

SBA

SOP 37 13 2

**EQUAL EMPLOYMENT
OPPORTUNITY PROGRAM**

Office of Equal Employment Opportunity
and Civil Rights Compliance

U. S. Small Business Administration



**SMALL BUSINESS ADMINISTRATION
STANDARD OPERATING PROCEDURE
Headquarters**

SUBJECT: Equal Employment Opportunity (EEO) Program	S.O.P.		REV
	SECTION 37	NO. 13	2

INTRODUCTION

1. Purpose. Revising SOP to include processes for requests for reasonable accommodation for persons with disabilities.
2. Personnel Concerned. All SBA Employees.
3. Directives Canceled. Remove Pages: 1, 8, 57-68. Insert Pages: 1, 8, 57-77.
4. Originator. Office of Equal Employment Opportunity and Civil Rights Compliance.

AUTHORIZED BY: James E. Rivera Assistant Administrator Equal Employment Opportunity and Civil Rights Compliance		EFFECTIVE DATE
		PAGE 1

SBA Form 989 (5-90) Ref: SOP 00 23

EQUAL EMPLOYMENT OPPORTUNITY (EEO) PROGRAM

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CHAPTER 1
EQUAL EMPLOYMENT OPPORTUNITY (EEO) PROGRAM
THE OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY AND CIVIL
RIGHTS COMPLIANCE (EEO&CRC)

The Assistant Administrator for Equal Employment Opportunity and Civil Rights Compliance has been delegated the authority to administer the Equal Employment Opportunity program.

This Standard Operating Procedure (SOP) is intended to serve as guidance for SBA employees and management regarding the administration of the Equal Employment Opportunity (EEO) Program, Office of Equal Employment Opportunity and Civil Rights Compliance (EEO&CRC), including the operating procedures of the EEO complaint process. This SOP is intended only to improve the internal management of the Small Business Administration's (SBA's) EEO Program. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party against the United States, SBA, its officers, or any person.

1. WHAT IS THE EEO PROGRAM?

Each Federal agency must establish a program to ensure equal opportunity in its employment policies, practices and procedures and to maintain a continuing affirmative employment campaign to eradicate all vestiges of discrimination.

The authority for implementation of the EEO program is found in various laws, regulations and management directives. A list of these authorities and an explanation of them is found in Chapter 7 of this SOP.

EEO complaint processing is primarily guided by federal regulations at 29 C.F.R. §1614 and the Equal Employment Opportunity Commission (EEOC) Management Directive 110.

2. HOW IS THE SBA's EEO PROGRAM ADMINISTERED?

- a. The Administrator has overall responsibility for ensuring a viable results-oriented EEO Program. The authority to administer SBA's EEO Program has been delegated to the Assistant Administrator for Equal Employment Opportunity and Civil Rights Compliance (AA/EEO&CRC).

To assist in this effort, there are full-time, part-time and/or collateral duty personnel assigned to perform EEO-related duties, i.e., EEO Specialists, EEO Coordinators and EEO Counselors.

- b. The SBA's EEO Program is separated into three components:
- (1) **COMPLAINT PROCESSING;**
 - (2) **AFFIRMATIVE EMPLOYMENT;** and
 - (3) **PROGRAM EVALUATION.**
- (1) COMPLAINT PROCESSING – **SBA is** required to process complaints of discrimination filed by employees and applicants for employment who believe that they have been discriminated against on the bases of **race, color, sex, age, religion, national origin, disability or reprisal**. Reprisal constitutes retaliation for participation in protected EEO activity or opposition to employment practices made unlawful by anti-discrimination statutes.
- (a) INFORMAL/PRECOMPLAINT STAGE - This stage is the initial point of contact for individuals alleging discrimination and is also known as the counseling stage. It is in the best interest of all parties to resolve workplace disputes as quickly as possible. Therefore, a primary purpose of this stage is to resolve the dispute(s) that has been raised. In addition, EEO&CRC may offer, in appropriate individual cases, another option: participation in the Alternative Dispute Resolution (ADR) program. (See Chapter 4.)
- (b) FORMAL STAGE - When the parties are unable to resolve the workplace dispute in the pre-complaint stage and a complaint is filed, the formal process begins. This formal stage may include EEO investigations, EEO hearings and appeals. ADR may also be offered during this stage. (See Chapter 4.)
- (2) AFFIRMATIVE EMPLOYMENT PROGRAM - The Affirmative Employment Program (AEP) consists of efforts on the part of the SBA to ensure equal opportunity for employees in all aspects of the Agency's programs, i.e., training, hiring, awards and promotions.

This phase of the EEO Program is monitored by analyzing SBA's policies, practices and workforce distribution to identify barriers or impediments to an effective EEO program and recommending solutions to eliminate these barriers, with specific time frames and identification of responsible officials who must comply.

Special Emphasis Program Managers (SEPMs) such as Federal Women's, Hispanic Employment and Individuals With Disabilities Managers assist in addressing those concerns facing their respective AEP group. The SEPMs are advocates within SBA who will

participate in the development of the affirmative action plan, serve as consultants to managers on related issues in the workplace, and assist in recruitment and upward mobility efforts. The SEPMs will often participate in the development of training on various EEO matters that will help, proactively, employees and managers better understand related workplace issues and EEO policies and procedures.

Managers and supervisors are also held accountable for meeting AEP goals and objectives through the annual performance management assessment system (PMAS). A further explanation of the AEP program can be found in Chapter 5 of this SOP.

- (3) PROGRAM EVALUATION – SBA is required to establish a system for periodically reviewing the overall effectiveness of its employment opportunity effort. This is done by conducting on-site EEO Evaluations in SBA field and headquarters program offices.

The purpose of the on-site review is to assess management's commitment and implementation of the EEO Program, as well as the general environment and employee awareness of their rights and responsibilities under the EEO Program. Chapter 5 outlines the procedures for conducting on-site reviews.

3. WHAT DEFINITIONS AND TERMS DO I NEED TO KNOW?

- a. Several terms are commonplace in Federal sector EEO programs including:

EEO Counselor – individual appointed by EEO&CRC who attempts to resolve EEO workplace disputes at the informal stage.

EEO Specialist - individual who may be involved in all aspects of the EEO Program, i.e., processing complaints of discrimination; negotiating settlements; drafting and analyzing AEP goals and accomplishments; managing the ADR program; and conducting EEO on-site evaluations.

Complainant - individual who files a formal complaint of discrimination.

Aggrieved - individual who believes that he/she has suffered a present harm or loss with respect to a term, condition, or privilege of employment because of discrimination based on race, color, religion, sex, national origin, age, physical and/or mental disability or other disabling condition and/or reprisal, and who brings such matter to the attention of an EEO Counselor.

b. A full list of terms and definitions can be found in Chapter 7 of this SOP.

4. **WHAT ARE GENERAL RESPONSIBILITIES OF THE EEO&CRC STAFF?**

a. EEO Specialists may be responsible for:

- (1) drafting and developing policy guidance and providing direction for the attainment of Federal equal opportunity objectives;
- (2) processing complaints of discrimination;
- (3) negotiating EEO settlements;
- (4) providing technical assistance to employees and managers/supervisors;
- (5) conducting statistical analyses;
- (6) conducting EEO on-site evaluations of program and field offices;
- (7) conducting EEO impact studies of SBA reorganizations;
- (8) conducting briefings with employees, including managers and supervisors, on various related topics, i.e., complaint processing, sexual harassment and affirmative employment; and, making available an Alternative Dispute Resolution (ADR) program.

b. Coordinators - EEO&CRC's Area Civil Rights Directors (ACRDs) and Central Office Duty Station Coordinators (CODS) act as the Agency's EEO Coordinators. ACRDs and CODS are primarily responsible for civil rights compliance, but may also be responsible for several EEO duties including:

- (1) providing technical advice to SBA's EEO Counselors;
- (2) advising employees and management of their rights at the EEO counseling stage; and,
- (3) performing Special Emphasis Program Manager (SEPM) duties.

c. Special Emphasis Program Managers (SEPMs) – The Deputy Assistant Administrator for EEO&CRC is the SEPM for Central Office. ACRDs and CODS Coordinators are SEPMs for their assigned regions. There

are three mandatory Special Emphasis Programs (SEP): Hispanic Employment Program, Federal Women's Program and Individuals With Disabilities Program.

The duties performed by SEPMs can be found in Chapter 6 of this SOP.

5. OVERVIEW OF COMPLAINT PROCESSING STEPS

a. INFORMAL STAGE (PRE-COMPLAINT)

- (1) Aggrieved contacts EEO Counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the personnel action.
- (2) EEO Counselor advises Aggrieved of his/her rights, clearly defines issues and attempts an informal settlement.
- (3) If appropriate, the EEO Counselor obtains clearance to offer the option of ADR to Aggrieved. The Aggrieved may then choose ADR or continuation of counseling.

If successful resolution is achieved through either counseling or ADR, the terms of the settlement agreement are reduced to writing, appropriate clearances/signatures are obtained and the matter is closed.

If attempts at settlement fail, a Notice of Right to File a Complaint is issued to the Aggrieved. A formal complaint must be filed within 15 calendar days of receipt of a Notice of Right to File.

b. FORMAL STAGE INTAKE:

- (1) A formal written complaint is filed.
- (2) EEO&CRC assigns the complaint a case number and acknowledges receipt.

- (3) The complaint is analyzed for acceptance or dismissal.
- (4) (a) If dismissed, a Final Agency Decision is issued to Complainant, including appropriate appeal rights; or
 - (b) If accepted, the Complainant is notified of the issues accepted and the investigatory procedures, and provided with a copy of the EEO Counselor's Report.
 - (c) If there is a partial dismissal (some issues are accepted, while others are dismissed), an acceptance letter is issued, as well as notification that certain issues were dismissed and will not be investigated. This partial dismissal is not appealable until final action is taken on the remainder of the complaint.

c. INVESTIGATIVE STAGE:

- (1) Following acceptance of an EEO complaint, the complaint is priced for investigation, and a requisition is prepared and submitted to the Office of Procurement for processing.
- (2) The Agency official(s) named in the complaint, or Principal Responding Official (PRO), is notified of the complaint's acceptance, and the appropriate Headquarters' program head, district director or regional administrator is notified by the AA/EEO&CRC of the pending investigation. A letter of authority to investigate is issued and the complaint file is sent to a contract investigative firm.
- (3) The contract investigative firm completes the investigation within 180 days of the filing of the complaint, and upon completion, the file is submitted to EEO&CRC. This timeframe may be subject to several extensions as set forth in the relevant regulations.
- (4) The Report of Investigation (ROI) is reviewed for adequacy, sufficiency and privacy concerns. If the investigation is insufficient, the file is returned to the contract firm for corrections and/or a supplemental investigation. The EEO Specialist shall notify the Complainant if the file is returned to the contract firm for a supplemental investigation and of the approximate date for completion of that investigation.

If the file is found to be adequate, it is transmitted to the Complainant and his/her representative with notice of a right to elect a hearing before the Equal Employment Opportunity Commission (EEOC) or a Final Agency Decision

(FAD). Complainant must request a hearing or FAD within 30 calendar days of receipt of this notice.

In a mixed case complaint, the complainant is entitled to a FAD but not to a hearing before the EEOC (29 C.F.R. § 1614.302). For additional information regarding mixed case complaints, see Chapter 2, Paragraph 13.

d. ADJUDICATION STAGE:

(1) If Complainant requests a hearing before an EEOC Administrative Judge (AJ), a copy of the complaint file and investigative file is sent to the appropriate EEOC field office. The Office of General Counsel (OGC) is notified immediately, and will appoint an Agency Representative (AR). Where the complainant is an employee of the Office of Inspector General (OIG), notification is also sent to the Counsel to the Inspector General. The Counsel to the Inspector General and OGC will appoint a mutually agreed upon Agency Representative. Following a hearing or a judgment without a hearing, the AJ issues a Final Decision. EEO&CRC may issue a Final Order implementing the decision of the AJ and notifying Complainant of appropriate appeal rights. Alternatively, EEO&CRC may issue a Final Order that does not fully implement the AJ's decision, and simultaneously file an appeal.

or

(2) If Complainant elects a **FAD** and does not request a hearing, or fails to make an election within the designated time frame, EEO&CRC issues a Final Agency Decision, either finding no discrimination and notifying Complainant of all appropriate appeal rights, or finding discrimination subsequent to obtaining appropriate clearances pursuant to Chapter 2, Paragraph 11.

e. APPEAL STAGE:

- (1) Complainant may appeal an SBA dismissal to the EEOC, but may not appeal the partial dismissal of an EEO complaint until final action by the Agency is taken on the remaining issues of the complaint.
- (2) Complainant may also appeal a FAD (on the merits of the complaint) or a Final Order (implementing the decision of an Administrative Judge) to the EEOC or a Complainant may file a civil action in court, in the appropriate circumstances.

If Complainant chooses to appeal to EEOC, the appeal must be filed within 30 calendar days of receipt of the final agency action. If Complainant fails to file

his/her appeal within the time limit, it will be untimely and dismissed by the EEOC. The appeal must be filed with the Director, Office of Federal Operations (OFO), Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036, by personal delivery to the EEOC at 1801 L St., NW, Washington, D.C., or by facsimile at 202-663-7022. The EEOC Form 573, "Notice of Appeal/Petition," which is enclosed with the final agency action, should be used to file the appeal.

