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EQUAL
EMPLOYMENT
OPPORTUNITY

Pilot Projects Could
Help Test Solutions to
Long-standing
Concerns with the
EEO Complaint
Process



GAO

Accountability * Integrity * Reliability



Highlights of [GAO-09-712](#), a report to congressional committees

Why GAO Did This Study

Delays in processing federal equal employment opportunity (EEO) complaints, apparent or perceived lack of fairness and impartiality in complaint processing, and fear of retaliation in the workplace have been long-standing concerns of the Equal Employment Opportunity Commission (EEOC), other federal agencies, and Congress. Based on a Notification and Federal Employee Antidiscrimination and Retaliation Act mandate, GAO analyzed (1) factors that EEO practitioners have identified as impeding the fair, prompt, and impartial processing of federal EEO complaints and (2) actions that EEO practitioners and other stakeholders think could be taken to help address those factors. GAO also identified actions that EEOC is taking to improve the federal complaint process. GAO surveyed 65 EEO practitioners representing a wide cross section of professionals knowledgeable about the federal EEO complaint process, who were selected from 16 federal agencies that accounted for about 88 percent of complaints filed in fiscal year 2005, EEOC, and private sector attorneys' offices. GAO did not assess the validity of practitioners' views or evaluate the effectiveness of initiatives.

What GAO Recommends

GAO recommends that if EEOC approves pilot projects to test ways to improve complaint processing, it should direct pilot project officials to develop sound evaluation plans and EEOC staff to review and approve such plans. EEOC agreed with GAO's recommendations.

[View GAO-09-712](#) or [key components](#). For more information, contact George Stalcup at (202) 512-6806 or stalcupg@gao.gov.

EQUAL EMPLOYMENT OPPORTUNITY

Pilot Projects Could Help Test Solutions to Long-standing Concerns with the EEO Complaint Process

What GAO Found

GAO analyzed and grouped into eight, the factors that EEO practitioners identified as those they believed impeded the fair, prompt, and impartial processing of federal EEO complaints: (1) lack of accountability by some agency officials and EEOC practitioners in carrying out their responsibilities; (2) lack of sufficient resources by some EEO programs and EEOC to fulfill their responsibilities; (3) lack of independence by some agency officials, including undue interference by some agency legal counsel and human resources officials in EEO matters; (4) insufficient knowledge and skills by some agency officials and EEO practitioners; (5) lack of authority by some EEO officials to dismiss cases that have no merit and lack of subpoena power by EEOC administrative judges (AJ); (6) lack of clarity in regulation and some guidance and consistent decisions from EEOC; (7) lack of effective communication by some EEO practitioners of relevant oral and written information to participants and that alternative dispute resolution is available; and (8) lack of a firm commitment by some agency management and EEO officials to the EEO process. The practitioners' views do not represent the official views of the selected agencies and should not be generalized to conclude that all federal agencies and EEO practitioners are deficient in all factors identified. Also, a few stakeholders GAO contacted stated that without the perception that the complaint process is fair, people may choose to not participate in it; GAO believes this concern is important and has been accounted for within the discussion of several of the factors.

EEO practitioners surveyed and stakeholders suggested potential solutions to address the factors practitioners identified and provided information on relevant changes their agencies had made to the process. For example, to strengthen accountability, practitioners reported establishing measures for timeliness and quality for agency EEO professionals and those contracted to perform EEO complaint functions. To strengthen EEO staff's independence, several practitioners and stakeholders offered that agencies should adhere more clearly to existing EEOC requirements on delineating the roles of the agency general counsels in the EEO process. Stakeholders offered potential advantages and disadvantages to allowing complainants to file directly with EEOC as a means to avoid real or perceived conflicts of allowing an agency to investigate a complaint against itself. Several practitioners and EEOC officials stated that providing subpoena authority to AJs could help improve the efficiency of the EEO complaint process by compelling witnesses to testify.

To help agencies achieve model EEO programs, EEOC has begun to measure agencies' progress in such areas as the timeliness of investigations. In June 2008, EEOC announced a proposal that includes provisions that may address some of the factors that practitioners identified. The proposal would require that agency EEO programs comply with EEOC regulations and other guidance and that EEOC review those programs for compliance. The proposal also would permit agencies to conduct pilot projects to test new ways to process EEO complaints that are not presently included in existing regulations.

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Abbreviations

ADR	alternative dispute resolution
AJ	administrative judge
DOD	Department of Defense
EEO	equal employment opportunity
EEOC	Equal Employment Opportunity Commission
EPCA	EEO Program Compliance Assessment
FAD	final agency decision
FAST	Federal Appellate Settlement Team
FLRA	Federal Labor Relations Authority
MD	management directive
MSPB	Merit Systems Protection Board
No FEAR	Notification and Federal Employee Antidiscrimination and Retaliation
OFO	Office of Federal Operations
OGC	Office of General Counsel
OPM	Office of Personnel Management

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Congressional Committees

The federal government is the nation's largest employer and as such it has a special responsibility to ensure equal opportunity of employment for its employees and applicants for employment. In a high-performing workplace, federal employees must be able to pursue the missions of their organizations free from discrimination and should not fear or experience retaliation or reprisal. To help achieve such a workplace, antidiscrimination laws prohibit employment discrimination on the basis of race, color, gender, religion, national origin, age, and disability. Federal employees or applicants for employment who allege that they have been discriminated against by a federal agency may file equal employment opportunity (EEO) complaints with that agency. In addition, a person who files an EEO complaint or participates in the investigation of such a complaint is protected from retaliation.

The Equal Employment Opportunity Commission (EEOC) has issued regulations that govern how the EEO discrimination complaints of federal employees are to be processed administratively and requires agencies to provide for the prompt, fair, and impartial processing of complaints.¹ Under these regulations, the federal EEO process consists of two stages—informal or precomplaint counseling, and formal, when a complaint is filed with the agency. The investigation into allegations of discrimination is a key component of the formal EEO process. EEOC regulations require agencies to investigate complaints they accept within 180 days.² Complainants may request a final decision from the agency or a hearing before an EEOC administrative judge (AJ), who has another 180 days to issue a decision. However, failures by agencies and EEOC to adhere to the time frames in regulation have been a perennial concern.

Delays in the processing of federal EEO complaints have been a long-standing concern of EEOC, other federal agencies, and Congress. Since the mid-1990s, we have reported that the EEO complaint process was

¹29 C.F.R. 1614. EEOC has supplemented these regulations with additional guidance related to the processing of complaints with Management Directive 110.

²This period can be extended an additional 90 days when both parties agree.

inefficient, expensive, and time-consuming.³ For example, in 2000, we testified that the complaint process and EEOC's role in eliminating discrimination in the federal workplace had been targets of criticism because of the rising number of complaints, growing backlogs of unresolved cases, and increasing amount of time it takes to bring cases to a close.⁴ In 2001 testimony during deliberation of the Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act,⁵ we noted that the lack of data on the number of complaints of workplace discrimination made it difficult for agency managers to understand the nature and scope of issues in the workplace involving discrimination and other conflicts and develop strategies for dealing with those issues. We also stated that agencies and their leaders should be held accountable for providing fair and equitable workplaces free from discrimination and that individuals need to be held accountable for their actions in cases where discrimination has occurred.

In 2002, Congress passed the No FEAR Act amid concerns about discrimination and retaliation against federal employees.⁶ Through various provisions of the No FEAR Act, Congress sought to improve accountability by federal agencies in complying with antidiscrimination laws, finding that those agencies that practice or tolerate discrimination cannot be run effectively. More recently, in 2008, the Merit Systems Protection Board (MSPB) reported that its survey results on retaliation suggest that work remains to be done in creating a workplace where employees can raise concerns about organizational priorities, work processes, and personnel

³GAO, *Federal Employee Redress: A System in Need of Reform*, [GAO/T-GGD-96-110](#) (Washington, D.C.: Apr. 23, 1996), and *Equal Employment Opportunity: Complaint Caseloads Rising, With Effects of New Regulations on Future Trends Unclear*, [GAO/GGD-99-128](#) (Washington, D.C.: Aug. 16, 1999).

⁴GAO, *Equal Employment Opportunity: Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention*, [GAO/T-GGD-00-104](#) (Washington, D.C.: Mar. 29, 2000).

⁵GAO, *The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing*, [GAO-01-715T](#) (Washington, D.C.: May 9, 2001).

⁶Pub. L. No. 107-174 (May 15, 2002).

policies and decisions without fear of retaliation and where managers can respond to such concerns openly and constructively.⁷

Various requirements in the act, including those for agencies to report on the cases of alleged discrimination and their disposition and the number of employees disciplined for discrimination, were intended to enable Congress to more effectively oversee compliance by agencies. One mandate in the act required us to evaluate the effect on agencies and EEOC of allowing complainants to bypass the agency complaint process and instead file complaints directly with EEOC.⁸

Based on discussions and agreement with interested committees, we analyzed underlying concerns with the federal EEO complaint process and potential options and solutions for addressing them. We surveyed a wide cross section of individuals involved with the federal EEO complaint process who were familiar with and had knowledge of the process. We termed these individuals “EEO practitioners” and collected their informed views concerning the EEO complaint process. The seven EEO practitioner groups we contacted were agency EEO directors, investigators, counselors, and legal counsel; EEOC AJs and appeals attorneys; and plaintiffs’ attorneys.⁹

This report provides the results of our analysis of (1) factors that EEO practitioners have identified as impeding the prompt, fair, and impartial processing of federal EEO complaints and (2) actions that EEO practitioners and other stakeholders think could be taken to help address those factors, including potential implications of changes to the administrative EEO complaint process. We also include information on options offered by stakeholders and actions being taken by EEOC to improve equal opportunity and the EEO complaint process in the federal workforce.

⁷MSPB is an independent quasi-judicial agency in the executive branch that adjudicates employee appeals of personnel actions and conducts studies of the federal merit system. See Merit System Protection Board, *The Federal Government: A Model Employer or a Work In Progress? Perspectives from 25 Years of the Merit Principles Survey* (Washington, D.C., September 2008).

⁸See § 206(a) of the No FEAR Act.

⁹These practitioners represent different parts of the complaint process, and some of the practitioners may only be familiar with their part of the process.

To identify factors that impede the processing of federal EEO complaints and ways to address these factors, we surveyed 65 EEO practitioners selected from 16 federal agencies that reported at least 50 complaints filed in fiscal year 2005 and EEOC.¹⁰ We also included plaintiffs' attorneys from the private sector. We selected nine individuals from each of the seven practitioner groups to ensure balance and reduce possible bias in our final results.¹¹ We did not select a member of every practitioner group from every agency. To identify actions for addressing the identified factors, we again used information from our survey and interviewed representatives from a variety of stakeholder organizations in the federal EEO complaint process, including federal employee unions, federal executive and managers associations, an agency attorney association, and federal employee organizations. The stakeholder organizations we contacted for this review do not represent all of the potential stakeholder organizations from specific groups protected by antidiscrimination laws. Additionally, we reviewed our prior reports and reports from EEOC and others in addressing both objectives. To identify actions taken by EEOC to improve equal opportunity in the federal workforce, we reviewed EEOC documents and interviewed EEOC officials. We report the views of practitioners who are knowledgeable of the federal EEO complaint process, but these views do not represent the official views of the 17 agencies. Moreover, the practitioners' views cannot be generalized to conclude that all federal agencies and EEO practitioners are deficient in some or all the factors identified. The views expressed by the practitioners do not represent the views of GAO. Further, we did not assess the validity of the practitioners' views of impediments or solutions to the EEO complaint processes or evaluate the effectiveness of initiatives that agency EEO practitioners said their agencies had implemented to improve their complaint process or those reported by EEOC. Appendix I contains a detailed description of our objectives, scope, and methodology.

We conducted this performance audit from May 2006 through August 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain

¹⁰The 16 agencies represent about 88 percent of EEO complaints filed governmentwide in fiscal year 2005.

¹¹After we sent our survey to the 63 selected practitioners, 1 practitioner informed us that she did not work in one of our practitioner categories. As she was the only respondent from her agency, we sent the survey to another EEO practitioner at that agency. Also, when we did not receive a response from another practitioner at another agency, we then sent the survey to an official from her agency. Thus, we sent the survey to 65 EEO practitioners.

sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The federal EEO complaint process consists of two stages, informal, or precomplaint counseling, and formal. Appendix II contains information on EEO laws applicable to federal employees.

