

US Department of Health and Human Services

Assistant Secretary for Administration and Management  
(ASAM)

Office of Diversity Management and EEO (ODME)

EEO and Diversity  
Policy and Procedures Manual

[Version 1.0 – April 2009]

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# **Chapter 1 - Plan of the Manual**



## **Chapter 1 - Plan of the Manual**

### **1.1 General Information**

#### **1.1.1 Purpose**

This manual establishes standard operating policy and procedures relating to the administration of Equal Employment Opportunity and Diversity Management programs within the Department of Health and Human Services (HHS). This manual provides the framework for Operating Divisions (OPDIVs) to execute their duties under the Delegation of Authority governing administration of Equal Employment Opportunity programs.

#### **1.1.2 Scope and Organization**

The Assistant Secretary for Administration and Management (ASAM), under the authority granted by the Secretary, Health and Human Services, is the Equal Employment Opportunity official for the Department. The ASAM has designated the Office of Diversity Management and Equal Employment Opportunity (ODME) as the primary office responsible for developing policy, providing oversight, and program evaluation to ensure compliance with anti-discrimination legislation and sustainment of the Department's "zero tolerance" policy. Congruently, OPDIV Heads have been delegated the authority to administer their respective EEO programs to include investigating allegations of discrimination, conducting outreach programs, educating the workforce on equal employment opportunity, and among others, instituting initiatives to enhance the employment of women, minorities, veterans, and persons with disabilities, thereby creating a workplace free of discrimination. Operating Divisions must adhere to Department policy and guidance contained in this manual, but may choose to implement it in a more restrictive manner within the respective OPDIV.

#### **1.1.3 Development and Maintenance**

##### **1.1.3.1 Authority**

This manual is published under the authority of 29 Code of Federal Regulations (C.F.R.) Part 1614, Management Directive 110 (MD-110), and the authority of the Assistant Secretary for Administration and Management (ASAM) as the Departmental EEO official.

##### **1.1.3.2 Supplemental Guidance**

Operating Divisions (OPDIVs) and Staff Divisions (STAFFDIVs) will ensure supplemental policy or guidance, when issued by the Department, is distributed to the appropriate staff for immediate compliance.

### 1.1.3.3 Effective Dates

A Transmittal Notice number and the date of issue appear at the top of each page of the HHS EEO & Diversity Management Policy and Procedures Manual. The date of issue is the effective date of the material on the page, unless a different effective date is specified in the text.

### 1.1.3.4 Distribution

This HHS EEO & Diversity Management Policy and Procedures Manual outlines the regulatory requirements established for the efficient and effective conduct of EEO and Diversity Management activities. It outlines in detail the responsibilities delegated to OPDIV Heads in performance of this duty and outlines specific procedures to be used by EEO and Diversity Management practitioners and managers of EEO staff. An electronic version of this manual is posted on the HHS intranet website: <http://www.hhs.gov/odme/>. When Chapters or Sections are revised and updated, they will be produced in electronic format and posted on the website.

### 1.1.4 Glossary

Adjudication	A determination on the merits of claims presented by parties in an administrative proceeding, following a review and analysis of pertinent facts. A process leading to a judicial decision on the merits of a dispute or issue.
Administrative Chain (AC)	The supervisory chain for Federal Employees that begins with the immediate or 1 <sup>st</sup> level supervisor up to and including the senior management official. Commissioned Corps regulations allow for the resolution of an informal complaint by use of the Administrative Chain (AC). The use of the AC mirrors processes within the military forces of the United States, which allow for the resolution of an informal complaint by using the Officer's chain of command.
Alternative Dispute Resolution	Refers to a variety of processes and approaches designed to resolve disputes in a manner that avoids the cost, delay and unpredictability of more traditional, adversarial and adjudicatory processes. These include techniques such as mediation, facilitation, fact-finding, early neutral evaluation, the use of an ombudsman, settlement conferences, mini-trials and peer review. Mediation has proven

to be the most popular technique used by those federal agencies with ADR programs.

Complaint of Discrimination

A claim by an aggrieved party that he/she has been subjected to unlawful discrimination based on race, color, sex, age, national origin, physical or mental disability, religion, reprisal or sexual orientation.

Complaint Process

The procedures for handling administrative complaints of discrimination under the provisions of Title 29 Code of Federal Regulations (C.F.R.) Part 1614, which includes: acknowledgement and acceptance/dismissal, investigation, hearing and final agency decision.

Commissioned Corps

Commissioned Corps currently serve at staff, management, and leadership levels within every Public Health Service (PHS) agency and in every functional role (i.e., clinical, regulatory, applied public health, administration, research and policy-making). PHS commissioned officers detailed to the United States Navy, United States Marine Corps, United States Army, United States Air Force and United States Coast Guard, remain subject to the law of the Armed Forces to which detailed. Commissioned Corps Equal Opportunity (EO) complaints filed by these officers will be processed in accordance with the procedures of the Service to which detailed.

Conflict of Interest Complaint

A complaint of discrimination in which the aggrieved person (AP)/complainant is employed in the OPDIV EEO Office and the OPDIV EEO Officer, an employee within the OPDIV EEO Office, or the individual to whom the OPDIV EEO Officer reports is named or identified as an alleged responsible management official (RMO).

Counselor

Individual who is assigned by the OPDIV EEO Office to perform the initial intake session with an aggrieved party to identify claims, who advises the aggrieved party of his or her rights in the complaints process, offers alternative dispute resolution, conducts an informal inquiry for the purposes of resolving the dispute, attempts

	resolution and prepares a Counselor's Report concerning claims of discrimination which are presented by the AP.
Counselor's Report	The document which is prepared by the EEO Counselor at the end of the EEO Counseling session and provided to the Complainant as well as individuals who will review the reported claims and outcome of unsuccessful resolution efforts to determine further processing requirements.
Diversity Management	The process through which employee differences are protected, valued, included, and leveraged in an organization in order to achieve the best performance outcomes.
EEO Compliance Practitioner	EEO Specialists who perform functions related to the EEO complaints process.
Final Action	Action taken by the Agency to close the complaint of discrimination or adjudication on the merits.
Final Agency Decision (FAD)	Document issued to the Complainant by the Director, EEO to dismiss the complaint on procedural grounds or following a review of the Report of Investigation, analysis and adjudication as to whether the complaint of discrimination has been substantiated on the merits.
Final Agency Order (FAO)	Document issued to the Complainant within 40 days of receipt of the hearing file and EEOC Administrative Judge's Decision which indicates whether the Agency will fully implement the AJ's Decision or appeal it to the Commission.
iComplaints	The customized commercial off the shelf electronic tracking system used to track, manage, and report on EEO complaint activity, in accordance with EEOC Management Directive 110 and EEO 462 reporting requirements.
Investigations	The formal fact-finding conducted by agencies pursuant to 29 CFR 1614.108 in order to develop an impartial and appropriate factual record upon which to make findings on the claims raised in a complaint.

Mediation	One of several Alternative Dispute Resolution techniques offered as an alternative to the traditional EEO complaint process. Mediation is an informal process in which a neutral third party assists the opposing parties in reaching a voluntary, negotiated resolution of a charge of discrimination. The decision to mediate is completely voluntary for the complainant and the employer. Mediation gives the parties the opportunity to discuss the issues raised in the complaint, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement and, ultimately, to incorporate those areas of agreements into resolutions. A mediator does not resolve the complaint or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. The mediation process is strictly confidential. Information disclosed during mediation will not be revealed to anyone.
Mixed Case Appeal	An appeal filed with the Merit Systems Protection Board that alleges an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability or age.
Mixed Case Complaint	A complaint of employment discrimination filed with a Federal agency based on race, color, sex, national origin, age or disability related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

Offer of Resolution	An offer made on behalf of the Agency, any time after the formal filing but not later than the date the Administrative Judge is appointed to conduct a hearing, to a Complainant who is represented by an attorney to resolve the complaint. The agency may make an offer of resolution to the complainant, whether represented by an attorney or not; any time after the parties have received notice that an Administrative Judge has been appointed to conduct a hearing, but no later than 30 days prior to the hearing. The offer of resolution shall be in writing and shall include a notice explaining the possible consequences of failing to accept the offer. The agency's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief. With regard to monetary relief, an agency may make a lump sum offer covering all forms of monetary liability, or it may itemize the amounts and types of monetary relief being offered. The complainant shall have 30 days from receipt of the offer of resolution to accept it.
Reasonable Accommodation	Any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy the benefits and privileges of employment equal to those enjoyed by employees without disabilities.
Responsible Management Official (RMO)	The individual who is named or identified in the complaint of discrimination as the management official who is responsible for initiating or implementing the employment action which is the subject of the EEO complaint.

Settlement	Terms of agreement reached by the Complainant and management officials to resolve claims of discrimination. Public policy favors the amicable settlement of disputes. It is clear that this policy in favor of settlement disputes applies particularly to employment discrimination cases. Agencies are encouraged to seek resolution of EEO complaints through settlement at any time during the administrative or judicial process. The authority to settle EEO complaints is derived from Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973 and the Equal Pay Act.
Settlement Officials	The Settlement Official for EEO complaints is the OPDIV Head, unless otherwise delegated in writing to another management official. If delegated, the Settlement Official should be a member of the SES with broad knowledge of the organization, extensive managerial experience, authority to obligate the OPDIV and ensure implementation of the agreement. EEO Directors or staff are precluded from being Settlement Officials.

## 1.2 HHS EEO Secretarial Policy

The Department of Health and Human Services has, at the very core of our mission, responsibility for promoting the well-being of all Americans. The respect and dignity with which we treat each other in the Department is crucial to the successful completion of this mission.

To foster an atmosphere of continuous improvement in our products and services, we must create an environment that fully uses the talents and capabilities of each and every one of our employees, from all backgrounds and at all organizational levels. To do this, we must strengthen our commitment to a workplace free of discrimination or harassment of any kind—a workplace where no one is denied the opportunity to contribute fully because of race, color, religion, gender, national origin, age, disability, or sexual orientation.

The Department's commitment to diversity and equality is longstanding and non-negotiable. Quite simply, diversity and inclusion are pre-requisites to excellence. Both discrimination and harassment are violations of the law as well as the policies of this Department. Anyone who believes he/she is a victim of discrimination or harassment based on disability, age, race, color, religion, sex, sexual orientation, national origin or reprisal for prior EEO activity should contact their local equal employment opportunity office, local union representative, or servicing personnel

office. In addition the Employee Assistance Program (EAP) can help resolve workplace differences and counsel employees who believe they are being treated unfairly.

The Department's commitment goes beyond compliance with anti-discrimination laws. All managers, not just in their hiring and promotion decisions, are charged with nurturing and capitalizing on the very best every employee has to offer. All employees should understand that a culturally diverse workplace is critical to the HHS mission to serve all Americans.

Celebrating cultural diversity will help every member of HHS better understand each other and our customers. With better understanding comes a greater capacity to serve. That is our real goal, and one we can all achieve.

### **1.2.1 Delegations of EEO Authority**

The Assistant Secretary for Administration and Management has been designated the Director of Equal Employment Opportunity for the Department of Health and Human Services with authority over all equal opportunity programs via delegation of authority dated October 11, 2001. This authority includes:

1. Authority to review, reexamine or have any matter, complaint, charge, or claim of alleged discrimination reviewed or reexamined for purpose of reconsidering the resolution, decision, disposition, or adjustment agreement.
2. Authority to designate the Director of Equal Employment Opportunity for the Department.

### **1.2.2 Delegations of Authority to Establish and Maintain EEO Programs**

Under authority vested in the Assistant Secretary for Administration and Management as the Director of Equal Employment Opportunity, Heads of Operating Divisions are delegated authority to exercise personal leadership for establishing and maintaining EEO programs for their respective organizations. The ASAM retains this authority for the Office of the Secretary. Specifically, OPDIV Heads are delegated the authority to:

1. Develop and implement required affirmative employment programs.
2. Conduct community outreach activities.
3. Select, train and make EEO Counselors available for mandatory pre-class and pre-individual discrimination complaint counseling.
4. Establish and promote alternative dispute resolution procedures to be used as adjuncts to pre-complaint counseling and during the formal complaint process.
5. Provide EEO training to staff, collateral duty counselors, supervisors and managers and other personnel as mandated by the Department.



6. Provide prompt, fair and impartial consideration of complaints charges and claims, including matters presented by aggrieved employees to EEO Counselors, emphasizing informal resolution of disputes within established timelines.
7. Ensure affected management officials are provided status reports on complaint activity throughout the entire process, as appropriate, without violating complainant's right to privacy.
8. Accept, dismiss, cancel and investigate individual and class complaints within established timelines.
9. Provide complainants with a copy of the investigative file and notify them of their right to a hearing or an immediate final agency decision.
10. Conduct any required or appropriate inquiry, and issue any subsequent written report, as may be required under the Age Discrimination in Employment Act of 1967, as amended, and under applicable implementing instructions.
11. Approve settlement agreements (agreements including retroactive personnel actions and back pay require the concurrence of the appropriate servicing personnel officer or Designee as to technical accuracy).
12. Award attorneys fees, in accordance with applicable laws and regulations.
13. Prepare recommended final decisions on the merits of those complaints for which the complainant does not timely request either a hearing or an immediate final decision, which will be reviewed for issuance by the HHS Director, EEO.

These authorities may be re-delegated. However, under no circumstance will the OPDIV EEO Official, or subordinate staffs, serve as the settlement official (Items 11 and 12 above) in any EEO related matter or settlement review board, if applicable. All re-delegations of the authorities must be in writing, and a copy provided to the Office of Assistant Secretary for Management and Administration (ASAM).

If a claim or charge involves the action of:

1. a person who has an organization peer relationship with the official to whom these authorities have been re-delegated or
2. a person who has a reporting relationship with the official to whom these authorities have been re-delegated

Processing of the complaint shall be transferred to the ASAM, Office of Diversity Management and Equal Employment Opportunity (ODME).

These authorities are limited to matters affecting civilian employees and applicants for civilian employment. They do not extend to functions, vacancies or personnel in the Commissioned Corps of the U.S. Public Health Service.

The HHS Director of EEO retains authority to:

1. Make the Department's final decision on the merits of complaints.
2. Request that the Commissioners of EEOC reopen and reconsider a previous appellate decision of EEOC's Office of Federal Operations in cases involving procedural and merit determinations.
3. Process, investigate, and decide cases when the matter involves a conflict or potential conflict of interest because the complainant or claimant is under the OPDIV direct management supervision or that of the EEO official, or the matter involves an action of the OPDIV Head, the EEO official, or a staff or line official superior to the EEO official.
4. Information and guidelines on exercising these authorities are contained in Title 29 C.F.R. Part 1614, appropriate guidelines and management directives promulgated by EEOC and the guidance contained in the HHS EEO and Diversity Management Policy and Procedures Manual.

The HHS EEO and Diversity Management Policy and Procedures Manual is directive in nature, is effective immediately upon release, and supersedes the Director of EEO's delegation memorandum dated September 20, 1995.

If an OPDIV is unable to comply with any provisions or directives in this manual, they must submit a request for waiver to the Director, Office of Diversity Management and EEO, outlining the specific area which would result in non-compliance and the corrective action plan to rectify the deficiency.

### **1.2.3 ASAM Diversity Management and EEO Council**

Each OPDIV Head shall designate two representatives (one who is a full-time Federal employee at the SES level or equivalent and who reports directly to the OPDIV Head and another who is qualified as an EEO or Diversity Management functional expert) to serve on the ASAM Diversity Management and EEO Council. The OPDIV EEO Director is the most likely candidate to serve as the OPDIV's second representative. The designation of these representatives must be reported to the Office of the Assistant Secretary for Administration and Management (ASAM), Office of Diversity Management and EEO (ODME). The Council member's responsibilities include but are not necessarily limited to:

1. Reporting directly to the OPDIV Head on all matters related to EEO and Diversity Management policy, programs, and practices;
2. Serving as the principal liaison between ODME, the OPDIV, and the subordinate components within the OPDIV on all matters regarding EEO and Diversity Management policy, programs, and practices;
3. Communicating EEO and Diversity Management related policy and operational information to all employees and management officials in the OPDIV;
4. Conducting appropriate oversight within the OPDIV of all EEO and Diversity Management related matters and adherence to policy; and
5. Serving as the primary advocate for EEO and Diversity Management activities aimed at achieving HHS goals in these areas.

In fulfilling this role, Council members will be required to attend Council meetings to discuss policy, program status, and pertinent issues related to EEO and Diversity Management practices.

The designation of these representatives does not relieve the OPDIV Head of the delegated responsibilities as prescribed in this manual.