When Complainant files his/her appeal with the EEOC, a copy must be furnished to the SBA addressed to the Assistant Administrator for Equal Employment Opportunity and Civil Rights Compliance, U.S. Small Business Administration, 409 Third Street, S. W., Suite 6400, Washington, D.C. 20416. Complainant must certify the date and method by which service was made on the Agency in or attached to the appeal. After the receipt of such notification, the Office of General Counsel (OGC) will be notified by EEO&CRC, and OGC may appoint an Agency Representative (AR) if one has not already been assigned to the case. Where the Complainant is an employee of the Office of Inspector General (OIG), notification is also sent to the Counsel to the Inspector General. The Counsel to the Inspector General and OGC will appoint a mutually agreed upon Agency Representative, if one has not already been assigned.

Complainant may request reconsideration of the EEOC decision on appeal, within 30 calendar days of receipt of the decision, to the Equal Employment Opportunity Commission, Office of Federal Operations. Complainant may also

file a civil action in an appropriate United States District Court under the following conditions:

- (a) Within 90 days of receipt of the final action if no appeal has been filed;
- (b) After 180 days from the date of filing the individual complaint if an appeal has not been filed and a final action has not been taken;
- (c) Within 90 days of receipt of the EEOC's final decision on an appeal; or
- (d) After 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the EEOC.

If Complainant decides to file a civil action and does not have or cannot afford the services of an attorney, he/she may request that the Court appoint an attorney to represent him/her. Further, Complainant may request that the Court permit him/her to file the action without payment of fees or costs.

The name of the proper defendant in any such lawsuit is (ENTER APPROPRIATE NAME HERE), Administrator, U.S. Small Business Administration.

f. SETTLEMENTS:

All settlement agreements at any stage must be coordinated with and cleared by the appropriate offices and a management representative pursuant to Chapter 2, paragraph 11. Except in matters involving OIG employees, the Assistant Administrator for EEO&CRC, a representative of OGC, and an appropriate management official must be signatories to all formal settlement agreements unless waived in writing by those individuals. In cases involving OIG employees, the AA/EEO&CRC will have the opportunity to review settlements prior to execution of the agreement. The management officials required to review and concur in any settlement agreement, as set forth in Chapter 2, paragraph 11, have a right to review the file(s) relied upon in settling any case, including information which may be otherwise confidential or privileged. All appropriate steps will be taken by OGC, OIG Counsel Division, and the management official(s) to keep all information reviewed prior to settlement confidential and protected from disclosure. Moreover, an OGC representative or an OIG representative must sign any settlement agreement entered at any stage of the process in which the payment of federal funds is involved.

(NOTE: MORE DETAILED STEP-BY-STEP IMPLEMENTATION PROCEDURES ARE FOUND IN CHAPTER 2 OF THIS SOP, EEOC REGULATIONS 29 C.F.R. PART 1614, EEOC MANAGEMENT DIRECTIVE (MD) - 110 GOVERNING PROCESSING OF FEDERAL SECTOR EEO COMPLAINTS)

CHAPTER 2

PROCESSING COMPLAINTS OF DISCRIMINATION

These procedures are implemented pursuant to Equal Employment Opportunity Commission (EEOC) regulations: Title 29, Code of Federal Regulations, Part 1614.

1. WHO MAY FILE COMPLAINTS OF DISCRIMINATION?

Any SBA employee, former employee or applicant for employment with SBA who believes he/she has been subjected to employment discrimination due to race, color, religion, sex, national origin, age, physical or mental disability and/or reprisal, may file a complaint alleging discrimination with SBA's Office of Equal Employment Opportunity and Civil Rights Compliance.

2. HOW IS A COMPLAINT FILED?

An aggrieved person must first contact an Agency EEO Counselor. The Aggrieved may be accompanied by legal counsel or a representative of his/her choice.

3. WHAT ARE THE TIMEFRAMES FOR FILING A COMPLAINT?

- a. The Aggrieved must first contact an EEO Counselor or EEO&CRC within 45 calendar days of the date of the matter alleged to be discriminatory; or in the case of a personnel action, within 45 calendar days of the effective date of the personnel action. Extensions of this time period may be granted under limited circumstances.
- b. The EEO Counselor must complete counseling and conduct a final interview with the Aggrieved within 30 calendar days of the initial contact with the EEO Counselor. At this time, the EEO Counselor must provide the Aggrieved with a written Notice of Final Interview notifying him/her of the right to file a discrimination complaint. The 30-day time frame may be extended under limited circumstances. However, in certain cases Alternative Dispute Resolution (ADR) may be offered to the Aggrieved in lieu of traditional EEO counseling. If the offer of ADR is accepted by the Aggrieved, the pre-complaint processing time period is extended from 30 days to 90 days. See Chapter 4 for more information.

- c. If the Aggrieved wishes to file a formal complaint, the Aggrieved must file it within 15 calendar days of receipt of the Notice of Right to File a Discrimination Complaint.

4. **WHAT ARE THE GENERAL RESPONSIBILITIES OF AN EEO COUNSELOR?**

(See § 1614.105 and the EEOC Management Directive 110 - Checklist for EEO Counselors).

- a. Advises individuals in writing of their rights and responsibilities.
- b. Contacts the EEO Coordinator assigned to the district/program office to advise him/her of the counseling session and maintains contact throughout counseling.
- c. Attempts to informally resolve the matter of concern to the Aggrieved provided the Aggrieved was not offered ADR, or did not elect ADR if offered. The EEO Counselor will conduct a limited inquiry by interviewing the individuals involved in the matter and reviewing appropriate documents.
- d. Conducts the final interview with the aggrieved person within 30 calendar days of the date the matter complained of was brought to the EEO Counselor's attention and provides the aggrieved person written notification of the right to file a discrimination complaint. This Notice of Right to File a Discrimination Complaint will be provided to the Aggrieved in person, or if by mail, via certified mail, return receipt requested. If an extension of the counseling period was granted, the Notice of Right to File will be issued at the end of the period, subject to the extension. If ADR was elected by the Aggrieved in lieu of counseling, the EEO Counselor will issue the Notice if and when the EEO Counselor is informed that the attempt at resolution was not successful.
- e. Provides a written EEO Counseling Report to EEO&CRC after issuing the Aggrieved the Notice of Right to File.
- f. Offers ADR to Aggrieved, if directed by EEO&CRC to do so.
- g. Refrains from restraining or dissuading the Aggrieved from filing a complaint. The EEO Counselor will not reveal the identity of the Aggrieved unless authorized to do so by the Aggrieved, or until a formal complaint is filed.

5. **HOW IS A FORMAL COMPLAINT PROCESSED?**

- a. A complaint is considered "filed" when it is received by EEO&CRC and date-stamped by that office.
- b. Once a complaint is filed, it is assigned a number and receipt of the complaint is acknowledged.
- c. Once the EEO Counselor's Report is received by EEO&CRC, the complaint is analyzed for acceptance or dismissal.
 - (1) If dismissed, a Final Agency Decision is issued to Complainant, including appropriate appeal rights; or
 - (2) If accepted, the Complainant is notified of the issues accepted and the investigatory procedures, and provided with a copy of the EEO Counselor's Report.
 - (3) If there is a partial dismissal (some issues are accepted, while others are dismissed), an acceptance letter is issued, as well as notification that certain issues were dismissed and will not be investigated. This partial dismissal is not appealable by Complainant until final action is taken on the remainder of the complaint.
- d. What happens to a complaint that is dismissed?

If the complaint is entirely dismissed, a Final Agency Decision dismissing the complaint is issued, which includes appropriate appeal rights. If the complaint is dismissed in part, Complainant is notified regarding: the rationale for the partial dismissal, that those claims will not be investigated, and that the partial dismissal is not immediately appealable. The partial dismissal may be appealed once final action is taken on the remainder of the complaint. See 29 C.F.R. §1614.107.

- e. What happens when a complaint is accepted for processing?

Complainant will receive a letter of acceptance and a copy of the EEO Counselor's Report. The Principal Responding Officials (PROs) and the program head/district director are notified of the acceptance of the complaint and the pending investigation. A letter of authority to investigate and a copy of the complaint file are sent to the investigative firm. Once the firm investigates and completes the Report of Investigation (ROI), it is returned to EEO&CRC and reviewed for adequacy, sufficiency and privacy concerns. The ROI is then transmitted to Complainant along with a notice of rights informing Complainant of the choice of requesting either a hearing before an EEOC Administrative Judge, or a Final Agency Decision from the Agency. Additionally, if 180 days have passed since the filing of a complaint and the investigation has not been completed, Complainant may make a written request for a hearing directly to the EEOC

Office identified in the acknowledgment letter, with a copy provided to EEO&CRC.

- f. May a complaint be amended to include additional issues?

A Complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. If a Complainant wishes to amend his/her complaint, Complainant should send written notification of the proposed amendment to EEO&CRC. After requesting a hearing, Complainant may file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint. See 29 C.F.R. §1614.106(d).

- g. What happens when a Complainant requests a hearing?

A Complainant must make a written request for a hearing directly to the appropriate EEOC District or Field Office, providing a copy of the request to EEO&CRC. The hearing must be requested within 30 days of receipt of the ROI. When EEO&CRC is notified that Complainant has requested a hearing, EEO&CRC will transmit a copy of the complaint file and ROI to the EEOC. At that time, a copy of the complaint file and ROI will be transmitted to the Office of General Counsel for assignment of an agency representative. If Complainant is an OIG employee, a copy of the complaint file and the ROI will be transmitted to the Counsel to the IG. Following a hearing or a judgment without a hearing, the Administrative Judge (AJ) issues a Final Decision. EEO&CRC may issue a Final Order implementing the decision of the AJ and containing appropriate appeal rights. Alternatively, EEO&CRC may issue a Final Order that does not fully implement the AJ's decision, and simultaneously file an appeal. The Final Orders will be subject to appropriate clearances as set forth in Chapter 2, Paragraph 11.

- h. What happens if Complainant requests a Final Agency Decision (FAD) without a hearing?

If Complainant elects a **FAD** and does not request a hearing, or fails to make an election within the designated time frame, EEO&CRC issues a Final Agency Decision, either finding no discrimination and notifying

Complainant of all appropriate appeal rights, or finding discrimination subsequent to obtaining appropriate clearances pursuant to Chapter 2, Paragraph 11.

- i. How is a mixed case complaint processed?

In the case of a mixed case complaint, the same procedures are followed, except that there is no hearing before the EEOC. Upon completion and transmittal of the ROI to the Complainant and his/her representative (if one is named), a FAD is issued. See Chapter 2, Paragraph 13.

- j. What happens if Complainant appeals to EEOC?

Once EEO&CRC is notified that an appeal was filed, EEO&CRC will send a copy of the appeal file and ROI to the Office of Federal Operations (OFO), EEOC within the 30-day regulatory time frame. At that time, the Office of General Counsel will also receive notification of the appeal or in the case of an IG employee, the Counsel to the IG will receive notification of the appeal. Where appropriate, the Office of General Counsel or the Counsel to the IG, will be provided copies of the appeal file and ROI, for assignment of an agency representative, if one has not heretofore been appointed. A Brief in Opposition to Complainant's appeal will be filed in a timely manner by OGC, OIG Counsel Division or EEO&CRC as appropriate.

6. HOW IS A COMPLAINT INVESTIGATED? (See 29 C.F.R. §1614.108)

- a. SBA contracts with General Services Administration (GSA) approved investigative firms to investigate Agency EEO complaints.
- b. SBA shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint.
- c. Complainant, the Agency and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.
- d. Statements of all witnesses must be made under oath or affirmation or by written statement under penalty of perjury. Agency employees may request assistance from OGC or its designees in providing such statements and in the interview with the EEO investigator. OIG employees may request the

assistance of an OIG attorney in providing such statements and in the interview with the EEO investigator.

- e. SBA must complete its investigation within 180 days of the filing of an individual complaint or within the time frame ordered by the EEOC Office of Federal Operations in an appeal decision remand. The investigatory time period may be subject to extension as set forth by relevant regulations.
- f. Complainant is notified when the investigation has been completed. A copy of the ROI is transmitted to Complainant and his/her representative, along with the notice of the option of either requesting a Final Agency Decision without a hearing or requesting a hearing as discussed under "How Is A Formal Complaint Processed?" (See ¶5 above.) In a mixed-case complaint, there is no option for a hearing at EEOC. See Chapter 2, Paragraph 13.

7. **HOW IS A FINAL AGENCY ACTION REACHED?**

If Complainant requests a Final Agency Decision or if Complainant has not made an election within 30 days of receiving the ROI, EEO&CRC will issue a final action in the form of a Final Agency Decision. After a factual and legal analysis of the Report of Investigation (ROI), the final decision consists of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint, and when discrimination is found, appropriate remedies and relief. Final decision analyses are based on the models set forth in the EEOC Management Directive 110, Appendix L. Where a final agency action is on a mixed case complaint, the appeal rights will be to MSPB.

If Complainant had requested an EEOC hearing, and the Administrative Judge (AJ) has issued a decision, EEO&CRC will take final action in the form of issuance of a Final Order. After a factual and legal analysis of the Report of Investigation (ROI), and a thorough review of the AJ's decision, the Final Order will implement the decision of the AJ and contain appropriate appeal rights. Alternatively, EEO&CRC may issue a Final Order which does not fully implement the AJ's decision, and simultaneously file an appeal with the Office of Federal Operations (OFO), EEOC.

The Agency's final action must also include notice of the right to appeal to the EEOC, 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 (SBA Administrator) in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, must be attached to the decision. Final actions will be delivered to the complainant via certified mail, return receipt requested.