Informal Stage, or Precomplaint Counseling

Under existing regulations, before filing a complaint, an employee must consult an EEO counselor at the agency in order to try to informally resolve the matter. The employee must contact an EEO counselor within 45 days of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. Counselors are to advise individuals that when the agency agrees to offer alternative dispute resolution (ADR) in the particular case,¹² they may choose to participate in either counseling or in ADR. Counseling is to be completed within 30 days from the date the employee contacted the EEO office unless the employee and agency agree to an extension of up to an additional 60 days. If ADR is chosen, the parties have 90 days in which to attempt resolution. If the matter is not resolved within these time frames, the counselor is required to inform the employee in writing of his or her right to file a formal discrimination complaint with the agency.¹³

Formal Stage

After a complainant files a formal discrimination complaint, the agency must decide whether to accept or dismiss the complaint and notify the complainant. If the agency dismisses the complaint, the complainant has

¹²ADR generally refers to any procedure agreed to by the parties in a dispute that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, or mediation. As of January 1, 2000, all federal agencies covered by 29 C.F.R. Part 1614 were required to establish or make available an ADR program during the informal (precomplaint counseling) and formal complaint stages of the EEO process.

¹³The written notice must inform the employee of the (1) right to file a discrimination complaint within 15 days of receipt of the notice, (2) appropriate agency official with whom to file a complaint, and (3) duty to ensure that the agency is informed immediately if the complainant retains counsel or a representative.

30 days to appeal the dismissal to EEOC.¹⁴ If the agency accepts the complaint, it has 180 days to investigate the accepted complaint from the date the complaint was filed and provide the complainant with a copy of the investigative file.¹⁵ Within 30 days of receipt of the copy of the investigative file, the complainant must choose between requesting (1) a hearing and decision from an AJ or (2) a final decision from the agency.¹⁶ When a hearing is not requested, the agency must issue a final agency decision (FAD) within 60 days on the merits of a complaint. A complainant may appeal an agency's final decision to EEOC within 30 days of receiving the final decision.

In cases where a hearing is requested, the complaint is assigned to an EEOC AJ, and the AJ has 180 days to issue a decision and send the decision to the complainant and the agency.¹⁷ If the AJ issues a finding of discrimination, he or she is to order appropriate relief. After the AJ decision is issued, the agency has 40 days to issue a final order notifying the complainant whether the agency will fully implement the decision of the AJ, after which the employee has 30 days to file an appeal with EEOC of the agency's final order.¹⁸ If the agency issues an order notifying the complainant that the agency will not fully implement the decision of the AJ, the agency also must file an appeal with EEOC at the same time. Following an appeal decision, both the complainant and the agency have 30 days in which to request reconsideration of EEOC's appeal decision. Decisions on appeals are issued by EEOC's Office of Federal Operations (OFO), on behalf of the commission.¹⁹

¹⁴An agency may dismiss an individual's complaint for a number of reasons, including failure to contact an EEO counselor in a timely manner, failure to file a complaint in a timely manner, or failure to state a claim based on covered discrimination.

¹⁵This period can be extended an additional 90 days when both parties agree.

¹⁶A complainant may request a hearing at any time after 180 days have elapsed from the filing of the complaint, regardless of whether the agency has completed its investigation.

¹⁷The AJ can extend this time for issuing a decision by making a written determination that good cause exists to do so.

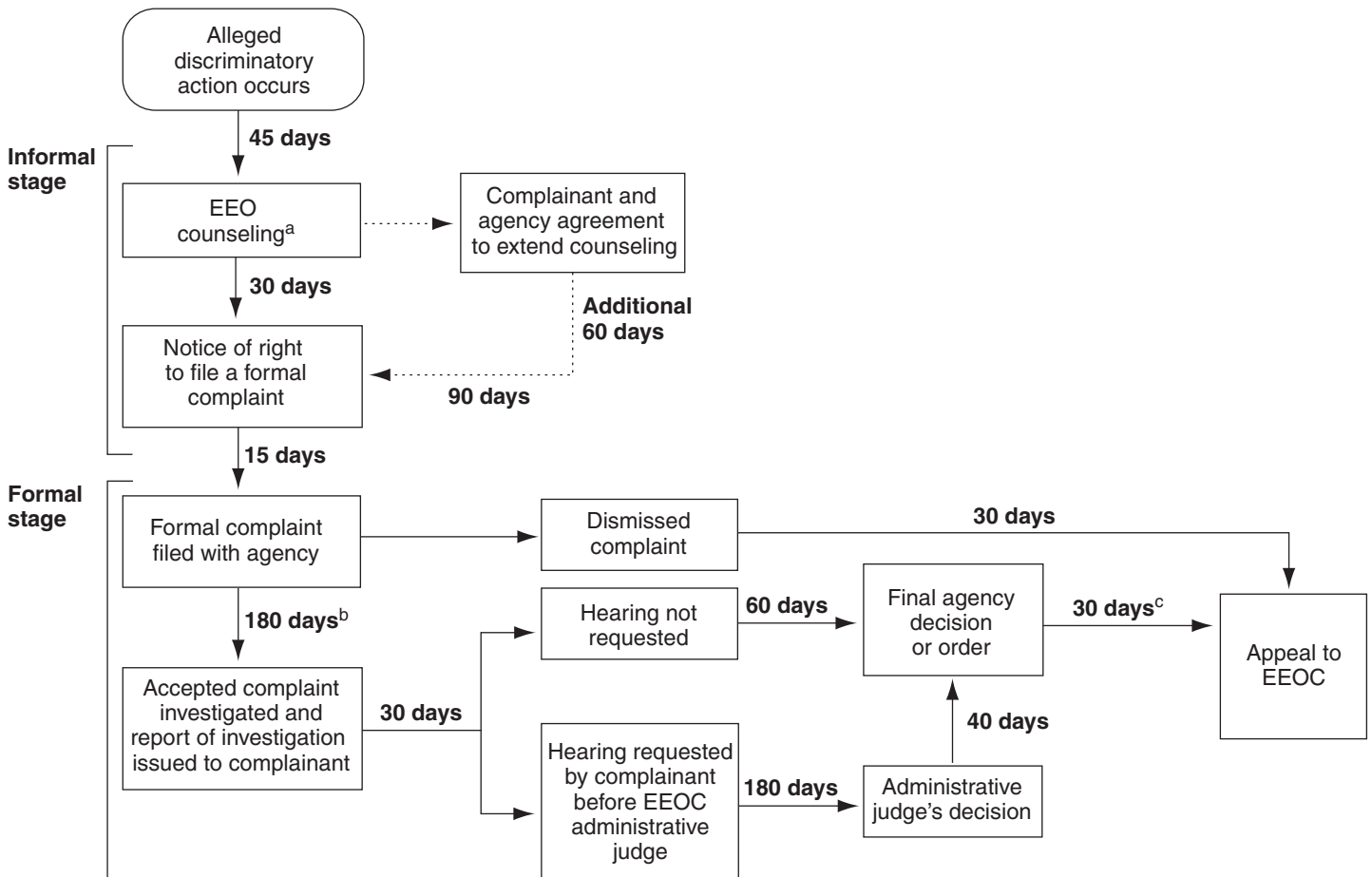
¹⁸If the agency does not issue a final order within 40 days, the decision of the AJ becomes the final action of the agency.

¹⁹29 C.F.R. § 1614.405.

A complainant may file a civil action in federal district court at various points during and after the administrative process.²⁰ The filing of a civil action will terminate the ongoing administrative processing of the complaint. A complainant may file a civil action within 90 days of receiving the agency's final decision or order or EEOC's final decision. A complainant may also file a civil action after 180 days from filing a complaint with his or her agency or after filing an appeal with EEOC, if no final action or decision has been made. Figure 1 shows the EEO complaint process.

²⁰For allegations of discrimination under the Age Discrimination in Employment Act or the Equal Pay Act, individuals are not required to file an administrative complaint as a prerequisite to filing a civil action in court. See 29 C.F.R. § 1614.201(a) and § 1614.408.

Figure 1: The EEO Administrative Complaint Process with Related Time Frames



Source: GAO, based on EEOC regulations.

^aWhere the agency agrees to offer ADR in the particular case, employees may choose between participation in ADR and counseling activities. ADR generally refers to any procedure agreed to by the parties in a dispute that is used to resolve issues in controversy, including, but not limited to, mediation.

^bThis period can be extended for up to an additional 90 days when both parties agree.

^cIf the final agency decision does not fully implement the AJ's decision, the agency must file an appeal at the same time it issues the final decision.

EEOC Management Directives Related to the Complaint Process

In addition to regulations governing the EEO complaint process, EEOC has issued guidance in the form of management directives (MD) to help agencies process complaints and create a model EEO program. MD-110, revised in November 1999, provides federal agencies with policies, procedures, and guidance relating to processing EEO complaints,

including, among other things, the authority of the EEO director and the director's reporting relationship to the agency head, mandatory training requirements for EEO counselors and investigators, procedures for counseling and ADR, and the role of the AJ. In 2003, EEOC issued MD-715, which, among other things, establishes requirements for federal agencies to create model EEO programs, including guidance for proactive prevention of unlawful discrimination. Under MD-715, each agency is to have an efficient and fair dispute resolution process and effective systems for evaluating the impact and effectiveness of its EEO program and use a complaint tracking and monitoring system that permits the agency to identify the location, status, and length of time elapsed at each stage of the process and other information necessary to analyze complaint activity and identify trends.

Timeliness of Complaint Processing

Among other requirements, EEOC regulations generally provide that agencies are to complete investigations of formal complaints within 180 days of their receipt and issue FADs within 60 days for those cases where a hearing is not requested. When a hearing is requested, AJs are to issue decisions within 180 days of receiving the complaint files from an agency. EEOC regulations do not set time frames for resolving appeals, but in its most recent strategic plan, EEOC has set an annual performance measure that by 2012 70 percent of federal sector appeals are to be resolved within 180 days. From fiscal years 2005 through 2007, appeals closures have averaged from 194 to 230 days. Table 1 shows that although federal agencies have made improvements in the time it takes to process formal EEO complaints, they are still not meeting the deadlines in regulation. The table includes data from EEOC's annual reports on the federal workforce on average processing days for investigations and FADs on merits of complaints, both including the U.S. Postal Service—which has the largest number of EEO complaints—and without it, because the Postal Service complaint volume affects average processing times.²¹ These data show that in fiscal year 2007, the Postal Service completed investigations in an average of 106 days and FADs in 28 days. Table 1 also shows average

²¹We found the EEO processing data sufficiently reliable for our purposes; see GAO, *Equal Employment Opportunity Commission: Sharing Promising Practices and Fully Implementing Strategic Human Capital Planning Can Improve Management of Growing Workload*, [GAO-08-589](#) (Washington, D.C.: June 23, 2008), in which we assessed the reliability of data EEOC used and found them to be sufficiently reliable for the purposes of the report.

processing days for EEOC hearings decisions, which on average have exceeded requirements.

Table 1: Data on Average Days for Processing Formal EEO Complaints by Agencies and EEOC for Fiscal Years 2005 through 2007

Fiscal year	Agencies				EEOC Hearing decisions (to be done in 180 days) ^c
	Investigations ^a (to be done in 180 days)		FADs ^b (to be done in 60 days)		
	With Postal Service data	Without Postal Service data	With Postal Service data	Without Postal Service data	
2005	237	247	191	300	249
2006	186	242	135	211	274
2007	176	226	120	180	248

Source: EEOC.

Notes: EEOC's annual report for fiscal year 2007, which was the most recent report containing agency complaint data, showed that the Postal Service accounted for about 42 percent of completed investigations in fiscal year 2007. In addition, the Postal Service accounted for about 60 percent of FADs.

The average processing days for hearings do not include the time EEOC takes to "docket" a case—that is, to send an order to the complainant and the agency that provides the parties with an EEOC hearing case number, orders the agency to forward a copy of the complaint file, and assigns an AJ. According to EEOC's *Handbook for Administrative Judges*, docketing a case is to be completed within 15 days of EEOC receiving a hearing request. In fiscal year 2008, according to a senior EEOC official, EEOC took an average of 56 days to docket a case after receiving a hearing request.

^aIncludes data on agency- and contractor-conducted investigations.

^bIncludes those complaints for which a FAD was required when there was no AJ decision.

^cThe 180 days begins when the AJ receives the complaint file from the agency.

Timeliness remains a problem. For example, according to EEOC officials in fiscal year 2008 EEOC took an average of 278 days to issue a hearing decision, but this period does not include the time EEOC takes to "docket" a case, that is, to send an order to the complainant and the agency that provides the parties with an EEOC hearing case number, orders the agency to forward a copy of the complaint file, and assigns an AJ. Although docketing a case is to be completed within 15 days of EEOC receiving a hearing request, in fiscal year 2008 according to a senior EEOC official, EEOC took an average of 56 days to docket a case after receiving a hearing request. In addition, only about 39 percent of hearings were done within the 180-day regulatory requirement.