## **Chapter 2 - Complaints Process**

## Chapter 2 - Complaints Process

These procedures represent the best-practices established by the EEO complaints processing community of the U.S. Department of Health and Human Services (HHS). Following extensive interviews of HHS Compliance Director/Complaints Manager/Team Leaders as well as Complaints Directors of several Federal agencies, HHS has established these procedures to serve as the standard for complaints processing throughout the Department. Developed by consensus of our complaints processing community, in many areas, these procedures go above and beyond what is expected in Title 29 of the Code of Federal Regulations (C.F.R.) Part 1614 and EEOC Management Directive 110 (EEO MD-110).

The goal of all HHS Operating Divisions (OPDIVs) is to create a model EEO Complaints Processing Program in the Federal sector. To that end, HHS OPDIVs will pool all available resources to assist in the processing of EEO complaints HHS-wide to include: EEO counseling, preparing intake decisions, and drafting final agency decisions (FAD). Whenever possible, OPDIVs will volunteer resources to assist fellow OPDIVs for the greater good of the overall HHS program.

This chapter establishes standard operating procedures for HHS administration of the EEO discrimination complaint process. These procedures will be revised as necessary to reflect changes made to Equal Employment Opportunity Commission (EEOC) and HHS regulations and directives. Through these procedures, we can better assist employees and managers by providing early problem resolution and compliance with the statutory and regulatory requirements for EEO complaints processing. This document establishes HHS-wide procedures for pre-complaint and formal complaint processing and includes standard form letters and templates for greater consistency throughout HHS.

At all times, the processing of EEO complaints will follow the requirements of Title 29 of the Code of Federal Regulations Part 1614 and EEOC Management Directive 110 (EEOC MD-110). We have followed the organizational structure of MD-110 in describing the HHS best practices, and where no change was made, the MD-110 reference appears. Those HHS additions are outlined throughout the document with specificity.

### 2.1 Responsibilities of EEO Counselors

1. Shall immediately contact the Compliance Director/Complaints Manager/Team Leader for assistance and guidance if the EEO Counselor experiences a lack of cooperation or resistance from any management official or other involved party;
2. Shall submit complete EEO Counselor's Reports, even if the AP agrees to participate in alternative dispute resolution (ADR);
3. Shall ensure prompt and efficient processing pursuant to regulatory time frames;
4. Shall comply with the procedures in this manual;
5. Shall not become personally involved with the Aggrieved Party (AP);
6. Shall not share personal biases or opinions with the AP or management;
7. Shall not serve as an advocate for the AP or management;
8. Shall not include personal opinions in the Counselor's Report

## **2.2 Use of Official Time**

Use of official time is specified in 29 C.F.R. § 1614.605. APs, Complainants, class agents, representatives, and witnesses who are HHS employees have the right to a "reasonable amount of official time" in the EEO complaint process.

- A. Reasonable time includes all time actually spent in meetings and hearings required by the OPDIV or EEOC plus a reasonable amount of time to prepare the complaint and respond to requests for information.
- B. Reasonable amount of official time will usually be defined in hours rather than days, weeks, or months.
- C. Employees must obtain advance approval from their supervisors before using official time.
- D. The immediate supervisor or Designee, with input from the EEO Compliance Director/Complaints Manager/Team Leader, will resolve disagreements as to what is "reasonable."
- E. The OPDIV will not change work schedules, incur overtime wages, or pay travel expenses in order to accommodate requests for official time in non-mandatory situations.

- F. The EEO Counselors and Complaints Specialists will provide the AP/Complainant, witness, and/or representative with the requisite Request for Official Time Form to request time to work on the EEO complaint, when needed.
- G. All denials of requests for official time will be in writing and reviewed by the EEO Compliance Director/Complaints Manager/Team Leader before a final decision is rendered.

## **2.3 Pre-Complaint Processing**

### **2.3.1 Pre-Complaint Contacts and Request for EEO Counseling**

Any employee, former employee, or applicant for employment who believes that (s)he has been discriminated against because of race, color, religion, sex, national origin, age, physical or mental disability, sexual orientation, or in retaliation for having participated in a protected activity under the EEO statutes must contact the EEO office for the OPDIV where the alleged discrimination occurred to initiate a complaint and obtain an EEO Counselor.

Also, before initiating the pre-complaint process, an AP is encouraged to consult with management in an attempt to informally resolve the matter at the lowest possible level.

- a. The AP must contact the EEO office within 45 calendar days from the date of the alleged discriminatory event, or, in the case of a personnel action, within 45 calendar days of the effective date of the action.
- b. An EEO official will communicate with the AP within 1 day of his/her contact with the OPDIV EEO office. The EEO official will verify if the AP is merely contacting the EEO office for information, or if the AP wishes to file a pre-complaint. If the AP does not wish to file a pre-complaint, the EEO official will document and close out the contact. If the AP wishes to file a pre-complaint, the EEO official will assign the matter to an EEO Counselor within 1-5 days of the contact (Inquiry/Pre-Complaint Intake Form – HHS-760).

Pre-complaints will be assigned to staff EEO Counselors whenever possible. Requests for EEO Counseling in conflict cases; *i.e.*, cases involving the OPDIV Head, OPDIV EEO Director, or member of the OPDIV EEO office will be processed by the Director, ODME, HHS. The AP is not entitled to an EEO Counselor of his/her choice. In making EEO Counselor assignments, the following should be considered to avoid any possible conflict; *i.e.*, working in the same division/office, line of supervision, personal friendships, and personal involvement in the matter alleged to be discriminatory, or work assignments. The EEO Compliance Director/Complaints Manager/Team Leader is responsible for resolving any conflicts involving EEO Counselor assignment.

- c. If an AP's first contact is directly with an EEO Counselor, the EEO Counselor must notify the EEO office of the contact within 1 day of the contact. The EEO office will determine if the EEO Counselor contacted will remain assigned to the pre-complaint.

### **2.3.2 Initial Counseling Interview**

- a. The EEO Counselor shall contact the AP within 3 days of assignment to schedule the initial interview.
- b. The initial interview with the AP should be conducted as soon as possible after receiving assignment but no later than 8 days of assignment. Unusual circumstances that may prevent conducting the interview immediately; *e.g.*, illness, emergency leave, priority assignments, must be brought to the attention of the EEO Compliance Director/Complaints Manager/Team Leader.
- c. During the initial interview, the EEO Counselor will complete the following tasks, obtain the AP's signature on all necessary paperwork, and answer any questions (s)he may have about the pre-complaint process. See EEO MD-110, Chapter 2, Section III and 29 C.F.R. § 1614.105.
  1. Advise the AP of his/her rights and responsibilities under 29 C.F.R. § 1614 (HHS-761).



Explain the Agency ADR program and explain that they must elect whether to seek pre-complaint resolution through ADR or through the traditional The EEO Counselor should inform the AP about the differences between the two processes.

2. Determine the claim(s) and bases raised by the AP.
  3. Determine if there are issues relating to the timeliness of the initial contact or other jurisdictional questions and obtain information relating to this issue.
  4. Advise the AP of his/her right to file a formal discrimination complaint if attempts to resolve the dispute through EEO counseling or ADR fail to resolve the dispute.
  5. Ask what the AP desires from the supervisory chain to resolve the complaint.
  6. Explain the right to anonymity during pre-complaint counseling only, (Inquiry/Pre-Complaint Form - HHS-760) the right to a representative of his/her choosing, and his/her obligation to inform the EEO office, immediately of the name, address, and phone number of a representative if one is chosen after the initial interview (Designation of Representative Form - HHS-763).
  8. Explain the role of the EEO Counselor and advise the AP that the EEO Counselor will complete his/her inquiry and conduct a Final Interview within 30 calendar days of the initial contact unless the AP has agreed in writing to an extension of the counseling period, or to participate in the ADR process.
- d. If ADR is elected by the AP during the initial interview, the EEO Counselor will provide the request for ADR/referral form to the appropriate person/office within 1 day of the election (ADR Request and Referral Form - HHS-767). The EEO Counselor will conduct a limited inquiry and obtain information regarding the allegations, relevant dates, and a description of each alleged discriminatory incident. Their role is to also obtain the necessary information regarding jurisdictional issues and timeliness for the Report. The EEO Counselor will interview the management official and anyone with relevant information to respond to the allegations. Following the interviews, the EEO Counselor will complete all relevant sections of the Report, but (s)he will conduct no further EEO counseling activities geared towards resolving the matter once the election for ADR is made over traditional counseling. MD-110, 3-8.
- e. If the matter is resolved through ADR, the EEO Counselor will submit all paperwork obtained during the EEO Counseling process to the EEO office and close out the case within 3 days of notification.

- f. If the matter is not resolved during ADR, the EEO Counselor will complete the Counselor's Report and submit it to the EEO office for review, along with a draft Notice of Right to File Formal. The Report and Notice will be issued within 90 days from the date of initial contact.

### **2.3.3 Conducting the EEO Counseling Inquiry**

The purpose of the EEO Counseling inquiry is to obtain information regarding the claim(s), address jurisdictional questions, and respond to the AP's requested remedy. The EEO Counselor should interview persons who can provide information that is relevant to the claim(s), settlement, and jurisdictional questions. The EEO counseling inquiry is not an "investigation" nor is it intended to resolve disputed facts, rather, it is simply gathering information necessary for the EEO Counselor to assist the parties in resolving the matter. The EEO Counselor must control the inquiry at all times and seek guidance and assistance from the EEO Compliance Director/Complaints Manager/Team Leader.

- a. The EEO Counselor will notify the Responsible Management Official (RMO) that a pre-complaint has been filed within 5 days of the initial interview (Responsible Manager Official Notification of Pre-Complaint - HHS-765).
- b. The EEO Counselor will interview all witnesses, including the RMO, within 20 days of the initial contact.
- c. The EEO Counselor should write-up each interview after completed and incorporate the information into the Counselor's Report.
- d. The EEO Counselor should review and summarize all documents relevant to the claim(s) and incorporate the information into the Counselor's Report.
- e. If the EEO Counselor believes the inquiry is deficient procedurally, or in content or scope, he/she should immediately notify the EEO Compliance Director/Complaints Manager/Team Leader.

### **2.3.4 Extending the Pre-Complaint Period Beyond 30 Days**

By the 28<sup>th</sup> day after initial contact, if the EEO Counselor has not completed the counseling process, the EEO Counselor should contact the AP regarding obtaining an extension.

- a. An AP may agree in writing to postpone the Final Interview and extend the period for pre-complaint counseling for up to or less than 60 additional calendar days from the date of the initial contact.

- b. Any extension of counseling must be requested by the EEO Compliance Director/Complaints Manager/Team Leader, prior to the expiration of the initial 30-day period.
- c. If a Contract Counselor is used, the EEO Compliance Director will obtain prior approval from the PSC Contract Administrator prior to extending the counseling period.

Because timely completion of pre-complaint counseling increases the probability of informal resolution and minimizes the negative impact that protracted inquiries have on the work environment, requests for extensions of EEO Counseling should be requested only in the following instances:

- 1. With the written consent of the AP; or
  - 2. Requested by the AP; or
  - 3. Unusual circumstances which prevented completion of the counseling inquiry during the initial 30-day period, *i.e.*, illness, travel, or emergency leave of the AP, EEO Counselor, or a primary witness; high priority and/or time sensitive primary duties of the EEO Counselor; or
  - 4. When the EEO Compliance Director/Complaints Manager/Team Leader believes that informal resolution is likely or imminent and a short additional counseling period is necessary to consummate an agreement.
- d. The requisite Extension Form should be used to obtain the request in writing (Extension of EEO Counseling Agreement - HHS-769).
  - e. If the AP is unwilling to grant additional time, the EEO Counselor must complete the counseling process and issue the Notice of Right to File Formal within 30 days from the date of initial contact. The EEO Counselor should immediately submit the Counselor's Report and draft Notice of Right to File Formal to the EEO office for review and issuance.

### 2.3.5 Settlement

The EEO Counselor should attempt to facilitate a settlement to the pre-complaint. If the AP and the Agency agree to an informal resolution of the dispute during the course of the EEO counseling inquiry, the terms of the settlement should be reduced to writing, in **DRAFT**, using the approved settlement template (HHS-TBD), and sent to the EEO Office for final review and validation by the EEO Office for form and compliance purposes.

- a. The EEO Counselor must document the settlement in writing if one is achieved.

- b. The EEO Counselor must coordinate with, and solicit guidance and advice from, the EEO Compliance Director/Complaints Manager/Team Leader.
- c. EEO Counselors cannot execute settlement of pre-complaints without first communicating with the EEO office.
- d. All settlements must be reviewed by the EEO office and approved by the OPDIV Settlement Official prior to execution.
- e. OPDIV Heads are highly encouraged to designate settlement officials from among the SES ranks who have broad knowledge of the organization and possess extensive managerial experience. This action does not preclude intermediate level supervisors and managers from participating in the settlement process if so delegated by the OPDIV Head.
- f. By virtue of their role as a facilitator in the EEO process, EEO Directors or any member of their staff are precluded from serving as the OPDIV Settlement Official or on a settlement review board if applicable.
- g. Resolutions that include any personnel actions or back pay must also be reviewed by the relevant Human Resources Center for technical accuracy and Human Resources must be a signatory to the agreement in those cases.
- h. The EEO office will be responsible for securing all necessary signatures on the agreement, disseminating copies of the agreement to the parties, implementing and monitoring compliance with the terms of the settlement.
- i. Once a settlement agreement has been executed, the EEO Counselor will submit all paperwork generated during the pre-complaint process to the EEO office and close out the case within 3 days of the agreement being signed.

### **2.3.6 Withdrawal**

If the AP elects to withdraw the pre-complaint, the withdrawal must be obtained in writing on the requisite Withdrawal Form (Voluntary withdrawal of EEO Complaint - HHS-771). Once a pre-complaint has been withdrawn, the EEO Counselor will submit all paperwork generated during the pre-complaint process to the EEO office and close out the case within 3 days of receipt of the withdrawal form.

### **2.3.7 EEO Counselor's Report**

If the pre-complaint has not been settled or withdrawn, the EEO Counselor's counseling activities end with him/her writing the Counselor's Report. The Counselor's Report is a critical part of the EEO complaint process and is used by the EEO office to make an informed decision to accept or dismiss a formal

complaint when filed.

- a. The EEO Counselor will complete the EEO Counselor's Report and submit it to the EEO Compliance Director/Complaints Manager/Team Leader within 5 calendar days before the Final Interview is conducted or the Notice of Right to File Formal is due to the AP.
- b. To ensure quality of the Counselor's Report, the EEO Compliance Director/Complaints Manager/Team Leader will review the Counselor's Report for completeness and sufficiency.
- c. EEO Counselor's Report must be completed even if the AP agrees to go through ADR.
- d. The EEO Counselor is responsible for making necessary edits and finalizing the Report.
- e. The EEO Counselor is responsible for providing the Counselor's Report to the AP at the same time the Final Interview is conducted and along with the Notice of Right to File Formal, when possible.
- f. If the Report is not issued to the AP with the Final Interview or Notice of Right to File Formal, then the report shall be issued within 15 calendar days after the Final Interview/issuance of the Notice of Right to File Formal to file formal to the AP.
- g. The EEO Counselor shall obtain the AP's signature on the report, when possible.
- h. The EEO Counselor is responsible for submitting a final copy of the Counselor's Report along with all paperwork gathered during the counseling process to the EEO office within 3 days of conducting the Final Interview/issuing the Notice of Right to File Formal.

### **2.3.8 Conducting the Final Interview**

In the event that the matter is not resolved, the EEO Counselor will summarize the inquiry and explain the requirements for initiating a formal complaint during a Final Interview with the AP. An in-person Final Interview will be held whenever possible. The Final Interview can also be conducted by telephone or video conference. During the Final Interview, the EEO Counselor should:

- a. Discuss what occurred during the counseling process in terms of attempts at resolution.
- b. Inform the AP of the right to pursue the claim(s) in the formal process.
- c. Inform the AP that the complaint:

1. Must be in writing and provide the Formal Complaint Form (Formal Complaint Form - HHS-773).
  2. Must be specific with regard to the claim(s) that the AP raised during EEO counseling
  3. Must be signed by the Complainant or their attorney
  4. Must be filed within 15 calendar days from the date (s)he receives the Notice of Final Interview (Notice of Final Interview and Right to File Formal - HHS-770). Receipt or postmark within the requisite 15 days will be evidence of a timely filing.
  5. Notify them that the complaint must be filed with the Director of the OPDIV EEO office.
  6. Once filed, the formal complaint will be shared with those who are involved and need to access it and that their confidentiality may not be preserved.
- d. The EEO Counselor must not indicate whether he/she believes the discrimination complaint has merit, nor should he/she express personal opinions to the AP regarding the complaint's merit. The EEO Counselor must not imply to the AP that his/her presentation of the issues in the case constitutes a finding of discrimination.
  - e. The EEO Counselor should provide the AP with the Notice of Final Interview and the Formal Complaint Form, as well as the Counselor's Report, when available.
  - f. Upon completion of the Final Interview, the EEO Counselor will review the case file for completeness and organization and send a copy of the EEO Counselor's Report to the AP no later than the 15<sup>th</sup> day from the Final Interview, if it was not issued during the Final Interview.
  - g. The EEO Counselor will update the iComplaints system and organize the case file to ensure proper closure of the informal complaint no later than the 20<sup>th</sup> day from the date of the Final Interview/issuance of the Notice of Right to File Formal.

