1.00	1.00	1.00
.26	.50	.98	.97	.96	.96	.95
.51	.75	.97	.95	.92	.91	.91

To find the plan's 12/31/92 UVBs in order to compute the 1993 variable rate premium, the plan administrator would take the following steps:

Step 1: Adjust the 1/1/92 Benefit Value for Retirees and Beneficiaries

The plan administrator's first step is to adjust the 1/1/92 value of vested benefits for retirees and beneficiaries to reflect the difference between the Funding Interest Rate used to value those benefits and the Premium Interest Rate mandated by the statute. The unadjusted benefits value is on line 6d(i) of the Schedule B: $40,000. The adjustment factor depends on the difference between the Funding Interest Rate and the Premium Interest Rate; for retiree benefits, the Premium Interest Rate is compared with the post-retirement Funding Interest Rate. The SFM table headings tell which table the adjustment factor should come from. In this case, the factor comes from Table 2, because the Premium Interest Rate (7.91 percent) is greater than the applicable Funding Interest Rate (7.625 percent). The adjustment factor comes from the second row of Table 2, because the difference between the Premium Interest Rate and the Funding Interest Rate is in the 0.26–0.50 range on the second row of column A of Table 2 (7.91 minus 7.625 is 0.285, which rounds up to 0.29 percentage points). Following this row over to column B leads to the adjustment factor for the line 6d(i) amount. The factor is 0.98. Multiplying

$40,000 by 0.98 gives $39,200. This is the adjusted 1/1/92 value of vested benefits for retirees and beneficiaries.

Step 2: Adjust the 1/1/92 Benefit Value for Terminated Vested Participants

The second step is very much like the first. Here, the plan administrator adjusts the 1/1/92 value of vested benefits for terminated vested participants to reflect the difference between the Funding Interest Rate and the Premium Interest Rate. This unadjusted benefits value is on line 6d(ii) of the Schedule B: $10,000. Once again, the adjustment factor depends on the difference between the Funding Interest Rate and the Premium Interest Rate, but where (as here) the pre- and post-retirement Funding Interest Rates are different, the plan administrator must compare the greater of the two Funding Interest Rates with the Premium Interest Rate to get the adjustment factor for terminated vested participants' benefits. In this case, the pre-retirement Funding Interest Rate (8.0 percent) is greater than the post-retirement Funding Interest Rate (7.625 percent). For this step, therefore, the adjustment factor comes from Table 1, because the Premium Interest Rate (7.91 percent) is less than the applicable Funding Interest Rate (8.0 percent). The adjustment factor comes from the first row of Table 1, because the difference between the Premium Interest Rate and the Funding Interest Rate is in the 0.01–0.25 range on the first row of column A of Table 1 (8.0 minus 7.91 is 0.09 percentage points).

Since terminated vested participants have not yet retired, the adjustment factor for the value of their benefits also depends on the plan's assumed retirement age. The assumed retirement age for this plan is 62. So the plan administrator follows the first row of Table 1 over to column C and then looks in the subcolumn headed "for ages 62–63" for the adjustment factor for the line 6d(ii) amount. The factor is 1.05. Multiplying $10,000 by 1.05 gives $10,500. This is the adjusted 1/1/92 value of vested benefits for terminated vested participants.

Step 3: Adjust the 1/1/92 Benefit Value for Active Participants

The third step is almost the same as the second. Here, the plan administrator adds accruals for 1992 to the 1/1/92 value of vested benefits for active participants and adjusts the sum to reflect the difference between the Funding Interest Rate and the Premium Interest Rate. The unadjusted benefits value for active participants is on line 6d(iii) of the Schedule B: $110,000. The current liability increase for 1992 accruals is on line 6e of the Schedule B: $8,000. The sum of these two figures is $118,000. The plan administrator uses the same Funding Interest Rate, and thus the same table (Table 1) and row (the first row), to find the adjustment factor for active participants' benefits as was used for terminated vested participants' benefits in step 2. The plan administrator also uses the same column (C) and subcolumn (for ages 62–63) as in step 2. So the adjustment factor for the line 6d(iii) amount is the same as that for the line 6d(ii) amount: 1.05. Multiplying $118,000 by 1.05 gives $123,900. This is the adjusted 1/1/92 value of vested benefits for active participants.

The sum of the three adjusted 1/1/92 vested benefits values is therefore $173,600 ($39,200+$10,500+$123,900), and this is the total value of vested benefits as of 1/1/92 that will be used in computing 1/1/92 UVBs in step 5 below.

Step 4: Adjust the 1/1/92 Value of Plan Assets

In this step, the plan administrator adjusts the 1/1/92 value of plan assets to reflect contributions for 1992. The unadjusted plan asset value comes from line 8b of the Schedule B: $100,000. The total 1992 contributions come from item 7 of the Schedule B: $10,000. The contributions (which may have been made on various dates in 1992 and 1993) are discounted back to 1/1/92 by multiplying them by 0.95. (The SFM uses this same discount factor no matter what the Premium Interest Rate is and no matter when the contributions were actually made.) Multiplying $10,000 by 0.95 gives $9,500 as the discounted value of the contributions. Then adding the discounted contributions to the unadjusted assets value gives $109,500 ($100,000 plus $9,500). This is the adjusted value of plan assets as of 1/1/92.

Step 5: Compute the UVBs

In this step, the plan administrator computes the 1/1/92 UVBs and then adjusts them so that the adjusted figure can be used as 12/31/92 UVBs. The 1/1/92 UVBs are equal to the total adjusted 1/1/92 vested benefits (from steps 1, 2, and 3) minus the total adjusted 1/1/92 assets (from step 4). At the end of step 3, the total adjusted 1/1/92 benefits were found to be $173,600; in step 4, the total adjusted 1/1/92 assets were found to be $109,500. So the 1/1/92 UVBs are $64,100 ($173,600 minus $109,500). To adjust this 1/1/92 figure for use as a 12/31/92 figure, the plan administrator adds interest using the Premium Interest Rate as the interest rate. Since the Premium Interest Rate is 7.91 percent, the 1/1/92 UVBs are multiplied by 1.0791 (1 plus the Premium Interest Rate) to yield $69,170.31. This is the UVBs as of 12/31/92. The plan administrator then uses this UVB figure to determine the plan's variable rate premium.

Details of the SFM

The SFM, applicable to premium payment years beginning after 1992, would be set forth in § 2610.23(c), and the ACM, limited to premium payment years beginning before 1993, would be transferred to a new § 2610.23(f). New § 2610.23(c)(1), like the introductory text of existing § 2610.23(c), would be a summary or general statement of how the method would work, and § 2610.23(c)(2)–(7) would provide the detailed rules. The tables of factors to be applied to the vested benefit values, and general rules for their use, would be in § 2610.23(c)(2). (To avoid possible confusion, the SFM tables would be called Tables 1 and 2 to distinguish them from ACM Tables A and B.) Section 2610.23(c)(3)–(5) would contain specific adjustment rules for the vested benefits of retirees and beneficiaries, terminated vested participants, and active participants respectively. Section 2610.23(c)(6) would provide for adjusting plan assets, and § 2610.23(c)(7) for determining and adjusting UVBs.

Use of the SFM, as of the ACM, would be restricted for plans paying premiums for 500 or more participants, but the restrictions would now be more stringent. The ACM requires such plans to make adjustments for any significant events described in § 2610.23(d), and the SFM would continue this requirement, which would be stated explicitly in new § 2610.23(c)(1) instead of just in § 2610.23(d) as at present. In addition, § 2610.23(c)(1) would allow such plans to use the SFM only if the amount of their UVBs determined under the general rule were not greater than that calculated with the SFM. An enrolled actuary would be required to certify to that fact if the SFM were used, and if an audit found that the general rule UVBs were greater, the amount of any premium deficiency (and related interest and penalties) would be based on the (higher) general rule figure.

As discussed above, this new restriction is proposed as a response to concerns that the PBGC may be exposed to significant revenue losses in individual cases where large plans select the ACM over the general rule because calculations with both methods show that use of the ACM minimizes UVBs. The PBGC believes that the new rule will solve this problem without

imposing substantial additional administrative costs on plans. A study of premium filings suggests that more than four-fifths of single-employer plans pay no variable rate premiums; for most of those plans, the absence of UVBs is likely to be obvious even before any calculations are done. As for large plans whose funding status is not so clear, the PBGC has reason to believe, as noted above, that calculations under both the general rule and the ACM are already routinely done as part of the premium payment process.

The SFM would also include another new limitation (applicable to all plans). Section 2610.23(c)(1) would provide that the SFM could be used only if the Premium Interest Rate prescribed under § 2610.23(b)(1) were not more than six percentage points less than the plan's Funding Interest Rates from its Schedule B. This limitation would be needed because use of the tables in new § 2610.23(c)(3) would be mandatory under the SFM (unlike the ACM, in which use of the tables is optional), and Table 1 would only cover Funding Interest Rates up to six percentage points higher than the Premium Interest Rate. The restriction of Table 1 to a six-point rate spread reflects two considerations. One is that the SFM makes simplifying assumptions about interest rates, and these assumptions introduce inaccuracies that, though relatively small when the Funding Interest Rate is close to the Premium Interest Rate, become more significant when the rates diverge further. The other is that, because of the way the Premium Interest Rate and the permissible range of the Funding Interest Rate are set by statute, a six-point spread between them is extremely unlikely. (Although no limitation would be placed on use of the SFM by a plan whose Funding Interest Rate (or Funding Interest Rates) was (or were) lower than the Premium Interest Rate, no matter how great the spread, the adjustment factors provided for spreads greater than six points would be the same as for a six-point spread. A six-point spread when the Funding Interest Rate is lower than the Premium Interest Rate is considered even less likely than when the Funding Interest Rate is higher.)