EEO Practitioners Identified Factors That Impede the Prompt, Fair, and Impartial Processing of EEO Complaints

When asked to identify factors that impeded the prompt, fair, and impartial processing of EEO complaints at their agencies and describe how those factors impeded the process, selected EEO practitioners provided hundreds of responses. Because these practitioners represent different parts of the complaint process and some of the practitioners may only be familiar with their part of the process, we could not tally the number of responses under each factor. While recognizing that the factors the practitioners identified are not necessarily discrete, we analyzed and grouped them into eight broad categories of factors and then asked those same EEO practitioners to rank them in terms of their importance for improving the federal EEO complaint process.²² These factors and their rankings are (1) lack of accountability on the part of some agency management officials and EEO practitioners in carrying out their responsibilities; (2) insufficient resources for some agency EEO offices and EEOC to fulfill their responsibilities; (3) lack of independence concerning the potential conflict of having agencies conduct their own EEO complaint investigations and the undue influence of some agency legal counsel and human resources officials on the EEO process; (4) insufficient knowledge and skills by some agency officials, complainants, and EEO practitioners to fulfill their responsibilities; (5) lack of authority by some EEO officials to dismiss cases that have no merit and lack of subpoena power by EEOC AJs; (6) lack of clarity in regulation and some guidance and consistent decisions from EEOC; (7) lack of effective communication by some EEO practitioners of relevant oral and written information to participants in the process and that ADR (e.g., conciliation, facilitation, or mediation) is available; and (8) lack of a firm commitment by some agency management and EEO officials to the EEO process.

In our discussions with stakeholders, they generally concurred with these eight factors. In addition, a few stakeholders identified the perception of unfairness as an overarching theme. These stakeholders commented that without the perception that the complaint process is fair, people may be frustrated and choose to not participate in it. We discussed with these stakeholders that fairness is indeed one of the goals of the EEO complaints process, along with promptness and impartiality. The perception that the system is not fair, among other issues, has led to calls

²²We also had “Other” and “Not applicable” categories. Other included responses that did not fit into the eight factors, and not applicable responses fell mainly into two broad areas that were outside of the scope of our review: class action complaints and “mixed cases,” which allege discrimination and another prohibited personnel practice.

for reform and is directly related to our effort in this review to identify factors that need to be addressed. We agree that this concern is important and believe it has been accounted for within the context of the discussion on factors related to accountability; independence; and clarity in regulation, guidance, and consistent EEOC decisions.

The eight factors are consistent with concerns raised previously about problems with the federal sector EEO complaint process. For example, in November 2002, EEOC held an open meeting to address issues with the EEO complaint process amid concerns from stakeholders representing both complainants and federal agencies that the process is “much too slow, far too expensive, unnecessarily cumbersome, and given to potential conflicts of interest.” In March 2003, a coalition of civil rights employee advocates and other stakeholder groups submitted a seven-step proposal to EEOC commissioners to improve the federal sector EEO complaint process.²³ This proposal included steps to make ADR mandatory for managers in the informal and formal stages of the administrative process and have EEO directors report directly to the agency head, and a recommendation that EEOC adopt a uniform standard for what states a claim of employment discrimination. Additionally, in September 2006, the commission held a meeting where stakeholders discussed the practices that work in obtaining a timely, thorough, and complete investigation as well as the barriers that prevent such investigations.²⁴ One issue raised in that meeting was the lack of consequences (related to accountability) for agencies that do not comply with the 180-day requirement to complete investigations. A commissioner noted that a double standard exists, because a complaint would be dismissed if a complainant missed any of the deadlines. The quality of investigations was another issue—for both in-house and contract investigations. One participant stated that clear benchmarks need to exist with respect to the quality of the report of investigation, noting that in the end a poor investigation hurts the agency as well as the employee.

²³ Coalition members included stakeholders representing the American Federation of Government Employees, the Council of Federal EEO and Civil Rights Executives, the National Association for the Advancement of Colored People, and several lawyers’ associations and law firms. On March 25, 2003, the coalition submitted its proposal to EEOC.

²⁴ Among the participants were a supervisory AJ, union representatives, the Senior Executive Association, the Council of Federal EEO and Civil Rights Executives, and firms that contract with agencies to perform EEO investigations.

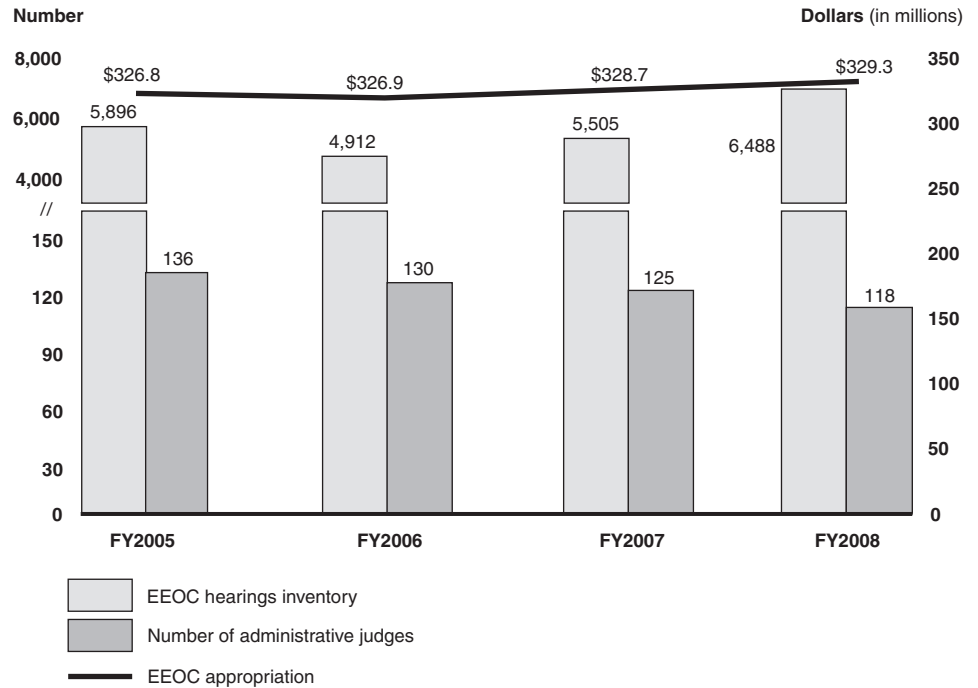
Lack of Accountability

EEO practitioners indicated that there appear to be no consequences for some agency officials or EEOC practitioners for not adhering to time frames established in EEOC regulations. For example, if an employee files a formal discrimination complaint, an agency must decide whether to accept the complaint and has 180 days to investigate an accepted complaint. In cases where the complainant requests a hearing from an EEOC AJ, the AJ generally has 180 days to issue a decision after the complaint file has been received from the agency. While many respondents cited agencies and EEOC for not adhering to time frames, some also said that a lack of timely cooperation by complainants delayed the processing of complaints.

Insufficient Resources for Agency EEO Offices and EEOC

Many EEO practitioners across the various practitioner groups identified a lack of resources—staff and funding at some agency EEO offices and at EEOC—as impeding the timely processing of federal EEO complaints. For example, an EEO director and an investigator stated that because of understaffing, regulatory time limits are often exceeded. Another agency practitioner said that internal delays are also caused by a lack of resources in agency EEO offices. Several EEO practitioners stated that retirements and reassignments have made it difficult to keep counselors in agency EEO offices. Others mentioned problems with staffing levels at EEOC. One AJ noted that because of a lack of support staff, AJs spent time copying files, filing documents, making all of their own travel arrangements, and preparing closed case files for mailing. Figure 2 shows that as of fiscal year 2008, the number of AJs has decreased by about 13 percent since fiscal year 2005 while EEOC’s hearings inventory has increased by 10 percent, and EEOC’s appropriations have generally remained constant, increasing by less than 1 percent.

Figure 2: Selected Data on EEOC's Appropriations, Number of AJs, and Hearings Inventory, Fiscal Years 2005 through 2008



Source: GAO analysis of EEOC data.

Lack of Independence

EEO practitioners raised concerns regarding the potential conflict of having agencies conduct their own EEO complaint investigations and agency offices or functions improperly interfering in the EEO complaint process (i.e., legal counsel and human resources professionals). For example, an AJ stated that agency-conducted investigations remain an impediment to impartiality and characterized such investigations as the “fox guarding the henhouse.” EEO practitioners specifically raised concerns regarding the perceived conflict of agency offices or functions improperly interfering in the EEO complaint process. For example, a plaintiff’s attorney stated that one problem that impedes the prompt and fair processing of complaints is the intrusion of agency defense counsel into the EEO process, despite EEOC’s guidance that agencies’ EEO functions and defense functions must remain separate. This practitioner further stated that many EEO offices get legal advice from the same agency component that defends the agency—a direct conflict of interest. An AJ added that although human resources and EEO offices should work together in resolving complaints and grievances, they should be totally

separated in the processing of EEO complaints because often allegations about personnel actions, including promotions, reassignments, and hiring, involve the human resources office as the responsible management official.

Insufficient Knowledge and Skills

Many EEO practitioners expressed concerns that some participants in the EEO complaint process, including EEO investigators, agency EEO directors, agency management, and EEO counselors, are not sufficiently knowledgeable of EEO regulations and guidance and of their responsibilities within the process. For example, several respondents cited a general lack of knowledge of EEO or employment discrimination law by agency personnel processing complaints (e.g., EEO counselors and investigators). Many respondents cited poor quality of EEO investigations, and several cited investigators' lack of skills. As one AJ remarked, when investigations are of poor quality, the parties are required to engage in discovery at the EEOC level, which takes time and delays processing. Several practitioners raised concerns about AJs as well, including that some of them have insufficient experience and training and that the quality of the work they perform is not systematically monitored or addressed.

Insufficient Authority

EEO practitioners cited several concerns that some individuals and organizations responsible for carrying out federal EEO programs did not have sufficient authority to fulfill their responsibilities, including the lack of sufficient authority to dismiss cases that do not meet criteria for discrimination and the lack of subpoena power to compel witnesses to testify and provide requested documents. According to an agency legal counsel, an AJ, and plaintiffs' attorneys, the inability to subpoena witnesses during EEOC hearings can delay fact-finding and presents a difficulty to complainants in trying to prove their claims when witnesses are reluctant to testify, including nonfederal witnesses (e.g., witnesses who are no longer with the agency).

Lack of Clarity of EEOC Regulations and Guidance and Consistent EEOC Decisions

Some EEO practitioners indicated that more guidance is needed from EEOC on regulations and MDs and that EEOC decisions need to follow judicial precedent and need to be consistent. Respondents provided numerous comments about the lack of consistency of AJ decisions with case law, and EEOC officials also acknowledged this concern. An AJ said that inconsistent EEOC OFO appellate decisions make it difficult for AJs and other parties to know what to do in certain situations. Another practitioner, an EEO investigator, stated that EEOC OFO appellate

decisions can be inconsistent and unclear, making procedural decisions (e.g., dismissals) a “gamble.”

Lack of Communication

According to EEO practitioners, some individuals and organizations responsible for carrying out federal EEO programs sometimes do not effectively communicate relevant oral and written information on the EEO process to participants in a timely and effective manner. Also, as an agency legal counsel stated, it can be difficult at times to understand the actions alleged in a complaint, which results in further follow-up (sometimes more than once) with complainants to get the necessary information. Further, an AJ stated that an impediment to the early resolution of complaints is the lack of a requirement for managers to participate in ADR or mediation.

Lack of Commitment

EEO practitioners stated that some agency management and other individuals responsible for carrying out federal EEO programs lack a firm commitment to fair and timely processing of complaints. The lack of top management commitment to the EEO program can have a cascading effect on other officials and staff. For example, one practitioner stated that if executive management does not support the EEO complaint process, other management officials give it little importance or priority. An EEO investigator cited a lack of urgency at most agencies in resolving and investigating EEO complaints.

EEO Practitioners and Other Stakeholders Proposed Solutions That They Believe Address the Identified Factors

EEO practitioners and other stakeholders provided potential solutions that they believe address the factors they identified as well as information on changes their agencies had made to the EEO complaint process. These practitioners also raised other options, beyond the potential solutions, for changing the EEO complaint process. EEOC has several initiatives under way or proposed for improving equal opportunity in the federal workforce.

Strengthening Accountability

EEOC regulations require federal agencies to provide for the prompt, fair, and impartial processing of complaints and for the review and evaluation of managerial and supervisory performance to help ensure vigorous enforcement of equal opportunity. Further, according to EEOC’s MD-715, a model EEO program will hold managers, supervisors, EEO officials, and

personnel officers accountable for the effective implementation and management of the agency's program. A majority of the respondents from the agencies and EEOC, as well as plaintiffs' attorneys, identified agency management, agency EEO directors, EEO investigators, and EEOC management as the top four groups of EEO practitioners for which they believed that it was very or extremely important to strengthen accountability. Measures of accountability outlined in MD-715 include evaluating managers and supervisors on efforts to ensure equality of opportunity for all employees and routinely reviewing personnel policies to ensure that they are consistently applied and fairly implemented. For fiscal year 2007, EEOC reported that in fiscal year 2006 117 of the 167 agencies that submitted MD-715 reports, or 70 percent, indicated that managers and supervisors were rated on their commitment to EEO.