8. **WHAT HAPPENS IF THE AGENCY FINDS DISCRIMINATION?**

Where discrimination is found, appropriate remedies and/or relief are set forth in the final agency action. Prior to issuance, the final action shall be submitted to the Agency Office of Human Resources (OHR) for compliance with personnel rules and regulations and to the Office of General Counsel (OGC) for legal sufficiency review. When the complainant is an OIG employee, prior to issuance, the final action shall be submitted to the OIG Personnel Officer for compliance with personnel rules and regulations and to the OIG Counsel Division for legal sufficiency review. After review by appropriate Agency offices, the appropriate relief required in the Final Agency Action is mandatory and binding on the Agency except as provided in 29 C.F.R. § 1614.502.

9. WHAT HAPPENS IF THE AGENCY DOES NOT FIND DISCRIMINATION?

If a Final Action is issued finding no discrimination, Complainant may appeal as set forth in the appeal rights section of the Final Action.

10. WHAT APPEAL RIGHTS DOES A COMPLAINANT HAVE?

Complainant has a right to appeal a final agency action. In order to appeal a partial dismissal, a Complainant must wait until the Agency completes processing of the remaining issues in the complaint. If Complainant chooses to appeal, he/she must file the appeal with the Equal Employment Opportunity Commission (EEOC) within 30 calendar days of receipt of the final decision or final order or notice of dismissal. If he/she fails to file an appeal within the regulatory time frame, the appeal will be untimely and dismissed by the EEOC. A copy of the appeal must be served on the Agency Representative (if already appointed) and EEO&CRC.

11. WHAT ARE THE ROLES OF OTHER AGENCY PROGRAM OFFICES AND EMPLOYEES IN THE PROCESSING OF COMPLAINTS?

- a. Office of Human Resources (OHR), Office of Disaster Personnel (ODP)
Office of Inspector General (OIG)

OHR, ODP, or OIG where appropriate, may provide staff support, assistance, and advice to management, EEO&CRC, EEO counselors, EEO investigators, and Special Emphasis Program Managers (SEPMs). This includes:

1. Ensuring the accuracy of workforce data submitted to the Civilian Employee Personnel Data File maintained by the Agency.

2. Collaborating with the AA/EEO&CRC to ensure that adequate record keeping and information systems are established and maintained.
3. Providing any other assistance and guidance necessary to the processing of complaints of discrimination, including the review for technical compliance of settlement agreements, as appropriate, and provision of relevant documents to the EEO investigator, upon request.

b. Office of General Counsel (OGC)

OGC, Office of General Law (OGL) participates in EEO matters (except in most cases involving OIG employees), including:

- (1) Reviewing and concurring for legal sufficiency on
 - (a) Settlement agreements;
 - (b) Orders of Relief;
 - (c) All matters relating to payment of attorney's fees and/or costs and compensatory damages; and,
 - (d) Final Actions in which there is a finding of discrimination.
- (2) Acting as Agency Representative
 - (a) During the ADR and investigation processes, where requested or appropriate;
 - (b) During the EEOC hearing process; and
 - (c) During appeals, requests for reconsideration, and all other matters before the EEOC.
- (3) Signatory
 - (a) Is signatory as to legal sufficiency to all formal settlements, and to those informal settlement agreements (e.g., through ADR, counseling) involving payment of Agency funds.

c. Office of the Inspector General

The OIG Counsel Division participates in EEO matters involving OIG employees, including:

- (1) Reviewing and concurring for legal sufficiency on
 - (a) Settlement agreements;
 - (b) Orders of Relief;
 - (c) All matters relating to payment of attorney's fees and/or costs and compensatory damages; and,
 - (d) Final Actions in which there is a finding of discrimination.
 - (2) Acting as Agency Representative
 - (a) During the ADR and investigation processes, where requested or appropriate;
 - (b) During the EEOC hearing process; and
 - (c) During appeals, requests for reconsideration, and all other matters before the EEOC.
 - (3) Signatory
 - (a) Is signatory as to legal sufficiency to all formal settlements, and informal settlement agreements (e.g., through ADR, counseling).
 - (b) On behalf of OIG management, signs all settlement agreements and orders of relief.
- d. Chief Operating Officer (COO)
 Except in matters involving OIG employees, COO concurrence is required for monetary relief awarded in all settlement agreements and for all orders of relief, and final actions in which there is a finding of discrimination, when the

relief includes a reassignment of an SBA employee, or the hiring or rehiring of a new or former employee.

e. Office of Field Operations

Office of Field Operations concurrence (for field offices, including regional office employees) is required for monetary relief awarded in all settlement agreements and for all orders of relief, and final actions in which there is a finding of discrimination, when the relief includes a reassignment of an SBA employee from or to an Agency field office, or the hiring or rehiring of a new or former employee to a field office.

f. Office of Chief Financial Officer (CFO)

Except in matters involving OIG employees, CFO concurrence is required for monetary relief awarded in all settlement agreements and for all orders of relief, and final actions in which there is a payment of Agency funds.

g. SBA Management Board

Except in matters involving OIG employees, the SBA Management Board (Associate Deputy Administrators, Associate/Assistant Administrators, and Regional Administrators) ensures that position descriptions and performance plans reflect EEO duties. The appropriate SBA Management Board member, District Director, or Area Director shall, on behalf of Agency management, sign all settlement agreements and orders of relief.

h. Managers and Supervisors

Management officials and supervisors must cooperate with EEO personnel in processing discrimination complaints and attempting

informal resolution of such complaints. Management must also support employees' collateral EEO responsibilities by including such duties in their official position descriptions; adjusting work schedules and workload as necessary; and ensuring that their responsibilities and their performance appraisal takes into consideration their duties as assigned.

i. Employees

All employees must cooperate with EEO Counselors, EEO investigators and Administrative Judges by providing, upon request, information during counseling, investigation of and hearings on discrimination complaints.

j. Unions and Union Representatives

Unions and Union Representatives are expected to cooperate with EEO personnel by providing information requested during any of the stages of discrimination complaint processing.

12. WHAT IS INVOLVED IN AN EEO SETTLEMENT?

Complaints may be settled at any time during the administrative process. A settlement is a written enforceable agreement between the parties. During the pre-complaint process, an EEO Counselor may facilitate a resolution (See Chapter 2; Paragraph 4) or a resolution may be reached through the ADR process (see Chapter 4). Except in cases involving OIG employees, if resolution is reached during the pre-complaint process, OGC will be involved in negotiating or reviewing settlement agreements when 1) the Aggrieved retains his/her own representation; or 2) if the agreement involves the payment of Agency funds. For cases involving OIG employees, if resolution is reached during the pre-complaint process, OIG Counsel Division will be involved in negotiating or reviewing all settlement agreements.

During the formal complaint process, the use of ADR may also be available through EEO&CRC, prior to Complainant's election of an EEOC hearing or a FAD. Once an Agency Representative is appointed by OGC or OIG Counsel Division, that representative will be involved in settlement negotiations. All EEO settlements must be reviewed by the AA/EEO&CRC and all appropriate clearances must be obtained pursuant to Chapter 2, Paragraph 11.

13. WHAT IS AN ELECTION OF FORUM?

a. Merit Systems Protection Board

The EEOC's regulations provide that an individual may raise allegations of discrimination in a "mixed case" either as a direct appeal to the Merit Systems Protection Board (MSPB) or as an EEO complaint with the agency, but not both. (See EEOC MD - 110 for personnel actions appealable to MSPB).

Whatever action the individual files first is considered an election to proceed in that forum. Filing a **formal** EEO complaint constitutes an election to proceed in the EEO forum. Contacting an EEO Counselor or receiving EEO counseling does **not** constitute such an election.

Where an aggrieved person files an MSPB appeal and timely seeks EEO counseling, counseling may continue at the option of the parties. In any case, counseling must be terminated with notice of rights pursuant to § 1614.105 (b)(d), (e), or (f).

A mixed case complaint is a complaint of employment discrimination related to or stemming from an action that can be appealed to MSPB. The complaint may contain only an allegation of employment discrimination or it may contain additional non-discrimination allegations that the MSPB has jurisdiction to address. A "mixed case appeal" is an appeal filed directly 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, disability or age.

Complainants who have mixed case complaints do not have a right to a hearing before an EEOC Administrative Judge. Additionally, a final agency decision on a mixed case complaint may be appealed to MSPB, not EEOC. The following employees generally have a right to appeal to the MSPB and, therefore, to initiate a mixed case complaint or appeal:

- (1) competitive service employees not serving a probationary or trial period under an initial appointment;
- (2) career appointees to the Senior Executive Service;
- (3) non-competitive service preference eligible employees with one or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and
- (4) non-preference eligible excepted service employees who have completed their probationary period or with two or more years of current continuous service (e.g., attorneys).

Please note that this is not an all-inclusive list of those employees who have standing to appeal to the MSPB, and questions which arise in this area should be referred to the Office of Human Resources of this Agency or to the MSPB. (See, Chapter 4 of the U.S. Equal Employment Opportunity Commission Management Directive 110 (MD-110)).

b. Negotiated Grievance Procedure

An employee subject to 5 U.S.C. § 7121(d) and covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure and wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either:

EEOC regulations, 29 C.F.R. § 1614; or the negotiated grievance procedure, but not both.

An individual's right to elect to proceed under the negotiated grievance procedure or under Part 1614 must be explained to the Aggrieved at the EEO counseling stage. The counselor must inform the Aggrieved of the possible applicability of the election of remedies provisions from the Civil Service Reform Act of 1978, 5 U.S.C. § 7121(d), concerning negotiated grievance procedures.

1. Election to File an EEO Complaint.

There is an election to proceed under 29 C.F.R. § 1614 when an employee or applicant files a formal written complaint with the Agency. Use of the pre-complaint process in § 1614.105 does not constitute an election to file an EEO complaint.

2. Filing in Either Forum.

An employee or applicant who files a complaint under 29 C.F.R. § 1614 may not 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 SBA whose negotiated agreement permits the acceptance of grievances which allege discrimination may not file an EEO complaint on the same matter, even if SBA has not informed the individual of the need to elect or that the grievance has raised an issue of discrimination.

Any EEO complaint filed after a grievance has been filed on the same matter shall be dismissed (1) without prejudice to the complainant's right to proceed through the negotiated grievance procedure; and (2) include the right to

appeal to EEOC from an SBA decision, to the extent applicable, as provided in 29 C.F.R. § 1614.401, et seq.

c. Elections under the Age Discrimination in Employment Act (29 C.F.R. 1614.201)

1. Election of Administrative Process

An aggrieved person may file an administrative age discrimination complaint with the agency pursuant to 29 C.F.R. Part 1614. If aggrieved persons elect to file administrative complaints, they must first exhaust administrative remedies before filing a civil action in U.S. District Court.

2. Aggrieved May Bypass the Administrative Process

An Aggrieved, who claims discrimination on the basis of age, may elect to bypass the administrative complaint process and file a civil action directly in U.S. District Court. The Aggrieved must first provide EEOC with not less than 30 days written notice of the intent to file such an action. (See EEOC Management Directive 110, Chapter 4, p.4-9 for information regarding the notice of intent.)

d. Elections under the Equal Pay Act (29 C.F.R. § 1614.202)

Equal Pay Act (EPA) complaints must be administratively processed like Title VII complaints. In EPA cases, EEO&CRC notifies Complainant of the statute of limitations of two years, or three years for willful violation, and of the right to file directly in U.S. District Court without first providing notice to the EEOC or exhausting administrative remedies.

14. WHAT IS A CLASS COMPLAINT? (29 C.F.R. § 1614.204)

A class complaint is a written complaint of discrimination filed on behalf of a class by an agent of the class alleging that: the class is so numerous that a consolidated complaint of the members of the class is impractical; that there are questions of fact common to the class; that the claims of the agent of the class are typical of the claims of the class; and the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

a. Time Requirements for Presentation of Class Complaint

An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105. Complainants may move for class certification at any reasonable point in the process when

it becomes apparent that there are class implications to the claim raised in an individual complaint. If Complainant moves for class certification after completing the counseling process, contained in §1614.105, no additional counseling is required.

The time frames for contacting an EEO Counselor, possible extension of time limits, and the time period for filing a formal EEO complaint are identical to those time periods set for filing individual complaints.

Also, as in the case of individual complaints, the counseling period or pre-complaint processing period may also be extended up to an additional 60 or 90 days when the aggrieved persons agree, in writing, to postpone the final interview or to participate in any established alternative dispute resolution procedure.

Within 30 calendar days of receipt of a class complaint, SBA must designate an agency representative and forward the complaint, along with a copy of the Counselor's report and any other relevant information, to EEOC. EEOC will assign an AJ to accept or dismiss the complaint.

Within 15 calendar days of receiving notice that the AJ has accepted a class complaint or a reasonable time frame specified by the AJ,

EEO&CRC 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.

b. Class Complaint Criteria

A class complaint, or allegations within, may be dismissed if it does not meet the following criteria:

1. The complaint does not meet the prerequisites of a class complaint, i.e., numerosity, commonality, typicality, and adequacy of representation;
2. The allegations lack specificity and detail;

3. The agent cannot satisfactorily explain why an allegation which appears in the formal complaint was not raised in counseling; or
4. The complaint meets any of the criteria for dismissal pursuant to § 1614.107, "Dismissals of Complaints."
5. The complainant unduly delayed in moving for class certification.