In addition to setting forth the two tables of vested benefit adjustment factors, proposed § 2610.23(c)(2) would describe how to select a table and a row within a table in finding each adjustment factor. The benefit adjustment factors would adjust the vested benefit values for the difference between the Premium Interest Rate and the Funding Interest Rate, and this difference would accordingly determine the table and row from which each adjustment factor would be taken. The Premium Interest Rate in the SFM is the same as the quantity called "RIR" in the ACM, viz., the rate prescribed in § 2610.23(b)(1) for the month in which the premium payment year began. The Funding Interest Rate would be one of the rates entered in the pre- or post-retirement column of line 12c(i) on the Schedule B. The pre- and post-retirement Funding Interest Rates are the same as the ACM's BIA and BIR respectively.

Since choosing a table and row would depend on the Funding Interest Rate applicable to each vested benefit amount, § 2610.23(c)(2) would refer to the specific adjustment rules for the three vested benefits amounts (in § 2610.23(c)(3)–(5)) for the Funding Interest Rate to be used for each adjustment. If the Premium Interest Rate were less than the applicable Funding Interest Rate, Table 1 would be used; if the Premium Interest Rate were equal to or greater than the Funding Interest Rate, Table 2 would be used. To find the proper row in the table, the difference between the Funding Interest Rate and the Premium Interest Rate (determined by subtracting the smaller of the two from the larger) would be rounded to the nearest hundredth of a percent. (For example, 1.035 percentage points would round to 1.04 points, and 0.374 percentage points would round to 0.37 points.) One would then locate the rate range in column A of the table that included the difference between the Premium Interest Rate and the applicable Funding Interest Rate. Each row would cover a difference range of one-quarter of one percent. The appropriate factor for the particular combination of Premium Interest Rate and Funding Interest Rate would be found on that row in the appropriate column of the table. The specific adjustment rules for the three vested benefits amounts in § 2610.23(c)(3)–(5) would also tell which column (and, for line 6d(ii) and 6d(iii) adjustments, which subcolumn) of the appropriate table to use for each adjustment.

Under § 2610.23(c)(3), the post-retirement Funding Interest Rate would be used to find the factor for adjusting the value from line 6d(i) of the Schedule B, since that is the rate used to value retiree benefits for the Schedule B. The appropriate column for the line 6d(i) adjustment factor would be column B. The adjusted line 6d(i) amount under § 2610.23(c)(3) would simply be the unadjusted amount from that line multiplied by the factor found in the appropriate table following the rules in § 2610.23(c) (2) and (3).

The benefits of active and terminated vested participants may be valued using two rates, one for the pre-retirement period and another for the post-retirement period. To simplify the SFM, only one rate would be used to find the adjustment factors for these values. In order to avoid premium losses to the PBGC, § 2610.23(c) (4) and (5) would require that the greater of the pre- and post-retirement Funding Interest Rates be used to find the adjustment factors for the values from lines 6d(ii) and 6d(iii) of the Schedule B.

The appropriate column for the line 6d(ii) and 6d(iii) adjustment factors would be column C. To find the factors, the assumed retirement age reported on line 12d of the Schedule B would be used to select the proper subcolumn of column C. (The assumed retirement age in the SFM is the same as the assumed retirement age used in the ACM.) Each subcolumn is headed by a range of ages: under 60, 60–61, 62–63, and over 63. The subcolumn used would be the one whose heading included the assumed retirement age.

In addition to specifying the Funding Interest Rate, column, and subcolumn to be used in adjusting the line 6d(ii) amount, § 2610.23(c)(4) would provide simply that the adjusted line 6d(ii) amount would be the unadjusted amount from that line multiplied by the factor found in the appropriate table following the rules in § 2610.23(c) (2) and (4). Section 2610.23(c)(5), on the other hand, would require that the unadjusted line 6d(iii) amount be increased by the amount of the expected current liability increase for benefits accruing during the plan year preceding the premium payment year—from line 6e of the Schedule B—before being multiplied by the adjustment factor. The line 6d(iii) factor would be the same as the line 6d(ii) factor because it would be based on the same Funding Interest Rate and assumed retirement age.

The use of the expected current liability increase figure from line 6e of the Schedule B represents a change from the ACM, which approximated accruals as an amount equal to seven percent of the combined vested benefits of active and terminated vested participants—no accrual figure having been available on the Schedule B when the ACM was devised. While the line 6e figure is typically determined as of the first day of the plan year, it need not be; the use of a later date would make benefit liabilities under the SFM higher than if the determination were made as of the beginning of the plan year, because the

SFM would add the line 6e figure, without discount, to the value of active participants' vested benefits as of the first day of the plan year from line 6d(iii) of the Schedule B. The line 6e figure may also include nonvested as well as vested accruals, and this also would tend to inflate benefit liabilities. However, the PBGC believes that the amount of any such inflation would typically be minimal. In any event, a plan would be free to use the general rule to avoid any disadvantage that the SFM might cause either by not providing a discount or by including nonvested accruals.

The three adjusted vested benefits values determined under § 2610.23(c)(2)–(5) would be added together to give a total adjusted value of vested benefits for computing UVBs under proposed § 2610.23(c)(7).

The factors in Tables 1 and 2 in § 2610.23(c)(2) have been derived from formulas similar to the formulas prescribed under the ACM. Each column B factor is equal to 0.94^D, where D is equal to the Premium Interest Rate minus the Funding Interest Rate. However, the factor in each row is used for a range of D's—the ranges shown in column A of each table. To avoid premium losses to the PBGC, the Table 1 factors are derived using the highest percentage point difference in each range, while the Table 2 factors are derived using the lowest difference in each range. For example, in the third row of Table 1, D would be –0.75, but in the third row of Table 2, D would be 0.51.

Similarly, each column C factor is equal to the column B factor from the same row multiplied by $((107-D)/107)^{(ARA-50)}$ (with "ARA" standing for the plan's assumed retirement age). However, the factor in each subcolumn of column C is used for a range of assumed retirement ages—the ranges shown in the subcolumn headings. To avoid premium losses to the PBGC, the Table 1 factors are derived using assumed retirement ages from the high end of each range, while Table 2 factors are derived using assumed retirement ages from the low end of each range. (The low end of the under-60 range is assumed to be 55, and the high end of the over-63 range is assumed to be 65.) Thus, for example, in the 60–61 subcolumn of Table 1, an assumed retirement age of 61 is used, but in the same subcolumn of Table 2, the assumed retirement age used is 60.

While the ACM uses both pre- and post-retirement interest corrections in its formula for adjusting the benefit values for active and terminated vested participants, the formulas used to generate the SFM tables refer to only one interest figure for these participants—either the pre- or post-retirement Funding Interest Rate, whichever is greater. To avoid having different tables for different values of Premium Interest Rate, the SFM formulas also use a simplified version of the fraction expressing the ratio of the Funding Interest Rate to the Premium Interest Rate. Since the value of this fraction depends mostly on the spread between the Funding Interest Rate and the Premium Interest Rate, rather than on their actual values, the SFM formulas use a fraction based on the actual spread and an assumed Premium Interest Rate of 7.00 percent. This assumed value of Premium Interest Rate represents a rough historical average of actual Premium Interest Rates; if Premium Interest Rates begin to deviate significantly from the assumed value, the PBGC may find it appropriate to issue new tables based on a different assumed value.

Proposed § 2610.23(c)(6) would provide rules for adjusting the value of plan assets taken from Schedule B. As under the ACM (§ 2610.23(c)(4) of the existing regulation), the basic figure would come from line 8b, unless that figure were determined as of a date other than the first day of the prior plan year, in which case the figure would come from line 6c. However, the SFM would provide a simplified procedure for adjusting that basic figure.

Like the existing adjustment procedure, the new procedure in proposed § 2610.23(c)(6) would correct for any contributions made for the plan year preceding the premium payment year. The value of assets as of the first day of that prior year, whether from line 8b or line 6c of the Schedule B, must exclude any contributions made for that year. (Of course, contributions for the year before the prior year are includible in the value of assets as of the beginning of the prior year only if actually made before the Schedule B for the prior year is filed.) The assets figure must therefore be increased to reflect contributions for the prior year.

The amount of contributions made for the prior year would be taken from columns (b) and (c) of item 7 of the Schedule B. The contributions would then have to be discounted to reflect the fact that they were paid after the date as of which the plan assets figure was determined (the beginning of the prior year). In order to simplify this step, § 2610.23(c)(6)(i) would use a flat discount factor of 0.95, so that the discounted contributions amount would be the total contributions amount times 0.95. This flat discount factor reflects an assumption that all of the contributions being discounted would have been made about three-quarters of the way through the prior year and that the discount rate would be about 7.00 percent (the same value assumed for the Premium Interest Rate in the simplified ratio between the Funding Interest Rate and the Premium Interest Rate that is used in the formulas for generating the benefit adjustment tables in § 2610.23(c)(2)). To the extent that the weighted average contribution date were earlier or the Premium Interest Rate were lower, these assumptions would result in a higher variable rate premium. However, the PBGC believes that relatively few plans receive contributions so early as to be seriously disadvantaged by the SFM's assumed weighted average contribution date. In any event, the SFM is an optional procedure that plans need not use. (The flat discount factor, like the tables of benefit adjustment factors in § 2610.23(c)(2), might be changed if Premium Interest Rates were to deviate significantly from historical values.)

Under proposed § 2610.23(c)(7), the adjusted assets value (computed under proposed § 2610.23(c)(6)) would be subtracted from the adjusted benefits value (computed under proposed § 2610.23(c)(2)–(5)) to yield the value of UVBs at the beginning of the plan year preceding the premium payment year, and this figure would be brought forward to the end of the prior year by multiplying it by the sum of one plus the Premium Interest Rate (expressing the Premium Interest Rate as a decimal fraction of 1, not as a percentage).

The ACM uses a somewhat more complicated method for adjusting the UVBs figure, expressed in a formula that compensates for the possibility that the plan year preceding the premium payment year may be a short year. By ignoring that possibility, the SFM would be simpler, but would produce a higher UVB amount, and therefore a higher variable rate premium, for a premium payment year that followed a short plan year. The PBGC believes that the increased simplicity of the SFM in this regard outweighs the detriment to plans in the relatively infrequent situations where there is a short plan year, especially in view of the fact that the SFM (like the ACM) would be an optional computation method.