For strengthening accountability, EEO practitioners suggested ways to better hold accountable (1) agency management and EEO staff, including directors, counselors, and investigators; (2) EEOC management, AJs, and appellate attorneys; and (3) EEO complainants. For example, an EEO director suggested that implementing performance-based accountability measures for EEO directors could improve the timeliness and quality of complaint processing, which could enhance the fairness and impartiality of the EEO complaint process. Another practitioner advocated adopting measurable EEO performance standards for managers and supervisors at the GS-13 level and above. In its June 2008 notice of proposed rulemaking, EEOC included a requirement that an agency that has not completed an EEO investigation within the 180-day time limit is to notify the complainant in writing that the investigation is not complete, when it will be completed, and that the complainant has the right to request a hearing or file a lawsuit.²⁵ EEOC stated its belief that such a requirement may shorten delays in agency investigations by providing an incentive for agencies to complete investigations in a timely manner.

Several EEO practitioners stated that just as accountability within agencies is important, EEOC should also be held more accountable for adhering to time frames for steps in the process, such as issuing a hearing decision. As for holding complainants more accountable, one practitioner felt that a complaint should be dismissed if the complainant fails to

²⁵Under current rules, a complainant has the right to request a hearing or file a lawsuit when an investigation has not been completed within 180 days of the complaint being filed, but there is no requirement that agencies notify the complainant when the time has elapsed.

cooperate if the agency has met its responsibilities.²⁶ The practitioner, an investigator, offered that complainants should be accountable for participating in a requested EEOC hearing after discovery and depositions have been conducted. According to this practitioner, EEOC should not allow the complainant to withdraw and request a FAD at this stage—if the complainant withdraws from the hearing at this stage, the complaint should be dismissed with no further action.

Some respondents said that their organizations established time thresholds and quality standards for internal processes. For example, an EEO investigator reported that the timely processing of complaints has been tied to performance standards to help ensure that cases are promptly processed. Another EEO investigator's agency established goals and measures for timeliness according to EEOC regulations and instituted quality standards for each centralized EEO process. Further, the agency established timelines and quality standards for both contractors and agency EEO professionals, and the agency developed measures in internal databases to track and monitor timelines and quality on daily, weekly, monthly, quarterly, and annual bases. An EEO director from another agency also reported that the agency achieved success in processing complaints by implementing performance-based accountability measures (i.e., internal timeliness and quality controls), including the following: standard operating procedures, stringent internal deadlines, timeliness and quality assurance review processes, timeliness and quality elements in results-based performance standards, management oversight, and EEO staff training. Finally, an EEO director reported that his agency had put in place a departmental accountability policy to track disciplinary and corrective actions taken as a result of discrimination-related misconduct.

Because of numerous concerns raised both before and during the commission's September 2006 meeting and subsequent focus group discussions, EEOC officials stated that the commission performed a limited assessment of the quality of agency investigations by having AJs complete surveys during selected periods from 2005 to 2007. Overall, from the limited assessment, the AJs reported that most of the reports of investigation were complete and well organized, containing enough evidence to allow the AJ to proceed with the hearing process. However,

²⁶Under 29 C.F.R. § 1614.107(a)(7), an agency may dismiss a complaint (any time prior to a request for a hearing) where the complainant has failed to cooperate. Instead of dismissing a complaint, an agency may proceed toward a decision if sufficient information is available.

the AJs reported that several agencies routinely submitted reports of investigation that were particularly lacking and described common deficiencies, including reports being disorganized and containing duplicative materials, being incomplete and always late, and containing an investigator's statement of the claim that was legally insufficient. EEOC officials noted that the commission is considering developing a formal Quality Control Evaluation system that would rate the quality of agency investigations. However, EEOC officials did not provide a proposed time frame for this effort.

Respondents also reported their agencies' making greater use of information technology to process and track complaints. One practitioner noted that his agency had automated several features of the EEO complaint process, including the format of decisions through use of boilerplate language that can be selected for routine matters; parts of decision writing with its forms, such as coversheets, code sheets, and envelopes; and storage of case files that are scanned into the Adobe Acrobat program, thereby expediting the reviewing, bookmarking, and searching of these files. One EEO director reported that her agency standardized EEO complaint forms, installed the forms on compact discs that were furnished to all counselors, trained the counselors in the use of the electronic forms, and purchased an automated complaints tracking system to simplify and standardize EEO-related reports. Several practitioners (EEO directors, an EEO counselor, agency legal counsel, and an investigator) indicated that their agencies had put in place a complaints tracking system, which helps in the preparation of standardized reports. Without a system like this one, several reported, much time is consumed finding the information that needs to be in such reports. An official from EEOC's Office of Field Programs indicated that EEOC has begun piloting an electronic case management system to provide more expeditious hearings case processing. Additionally, a senior official from MSPB described several actions that MSPB has taken to improve its operations, including establishing an electronic filing program and a repository of electronic documents that are available to the parties in cases.

Providing Sufficient Resources at the Agency and at EEOC

Regulations and EEOC MD-715 state that agencies should allocate sufficient resources to their EEO programs to, among other things, ensure that unlawful discrimination in the workplace is promptly corrected and addressed. More than three-quarters of the respondents from the agencies and EEOC as well as plaintiffs' attorneys stated that it would be very or extremely important to improve the current allocation of resources for EEOC AJs, while about three-quarters of respondents felt that

improvement in the current allocation of resources for EEO investigators, agency EEO directors, and EEOC management was very or extremely important.

Although it is important for agencies to provide sufficient resources for EEO programs, it is equally important for those programs to use those resources efficiently. One practitioner, an EEO investigator, reported two ways her agency uses resources efficiently. First, the investigator stated that her agency was shifting away from staff investigators and FAD writers to greater reliance on contractors and that the two firms her agency used delivered good quality products and were faster and more cost-effective than agency staff. Second, the investigator also reported that her agency was engaged in an activity-based costing exercise, so staff must account for all complaint-processing-related tasks, which her office can then cost out to the bureau where the complaints arose, allowing the bureaus to focus on early resolution to keep costs down. In addition, the greater use of information technology by some agencies, which was cited earlier as assisting agencies in saving time, can also help them in keeping costs down. An EEO director stated that EEOC should have the capacity to process workloads and accept evidence, records, and files electronically. At EEOC, where its hearings inventory has increased but its appropriations have generally remained constant, EEOC officials said that as of April 2009, the agency was in the process of completing draft instructions to implement the pilot “Three-Track Case Management Process” system for hearings that the agency expects will result in quicker resolutions and shorter processing times through expedited discovery and hearing time frames using its existing resources. Under this process, AJs would prioritize their cases based on complexity, using one of three tracks: fast, regular, or complex.²⁷

Further, it is necessary that agencies assess the quality as well as the costs associated with contracted investigations and proposed FADs. EEOC’s 2004 report on federal sector investigations and costs found that some agencies were incurring additional costs when they had to supplement the investigative report or require the contractor to conduct additional work,

²⁷“Fast track” cases contain simple issues for which complete investigations have been conducted but for which hearings must be held to resolve credibility problems; for “fast track” cases, the process will be expedited. “Regular track” cases are of average complexity and will be processed in a manner similar to current processing. A “complex track” case involves complex issues or other circumstances that require more time to reach a full and fair adjudication.

which could contribute to delays in meeting time frames.²⁸ Several practitioners mentioned that agencies need to have better reviewers for sufficiency of investigations and to do quality control. For example, an agency legal counsel stated that at his agency, the EEO office reviews contracted reports of investigation and draft FADs but that reports of investigation were not always reviewed for completeness and relevance before being provided to the complainants. This practitioner pointed out that because of the lack of a quality review, often the agency or the complainant needed to get additional documents in discovery, although the agency had already paid for the preparation of a report of investigation.

Strengthening Independence

Within agencies, EEOC regulations and MD-110 require that EEO directors should be under the immediate supervision of the head of the agency. Placing the EEO director in this position underscores the importance of equal opportunity to the mission of the agency and helps ensure that the EEO director is able to act with the greatest degree of independence. In its fiscal year 2007 report on the federal workforce, EEOC reported that 61 percent of the EEO directors reported to the agency head.²⁹ In addition, EEOC's MD-110 states that to maintain the integrity of the EEO investigative process, it should be kept separate from the agency's personnel function, to avoid conflicts of interest or the appearance of such conflicts. Moreover, MD-110 states that separating the agency's representatives and the offices responsible for defending the agency against EEO complaints from those responsible for conducting EEO complaint investigations enhances the credibility of the EEO office and the integrity of the EEO complaint process.

At least three-quarters of plaintiffs' attorneys and respondents from EEOC indicated that strengthening independence for EEO directors and EEO investigators was very or extremely important. Further, several EEO practitioners believe that agencies should adhere more clearly to existing EEOC requirements on delineating the roles of the agency general

²⁸Equal Employment Opportunity Commission, *Federal Sector Investigations—Time and Cost* (Washington, D.C., Aug. 25, 2004).

²⁹EEOC requires agencies with 100 or more employees to submit a report that captures information from EEO Form 462, which summarizes the details of each EEO complaint processed by an agency from October 1 of one year to September 30 of the next year. The report also contains summary information about agency staff resources, staff training, EEO director reporting lines, and contact information.

counsels in the EEO complaint process. For example, an EEO director stated that EEO legal advisors should be separate and distinct from the agency's legal office and should report to the head of the civil rights office instead of to agency legal counsel. Several EEO practitioners also stated that agency human resources offices should be required to avoid activities or actions that may be construed as having undue influence. An AJ favored having clear firewalls between the human resources and EEO offices when investigating complaints. In its March 2003 proposal, the coalition of civil rights employee advocates and other stakeholder groups recommended that EEOC's regulations and MD-110 be changed to clearly prohibit agency actions that interfere with the independent judgment of the EEO investigator. Noting that stakeholders have complained of intrusion in the operations of the agency EEO office by staff responsible for defending the agency against complaints of discrimination and that such intrusion could affect the impartiality of the investigation, EEOC officials stated that EEOC has draft guidance on the intrusion into the EEO process by agency counsel, especially in the informal part of the process, which is being reviewed by the commissioners.

Because of the concern that the practice of allowing an agency to investigate a complaint against itself can represent either a clear conflict of interest or the appearance of such conflict, practitioners cited filing complaints directly with EEOC as a means of avoiding such conflicts. Allowing such filings would alter the current administrative complaint process. Stakeholders cited several advantages to having EEOC conduct investigations. One advantage would be its potential to reduce concerns regarding independence, conflicts of interest, and perceptions of unfairness surrounding the existing federal EEO complaint process. Another advantage stakeholders cited was EEOC's potential to leverage its expertise, which in addition to administering the federal sector EEO process, promulgating regulations, providing EEO training, and collecting governmentwide data on EEO activities, also includes investigating private sector complaints of discrimination. According to stakeholders, potential disadvantages of transferring investigations to EEOC included

- adding an immense burden along with insufficient resources for EEOC to handle the larger workload, which would add more time to the complaint process and compound the time it takes EEOC to make decisions in EEO complaint processing, and
- creating tension between the various roles the agency is responsible for when one agency is afforded too many functions (e.g., investigations, decisions, and appeals) under the EEO process, which may impair neutrality, fairness, and accountability.

EEOC officials noted that an overwhelming number of stakeholders who testified at the September 7, 2006, commission meeting or participated in focus groups conducted after that meeting recommended that EEOC take over the investigative function in its entirety from the agencies or that some type of independent body apart from EEOC assume this function.³⁰ According to EEOC officials, stakeholders cited the conflict of interest perception and agencies' failure to complete their investigations in a timely manner as the principal reasons. EEOC also noted its belief that having it conduct the federal sector investigations would also bring efficiency, uniformity, and quality to the process as the commission would either hire a cadre of investigators dedicated to the federal sector or possibly act as a conduit for contract investigations. In the past, EEOC stated that fiscal realities have prevented it from assuming responsibility for all federal sector investigations, noting that in fiscal year 2008, agencies conducted over 11,000 investigations at a cost of a little more than \$36 million. Thus, according to EEOC officials, the resource implications of EEOC assuming the investigative function would be considerable, and the various ways of funding investigations by EEOC need further study.