### **2.23.9 Assigning Pre-Complaint Numbers and Establishing Case File**

To facilitate tracking of EEO complaints and to minimize confusion when multiple complaints are initiated by the same AP/Complainant, an identifying number will be assigned to each pre-complaint filed. These numbers will consist of HHS, OPDIV acronym, followed by consecutive numbers beginning with 01, and ending with two-digit fiscal year; e.g., HHS-NIHNCI-01-06. This number should be used on all documents generated during the pre-complaint process. The pre-complaint number will be included on all documents, letters, and reports, and serve as the unique

identification number for that pre-complaint and the formal complaint that may follow. (If the matter becomes formal, a designation of “F” will be added after the two-digit fiscal year; e.g., HHS-CMS-01-05-F).

The OPDIV EEO Office should maintain a written case log by fiscal year designating the pre-complaints filed against the OPDIV within the particular fiscal year starting with sequential number 01 and continuing until September 30<sup>th</sup> of the particular fiscal year. This written case log shall serve as an audit check against the data entered into iComplaints.

Once the case number is given to the pre-complaint, the EEO Counselor should go into iComplaints and custom case number the complaint to match the case number the Counselor assigned to the pre-complaint. The auto-generated case number should not be used in iComplaints as these case numbers are assigned based on the number of cases filed across HHS in one fiscal year and not filed against a particular OPDIV. The EEO Counselor is responsible for establishing a case file with the designated case number. The case file should be established to include all of the necessary sections through the formal complaint processing, in the event that the AP files a formal complaint. The information on the pre-complaint should be entered into iComplaints within 3 days of initial contact and within 1 day of each event thereafter.

In accordance with the General Records Schedule for Civilian Personnel Records, the pre-complaint file will be retained for 4 years, if the pre-complaint does not result in a formal filing. If the pre-complaint results in a formal filing, the pre-complaint file will become part of the formal complaint file and subject to further record retention requirements.

### **2.3.9 iComplaints Data Entry**

Data integrity regarding EEO activity is a critical component of the complaints process, specifically in regards to ensuring compliance and timeliness of EEO activity. iComplaints is the official HHS complaints tracking system and is the web-based application used to produce the HHS annual 462 Report to the EEOC and evaluate OPDIV performance within the EEO arena. Therefore, data entry must be performed in this application in real time. When an EEO Specialist obtains data necessary for iComplaints; that data will be entered immediately into the iComplaints database upon receipt of the information. Such data shall be entered by the Specialist within 1 day of obtaining the new data to be entered.

Each Compliance Director/Complaints Manager/Team Leader will conduct a monthly audit of their iComplaints data entry by pulling a monthly 462 Report for their OPDIV. The data should be analyzed and compared against the OPDIV complaints log, to ensure the data is accurate and that all cases have been entered into the application.

## 2.4 Special Pre-Complaint Processing Procedures

### 2.4.1 Counseling Class Complaints

An employee, former employee, or applicant who wishes to be an agent for a class or group of employees, former employees, or applicants for employment who believe they have been or are being adversely affected by an OPDIV policy or practice that discriminates against the class because of race, color, religion, sex, national origin, age, or physical or mental disability may file a class complaint of discrimination. An agent must be a member of the class and allege that he/she has been personally harmed by the personnel policy or practice at issue.

The agent must contact the EEO office within 45 calendar days of the date of the policy or practice that affected the class or, if a personnel action, within 45 days of the effective date of the action.

The EEO Counseling requirements for class claims are the same as those for individual claims, but the facts must be framed to meet the requirements of 29 C.F.R. §1614.204.

The EEO Compliance Director/Complaints Manager/Team Leader will be responsible for assigning an EEO Counselor and will provide the necessary guidance and direction in the processing of the pre-complaint. Contract as opposed to staff EEO Counselors will be used as appropriate for class complaint counseling.

If a class agent's initial contact is with an EEO Counselor, the EEO Counselor must contact the EEO office immediately before commencing any counseling activities.

During EEO Counseling, the EEO Counselor will advise the class agent of:

1. The rights and responsibilities of a class agent;
  2. The class complaint procedures; and
  3. The criteria for the acceptance of class complaints.
- f) The EEO Counselor and the class agent will reach written agreement on the specific identity of the class, the allegations to be addressed during the inquiry, the personnel policies and/or practices that discriminate against the class, and the personnel action or matter that adversely affected the agent.
- g) The EEO Counselor will conduct the limited inquiry and issue the Notice of Right to File Formal within the 30-day counseling period, absent an extension of up to an additional 60 days, settlement, or withdrawal of the pre-complaint.



For additional information on processing class complaints, please refer to EEO MD-110, Chapter 2, Section IX, Chapter 8, and 29 C.F.R. § 1614.204.

## **2.4.2 Counseling Allegations of Discrimination Based on Sexual Orientation**

Allegations of discrimination based on sexual orientation are not covered by the Federal Sector EEO Complaints Process as described in 29 C.F.R. § 1614. However, HHS employees and applicants for employment can raise these matters with either the U.S. Office of Special Counsel (OSC) at [www.osc.gov](http://www.osc.gov), or through HHS' internal complaint process for discrimination based on sexual orientation. Under HHS' policy, an AP must raise an allegation of discrimination within 45 calendar days of the event with the OPDIV EEO office and is entitled to pre-complaint counseling. Section 1.2 of this Manual contains the HHS-EEO and Diversity policy, which includes sexual orientation as a protected basis. The pre-complaint counseling process involves an initial interview, limited inquiry, and issuance of a Counselor's Report and Notice of Right to File Formal, if the matter is not resolved during the 30/90 day EEO counseling period. The AP can also elect ADR in those instances where the Agency agrees to offer it.

- a. During the pre-complaint process, the EEO Counselor must inform the AP of relevant distinctions between complaints based on sexual orientation and those processed under EEOC regulations. For example, complaints based on sexual orientation cannot be the subject of either a hearing before an AJ of the EEOC, an appeal to EEOC, or a civil action under Title VII of the Civil Rights Act of 1964, as amended.
- b. If the AP raises other bases of discrimination that are covered under 29 C.F.R. § 1614 in addition to sexual orientation, the EEO Counselor should separate out the covered bases from the non-covered basis and provide the AP with two separate Reports and Notices so if (s)he decides to file formal the discrimination based on sexual orientation would proceed through the Department's internal process and be adjudicated by HHS, and the allegations of discrimination on the other bases would proceed before the EEOC.
- c. Within 5 days of completion of the pre-complaint process, all paperwork must be submitted to the EEO office for recordkeeping purposes. Also, information on complaints of discrimination based on sexual orientation is not entered into the iComplaints system but tracked on a separate spreadsheet.

For additional information on processing complaints of discrimination based on sexual orientation, please refer to HHS procedures on Processing Complaints of Discrimination or Harassment Based on Sexual Orientation. (Appendix to this SOP)

### **2.4.3 Allegations of Discrimination Raised by Commissioned Corps**

Commissioned Corps Officers of the U.S. Public Health Service are not covered under the EEO laws or subject to the provisions of 29 C.F.R. § 1614. However, Commissioned Corps Personnel Manual, INSTRUCTION 6, Subchapter CC26.1, “Equal Opportunity: Discrimination Complaints Processing” establishes the rights of Commissioned Corps Officers to be free from discrimination and retaliation.

In accordance with this INSTRUCTION, a Commissioned Corps Officer subject to a matter under the control of HHS must file a formal complaint within 60 calendar days (versus 45 under 1614) of the offending incident and may, but is not required, to initiate the pre-complaint process before filing a formal complaint. The Officer is encouraged to work within his/her chain-of-command before filing formal.

Commissioned Corps regulations allow for the resolution of an informal complaint by use of the Administrative Chain (AC). The use of the AC mirrors processes within the military forces of the United States, which allows for the resolution of an informal complaint by using the Officer’s chain of command. This process is similar to a grievance procedure; however, the similarities do not continue since this process does not constitute an election of forum for the processing the complaint. If the use of the AC process is unsuccessful, an Officer may request the use of Alternative Dispute Resolution (ADR).

At any time in the informal process, an Officer may consult with the Commissioned Corps Liaison Officer or any senior commissioned officer concerning the processing of his informal complaint of discrimination.

The processing of informal complaints of discrimination must be completed within a 30 day limit unless extended for an additional 30 day period. There is no additional 30 day extension beyond the 60 days afforded under the Instruction unless they request ADR which allows for an additional 30 days (90 days total for ADR).

#### **Right to Representation**

A Commissioned Corps Officer has the same rights to representation as civilian applicants or employees, with the following distinctions: 1) a representative, who is an active-duty officer or an employee on duty status within HHS, must advise his/her supervisor of complainant’s request for services as a representative; 2) any limitations on the representation imposed by the supervisor must be in writing and addressed to the EEO Officer; 3) the proposed representative shall advise the complainant immediately in writing of the limitation on or the bar to service, and the reasons therefore and 4) complainant may appeal the restriction to the Director, Office of Diversity Management and Equal Employment (ODME), HHS.

## Legal Counsel

A complainant may, at his/her own expense, obtain such counsel as may be considered necessary to prosecute a complaint.

- a. If the Officer engages the pre-complaint process before filing formal, (s)he is encouraged to initiate contact with the OPDIV EEO office where the alleged discriminatory act occurred within 15 days of the incident.
- b. The OPDIV EEO Office will assign an EEO Counselor within 1 day of the contact, and the EEO Counselor will conduct an initial interview within 5 days of initial contact.
- c. The Officer will be advised of his/her right to elect between traditional EEO counseling and ADR, when offered by the Agency.
- d. If the Officer elects EEO Counseling, the EEO Counselor must complete all counseling activities within 30 days of the initial contact. This includes conducting the final interview, providing the Officer with the Counselor's Report, and advising him/her of his/her right to file formal within 60 days of the incident.
- e. The EEO Counseling period may be extended for an additional 30 days if the parties are close to a settlement.
- f. If the counseling period is extended, the Officer has 10 days from receipt of the Counselor's Report to file a formal complaint with the OPDIV EEO Office.
- g. Any settlement or withdrawal reached during the counseling process must be in writing and reviewed by the EEO office.
- h. If the Officer elects ADR during the initial interview, the EEO Counselor must provide the request/referral to the appropriate person/office within 1 day of receipt.
- i. The parties will have 60 days from the date of initial contact to complete the ADR process.
- j. If the matter is resolved through ADR, the resolution will be reduced to writing and submitted to the EEO office.
- k. If the matter is not resolved through ADR, the Officer will have 10 days from the conclusion of the ADR process to file a formal complaint.
- l. Within 5 days of completion of the pre-complaint process, all paperwork must be submitted to the EEO office for recordkeeping purposes. Also, information on complaints of discrimination filed by Commissioned Corps Officers is not entered into the iComplaints system but tracked on a separate spreadsheet.

## **2.5 Alternative Dispute Resolution**

Statutes enforced by EEOC and executive orders encourage the use of Alternative Dispute Resolution (ADR) in resolving employment disputes. EEOC's revised regulations at 29 C.F.R. § 1614.102 (b)(2) require agencies to establish or make available an ADR program. The ADR program must be available during both the pre-complaint and the formal complaint processes.

The guiding principles in the implementation of the ADR program as set forth in Management Directive (MD-110) include: a) Furthering the EEOC's mission; b) Fairness, c) Voluntariness; d) Neutrality; e) Confidentiality and f) enforceability. As a result, ADR programs must be flexible enough to respond to varied and changing priorities and caseloads. Further, ADR programs must have adequate training and evaluation components.

HHS has chosen, as required by 29 C.F.R. § 1614, to establish an ADR program, that uses mediation to address EEO matters. Mediation can be elected in lieu of traditional EEO counseling at the pre-complaint stage or at any time during the formal complaint process.

HHS policy is that management must participate in the ADR process when the aggrieved party or the complainant has requested mediation in either the informal or formal stage.

### **2.5.1 Mediation at the Pre-Complaint Stage**

- a. Once an EEO Counselor is assigned, the Counselor must fully inform the AP about the counseling process and their right to elect either traditional EEO counseling or Alternative Dispute Resolution (ADR) in an effort to resolve the issues in the complaint at the lowest possible level. The election must be in writing, using the appropriate form developed by HHS. The AP's election to proceed through EEO counseling or ADR is final. EEO MD-110, Chapter 2, Section VII, A. If the mediation does not work out to AP's satisfaction, they can not return for traditional counseling or vice versa. The election decision is final.
- b. If the AP elects ADR, the pre-complaint processing period shall be no more than 90 days from the date of the initial contact. The AP has the right to be represented during the mediation process and must designate his/her representative in writing.
- c. If an individual enters into an ADR procedure after a formal complaint is filed, the time period for processing the formal complaint may be extended by agreement for not more than 90 days.

- d. If the AP elects the mediation process, the EEO Counselor will refer the matter to the appropriate EEO official/office to coordinate the mediation process. The EEO Counselor will forward the mediation request/referral form to the EEO office within 1 day of receipt.
- e. Those OPDIV EEO programs which have ADR functions within their portfolio of services may, on a case-by-case basis, assist those OPDIV EEO programs lacking an ADR program as needed and as the workload will allow. Alternatively, those EEO programs having ADR functions in-house may choose to execute Inter-Agency Agreements (IAGs) with OPDIVs seeking to get their ADR services through those OPDIV EEO programs. Otherwise, those EEO programs without an ADR function should obtain a mediator through the Shared Neutrals Program of the Departmental Appeals Board or contract for those services through the PSC within five (5) business days following the ADR election by the AP or Complainant. The OPDIV EEO Office will work cooperatively with the assigned mediator to provide necessary staff services and/or guidance.
- f. Regardless of whether the AP elects ADR, the Counselor must still: Advise the AP of the EEO complaint process; Determine the claim(s) and basis(es) raised by the potential complaint; Conduct a limited inquiry for purposes of determining jurisdictional questions such as timeliness; Advise the AP of their right to file a formal complaint if settlement resolution attempts fail; Prepare a Counselor's Report.
- g. Within 5 days of receipt of the request, the EEO office will notify the RMO of the AP's election (Form). The EEO office will assist the RMO in identifying a management official with the authority to resolve the matter to participate in the mediation session. While ADR is voluntary on the part of the aggrieved party, if an employee elects mediation at any stage of the EEO process (pre-complaint or formal), HHS management is required to participate.
- h. The Administrative Dispute Resolution Act of 1996 (ADRA) and the EEOC ADR Policy Statement recognize that there are instances in which ADR may not be appropriate or feasible. See 5 U.S.C. § 572(b). OPDIV EEO Offices have discretion to determine whether a given dispute is appropriate for ADR and may decide on a case-by-case basis whether it is appropriate to offer ADR.
- i. OPDIV EEO Offices may also limit ADR in other ways, such as geographically (if extensive travel would be required), or by issue. However, OPDIV EEO Offices may not decline to offer ADR to particular cases because of the bases involved (i.e., race, color, religion, national origin, sex, age, disability, or retaliation).

- j. Within 7-14 days of the referral, the EEO Counselor will make arrangements for the mediation. The mediation will take place within 45-60 days from the date of the AP's initial contact.
- k. In order to be timely for purposes of the 462 Report, the settlement agreement must be fully executed within the 90 day counseling period if ADR is elected. If the agreement is not fully executed within the 90 day period, then the Counselor should close the pre-complaint with the issuance of a Notice of Right to File a Formal Complaint (Notice) within the 90 day timeframe. If the settlement agreement is fully executed following the issuance of the Notice, then the agreement should be uploaded into iComplaints and a notation made in the file but the case will still reflect a closure with the issuance of a Notice.
- l. If the ADR mediation process does not result in the resolution of the complaint, the EEO Counselor will issue the EEO Counselor's Report and Notice of Right to File a Formal Complaint along with the copy of the Formal Complaint Form no later than 90 days from the date of the AP's initial contact with the EEO office. If mediation is not successful, the AP will resume EEO Counseling under the provisions of EEOC complaint processing regulations, which require the issuance to the AP of a Notice within 15 calendar days after Notice is received. The EEO Counselor will complete a Counselor's Report, and indicate that mediation failed and that no other information regarding the substance/content of the mediation session should be included in the Report, or in the administrative complaint file.
- m. If not resolved, the EEO Counselor will close out the pre-complaint process, forward all related documents to the EEO office by the 95<sup>th</sup> day of the initial contact, and update iComplaints by the 95<sup>th</sup> day of the initial contact.
- n. The EEO Counselor shall notify the RMO that the pre-complaint phase has ended and that the AP was issued his/her Notice of Right to File a Formal complaint not later than the 20<sup>th</sup> day from the date that the Notice was issued.
- o. Both aggrieved individuals and management officials have the right to designate a representative throughout the complaint process, including during the ADR process, as long as such representation will not result in a conflict of interest. AP's must designate their representatives in writing on the form provided by the Agency. (NOTE: while OGC is available to provide technical advice to both parties during the administrative (formal/informal) phase of the complaints process, once the complainant has entered the litigation stage, OGC represents the interests of the Department. Therefore, to preserve the integrity of the EEO process, it is not advisable for OGC to serve as a representative to management officials.)