Taking into account the aggregate effect of all of the differences between the ACM and the SFM, the PBGC believes that its aggregate premium receipts from plans using the SFM would be neither less than nor significantly greater than if the ACM were used instead. For most plans, the results produced by the SFM would differ from

those produced by the ACM primarily because of the shift from the ACM's assumed value of benefit accruals (in current § 2610.23(c)(1)) to the SFM's actual value (in proposed § 2610.23(c)(5)). Any such difference for an individual plan would be in the direction of improved accuracy and should thus be unobjectionable.

Aside from the change in accounting for accruals, the PBGC believes that for the vast majority of plans, the results produced by the SFM would not differ significantly from those that would be produced by the ACM. While there would be a relatively small number of plans for which the SFM would produce a significantly higher premium than the ACM, such a plan could avoid paying an unnecessarily high premium by using the general rule.

The other proposed amendments to § 2610.23 reflect technical, clarifying, and conforming changes that are not intended to have any substantive effect.

SFM for Distress or Involuntary Terminations

Section 2610.24(c) currently contains a special version of the ACM for plans undergoing distress or involuntary termination. Following the same pattern as in § 2610.23, the amendment would move this special ACM rule to the end of § 2610.24 and preserve it (as § 2610.24(h)) for premium payment years beginning after 1988 and before 1993. In its place, a new § 2610.24(c) would provide a special version of the SFM for plans in involuntary or distress terminations. (As in § 2610.23, there would also be a number of technical and conforming changes.)

New § 2610.24(c) would be much like the existing provision, except that it would tie into the SFM rather than the ACM. Aside from the new restriction (discussed above) on use of the SFM by large plans, the plans permitted to use the new special rule would be the same as under the existing rule, and the Schedule B they could use would be determined in the same way as it is now. However, because the SFM would adjust benefits for additional accruals, and UVBs for the passage of time, differently than the ACM does, new § 2610.24(c) (3), (4), and (6), which deal with these adjustments, would be restructured to conform to the new SFM rules. In particular, § 2610.24(c) (3) and (4) would provide different modifications of the SFM rules, depending on whether or not the Schedule B being used included separate entries for active and terminated vested participants' vested benefits and an entry for accruals (features that were added in 1989).

Also, § 2610.24(c)(5) would provide that the new simpler method for adjusting plan assets in proposed § 2610.23(c)(6) could not be used; instead, a method that tracks the current ACM asset adjustment method in existing § 2610.23(c)(4) would be required. This provision is prompted by the difficulty of devising an adaptation of the simple new § 2610.23(c)(6) rule that would appropriately discount contributions that might cover multiple years and that might have been made before the full phase-in of the quarterly contribution requirement in section 302(e) of ERISA and section 412(m) of the Internal Revenue Code of 1986.

Due Dates

ERISA section 4007 specified a due date of 30 days after the beginning of the premium payment year for premiums for the first premium payment year beginning after ERISA's effective date. The premium regulation retained this due date rule until 1978, when the due date was changed to seven months after the end of the preceding plan year; for 1981 through 1984, the due date was the end of the seventh month of the premium payment year. In 1985, it was changed to the end of the second month of the premium payment year for large plans only, in response to recommendations of the Grace Commission (the President's Private Sector Survey on Cost Control) (see the preambles to the proposed and final 1985 amendment to the premium regulation, 50 FR 1065 at 1066 (January 9, 1985) and 50 FR 12533 at 12534–5 (March 29, 1985)). (For the first year of the new rule, large plans were defined as those with at least 10,000 participants; beginning in 1986, the threshold was dropped to 500 participants.) However, the end of the seventh month was retained in 1985 as the small plan due date.

The PBGC recognized that some large plans might have problems computing their premiums by the new, earlier due date because of difficulty in determining participant counts as of the required determination date (the last day of the prior year). The PBGC therefore made provision for the estimation of early payments, established safe harbor rules to give large plans a means of avoiding penalties on underpayments resulting from low estimates, and established explicit rules in the premium regulation for the reconciliation of estimated early premium payments with the final participant count. The reconciliation date was made the same as the later due date that remained applicable to small plans.

In 1988, the variable rate premium for single-employer plans was introduced. The flat rate premium due date for large plans remained the end of the second month of the premium payment year (e.g., February 28th for calendar year plans); however, the due date for the new variable rate premium was made the same for large plans as for small plans (and the same as the reconciliation date for large plans), and was deferred to the fifteenth day of the eighth month after the beginning of the premium payment year (e.g., September 15th for calendar year plans). (The use of the later due date for large plans' variable rate premiums—an anomaly in the context of the Grace Commission recommendations—reflected concern for plans' ability to make realistic variable rate premium estimates by the early due date, in view particularly of the variable rate premium computation rules prescribed in the regulation, which relied heavily on data developed for the Form 5500 and Schedule B thereto.)

Thus, although the premium regulation does not actually require two annual premium filings by large plans, the due date structure makes filing twice a year a practical necessity for most large plans. This is true for those plans that find it necessary (or administratively convenient) to pay an estimate at the early filing date, which they must later reconcile; and also for those single-employer plans that find it impossible (or administratively inconvenient) to compute the variable rate premium in time to pay it at the same time the flat rate premium is due. The need for two filings each year by most large plans is a burden for them and for the PBGC.

Moreover, a large plan that underestimates its flat rate premium on the early due date must pay interest to the PBGC on the amount of the underpayment, even if it satisfies the safe harbor rules. The safe harbor rules provide protection only from penalties, not from interest charges; the PBGC does not have the authority to waive interest charges. If an estimated payment turns out to be higher than the flat rate amount finally determined to be due, the plan may receive a credit or refund, but the PBGC lacks the authority to pay interest on overpayments.

Furthermore, although the safe harbor rules give large plans an opportunity to avoid penalties on underpayment of the flat rate premium by paying a definitely determinable amount (last year's participant count times the current year's flat rate) and making up any shortfall by the reconciliation due date, the safe harbor rules make the premium regulation more complex by providing a

different rule for penalties than is provided for interest. The safe harbor rules are also an administrative burden for the PBGC, which must treat plans that fail the safe harbor tests differently than those that pass the tests but nonetheless underpay the flat rate premium at the early due date, assessing both interest and penalties against the former but charging the latter for interest only. Where a penalty is assessed, it is based on the full difference between the early payment actually made and the final flat-rate amount due (rather than just the difference between the actual early payment and the safe harbor amount).

Finally, while variable rate premiums are due after the nominal due date for the Form 5500 (and Schedule B), the Form 5500 due date is often extended by two-and-a-half months, making it later than the premium due date. Thus, single-employer plans must often pay variable rate premiums a whole month before they are required to report on Form 5500 the data on which those premiums are based (although of course the data ultimately reported on Form 5500 may be used to determine premiums before the Form 5500 is in fact filed). This discrepancy has been of particular concern for plans using the alternative calculation method, which refers explicitly to Schedule B line items. (The same comment would apply to the simplified filing method that the PBGC proposes to substitute for the existing alternative calculation method.)

The PBGC proposes to address these problems by deferring the final filing due date (to just 15 days before the extended Form 5500 due date), raising the number of participants a plan must have in order to be required to make the early premium payment (so that fewer plans must file twice a year), and charging neither penalties nor interest on early payments that equal at least a definitely determinable amount (so that both estimates and special safe harbor rules are unnecessary). Providing a definite amount for the early payment would also obviate the need for even estimated data determinations before the early payment was made. This would make it possible to accelerate the early filing due date to nearer the beginning of the premium payment year and to widen the scope of the early payment to cover the variable rate, as well as the flat rate, portion of the premium—changes that would balance those described above in order to achieve approximate revenue neutrality for the PBGC.

Structurally, the existing due date rules in § 2610.25 (b), (c), and (d) (and those in § 2610.34 (a) and (b) for premium payment years of multiemployer plans beginning after 1987) would be consolidated, moved to the end of § 2610.25 (as § 2610.25(e)), and preserved for premium payment years beginning after 1987 and before 1993. (These rules would be significantly reworded to make them consistent in format with the new rules being proposed for premium payment years beginning after 1992, but without the intent to make any substantive changes in the old rules.) Current § 2610.25 (e) and (f) would be redesignated as § 2610.25 (c) and (d). The new due date rules, for premium payment years beginning after 1992, would be set forth in a new § 2610.25(b).

Although the proposed amendment would eliminate prospectively the need for the safe harbor rules (currently in § 2610.8(b)(4)), these rules would need to be preserved for premium payment years beginning before 1993. Accordingly, the safe harbor rules would be moved to the end of § 2610.8(b) (that is, redesignated as § 2610.8(b)(5)) and reworded slightly to make them applicable only to premium payment years beginning before 1993 and to conform references to other provisions of the amended premium regulation.

Under the current due date rules, the plans that must pay the flat rate premium by the early due date are those that were required to pay premiums for at least 500 participants for the plan year preceding the premium payment year (the current "large plan threshold," which would be preserved in § 2610.25(e)(5)). Under the new rules, the number of plans required to file by the early due date would be reduced by increasing the large plan threshold to 5,000 participants. This would be reflected in the definitions (for purposes of the new due date rules) of the terms "large plan" and "small plan" in proposed § 2610.25(b)(5). For the 1989 premium payment year, there were about 8,000 plans at or above the 500-participant threshold, but only about 1,000 plans that had at least 5,000 participants; thus, the PBGC estimates that the proposed increase in the large plan threshold would reduce by about 7,000 (or 87 percent) the number of plans that would potentially need to make two filings per year.

The amendment would also change both annual due dates (that is, the early date applicable only to the new, smaller group of "large plans" and the later date applicable to the new, larger group of "small plans" and to reconciliation filings by the large plans). Under proposed new § 2610.25(b)(1), the small plan due date would be the last day of the ninth full calendar month following the end of the plan year preceding the premium payment year (i.e., September 30th for calendar year plans, October 31st for plans with plan years beginning January 2d-February 1st, etc.). Under proposed § 2610.25(b)(2)(ii), this would also be the reconciliation due date for large plans. This is only 15 days before the due date for the Form 5500 with the typical two-and-a-half-month extension. This change would relieve plans of the need to compute premiums a full month before the underlying data have to be reported on Form 5500 and Schedule B thereto.