Several EEO practitioners mentioned addressing independence through the use of contractors for conducting investigations and drafting FADs. The Postal Service's Office of Inspector General reported that the Postal Service contracts investigations to enhance the independence and neutrality of the EEO administrative process and to improve the overall quality and efficiency of investigations.³¹ The report states that a single office from the Postal Service National EEO Investigative Services Office oversees investigations and contract FAD writers. This report did not address the quality of the investigations. As mentioned earlier, it is important that agencies review the quality of contract investigations.

Enhancing Knowledge and Skills

In its 2004 report on federal sector EEO investigations and cost, EEOC cited the importance of federal agencies having EEO programs staffed with employees who have the necessary knowledge, skills, and abilities to

³⁰Stakeholders who spoke at the meeting included union representatives and representatives of companies that partnered with agencies to conduct EEO investigations.

³¹U.S. Postal Service, Office of Inspector General, *Management Advisory: The Postal Service's Equal Employment Opportunity Contracting Function*, Report Number HM-MA-08-001 (Washington, D.C., Feb. 21, 2008).

help reduce the time it takes to conduct investigations. More than three-quarters of our survey respondents from the agencies and EEOC as well as plaintiffs' attorneys pointed to the importance of investigators enhancing their current level of knowledge and skills in the federal EEO complaint process. Almost three-quarters of respondents cited enhancing the knowledge and skills of EEO directors and agency management as very or extremely important, and about two-thirds of respondents cited enhancing the knowledge and skills of EEO counselors as very or extremely important. Several EEO practitioners offered suggestions for enhancing the knowledge and skills of EEO staff. For example, a plaintiffs' attorney offered that counselors should be required to spend at least 8 hours observing an experienced counselor before providing counseling. EEOC's MD-110 requires at least 32 hours of counselor training before providing counseling as well as 8 hours of continuing annual training.³² As for investigators, another plaintiffs' attorney, noting that the minimum requirements in EEOC guidance for investigators is insufficient, stated that EEOC should expand the minimum training and experience requirements and require additional annual continuing education. Similar to the training required for counselors, MD-110 also requires at least 32 hours of investigator training before conducting investigations as well as 8 hours of continuing annual training. Several practitioners and stakeholders suggested that investigators should receive some kind of certification. One practitioner recommended that EEOC certify individual investigator credentials through a combination of agency-provided training or by licensing training programs that meet EEOC-established minimum requirements, and require every investigator, whether in-house agency employee or contract investigator, to apply for and be certified as meeting the minimum requirements.

Some respondents said that their organizations had improved training for EEO staff. For example, an EEO director reported that her agency has standardized its basic and advanced EEO counselor training class. The director's office has coordinated with the agency's ADR office and office of inspector general to participate in the training. All bureaus send counselors to the same course, and counselors are issued credentials at the end of the training by the agency. An EEO counselor reported that her agency trained all EEO specialists to be EEO counselors and investigators

³²To help improve the knowledge and skills of agency EEO staff, EEOC offers a variety of training courses through its Training Institute. Courses include investigator and counselor training, drafting letters of acceptance and dismissal, and drafting FADs.

and to write dismissals and FADs. This practitioner noted that providing all EEO staff with all available EEOC training can enhance their understanding of the process from start to finish, thereby increasing completeness, accuracy, and effectiveness of complaint processing. An EEO counselor from another agency reported that at her agency there is a focus on developing the legal analysis skill set of EEO specialists who process complaints. During team meetings, the EEO specialists review intake decisions and FADs that they have prepared, and the specialists brief the team on the legal analysis conducted and the rationale for decisions. Counselors attend these meetings to increase their understanding of the bases for dismissal, the types of questions that need to be asked during the counseling inquiry, and the legal implications of new case decisions.

Increasing Authority of EEO Directors and AJs

Almost all EEOC practitioners and plaintiffs' attorneys and a majority of agency respondents indicated that it would be important to increase the current level of authority of EEOC AJs, and most respondents cited increasing authority for agency EEO directors as very or extremely important. EEO practitioners cited a need for subpoena power for AJs, who currently do not have this authority. In addition, EEO practitioners expressed the desire for expanded authority for (1) EEO directors to dismiss complaints of discrimination and (2) EEOC to order discipline against managers who discriminate. Practitioners also expressed a desire for EEOC to make sufficient use of its authority to sanction agencies that do not complete investigations on time.

Several EEO practitioners felt that allowing AJs to subpoena witnesses would improve the EEO complaint process. An agency legal counsel cited cases where the agency and complainant suffer when potential witnesses, such as those who are no longer with the agency, refuse to testify. Until AJs are given such power, a plaintiffs' attorney felt that the administrative complaint process cannot serve its intended purpose as a viable alternative to litigation in federal courts. While EEOC AJs have authority to sanction an agency for failure to produce an approved witness who is a federal employee,³³ they do not have the authority to subpoena the statements of individuals and therefore have no mechanism with which to compel the testimony of witnesses who are not current federal employees. With respect to subpoena power, according to MSPB officials, the board

³³See MD-110, ch. 7, III, D. 10.

has delegated to its regional directors/chief administrative judges and AJs the authority to subpoena witnesses.³⁴ EEOC officials also favor granting EEOC's AJs subpoena power, noting that AJs have often voiced the belief that their lack of subpoena power is a significant defect in the hearings process, in many cases hindering their ability to conduct full and fair hearings. For instance, without subpoena authority, it is often difficult for AJs to compel a potential witness for the complainant, such as an agency's outside medical personnel or a contractor employee, to testify on the complainant's behalf. Although AJs use a variety of means to try to persuade former employees, contractors, and outside medical personnel to testify, it would be more efficient if AJs possessed subpoena authority. EEOC officials stated that having subpoena authority would further ensure that AJs have access to all relevant evidence. However, according to EEOC's Office of Legal Counsel, granting subpoena power to AJs would potentially require a statutory change.³⁵ According to a senior EEOC official, EEOC has not sought such a statutory change.

An example of expanded authority for EEO directors relates to the dismissal of complaints of discrimination. EEOC regulations set out circumstances under which complaints can be dismissed,³⁶ including complaints that fail to state a claim of discrimination. In this regard, EEOC has consistently reversed agencies' dismissals for failure to state a claim where the agency dismissal is based on the agency's view of the ultimate merit of the complaint allegations.³⁷ An EEO investigator stated that EEO directors should be given the authority to make a merit analysis to dismiss those claims that are frivolous and show self-defeating evidence to ensure quicker and less costly processing of cases.³⁸ In cases that are dismissed, complainants could still appeal such decisions to EEOC.

³⁴See 5 U.S.C. § 1204(b)(2)(A) and 5 C.F.R. § 1201.81.

³⁵Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, which addresses EEOC's role in the federal sector, does not refer back to the provision (42 U.S.C. § 2000-9) granting subpoena authority for private sector enforcement under Title VII.

³⁶29 C.F.R. § 1614.107 (a).

³⁷See, for example, *Presley v. United States Postal Service*, EEOC Request No. 0120090625 (Mar. 17, 2009), and *Cobb v. Department of the Treasury*, EEOC Request No. 05970077 (Mar. 13, 1997).

³⁸Of 15,805 complaints closed in fiscal year 2007, merit decisions were issued in 7,673 cases. In other cases that were closed, the complaint was dismissed or withdrawn or a settlement was reached by the complainant and agency. Of the 7,673 cases with merit, discrimination was found in 216 (2.8 percent).

As for the authority to order discipline for managers who have been found to have discriminated, EEOC's practice is to advise rather than direct agencies to consider disciplining such managers. In addition, the No FEAR Act requires agencies to report information annually on disciplinary actions taken.³⁹ The act also requires the President's designee, the Office of Personnel Management (OPM), to undertake a study of best practices among agencies for taking disciplinary action for conduct inconsistent with antidiscrimination laws and whistleblower protection laws.⁴⁰ OPM issued the advisory guidelines in September 2008; agencies have not yet reported actions they have taken consistent with these guidelines.

EEOC regulations provide for sanctions against parties for failure (without good cause shown) to respond fully and in a timely fashion to an order of an AJ, to discovery requests, or to requests for the attendance of witnesses. Sanctions include the drawing of adverse inferences against, or exclusion of other evidence offered by, the noncomplying party, issuing a decision fully or partially in favor of the opposing party, or such other actions as appropriate.⁴¹ Specifically, AJs may impose monetary sanctions where the agency has failed to complete an investigation that is timely, adequate, or both, including requiring agencies to bear the costs for the complainant to obtain depositions or other discovery.⁴² EEOC's OFO can also sanction agencies at the appellate level.⁴³ Some practitioners stated that EEOC does not make sufficient use of its sanctioning authority. On the matter of sanctioning authority, EEOC officials stated that AJs are guided by OFO decisions on sanction authority, that the agency is considering issuing further guidance to AJs, and that it will include training on the appropriate use of sanctions in federal sector training of AJs to be held later in 2009.

³⁹Agencies are to report annually to the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the Senate Committee on Governmental Affairs, the House Committee on Government Reform, each committee of Congress with jurisdiction relating to the agency, EEOC, and the Attorney General.

⁴⁰OPM used these terms as defined in 5 C.F.R. 724.102.

⁴¹29 C.F.R. § 1614.109(f)(3).

⁴²See, MD-110, ch. 7, III, B. and IV, F.

⁴³29 C.F.R. §1614.108(c)(3).

Increasing the Clarity of EEOC Regulations and Guidance and Consistency of EEOC Decisions

In commenting on the importance of increasing the clarity and consistency of antidiscrimination laws (e.g., Title VII of the Civil Rights Act), EEOC regulations and guidance (e.g., MD-110 and MD-715), and EEOC decisions (e.g., decisions by AJs and appellate attorneys), the majority of EEO practitioners responding felt that it was most important to increase the clarity and consistency of EEOC decisions. Primarily, practitioners indicated that increasing the consistency of decisions at several levels within EEOC was very or extremely important: decisions from EEOC's OFO appellate attorneys, decisions by AJs, and decisions resulting from requests for reconsideration of appeals decisions. An EEO investigator suggested that EEOC's OFO should index its decisions and cross-check them for consistency so that only those decisions that express a cogent, correct application of the law should be indexed and made available as precedent. According to a senior EEOC official, EEOC began to conduct quality reviews of AJ decisions in fiscal year 2007 by reviewing a sample of files from all offices to assess the legal adequacy of decisions and the consistency with case law as well as to determine whether time frames were met. The official said that EEOC officials share the results of the reviews with AJs through monthly conference calls and quarterly video conferences. In addition, according to EEOC, through a technical assistance group, EEOC staff visit selected field offices to review files for cases and decisions.

Noting the importance of the AJ position, one practitioner stated that EEOC should establish better qualifications for its AJs, including a minimum of 5 years litigation or related EEO or civil rights experience and that the position should be given a higher grade to make the position more competitive. MSPB, which also employs AJs to hear and decide appeals from former and current federal employees, applicants for federal employment, and federal annuitants concerning any matter over which the board has appellate jurisdiction, hires AJs in the range of GS-13s through GS-15s and has established timeliness, quality, and production standards for their performance. At EEOC, AJs can be hired at the GS-11 to the GS-13 level with promotion potential to GS-14. EEOC officials stated that the agency recognizes that a range of experience is important to adjudicate complex federal employment cases.

Some practitioners indicated that they would like EEOC to make changes to its regulations or guidance. For example, one practitioner, a plaintiffs' attorney, stated that EEOC should review its federal sector regulations with the aim of identifying and eliminating (or modifying) those provisions that undermine effectiveness and fairness. An agency legal counsel stated that EEOC must establish clear guidelines for the conduct of agency

counsel and their role in the EEO process. Practitioners and stakeholders expressed the need for clarification regarding the dismissal of complaints, specifically addressing dismissals for (1) failure to state a claim (including complaints alleging a hostile work environment), (2) abuse of the process, and (3) failure to cooperate.

Also, in its March 2003 proposal, the coalition of civil rights employee advocates and other stakeholder groups recommended that EEOC adopt uniform standards for what states a claim of employment discrimination. Under this recommendation, complaints could be dismissed on these grounds either at the agency, before the complaints are investigated, or after a hearing request is submitted. While noting that its regulations provide standards for dismissing complaints that do not state a claim and that based on case law, EEOC has also broadly construed what actions may constitute a claim, EEOC officials stated that the commission is considering recommendations by internal and external stakeholders to provide additional guidance.