- p. Nothing said or done during attempts to resolve the complaint through ADR can be made the subject of an EEO complaint. Likewise, an agency decision not to engage in ADR, or not to make ADR available for a particular case, or an agency failure to provide a neutral, cannot be made the subject of an EEO complaint.
- q. Pursuant to the ADRA, there should be no files kept on the substance/content of the mediation; however records should be kept documenting the occurrence of the mediation for case tracking and program auditing purposes.

### **2.5.2 Mediation at the Formal Stage**

If the Complainant submits a written request for mediation after filing formal, the Agency will review the request and determine if the case is eligible for mediation. If the Agency determines that the case is eligible, participation of a management official in the mediation process is mandatory. When mediation is requested at the formal stage, the parties have up to 90 days to complete the mediation process.

- a. The EEO office will notify the RMO of the mediation request within 5 days of receipt (Information for Management Official – Preparing to Mediate - HHS-768). While ADR is voluntary on the part of the aggrieved party, if an employee elects mediation at any stage of the EEO process (pre-complaint or formal), HHS management is required to participate.
- b. The mediation will be scheduled within 7-14 days of receipt of the request. The mediation will take place within 45-60 days from receipt of the request.
- c. The Complainant has the right to be represented during the mediation process and must designate his/her representative in writing.
- d. If the matter is resolved during mediation, the EEO office will work with the parties to finalize the agreement. All resolutions must be in writing. Once the signatures are obtained, the EEO office will make distribution of the agreement to the necessary Agency officials for the purposes of implementation by the 80<sup>th</sup> day from receipt of the request and monitor/document compliance with the terms.
- e. If the matter is not resolved during mediation, the EEO office will notify the Complainant that processing of his/her formal complaint will continue from the point at which mediation was requested.
- f. All of the Complainant's rights are preserved while the parties are attempting mediation.
- g. All information relating to the mediation process will be entered into iComplaints within 1 day of completion of mediation.

- h. All guidance in section 2.4.1 above regarding the confidentiality of the ADR process, the non-disclosure of any substance/content of the mediation in the administrative complaint file, and the destruction of documents and records pertaining to the substance/content of the mediation following the mediation session also applies to ADR at the formal stage.

## **2.6 Formal Complaint Processing**

### **2.6.1 Acknowledging Receipt of Formal Complaints**

When a formal complaint of discrimination is received by the OPDIV EEO office, the complaint will be date-stamped and immediately entered into the iComplaints system after closing the pre-complaint and converting the case to formal. The case number will remain the same as the case number designated at the pre-complaint stage, with the exception of the letter "F" being added to the end of the pre-complaint case number.

The EEO Compliance Director/Complaints Manager/Team Leader will assign the case to an EEO Complaints Specialist within 1 day of receipt. The EEO Complaints Specialist is responsible for updating the iComplaints system to reflect all new events during the formal stage of the process within 1 day of the event.

The EEO Complaints Specialist will issue a letter acknowledging receipt of the formal complaint within 1-3 days of receipt of the complaint. (Acknowledgement Letter - HHS-775)

### **2.6.2 Requesting Clarification of the Complaint**

If the EEO Complaints Specialist needs additional information or clarification regarding the formal complaint, the EEO Complaints Specialist will issue a letter within 5-10 days of receipt of the formal complaint. The Complainant will be given 15 calendar days from the date of receipt of the request to provide specific information that will clearly define the claim(s). (Request for Additional Information - HHS-777)

- a. If the Complainant does not provide specific information as requested within the time allotted and the record is insufficient to issue a decision on the basis(es) and claim(s), the complaint may be dismissed for failure to cooperate in accordance with the criteria described in 29 C.F.R. § 1614.107(a)(7) and EEO MD-110, Chapter 5, Section IV.B.2. Should the complaint be dismissed pursuant to 29 C.F.R. § 1614.107(a)(7), the EEO Complaints Specialist will issue the dismissal letter within 7 days of the expiration of the time allotted for submitting the additional information.
- b. Should the Complainant provide the information requested, the EEO Complaints Specialist will issue a letter of acceptance/dismissal within 7 days of receipt of the information.



### **2.6.3 Accepting the Complaint in Whole or Part**

When clarification of the complaint is not needed, the EEO Complaints Specialist will complete an expeditious review of the complaint and make a determination as to whether the complaint should be accepted in whole or in part within 20 days of receipt of the formal filing. (Acceptance of EEO Complaint - HHS-779)

Where the Agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in 29 C.F.R. § 1614.107(a), the EEO Complaints Specialist must notify the Complainant in writing of its determination and advise the Complainant that the claim(s) will not be investigated. Also, the Complainant must be advised that there is no immediate right to appeal a partial dismissal. (Letter of Partial Acceptance - HHS-781)

If the Complainant elects a hearing before the EEOC, an AJ will review the Agency's partial dismissal determination, and if the AJ concludes that the Agency's decision did not meet the standards for dismissal that portion will continue in the hearing process.

If the Complainant elects a FAD without a hearing, the Agency will issue a decision addressing all claims in the complaint, including its rationale for dismissing claims.

The Complainant may appeal the AJ's decision or the Agency's decision to the EEOC's, Office of Federal Operations (OFO) for further review.

Further, the letter of acceptance/partial acceptance will advise the Complainant that (s)he has 7 days from receipt of the letter to notify the OPDIV EEO office of any disagreement with the framing of the claim(s). The EEO office will reconcile any disagreements with the framing of the claim(s) within 7 days of receipt of the Complainant's letter.

Attached to the letter of acceptance/partial acceptance will be a document providing the Complainant with specific information and instructions pertaining to the investigative process. (Notice to Complainant regarding Discrimination Complainant Investigation - HHS-784)

Within 1-5 days of issuance of the acceptance letter, the EEO Complaints Specialist will notify management and relevant witnesses that the complaint has been accepted for investigation. (Witness and RMO Letter Explaining Investigation - HHS-785)

In complaints where the documentation needed for the investigation is readily identifiable, the EEO Complaints Specialist will prepare and send a preliminary document request to the relevant Human Resources (HR) Center and/or custodian of the required record(s) within 1-5 days of issuance of the acceptance letter. The EEO Complaints Specialist will request that the documents be provided within 7-15 days of receipt of the request. (Request for Additional Information – HHS-777)

#### **2.6.4 Dismissing the Complaint**

If after reviewing the formal filing, the EEO Complaint Specialist determines that there are sufficient grounds to dismiss the complaint, within 30 days of receipt of the formal filing, he/she will issue a letter of dismissal to the Complainant. The dismissal letter will advise the Complainant of his/her rights appeal rights. The dismissal letter will notify the Complainant that he/she must provide a copy of any appeal and/or brief filed with the EEO to the OPDIV EEO Director. (Final Agency Intake Decision – Dismissal of Complaint - HHS-778)

The EEO Complaints Specialist will contact the HHS, ODME within 35 days of the Complainant's receipt of the dismissal to confirm if an appeal has been filed. If no appeal has been filed, the case will be closed.

#### **2.6.5 Consolidation of Complaints**

Pursuant to 29 C.F.R. § 1614.606, agencies are required to consolidate for joint processing two or more complaints of discrimination filed by the same complainant, after appropriate notification is provided to the parties. Additionally, although not required, 29 C.F.R. § 1614.606 permits the consolidation of complaints filed by different complainants that consist of substantially similar allegations or allegations related to the same matter.

When a complaint has been consolidated, the time frame for completing the investigation is within 180 days after filing the last complaint or 360 days after the filing of the original complaint, whichever is earlier. Also, the complainant may request a hearing after 180 days have elapsed from the original filing. The OPDIV EEO office will consolidate and process formal complaints consistent with the EEOC's regulation and EEO MD-110, Chapter 5, Section III, C.

#### **2.6.6 Amendment of Complaints**

After filing a formal complaint, a complainant may amend a pending complaint to add claims that are like or related to those claims raised in the pending complaint, and there is no requirement that the complainant seek EEO counseling on these new claims. See 29 C.F.R. § 1614.106(d) and EEO MD-110, Chapter 5, Section III, B.

When a complainant raises a new incident of alleged discrimination during the processing of an EEO complaint, it must be determined whether the new incident: (1) provides additional evidence offered to support an existing claim, but does not raise a new claim in and of itself; (2) raises a new claim that is like or related to a claim raised in the pending complaint; or (3) raises a new claim that is not like or related to a claim raised in the pending complaint.

In order to facilitate such determination, the Complainant shall be instructed to submit a letter to the OPDIV EEO office describing the new incident(s) and stating that he/she wishes to amend his/her complaint to include the new incident(s). The request to amend must be filed within 45 days of the date of the alleged discriminatory action in order to be considered timely.

The EEO Complaints Specialist will review the request and determine if the new incident is appropriate for amendment within 10 days of receipt of the request to amend.

The EEO Complaints Specialist will issue a letter either accepting the amendment, dismissing the amendment, or referring the matter back to the pre-complaint process. All documentation related to the request to amend will be included in the EEO complaint file. If a request to amend is received and accepted after the investigation has commenced, the EEO Project Officer for Investigations will provide the assigned investigator with a copy of all relevant documentation for inclusion in the report of investigation within 1 day of issuance of the letter on the request to amend. A copy of this documentation will also be sent to the PSC Contract Manager within 1 day of issuance to allow for any modifications to the cost of the investigation.

Once a complaint has been amended, the Agency is required to complete its investigation of the complaint within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint. Given these time frames, when a complaint is in the investigative process, has already been amended, and an additional amendment is received on or after the 270<sup>th</sup> day from the filing of the original complaint, the Agency will make a determination on whether to accept the amendment, and if accepted, it will be processed as a supplemental investigation. (See - Scheduling and Coordinating the Investigation.)

When a case has been amended, the Complainant retains the right to request a hearing after 180 days have elapsed from the original filing.

### **2.6.7 Offer of Resolution**

Pursuant to 29 C.F.R. § 1614.109 (c) an agency can make an offer of resolution to a complainant who is represented by an attorney at any time after the formal filing until 30 days before a hearing. If the complainant is not represented by an attorney, an offer of resolution cannot be made before the case is assigned to an EEOC Administrative Judge (EEOC AJ).

Complainants have 30 days from receipt of the offer to consider the offer and decide whether to accept it. Offers of resolution must be in writing and explain the consequences of failing to accept the offer. The agency's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief. The complainant's acceptance or rejection of the offer must be in writing.

If a Complainant does not accept an offer of resolution made in accordance with the requirements of § 1614.109 and subsequently obtains less relief than had been offered, the Complainant's attorney's fees will be limited. Specifically, if the AJ finds discrimination and provides less relief than the amount offered by the agency in the offer of resolution, the agency may use the Complainant's rejection of the offer to argue for a reduction of attorney's fees; *i.e.*, no payment for fees or costs incurred after the expiration of the 30-day acceptance period. See - EEO MD-110, Chapter 6, XIV.

### **2.6.8 Allegations of Dissatisfaction Regarding Processing of Pending Complaints**

A Complainant must raise any dissatisfaction with the processing of a complaint before the agency or an AJ dismisses or issues a decision or takes a final action on a complaint of discrimination. If a complainant is dissatisfied with the processing of his/her pending complaint, he/she could be referred to the EEO Director/Complaints Manager/Team Leader. No concerns regarding improper processing raised after a decision will be accepted by the Agency of the EEOC.

- a. Within 5 days of notification of dissatisfaction with the processing of a complaint, the EEO Compliance Director/Complaints Manager/Team Leader must add to the complaint file, a record of the Complainant's concerns and any actions the Agency took to resolve the concerns. If no action was taken, the file must contain an explanation of the Agency's reason for not taking any action.
  
- c. Should the Agency not resolve the Complainant's concerns, he/she may present those concerns to the EEOC at either of the following stages of processing:

1. When a hearing has been requested, to the EEOC AJ; or
  2. When a hearing has not been requested, to the EEOC, OFO on appeal.
- d. Where the AJ or OFO finds an agency has improperly processed the complaint and the improper processing has a material effect on the case, the AJ or OFO may impose sanctions on the agency.
  - e. Allegations of dissatisfaction with the processing of a previously filed complaint should not be the subject of a new complaint or claim. If a complainant files a new complaint or requests to amend a pending complaint to include a claim of dissatisfaction with the processing, the complaint/amendment should be dismissed pursuant to 29 C.F.R. § 1614.107(a)(8). The EEO Complaints Specialist should issue the dismissal within 7-15 days of receipt of the complaint/amendment.

### **2.6.9 Scheduling and Coordinating the Investigations**

On the same day the acceptance letter is issued, the EEO Complaints Specialist will prepare a letter transmitting the complaint to the Project Officer, Program Support Center, 5600 Fishers Lane, Room 16A-54, Rockville, MD 20857, for investigation.

The letter of transmittal will contain the following information: (Transmittal Letter to Investigator - HHS-783)

- a. A clear statement of the issues that were accepted
- b. The Complainant's home mailing address, work location, and work telephone numbers.
- c. The Complainant's designation of a representative, including the representative's mailing address and telephone numbers, if applicable.
- d. Contact information for the designated EEO Complaints Specialist with appropriate telephone numbers. This individual will serve as the coordinator for the on-site investigation.
- e. Legible and unaltered copies of the Letter of Acceptance or Partial Acceptance and EEO Counselor's Report with any attachments

The EEO Complaints Specialist will handle all logistics and arrangements related to the investigation. This will include some or all of the following actions:

1. Transmitting the complaint file to the contract investigator within 1 day of notification of the contractor assignment. (Transmittal Letter to Investigator-HHS-783)

2. Contacting the contract investigator within 1 week after transmitting the file to coordinate the document request and on-site investigation
3. If not previously issued, within 1-5 days of assignment of the investigator, the EEO Complaints Specialist will notify management and relevant witnesses that the complaint has been accepted for investigation.
4. Within 1-5 days of receipt of the investigator's document request, issuing letters to the appropriate offices and individuals to obtain the materials. The EEO Complaints Specialist will allow 7- 15 days from receipt of the request for the documents to be submitted.

Should the EEO Complaints Specialist encounter any problems in obtaining documents, securing cooperation of the Complainant or witnesses, or experience any issues which could delay timely completion of the investigation, he/she must immediately inform the EEO Compliance Director/Complaints Manager/Team Leader for assistance in resolving the matter.

Union Notification: HHS has multiple union agreements, which may impact union representation and involvement in the process. Agencies are strongly advised to seek the advice of the Labor Relations as well as the Office of the General Counsel regarding specific unions and their role in EEO matters. If complainant is a member of the Collective Bargaining Unit (CBU), the Specialist shall notify the Union of any scheduled meeting between the EEO Investigator and complainant. These meetings are deemed to be formal discussions and the Union must be provided advance notice of the meeting and an opportunity to attend. The Union must be given the opportunity to attend the meeting between complainant and the Investigator irrespective of complainant's desire or lack of desire for Union representation. The Specialist should look at the terms of their OPDIV Collective Bargaining Agreement (CBA) to see how many days advance notice is required of such meetings. The notification to the Union must occur within the formal discussion timelines of the OPDIV CBA.

#### **2.6.10 Extending the Investigative Process beyond 180 Days**

The Agency shall complete the investigation within 180 days of the date of filing, unless the complaint has been consolidated or amended. By written agreement within the referenced time period, a complainant may agree to extend the period for investigation for not more than an additional 90 days. (HHS-TBD) If circumstances beyond the control of the investigator exist, the request must be submitted to the PSC Project Officer for formal approval and processing.

### **2.6.11 Receipt of Report of Investigation**

The EEO contract investigator/contractor authorized to conduct the investigation will:

- a. Complete the investigation and submit four (4) copies of the Report of Investigation (ROI) to the OPDIV EEO office (1 original and 3 sanitized) within the delivery times outlined in the statement of work. Any delays which will impact the timely completion of the investigation must be immediately reported to the EEO Compliance Director/Complaints Manager/Team Leader, who will attempt to resolve the matter and/or contact the PSC, as appropriate.
- b. Assemble the ROI in accordance with the requirements outlined in EEO MD-110, Chapter 6, Section IX, Parts A through C.
- c. Provide the OPDIV EEO office with an electronic copy of the ROI. The OPDIV will be responsible for any additional costs associated with obtaining an electronic version of the ROI.