Under new § 2610.25(b)(2)(i), the early due date for large plans would be advanced to the fifteenth day of the first full calendar month following the end of the plan year preceding the premium payment year (i.e., January 15th for calendar year plans, February 15th for plans with plan years beginning January 2d-February 1st, etc.). If large plans were still to be required to pay their (actual or estimated) flat rate premiums for the premium payment year by the early filing date, advancing the date would worsen the existing problems with early filing. However, as mentioned briefly above and discussed in detail below, the amendment would also provide large plans with a definitely determinable amount to pay at the early filing date, thus making estimation unnecessary. In view of this latter change, there would no longer be any reason not to collect the preliminary payment close to the beginning of the premium payment year. This practice would be more in line with the practices of commercial insurance companies.

New § 2610.25(b)(2)(i) would also prescribe the amount due from large plans on the early filing date. This would be either the dollar amount of the total (flat and variable rate) premium payable for the plan year preceding the premium payment year—a definitely determinable amount that would be known well in advance of the early due date—or, at the plan's option, the total (flat and variable rate) premium due for the premium payment year (which the plan could estimate if it chose). If the early payment fell short of the total premium finally determined to be payable for the premium payment year, the amount of the shortfall would be due by the reconciliation due date under new § 2610.25(b)(2)(ii).

It should be noted that under this proposal, the scope of the early payment for large plans would not be limited to the flat rate portion of the premium, as it has been up to now. As mentioned above, problems with estimating the

variable rate premium militated against including it in the initial payment when it was introduced in 1988. Since estimating would no longer be required under this proposal, however, the PBGC sees no reason to continue deferring large plans' variable rate payments to a date close to the end of the premium payment year.

It should also be noted that the proposed early payment would be based on the dollar amount of the previous year's premium, rather than on the previous year's plan data and the current year's premium rates, as under the existing regulation's safe harbor rules. The proposed approach has been taken in the interest of simplicity, even though it would mean that the PBGC would lose the benefit of any future premium rate increases in the initial premium filing.

A third point to note is that in determining the amount of the previous year's premium, refunds and credits under existing § 2610.22(d) and proposed new § 2610.22(e) would be disregarded. Thus, the early payment obligation would not be artificially reduced by the circumstance that the preceding plan year was a short year.

The key feature of the proposed new early payment requirement, however, would be the elimination of the need to estimate, and with it the need for special safe harbor rules and the risk of interest charges. Currently, safe harbor rules are needed to relieve plans from penalties that would otherwise accrue for even small, good faith underestimates of their flat rate premiums at the early filing date. But even the safe harbor rules provide no relief from interest charges on underestimates. Under the proposal, a plan that paid the same amount as the previous year's final total premium by the early filing date would be assured of avoiding not only penalties (as under the existing safe harbor rules) but also interest on any amount by which the early payment fell short of the final total premium.

However, the proposal would still allow a plan to pay an estimate of the current year's premium at the early filing date if it so chose. Choosing to pay an estimate would open the plan to the risk of interest and penalty charges if the estimate proved to be too low, but a plan would presumably accept this risk if it believed that its current year's premium would end up being substantially less than its previous year's premium (as, for example, if it had lost many of its participants or had substantially improved its funding during the preceding year).

Upon reconciliation, a plan would owe the amount (if any) by which its early payment was less than the premium finally determined to be due. However, no penalty or interest on the amount of the shortfall would be owed as long as the early payment were at least equal to the previous year's premium. If the early payment were less than both the previous year's final amount and the current year's final amount, interest and penalty would be imposed only on the amount by which the early payment fell short of the lesser of the previous year's final premium or the current year's final premium. (If the early payment were more than the current year's final amount, a refund or credit would be available under the same rules applicable to overpayments generally.)

For example, suppose that a plan's final total premium obligation for 1995 were $1,000 and that the plan made an early premium payment (using an estimate) of $700 for 1996. If its final 1996 premium were $1,200, it would owe penalty and interest only on $300, the amount by which its early payment fell short of $1,000 (the lesser of 1995's or 1996's final premium obligation). But if its final 1996 premium were $900, it would owe interest and penalty only on $200, the shortfall from $900 (again, the lesser of the 1995 or the 1996 final premium). Of course, if the plan made an early payment of $1,000, it would owe no penalty or interest no matter how large its final 1996 obligation turned out to be.

The PBGC now permits large plans to file a Form 1 instead of a Form 1–ES at the early filing date; single-employer plans are allowed to file this early Form 1 without a Schedule A. This practice is consistent with the fact that the early payment under the current rules is an estimate of only the flat rate portion of the final premium. By filing Form 1 early without Schedule A, therefore, a plan is simply substituting a final flat rate figure for an estimate of the same figure. Under the proposed system, however, the early payment would be keyed to the total premium liability (either the previous year's figure or an estimate of the current year's). Thus, the PBGC would continue to accept advance filing of a final premium payment (either instead of the early payment or after the early payment was made) only if the advance filing were a complete final filing, including (in the case of a single-employer plan) Schedule A and payment of both the flat and variable rate premiums.

The proposed due date rules for new and newly covered plans (in new § 2610.25(b)(3)) would be the same as the existing rules for such plans (which would be preserved in § 2610.25(e)(3)). The proposed due date rules for plans changing plan years (in new § 2610.25(b)(4)) would be almost the same as the corresponding rules in the existing regulation (which would be preserved in § 2610.25(e)(4)), except that a plan would have at least 90 days, instead of the 30 days now allowed, to pay its premium after adopting the amendment changing the plan year. The purpose of this change would be simply to make the filing rule for plans that change plan years more consistent with the rule for new and newly covered plans (which permits filing 90 days after plan adoption or the beginning of title IV coverage), and thus remove a potential source of confusion.

As alluded to briefly above, the new due date provisions would embody a combination of changes (some representing financial losses for the PBGC and others representing financial gains) that the PBGC has designed to have no substantial net revenue effect for the PBGC. Obviously, however, the new rules would shift financial burdens among premium payers to some degree, primarily away from smaller "large plans" that would no longer be required to pay premiums by the early due date and toward larger "large plans" that would be required to pay more of their premiums by an earlier due date. (The policy of requiring earlier payment from larger plans than from smaller plans was discussed in the preamble to the final 1985 amendment to the premium regulation, 50 FR 12533 at 12535 (March 29, 1985).)

In the process of devising the new premium payment system embodied in the proposed changes to the due date rules in § 2610.25, the PBGC considered and rejected several alternative approaches to the premium payment problems discussed above. For example, the early payment required of large plans might have remained limited to the flat rate portion of the premium only. However, the proposal's substantial reduction in the number of plans required to make the early filing would not then have been possible without significant revenue loss to the PBGC. Another possibility would have been to base the early payment required of large plans on the amount of the previous year's premium only, without the option of paying an estimate. However, the lack of an estimation option might have created problems for plans that underwent very substantial contraction (as through spinoff of most of their participants) or substantially improved their funding during the year preceding the premium payment year.

Another approach (the "maximum simplicity" approach) would have

returned to the pre-Grace Commission practice of having all plans pay their premiums on the same schedule, with the due date for all plans deferred to the Form 5500 due date. This approach would have solved all the due date problems discussed above. However, it would have entailed an unacceptable loss of revenue to the PBGC, due to the deferral of premium receipts from large plans.

A third approach (the "legislative change" approach) would have sought a statutory amendment moving the premium determination date back one year, from the last day of the plan year preceding the premium payment year to the last day of the plan year *before* the plan year preceding the premium payment year. The premium due date would then have been accelerated to the beginning of the premium payment year for all plans.

Since the extended due date of the applicable Form 5500 would have fallen in the tenth month of the preceding plan year, this approach would have avoided the need to pay premiums before the relevant data had to be filed on Form 5500. It would also have eliminated estimated premium payments and reconciliation by making the early payment the only payment. However, it would have involved a substantial additional cost for small plans, which currently pay relatively late in the premium payment year.

Also, the use of older determination data would have made premiums lag behind changes in participant counts and funding levels. This would have tended to favor plans with increasing participant counts and single-employer plans with deteriorating funding levels by making their premiums lower than under the current system. But plans with declining participant counts and single-employer plans with improving funding levels would have been disadvantaged because their premiums would have been higher than under the current system.

In addition, creating a one-year gap between the premium determination date and the beginning of the premium payment year would have created significant complexities regarding the premium obligations of plans involved in mergers, consolidations and spinoffs during the period between the earlier determination date and the beginning of the premium payment year.

A fourth approach (the "combined filing" approach) would also have called for all plans to pay premiums just once a year, at the beginning of each premium payment year. The payment would have been a combination of two components. One component would have been a reconciliation for the prior year, based on the Form 5500 data filed during the prior year for the year preceding the prior year. The second component would have been a preliminary payment for the current year equal to the prior year's total premium. If the reconciliation involved an additional payment, it would have been added to the preliminary premium for the current year, without any penalties or interest. If the reconciliation generated a credit, it would have been subtracted from the preliminary payment for the current year.

As with the legislative change approach, the applicable Form 5500 due date under the combined filing approach would have been well before the premium due date when the Form 5500 data would be needed. Estimates would also have been avoided, and although there would have been reconciliation filings, they would have been combined with the preliminary premium filings so that plans would not have had to file twice a year. But accelerating most of the premium to the beginning of the year would have meant increased costs for plans, particularly for small plans.

Furthermore, plans with declining participant counts and single-employer plans with improving funding would have been disadvantaged under the combined filing approach in much the same way as under the legislative change approach because, although the preliminary payment would eventually have been reconciled, the reconciliation date would have been a whole year after the preliminary payment. (A plan would have been allowed to reconcile earlier only if it also paid the preliminary premium for the following year at the same time.)