Improving Communication throughout the Complaint Process

EEOC MD-110 states that in the precomplaint process, counselors should create an atmosphere that is open to good communication and dialogue. EEOC regulations require agencies to establish ADR programs, and EEOC MD-715 encourages the widespread use of an ADR program that facilitates the early, effective, and efficient informal resolution of disputes. According to EEOC, such programs can help agencies to avoid the time and costs associated with more formal dispute resolution processes and improve workforce communication and morale. Almost all respondents indicated that improving communication during the informal or precomplaint phase, claim acceptance/dismissal, and complaint investigation was very or extremely important. Also, about three-quarters of respondents indicated that improving communication during ADR was very or extremely important. Several EEO practitioners suggested that ADR should be used more often in disputes or even made mandatory. For example, a plaintiffs' attorney offered that for ADR to be successful, agencies need to ensure that officials do not merely "go through the motion" on ADR but that an official at an appropriate level of authority represents management and that this official has settlement authority. In addition, in its March 2003 proposal, a coalition of civil rights employee advocates and other stakeholder groups recommended making ADR mandatory for managers in the informal and formal stages of the administrative process and for EEOC hearings.

Several counselors reported that their agencies gave employees the option of using ADR in the informal and formal stages of the EEO complaint process as a means for resolving an EEO concern. According to one counselor, using ADR in this way focuses both parties on the objective of resolving the conflict rather than defending their respective positions. Another counselor reported that at her agency, at the time that contact is made with the informal EEO process, her agency gives employees the option—explained verbally and in writing—of traditional counseling or mediation (i.e., a type of ADR) when they initially begin the informal EEO process. Mediation is offered 100 percent of the time at initial contact, and ADR may be offered again in the formal stage of the process if the case proceeds. This practitioner found that offering ADR services is helpful in resolving complaints at the lowest possible level.

Almost universally, stakeholder groups believed that counseling should be done at agencies, and EEOC also favors leaving the counseling responsibilities with the agencies. Two stakeholders explained that EEO counselors who work in an agency possess a familiarity with the organization's operations, culture, and leadership and that keeping counseling at the agencies enables counselors to see problems firsthand while giving agencies opportunities to correct problems and demonstrate some commitment to EEO principles. EEOC officials stated that stakeholders have recommended that the commission ensure that during counseling, agencies provide better, more understandable, and more consistent information describing the EEO process and complainants' rights and responsibilities therein.

In its 2008 performance and accountability report, EEOC noted that precomplaint EEO counseling and ADR programs addressed many employee concerns before they resulted in formal complaints. Of the 37,809 instances of counseling in fiscal year 2007, about 56 percent did not result in a formal complaint because of either settlement by the parties or withdrawal from the EEO process. According to EEOC's 2007 report, agencies' ADR offer, participation, and resolution rates varied widely. For example, the Postal Service offered ADR in about 93 percent of precomplaint counseling, while the other agencies' offer rate was about 71 percent, with some agencies not offering ADR in any counseling sessions. The governmentwide ADR participation rate in fiscal year 2007 was 48 percent. The Postal Service, which requires management to participate, reported the highest rate of ADR participation (about 76 percent) compared with the average participation rate of about 25 percent among other agencies. According to EEOC's 2007 annual report, complainants rejected ADR offers 10 times more often than agencies. Similarly, the

Postal Service had an overall resolution rate of about 75 percent, while the rate for other agencies was about 46 percent.

EEOC officials reported taking a number of actions to encourage more use of ADR, such as updating EEOC's federal sector ADR Web page to improve the delivery of information on the benefits of ADR and ADR best practices; providing technical assistance through e-mail, telephone contacts, and on-site visits, as requested; and participating in federal ADR work groups and agency conferences. The commission also reported establishing the Federal Appellate Settlement Team (FAST) Program to utilize ADR techniques to resolve EEO appeals that have been filed in OFO. The FAST Program focuses on appeals that have been decided based on FADs on the merits. According to EEOC, qualified EEOC staff, who are experts in federal sector EEO law, conduct ADR to assist parties in reaching a mutually satisfactory agreement. Participation in the FAST Program is voluntary for both parties.

Two practitioners made suggestions that would further communication outside of an ADR program. One described a precomplaint resolution program to address all issues involving the terms and conditions of employment, including EEO complaints. This practitioner stated that the program generally has been successful in resolving issues that do not belong in the EEO process, addressing matters before they become formal EEO complaints, and correcting situations that could result in a hostile environment or harassment claims. An EEO counselor suggested increased training in conflict management and effective communication for employees and supervisors as well as including conflict management in both performance plans to focus the responsibility for resolving everyday conflicts on the parties themselves, rather than bringing in a third party.

Reinforcing Commitment at All Levels in the EEO Complaint Process

Our prior work has shown that commitment from top management is key to successful management improvement initiatives. For example, our work on leading diversity management identified top management commitment as a fundamental element in the implementation of diversity management initiatives.⁴⁴ Similarly, EEOC MD-715 emphasizes the importance of demonstrating commitment to equality of opportunity for all employees and applicants for employment that is communicated throughout the

⁴⁴See GAO, *Diversity Management: Expert-Identified Leading Practices and Agency Examples*, GAO-05-90 (Washington, D.C.: Jan. 14, 2005).

agency from the top down. Agency heads have many ways to demonstrate commitment to equal opportunity and a workplace free of discriminatory harassment, but one important way is to provide the EEO director with “a seat at the table,” that is, access to the agency head. Having the EEO director report to the head of the agency sends a message to employees and managers about the importance of and commitment to the EEO program. An EEO practitioner stated that agencies should adhere more clearly to existing EEOC requirements on delineating the reporting lines of authority for EEO directors.

EEOC advises that following each yearly submission of the MD-715 report to EEOC, EEO directors should present the “state of the EEO program” to the agency head outlining, among other things, the effectiveness, efficiency, and legal compliance of the agency’s EEO program. EEOC reported in its fiscal year 2007 annual report that 63 percent of EEO directors presented such a report. EEOC also emphasized that ensuring that the EEO professionals are involved with and consulted on management and deployment of human resources, providing managers with training in EEO-related matters, having managers and employees involved in implementing the EEO program, and informing employees of the EEO program are other important aspects of demonstrating commitment to the EEO program.

A majority of respondents indicated that it would be very or extremely important for agency management, agency EEO directors, and EEO investigators to reinforce their current level of commitment to the federal EEO complaint process. According to one EEO practitioner, agencies need to make the EEO function a priority, in terms of importance, expectations, and oversight. Another demonstrated means of support from the agency head, as one practitioner stated, is adequate funding and staffing of the EEO function within the agency. For example, an EEO counselor indicated that agencies have to move away from “dumping” agency employees in EEO offices and instead staff those offices with individuals who have the appropriate skill sets, perhaps even legal backgrounds, to develop credible programs. According to a plaintiffs’ attorney, EEO must receive support from agency heads, and EEOC’s most recent federal workforce report shows that a significant percentage of agency heads did not issue an annual statement supporting EEO as recommended by EEO guidance. The practitioner suggested that agency heads who could not bother to issue a statement certainly could not be bothered to make EEO an agency priority. In its fiscal year 2007 annual report, EEOC reported that of the 167 agencies and subcomponents that submitted fiscal year 2006 MD-715 reports, 68 percent of the agencies issued EEO policy

statements, an increase over the 50 percent of the 158 agencies and subcomponents that submitted MD-715 reports in fiscal year 2005.

Raising Other Options for Changing the EEO Complaint Process

Stakeholders raised other options for changing how EEO complaints are processed that were outside of the eight factors that we used to group participant and stakeholder responses and solutions. For example:

- Some stakeholders noted the considerable amount of time that can elapse from the filing of a formal EEO complaint through the administrative process to the potential conclusion of the matter in federal court and suggested that complainants be given the choice of using the administrative or the judicial process but not be permitted to use both. Under this option, stakeholders provided that the administrative process could afford the right to a judicial appeal of that administrative decision to a U.S. federal court of appeals.
- Other stakeholders, concerned with the multiple forums that complainants have available, suggested an administrative tribunal, which could handle all variety of issues, including discrimination, prohibited personnel practices, and unfair labor practices. Stakeholders indicated that this could avoid the problem of a matter going to more than one forum and could avoid the difficulty encountered (and mistakes made in assessing the nature of a complaint) by a complainant when faced with making a forum choice at the outset.
- Some stakeholders raised concern over the number of complaints accepted into the process that should not be (i.e., frivolous, not discrimination) and supported having EEO complaints go through a similar process as unfair labor practice allegations.⁴⁵ With unfair labor practice allegations, an investigation by an independent third party serves to eliminate matters that should not go forward before a full-scale hearing is afforded.

Some stakeholders observed that under options in which an individual goes directly to a third party with allegations, the adversarial nature of the

⁴⁵Unfair labor practice allegations are investigated by the Federal Labor Relations Authority's (FLRA) Office of General Counsel (OGC), which also settles and prosecutes unfair labor practice charges. At the conclusion of the investigation, FLRA's OGC makes a decision as to whether to dismiss the charge or file a complaint (on the individual's behalf) with an FLRA administrative law judge.

process could potentially increase. One stakeholder observed that such options could require mandatory ADR to minimize this potential effect. Concern was also raised by another stakeholder that some options may serve to preclude lower-graded employees from pursuing claims where the option does not provide for a cost-free investigation.

Improving Equal Opportunity in the Federal Workforce

Through the use of several initiatives introduced in fiscal year 2008, EEOC is seeking to help federal agencies achieve model EEO programs where they can make employment decisions that are free from discrimination and that remove barriers to free and open workplace competition. One such tool is EEOC's EEO Program Compliance Assessment (EPCA), a type of scorecard that is divided into two sections. In the EEO program activities section, EEOC evaluated agencies on selected indicators under each model element of MD-715 using fiscal year 2006 data and reports. Among the indicators measured were timeliness of investigations, FADs, and submission of complaint files for hearings and appeals. EEOC also measured agencies' use of ADR. EPCA does not evaluate agencies on the quality of their investigations, but according to EEOC officials, the Commission is currently examining how to incorporate agencies' quality of investigations as a performance measure under EPCA. In the EEO program outcome indicators section, EPCA includes selected responses from OPM's fiscal year 2006 Federal Human Capital Survey to five survey questions as "proxy outcome indicators" to gauge each agency's progress in creating a fair and inclusive workplace. The outcome indicators section also includes workforce analyses based on race, national origin, gender, and targeted disabilities that show how a particular agency's workforce is composed by major occupation and compare it to the civilian labor force; provides an odds ratio analysis on promotions in the senior grade levels; and shows agencies how they compare to the federal government as a whole on various climate and other issues. During our audit work, agencies' EPCA results were available to the public on EEOC's Web site; however, EEOC has since removed the results. According to a senior EEOC official, EEOC is evaluating the appropriate use of the program indicators in EPCA in an attempt to ensure that the indicators chosen are accurate measures of the performance of agency EEO programs. The official did not provide a time frame for this evaluation.

In addition to EPCA, EEOC stated in its fiscal year 2008 performance and accountability report that a key strategy in its efforts to be more responsive to federal agencies was the continued development of its relationship management pilot. This initiative was first piloted in fiscal year 2004 and involves EEOC personnel partnering with EEO staff in 11

agencies in a consultative relationship to improve customer service and help them successfully implement the essential elements of MD-715's model EEO program. In addition to these activities, EEOC staff provide trend analysis feedback to selected agencies on their MD-715 submissions, and EEOC is conducting on-site reviews of five agencies with high underrepresentation of racial minorities at the Senior Executive Service level and of another agency to investigate a spike in retaliation complaints.

Finally, in June 2008, EEOC announced a proposal that brought together previous EEOC commissioners' efforts.⁴⁶ Among the changes contained in the notice, are the following:

- A requirement that agency EEO programs comply with EEOC regulations,⁴⁷ MDs (MD-110 and MD-715), and management bulletins and that EEOC will review agency programs for compliance.⁴⁸
- Permission from EEOC for agencies to conduct pilot projects—usually for not more than 12 months—for processing complaints in ways other than those prescribed in EEOC regulations (Part 1614).
- A requirement that an agency that has not completed an EEO investigation within the 180-day time limit notify the complainant in writing that the investigation is not complete and when it will be completed and that the complainant has the right to request a hearing or file a lawsuit.⁴⁹

The proposals for EEOC to review compliance with its regulations, MDs, and other guidance and to provide additional notification to complainants have the potential for an immediate impact on the EEO complaint process.

⁴⁶EEOC announced its Notice of Proposed Rulemaking on Federal Sector Regulations at a June 2, 2008, commission meeting but has not yet published it. See notice of meeting at 73 Fed. Reg. 30392 (May 27, 2008). In addition to the changes in regulations it is proposing, EEOC has tasked a work group with developing recommendations on ways to improve the hearings process.

⁴⁷Part 1614 of Title 29 of the Code of Federal Regulations.

⁴⁸With this provision, the commission stated that it intends to provide a mechanism for reviewing and seeking compliance from agencies.

⁴⁹As stated earlier, currently a complainant has the right to request a hearing or file a lawsuit when an investigation has not been completed within 180 days of the complaint being filed, but there is no requirement that the agency notifies the complainant when the time has elapsed.