CHAPTER 3

ALTERNATE PROCEDURES FOR PROCESSING COMPLAINTS

1. AD HOC COMMITTEE ON SEXUAL HARASSMENT

Agency managers and supervisors must act when they become aware of alleged incidents of sexual harassment. This is true even where the employee allegedly being harassed does not request action against the alleged harasser. This is also true even if the alleged conduct does not ultimately rise to the level of legally actionable sexual harassment. For example, unwelcome conduct of a sexual nature should be reported by managers before it rises to the legally actionable level of severe or pervasive conduct. Upon learning of the alleged harassment, managers/supervisors must, in writing and in a timely fashion, advise the Agency Ad Hoc Committee on Sexual Harassment of the alleged harassment. This can be done by writing or emailing any of the three members named below. Any correspondence with the Committee should be transmitted in a manner to assure confidentiality of the contents of the correspondence.

The Ad Hoc Committee on Sexual Harassment, established by the Administrator, consists of one representative appointed by each of the following officials:

- (1) the Assistant Administrator for EEO&CRC, Chair;
- (2) the General Counsel; and
- (3) the Assistant Administrator for Human Resources.

A manager/supervisor may contact any one of these officials to activate consideration of the alleged incident(s) of sexual harassment. The Assistant Administrator for EEO&CRC, or designee will immediately convene a meeting with the other members to consider the matter. The Committee is empowered to and may appoint a team to investigate the matter on behalf of the Agency, or the Committee may conduct further informal inquiries, or it may recommend or take other appropriate action.

An investigation authorized by the Committee constitutes an authorized Agency investigation requiring full and complete employee cooperation. The

investigators appointed by the Committee will be provided with a written letter of authority. Employees failing to cooperate with an authorized investigation may be disciplined for such failure. Additionally, any statements made to the investigators

later deemed to be false may be the subject of additional administrative action, including disciplinary action. The investigation may result in a written report, at the discretion of the AA/EEO&CRC.

Based upon an authorized investigation or other source of facts, the Committee may request a legal opinion from OGC/OGL. The Committee will determine what action, if any, is appropriate. Such action may include, but is not limited to, discipline of the employee found to have sexually harassed another. The Committee will not take such action itself, but instead will make recommendations to the management official directly supervising the alleged offender.

Managers/supervisors who know or have reason to know that sexual harassment may have occurred and who fail to consult with the Committee where a credible allegation has been made, may themselves be disciplined for their failure to act.

Any action by the Ad Hoc Committee can be undertaken concurrently with the processing of individual or class complaints of discrimination regarding the same or similar issues. The Aggrieved still retains an obligation to contact an EEO Counselor within 45 days of the alleged incident if the Aggrieved wishes to pursue a complaint through the EEO process.

2. **CONFLICT OF INTEREST-REDELEGATION OF COMPLAINTS**

{Reserved}

CHAPTER 4

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

OVERVIEW

a. **What is Alternative Dispute Resolution?**

Alternative Dispute Resolution (ADR) is a process during which third party neutrals assist in resolving workplace disputes. Use of ADR encourages early intervention and resolution, thereby promoting workplace cohesiveness, and decreasing the use of litigation and other more costly means of dispute resolution.

b. **Has ADR been used to resolve Equal Employment Opportunity (EEO) complaints in the Federal sector?**

Yes, all Federal agencies are required to establish or make available ADR programs to help resolve EEO complaints. During FY99, the Office of Equal Employment and Civil Rights Compliance (EEO&CRC) implemented a pre-pilot ADR program using facilitation and fact-finding.

c. **What is the legal authority for using ADR procedures in the Federal sector EEO process?**

Legal authority is found in the Equal Employment Opportunity Commission (EEOC) Federal regulations at 29 C.F.R. § 1614. The EEOC requires all Federal agencies to have made available an EEO alternative dispute resolution program by January 2000. Guidance on the parameters of this program can be found in the EEOC Management Directive 110, the Federal Sector Complaints Processing Manual, which can be accessed on the EEOC web site at www.eeoc.gov. In addition, SBA relies on the confidentiality provisions of the Administrative Dispute Resolution Act (ADRA), which imposes limitations on the disclosure of information. See 5 U.S.C. § 571 et seq. EEO&CRC's program also conforms with Executive Order 12988 and the 1998 White House Memorandum for Heads of Executive Departments and Agencies all of which encourage agency use of ADR procedures.

d. **What are the key points of the SBA ADR process for EEO complaints?**

ADR emphasizes open communication, cooperation, and flexibility in identifying mutual concerns and potential solutions in the workplace. According to EEOC guidelines, the major tenets of the ADR program are:

- ◆ Confidentiality: Information revealed during ADR must remain strictly confidential and cannot later be used against the parties.
- ◆ Voluntariness: It is voluntary on the part of the employee whether or not to accept the offer of ADR. Prior to receiving a request for a hearing or a FAD, EEO&CRC has discretion whether or not to offer ADR in each case. Parties may end the ADR process at any time.
- ◆ Neutrality: Neutral third parties are impartial and independent of any control by the parties. Neutrals conducting ADR proceedings facilitate or mediate resolution, but do not impose solutions.
- ◆ Enforceability: Designated Agency officials with settlement authority will be accessible, if not present at ADR proceedings. Any settlement agreement knowingly and voluntarily agreed to by the parties is binding, after clearances and signatures (or written concurrence of some kind) are obtained from appropriate Agency officials. (See Chapter 2, ¶11).

e. **How is ADR incorporated into the EEO complaint process?**

Traditional EEO complaint adjudication remains available. Following an initial contact with an EEO Counselor, and upon thorough review of a case, EEO&CRC may offer ADR as an option to expedite resolution of the workplace dispute. If an employee elects the ADR option in the pre-complaint stage, ADR replaces traditional counseling after the initial counselor contact is made. If ADR is unsuccessful, the EEO Counselor will issue a Notice of Right to File a Discrimination Complaint, and the employee may then file a formal EEO complaint. If an employee elects the ADR option in the formal complaint stage and ADR is unsuccessful, the employee may revert to the formal complaint process at the same stage at which the process was halted.

f. **What if the dispute involves non-EEO issues?**

ADR participants may address both EEO and non-EEO issues during the resolution of their workplace disputes. However, if the parties do not reach a resolution during ADR, the employee cannot include non-EEO issues in a formal complaint. Likewise, only EEO issues brought to the attention of the EEO Counselor can be raised in a formal complaint, unless the issue is like or related to issues raised during counseling.

g. **Does the aggrieved employee waive any rights by participating in ADR?**

No. Individuals do not waive the right to an investigation, a hearing, or to appeal the final decision to the EEOC by invoking ADR. In addition, regulatory time frames are tolled during the pendency of the ADR process. When employees elect ADR in lieu of traditional EEO counseling, they retain the right to file a formal complaint if ADR does not resolve all issues.

h. **What are some examples of ADR techniques?**

EEO&CRC utilizes techniques, including but not limited to, mediation and facilitation to resolve EEO workplace disputes. These techniques employ a third party neutral who assists in resolving the issues at hand.

Mediation: A trained and experienced mediator helps parties explore mutual interests and reconcile differences, yet does not make decisions or impose settlements. A mediator may caucus separately with individual parties, in addition to meeting with them together.

Facilitation: In facilitation, a neutral, who may be a senior level EEO&CRC official, focuses on guiding the parties to resolution using steps similar to those taken at the EEO counseling stage, but at a higher level of authority.

i. **Is the use of ADR always appropriate?**

No. The use of ADR is not always appropriate and will not be offered to every employee in every EEO case. EEO&CRC evaluates cases on an individual basis and considers appropriate factors including, but not limited to: the nature of the case, issues presented, relationship between the parties, size and complexity of the case, potential precedent-setting effects, and remedies requested by the aggrieved party.

j. **Does the Agency have discretion to exclude any of the eight EEO bases from ADR?**

No. Agencies cannot preclude from ADR any of the bases of discrimination: race, color, sex, national origin, religion, age, disability, or reprisal. However, agencies do have the discretion to determine on a case-by-case basis whether it is appropriate to offer ADR to a complainant or an Aggrieved. Agencies may also limit ADR in other ways, such as geographically, or by issue.

k. **What is the major goal of the EEO&CRC ADR program?**

The primary goal of the EEO&CRC ADR program is to resolve the greatest number of workplace disputes at the earliest possible stage. Earlier dispute resolution promotes a more positive workforce culture that results in a decrease in time and costs incurred in the formal EEO complaint process for both Complainant and the Agency.

1. **HOW WILL EEO&CRC EVALUATE THE NEW ADR PROGRAM?**

2. **EEO&CRC EVALUATION**

EEO&CRC will evaluate the ADR program based on feedback from participating parties and neutrals. EEO&CRC will track factors such as: successful resolutions, how many employees are offered the choice of ADR, and how many employees choose ADR.

3. **PROGRAM SPECIFICS**

a. **When is ADR first available in the EEO process?**

After each initial counseling contact, EEO&CRC evaluates each case for potential ADR resolution. If a case is appropriate for ADR, the EEO Counselor will offer the employee the option of ADR in lieu of the traditional counseling process. If EEO&CRC does not deem a case appropriate for ADR at that time, it still may be offered during the formal complaint process. Throughout the formal process, EEO&CRC will monitor complaints to discern which ones would be appropriate for ADR at each stage of the process.

b. **If the Agency decides that ADR is not appropriate, can the employee make this decision the subject of an EEO complaint?**

No. EEOC guidelines make clear that an Agency decision not to offer ADR in a particular case cannot be made the subject of an EEO complaint. *See* EEOC Management Directive 110 (3-3).

c. **Who offers ADR to the Aggrieved?**

In the pre-complaint stage, after the EEO Counselor is informed by EEO&CRC that ADR is appropriate, the EEO Counselor offers ADR to the Aggrieved. The EEO Counselor also provides a) information on the ADR

process; and b) an Election Form on which the employee designates a choice of either ADR or traditional EEO counseling.

During the formal process, if EEO&CRC determines that ADR may be

beneficial at that particular stage, EEO&CRC offers Complainant information on the ADR process and the Election Form.

d. **How does an employee request ADR?**

During the pre-complaint process, all counselor contacts are reviewed for ADR appropriateness. If an employee is interested in participating in ADR, the employee may inform their EEO Counselor, who will include the request in the initial counselor contact form reviewed by EEO&CRC. EEO&CRC will take this request into consideration when reviewing for ADR appropriateness.

After an employee files a formal complaint, an employee may request ADR by sending a dated written request to the Office of Equal Employment Opportunity and Civil Rights Compliance, Small Business Administration, Attn: ADR Coordinator, 409 3rd St., SW, Suite 6400, Washington, DC 20416. EEO&CRC will evaluate this request and reply in writing to Complainant.

e. **Why would an aggrieved employee want to elect ADR?**

ADR may be an attractive option for the Aggrieved because of several factors:

◆ Relationships: It may be difficult to maintain positive work relationships throughout the formal complaint process. ADR has the potential not only to resolve current workplace disputes, but also to strengthen work relationships and foster clearer understanding between the parties.

◆ Time & Costs: Investigating and processing a formal EEO complaint, including significant time for a final agency decision, a hearing at EEOC, an appeal to EEOC, and possible litigation in civil court, is a lengthy and costly process. ADR can potentially resolve workplace disputes more quickly and with less expense.

◆ Flexibility: Solutions forged through ADR can be better tailored to the parties' needs and concerns, than traditional solutions attainable through formal complaint processing.

◆ Control: The parties have greater control of potential remedies through ADR, and over the process itself. Parties can choose to create resolutions themselves; they do not need to wait for others to make decisions.

◆ Win/Win: ADR promotes positive resolutions for all involved. In contrast, in administrative or civil litigation, the most likely result is a win/lose situation.

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f. **If the employee elects ADR, can the management official involved in the incident decline to participate in the ADR session?**

Once the Agency offers ADR to the employee, and it is accepted, the management official involved has a duty to participate in the ADR session and attempt resolution of the issue(s) in good faith. See EEOC Management Directive 110, Ch.3, p.3-2.

g. **Who serves as the “neutral”?**

SBA primarily uses internal EEO&CRC and collateral-duty mediators. These internal neutrals are trained and experienced mediators, certified in workplace disputes mediation by institutions such as the Justice Center of Atlanta. On a case-by-case basis, EEO&CRC may obtain the services of external mediators through Federal “Shared Neutral” programs, or through a contract with outside vendors. Senior level EEO&CRC officials may also conduct negotiations and settlement conferences.