A fifth approach (the "two-system" approach) would have combined the maximum simplicity approach for small plans with the combined filing approach for large plans, giving the advantages of both approaches. However, large plans with declining participant counts and large single-employer plans with improving funding would have had the same kinds of problems as under the combined filing approach. In addition, the difference in payment rules for large and small plans would have been great enough so that different forms and instructions for large and small plans might have been needed.

Compliance With Rulemaking Guidelines

The PBGC has determined that this amendment is not a "major rule" for purposes of Executive Order 12291 (46 FR 13193 (February 17, 1981)) because it will not have an annual effect on the economy of $100 million or more; or create a major increase in costs or prices for consumers, individual industries, or geographic regions; or have significant adverse effects on competition, employment, investment, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. This determination is based on the fact that this amendment would have no significant effect on the overall financial burden of PBGC premiums on plans in general, but rather would only shift those burdens to a limited extent among classes of plans, primarily away from smaller plans and toward larger plans (especially larger underfunded plans); and on the fact that this amendment would tend to decrease the non-financial burden of paying PBGC premiums by making the premium payment process simpler.

Under section 605(b) of the Regulatory Flexibility Act, the PBGC certifies that this amendment will not have a significant economic impact on a substantial number of small entities. The amendment will tend to shift the financial burden of PBGC premiums away from smaller plans and toward larger plans (especially larger underfunded plans), and will tend to decrease the non-financial burden of paying PBGC premiums by making the premium payment process simpler. For these reasons, compliance with sections 603 and 604 of the Regulatory Flexibility Act is waived.

List of Subjects in 29 CFR Part 2610

Employee benefit plans, Penalties, Pension insurance, Pensions, and Reporting and recordkeeping requirements.

In consideration of the foregoing, the PBGC proposes to amend part 2610 of subchapter H of chapter XXVI of title 29, Code of Federal Regulations, as follows:

PART 2610—PAYMENT OF PREMIUMS

1. The authority citation for part 2610 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1306, 1307 (1988 & Supp. I 1989), as amended by sec. 12021, Public Law 101–508, 104 Stat. 1388, 1388–573.

2. In § 2610.1, the second sentence and the last three sentences of paragraph (a) are revised to read as follows:

§ 2610.1 Purpose and scope.

(a) *Purpose.* * * * Subpart A contains rules that apply to both single-employer and multiemployer plans with respect to all premium payment years. * * *

Subpart B contains the premium rates, due dates and computational rules for premium payment years beginning after 1987. Subpart C contains the premium rates and due dates for premium payment years beginning before 1988.

* * * * *

3. Section 2610.2 is revised to read as follows:

§ 2610.2 Definitions.

(a) *In general.* For purposes of this part:

Act means the Employee Retirement Income Security Act of 1974, as amended.

Code means the Internal Revenue Code of 1986, as amended.

Form 5500 means the Form 5500 series annual report prescribed by the Internal Revenue Service, the Department of Labor and the PBGC.

Multiemployer plan means a plan described in section 4001(a)(3) of the Act.

New plan means a plan that became effective within the premium payment year and includes a plan resulting from a consolidation or spinoff. A plan that meets this definition is considered to be a new plan for purposes of this part even if the plan constitutes a successor plan within the meaning of section 4021(a) of the Act.

Newly covered plan means a plan that is not a new plan and that was not covered by title IV of the Act pursuant to section 4021 of the Act immediately before the premium payment year.

PBGC means the Pension Benefit Guaranty Corporation.

Plan year means the calendar, policy or fiscal year on which the records of the plan are kept.

Premium payment year means the plan year for which the premium is being paid.

Short plan year means a plan year that is less than twelve full months.

Single-employer plan means a plan described in section 4001(a)(15) of the Act.

(b) *"Participant" for premium payment years beginning after 1992.* For purposes of this part, for a premium payment year beginning after 1992, "participant" means the same as it does for purposes of the Form 5500 for the plan year preceding the premium payment year (or, in the case of a new plan, or a newly covered plan that was not required to file Form 5500 for the plan year preceding the premium payment year, the Form 5500 prescribed for plan years beginning one year before the first day of the plan's first premium payment year).

(c) *"Participant" for premium payment years beginning before 1993.* For purposes of this part, for a premium payment year beginning before 1993, "participant" means any individual who is included in one of the categories described in paragraphs (c)(1)–(c)(3) of this section, subject to the provisions of paragraph (c)(4) of this section.

(1) *Active.* (i) Any individual who is currently in employment covered by the plan and who is earning or retaining credited service under the plan. This category includes any individual who is considered covered under the plan for purposes of meeting the minimum coverage requirements, but who, because of offset or other provisions (including integration with Social Security benefits), does not have any accrued benefits.

(ii) Any non-vested individual who is not currently in employment covered by the plan but who is earning or retaining credited service under the plan. This category does not include a non-vested former employee who has incurred a break in service the greater of one year or the break in service period specified in the plan.

(2) *Inactive*—(i) *Inactive receiving benefits.* Any individual who is retired or separated from employment covered by the plan and who is receiving benefits under the plan. This category does not include an individual to whom an insurer has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

(ii) *Inactive entitled to future benefits.* Any individual who is retired or separated from employment covered by the plan and who is entitled to begin receiving benefits under the plan in the future. This category does not include an individual to whom an insurer has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

(3) *Deceased.* Any deceased individual who has one or more beneficiaries who are receiving or entitled to receive benefits under the plan. This category does not include an individual if an insurer has made an irrevocable commitment to pay all the benefits to which the beneficiaries of that individual are entitled under the plan.

(4) For plan years beginning before September 2, 1975, a retiree or former employee for whom a fully paid-up immediate or deferred annuity has been purchased shall be treated as a "participant" for purposes of this part if such individual retains a legal claim against the plan for benefits or if the plan retains a participating interest in the annuity policy.

4. Section 2610.4 is revised to read as follows:

§ 2610.4 Filing address.

Except as may otherwise be provided by instructions in the PBGC Annual Premium Payment Package, any form or payment required to be filed or paid under the provisions of this part shall be mailed to Pension Benefit Guaranty Corporation, P.O. Box 105655, Atlanta, GA 30348–5655, or delivered to NationsBank Retail Lockbox Processing Center, PBGC Lockbox 105655, 6000 Feldwood Road, 5 Southside East, College Park, GA 30349.

5. Section 2610.5 is revised to read as follows:

§ 2610.5 Date of filing.

(a) *Premium payment years beginning after 1992.* (1) Any form or payment required to be filed or paid under the provisions of this part with respect to a premium payment year beginning after 1992 shall be deemed filed or paid on the earlier of—

(i) The date on which it is mailed, as evidenced by a legible United States Postal Service postmark, registered mail receipt, or other proof of the date of mailing with the United States Postal Service, or

(ii) Five days before the date on which it is received by the PBGC.

(2) For purposes of this section, if the PBGC receives a form or payment on the first business day following a weekend or a federal holiday, then the PBGC shall be deemed to have received the form or payment on the day after the last business day preceding the weekend or holiday. The term *business day* as used in this section means any day that is not a Saturday, a Sunday, or a federal holiday.

(b) *Premium payment years beginning before 1993.* (1) Any form or payment required to be filed or paid under the provisions of this part with respect to a premium payment year beginning before 1993 shall be deemed filed or paid on the date on which it is mailed.

(2) For purposes of this paragraph (b), a form or payment shall be presumed to have been mailed on the date on which it is postmarked by the United States Postal Service, or three days prior to the date on which it is received by the PBGC if it does not contain a legible United States Postal Service postmark.

6. In § 2610.8, paragraphs (b)(4) and (b)(5) are revised to read as follows:

§ 2610.8 Late payment penalty charges.

* * * * *

(b) *Waiver of penalty charge.* * * *

(4) With respect to the period of 30 days after the date of any PBGC bill for the premium payment necessary to reconcile the premium paid with the actual premium due, if the bill is paid within that 30-day period; or

(5) With respect to any premium payment (excluding any variable rate portion of the premium under § 2610.22(a)(2)) for a premium payment year beginning before 1993, if a plan that is required to make a reconciliation filing described in § 2610.25(e)(2)(iii) or § 2610.34(b)—

(i) paid at least 90 percent of the flat rate portion of the premium due for the premium payment year by the due date specified in § 2610.25(e)(2)(i) or § 2610.34(a); or

(ii) paid by the due date specified in § 2610.25(e)(2)(i) or § 2610.34(a) an amount equal to the premium that would be due for the premium payment year, computed using the flat per capita premium rate for the premium payment year and the participant count upon which the prior year's premium was based; and

(iii) pays 100 percent of the premium due for the premium payment year under § 2610.22 (excluding any variable rate portion of the premium under § 2610.22(a)(2)), § 2610.32, or § 2610.33, as applicable, on or before the due date for the reconciliation filing under § 2610.25(e)(2)(iii) or § 2610.34(b), as applicable.

7. Section 2610.21 is revised to read as follows:

§ 2610.21 Purpose and scope.

This subpart provides rules for computing and procedures for paying premiums for plan years beginning after 1987.

8. In § 2610.22, paragraph (a) is amended by revising its heading; paragraphs (a)(3) introductory text and (a)(3)(i)–(a)(3)(v) are redesignated as paragraphs (f) introductory text and (f)(1)–(f)(5) respectively; redesignated paragraphs (f) introductory text and (f)(5) are amended by revising the references "(a)(3)", "(a)(3)(i)", "(a)(3)(ii)", "(a)(3)(iii)", "(a)(3)(iv)", and "(a)(3)(v)" (wherever they appear) to read "(f)", "(f)(1)", "(f)(2)", "(f)(3)", "(f)(4)", and "(f)(5)" respectively; paragraph (c) is removed; paragraph (b) is redesignated as paragraph (c); redesignated paragraph (c) is amended by revising the reference "paragraph (a)" to read "paragraphs (a) and (b)"; redesignated paragraph (f) is amended by revising its heading and by removing the first sentence of its introductory text; paragraph (d) is revised; and new paragraphs (a)(3), (b), and (e) are added, to read as follows:

§ 2610.22 Premium rates.