By reviewing compliance, EEOC could address several of the factors that EEO practitioners indicated impede the timely processing of complaints and independence. For example, requiring agency compliance with regulations and MDs delineating the reporting lines of authority for EEO Directors and the roles of agency offices of general counsel in the EEO complaint process could help strengthen the independence of EEO professionals to fulfill their responsibilities. As we stated earlier, EEOC stated its belief that a requirement to notify the complainant in writing about complaints that have not been investigated within 180 days may provide an incentive for agencies to complete investigations in a timely manner.

Pilot projects could provide helpful data with which EEOC could make decisions about future improvements to the federal sector EEO complaint process. For example, the Department of Defense (DOD) had the authority to operate pilot programs outside of the procedural requirements prescribed by EEOC to improve processes for the resolution of EEO complaints by civilian employees of DOD.⁵⁰ DOD operated three such programs between 2005 and 2007, although only one of the three DOD pilot programs met the criteria of “operating outside of EEOC regulations.”

The other two operated within the framework of EEOC regulations by increasing the use of ADR to informally settle disputes before they became formal complaints. Our prior work on the DOD pilot programs showed the importance of having a sound evaluation plan, including key features that are essential for assessing the performance of the pilot programs and making determinations regarding the wider applications of the pilot programs.⁵¹

Some key features of a sound evaluation plan include the following:

- Well-defined, clear, and measurable objectives.
- Measures that are directly linked to the program objectives.

⁵⁰Other than an early consultation with DOD, EEOC was not involved in the design or implementation of the DOD pilot programs.

⁵¹GAO, *Equal Employment Opportunity: DOD's EEO Pilot Program Under Way, but Improvements Needed to DOD's Evaluation Plan*, [GAO-06-538](#) (Washington, D.C.: May 5, 2006), and *Limitations in DOD's Evaluation Plan for EEO Complaint Pilot Program Hinder Determination of Pilot Results*, [GAO-08-387R](#) (Washington, D.C.: Feb. 22, 2008).

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- Criteria for determining pilot program performance.
 - A way to isolate the effects of the pilot programs.
 - A data analysis plan for the evaluation design.
 - A detailed plan to ensure that data collection, entry, and storage are reliable and error free.⁵²

In addition to the importance of having a strong evaluation program, our work on the DOD pilots also identified lessons learned that can be instrumental for EEOC and potential pilot program officials as they consider whether to institute pilot projects to address concerns that have been identified with the EEO complaint process. For example, it is important to (1) involve senior management and stakeholder groups in designing, implementing, and evaluating the pilot program to help with buy-in; (2) emphasize the importance of customer feedback; and (3) include mechanisms to solicit such feedback.

As of May 2009, EEOC had not issued its notice of proposed rulemaking outlining such specific features as the number of pilot projects, how they will operate, or how they will be evaluated. The solutions that EEO practitioners and others have offered to improve the quality and timeliness of investigations may provide candidates for the pilot projects, allowing EEOC to make data-driven decisions about changes to the federal EEO complaint process.

Conclusions

Equal opportunity in the federal workplace is key to enabling federal agencies to meet the complex needs of our nation. Agencies must make a firm commitment to the principles of equal opportunity and make those principles a fundamental part of agency culture so that all employees can compete on a fair and level playing field and have the opportunity to achieve their potential, without regard to race, color, religion, national origin, age, gender, or disability. Holding agencies accountable for adhering to EEOC regulations and guidance will help EEOC to ensure that the EEO complaint process is operating as intended. EEO practitioners and others have identified shortcomings in the operation of the federal EEO process at both the agencies and EEOC. Some of these shortcomings

⁵²This plan should include forms for collecting baseline data (before the pilot program begins) and program data from the pilot as well as detailed time frames, roles and responsibilities, and report planning in the evaluation plan.

could potentially be addressed through additional guidance that EEOC has stated it intends to issue in such areas as the appropriate relationship between EEO offices and offices involved in defending the agencies against discrimination complaints as well as what constitutes a claim; it will be important for the commission to follow through with this guidance. Additionally, EEOC is considering allowing agencies to conduct pilot projects for processing complaints outside of EEOC regulations. If agencies were to participate in pilot projects, it would be important for them to have well-developed evaluation plans that include key evaluation features. Pilots that are undertaken without sound evaluation plans increase the likelihood of insufficient or unreliable data, limiting confidence in pilot project results. Without confidence in pilot project results, EEOC will be limited in its decision making regarding the pilot projects, and to the extent that proposed changes in the federal EEO complaint process require congressional action, Congress will be limited in its decision making about the pilot projects' potential broader application.

Recommendations for Executive Action

If pilot projects are approved by EEOC, we recommend that the Acting Chairman of EEOC take the following two actions:

- Direct pilot project officials to develop for each pilot project an evaluation plan that includes key features to improve the likelihood that pilot project evaluations will yield sound results, such as
 - well-defined, clear, and measurable objectives;
 - measures that are directly linked to the program objectives; criteria for determining pilot program performance;
 - a way to isolate the effects of the pilot programs;
 - a data analysis plan for the evaluation design; and
 - a detailed plan to ensure that data collection, entry, and storage are reliable and error free.
- Direct commission staff to review and approve pilot projects' evaluation plans to increase the likelihood that evaluations will yield methodologically sound results, thereby supporting effective program and policy decisions.

Agency Comments

We provided a draft of this report to EEOC for review and comment. In a June 24, 2009, letter, EEOC's Acting Chairman agreed with our recommendations and stated that EEOC plans on implementing them. The Acting Chairman further stated that EEOC is committed to improving the timeliness of complaint processing, enhancing the quality of the

investigative reports as well as the hearing and appellate decisions, and ensuring greater accountability by all parties in the federal sector complaint process. EEOC's letter is reprinted in appendix III.

We are sending copies of this report to the Attorney General; the Acting Chairman, Equal Employment Opportunity Commission; and interested congressional committees and subcommittees. The report also is available at no charge on the GAO Web site at <http://www.gao.gov>.

Please contact me at (202) 512-6806 or stalcup@gao.gov if you or your staffs have any questions about this report. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix IV.



George H. Stalcup
Director, Strategic Issues

List of Congressional Committees

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Daniel K. Akaka
Chairman
The Honorable George V. Voinovich
Ranking Member
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Edolphus Towns
Chairman
The Honorable Darrell Issa
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable John Conyers Jr.
Chairman
The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
House of Representatives

The Honorable Stephen F. Lynch
Chairman
The Honorable Jason Chaffetz
Ranking Member
Subcommittee on Federal Workforce, Postal Service,
and the District of Columbia
Committee on Oversight and Government Reform
House of Representatives

Appendix I: Objectives, Scope, and Methodology

As agreed with interested congressional committees, this report provided the results of our analysis of (1) factors that practitioners identified that they believe impede the prompt, fair, and impartial processing of federal equal employment opportunity (EEO) complaints and (2) actions that practitioners and other stakeholders think could be taken to address those factors. We also included information on what the Equal Employment Opportunity Commission (EEOC) is doing to improve equal opportunity in the federal workforce.

Objectives 1 and 2

For the purposes of this review, we surveyed individuals whose work roles and responsibilities put them in regular contact with the federal EEO complaint process, thereby ensuring their familiarity with and knowledge about the process. Based on prior GAO work on the EEO process, we identified seven categories of individuals familiar with the federal EEO complaint process. We termed these individuals “EEO practitioners” and collected their informed views concerning the EEO complaint process. We derived our seven categories of practitioners from three sources: individual agencies, EEOC, and the plaintiffs’ attorney community. Agency practitioners we surveyed included the EEO directors responsible for administering agency EEO programs, EEO counselors responsible for reviewing the complainants initial allegations and advising them on their roles and responsibilities in the EEO process, EEO investigators responsible for investigating EEO complaints, and legal counsels responsible for advising and defending agencies against EEO complaints. EEOC practitioners included the EEOC administrative judges (AJ) responsible for adjudicating complaints, conducting hearings, and issuing decisions on EEO complaints, and EEOC appeals attorneys responsible for processing appeals of decisions. The plaintiffs’ attorneys represent individual employees who filed EEO complaint cases. We obtained e-mail addresses, physical addresses, and telephone numbers for all EEO practitioners in order to contact them.

Agency Selection

To attain a wide representation of agencies, we selected agency-level EEO practitioners from 17 agencies based on agency size, complaint activity, and investigation source (in-house versus contractor) as of fiscal year 2005.¹ In an effort to obtain a sufficiently representative and diverse group

¹We used fiscal year 2005 data because those were the most recently available data from EEOC at the time we began our work in May 2006.

of large, medium, and small agencies from which to begin our selection process, we focused on agencies that had reported at least 50 complaints filed in fiscal year 2005, the number of employees at agencies, and the mechanism the agencies used to investigate complaints—primarily agency employees, contract investigators, or a mix of in-house and contract investigators in fiscal year 2005. The 17 agencies that we selected on the basis of the number of complaints filed and the mechanism for EEO investigations were the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, the Interior, Justice, Transportation, the Treasury, State, and Veterans Affairs; the Environmental Protection Agency; the General Services Administration; the Office of Personnel Management; and the U.S. Postal Service. EEO complaints filed at the selected 17 agencies in the aggregate represented 91 percent of EEO complaints filed governmentwide in fiscal year 2005.

We decided against including the Department of Justice (Justice) after agency officials said that their practitioners' survey responses first would have to undergo vetting within the agency. Under those conditions, we could not allow Justice practitioners to participate in the survey. We so advised Justice representatives during a telephone conference, during which we also proposed interviewing Justice officials later in the engagement about possible changes to the EEO complaint process. Justice representatives agreed to participate under those conditions. The decision not to include Justice left us with 16 agencies that in the aggregate represented 87.5 percent of EEO complaints filed governmentwide in fiscal year 2005.

Finally, for a total of 17 agencies, we included EEOC because of the roles that its AJs play in adjudicating hearings of EEO complaints and its appeals attorneys play in adjudicating appeals of decisions on those complaints.

EEO Practitioner Selection

To recruit EEO practitioners from the 16 agencies, we contacted EEO directors at these agencies by telephone and e-mail, informed them about the nature of our review, requested their participation in the survey, and asked them to nominate EEO counselors, investigators, and agency counsel. We contacted EEOC officials to recruit EEOC AJs and appeals attorneys. We also contacted plaintiffs' attorneys from the private sector. The selected practitioners represent different parts of the complaint process, and some of the practitioners may only be familiar with their part of the process.

We recruited an equal number of individuals from each category of EEO practitioners to attain a wide representation of agencies and reduce possible bias in the final results. To achieve a more independent distribution of agency practitioners, we selected our final list of practitioners from 16 agencies (not including EEOC) in an effort to reduce the risk of collaborative responses caused by horizontal integration. We recruited no more than 3 practitioners for each of the four categories of agency practitioners (i.e., directors, counselors, investigators, and agency counsels) to lessen the likelihood that any of the agencies would have all categories of practitioners and ensure a broader perspective on the issues. In all, we selected 36 practitioners, 9 from each group of agency practitioners. We did not select a member of every practitioner group from every agency.

In addition to the agency practitioners, we also sought the perspectives of practitioners from EEOC, which administers and provides guidance and oversees the federal EEO complaint process. We asked EEOC supervisors and nonsupervisors to nominate EEOC AJs and appeals attorneys to participate in the survey. To recruit AJs, we also considered recommendations from EEOC management and from an organization representing EEOC AJs, contacted nominees and asked them to participate in the survey and to recommend other AJs for participation, and then contacted the nominees to request their involvement. We selected nine EEOC appeals attorneys and nine EEOC AJs.

Finally, we selected nine plaintiffs' attorneys after considering relevant information from other EEO practitioners and people in the EEO community.

To address our objectives, we primarily used two Web-based surveys to systematically collect and distill knowledge from the EEO practitioners we had selected.²

Phase I Survey

Our first Web-based survey consisted of open-ended questions that were designed to capture the practitioners' narrative responses. Specifically, we

²By using a Web-based process instead of a panel discussion, we were able to overcome the potential biases that can occur as experts share their opinions in group settings where factors such as especially vocal individuals and pressures to conform to the group may skew results. By creating a Web-based virtual panel, we were able to include more individuals from these groups than would have been possible with a live panel.

asked practitioners three questions: (1) Based on your experience as an EEO practitioner, what are the most important factors you have observed that materially impede the prompt, fair, and impartial processing of complaints at your agency, or at EEOC, and how have those factors impeded complaint processing? (2) What specific changes could be made to address the factors you listed above, in order to promote the prompt, fair, and impartial processing of federal EEO complaints? (3) What changes have been made to the EEO complaint process at your agency? What effects did these changes have on the prompt, fair, and impartial processing of EEO complaints at your agency?³

Before launching each survey, we conducted a series of pretests with internal and external EEO practitioners, including some actual survey respondents. The goals of the pretests were to check that (1) the questions were clear and unambiguous and (2) the terminology was used correctly. To conduct pretests, we selected representatives from several practitioner categories, provided them with survey drafts for their review, and interviewed them either in person or by teleconference to obtain their opinions about the language, format, and tone of questions in the survey. Based on the reactions of practitioners, we changed the survey content and format during pretesting as necessary. We also conducted usability tests that entailed checking each practitioner's password, user name, and link to ensure their operability before we launched the Web survey.