### **2.6.12 Review of Reports of Investigations**

Within 10 days of receipt of the ROI, the EEO Complaints Specialist will complete a technical review of the ROI. An ROI review checklist will be used. (HHS-788) If the review of the ROI reveals that the investigation does not meet the requirements of 29 C.F.R. § 1614.108 and EEO MD-110, Chapter 5, the EEO Complaints Specialist will either take the necessary action to correct the deficiencies internally, or the contractor will be contacted with specific instructions on what action needs to be taken to address the insufficiencies. In either case, the EEO Complaints Specialist will inform the PSC of the problems with the ROI, and when additional work is being requested of the contractor, forward a request for a supplemental investigation within 11 days of receipt of the ROI to the PSC.

When requested by the EEO Compliance Director/Complaints Manager/Team Leader, the EEO Complaints Specialist will also arrange for a legal review of the evidence in the ROI. (Determining the Sufficiency of EEO Investigations by EEOC - HHS-786)

### **2.6.13 Distribution of Reports of Investigations and Complaint Files**

Within 1 day after reviewing the ROI and determining that it is sufficient to issue, and in no case later than 180 days after the date the complaint is filed unless it was consolidated or amended, the EEO Complaints Specialist will send the Complainant and his/her representative, if applicable, the ROI. The letter transmitting the ROI will advise the Complainant of his/her right to, within 30 days of his/her or an attorney's receipt of the ROI, elect a hearing before the EEOC, a FAD without a hearing from HHS (FAD), to withdraw the complaint, and when offered, to engage in mediation. (HHS-789) The EEO Complaints Specialist assigned to the case will

monitor the 30-day time frame to ensure that a timely election is made, or if no election is made, take appropriate action.

## 2.7 Hearings, FADs, Appeals, and Civil Action

### 2.7.1 Hearings before the EEOC

- a. Within 2 days of receipt of the Complainant's request for a hearing, the EEO Complaints Specialist will issue a letter acknowledging receipt of the request. (Acknowledgement of Hearing Request - HHS-791)
- b. If a Complainant submits a timely request for a hearing, within 5 days of receipt of the election or request for the file from the EEOC **Error! Bookmark not defined.**, the EEO Complaints Specialist will forward a copy of the file to the EEOC and the HHS, Office of the General Counsel (OGC). (Hearing Transmittal Request to EEOC - HHS-792) The transmittal letter will inform the EEOC of to whom correspondence should be sent and request that the OGC assign an attorney to serve as the Agency Representative in the case.
- c. Within 7 days of OGC's receipt of the file, the EEO Complaints Specialist will contact OGC to confirm that an attorney has been assigned to the complaint.
- d. The EEO Complaints Specialist is responsible for coordinating with the assigned attorney on discovery requests, pre-hearing conferences, settlements, and all technical aspects of the hearing process; to include making space available for depositions, witness preparation, the hearing; notifying the union when the OGC attorney has scheduled a formal discussion with a bargaining unit employee; arranging for court reporting services; responding to requests for reasonable accommodation by participants in the hearing process; ensuring witness cooperation in the process; responding to witness requests for reimbursement of travel associated with the hearing, etc.
- e. The EEO Complaints Specialist is responsible for following-up with the Agency Representative on a regular basis regarding the status of the complaint and ensuring that after a hearing has been held, all parties receive copies of the hearing transcript and decision. The EEO Complaints Specialist will contact OGC and the HHS, ODME within 2 days of receipt of the AJ's decision to ensure both parties have received the document.
- f. The ODME will issue a Final Order within 40 days of receipt of the EEOC's decision. The Final Order will notify the Complainant whether or not the Agency will fully implement the decision and contain applicable appeal rights. If the Final Order does not fully implement the EEOC's decision, the ODME will coordinate with OGC, and the affected OPDIV, to



file an appeal with OFO.

- g. If a finding of discrimination is issued by the EEOC and the Agency adopts the decision, within 30 days of issuing the Final Order, the Agency will implement the terms ordered by the EEOC, if the Complainant has not filed an appeal. The OPDIV EEO Officer or Complaints Manager will forward a report outlining and documenting the OPDIV's compliance with the decision to ODME within 5 days of completion of all actions.

### **2.7.2 Final Agency Decision without a Hearing**

When a FAD without a hearing (FAD) has been timely requested or a complaint has been remanded by the EEOC for a decision without a hearing:

- a. The OPDIV EEO office will draft the FAD and forward the decision along with the FAD Executive Summary to the ODME within 45 days of receipt of the request for a FAD or receipt of the EEOC's Order. (Request for DHHS Final Agency Decision (FAD) - HHS-793)
- b. The ODME will review and issue the FAD within 60 days of receipt of the request for a FAD.
- c. OPDIV EEO offices without available staff to draft the FAD can (1) secure the services of a contractor to prepare the FAD; or (2) contact another OPDIV EEO office for assistance. In either case, the FAD should be submitted to the ODME within 45 days of receipt of the request.
- d. All FADs drafted by EEO staff or contractors will conform to the standard format established by the ODME.
- e. Should the OPDIV EEO office choose not to secure the services of a contractor to draft the FAD or obtain assistance from another OPDIV EEO office, the request will be sent to the ODME within 1 day of receipt for the ODME to draft and issue the FAD.

When the Complainant has not made a request for a hearing or a FAD without a hearing within 30 days of receipt of the ROI, the Complainant will automatically receive a FAD.

- a. The OPDIV EEO office will draft and submit the FAD to ODME within 40 days from the expiration of the 30-day election period. ODME will issue all non-election FADs within 20 days of receipt.
- b. The FAD should be issued by ODME within the aforementioned 60 days from the expiration of the 30 day election period. OPDIV EEO offices without available staff to draft the FAD can (1) secure the services of a contractor to prepare the FAD; or (2) contact another OPDIV EEO office for assistance. In either case, the FAD should be issued within the aforementioned 60 days.



- c. All FADs drafted by EEO staff or contractors will conform to the standard format established by the ODME.

### **2.7.3 Appeals by Complainants**

- a. Procedural Dismissals:
  - 1. Once notified that a procedural dismissal has been appealed, the EEO Complaints Specialist will transmit a copy of the complaint file to the EEOC, OFO within 10 days of the Agency's receipt of the appeal notification. (Transmittal of Case File to OFO with Agency Checklist – HHS-795)
  - 2. Upon notification of the appeal, the EEO Complaints Specialist will follow-up with the ODME and determine if a brief in support of the appeal was submitted either at the time the appeal was filed or within 30 days of the appeal being filed.
  - 3. If a brief in support of the appeal was filed, the EEO Complaints Specialist will prepare and send a brief in opposition to OFO within 30 days of the Agency's receipt of the brief in support. (Appeal Brief Cover Letter - HHS-796)
  - 4. If a brief in support of the appeal is not filed by the Complainant, the EEO Complaints Specialist will prepare and send a brief in opposition to OFO within 60 days of the Agency's receipt of the appeal.
  - 5. While the appeal is pending before the EEOC, the EEO Complaints Specialist will periodically follow-up with the ODME until notified that a decision has been rendered on the appeal. Once the EEO Complaints Specialist receives the decision, he/she will update the iComplaints system as appropriate.
- b. FADs:
  - 1. Once notified that a FAD prepared by the OPDIV EEO office has been appealed, the EEO Complaints Specialist will transmit a copy of the complaint file to the EEOC, OFO within 10 days of the Agency's receipt of the appeal notification. (Transmittal of Case File to OFO with Agency Checklist – HHS-795)
  - 2. Upon notification that the FAD has been appealed, the EEO Complaints Specialist will follow-up with the ODME and determine if a brief in support of the appeal was submitted at the time the appeal was filed or within 30 days of the appeal being filed.

3. If a brief in support of the appeal was filed, the EEO Complaints Specialist will prepare and send a brief in opposition to OFO within 30 days of the Agency's receipt of the brief in support. (Appeal brief cover Letter - HHS-796)
4. If a brief in support of the appeal is not filed by the Complainant, the EEO Complaints Specialist will prepare and send a brief in opposition to OFO within 60 days of the Agency's receipt of the appeal.
5. If the FAD was prepared by a contractor or the ODME, within 5 days of notification of the appeal, the OPDIV EEO office and the ODME will determine whether to file a brief in opposition to the appeal.
6. While the appeal is pending before the EEOC, the EEO Complaints Specialist will periodically follow-up with the ODME until notified that a decision has been rendered on the appeal. Once the EEO Complaints Specialist receives the decision, he/she will update the iComplaints system as appropriate.

c. Final Actions:

1. Once notified that a decision rendered by the EEOC has been appealed, the EEO Complaints Specialist will transmit a copy of the complaint file to the EEOC, OFO within 10 days of the Agency's receipt of the appeal notification. (Transmittal of Case File to OFO with Agency Checklist – HHS-795)
2. Within 1 day of being notified of the appeal, the EEO Complaints Specialist will notify the OGC attorney assigned to the case that an appeal has been filed and provide him/her with a copy of the appeal.
3. The EEO Complaints Specialist will follow-up with the ODME and determine if a brief in support of the appeal was submitted at the time the appeal was filed or within 30 days of the appeal being filed.
4. If a brief in support of the appeal was filed, the EEO Complaints Specialist will provide the Agency Representative with a copy within 1 day of receipt.
5. The OPDIV EEO office and the OGC will review the appeal and determine whether a brief in opposition should be submitted within the established time frames.
6. While the appeal is pending before the EEOC, the EEO

Complaints Specialist will periodically follow-up with the ODME until notified that a decision has been rendered on the appeal. Once the EEO Complaints Specialist receives the decision, within 1 day he/she will provide the Agency Representative with a copy and update the iComplaints system as appropriate.

d. Noncompliance with Settlement Agreement:

Pursuant to 29 C.F.R. § 1614.504, if a complainant believes that the agency has failed to comply with the terms of a settlement agreement, the Complainant shall notify the OPDIV EEO Director, in writing, of the alleged noncompliance within 30 days of when the Complainant knew or should have known of the noncompliance. The agency shall resolve the matter and respond to the Complainant, in writing. If the agency has not responded or the Complainant is not satisfied with the agency's response, the Complainant may file an appeal within 35 days after notifying the agency of the noncompliance or within 30 days of receipt of the agency's response.

1. Once notified that compliance with a settlement agreement has been appealed, the EEO Complaints Specialist involved in the settlement of the case, will prepare and send a response to the appeal to the EEOC within 30 days of the Agency's receipt of the appeal.
2. While the appeal is pending before the EEOC, the EEO Complaints Specialist will periodically follow-up with the ODME until notified that a decision has been rendered on the appeal. Once the EEO Complaints Specialist receives the decision, he/she will update the iComplaints system as appropriate.
3. Should the EEOC order compliance with the settlement agreement, the EEO office will take all necessary action to comply with the EEOC's decision within 10 days of receipt of the decision, unless the OPDIV determines a request for reconsideration is appropriate.

#### **2.7.4 Appeals by the Agency**

a. Final Actions:

When the EEOC has issued a finding of discrimination, ODME will consult with the affected OPDIV EEO Office and OGC within 5 days of receipt of the decision and determine whether to file an appeal on behalf of the Department.

1. If it is determined that an appeal will be filed, ODME will notify EEOC that it does not intend to fully implement the decision and

issue a Final Order to that effect.

2. At the same time the ODME issues a Final Order not fully implementing the AJ's decision, an appeal will be filed with the OFO. A copy of the appeal will be appended to the Final Order.
3. Within 5 days of receipt of the EEOC's acknowledgment of the Agency's appeal, ODME will submit a copy of the complaint file to OFO. (Transmittal of Case File to OFO with Agency Checklist – HHS-795)

ODME will coordinate with the affected OPDIV EEO Office and OGC to file a brief in support of the appeal within 20 days of filing the appeal. The brief should be submitted to the ODME for review 5 days before the brief is filed with OFO. (Appeal Brief Cover Letter - HHS-796)

4. While the appeal is pending before the EEOC, the EEO Complaints Specialist will periodically follow-up with the ODME until notified that a decision has been rendered on the appeal. Once the EEO Complaints Specialist receives the decision, within 1 day (s)he will provide the Agency Representative with a copy and update the iComplaints system as appropriate.
5. Should the OFO uphold the AJ's decision, the EEO office will take all necessary action to comply with the EEOC's decision within 10 days of receipt of the decision, unless ODME, in conjunction with OGC and the OPDIV EEO, determine a request for reconsideration is appropriate.

#### **2.7.5 Request for Reconsideration of Appellate Decisions by the Complainant**

- a. When the Complainant requests reconsideration of an appellate decision, ODME, in consultation with OGC and the OPDIV EEO office will determine, whether the Agency should submit a statement or brief in response within 5 days of notification by ODME that the Complainant has requested reconsideration.
- b. Should a decision be reached to submit a statement or brief, ODME will coordinate with OGC or the OPDIV to prepare and submit the document to OFO within 20 days of the Agency's receipt of the Complainant's request for reconsideration.

- c. While the request is pending before the EEOC, the EEO Complaints Specialist will periodically follow-up with the ODME until notified that a decision has been rendered. Once the EEO Complaints Specialist receives the decision, within 1 day he/she will provide the Agency Representative with a copy and update the iComplaints system, as appropriate.

#### **2.7.6 Requests for Reconsideration of Appellate Decisions by the Agency**

- a. Should the OFO reverse an Agency decision to dismiss a complaint, a finding of no discrimination, or a determination of compliance with a settlement agreement, or fail to reverse the AJ's decision when the Agency appealed a finding of discrimination, the ODME, in consultation with the OGC and the OPDIV EEO Office, as appropriate, will determine whether to request reconsideration within 5 days of the Agency's receipt of the OFO decision.
- b. Should a decision be reached to request reconsideration, the request will be filed and a statement or brief prepared by the EEO office/OGC for ODME's submission within 30 days of the Agency's receipt of the appellate decision.
- c. While the request is pending before the EEOC, the EEO Complaints Specialist will periodically follow-up with the ODME until notified that a decision has been rendered. Once the EEO Complaints Specialist receives the decision, within 1 day he/she will provide the Agency Representative with a copy and update the iComplaints system, as appropriate.
- d. Should the Agency's request not be granted, the OPDIV EEO office will take all necessary action to comply with the EEOC's decision within 10 days of receipt of the decision. A report outlining and documenting the Agency's compliance with the decision will be filed with the ODME within 5 days of completion of all actions.

#### **2.7.7 Civil Action**

- a. If the Complainant files a civil action while the complaint is pending in the administrative process, within 5 days of receiving notification that the matter pending before the Agency has been filed in District Court, the Agency will take the necessary steps to dismiss the complaint pursuant to 29 C.F.R. § 1614.107(a)(3).
- b. The EEO Complaints Specialist assigned to the complaint will coordinate with the Department of Justice, Assistant United States Attorney (AUSA) and HHS, OGC while the case is pending in District Court.

- c. The EEO Complaints Specialist will respond to all requests for information, documentation, and provide technical assistance to the assigned attorney.
- d. The EEO Complaints Specialist will periodically follow-up with the attorney on the status of the case until a decision is rendered.
- e. Should the case be settled while pending in District Court, the EEO office will be responsible for implementing the terms of the settlement agreement, and when monetary relief is involved, the EEO office will coordinate with the ODME to ensure that the OPDIV reimburses the Department of Treasury for any monies paid pursuant to the requirements of the No Fear Act.

### **2.7.8 Record Retention of Formal Complaints**

In accordance with the General Records Schedule for Civilian Personnel Records, the formal complaint file will be retained for 4 years from the date of closure.

## **2.8 Special Formal Complaint Processing Procedures**

### **2.8.1 Processing Mixed Cases**

Certain actions such as removal, reduction-in-grade, and suspension for more than 14 days, allegations of involuntary resignation/retirement may be appealed to the Merit Systems Protection Board (MSPB). In these cases, when an action is appealable to the MSPB and the employee believes that the action is based on unlawful discrimination or retaliation for EEO activity, the employee may file a complaint with either the OPDIV EEO Office, or an appeal with the MSPB, but not both. Whichever appeal is filed first by the employee (e.g., either the formal complaint or an appeal with the MSPB), is considered an election to proceed in that form.

Mixed case complaints are largely processed the same as non-mixed complaints. The pre-complaint and formal complaint processing procedures and time frames previously described in this document will apply to mixed case complaints with the following exceptions as described below:

- a. An employee must contact an EEO official within 45 calendar days of the alleged discriminatory event or the effective date of a personnel action.
- b. EEO counseling will be conducted. Since the regulations do not permit the consolidation of mixed and non-mixed claims, if the AP raises both mixed and non-mixed claims with the EEO Counselor, two separate Counselor's Reports and Notices of Right to File Formal must be generated.