(a) *Single-employer plans.* * * *

(3) *Cap on variable rate amount.* In no event shall the variable rate amount determined under paragraph (a)(2) of this section exceed $34 per participant (for premium payment years beginning in 1988, 1989, or 1990) or $53 per participant (for premium payment years beginning after 1990), or (for premium payment years beginning before 1993) such lesser amount as may be determined under paragraph (f) of this section.

(b) *Multiemployer plans.* For a premium payment year beginning on or after January 1, 1988, the premium paid by a multiemployer plan for basic benefits guaranteed under section 4022A(a) of the Act is equal to the number of participants in the plan on the last day of the plan year preceding the premium payment year multiplied by:

(1) For premium payment years beginning before September 27, 1988, $2.20; and

(2) For premium payment years beginning after September 26, 1988, $2.60.

* * * * *

(d) *Special refund rule for certain short plan years.* A plan described in this paragraph that pays the full premium due for a short plan year that begins after 1988 is entitled, upon request, to a refund of a portion of the premium. The amount of the refund will be determined by prorating the premium for the short plan year by the number of months (treating a part of a month as a month) in the short plan year. A plan is described in this paragraph if—

(1) the plan is a new or newly covered plan that becomes effective for premium purposes on a date other than the first day of its first plan year;

(2) the plan adopts an amendment changing its plan year, resulting in a short plan year;

(3) the plan's assets are distributed pursuant to the plan's termination, in which case the short plan year for purposes of computing the amount of the refund under this paragraph shall be deemed to end on the asset distribution date or, if later (in the case of a single-employer plan), the date 30 days before the PBGC receives the plan's post-distribution certification; or

(4) the plan is a single-employer plan, and a trustee of the plan is appointed pursuant to section 4042 of the Act, in which case the short plan year for purposes of computing the amount of the refund under this paragraph shall be deemed to end on the date of appointment.

(e) *Special credit rule for certain short plan years.* A plan described in paragraph (d)(1) or (d)(2) of this section is entitled at its option to a credit for a portion of the premium for a short plan year, in lieu of a refund under paragraph (d) of this section, under the circumstances described in this paragraph (e). A plan described in paragraph (d)(1) of this section may claim the credit against the premium due for an initial short plan year that begins after 1992. A plan described in paragraph (d)(2) of this section that pays the full premium due for a short plan year may claim the credit for the short plan year against the premium due for the following full plan year if the full plan year begins after 1992. In either case, the amount of the credit shall be determined in the same manner as the amount of a refund under paragraph (d) of this section, and the credit shall be claimed in accordance with instructions in the PBGC Annual Premium Payment Package.

(f) *Variable rate cap reduction for premium payment years beginning before 1993.*

* * * * *

9. In § 2610.23, paragraph (a) is amended by adding, after the reference "paragraph (c)" in the first sentence of the introductory text, the reference "or (f)"; paragraph (c) is redesignated as paragraph (f); paragraph (e) is amended by adding, after the reference "paragraphs (a) through (d)", the reference "and (f)"; redesignated paragraph (f) is amended by revising the references "(c)(1)", "(c)(2)", "(c)(3)", "(c)(4)", and "(c)(5)" (wherever they appear) to read "(f)(1)", "(f)(2)", "(f)(3)", "(f)(4)", and "(f)(5)" respectively; paragraph (b)(2) is amended by revising the second, third and fourth sentences; paragraph (d) is amended by revising the heading and introductory text; redesignated paragraph (f) is amended by revising the heading and the first sentence of the introductory text; and paragraph (c) is added, to read as follows:

§ 2610.23 Determination of unfunded vested benefits.

* * * * *

(b) *Unfunded vested benefits.* * * *

(2) *Actuarial value of assets.* * * * Contributions owed for any plan year preceding the premium payment year shall be included for premium payment years beginning during 1988 and, for premium payment years beginning after 1988, shall be included for plans with 500 or more participants as of the last day of the plan year preceding the premium payment year and may be

included for any other plan. However, contributions may be included only to the extent such contributions have been paid into the plan on or before the earlier of the due date specified in § 2610.25 (b)(1), (b)(2)(ii), (e)(1), or (e)(2)(ii) (as applicable) or the date that the full amount of the premium (including any variable rate portion) is paid. Contributions included that are paid after the last day of the plan year preceding the premium payment year shall be discounted at the plan asset valuation rate (on a simple or compound basis in accordance with the plan's discounting rules) to the last day of the plan year preceding the premium payment year to reflect the date(s) of payment. * * *

(c) *Simplified filing method for premium payment years after 1992*—(1) *In general.* In lieu of determining the amount of a plan's unfunded vested benefits pursuant to paragraph (a) of this section for a premium payment year beginning after 1992, the plan administrator may, subject to the restrictions in paragraphs (c)(1)(i) and (c)(1)(ii) of this section, calculate the amount of the plan's unfunded vested benefits under this paragraph (c). The computation shall be done, using the plan's Form 5500 Schedule B for the plan year preceding the premium payment year, as follows. The value of the plan's vested benefits shall be adjusted in accordance with paragraphs (c)(2) through (c)(5) of this section to reflect accruals for the plan year preceding the premium payment year and the difference between the interest rate prescribed in paragraph (b)(1) of this section and the plan's current liability interest rate or rates. The value of plan assets shall be adjusted in accordance with paragraph (c)(6) of this section to reflect contributions for the plan year preceding the premium payment year. The resulting unfunded vested benefits amount (the adjusted value of vested benefits minus the adjusted value of assets) shall be further adjusted in accordance with paragraph (c)(7) of this section to reflect the passage of time from the date of the adjusted Schedule B data (the first day of the plan year preceding the premium payment year) to the last day of the plan year preceding the premium payment year. [An alternative calculation method for premium payment years beginning before 1993 is described in paragraph (f) of this section.]

(i) A plan's unfunded vested benefits may be calculated under this paragraph (c) only if neither of the plan's current liability interest rates required to be entered in line 12c(i) of the plan's Form 5500 Schedule B for the plan year preceding the premium payment year exceeds the interest rate prescribed in paragraph (b)(1) of this section by more than six percentage points.

(ii) The unfunded vested benefits of a plan with 500 or more participants as of the last day of the plan year preceding the premium payment year may be calculated under this paragraph (c) only in accordance with the provisions of paragraph (d) of this section, and only if the amount of the plan's unfunded vested benefits determined pursuant to paragraph (a) of this section does not exceed the amount of such unfunded vested benefits calculated under this paragraph (c) and an enrolled actuary so certifies in accordance with the Premium Payment Package.

(2) *Vested benefits adjustment factors.* In the simplified filing method described in this paragraph (c), the vested benefits values required to be entered in item 6d of Schedule B shall be adjusted in accordance with paragraphs (c)(3), (c)(4), and (c)(5) of this section using factors from the tables set forth in this paragraph (c)(2), and the sum of the three vested benefits values as so adjusted shall be used in determining unfunded vested benefits under paragraph (c)(7) of this section. For each adjustment, a Table 1 factor shall be used if the required interest rate prescribed in paragraph (b)(1) of this section (the "Premium Interest Rate") is less than the applicable current liability interest rate specified in paragraph (c)(3), (c)(4), or (c)(5) of this section (the "Funding Interest Rate"), and a Table 2 factor shall be used if the Premium Interest Rate equals or exceeds the applicable Funding Interest Rate. The factor for each adjustment shall be taken from the line in the appropriate table on which appears, in column A, the range of values that includes the amount (expressed as a percentage, rounded to the nearest hundredth of one percent) by which the Premium Interest Rate differs from the applicable Funding Interest Rate, and from the column specified in paragraph (c)(3), (c)(4), or (c)(5) of this section (based, in the case of paragraphs (c)(4) and (c)(5) of this section, on the assumed retirement age required to be entered in line 12d of Schedule B).

TABLE 1

[To be used when the Premium Interest Rate is less than the Funding Interest Rate]

Column A		Column B	Column C			
If the Funding Interest Rate minus the Premium Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60–61	for ages 62–63	for ages over 63
0.01	0.25	1.02	1.04	1.04	1.05	1.05
.26	.50	1.03	1.08	1.09	1.10	1.11
.51	.75	1.05	1.12	1.13	1.15	1.16
.76	1.00	1.06	1.16	1.18	1.20	1.22
1.01	1.25	1.08	1.20	1.23	1.26	1.29
1.26	1.50	1.10	1.24	1.28	1.31	1.35
1.51	1.75	1.11	1.29	1.33	1.38	1.42
1.76	2.00	1.13	1.34	1.39	1.44	1.49
2.01	2.25	1.15	1.39	1.45	1.51	1.57
2.26	2.50	1.17	1.44	1.50	1.58	1.65
2.51	2.75	1.19	1.49	1.57	1.65	1.73
2.76	3.00	1.20	1.54	1.63	1.72	1.82
3.01	3.25	1.22	1.60	1.70	1.80	1.92
3.26	3.50	1.24	1.66	1.77	1.89	2.01
3.51	3.75	1.26	1.72	1.84	1.97	2.11
3.76	4.00	1.28	1.78	1.92	2.06	2.22
4.01	4.25	1.30	1.85	2.00	2.16	2.33
4.26	4.50	1.32	1.91	2.08	2.26	2.45

TABLE 1—Continued

[To be used when the Premium Interest Rate is less than the Funding Interest Rate]

Column A		Column B	Column C			
If the Funding Interest Rate minus the Premium Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60–61	for ages 62–63	for ages over 63
4.51	4.75	1.34	1.98	2.16	2.36	2.57
4.76	5.00	1.36	2.06	2.25	2.47	2.70
5.01	5.25	1.38	2.13	2.34	2.58	2.84
5.26	5.50	1.41	2.21	2.44	2.70	2.98
5.51	5.75	1.43	2.29	2.54	2.82	3.13
5.76	6.00	1.45	2.37	2.64	2.95	3.29

TABLE 2

[To be used when the Premium Interest Rate equals or exceeds the Funding Interest Rate]