All neutrals used in the EEO&CRC ADR program must have suitable training in ADR techniques as recognized within the dispute resolution profession, which usually includes at least 20 hours of skills training and experience as a co-mediator. The neutral must also have significant knowledge of EEO law and process, including theories of discrimination and a familiarity with 29 C.F.R. § 1614. Choice of the neutral for each ADR session will be determined by EEO&CRC.

h. **Where do ADR sessions take place?**

ADR sessions take place in a location agreeable to both parties and the neutral.

i. **Who attends and participates in the ADR session?**

The complainant and the primary responsible official involved should attend the AI **January 15, 2003** ment official with authority to settle the case and a representative of OGC should also be present or easily accessible at that location or by telephone.

j. **Are representatives of the parties permitted to attend the ADR session?**

Yes. Either party may choose to be accompanied by a representative, although it is neither necessary nor required. A representative may be either an attorney or a non-attorney. If a party's representative is an employee of SBA, the choice of representative must not present a conflict of interest. If the complainant brings an attorney, SBA will also be represented by an attorney.

k. **Who is responsible for any costs associated with ADR?**

EEO&CRC is responsible for the costs incurred to obtain ADR services procured through the EEO&CRC ADR program. This does not cover fees and charges associated with an employee's selected representation.

l. **How long does ADR take?**

One of the benefits of ADR is that it is extremely efficient. The majority of sessions are completed in less than eight hours, usually taking from one to five hours. Successful ADR preempts a lengthy investigation and time-consuming litigation.

m. **Is administrative leave approved for preparation time for the ADR session for the employee and a representative?**

Yes. A reasonable amount of administrative leave may be granted to an employee and representative (if the representative is a current SBA employee) to prepare for an ADR session. Parties must receive approval from their supervisors before using administrative leave. It is EEO&CRC policy to recommend up to 8 hours of preparation for an ADR session.

n. **Is this process confidential?**

Yes. There is strict confidentiality of all information revealed during ADR. These sessions are neither tape-recorded nor transcribed and any notes taken during the session are retained only through the end of the process.

Participants in the session must abide by the confidentiality provisions enumerated in the Administrative Dispute Resolution Act. 5 U.S.C. § 574.

o. **When does ADR end?**

ADR will end with either:

- a. A successful written resolution reviewed or signed by EEO&CRC, and cleared by appropriate offices as set forth in Chapter 2, Paragraph 11.
- b. A written request by either party to end ADR; or
- c. Notification to EEO&CRC that a resolution cannot be reached.

p. What happens to issues unresolved in ADR?

If any issues are not resolved during ADR, the EEO complaint process is resumed to complete the process from the point at which it was halted for ADR. For example, if an employee chooses ADR in lieu of traditional EEO counseling, and ADR is unsuccessful, EEO&CRC will inform the EEO Counselor that ADR was unsuccessful. The EEO Counselor then issues a Notice of Right to File a Discrimination Complaint, and the employee may file a formal EEO complaint. If there is a partial resolution, the remaining unresolved EEO issues may move forward through the complaint process, if they had been addressed in counseling, or are like or related to issues raised during counseling.

q. If issues are unresolved in ADR, can information revealed during ADR be used in the further processing of the complaint?

No. All information revealed during ADR is held as strictly confidential and may not be disclosed to anyone at any time, including during any subsequent investigation or litigation.

r. Can information revealed during ADR be used to comprise an issue in a subsequent EEO complaint?

No. Nothing said or done during ADR can be made the subject of an EEO complaint.

s. Must ADR resolutions be in writing?

Yes. All resolutions must be reduced to writing, signed by both parties, and cleared by appropriate SBA officials, as set forth in Chapter 2, ¶11.

The management officials required to review and concur in any settlement agreement, as set forth in Chapter 2, paragraph 11, have a right to review the file(s) relied upon in settling any case, including information which may be otherwise confidential or privileged. All appropriate steps will be taken by OGC, OIG Counsel Division and the management official(s) to keep all information reviewed prior to settlement confidential and protected from

disclosure. EEO&CRC will retain a copy of the resolution for at least one year, or until the agreement has been fully implemented, whichever is later.

An official with settlement authority should be included at all ADR sessions. If such an official is not present, such official must be immediately accessible during ADR. See EEOC Management Directive 110, Chapter 1, 1-2.

t. What happens if a party does not comply with an agreement reached during ADR?

If an employee believes that SBA has failed to comply with an agreement reached during ADR, the employee should contact EEO&CRC, in writing, within 30 days of the alleged noncompliance. This letter should request that either the terms of the settlement be fully implemented, or the original complaint be reinstated for processing. If the SBA does not resolve the issue to the employee's satisfaction, the employee may file an appeal with EEOC. A clause is inserted into all written resolutions providing for this enforcement process.

If the Agency believes that the employee has failed to comply with an agreement, the AA/EEO&CRC will determine, in conjunction with appropriate offices, whether or not to render the agreement null & void.

4. ADDITIONAL INFORMATION

a. What is the impact of ADR on collective bargaining agreements and the Privacy Act?

All pre- and post-complaint information is contained in a system of records subject to the Privacy Act. Such information, including the fact that a particular person has sought counseling or filed a complaint, cannot be disclosed to a union or union representative unless the complaining party elects union representation or gives written consent to the disclosures.

b. Will EEO&CRC offer any ADR training?

Training is an essential component of a successful ADR program and will be offered to managers and employees throughout the Agency. EEO Counselors

also receive training on ADR procedures through conference calls and information guides.

c. **Must the EEO ADR Program be in compliance with additional laws?**

Written agreements must comply with EEOC Enforcement Guidance on non-waivable employee rights under statutes enforced by EEOC. Any written agreement settling a claim under the Age Discrimination in Employment Act (ADEA) must also comply with the requirements of the Older Workers Benefit Protection Act of 1990 (OWBPA), the ADEA, and EEOC regulations regarding Waiver of Rights and Claims under the ADEA.

d. **What are the record-keeping procedures?**

Pursuant to 29 CFR § 1614.602(a), EEOC collects Federal complaint processing data on an annual basis. EEO&CRC will maintain records of ADR activity to make such annual reporting to EEOC.

CHAPTER 5

WORKING WITH THE AGENCY AFFIRMATIVE EMPLOYMENT PROGRAM

1. WHAT IS AN AFFIRMATIVE EMPLOYMENT PROGRAM?

- a. SBA's Affirmative Employment Program involves the following:
 - (1) Thorough, methodical efforts to prevent employment discrimination or to eradicate it as promptly as possible; and
 - (2) Recruitment, outreach, development and any other measures designed to ensure equal opportunity.

- b. EEOC guidelines require SBA to establish a written program (AEP) detailing the steps it will take and has taken, to ensure equal employment opportunity. EEOC guidelines require three major elements:
 - (1) a reasonable self-analysis to determine if employment discrimination practices currently exist or if earlier bases of employment discrimination are uncorrected;
 - (2) a reasonable basis for concluding that affirmative action is appropriate; and
 - (3) a reasonable action taken in relation to the problems disclosed by the self-analysis.

Reports of Accomplishments specify the actions taken by the SBA during a fiscal year to meet program objectives identified in Affirmative Employment Plans (AEP) and reflect changes in the representation of minorities, women and persons with disabilities in the workforce.

The AEPs and Report of Accomplishments are developed pursuant to § 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16; Reorganization Plan No. 1 of 1978, issued pursuant to 5 U.S.C. 901 et seq., E.O. 11178 (3 C.F.R. 1966-70 Comp., p. 803) as amended by E. O. 12106 (3 C.F.R. 1978 Comp., p. 263); 29 C.F.R. § 1614.601 and EEOC Management Directives (EEO MDs) 713 and 714.

- c. All of SBA's actions, policies and procedures are designed to achieve equal employment opportunity. The AEPs must address SBA's actions and policies.
- d. The SBA must ensure that adequate personnel and resources, including competently trained staff, are allocated to implement the Plan. SBA must ensure that managers and supervisors know their responsibilities to meet the plan's objectives, especially in relation to their individual offices.
- e. The basic elements of an Affirmative Employment Program include an EEO Policy Statement, which is a written statement, signed by the Administrator stating his/her commitment to equal employment opportunity and AEP objectives.
 - (1) The National Plans must include an analysis of the status of the EEO/affirmative employment program. This analysis must include a workforce analysis to identify areas of underrepresentation of minorities, women and persons with disabilities, along with identification of problems and barriers which may contribute to such underrepresentation. Recommendations must be made on the specific measures to be implemented and must address the causes of underrepresentation and removal of barriers, including the establishment of hiring and promotion objectives, where appropriate, indicating the action required to reach full representation and provide annual benchmarks of progress.
 - (2) Under the EEOC guidelines, EEO&CRC looks at underrepresentation to determine compliance with Affirmative Employment Program goals. Underrepresentation is a situation in which the percentage representation of a minority, disabled or sex group, including white females, in a category of employment within the Agency is lower than the participation rate for that group in the appropriate civilian labor force.
 - (3) The required elements of the National annual and multi-year Affirmative Employment Plans, accomplishment reports and Plan updates are more fully discussed in EEOC's Management Directives 713 and 714. These directives provide instructions for the development and submission of AEPs and reports.

2. **WHO IS RESPONSIBLE FOR THE DEVELOPMENT AND IMPLEMENTATION OF THE AGENCY'S AEP?**

- a. AA/EEO&CRC: This person administers SBA's internal EEO Program and is responsible for carrying out the functions prescribed in 29 C.F.R. § 1614.101 et seq. He/she directs the development of the Agency's EEO/affirmative employment plans, plan updates and reports of accomplishments, and EEO/affirmative employment program, guidance, policies, standards and procedures.

The SBA Administrator is responsible for Agency compliance with the instructions issued by EEOC, which will approve or disapprove SBA plans and communicate, in writing, results of its evaluations to SBA, with instructions for submission of revised plans, if required.

- b. MANAGEMENT OFFICIALS AND SUPERVISORS: These individuals are responsible for the implementation of viable, results-oriented EEO and affirmative employment programs within their areas of operation and will be rated on their effectiveness in the same. This includes:
- (1) Analyzing employment patterns and conditions to identify problems or potential problem areas which may act as barriers to equal employment opportunity, and taking appropriate corrective action;
 - (2) Evaluating all personnel procedures and practices within their operations to ensure that personnel decisions are based on merit and fitness of the individual and are free from discrimination;
 - (3) Implementing action items in the affirmative employment program plan for which they are responsible in a timely manner;
 - (4) Communicating their commitment to EEO goals and objectives at least annually;
 - (5) Initiating action to establish upward mobility, trainee and/or career development positions, wherever feasible, to give lower-graded employees an opportunity for advancement;
 - (6) Informing subordinates on matters that have EEO implications and coordinating such actions with supervisors and EEO Officials;
 - (7) Cooperating fully with EEO personnel in the processing of discrimination complaints and attempting to informally resolve such complaints;

- (8) Supporting employees under their supervision who have collateral EEO responsibilities by documenting such duties in their official position description; and adjusting work schedules and workload as necessary; and,
 - (9) Initiating and supporting action to eliminate underrepresentation (manifest imbalance or conspicuous absence) of minorities, women and persons with disabilities on their staff.
- c. SBA MANAGEMENT BOARD: The SBA Management Board (Associate Deputy Administrators, Associate/Assistant Administrators, Office Directors, Regional Administrators and District Directors) are responsible for the development and effective implementation of viable, result-oriented EEO/affirmative employment programs within their areas of jurisdiction and will be rated on their effectiveness in the same. This includes:
- (1) Complying with program instructions issued by EEOC and internal SBA policies, guidelines, standards and procedures;
 - (2) Ensuring that sufficient resources and emphasis are devoted to these programs;
 - (3) Communicating EEO policy, program goals and objectives to all employees, recognized labor organizations, and interested community groups;
 - (4) Ensuring that recruitment activities reach all sources of job candidates; recruitment is geared to achieve a workforce representative of all segments of society; and efforts are undertaken to eliminate underrepresentation of minorities, women and persons with disabilities at all levels of their workforce;
 - (5) Ensuring that managers and supervisors are knowledgeable of principles and concepts of EEO and affirmative action and their responsibilities in this area, and that their performance evaluations reflect both individual and organizational performance in EEO;
 - (6) Identifying and eliminating barriers to the hiring and promotion of women, minorities and persons with disabilities;
 - (7) Ensuring that all employees actively involved in the EEO program are properly trained to carry out their responsibilities, and that their position descriptions reflect their EEO duties; and

- (8) Recognizing, under the SBA Incentive Awards Program, employees, managers, supervisors, or units for making outstanding contributions to the EEO program.
- d. UNION AND UNION REPRESENTATIVES: Unions are expected to cooperate with and support Agency management and EEO personnel in continuing efforts to implement SBA's Affirmative Employment Plan (AEP). Unions will be consulted in the development and implementation of AEPs and in advance of any proposed substantive changes in EEO policies or programs.

3. HOW IS ACCOUNTABILITY ACHIEVED?

- a. The annual performance appraisal of each manager and supervisor must address individual and organizational performance, as appropriate, in meeting affirmative employment requirements and achieving equal employment opportunity objectives.
- b. SBA's affirmative employment program plans and reports of accomplishments are public documents which, upon request, must be made available for review and, if feasible, copies provided to interested individuals or organizations. In addition, the AA/EEO&CRC, Regional Administrators and District Directors must ensure a wide distribution and availability of affirmative employment plans and reports of accomplishments to all employees.

4. HOW ARE PROGRAM EVALUATION REVIEWS CONDUCTED?

E. O. 11478, 29 C.F.R. § 1614 and EEOC regulations require that agencies review and appraise their EEO programs in order to ensure that equal opportunity is fully realized in every aspect of agency policy and practice and to determine whether the agency is meeting its EEO objectives. SBA evaluates EEO program effectiveness through on-site evaluations.

ON-SITE EEO EVALUATIONS

Periodic on-site field or Headquarters program office evaluations will be scheduled. Such evaluations are occasionally coordinated with OHR or ODP. The purpose of on-site evaluations is to ascertain the atmosphere in the office, and the awareness and attitude of employees about the EEO program. The commitment and effort demonstrated by management in implementing

the program, as well as its effectiveness, must also be assessed. On-site evaluations shall be planned well in advance.

The Regional Administrator, District Director or program head must be notified, in writing, of the specific dates and purpose of the evaluation and shall be requested to direct employees, EEO personnel, and employee representatives to be available for possible interviews.