- c. At the conclusion of the counseling process, if the matter has not been resolved, the AP has 15 calendar days to file a formal complaint.
- d. The OPDIV EEO office will acknowledge receipt of the formal mixed case complaint within 1-3 days of receipt of the complaint (Form) and determine within 20 days of receipt of the complaint whether the complaint should be accepted or dismissed.
  - 1. If dismissed on procedural grounds under § 1614.107, the Complainant will receive appeal rights to the EEOC. (Notice of EEOC Appeal Rights - HHS-797)
  - 2. If dismissed because the Complainant has already filed an appeal with the MSPB on this matter and there is no dispute relating to MSPB's jurisdiction, he/she will be notified of his/her rights and advised to raise the allegations of discrimination with the MSPB.
  - 3. If the Complainant has filed both a mixed case complaint and an appeal with the MSPB and there is a question relating to the MSPB's jurisdiction over the matter, the Agency should hold the complaint in abeyance until the MSPB rules on jurisdiction. The Complainant will receive written notification of this within 7 days of learning of the dual filing and be advised that all time frames are tolled until a decision is rendered.
    - 1. If the MSPB determines that they have jurisdiction over the matter, the complaint will be dismissed pursuant to § 1614.107(d) within 7 days of receiving notification from the MSPB.
    - 2. If the MSPB determines that they do not have jurisdiction over the matter, the complaint will proceed as a non-mixed case, and an acceptance letter will be issued within 7 days of receiving this notification.
  - 4. If the complaint is accepted as a mixed case, the complaint will be investigated. (Acceptance of a Mixed Case Complaint - HHS-780)
- e. At the conclusion of the investigation, the Complainant will receive a copy of the ROI. (Transmittal of ROI – Mixed Case Complaint - HHS-790)
- f. Unlike with non-mixed complaints, the Complainant does not have the right to a hearing before the EEOC. Within 45 days following completion of the investigation, the Agency will issue a FAD.
- g. Within 30 days of receiving the FAD, the Complainant may appeal the decision to the MSPB or file a civil action. The Complainant may petition the EEOC to review the appellate decision of the MSPB.

- h. If after appealing the matter to the MSPB, the MSPB determines that they do not have jurisdiction, the Agency must immediately notify the Complainant that his/her complaint will proceed as a non-mixed case and provide him/her with 30 days in which to request a hearing before the EEOC.
- i. Should the Agency fail to issue a FAD within 120 days of the date of filing the mixed case complaint, the Complainant may file an appeal with the MSPB or file a civil action.

For additional information on mixed cases, refer to 29 C.F.R. § 1614.302 and EEO MD-110, Chapter 4, Section II.

## 2.8.2 Processing Class Complaints

- a. Receipt of the Class complaint.
  1. As previously noted, an individual who wishes to file a class complaint, must complete EEO counseling before filing a formal complaint. Once EEO counseling is completed, the class agent has **15 calendar days** from receipt of the Notice of Right to File Formal to file the class complaint with the OPDIV EEO office.
  2. Within **20 days** of receipt of the class complaint, the Agency will acknowledge receipt of the complaint, designate an Agency Representative who will be assigned to the complaint, and forward the complaint along with the Counselor's Report and any other relevant information pertaining to the complaint, to the EEOC.
  3. Within 20 days of receipt of the class complaint, the Agency will also take all necessary action to preserve any and all evidence with potential relevance to the class complaint; to include appropriate notification to HR, etc. This obligation begins before class certification and continues throughout the processing of the complaint.
- b. Individual complaints that fall within the definition of the class
  1. After a class complaint has been filed, any individual complaint filed before or after the complaint that comes within the definition of the class will not be dismissed by the Agency but subsumed within the class complaint.
  2. The Agency will review all pending complaints and monitor all incoming complaints and provide all relevant complainants with this information within 7 days of determining that the individual complaint falls within the definition of the class.
    - (a) If the class complaint proceeds to a hearing, the claims raised in the separately filed individual complaints may be presented by the class representative at the liability stage, or presented at the remedy stage by the complainant.
    - (b) If the class complaint is dismissed at the certification stage, the separately filed individual complaints will still proceed unless another basis for dismissal applies. The Agency will issue a letter of acceptance or dismissal (or continue processing the complaint if already accepted) on all individual complaints that were subsumed within the class within 20 days of receipt of notification that the class was not certified.

- c. Certification.
  - 1. The EEOC will appoint an AJ to make a decision as to whether to certify the class. The AJ determines if the class meets the certification requirements of numerosity, commonality, typicality, and adequacy of representation.
  - 2. The AJ will issue a decision either accepting or dismissing the class complaint.
  - 3. The Agency will take final action on the decision within 40 days of receipt.
  - 4. The OPDIV EEO office, Agency Representative, and the ODME will review the decision and within 30 days of receipt decide whether to implement or appeal the decision to OFO.
- d. Class Complaint dismissed.
  - 1. If the AJ dismisses the class complaint and the Agency implements the decision, the OPDIV EEO office will process the class agent(s) complaint(s) as an individual complaint and consider it filed on the date of dismissal.
  - 2. The Agency will issue a letter of acceptance or dismissal within 20 days of the effective date of the final order, if no appeal has been filed by the class agent.
  - 3. If the class complaint is dismissed at the certification stage, none of the class members may proceed unless they have filed individual complaints.
- e. Class Complaint accepted.
  - 1. When a class complaint has been accepted by the EEOC and the decision implemented by the Agency, the Agency must use reasonable means to notify the class members of the acceptance of the complaint within **15 days** of receipt of the AJ's decision.
  - 2. The notice must contain the name of the Agency, location and date the complaint was accepted, definition of the class and description of accepted claims, explanation of the binding nature of the decision or resolution of the complaint on class members, name, address, and phone number of the class representative, and a copy of the AJ's decision certifying the class.

- f. Hearing, EEOC recommended decision, and agency final decision.
1. The AJ will develop the record through discovery and a hearing.
  2. The parties will have 60 days to develop evidence.
  3. The AJ will, upon expiration of the period allowed for preparation of the case, set a date for a hearing.
  4. Upon conclusion of the hearing, the AJ will issue a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class, and any individual relief, where appropriate, with regard to the personnel action or policy that gave rise to the complaint.
  5. Within 60 days of receipt of the decision on the merits, the Agency must issue a final decision that either accepts, rejects, or modifies the recommended decision.
  6. The Agency must transmit the final decision to the class agent within 5 days of the expiration of the 60-day time frame. The decision must be in writing, sent to the class agent via certified mail return receipt, and include a copy of the report of findings and recommendation of the AJ. When the AJ addressed the merits of the complaint, the Agency final decision must also address the merits and must include a finding on the issue of discrimination, address the merits of the class agent's personal claim, and include any corrective action. The final decision shall inform the agent of the right to appeal or file a civil action.
  7. The FAD finding discrimination will be binding on all members of the class and the Agency. A finding of no discrimination is not binding on a class member's individual complaint.
  8. The Agency shall notify the class agent and class members of the decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief and the procedures to be followed. Notice shall be given by the Agency within 10 days of sending the final decision to the class agent. The notice will also include the period for which the relief will be available.

9. If the final decision does not find class-wide discrimination, within 60 days of issuance of the decision, the Agency will accept or dismiss or continue processing the separate individual complaints that were subsumed in the class complaint.
- g. Finding of discrimination and individual relief
10. Where a finding of discrimination against a class has been made, there is a presumption of discrimination as to each class member, and the Agency has the burden of proving the member is not entitled to relief.
  11. When discrimination is found and a class member believes he/she may be entitled to relief, the member must file a written claim with the Agency within 30 days of receipt of notification by the Agency of its final decision.
  12. The Agency must issue a final decision on each individual claim within 90 days of receipt of the claim. The decision must include a notice of the right to file an appeal or a civil action.
  13. The AJ retains jurisdiction over the complaint during this time and can resolve any disputed claims of class members and may hold hearings or otherwise supplement the record on the claim of a class member. The Agency must inform the AJ in writing within 60 days of receipt of the class members claim if it intends to dispute the claim and provide such notice to the class member. The AJ will issue an Order tolling the 90-day period within which the Agency is required to issue a decision on the claim. The Agency is required to provide a statement in support of its decision to dispute the claim within 15 days of receipt of the AJ's Order. The class member will have 15 days to respond. The AJ will thereafter issue a decision on the claim, and the Agency will have 90 days from receipt to issue a final decision.
- h. Settlement of a class complaint
1. If a resolution is proposed, notice must be given to all class members in the same manner as notification of certification was given. The notice must include a copy of the proposed settlement, set out the relief, if any, that the Agency will grant, and inform the class members that the settlement will bind all members. The notice will inform the members of the right to submit objections to the settlement within 30 days of receipt of the notice. The AJ will receive a copy of the proposed

settlement and notice sent to all parties.

2. The AJ will review and issue a decision on the settlement after the expiration of the 30-day period allowed for objections. If the AJ determines the settlement is not fair, adequate, or reasonable, (s)he will vacate the settlement and advise the parties of the right to appeal the decision. If the AJ determines that the settlement is fair, adequate, and reasonable, the decision is binding on all members of the class. Anyone who filed objections will be notified of the right to appeal the decision.

For additional information on class complaints, refer to 29 C.F.R. § 1614.204 and EEO MD-110, Chapter 8.

### **2.8.2.1 Processing Allegations of Discrimination Based on Sexual Orientation**

If an individual files a formal complaint of discrimination based on sexual orientation with the OPDIV EEO office, the following formal complaint process procedures will be followed:

- (a) The EEO Complaints Specialist will acknowledge receipt of the complaint within 1-3 days of receipt of the formal filing.
- (b) If the complaint meets all of the jurisdictional prerequisites; *e.g.*, timeliness, the EEO Complaints Specialist will issue a letter accepting the complaint within 20 days of receipt of the formal filing.
- (c) The complaint will be investigated, and at the conclusion of the investigation, the Complainant will receive a copy of the ROI.
- (d) The Complainant has no right to a hearing before the EEOC. Therefore, the OPDIV EEO office will issue a FAD within 60 days of issuance of the ROI.
- (e) If the Complainant is not satisfied with the decision rendered by the OPDIV, (s)he may appeal the decision to the Director, ODME within 30 days of receipt of the OPDIV's decision.
- (f) The Director, ODME will issue a decision within 60 days of receipt of the appeal request.
- (g) The decision of the Director, ODME is final. The Complainant has no further right to appeal or review and may not file a civil action on the matter.

For additional information on complaints of discrimination based on sexual orientation, refer to HHS Procedures on Processing Complaints of Discrimination or Harassment Based on Sexual Orientation.

### **2.8.2.2 Processing Allegations of Discrimination Filed by Commissioned Corps Officers**

If a Commissioned Corps Officer files a formal complaint of discrimination with the OPDIV EEO office, the following formal complaint process procedures will be followed:

- a. If the informal resolution attempt of the Commissioned Corps complaint is unsuccessful, the Commissioned Corps Officer (complainant) must file his/her formal complaint with the OPDIV EEO Officer within 10 days of receipt of the EEO Counselor's Report or within 10 day of conclusion of ADR.
- b. EEO Complaints Specialist will acknowledge receipt of the complaint within 1-3 days of receipt of the formal filing. (Acknowledgement Letter - HHS-805)
- c. The EEO Complaints Specialist will determine whether to accept or dismiss the complaint and provide notice to the Complainant of the determination within 30 days of receipt of the formal filing.
- d. If dismissed, the Officer will be advised of his/her right to appeal the decision to the Surgeon General within 15 days of receipt of the dismissal.
- e. If the complaint is accepted, it will be forwarded for investigation. (Acceptance Letter - HHS-806)
- f. Within 90 days of receipt of the formal filing, the Officer will receive a copy of the ROI. (ROI Transmittal - HHS-808) The time frame for investigation may be extended for a period not to exceed 45 days, if the Officer agrees.
- g. If the Officer does not receive a copy of the ROI within 90 days, and he/she did not agree to an extension, he/she may request that the Surgeon General's Policy Advisory Council (SGPAC) Representative perform an expedited review of the file.
- h. The Officer will have 30 days after receiving the ROI to review, comment, and supplement the ROI.
- i. Within 30 days of receiving comments from the Officer or within 30 days of the expiration of the comment period if no comments were received, the EEO Complaints Specialist will prepare a recommended decision on the merits of the complaint and transmit it to the Officer, the ODME, the SGPAC Representative, and the Surgeon General. If the OPDIV EEO



Office does not issue a decision within the requisite time frame, the Officer may forward the complaint and supporting documentation to the Surgeon General.

- j. The Surgeon General will review the file and recommended decision of the OPDIV and within 30 days render a final decision; request further investigation from the OPDIV EEO office and render a decision within 30 days of receipt of the requested information; or convene a Commissioned Corps Equal Opportunity Review Board (EORB) to review the record and make a recommendation from which the Surgeon General will render a final decision within 30 days.
- k. The decision of the Surgeon General is final and binding. There is no additional right to appeal and no right to file a civil action.
- l. The formal complaint process for Commissioned Corps complaints is not governed by Title VII or 29 C.F.R. Part 1614. As outlined, however, the Commissioned Corps process mirrors the Title VII process with some critical differences: 1) the OPDIV EEO Officer must issue a Recommended Decision (RD) to Complainant; 2) the RD is appealable to the Surgeon General only; 3) the Surgeon General conducts a mandatory review of all Recommended Decisions and issues the Final Agency Decision (FAD) on behalf of the Department; 4) there is no appeal from the FAD issued by the Surgeon General to the Equal Employment Opportunity Commission, Merit Systems Protection Board or U.S. District Court under EEO complaint processing procedures.
- m. Data entry for Commissioned Corps complaints should be made in real time, i.e. (as the events occur) and should be made on the iComplaints website for Commissioned Corps cases. Commissioned Corps cases are not included on the Agency 462 Report so OPDIVs should be careful to avoid entering these cases on the incorrect iComplaints website.

For additional information on complaints of discrimination filed by Commissioned Corps Officers, refer to Commissioned Corps Personnel Manual, INSTRUCTION 6, Subchapter CC26.1.

### **2.8.2.3 Conflicts of Position or Interest**

If the Director of the OPDIV EEO Office, an employee within the OPDIV EEO Office, or the OPDIV Agency official to whom the Director of the OPDIV EEO Office reports is alleged to be a Responsible Management Official (RMO) in a complaint based on actions (s)he personally has taken or failed to take against an AP/Complainant, the complaint will be processed by the Director, Office of Diversity Management and EEO (ODME), HHS, as a conflict of interest complaint of discrimination pursuant to 2.2 – “Pre-complaint Processing” of this Manual. The conflict of interest complaint must be processed outside of the OPDIV EEO Office to avoid the appearance of impropriety or potential for a conflict of interest if such processing occurred at the

OPDIV level. Upon initial contact by the AP or the OPDIV EEO Office on behalf of the AP, ODME will make arrangements for the assignment of a contract EEO Counselor. ODME must also ascertain the relationship between AP and office/alleged Responsible Management Official (RMO) to confirm whether processing the complaint at OPDIV level would create the appearance of, or potential for, conflict of interest because AP is employed in the OPDIV EEO Office, complaint involves the OPDIV EEO Officer or someone in his or her reporting chain is alleged RMO. Once it is determined that the complaint is indeed a conflict of interest matter, ODME staff will contact OPDIV EEO Office for the assigned case number. The OPDIV will assign the case number based on the next available sequential case number on the OPDIV written case log for that fiscal year. The OPDIV EEO Office will create the initial case entry in iComplaints and customize the case number to match that which was assigned. All further data entry into iComplaints on the case will be conducted in a timely fashion by ODME staff to ensure data accuracy and accuracy in reporting. ODME staff will also request the Project Officer, EEO Complaint Investigations (PSC) to assign a contract EEO Counselor.

Throughout the processing of the conflict of interest complaint, ODME staff will provide guidance/cooperation with EEO Counselor, contract EEO investigator, Office of the General Counsel (OGC) Agency Representative or others, as applicable.

Just as in the processing of any other complaint, the aggrieved party may elect traditional EEO Counseling or Alternative Dispute Resolution (ADR). If traditional EEO Counseling is elected, the EEO Counselor will proceed with conducting an informal inquiry and attempting to informally resolve the matter. If there is no resolution within 30 days following the EEO Counselor's assignment, and in the absence of an extension agreement obtained prior to the 30 day expiration of the counseling period, the EEO Counselor will issue the Notice of Right to File a Complaint of Discrimination (NOR) and/or conduct the Final Interview. The OPDIV should inquire as to the status of the case and follow up to ensure that the NOR is issued in a timely fashion or any extension is obtained in a timely fashion to ensure that the case is concluded in a timely manner for 462 Reporting because although these are conflict cases, any untimely counseling will appear on the OPDIV's 462 Report. If the AP elects ADR, ODME will secure the services of a certified mediator by the assignment of in-house staff, through the Departmental Appeals Board, Shared Neutrals Program or through contracting out for those services.