Column A		Column B	Column C			
If the Premium Interest Rate minus the Funding Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60–61	for ages 62–63	for ages over 63
0.00	0.25	1.00	1.00	1.00	1.00	1.00
.26	.50	.98	.97	.96	.96	.95
.51	.75	.97	.95	.92	.91	.91
.76	1.00	.95	.92	.89	.88	.86
1.01	1.25	.94	.90	.85	.84	.82
1.26	1.50	.92	.87	.82	.80	.78
1.51	1.75	.91	.85	.79	.77	.75
1.76	2.00	.90	.83	.76	.73	.71
2.01	2.25	.88	.80	.73	.70	.68
2.26	2.50	.87	.78	.70	.67	.64
2.51	2.75	.86	.76	.68	.64	.61
2.76	3.00	.84	.74	.65	.62	.58
3.01	3.25	.83	.72	.62	.59	.56
3.26	3.50	.83	.70	.60	.56	.53
3.51	3.75	.80	.68	.58	.54	.50
3.76	4.00	.79	.66	.55	.52	.48
4.01	4.25	.78	.64	.53	.49	.46
4.26	4.50	.77	.63	.51	.47	.44
4.51	4.75	.76	.61	.49	.45	.41
4.76	5.00	.74	.59	.47	.43	.39
5.01	5.25	.73	.58	.45	.41	.37
5.26	5.50	.72	.56	.44	.39	.36
5.51	5.75	.71	.55	.42	.38	.34
>5.75	>5.75	.70	.53	.40	.36	.32

(3) *Adjusted value of vested benefits—retirees and beneficiaries.* In the simplified filing method described in this paragraph (c), the adjusted value of vested benefits for retirees and beneficiaries shall be the value of such benefits required to be entered in column (2) on line 6d(i) of Schedule B, multiplied by the appropriate factor determined under paragraph (c)(2) of this section. The factor shall be determined using the Funding Interest Rate required to be entered in the post-retirement column on line 12c(i) of Schedule B and shall be taken from column B of the appropriate table in paragraph (c)(2) of this section.

(4) *Adjusted value of vested benefits—terminated vested participants.* In the simplified filing method described in this paragraph (c), the adjusted value of vested benefits for terminated vested participants shall be the value of such benefits required to be entered in column (2) on line 6d(ii) of Schedule B, multiplied by the appropriate factor determined under paragraph (c)(2) of this section. The factor shall be determined using the greater of the Funding Interest Rates required to be entered in the pre-retirement and post-retirement columns on line 12c(i) of Schedule B and shall be taken from column C of the appropriate table in paragraph (c)(2) of this section and from the subcolumn of column C that is headed by the age range that includes the plan's assumed retirement age.

(5) *Adjusted value of vested benefits—active participants.* In the simplified filing method described in this paragraph (c), the adjusted value of vested benefits for active participants shall be the sum of the value of such benefits required to be entered in column (2) on line 6d(iii) of Schedule B and the expected accruals for the plan year preceding the premium payment year required to be entered on line 6e of Schedule B, multiplied by the appropriate factor determined under paragraph (c)(2) of this section. The factor shall be determined using the same Funding Interest Rate, and shall be taken from the same column and subcolumn, as specified for terminated vested participants' benefits under paragraph (c)(4) of this section.

(6) *Adjusted value of plan assets.* In the simplified filing method described in this paragraph (c), the adjusted value of plan assets that shall be used in determining unfunded vested benefits under paragraph (c)(7) of this section shall be the sum of—

(i) the value of such assets required to be entered on line 8b of Schedule B (if the amount on line 8b was determined as of the first day of the plan year preceding the premium payment year) or on line 6c of Schedule B (if the amount on line 8b was determined as of a date other than the first day of the plan year preceding the premium payment year), plus

(ii) an amount equal to 0.95 times the total amount of contributions required to be entered in columns (b) and (c) of item 7 of Schedule B.

(7) *Adjusted value of unfunded vested benefits.* In the simplified filing method described in this paragraph (c), the amount of the plan's unfunded vested benefits shall be the product of—

(i) the sum of the adjusted values of vested benefits determined under paragraphs (c)(3), (c)(4), and (c)(5) of this section minus the adjusted value of plan assets determined under paragraph (c)(6) of this section, multiplied by

(ii) the sum of 1 plus the required interest rate prescribed in paragraph (b)(1) of this section (expressed as a decimal fraction of 1, not as a percentage).

(d) *Significant events.* The significant events described in this paragraph shall be reflected in the assumptions used in determining a plan's unfunded vested benefits under paragraph (a) of this section to the extent required by paragraph (a) of this section. A plan with 500 or more participants as of the last day of the plan year preceding the premium payment year may use the simplified filing method described in paragraph (c) of this section or the alternative calculation method described in paragraph (f) of this section if no significant event, as described in this paragraph, has occurred between the first day and the last day of the plan year preceding the premium payment year and an enrolled actuary so certifies in accordance with the Premium Payment Package. If a significant event has occurred between those dates, such a plan may use the simplified filing method or alternative calculation method only if an enrolled actuary makes an appropriate adjustment to the value of unfunded vested benefits to reflect the occurrence of the significant event and certifies to that fact in accordance with the Premium Payment Package. The significant events described in this paragraph are—

* * * * *

(f) *Alternative calculation method for premium payment years before 1993.* In lieu of determining the amount of a plan's unfunded vested benefits pursuant to paragraph (a) of this section for a premium payment year beginning before 1993, the plan administrator may calculate the amount of the plan's unfunded vested benefits under this paragraph (f) using the plan's Form 5500, Schedule B, for the plan year preceding the premium payment year. * * *

* * * * *

10. In § 2610.24, paragraph (c) is redesignated as paragraph (h); paragraph (d) is amended by revising the reference "§ 2610.22(a)(3)" to read "§ 2610.22(f)"; paragraph (g) is amended by revising the reference "(e)(1) and (e)(2)" to read "(f)(1) and (f)(2)"; redesignated paragraph (h) is amended by adding, after the words "*unfunded vested benefits*" in the heading, the words "*for premium payment years beginning before 1993*" and by revising the words "on or after January 1, 1989" in the first sentence of the introductory text to read "after 1988 and before 1993"; redesignated paragraphs (h) introductory text, (h)(2), (h)(3), and (h)(4) are amended by revising the references "§ 2610.23(c)", "§ 2610.23(c)(1)", and "§ 2610.23(c)(5)" (wherever they appear) to read "§ 2610.23(f)", "§ 2610.23(f)(1)", and "§ 2610.23(f)(5)", respectively; paragraph (a)(3) is revised; and new paragraph (c) is added, to read as follows:

§ 2610.24 Variable rate exemptions and special rules.

(a) *Exemptions.* * * *

(3) *Section 412(i) plans.* A plan is described in this paragraph if the plan satisfied all criteria listed in section 412(i) of the Code and the regulations thereunder on the last day of the plan year preceding the premium payment year and the plan administrator so certifies, in accordance with the Premium Payment Package.

* * * * *

(c) *Special rule for determining unfunded vested benefits for premium payment years beginning after 1992 for plans terminating in distress or involuntary terminations.* With respect to premium payment years beginning after 1992, a plan described in this paragraph (c) may determine its unfunded vested benefits by using the special simplified filing method set forth in this paragraph, but only if neither of the plan's current liability interest rates required to be entered in line 12c(i) of the Schedule B described in paragraph (c)(1) of this section exceeds the interest rate prescribed in § 2610.23(b)(1) by more than six percentage points; and, in the case of a plan with 500 or more participants as of the last day of the plan year preceding the premium payment year, only in accordance with the provisions of § 2610.23(d), and only if the amount of the plan's unfunded vested benefits determined pursuant to § 2610.23(a) does not exceed the amount of such unfunded vested benefits determined under this paragraph (c) and an enrolled actuary so certifies in accordance with the Premium Payment Package. (A similar special rule for premium payment years beginning before 1993 is described in paragraph (h) of this section.) A plan is described in this paragraph if it has issued notices of intent to terminate in a distress termination in accordance with section 4041(a)(2) of the Act with a proposed termination date on or before the last day of the plan year preceding the premium payment year, or if the PBGC has instituted proceedings to terminate the plan in accordance with section 4042 of the Act and has sought a termination date on or before the last day of the plan year preceding the premium payment year. Pursuant to this paragraph, a plan shall determine its unfunded vested benefits in accordance with the simplified filing method in § 2610.23(c), except that—

(1) The calculation shall be based on the plan's Form 5500 Schedule B for the plan year that includes (in the case of a distress termination) the proposed termination date or (in the case of an involuntary termination) the termination date sought by the PBGC, or, if no Schedule B is filed for that plan year, on the Schedule B for the immediately preceding plan year;

(2) All references in § 2610.23(c) and § 2610.23(d) to the first day of the plan year preceding the premium payment year shall be deemed to refer to the first day of the plan year for which the Schedule B was filed;

(3) If the Schedule B described in paragraph (c)(1) of this section is for a plan year beginning after 1988, then § 2610.23(c)(5) shall be applied by using, instead of the amount required to be entered on line 6e of Schedule B, an amount equal to the product of—

(i) The amount required to be entered on line 6e of Schedule B, multiplied by

(ii) the number of years (rounded to the nearest hundredth of a year) between the date of the Schedule B data and (in the case of a distress termination) the proposed termination date or (in the case of an involuntary

termination) the termination date sought by the PBGC;

(4) if the Schedule B described in paragraph (c)(1) of this section is for a plan year beginning before 1989, then—

(i) the reference to "column (2)" in § 2610.23(c)(3) shall be ignored;

(ii) Section 2610.23(c)(4) shall not be applied; and

(iii) Section 2610.23(c)(5) shall be applied by using, instead of the amount required to be entered in column (2) on line 6d(iii) of Schedule B, the amount required to be entered on line 6d(ii) of Schedule B, and instead of the amount required to be entered on line 6e of Schedule B, an amount equal to the product of—

(A) Seven percent of the amount required to be entered on line 6d(ii) of Schedule B, multiplied by

(B) The number of years (rounded to the nearest hundredth of a year) between the date of the Schedule B data and (in the case of a distress termination) the proposed termination date or (in the case of an involuntary termination) the termination date sought by the PBGC;

(5) Section 2610.23(c)(6) shall not be applied, and the adjusted value of plan assets shall be the value of such assets required to be entered on line 8b of Schedule B (if the amount on line 8b was determined as of the first day of the plan year preceding the premium payment year) or on line 6c of Schedule B (if the amount on line 8b was determined as of a date other than the first day of the plan year preceding the premium payment year), adjusted in accordance with § 2610.23(b)(2); except that the amount of all contributions that are included in the value of assets and that were made after the first day of the plan year preceding the premium payment year shall be discounted to such first day at the interest rate prescribed in § 2610.23(b)(1) for the premium payment year, compounded annually except that simple interest may be used for any partial years; and

(6) For purposes of applying § 2610.23(c)(7), the quantity described in § 2610.23(c)(7)(ii) shall be modified by raising it to a power, the exponent being the number of years (rounded to the nearest hundredth of a year) between the date of the Schedule B data and the last day of the plan year preceding the premium payment year.