Prior to the actual on-site visit, the most recent evaluations (SBA , OHR or ODP), employment statistics, complaint statistics, and related correspondence pertaining to the office/region shall be reviewed and analyzed. An EEO questionnaire will be sent to each employee and the results analyzed prior to going on-site. Any further information will be requested from the appropriate personnel office or administrative officer.

During the actual on-site visit, interviews will be held with a cross section of employees, e.g., males, females, clerical, technical, White, Black, etc., as well as a review made of all personnel actions for a 2 year period. The personnel actions reviewed will include, but are not limited to, training, promotion, hiring and awards records.

In the case of joint on-site visits with OHR or ODP, the evaluation report on the EEO program, after concurrence by the AA/EEO&CRC, shall be submitted to the Assistant Administrator, Office of Human Resources or Associate Administrator, Office of Disaster Assistance, within 10 working days to be incorporated in the OHR's or ODA's Personnel Management Evaluation (PME). The report will identify accomplishments and deficiencies which require the implementation of specific corrective actions. Implementation efforts must be reported on within an established time period.

When the on-site evaluation is not done in conjunction with OHR or ODP staff, these procedures will be followed: Within 45 working days following completion of an on-site evaluation, the AA/EEO&CRC, will prepare and transmit to the Regional Administrator, District Director, or Headquarter's program head the official evaluation report, including a digest summarizing the most significant findings. Where no corrective action is requested, the Regional Administrator, District Director or Headquarters program head will be so advised and provided with the report of findings. Where corrective action is requested, recommendations will be made in the digest of findings. The AA/EEO&CRC will prepare a letter to the appropriate official regarding the actions to be taken as a result of the findings and recommendations identified in the evaluation report.

This letter will require a written reply within 60 working days on the actions taken or contemplated and support will be required for those issues in dispute.

The response to the evaluation report will specify the date corrective action began, the method used for correction, and the date action was or is expected to be completed. Deficiencies which cannot be corrected within 60 working days will require submission of monthly progress reports until all are corrected. Any corrective actions which are not adequately addressed in the report must be considered in dispute and must be discussed with the Administrator and/or Field Operations to determine what future action, if any, must be taken for a final resolution.

5. **ARE THERE OTHER METHODS OF REVIEWING OR COLLECTING DATA?**

Yes. Pursuant to 29 C.F.R. § 1614.601, SBA is required to establish a system to collect and maintain accurate employment information on the race, national origin, sex and disabilities of its employees. Data on race, national origin and sex must be collected by voluntary self-identification.

If an employee refuses to provide requested information, the Agency should advise him/her of the data's importance and SBA's obligation to collect it. If the employee still refuses, a visual identification should be made. SBA must advise employees about the sole statistical purpose of the data and procedures to prevent its unauthorized use. If an employee provides inaccurate data after being informed of its intended use, SBA must accept the inaccurate data.

Data referenced above must be collected only in the form of gross statistics. Data collection (on race, sex, or national origin) must be done only with an automated data processing system approved by EEOC. Refer to 29 C.F.R. § 1614.601(d) for the controls required in a data system.

SBA may use the data collected only for studies and analyses which contribute affirmatively to achieving its EEO objectives. SBA must not establish a quota for the employment of persons on the basis of race, color, religion, sex, national origin, or disability.

Data collection on disabilities (handicaps) must also be collected by voluntary self-identification. SBA must advise employees of the importance of data and the Agency's obligation to report it.

If an employee appointed under special authority for hiring individuals with disabilities refuses to provide requested information, SBA must identify the employee's disability based upon records supporting his/her appointment.

For any other disabled person refusing to provide requested information, or to change information SBA believes is inaccurate, the Agency must report the employee's disability status as unknown.

SBA must report to EEOC on employment by race, national origin, sex and disability in the form and at such times as EEOC may require.

CHAPTER 6

WORKING WITH SBA's SPECIAL EMPHASIS PROGRAMS

1. WHAT IS A SPECIAL EMPHASIS PROGRAM (SEP)?

SEPs support and strengthen the EEO/affirmative employment program by addressing the unique concerns and needs of particular constituent groups and by helping to ensure that they are afforded equal opportunity in employment areas such as recruitment, hiring, training, upward mobility, employee recognition, career counseling and promotion. Special Emphasis Program Managers (SEPMs) such as Federal Women's, Hispanic Employment and Individuals With Disabilities Managers assist in addressing those concerns facing their respective AEP group. The SEPMs are advocates within SBA who will participate in the development of the affirmative action plan, serve as consultants to managers on related issues in the workplace and assist in recruitment and upward mobility efforts. The SEPMs will often participate in the development of training on various EEO matters that will help, proactively, employees and managers better understand related workplace issues and EEO policies and procedures.

2. WHAT ARE THE SEPs?

- a. SBA SEPs include the Federal Women's Program (FWP), the Hispanic Employment Program (HEP) and the Individuals With Disabilities Program (PWDP). Other SEPs, such as Black Employment Program, Asian American Pacific Islander Employment Program and the American Indian Employment Program, may be established by the AA/EEO&CRC or by Regional Administrators or District Directors, with the concurrence of the AA/EEO&CRC.
- b. The FWP applies to all women, regardless of race, ethnicity, or disability. The HEP applies to all Hispanics (persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin), regardless of race or whether or not they speak Spanish or have a Spanish surname. The PWDP applies to individuals with physical and/or mental disabilities.

3. WHO IS RESPONSIBLE FOR SEPs?

The AA/EEO&CRC provides program guidance and oversight relative to SEPs. SEPs are an essential part of the total EEO Program and merit the full cooperation and support of employees, supervisors and managers.

4. **HOW ARE SEPs IMPLEMENTED?**

- a. Federal regulations mandate that each agency designate various Special Emphasis Program Managers (e.g., Federal Women's Program Managers (FWPMs), Hispanic Employment Program Managers (HEPMs) and People With Disabilities Program Managers (PWDPMs)) to assist the agency's EEO office in carrying out EEO functions nation-wide.
- b. SEPM duties are performed by EEO&CRC field staff, specifically, Area Civil Rights Directors (ACRDs) and Central Office Duty Stations (CODs) Leaders. SEPMs, for designated Regions must:
 - (1) Be actively involved in the recruitment and hiring of constituent groups;
 - (2) Assist in obtaining jobs which offer advancement;
 - (3) Encourage the Agency to restructure positions so that constituents can have a greater chance to compete;
 - (4) Advise the AA/EEO&CRC and other appropriate management officials of barriers to the employment and advancement of constituents;
 - (5) Use statistical data to assess trends in employment, promotion, hiring, awards and training for group members; and,
 - (6) Coordinate special observances and distribute information to increase employee awareness of matters concerning constituent groups.

At SBA Headquarters, these functions are performed by a member of the EEO&CRC staff.

CHAPTER 7

REASONABLE ACCOMMODATION PROCEDURES

1. WHAT IS THE SBA POLICY ON REASONABLE ACCOMMODATION?

SBA's policy is to fully comply with the reasonable accommodation requirements of the Rehabilitation Act of 1973, as amended. SBA shall give full consideration to the hiring, placement and advancement of qualified persons with disabilities and shall not discriminate against a qualified person with a disability. This section sets forth a reasonable accommodation policy, and policy under which SBA shall establish a continuing program to ensure nondiscrimination because of disability.

- a. NONDISCRIMINATION: SBA will not discriminate against qualified applicants for employment or employees with disabilities for any reason, including lack of accessibility to Agency facilities.
- b. REASONABLE ACCOMMODATION: SBA shall make reasonable accommodation for the documented physical or mental limitations of a qualified applicant, employee, and volunteer with a disability unless SBA demonstrates that the accommodation would impose an undue hardship on the operation of its program. Where appropriate, reasonable accommodation may include, but shall not be limited to: making facilities readily accessible to and usable by persons with disabilities; job restructuring and part-time or modified work schedules; acquisition or modification of equipment or devices such as Telecommunication Device for the Deaf (TDD); provision of readers or interpreters; reassignments; and other similar actions, consistent with applicable law and regulation.
- c. PRE-EMPLOYMENT INQUIRIES: Except as provided below, SBA shall not conduct a pre-employment medical examination and shall not make pre-employment inquiries of an applicant for employment as to whether the applicant has a disability or as to the nature or severity of the disability.
 - (1) SBA may condition an employment offer on the results of a medical examination conducted prior to the employee's entrance on duty, provided that:
 - (a) All employees entering that specific position shall be subjected to such an examination regardless of disability, or when the pre-employment 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
 - (b) The results of such an examination shall be used only in accordance with the requirements of this section.
 - (2) Nothing in this section shall be construed to prohibit the gathering of pre-

employment information for statistical purposes or for the purposes of special appointing authorities for persons with disabilities.

(3) Information obtained in accordance with this section as to the medical condition or history of the applicant will be kept confidential and kept in files separate from the individual's job application and/or official personnel file, and shall be collected and maintained according to the existing maintenance, use, and disposition schedules for medical records, except that:

(a) Selecting officials may be informed regarding necessary accommodations; and

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

d. **REASSIGNMENT:** In accordance with applicable law and regulation, when a non-probationary employee becomes unable to perform the essential functions of an encumbered position, even with reasonable accommodation, due to a disability, SBA shall offer to reassign the individual to a funded vacant position for which she/he is qualified, unless such a reassignment would impose an undue hardship on the Agency. If SBA has already posted a notice or announcement seeking applications for a specific vacant position at the time it is determined that the employee is disabled, the Agency does not have an obligation to offer such reassignment to the employee, but the individual must be considered on an equal basis with other applicants for the position. Reassignment will be used only as a last resort in cases where there is no other effective form of reasonable accommodation. Managers should consult with their servicing personnel office to obtain procedural guidance regarding reassignment.

2. **HOW DOES SBA ENSURE EQUAL EMPLOYMENT OPPORTUNITY FOR PERSONS WITH DISABILITIES?**

For purposes of ensuring equal employment opportunity for persons with disabilities, every attempt should be made to resolve requests for reasonable accommodation at the lowest possible level in the supervisory chain (see 2a3 below). In cases where resolution cannot be achieved, the Agency shall utilize the Reasonable Accommodation Review Committee (RARC). The primary purpose of the RARC is to make determinations on contested requests for reasonable accommodation that cannot be resolved at a lower level. The RARC will have oversight of the Agency's reasonable accommodation process and will serve as one of the Agency's resources on issues pertaining to the Rehabilitation Act.

a. **REQUESTS FOR REASONABLE ACCOMMODATION:** When, if desired, an applicant or employee shall request reasonable accommodation either orally or in writing describing the disability which necessitates the reasonable accommodation and describing the desired accommodation. Requests for reasonable accommodation do not have to be in any particular format or contain any special phrases. An individual's oral or written request will start the reasonable accommodation process. Where applicable, if

requested, persons seeking reasonable accommodation will include administratively acceptable medical documentation of the condition, as set forth in 5 C.F.R. 339.101-104.

- (1) Applicants for employment at SBA with disabilities may direct their requests to the appropriate servicing personnel specialist indicated on the job announcement or the selecting official.
- (2) SBA employees with disabilities may direct their requests to their direct supervisor, or another supervisor or manager in his/her immediate chain of command. The official receiving the request for reasonable accommodation will notify the appropriate management board member, district director, or disaster assistance area director as expeditiously as possible, with the goal of notification up the chain of command within 3 business days of the request. Supervisors and managers must process requests imposing the fewest burdens on individuals with disabilities and permitting the most expeditious consideration and delivery of the reasonable accommodation. Generally, if there are no extenuating circumstances, and appropriate documentation has been provided, requests shall be processed and the accommodation, if approved, provided with the goal of responding within 15 business days from the date the decision maker receives the request. All oral requests shall be documented in writing by the official receiving the request, and the official thereafter shall provide a copy to the requestor.
- (3) Every attempt must be made to resolve the request at the lowest possible level in the supervisory chain. To ensure that all effective accommodations have been considered, supervisors and managers must meet with the individual requesting the accommodation, especially where the specific limitation, problem, or barrier is unclear; where an effective accommodation is not obvious; or where the parties are choosing between different possible reasonable accommodations.
- (4) Requests for reasonable accommodation that cannot be resolved through the supervisory chain will be forwarded to the RARC by the management board member for a decision. Requests forwarded to the RARC shall be in writing and submitted to the AA/EEO&CRC.
- (5) When an employee has requested and been approved for a type of reasonable accommodation that she/he is likely to need on a repeated basis (for example, the assistance of sign language interpreters or readers), the employee is not required to submit a new request on every occasion, and may obtain the accommodation by advance notice, where possible, to the appropriate individual or office as indicated by this SOP.
- (6) A family member, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. If so, the supervisor or manager should then confirm with the person with a disability that she/he in fact wants the reasonable accommodation requested.