Another alternative is for the OPDIV to obtain an interagency agreement (IAG) with the National Institutes of Health (NIH) Office of the Ombudsman, Centers for Disease Control and Prevention (CDC) Office of Dispute Resolution and EEO, or the Food and Drug Administration (FDA) Conflict Prevention and Resolution Program (CPR). It will be up to NIH, CDC, and FDA to determine whether an IAG for such services is feasible taking into consideration current workload and staffing. If the ADR attempt is successful, a settlement agreement, containing a withdrawal clause, will be signed by the relevant parties. If the ADR attempt is not successful, the EEO Counselor will resume EEO Counseling under the provisions of EEOC

complaint processing regulations and issue the Notice of Right to File a Formal Complaint (NOR). The AP must file their formal complaint within 15 calendar days of receipt of the NOR. The AP, as well as management, has the right to representation throughout the complaint process, as long as such representation would not also result in a conflict of interest.

With regard to formal complaint processing, the following procedures will be observed:

1. ODME will prepare an intake decision letter either accepting or dismissing claims pursuant to Title 29 C.F.R. Part 1614. Neither the RMO nor EEO Officer should be copied on the intake decision letter.
2. ODME will request assignment of an EEO Investigator from Project Officer, PSC. ODME will follow-up with the assigned EEO Investigator to ensure timeliness of the Report of Investigation (ROI). The OPDIV EEO Office should follow up with ODME to ensure timeliness of the issuance of the ROI since any untimely case will reflect on the OPDIV's 462 Report.
3. If the Complainant is a member of the collective bargaining unit, ODME shall notify the Union of the times scheduled for meeting with the Complainant so that the Union will have the opportunity to participate in the meeting as a formal discussion. This contact with the Union shall be made in writing and made a part of the Complaint file. The Union must be provided with 48 hours advance notice of any interview or meeting with the Complainant and their right to be invited is irrespective of the Complainant's desire to have them attend the meeting. ODME's failure to provide adequate notification to the Union may result in an Unfair Labor Practice charge filed against the Agency.
4. ODME will receive and review ROI for sufficiency.
5. ODME will issue the ROI to the Complainant informing him/her of their right to elect a Final Agency Decision (FAD) with or without a hearing.
6. If hearing is elected, ODME will prepare and forward complaint file to EEOC District Office, then issue Final Order following EEOC hearing.
7. If FAD without a hearing is elected, ODME shall prepare the FAD timely manner and have it issued to the Complainant.
8. ODME will coordinate processing of any EEOC or MSPB appeal of FAD.

## **Chapter 3 - EEO Investigations**

## Chapter 3 - EEO Investigations

### 3.1 Applicability

These procedures apply to all Department of Health and Human Services (HHS) Operating Divisions (OPDIVs). In cases where an OPDIV has been authorized to contract their own EEO investigative services, rather than obtaining support through the HHS EEO Contract Program Manager (ECPM), the OPDIV will submit a waiver request to the Office of Diversity Management and EEO that outlines their procedures to ensure compliance with the policies and procedures contained in this chapter.

### 3.2 Statement of Work/Reporting Requirements

In July of each year, the HHS ECPM will convene a meeting of the OPDIV EEO Complaints Directors/Managers/Team Leaders to prepare the Statement of Work (SOW) for implementation in the next Fiscal Year, with the goal of improving timeliness and quality of EEO Investigations. The group shall also review the any standards or processes required of the investigators for process improvement.

The ECPM will maintain an Investigations Log which will track and record concerns received from the OPDIVs regarding the quality and timeliness of investigations. The Investigations Log, described in Section 3.13.1 of this Chapter, shall record customer feedback tied to the individual investigator and contracted firm. The ECPM will report this data, via a key performance indicator (KPI), to the Director, Office of Diversity Management, on a monthly basis. The ECPM will take immediate steps to rectify any contract deficiencies and will work with the Director, ODME to determine whether individual investigators or firms should be prohibited from doing further investigations for HHS.

The ECPM will work in concert with the OPDIV EEO Complaints Directors/Managers/Team Leaders to draft the SOW for the investigative firms. The SOW shall require any firm doing business with HHS to abide by the guidance and procedures contained in this Manual.

Once the SOW is finalized, a copy shall be provided to the OPDIV Complaints Director/Manager/Team Leader to ensure they are knowledgeable of the contract performance specifications.

The ECPM shall provide a financial report to the ASAM Diversity Management and EEO Council during the first quarter of each fiscal year outlining all contracted EEO services to include cost for investigations, amendments, counselings, Final Agency Decisions (FADs), and any other service provided by the contract firms.

### **3.2.1 Meeting with Investigative Contracting Firm**

The ECPM shall meet with each investigative firm currently used by HHS at least annually, or as needed, to:

- Brief each company on any new HHS requirements or procedures
- Summarize problems realized in the prior Fiscal Year
- Present the performance KPIs of their particular company
- Review the terms of the new SOW
- Obtain the firm assurances that their investigators will comply with the requirements of the HHS EEO and Diversity Management Policy and Procedures Manual.

During the meeting with the investigative firm representatives, each firm shall present certification that they have trained all of their EEO investigators prior to the start of the current Fiscal Year. The ECPM shall maintain a file with these certificates organized by Fiscal year. In addition, the ECPM shall collect the training plans of the investigative firms for the upcoming Fiscal Year.

### 3.3 Investigative Training Plans

The ECPM shall review the investigative training plans, including the lesson plans, of the investigative firms to ensure that they meet the requirements contained in Management Directive-110 (MD-110, Chapter 6, Section II, page 6-1). If the ECPM is dissatisfied with the training plans for the investigators he shall work with the contracting firms to make sure that the training meets the HHS expectations.

The Investigative Training Plans for the firms should include a module for 32-Hour Initial Investigative Training as well as a module for the 8-Hour Continuing Investigator Training.

The 32-Hour course should include at a minimum the following:

#### Overview of EEO Process

1. Emphasize time frames
2. Role and responsibilities of EEO investigator as described in MD-110
3. Presentation of relevant statutes including, but not limited to, Title VII, Rehabilitation Act, Americans with Disabilities Act, Age Discrimination and Employment Act, Equal Pay Act
4. Must present theories of discrimination relevant to the statutes above including disparate treatment, adverse impact, and reasonable accommodation theories
5. Detailed instructions concerning issues attendant to fragmentation
6. Case management issues, including practical techniques concerning the timely investigation of complaints
7. Remedies including compensatory damages, attorneys fees, costs
8. The collection of relevant information when compensatory damages, attorneys fees, and costs are at issue
9. Investigative techniques such as gathering and analysis of evidence, interviewing witnesses, making credibility determinations, and gathering and reviewing documentary evidence.
10. Privacy Act protected information for sanitizing the ROI

The 8-Hour Refresher course should include at a minimum:

- a. Segments on legal and policy updates
- b. Regulatory and statutory changes
- c. Investigative skill development
- d. Privacy Act protected information for sanitizing the ROI

### **3.4 Requesting an Investigator**

After an Acceptance/Dismissal Letter or Partial Acceptance Letter is sent to the Complainant, a request for an investigator will be e-mailed within two business days to the HHS ECPM. A copy of the Acceptance/Dismissal or Partial Acceptance Letter will be attached to the e-mail. The letter will be signed and dated on letterhead stationary. If the OPDIV is unable to scan the signed letter, the letter will be faxed to the ECPM after the e-mail requesting an investigator is sent.

The ECPM will acknowledge the OPDIV request for an investigator through e-mail to the OPDIV EEO Complaints Director/Manager/Team Leader with a copy to the EEO Specialist.

The ECPM will assign a contract investigative firm (contractor firm) within two business days, to perform the investigation. If the EEO Specialist does not receive a response from the ECPM that a contractor firm has been assigned within that time, they will immediately contact the ECPM and his/her immediate supervisor for immediate assignment to a firm.

Once the EEO Specialist is notified of which contractor firm will investigate the complaint, they will provide an official copy of all the documents contained in the administrative file and a copy of the SOW to the contractor firm. This will be done within two business days of receiving the notification from ECPM of which contractor firm will be handling the investigation.

### **3.5 Designating the Investigator**

When the contractor firm receives the complaint assignment, they will have two business days to assign an investigator. After the assignment of the investigator, the contractor firm must send the name of the assigned investigator and their e-mail contact information to the ECPM and request the ECPM issue a Letter of Authorization. The ECPM will provide the letter to the investigator, contractor firm, and the OPDIV EEO Specialist within two business days of being notified.

#### **3.5.1 Notification to OPDIV Officials**

Once the investigator has been identified and assigned, the ECPM shall send a letter to the OPDIV Executive Officer or equivalent, and Responsible Management Official (RMO). The letter will introduce the investigator, explain that they are investigating an EEO complaint filed in the OPDIV, request that all documents pertinent to the investigation in their possession be preserved, and solicit their



support to ensure all prerequisites for a successful and prompt investigation is conducted. The letter will contain a “Required No Later Than Date” for submission of all data, files, and other pertinent information listed in the IP from the OPDIV. The letter will also list the accepted claims which will be investigated. The ECPM will coordinate with the EEO Specialist on the OPDIV notification and ensure a copy is also sent to the investigator and each listed witness.

### **3.6 The Investigation**

Once the Letter of Authorization is received by the investigator, they will have five business days to submit an Investigative Plan (IP) to the ECPM and the EEO Specialist. The contractor firm and investigators will be provided with a standardized format for the Investigative Plan, which the investigator will use to prepare the IP.

The IP will include a list of potential witnesses and the questions each witness will be asked. It will also include a list of the documents needed to perform the investigation. The ECPM and the EEO Specialist will have two business days to review the IP and make any corrections or required changes. The ECPM will send the Plan back to the investigative firm. If the IP is deficient, the ECPM will notify the investigative firm of the nature of the deficiencies and require them to resubmit the corrected IP within two business days.

### **3.7 Scheduling and Coordinating the Investigation**

Once the IP is approved, the ECPM will notify the contractor firm and the EEO Specialist, who will then relay the OPDIV EEO contact information to the contractor. The OPDIV EEO contact will serve as the liaison for the investigator for any logistical needs, administrative needs, and collection of workforce analysis that may be needed. If the investigator is having a difficult time contacting a witness or getting documents from a witness, they must notify the OPDIV EEO contact to request assistance.

#### **3.7.1 Document Requests**

The EEO Specialist will forward the list of documents requested by the investigator to relevant OPDIV officials. Upon receipt of the request from the OPDIV EEO Office Agency officials will immediately begin to assemble the requested documents. The documents will be provided to the investigator within 15 days of receipt of the request by the Agency official.

If the investigator is having a problem getting documents, they will immediately inform their EEO contact at the OPDIV and the HHS ECPM. If the EEO contact is unable to secure the documents from the Agency officials, s/he will immediately inform the OPDIV Complaints Director/Manager/Team Leader and the ECPM who will contact the OPDIV Executive Officer or designated representative to solicit their support.

### **3.7.2 Affidavits**

The investigator will first take the affidavit of the Complainant. The investigator will contact the Complainant directly. Once the date and time of the interview are set, the investigator will contact the EEO contact to secure a space for taking the affidavit, if they are unable to find one on their own. The interview will be conducted face-to-face. However if circumstances exist which preclude a face-to-face interview, the investigator may request, and the OPDIV EEO Director/Manager/Team Leader may allow the interview of the Complainant to be done by an alternative method. This may be done at the request of the Complainant or their representative or when the Complaints Director/Manager/Team Leader deems it necessary to do so.

The investigator will not administer an Oath, but will instead emphasize that the interviewee will be required to sign an affidavit affirming the truthfulness of their testimony. This affidavit will become an official part of the completed Report of Investigation (ROI).

The investigator will make a best effort to have the Complainant sign their affidavit at the end of the interview. Upon the request of the complainant they may have the affidavit reviewed by their representative, attorney, or union representative and return the signed affidavit within 7 days. However, in this case, the signature on the affidavit should be made before a notary public and the original should bear the notary seal.

### **3.7.3 Witnesses**

At the end of the interview, the investigator will ask the Complainant for a list of witnesses they want interviewed, including a proffer of their testimony. The Complainant's witness list will be an Exhibit in the ROI. In addition, the reasons why the investigator determined not to interview some or all of the listed witnesses will be included in a Memorandum to the File which will be part of the same Exhibit.

If there are other witnesses located in the same commuting area as the Complainant, the investigator will meet with those witnesses in person to take their affidavit. However, the OPDIV EEO Complaints Director/Manager/Team Leader may determine whether interviews of other witnesses in the commuting area can be done by some other means, such as those listed in the next paragraph or those methods contained in MD-110, Chapter 6.

Interviews of witnesses outside the commuting area will not be done in person but either telephonically, by sending interrogatories to the witness, or by some other approved means. However, telephonic interviews are the next preferred means of taking an affidavit.

If there is a problem with in-person interviews or telephonic interviews for a witness, such as when a witness is unavailable due to workload or leave, a witness can be e-mailed or mailed a set of interrogatories to complete. If interrogatories are used, the investigator will forward the interrogatories to the witness by e-mail. If the witness does not have access to e-mail the investigator shall send interrogatories to the witness by both Certified Mail – Return Receipt Requested and first-class mail. The witness will be given five business days to submit their responses. Their responses must be certified to be the complete truth to the best of their knowledge, which language will be included by the investigator in the form sent to the witness. If the witness was e-mailed the interrogatories, they can respond by e-mail. However, an electronic signature (/s/ Witness Name) must be attached and an original signed copy of the responses to the interrogatories must be sent by mail to the investigator (or the contractor for which they are subcontracting to do this work).

Testimony may be obtained and the investigation may be completed using all of the available methods contained within MD-110.

After finishing the interview, the investigator will e-mail the Complainant or other witness the draft affidavit attached by close of business the day after the interview was completed. The affiant will be informed that s/he may make corrections or additions to the affidavit prior to signing the affidavit, but the corrections or additions require the affiant's initials." Whether the complainant is represented or not, they will have four business days to e-mail back the affidavit with an electronic signature (/s/ Witness Name) attached and an original signed copy of the affidavit must be sent by mail to the investigator (or the contractor for which they are doing this work).

### **3.7.4 Privacy Act Protected Information**

In order to be in compliance with the Privacy Act, investigators shall not disclose Privacy Act protected information of one witness with any other witness. This includes, but is not limited to, social security numbers, home addresses and phone numbers. Other information, such as dates of birth, salary information and medical information, will normally be excluded from the ROI depending upon the issues under investigation.

### **3.7.5 Uncooperative Witnesses**

If the Complainant or a witness is uncooperative, the investigator will immediately notify the OPDIV contact person, in addition to the Complaints Director/Manager/Team Leader and the HHS ECPM. This includes witnesses who are reluctant to participate, but also those who have work responsibilities or leave plans that will delay the investigation. Since the complaint is being processed for the Complainant, the latter must make themselves available to meet with the

investigator and complete their responsibilities for documentation. While official time is available to Complainants to participate in various elements of the EEO process, this does not mean they are only obligated to participate in processing their complaint when they are at work. Witnesses also have an obligation to prevent delays in complaint process.

### **3.8 Timeliness of the Investigation**

#### **3.8.1 Investigations Stretch Goal**

HHS has established stretch goals for the completion of EEO investigations in an effort to improve and strengthen the EEO complaints program. The stretch goal for the completion of the investigation is within 60 days of its assignment to an EEO investigator. Each OPDIV should make every effort to achieve this 60 day stretch goal and assist the HHS ECPMS in achieving this goal. While the Equal Employment Opportunity Commission (EEOC) allows a 180 day completion period for an investigation, extending this timeline beyond the 60 day stretch goal should be the exception. It should be noted that 29 C.F.R. § 1614.407(b) provides complainants may file directly in federal district court if no final agency action has been taken within 180 days of the filing of the formal complaint.

#### **3.8.2 Extensions of Investigations**

If the Investigator believes they will not be able to meet the 60 day completion stretch goal, they will contact the OPDIV EEO Complaints Director/Manager/Team Leader, who will request an extension from the HHS ECPM.

The OPDIV EEO Complaints Director/Manager/Team Leader will take a proactive role in ensuring the timeliness of the investigation. S/he shall check in with the investigative firm at 30 days from the date the investigation is assigned to the contractor to determine the status of the investigation, whether they are on track to meet the 60 day stretch goal deadline for investigations, and determine if they are experiencing any problems which may delay the investigation, such as problems with witnesses and document collection.

If the OPDIV EEO Complaints Director/Manager/Team Leader determines there are problems which may delay the investigation, they will convey these concerns to the ECPM, and take steps towards immediate resolution. For instance, if there are problems with witnesses, the OPDIV EEO Complaints Director/Manager/Team Leader should elevate the concern through the witnesses' chain of command within the OPDIV and get a resolution to the problem witness or problem with document collection. There should be proactive strategy involved in ensuring that the 60 day deadline is met.

Extensions may be granted as follows:

OPDIV EEO Complaints Director/Manager/Team Leader	Up to 90 days
ECPM	Up to 120 days
Director, Office of Diversity Management & EEO	Up to 180 days

### **3.9 Post-Investigation**

#### **3.9.1 Content of the ROI**

Once the investigation is completed, the ROI will be compiled in accordance with EEOC MD-110, Chapter 6. It will contain a Summary of the ROI, signed affidavits from the complainant, the RMOs, and all other witnesses interviewed. It will also contain all relevant documents. If there are missing affidavits or documents, the investigator will prepare a signed Memorandum to the File explaining why the information is missing.