* * * * *

11. In § 2610.25, paragraphs (b), (c), and (d) are removed; paragraphs (e) and (f) are redesignated as paragraphs (c) and (d); paragraph (a) is amended by revising the last sentence; redesignated paragraph (c) is amended by revising the last sentence; and new paragraphs (b) and (e) are added, to read as follows:

§ 2610.25 Filing requirement.

(a) *General rule.* * * * The premium forms and payments shall be filed no later than the applicable due dates specified in paragraph (b) of this section (for premium payment years beginning after 1992) or paragraph (e) of this section (for premium payment years beginning after 1987 and before 1993).

(b) *Due dates for premium payment years beginning after 1992.* For premium payment years beginning after 1992, the due date generally applicable to small plans is prescribed in paragraph (b)(1) of this section and the due dates generally applicable to large plans are prescribed in paragraph (b)(2) of this section; paragraphs (b)(3) and (b)(4) of this section prescribe special rules for new and newly covered plans and for plans that change plan years; and paragraph (b)(5) of this section defines the terms "large plan" and "small plan" for purposes of this paragraph (b).

(1) *Small plans; in general.* The due date for a small plan (except as provided in paragraphs (b)(3) and (b)(4) of this section) is the last day of the ninth full calendar month following the end of the plan year preceding the premium payment year.

(2) *Large plans; in general.* For a large plan (except as provided in paragraphs (b)(3) and (b)(4) of this section)—

(i) The fifteenth day of the first full calendar month following the end of the plan year preceding the premium payment year is the due date for so much of the premium as does not exceed the amount of the premium required to be paid for the plan year preceding the premium payment year (determined without regard to any refund or credit for a short premium payment year under § 2610.22(d) or (e)); and

(ii) the due date for any portion of the premium that exceeds the amount described in paragraph (b)(2)(i) of this section is the last day of the ninth full calendar month following the end of the plan year preceding the premium payment year.

(3) *New and newly covered plans.* The due date for the first premium payment year of coverage of any new plan or newly covered plan (as defined in § 2610.2) is the latest of—

(i) The last day of the ninth full calendar month that begins on or after the later of—

(A) The first day of the premium payment year, or

(B) The day on which the plan becomes effective for benefit accruals for future service;

(ii) 90 days after the date of the plan's adoption; or

(iii) 90 days after the date on which the plan becomes covered by title IV of the Act pursuant to section 4021 of the Act.

(4) *Plans that change plan years.* For a plan that changes its plan year, each due date for the short plan year shall be the applicable due date specified in paragraph (b)(1), (b)(2), or (b)(3) of this section, and each due date for the plan year that follows the short plan year shall be the later of—

(i) The applicable due date specified in paragraph (b)(1) or (b)(2) of this section; or

(ii) 90 days after the date on which the amendment changing the plan year was adopted.

(5) *Definition of "large plan" and "small plan."* For purposes of this paragraph (b), a "large plan" is a plan that was required to pay premiums for 5,000 or more participants for the plan year preceding the premium payment year, and a "small plan" is a plan that was required to pay premiums for fewer than 5,000 participants for the plan year preceding the premium payment year.

(c) *Continuing obligation to file.* * * * The entire premium computed under this subpart must be paid for that plan year, whether or not the plan is entitled to a refund for a short plan year pursuant to § 2610.22(d)(3) or (4).

* * * * *

(e) *Due dates for premium payment years beginning after 1987 and before 1993.* For premium payment years beginning after 1987 and before 1993, the due date generally applicable to small plans is prescribed in paragraph (e)(1) of this section and the due dates generally applicable to large plans are prescribed in paragraph (e)(2) of this section; paragraphs (e)(3) and (e)(4) of this section prescribe special rules for new and newly covered plans and for plans that change plan years; and paragraph (e)(5) of this section defines the terms "large plan" and "small plan" for purposes of this paragraph (e).

(1) *Small plans; in general.* The due date for a small plan (except as provided in paragraphs (e)(3) and (e)(4) of this section) is the fifteenth day of the eighth full calendar month following the month in which the premium payment year begins.

(2) *Large plans; in general.* For a large plan (except as provided in paragraphs (e)(3) and (e)(4) of this section)—

(i) The due date for the multiemployer premium required by § 2610.22(b) and for the flat rate portion of the single-employer premium required by § 2610.22(a)(1) is the last day of the

second full calendar month following the close of the plan year preceding the premium payment year; and

(ii) The due date for the variable rate portion of the single-employer premium required by § 2610.22(a)(2) is the fifteenth day of the eighth full calendar month following the month in which the premium payment year begins.

(iii) If the number of plan participants on the last day of the plan year preceding the premium payment year is not known by the date specified in paragraph (e)(2)(i) of this section, a reconciliation filing (on the form prescribed by this part) and any required premium payment or request for refund shall be made by the date specified in paragraph (e)(2)(ii) of this section.

(3) *New and newly covered plans.* The due date for the first premium payment year of coverage of any new plan or newly covered plan (as defined in § 2610.2) is the latest of—

(i) The fifteenth day of the eighth full calendar month following the month in which the plan year begins or, if later, in which the plan becomes effective for benefit accruals for future service;

(ii) 90 days after the date of the plan's adoption; or

(iii) 90 days after the date on which the plan becomes covered by Title IV of the Act pursuant to section 4021 of the Act.

(4) *Plans that change plan years.* For a plan that changes its plan year, each due date for the short plan year shall be the applicable due date specified in paragraph (e)(1), (e)(2), or (e)(3) of this section, and each due date for the plan year that follows the short plan year shall be the later of—

(i) The applicable due date specified in paragraph (e)(1) or (e)(2) of this section; or

(ii) 30 days after the date on which the amendment changing the plan year was adopted.

(5) *Definition of "large plan" and "small plan."* For purposes of this paragraph (e), a "large plan" is a plan that was required to pay premiums for 500 or more participants for the plan year preceding the premium payment year, and a "small plan" is a plan that was required to pay premiums for fewer than 500 participants for the plan year preceding the premium payment year.

* * * * *

12. Section 2610.31 is revised to read as follows:

§ 2610.31 Purpose and scope.

This subpart provides rules for calculating and procedures for paying premiums for plan years beginning before 1988.

13. In § 2610.33, paragraph (d) is removed; paragraph (a)(1) is amended by revising the table; and paragraph (b) is revised, to read as follows:

§ 2610.33 Multiemployer premium rates.

(a) * * *

(1) * * *

For premium payment years	Rate
After Sept. 26, 1980, and before Sept. 27, 1984	$1.40
After Sept. 26, 1984, and before Sept. 27, 1986	1.80
After Sept. 26, 1986, and before 1988	2.20

* * * * *

(b) *New and newly covered plans.* For any new plan or newly covered plan (as defined in § 2610.2), the plan administrator shall pay the applicable premium under paragraph (a) of this section for each individual who is a participant in the plan on the date the plan becomes covered by section 4021(a) of the Act.

* * * * *

14. In § 2610.34, paragraphs (a)(7), (a)(8)(ii), (a)(9)(iv), and (b)(6) are removed; paragraph (a)(8)(i) is amended by removing the introductory text and by redesignating paragraphs (a)(8)(i)(A)–(D) as paragraphs (a)(8)(i)–(iv) respectively; paragraphs (a)(8), (a)(9), and (a)(10) are redesignated respectively as paragraphs (a)(7), (a)(8), and (a)(9); paragraphs (a) introductory text, (a)(5)(i), (a)(5)(ii), (a)(6)(i), and (a)(6)(ii), and redesignated paragraphs (a)(7), (a)(8) introductory text, (a)(8)(ii)(A), (a)(8)(ii)(B), (a)(8)(iii)(A), and (a)(8)(iii)(B) are amended by revising the references "(a)(7)", "(a)(7)(ii)", "(a)(8)", "(a)(9)", and "(a)(10)" (wherever they appear) to read "(a)(6)", "(a)(6)", "(a)(7)", "(a)(8)", and "(a)(9)" respectively; redesignated paragraph (a)(9) is amended by revising the introductory text; and paragraph (c) is amended by revising the last sentence, to read as follows:

§ 2610.34 Filing requirement.

(a) * * *

(9) For purposes of paragraphs (a)(5), (a)(6), (a)(8), (b)(4), and (b)(5) of this section, the number of participants in a plan year is determined as of the following dates:

* * * * *

(c) *Continuing obligation to file.* * * * The entire premium computed under this subpart must be paid for that plan year.

* * * * *

15. Appendix B to part 2610 is amended by revising the introductory text preceding the table to read as follows:

Appendix B—Interest Rates for Valuing Vested Benefits

The following table lists the required interest rates to be used in valuing a plan's vested benefits under § 2610.23(b) and in calculating a plan's adjusted vested benefits under § 2610.23(c)(2) and (e)(1):

* * * * *

Issued in Washington, DC, this 6th day of April, 1992.

James B. Lockhart III,

Executive Director, Pension Benefit Guaranty Corporation.

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