- b. RARC CHAIR: The AA/EEO&CRC, or designee, shall serve as Chair of the RARC and convene meetings of the RARC to make decisions on requests for reasonable accommodation that have been forwarded to the Committee by Agency management.
- c. RARC COMPOSITION: The RARC will be composed of three voting members; one representative each from the Office of Equal Employment Opportunity and Civil Rights Compliance (the Chair), the Office of General Counsel, and the Office of Human Resources. In cases in which the request originates from an OIG or ODA applicant or employee, these offices will provide a non-voting representative to the RARC. The RARC will contact appropriate personnel for additional information and assistance as necessary and where appropriate.
- d. RARC DETERMINATIONS: The RARC shall convene as necessary to review all documentation submitted and approve/disapprove the requested accommodation(s). The RARC shall determine whether the requested accommodation(s) will impose an undue hardship on SBA, and, if so, whether alternative accommodation(s) shall be deemed appropriate. The RARC decisions will be made expeditiously and are final except as stated below.
 - (1) In the case of a request for reasonable accommodation originating from an OIG applicant or employee, the RARC will issue a non-binding advisory opinion to the IG. The IG will review the RARC opinion and any other information deemed appropriate before issuing a final decision. The IG will obtain additional information and assistance as necessary and where appropriate.
- e. MEDICAL DOCUMENTATION: The RARC may make requests for additional medical documentation when appropriate. Medical information will not be required if both the disability and the need for reasonable accommodation are obvious, or if the individual has already provided the Agency with sufficient information to document the existence of the disability and his/her functional limitations.

When warranted by the circumstances, the RARC may refer an individual's medical documentation to a private health care professional or the Federal Occupational Health (FOH) Services, to obtain additional information regarding submitted medical documentation, the nature of the disability, or the nature of the proposed or alternative accommodation. In order to obtain additional information, the requestor must sign a limited release allowing his/her medical documentation to be submitted to the Agency's selected health care professional. Any such additional information or opinions shall be provided in writing to the RARC. The RARC will provide this and all information or opinions related to the request for accommodation, to the person seeking the accommodation, upon their request.

The RARC may request that an individual be examined by a health care professional if the individual has provided insufficient documentation from his/her own health care

provider or other appropriate professional to substantiate the existence of a disability and the need for reasonable accommodation. Prior to the RARC requesting such an exam, the specific required information will be identified to the individual and an opportunity will be given for the individual to provide the needed information. Failure to provide medical information or agree to submit to an exam by the Agency's chosen health care professional may result in a denial of reasonable accommodation.

All medical information that the Agency obtains in connection with a request for reasonable accommodation will be kept confidential and kept in files separate from the individual's official personnel file.

- f. UNDUE HARDSHIP: Requests for reasonable accommodation may be denied on the basis of undue hardship to the Agency. All denials will be issued by the RARC, in writing, and will be consistent with law and regulation.
- g. RARC VOTE: The RARC shall make a decision on the request, by majority vote, and shall prepare and deliver a written response to the individual requesting the accommodation and to the appropriate management board member with a goal of responding within 5 working days of its decision.
- h. IMPLEMENTING DIRECTIONS: The RARC will prepare and issue any necessary implementing directions to the appropriate Agency officials.
- i. RESOURCES: SBA includes in its agencywide annual budget projection, funding for reasonable accommodation. The annual budget for reasonable accommodation is managed by OEEO&CRC. Offices will not be charged on an individual basis for accommodations.
- j. TRACKING: In conjunction with appropriate offices, OEEO&CRC will maintain a database that tracks information related to requests for reasonable accommodation. This information will be used to evaluate and identify trends in all aspects of SBA's performance in responding to requests for, and providing, reasonable accommodation. Information to be tracked will include, but is not limited to the following:
 - (1) Number and types of reasonable accommodations that have been requested in the application process and whether those requests have been granted or denied;
 - (2) Job types (occupational series, grade level, and Agency component) for which reasonable accommodations have been requested;
 - (3) Types of reasonable accommodations that have been requested for each of those job types;
 - (4) Number and types of reasonable accommodations for each job, by Agency component, that have been approved, and the number and types that have been

- denied;
- (5) Number and types of requests for reasonable accommodations that relate to the benefits or privileges of employment, and whether those requests have been granted or denied;
 - (6) Reasons for denial of requests for reasonable accommodation;
 - (7) Amount of time taken to process each request for reasonable accommodation; and
 - (8) Sources of technical assistance that have been consulted in trying to identify possible reasonable accommodation.
- k. DISCRIMINATION COMPLAINTS: An employee/applicant has a right to file a complaint using the EEO process and other statutory processes, as appropriate, if not satisfied with an accommodation decision or if the accommodation, once granted, is not implemented. Discrimination complaints filed on the basis of physical or mental disability will be processed by SBA in accordance with the provisions of the appropriate law and regulation in effect at the time.
 - l. INFORMAL RESOLUTION: SBA encourages the use of the informal dispute resolution process to allow individuals with disabilities to obtain prompt reconsideration of denials of reasonable accommodation.
 - m. RIGHTS: This SOP and the procedures set forth herein confer no rights upon any employee in addition to those granted by law and regulation.

CHAPTER 8

AUTHORITY FOR THE EEO PROGRAM

1. WHAT ARE THE AUTHORITIES FOR THE EEO PROGRAM?

EEO&CRC's policies, practices and procedures are based on statutes, regulations, administrative decisions and Federal case law. EEO's paramount authorities are as follows:

- a. Title VII of the Civil Rights Act of 1964 (Title VII), as amended - codified at 42 U.S.C. §§ 2000e *et seq.* Prohibits employment discrimination based on race, color, religion, sex, national origin, and reprisal.

The Equal Employment Opportunity Act of 1972 – codified at 42 U.S.C. § 2000e-16. Amended Title VII to include coverage for employees of the Federal Government.

- b. The Age Discrimination in Employment Act of 1967 (ADEA), codified at 29 U.S.C. §§ 621 *et seq.* Prohibits employment discrimination based on age. Coverage for federal employees and applicants for employment who are at least 40 years of age is provided at 29 U.S.C. § 633(a).
- c. The Equal Pay Act of 1963 (EPA), codified at 29 U.S.C. § 206(d), was added to the Fair Labor Standards Act of 1938, as amended. The EPA did not cover federal employees until the 1974 amendments to the Fair Labor Standards Act. In its enforcement of EPA, EEOC has the authority to investigate an agency's employment practices on its own initiative, at any time, in order to determine compliance with EPA provisions.

EPA prohibits gender-based pay discrimination among employees performing similar work. It does not apply to pay differentials in jobs that are not equal. Instead, "it stands for the straightforward proposition that 'employees doing equal work should be paid equal wages, regardless of sex.'" Goodrich v. International Brotherhood of Electrical Workers, 815 F.2d 1519, 1523 (D.C. Cir. 1987) (quoting H.R. Rep No. 309, 88th Cong., 1st Sess. 2 (1963)).

- d. The Rehabilitation Act of 1973, as amended, has three controlling provisions intended to eradicate discrimination against individuals with physical and/or mental disabilities in the Federal Government. These provisions are codified at 29 U.S.C. §§ 791, 793-94.

Section 501 of the Rehabilitation Act prohibits discrimination by the Federal Government based on physical and/or mental disabilities in its employment or persons and applicants for employment. Section 501 is intended to parallel Section

717 of Title VII entitled, Nondiscrimination In Federal Government Employment, cited at 42 U.S.C. § 2000e-16.

- e. The Civil Rights Act of 1991 (CRA) (Pub. L. No. 102-166, passed by Congress on Nov. 7, 1991 and signed into law on Nov 21, 1991, amended by Pub. L. No. 102-392 (Oct 6, 1992)), amends portions of Title VII; Section 1981 of the Civil Rights Act of 1866; the Attorney's Fees Awards Act of 1976; portions of the Americans With Disabilities Act of 1990; the Rehabilitation Act of 1973; and the Age Discrimination In Employment Act of 1967. The CRA reversed or modified portions of several U. S. Supreme Court decisions, and made pivotal changes in many areas of employment discrimination law including, but not limited to: (a) permitting jury trials and payment of attorney's fees in federal employment discrimination claims, the award of specified amounts of compensatory and punitive damages (punitive damages may not be recovered from a government, government agency or subdivision) to victims of intentional job discrimination (disparate treatment) in violation of Title VII, the Rehabilitation Act of 1973, and the ADA (no provision for compensatory or punitive damages for ADEA claims); and (b) placing the burden of proof and responsibility on an employer defending a Title VII disparate impact challenge to an employment practice to show that the practice is job-related for the particular position and consistent with business necessity.
- f. E. O. No. 11478, 34 Federal Register 12985 (1969) (E. O. No. 11478 (Aug 8, 1969)), as amended by E. O. No. 12106 (Dec 26, 1978), focuses on, among other things, the policy of the U. S. Government to provide equal opportunity in Federal employment for all persons and prohibit discrimination in employment because of race, color, religion, sex, national origin, physical or mental disability, or age; and the responsibility of each executive department or agency to promote EEO sensitivity through an ongoing affirmative employment program.
- g. Federal Regulations at 29 C.F.R. § 1614.101 et seq., (1999), Federal Sector Equal Employment Opportunity, set forth procedures for processing Federal sector discrimination complaints.
- h. EEOC Management Directive 110 (EEO MD-110, revised effective November 9, 1999), provides Federal agencies with EEOC's policies, procedures, and guidance related to the processing of employment discrimination complaints controlled by EEOC regulation, 29 C.F.R. § 1614.101 et seq.
- i. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, effective Jan 1, 1979, and last amended by Pub. L. No. 101-12, approved April 10, 1989, abolished the U.S. Civil Service Commission (CSC) and separated its functions between two new agencies – Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). OPM was charged with carrying out the CSC's management functions, while MSPB was given its adjudicatory responsibilities.

- j. The Freedom of Information Act (FOIA) 5 U.S.C. § 552 (1988), requires the Federal Government make available to the public, upon request, certain records and documents, except those subject to exemptions set forth in the statute.
- k. The Privacy Act of 1974, 5 U.S.C. § 552a, as amended (1988 & Supp. VI 1993), Pub. L. No. 93-579, imposes certain requirements on Federal agencies with respect to the collection, use, maintenance and dissemination of information kept within a designated system of records.
- l. EEOC Management Directive 713 (EEO MD-713) supersedes EEO MD-711 (Nov 2, 1982), and EEO MD.711A (Oct 4, 1983). This directive governs the Federal Government mandate to recruit and employ persons with physical and/or mental disabilities. MD-713 was prepared pursuant to EEOC's obligation and authority under Section 501 of the Rehabilitation Act of 1973, as amended by Pub. L. No. 99-506, 100 Stat. 1807 (October 21, 1986).
- m. EEOC Management Directive 714 (EEO MD-714) effective October 1, 1987, provides instructions and guidance to heads of Federal agencies for the development and submission of Affirmative Employment Multi-Year Program Plans, Annual Accomplishment Reports, and Annual Plan Updates for FY 1988 through FY 1992. EEOC, in September 1993, extended the coverage of EEO Management Directives 713 and 714 through fiscal year 1994. By correspondence dated September 1994, EEOC extended coverage indefinitely for these Management Directives pending its issuance of further guidance.
- n. The Federal Equal Opportunity Recruitment Program (FEORP) is cited at 5 C.F.R. § 720.101. This regulation incorporates the statutory requirements for establishing and conducting an FEORP.
- o. EEOC's Guidelines on Specific Areas of Employment Discrimination Law (29 C.F.R. §§ 1604, 1605, 1606, and 1607 et seq.). These guidelines cover the following areas: (a) § 1604.1 et seq. sets forth the guidelines on discrimination because of sex (including § 1604.10 - Employment policies relating to pregnancy and childbirth, The Pregnancy Discrimination Act, Pub. L. No. 95-555; and § 1604.11 - Sexual Harassment); (b) § 1605.1 et seq. sets forth the guidelines on discrimination because of religion; (c) § 1606.1 et seq. sets forth the guidelines on discrimination because of national origin; and (d) Section 1607.1 et seq. sets forth the uniform guidelines on employee selection procedures.
- p. In October, 1967 E. O. 11375 amended E. O. 11246 by adding the basis of sex to other listed prohibited bases of discrimination (i.e., race, color, religion, or national origin) for Federal employees and applicants for employment in the Federal Government. The U.S. C.S.C. (currently entitled the U.S. OPM) responded to this Order by establishing the FWP in order to enhance women's opportunities for employment advancement in the Federal sector. In August 1969, E. O. 11478 integrated the FWP into the overall EEO program.

The EEO Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, brought Federal employees and agencies under the provisions of Title VII. Federal agencies and departments were then required to designate SEPMs for the Persons with Disabilities Program, HEP, and the FWP.

- q. Reorganization Act No. 1 of 1978 transferred jurisdiction over Section 717 of Title VII entitled, "Nondiscrimination In Federal Government Employment" from the U.S. C.S.C. to EEOC.

2. HOW ARE DELEGATIONS OF AUTHORITY ACCOMPLISHED?

SBA's Administrator delegates authority to the Assistant Administrator (AA) for the Office of Equal Employment Opportunity and Civil Rights Compliance (OEEO&CRC) to manage the EEO program. The AA/OEEO&CRC is under the immediate supervision of the SBA Administrator.

3. WHAT IS THE ASSISTANT ADMINISTRATOR FOR EEO&CRC'S AUTHORITY?

SBA's Office of EEO&CRC is committed to sustaining the credibility of its mission and EEO programs by adhering to the following guidance:

- a. The AA/OEEO&CRC will avoid conflicts of position or conflicts of interest, as well as the appearance of such conflicts. For example, the same SBA official(s) responsible for executing and advising on personnel actions, may not be responsible for managing, advising, or overseeing the administrative EEO informal or formal complaint stages. Since these stages generally challenge the motivations and impacts of personnel actions and decisions, they must be separated from the personnel function to ensure the integrity of EEO investigative and decision-making processes.
- b. In instances where there is a conflict of interest, or the appearance thereof, the administrative EEO complaint may be referred to an outside Agency for processing.
- c. Legal sufficiency reviews of findings of discrimination will be reviewed by an attorney in OGC who does not or has not provided representation at the administrative EEO hearing in that particular case.