To activate the survey, we posted it to the Internet. We notified the 63 EEO practitioners of the availability of the questionnaire with an e-mail message that contained a unique user name and password that allowed each respondent to log on and fill out a questionnaire while preventing respondents from gaining access to the surveys of others. Using their access information, practitioners could access the survey on the Internet at any time and could complete it at their convenience. If practitioners did not respond to the confidential link we provided, we accepted official submissions for responses in another format (e.g., e-mail). Access to the Phase I survey formally began on April 9, 2007, after which practitioners had approximately 8 weeks from April 2007 through May 2007 to complete the survey. While the survey was ongoing, we wrote follow-up e-mails and made telephone calls to practitioners who did not initially respond to the survey to ensure that we made every effort to reach them.

³We did not evaluate the effectiveness of any of the initiatives practitioners identified.

Of the 63 practitioners to whom we made the Phase I survey available, 1 practitioner informed us that she did not work in one of our practitioner categories. As she was the only respondent from her agency, we sent the survey to another EEO practitioner at that agency. When we did not receive a response from another practitioner at another agency, we then sent the survey to an official from her agency, because that official's office is in charge of the discrimination complaint counseling and investigation processes and alternative dispute resolution. Thus, we selected 65 practitioners to participate in the Phase I Web-based survey. By June 2007, of the 65, 62, or about 95 percent of the EEO practitioners, had completed the Phase I survey. Responses to the survey express only the views and attitudes of the practitioners.

Once the Phase I survey was complete, we conducted a content analysis of practitioners' open-ended narrative responses to that survey. We developed a coding system that was based on the type of practitioner, the individual respondent, sequential numbers to identify the response, and the type (solution or factor) of response. We assigned individual codes to each sentence or paragraph provided by each practitioner. Based on our content analysis of Phase I responses, we developed a list of eight broad categories of factors—accountability, knowledge and skills, authority, independence, commitment, resources, communication, and laws and guidance—into which we grouped the responses. We also included "Other" and "Not applicable" categories where we placed that very small number of responses that did not fit under the eight factors.⁴ Some Phase I survey responses may have addressed multiple issues and so may have been classified into more than one of these factors.

We did not assess the validity of the practitioners' views of impediments or solutions to the EEO complaint process or evaluate the effectiveness of initiatives that agency EEO practitioners said their agencies had implemented to improve their complaint processes. We report the views of practitioners who are knowledgeable of the federal EEO complaint process, but these views do not represent the official views of the 17 agencies. In addition, the practitioners' views cannot be generalized to all federal agencies and EEO practitioners for some or all of the factors identified.

⁴"Other" included responses that did not fit into the eight factors. "Not applicable" responses fell mainly into two broad areas that were outside of the scope of our review: class action complaints and "mixed cases," which allege discrimination related to actions that can be appealed to the Merit Systems Protection Board.

Phase II Survey

After categorizing all responses according to the eight broad factors, we used the results as a basis for developing the closed-ended questions that made up the Phase II survey and asked practitioners to rank on a scale of 1 through 8 the solutions they considered to be most important for improving the current federal EEO complaint process.

As we had done for the Phase I survey, we conducted pretests of the Phase II survey with practitioners to ensure that our questions were clear and unambiguous and that the terminology was being used correctly. For pretest subjects, we selected representatives from each of the practitioner categories and included some actual survey respondents. We provided them with survey drafts for their review and interviewed them in person or by telephone. We modified the draft survey to address feedback we received from pretesters.

The Phase II survey formally began on January 10, 2008. We sent the survey to the 62 EEO practitioners who responded to the Phase I survey. Survey respondents took approximately 8 weeks, from January 2008 through February 2008, to complete the second phase of the survey. We wrote follow-up e-mails and made numerous telephone calls to contact practitioners who did not initially respond to the survey to ensure that we obtained responses from as many practitioners as possible. In all, 56, or about 90 percent, of the 62 practitioners completed the Phase II survey, which refines the results of the Phase I survey by asking respondents to provide their views as to where directed improvements in the EEO complaint process for each of the eight broad factors from the Phase I survey could have the greatest effect. The Phase II survey asked respondents to rank each of the eight factors identified in the Phase I survey from highest to lowest in terms of importance for improving the federal EEO complaint process. Once respondents completed the Phase II survey, we computed overall rankings of the factors according to the order of frequency in which respondents ranked them as most, second most, or third most important. The views expressed by the survey respondents do not represent the views of GAO.

Discussions with Stakeholders

We also gathered information to address our second objective by interviewing representatives from a variety of stakeholder organizations in the federal EEO complaint process, including federal employee unions, federal executive and managers associations, agency attorneys' associations, and federal employee organizations, to obtain their views regarding possible changes that could be made to the federal EEO complaint process and the advantages and disadvantages of implementing

such changes. We selected these stakeholder organizations based on a literature search, recommendations from EEOC, and our professional judgment in an effort to compile a diverse list of organizations with involvement in EEO activities or that represented specific groups protected by EEO laws. The stakeholder organizations we contacted for this review do not represent all of the potential stakeholder organizations from specific groups protected by EEO laws.

Using a preliminary list we developed, we obtained the names, street addresses, and e-mail addresses of officials from these organizations and conducted interviews with representatives from these organizations in their headquarters offices and in facilitated group meetings at GAO headquarters. Before conducting the stakeholder interviews, we e-mailed representatives a document that contained preliminary information from our Phase I survey and descriptions of several possible options for reassigning responsibilities for operating federal EEO investigations, counseling, hearings, and appeals to EEOC, another agency, or a hypothetical entity. We provided this information to enable stakeholders to review the document before interviews where it would serve as a point of discussion. During these interviews, we asked stakeholder organization representatives whether they thought our eight broad factors adequately captured the complex issues in the federal EEO complaint process and to identify the advantages and disadvantages of implementing the structural options that we had described for changing the EEO complaint process.⁵ We analyzed the views of these stakeholder organization representatives by reviewing their observations concerning our eight broad factors as well as their observations on the possible options for making changes to the EEO complaint process.

⁵We interviewed representatives from organizations with government oversight responsibility, including the Merit Systems Protection Board, the Office of Personnel Management, and the National Academy of Public Administration; EEO practitioners, including officials from EEOC; attorneys from Justice who represent the government in EEO litigation and U.S. attorneys presiding over such litigation; attorneys from the American Bar Association; representatives from both the American Federation of Government Employees and the National Treasury Employees Union; officials from the Federal Managers Association and the Senior Executives Association that represent current and former members of the Senior Executive Service and equivalent federal pay systems; Federal Employment Lawyers Group; and others from organizations involved with the complaint process through their representation of employees, including Blacks in Government, Federally Employed Women, the National Council on Disability, the National Association of Hispanic Federal Executives, the Association for Persons with Disabilities in Agriculture, the Asian American Government Executives Network, the Council on Federal EEO and Civil Rights Executives, and the Deaf and Hard of Hearing in Government.

**Actions Taken by EEOC to
Improve Equal
Opportunity in the Federal
Workforce**

To identify actions taken by EEOC to improve the federal EEO complaint process, we reviewed EEOC documents and interviewed commission officials. We did not evaluate the effectiveness of actions EEOC reported taking.

We conducted this performance audit from May 2006 through August 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: EEO Laws Applicable to Federal Employees

Title VII of the Civil Rights Act of 1964, as amended, makes it illegal for employers, including federal agencies, to discriminate against their employees or job applicants on the basis of race, color, religion, sex, or national origin.¹ The Equal Pay Act of 1963 protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.² The Age Discrimination in Employment Act of 1967, as amended, prohibits employment discrimination against individuals who are 40 years of age or older.³ Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, prohibit discrimination against qualified individuals with disabilities who work or apply to work in the federal government.⁴ Federal agencies are required to provide reasonable accommodation to qualified employees or applicants for employment with disabilities, except when such accommodation would cause an undue hardship. In addition, a person who files a complaint or participates in an investigation of an EEO complaint or who opposes an employment practice made illegal under any of the antidiscrimination statutes is protected from retaliation. The EEOC is responsible for enforcing all of these laws.

¹42 U.S.C. §§ 2000e et seq.

²29 U.S.C. § 206(d).

³29 U.S.C. §§ 621 et seq.

⁴29 U.S.C. §§ 791 and 794a.

Appendix III: Comments from the U.S. Equal Employment Opportunity Commission



U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Office of the Chair

June 24, 2009

George H. Stalcup, Director
Strategic Issues
U.S. Government Accountability Office
Washington, D.C. 20548

Dear Mr. Stalcup:

On behalf of the EEOC, I thank you for the opportunity to comment on the draft report entitled, "Equal Employment Opportunity: Pilot Projects Could Help Test Solutions to Longstanding Concerns with the EEO Complaint Process." The report comes at a particularly opportune time for EEOC as it acknowledges and supports many of the activities that our agency is undertaking to improve the federal sector EEO process.

The stakeholder concerns chronicled in the GAO report have been raised before with EEOC and have served as the basis for a number of improvements that are being made to the federal sector process, including those contained in the pending Notice of Proposed Rulemaking. As your report points out, in the NPRM the Commission has created a formal procedure by which agencies may apply to use pilot projects that will permit agencies, with Commission approval, to test methods for improving the federal sector EEO process. We agree with and plan on incorporating the report's recommendations that pilot projects have sound evaluation plans and that EEOC review and approve such plans. The NPRM also contains provisions that will strive to increase accountability and efficiency by the agencies and EEOC for the timely processing of EEO complaints. These include the requirement that a 180 day notice be sent to complainants at the point at which an agency investigation is to be complete, that agencies begin to provide files electronically, as well as imposing time limits on decisions on class certification appeals in an effort to expedite the class certification process. The EEOC also takes very seriously the questions raised concerning the lack of consistency in EEOC decisions at the hearings stage and on appeal. The EEOC is conducting a federal sector joint training conference in July in which Administrative Judges and Appellate Attorneys will work together to develop procedures to improve consistency in their decisions, and will share in training sessions on the better use of sanctions, summary judgments, and class action determinations.

Most importantly, the EEOC is committed to improving the timelines and quality of the EEO complaint process, from the report of investigation to the hearings process as well as on appeal. The Commission, led by the Acting Vice Chair, has engaged in a thorough review of the agency investigative process, and is developing a number of recommendations for improvement in this area, including increased training requirements for investigators, greater consistency in the production of reports of investigation, and development of a formal review process to evaluate the quality of investigators. We will also soon implement a pilot project which we believe will

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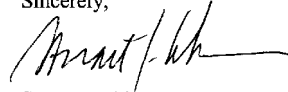
increase the efficiency of the hearing process, and we are finalizing a document on the appropriate relationship between agency EEO offices and agency defense counsel.

We note the fact that the GAO report does not analyze and evaluate the validity of the concerns raised by stakeholders or their proposed solutions. For example, apparently some stakeholders believed that complainants are not held accountable in this process; yet, there are specific regulatory provisions that require the dismissal of a complaint where the complainant fails to cooperate or is found to have abused the complaint process, and complainants have numerous time limits they are required to meet and for which their complaint may be dismissed for failing to do so. A review of the procedural dismissals by agencies shows the high frequency with which these regulatory provisions are used to hold complainants accountable.

The EEOC is committed to improving the timeliness of complaint processing, enhancing the quality of the investigative reports as well as our hearing and appellate decisions, and ensuring greater accountability by all parties in the federal sector complaint process. These efforts are ongoing and we will continue to strive to make the EEO complaint process a more efficient and fair system for our federal employees.

We thank you for the time you have spent studying the federal sector EEO process and look forward to working with you in the future.

Sincerely,



Stuart J. Ishimaru
Acting Chairman

Appendix IV: GAO Contact and Staff Acknowledgments

GAO Contact

George Stalcup, (202) 512-6806 or stalcupg@gao.gov

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In addition to the contact named above, Anthony Lofaro, Belva Martin, and Kiki Theodoropoulos, Assistant Directors; Gerard Burke; Jeff Dawson; Brandon Haller; Karin Fangman; Jeff Niblack; and Greg Wilmoth made major contributions to this report.

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