DEFINITIONS

1. ADEQUACY OF REPRESENTATION - AGENT OF CLASS COMPLAINT An individual who files a class complaint of discrimination on behalf of a class. The Federal Rules of Civil Procedure, Rule 23(a)(4) requires a determination that "the representative parties (agent(s)) will fairly and adequately protect the interests of the class,...must be part of the class, and 'possess the same interest and suffer the same injury' as the class members."
2. ADMINISTRATIVE JUDGE (AJ) The presiding official at an administrative EEOC hearing.
3. AFFIRMATIVE EMPLOYMENT SBA's actions, policies and procedures are designed to achieve equal employment opportunity. SBA's affirmative action involves the following:
 - (1) Thorough, methodical efforts to prevent employment discrimination or to eradicate it as promptly as possible; and
 - (2) Recruitment and outreach measures.
4. AFFIRMATIVE EMPLOYMENT PROGRAM EEOC guidelines require Federal agencies to establish a written program detailing the steps they will take and have taken, to ensure equal employment opportunity. EEOC guidelines require three elements for an affirmative action program:
 - (1) a reasonable self-analysis to determine if discriminatory practices currently exist or if earlier bases of employment discrimination are uncorrected;
 - (2) a reasonable basis for concluding that affirmative action is appropriate; and,
 - (3) reasonable action - the action taken must be reasonable in relation to the problems disclosed by the self-analysis.
5. AGENCY REPRESENTATIVE An employee located in OGC, OIG Counsel Division, Denver Administrative Litigation Unit, and/or a District Counsel, who represents the Agency in administrative and/or judicial forums in EEO cases against SBA.
6. AGENT Either an SBA employee, former employee or an applicant for employment with the Agency, who is authorized to act as the representative of the individuals who have filed a complaint as a class.
7. AGGRIEVED PARTY An aggrieved party is one who believes that he/she has suffered a present harm or loss with respect to a term, condition, or privilege of employment because of discrimination based on race, color, religion, sex, national origin, age, physical and/or mental disability or other disabling condition and/or reprisal, and who brings such matter to the attention of an EEO counselor.

8. ALTERNATIVE DISPUTE RESOLUTION (ADR) The use of an alternative means of dispute resolution designed to facilitate an early resolution of employment discrimination disputes, without seeking recourse through administrative and/or judicial channels. ADR methods utilized by EEO&CRC include mediation and facilitation.
9. APPLICANT for employment: an individual who applies at SBA for available positions for which SBA has advertised.
10. ASSISTANT ADMINISTRATOR, OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY AND CIVIL RIGHTS COMPLIANCE The official designated by the Administrator of SBA to carry out the Agency's equal employment opportunity program.
11. CLASS COMPLAINT A written complaint filed by a group of employees, former employees, or applicants for employment who allege that they have been or are being adversely affected by an Agency personnel management policy or practice that discriminates against the group on the basis of race, color, religion, sex, national origin, age, or physical and/or mental disability.
12. COMPENSATORY AND PUNITIVE DAMAGES Compensatory and punitive damages (punitive damages may not be recovered from a government, Government agency or subdivision) apply only to intentional (disparate treatment), not to disparate-impact or mixed motive discrimination, in violation of § 717 of Title VII; § 107(a) of the ADA; and § 501 of the Rehabilitation Act of 1973.

Compensatory damages may be awarded for tangible, pecuniary losses such as moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other measurable out-of-pocket expenses.

Compensatory damages may be awarded for intangible (nonpecuniary) losses such as emotional pain (e.g., sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, nervous breakdown, hair loss, and/or headaches), suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, and injury to credit standing.

The purposes for such damages are: (1) to compensate or make whole a victim, and; (2) to encourage private attorneys to enforce anti-discrimination laws. For further insight into compensatory and punitive damages, see the Civil Rights Act of 1991, Pub. L. No 102-166, 105 Stat. 1071 (1991), Title I at § 102.

13. COMPLAINANT Either an SBA employee, former employee, and/or rejected applicant for employment who believes that he/she has been subjected to employment discrimination due to his/her race, color, religion, sex, national origin, age, physical and/or mental disability and/or reprisal, who filed a formal EEO complaint through the auspices of EEO&CRC.

14. COMPLAINT A written, signed statement by the complainant, or the complainant's representative, explaining his/her belief that a particular SBA personnel action, procedure, or practice was discriminatorily applied to him/her based, in whole or in part, upon his/her race, color, religion, sex, national origin, age, physical and/or mental disability, and/or reprisal.
15. COMPLAINT FILE The file containing all documents pertinent to the formal EEO complaint, including, but not limited to, the EEO counselor's written notices, notes and reports stemming from the pre-complaint counseling stage; the formal EEO complaint; the EEO investigative file; documentation from the complainant if he/she withdraws his/her formal EEO complaint; amendment(s) to the formal EEO complaint; and a copy of SBA's Final Agency Decision, signed by the AA/EEO&CRC, coupled with the appropriate transmittal letter(s) and notice of the complainant's right to appeal to EEOC or to file a civil action in an appropriate U.S. District Court; other decisions; and transmittal letters, notices and/or documentation pertinent to the formal EEO complaint. The EEO complaint file should not contain any material regarding the personal opinions of the EEO specialist concerning the case.
16. CONSOLIDATION OF ADMINISTRATIVE FORMAL EEO COMPLAINTS
Administrative formal EEO complaints filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter, may be consolidated by SBA for joint processing after appropriate notification to the parties. See 29 C.F.R. § 1614.606.
17. DISPARATE TREATMENT A theory or category of employment discrimination. Disparate treatment discrimination occurs when an employer intentionally or with mixed motives treats an individual or group differently based on race, color, religion, sex, age, national origin, physical and/or mental disability, and/or reprisal. An intent to discriminate is a necessary element in this type of employment discrimination, and can be shown by direct evidence or inferentially by statistical, anecdotal, and/or comparative evidence.
18. DISPARATE IMPACT A theory or category of employment discrimination. Disparate impact discrimination may be found when an employer's use of a facially neutral selection standard, such as a test, an interview or a degree requirement, disqualifies members of a particular race, sex, religion, color, national origin, age, and/or physical and/or mental disability at a significantly higher rate than others and is not justified by business necessity or job-related duties. An intent to discriminate is not necessary for this type of employment discrimination to be found. The disparate impact theory can be used to

analyze both objective and subjective selection standards. Additionally, in disparate impact cases, the standard prima facie intentional discrimination analysis does not apply.

19. EEO COUNSELOR an individual appointed by the AA/EEO&CRC to provide EEO counseling on a collateral duty basis.
20. ESSENTIAL FUNCTIONS The essential functions of a job are those job duties that are so fundamental to the position that the employee cannot do his/her job without being able to perform these functions. A function can be "essential" if, among other things, the position exists specifically to perform that function, there are a limited number of other employees who could perform the function if it were assigned to them, or the function is specialized and the incumbent is hired based on his/her ability to perform it.
21. EXTENUATING CIRCUMSTANCES Factors that could not reasonably have been anticipated or avoided in advance of the request for the accommodation. These can include, but are not limited to, situations in which equipment must be back-ordered, or where an individual's health professional fails to provide needed documentation.
22. INDIVIDUAL WITH A DISABILITY A person who has a physical or mental impairment which substantially limits one or more of his/her major life activities, has a record of such an impairment, or is regarded as having such an impairment.
23. JOINT PROCESSING OF COMPLAINT When the same complainant has filed two or more complaints of discrimination, consisting of substantially similar allegations of discrimination or relating to the same matter, these complaints shall be consolidated by the Agency or the EEOC for joint processing after appropriate notification to the parties. See 29 C.F.R. § 1614.606.
24. MINORITY GROUP MEMBER As defined by the Office of Personnel Management (OPM), a member of a minority group must be Black, Hispanic, American Indian or Alaskan Native, Asian, or Pacific Islander. The term "Black" means a person originating in any of the Black racial groups of Africa.

"Hispanic" means a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish cultures or origins regardless of race (but does not include persons of Portuguese culture or origin).

An "American Indian" or "Alaskan Native" is a person originating in any of the original

peoples of North America and who maintains cultural identification through community recognition or tribal affiliation.

An "Asian or Pacific Islander" is a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands (for example, China, India, Japan, Korea, the Philippines, Samoa, or Vietnam).

25. MIXED CASE APPEAL An appeal filed with the MSPB alleging 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, age, physical and/or mental disability.
26. MIXED CASE COMPLAINT A complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or physical and/or mental disability related to or stemming from an action that can be appealed to the U.S. Merit Systems Protection Board (MSPB).
27. MIXED MOTIVES A theory or category of employment discrimination. Mixed motives cases are established where a complainant has demonstrated that race, color, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice. 42 U.S.C. § 2000e-2 Only declaratory relief, injunctive relief, attorneys fees and costs directly attributable to the pursuit of a claim are obtainable under this theory.
28. NEGOTIATED GRIEVANCE PROCEDURE A Federal employee who is covered by a collective bargaining agreement may elect to pursue allegations of discrimination through the grievance and arbitration procedures set out by SBA's collective bargaining agreement, if the matter is grievable under the agreement, in lieu of the EEO process. Once an election has been made, the selection is final.
29. PERSON WITH DISABILITY One who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Exclusions from definition of "Person with Disability":

- a. The term does not include an individual who is currently engaging in the illegal use of drugs, when the Agency acts on the basis of such use.
- b. The term "drug" means a controlled substance defined in schedules I through V of Section 202 of the Controlled Substance Act (2 U.S.C. 812).

- c. The term "illegal use of drugs" means the use of drugs, possession or distribution of which is unlawful under the Controlled Substance Act, but does not include use of a drug taken under supervision of a licensed health care professional or other uses authorized by the act or other provisions of law.
- d. The exclusion in a-c above does not exclude an individual with disabilities who:
- (1) 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;
 - (2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or
 - (3) Is erroneously regarded as engaging in such use.
- e. SBA is not precluded from adopting or administering existent reasonable policies or other procedures, including but not limited to drug testing, designed to ensure that an individual described in d. above is no longer engaging in the illegal use of drugs.
30. PRINCIPAL RESPONDING OFFICIAL An SBA official (current or former employee) who is accused of allegedly subjecting another former or current SBA employee or applicant for employment with SBA, to discrimination due to race, color, religion, sex, national origin, age, physical and/or mental disability, or reprisal.
31. REASONABLE ACCOMMODATION Any change in the work environment, or in the way things are customarily done to enable a qualified applicant or employee with a disability to perform the essential functions of a job. Also, a modification or adjustment that enables an applicant or employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly-situated employees without disabilities.
- a. Although reasonable accommodations must be determined on a case-by-case basis, some examples of reasonable accommodation include:
- Making facilities readily accessible to and usable by an individual with a disability;
 - Restructuring a job by reallocating or redistributing non-essential job functions;
 - Altering when or how an essential job function is performed;
 - Part-time or modified work schedules;

- Obtaining or modifying equipment or devices;
 - Modifying training materials or policies;
-
- Providing qualified readers and interpreters;
 - Reassignment to a vacant, funded position;
 - Permitting use of accrued paid leave or unpaid leave for necessary treatment;
 - Providing reserved parking for a person with a mobility impairment; and
 - Allowing an employee to provide equipment or devices to the workplace that an employee is not required to provide.
32. REPORT OF INVESTIGATION A labeled file which contains the documents and information acquired during the investigation of the discrimination complaint, including affidavits of the complainant, the Principal Respondent Official (PRO), and witnesses; and copies of, or extracts from records, policy statements, or Agency regulations, organized to show their relevance to the complaint or general environment out of which the complaint arose.
33. REPRISAL Reprisal constitutes retaliation for participation in protected EEO activity or opposition to employment practices made unlawful by anti-discrimination statutes.
34. SETTLEMENT AGREEMENT A written agreement signed by the complainant(s) and appropriate Agency official(s) whereby, in exchange for specific terms (promises) outlined in the agreement, they agree to mutually resolve the complaint(s) of discrimination which is/are the subject of the settlement agreement.
- The Agency official(s) signing the agreement must have the authority to bind the Agency to the terms of the agreement. A settlement agreement is entered into voluntarily and is binding on all parties.
35. SEXUAL HARASSMENT As defined in EEOC guidelines and recent U.S. Supreme Court rulings on the issue, sexual harassment is unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a nature in which:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or,
- (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or,
- (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment involves discriminatory treatment on the basis of sex, which is so objectively offensive as to alter the conditions of the victim's employment. The conditions of employment are altered if the harassment culminated in a tangible employment action, or was sufficiently severe or pervasive to create a hostile environment.

36. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION The Civil Service Reform Act of 1978 transferred jurisdiction over Title VII from the U.S. Civil Service Commission (CSC) to EEOC. EEOC has overall responsibility for leadership and supervision of the Federal sector EEO program.
37. UNDERREPRESENTATION A situation in which the percentage representation of a minority, disabled or sex group, including white females, in a category of employment within the Agency is lower than the participation rate for that group in the appropriate civilian labor force.
38. UNDUE HARDSHIP An action requiring significant difficulty or expense when considered in light of factors such as the nature and cost of the accommodation requested; the mission of the organization the accommodation would impact; the structure and composition of the organization; any pertinent legal or Agency precedents; and the function, with or without accommodation, of the employee/applicant requesting the accommodation.