The Investigative Summary will include a Table of Contents which will be the final part of the Investigative Summary. All dates will be written out: August 27, 2007, not 8/27/07. In cases where age is a basis, the date of birth will be provided rather than the witness' age or 40+. See MD-110, Chapter 6, Section X, page 6-22.

It is expected that the contractor firm will perform a thorough review of the ROI before submitting it to the OPDIV.

When the ROI is completed, the contractor firm will submit one original and four copies of the ROI to the OPDIV's EEO Office. The original will not be sanitized. The copies will be sanitized, including having all social security numbers, salary information, dates of birth, home addresses, and phone numbers pertaining to any witness removed from the copies of the ROI. All Privacy Act protected information shall be redacted from all copies of the ROI prior to submitting them to the OPDIV EEO Office.

#### **3.9.2 Review of the ROI**

When the ROI is received by the OPDIV EEO Office, the assigned EEO Specialist will review the ROI for sufficiency. The EEO Specialist will be responsible for determining if the ROI needs to be sent back to the contractor for additional work. This may include requesting a supplemental investigation or just correcting errors. However, if the errors are not substantial, the EEO Specialist will make the corrections. See MD-110, Chapter 6 requirements.

The ROI will be checked to make sure no additional documents are needed. The EEO Specialist will also check to ensure that all appropriate witnesses were interviewed and gave a statement. If the investigator was unable to obtain a statement from an appropriate witness, the ROI should contain a Memorandum to the File explaining why.

Affidavits of Complainant, RMOs and all witnesses will be reviewed to ensure they are complete and that the Investigative Summary includes an accurate recitation of what was said in the affidavits. If it does not, the Investigative Summary needs to be changed to ensure that it accurately states what is in the affidavits and documents. This review will be completed within ten business days of receipt of the ROI. Citations in the Investigative Summary to documents in the ROI will be checked to make sure they are accurate. Citations in the Investigative Summary to statutes, regulations, EEOC decisions and Court decisions will be checked to make sure they are accurate.

The ROI Sufficiency Review should be conducted using the ROI Review Checklist and/or ROI Review for Sufficiency contained in the standardized forms supporting Chapter 2 of this Manual. (ROI Review Checklists (Internal Use Only) - HHS-788)

If the OPDIV EEO Specialist determines the ROI is deficient, they will immediately contact the ECPM and arrange to immediately rectify the deficiencies.

The ROI will not contain any reference to the validity or credence of the complaint, nor shall it render any “legal opinions” with regard to the complainant’s claims. The ROI will be factual in nature based on the information provided during the course of the investigation.

### **3.10 Amendments**

Any request for an amendment must be made prior to finalization of the ROI. If an OPDIV EEO Office determines that amended claims should be accepted for investigation a new Letter of Acceptance/Dismissal or Partial Acceptance shall be prepared informing the complainant which amended claims are accepted and which are dismissed.

The OPDIV EEO Office will notify the HHS ECPM for the assignment of an investigator following the procedures in Section 3.2 of this Chapter.

The ECPM will contact the contractor to determine how far along the investigation is and see if the investigation can include the new claims. If it can, the investigator will add on the new claims. If not, then a Supplemental Investigation will be done. Unless the OPDIV EEO Complaints Director/Manager/Team Leader objects, the same contractor and investigator will be used as did the original investigation.

### **3.11 Mixed Case Complaints**

The time limit for completing the investigation of a mixed case complaint is 120 days.

29 C.F.R. § 1614.302(d)(1) provides complainants may file directly to the MSPB or a federal district court if no final agency action has been taken within 120 days of the filing of a mixed case complaint.

### **3.12 Forwarding the ROI to Complainant**

Once the EEO Specialist finishes his/her review of the ROI, an ROI Transmittal and Election letter will be prepared to forward the ROI to the Complainant. The transmittal letter will follow the format contained in the HHS's standardized forms.

If the Complainant is represented, one copy of the ROI is sent to Complainant's representative and another to the Complainant. The transmittal letter will be addressed to the Complainant's representative with a copy of the letter sent to the Complainant. The OPDIV will always keep the original of the ROI, along with the other two copies in case an EEOC hearing or trial is requested later.

### **3.13 Quality of Investigations**

In attempt to ensure the highest quality of EEO investigations at HHS, the ECPM should keep track of all investigations conducted throughout the HHS to ensure timeliness and effectiveness of these investigations. It is within the ECPM's responsibility as the contracting officer for HHS to ensure that there is sufficient oversight over these investigations.

#### **3.13.1 Investigations Log**

The ECPM will keep track of each individual investigator and their success in completing the investigation. The ECPM should keep an Investigations Log, by contract firm, by name of each investigator assigned to each EEO complaint within the Fiscal year, to include the Complainant's name and the assigned case number.

This Investigations Log should track the cases the individual investigators complete within the 60 day investigations stretch goal, and within the 180 day regulatory goal. In addition to timeliness, this Investigations Log should include information regarding complaints received by the OPDIV EEO offices and witnesses regarding the manner in which the investigation was conducted. The Log should reflect the nature of the complaint and the individual logging the complaint and it should appear under the name of the investigator. This Log should also include the name of the investigator's investigative firm. The ECPM should do regular assessments of this Log to determine patterns with particular firms or investigators.

Those investigators who repeatedly miss the stretch goal of 60 days or the statutory goal of 180 days to complete the investigation or who have multiple complaints lodged against them during the Fiscal Year will be evaluated for non-performance. If non-performance is confirmed, the ECPM will notify the investigative firm in writing that the particular investigator should not be assigned to future HHS investigations and the reasons for this request. The Investigation Log should reflect this decision.

The ECPM will continually monitor the Investigations Log throughout the Fiscal Year and if there are disturbing trends with a particular investigative firm repeatedly missing deadlines or a large number of concerns raised against the investigators of the firm, then ECPM shall meet with the head of the investigative firm and share the Investigations Log with them to show them the problems that they have been having with the investigators and allow the firm an opportunity to correct the problems. If the problems persist, the ECPM shall take immediate actions to restrict the contractor from conducting HHS investigations.

In order for a firm to be reinstated for purposes of HHS investigations, they must submit a proposal to the ECPM outlining the corrective measures they have implemented to avoid the problems reported upon in the past. The ECPM will make a determination as to whether the investigative firm should be reinstated.

The ECPM shall compile this Investigations Log throughout the Fiscal Year and at the Annual Meeting of OPDIV EEO Complaints Directors/Managers/Team Leaders share the list of concerns and ask whether there are any additional concerns which were not covered in the Log. This Annual Meeting is described in Chapter 3.1 of this Manual.

### **3.13.2 OPDIV Feedback**

At the conclusion of each investigation, the OPDIV EEO Complaints Director/Manager/Team Leader shall provide the ECPM with any negative feedback on particular investigators or particular firms to be included in the ECPM Investigation Log. This feedback shall be submitted to the ECPM within 15 days of the OPDIV receipt of the ROI.

The ECPM shall develop a standardized form for the OPDIVs to use in order to provide this feedback.

The OPDIV Complaints Director/Manager/Team Leader shall consult with the ECPM and make a determination as to whether the particular investigator should ever be assigned to conduct a HHS investigation again, based on the egregiousness or seriousness of the investigator mistake.

Once it is determined that a particular investigator should no longer be assigned to HHS investigations, the ECPM shall notify the contract investigative firm in writing that the investigator should not be assigned to future HHS cases following the steps outlined in Section 3.13.1 of this Chapter.



### **3.14 iComplaints**

#### **3.14.1 Data Entry**

It is the goal of HHS to have real time data entry into iComplaints to ensure the accuracy of the data and allow OPDIVs to effectively report to HHS on the status of their complaints. This includes the cost data for the EEO investigations contracted through the ECPM.

Once the complaint is assigned to the investigative firm, the ECPM will know the initial price that is being charged for the investigation based on the accepted claims. This initial price should be entered into iComplaints immediately. Occasionally, there will be other costs that arise during the course of an investigation and the final amount charged by the firm may change.

Once the final invoice is received from the investigative firm at the conclusion of the investigation, the ECPM shall immediately update iComplaints with the actual cost of the investigation.

Note, this may result in a difference in the end of the year Key Performance Indicators (KPIs) because the initial data entry of cost is based on the initial cost and the final cost will not be realized until the conclusion of the investigation and the final invoice is received.

#### **3.14.2 Efficiency**

iComplaints has many features to allow for efficiency of reporting and record retention. The ECPM should use the application to generate reports needed and speak with HHS Administrators about adding the appropriate fields needed to capture data for the ECPM reporting.

iComplaints also allows the user to scan and load documentation related to the case file. The ECPM should make efforts, where possible, to upload invoices, Letters of Authorization, communication and e-mails between the investigative firm and investigators into the case file within iComplaints. This application will provide for an electronic filing system for the ECPM documents and will greatly reduce the need for paper copies and office space.

The OPDIV should already load the signed copy of the Acceptance/Dismissal and Partial Acceptance Letters into the iComplaints; accordingly, there is no need for the ECPM to maintain paper copies on these letters because if they need to be reviewed, this can be done by going into the case in iComplaints.

## **Chapter 4 – Reasonable Accommodations**

## Chapter 4 - Reasonable Accommodations

### 4.1 Introduction

US Department of Health and Human Services (HHS) and its Operating Divisions (OPDIVs) will implement reasonable accommodation procedures in compliance with policies established by the Equal Employment Opportunity Commission (EEOC).

**Request:** Individual makes request for reasonable accommodation (Section 4.6):

1. An **employee** should request a reasonable accommodation from his/her immediate supervisor; or the HHS Operating Division (OPDIV) Reasonable Accommodation Designee. The request may be made orally or in writing.
2. A **job applicant** can request reasonable accommodation from Human Resources (HR) Specialists, individual hiring managers, selective placement coordinators, reasonable accommodations specialists, or other HHS employees with whom s/he has contact in connection with the application process.
3. For record keeping purposes, an oral request should be followed by completion of a “Confirmation of Request for Reasonable Accommodation” (See HHS Form 557 at Appendix D) or by confirming the request in writing (including E-mail) to the person or office designated by the HHS OPDIV. A staff member can assist the individual with this documentation.

#### 4.1.1 Individuals Processing Requests:

The staff member receiving the request must determine who will be responsible for handling it and forward it, if necessary, to that person **as soon as possible but in no more than three business days**. The **individuals designated to process requests for** reasonable accommodation can include: HR Specialists (for applicants); employee supervisors; employee’s Office Director; or the HHS OPDIV Reasonable Accommodation Designee. (Section 4.6)

#### 4.1.2 Time Frames for Processing Requests and Providing Reasonable Accommodations (Section 4.11):

If a request can be processed by the employee's supervisor or Office Director, does not require supporting medical information, and no extenuating circumstances apply, the request shall be approved or denied in no more than **ten business days** from the date the employee makes the request, and sooner whenever possible.

The accommodation, if approved, will be provided within **ten business days** of the date the request was approved.

If medical documentation is required, time frames are suspended until the requested medical documentation is submitted. In order to allow the agency's medical reviewing authority an opportunity to review medical documentation, the agency shall request from the employee authorization to contact the physician completing the medical documentation. After medical documentation is received and a decision is made to grant the accommodation, it will be provided within **15 business days** from the receipt of the documentation.

If the employee needs to try various accommodations to find one that is suitable, the time frame will be expanded by mutual consent.

Certain **extenuating circumstances** beyond the control of the agency may delay providing reasonable accommodation within the time frames listed above.

Every accommodation should be provided as soon as possible. Certain requests require **expedited processing** including provision of accommodation during the application process and to enable an employee to attend a meeting on a specific date.

#### 4.1.3 Denial of reasonable accommodation must be documented. (See HHS Form 557a at Appendix D). The decision maker may not issue a written or verbal denial of a reasonable accommodation request without first consulting with the HHS OPDIV's Reasonable Accommodation Designee. A denial of a reasonable accommodation request which contradicts the recommendations of the OPDIV Reasonable Accommodation Designee must be routed through the OPDIV EEO Director within **three business days**. The OPDIV EEO Director will advise the appropriate management official, who will in turn make the final decision regarding the reasonable accommodation. (Section 4.7)

- 4.1.4** The decision maker must complete a “**Reasonable Accommodation Information Tracking Form**” (See HHS Form 557b at Appendix D) within **ten business days** of the decision and give it to the HHS OPDIV Reasonable Accommodation Designee.
- 4.1.5** **Reports on provision of reasonable accommodation** will be completed annually and transmitted with the annual report on the Affirmative Action Program for Individuals with Disabilities to the ODME Diversity Management Division, Office of the Assistant Secretary for Administration and Management (ASAM). (Section 4.17)
- 4.1.6** **HHS Procedures for Reasonable Accommodation** will be available on the web at <http://www.hhs.gov/odme/>. Forms used to confirm, deny and track request and reasonable accommodation provisions will be available electronically.

## **4.2 Abbreviations, Acronyms, and Definitions**

**For the purpose of this policy, the following abbreviations and acronyms will apply:**

1. ODME – Office of Diversity Management and EEO
2. OHR – Office of Human Resources
2. CAP – Computer/ Electronic Accommodations Program
3. EEO – Equal Employment Opportunity
4. EEOC – Equal Employment Opportunity Commission
5. MSPB – Merit Systems Protection Board
6. OPDIVS – Operating Divisions

**For the purpose of this policy, the following definitions apply:**

1. **Person With a Disability** – An individual with a disability is a person who has: a physical and/or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such impairment.
  - a. “Physical and/or mental impairment” includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body system: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic disorder; mental retardation; endocrine; organic brain syndrome; emotional or mental illness; and specific learning disabilities.

- b. “Major life activities” are activities that an average person can perform with little or no difficulty. Examples are: walking; speaking; breathing; performing manual tasks; seeing; hearing; learning; caring for oneself; and working.
  - c. “Record of impairment” means that an individual has a history of, or has been classified as having a mental or physical impairment that substantially limits one or more major life activities.
  - d. “Is regarded as having impairment” means that individuals, including supervisors, managers and/or employees, believe that the individual has a disability, whether the individual actually has a disability or not.
2. **Employee** – An individual who is employed by the HHS OPDIVs, regardless of the type of appointment mechanism; whether an individual can be considered an employee for reasonable accommodation will be decided on a case by case basis.
3. **Qualified Individual With a Disability** – an individual with a disability who, with or without reasonable accommodations, can perform the essential duties of the position description (or “condition of employment”) that the individual holds.

**Specific exclusion:** A person who currently uses illegal drugs is not protected by these procedures as a “qualified individual with a disability.” However, a former drug user who is receiving treatment for a drug addiction or has been rehabilitated successfully is protected.

4. **Reasonable Accommodation** – A request for reasonable accommodation is a statement that an individual needs an adjustment or change at work for a reason related to a medical condition so that the individual may enjoy the same benefits and privileges of employment as are available to a similarly situated employee without a disability. Reasonable Accommodations is not the creation of a new position or intentional altering of a position (job/condition of employment) of record beyond its grade controlling factors. If requested or identified, reasonable accommodations are addressed in three aspects of employment:
- a. In the recruitment/application process: A reasonable accommodation is provided in the recruitment process to provide a qualified applicant with a disability an equal opportunity to be considered for the position the person applied for.

- b. In the performance of the essential functions of a job: a reasonable accommodation is provided to enable a qualified person with a disability to perform the essential duties of the job being sought or currently held. This may include modification or adjustments to the work environment and to the way duties are customarily performed.
  - c. In receipt of all benefits of employment: A reasonable accommodation is provided to enable an employee with a disability to enjoy benefits and privileges of employment equal to those enjoyed by other similarly situated employees without disabilities. This would include equal access to buildings, conferences and meetings that are OPDIV-sponsored services and events.
5. **Reassignment** – a form of reasonable accommodation that, absent undue hardship, is provided to employees (not applicants) who, because of a disability, can no longer perform the essential functions of their job, with or without reasonable accommodation. Reassignments are made only to vacant positions and to employees who are qualified for the new position. If the employee is qualified for the position, s/he will be reassigned to the job and will not have to compete for it.
6. **Essential Functions** – those job duties that are so fundamental to the position that the individual holds or desires that s/he cannot do the job without performing them. A function can be “essential” if, among other things: the position exists specifically to perform that function; there are a limited number of other employees who could perform the function; or the function is specialized and the individual is hired based on his/her ability to perform it. Determination of the essential functions of a position must be done on a case-by-case basis so that it reflects the job as actually performed, and not simply the components of a generic position description.
7. **Undue Hardship** – if a specific type of reasonable accommodation causes significant difficulty or expense, then HHS OPDIVS does not have to provide that particular accommodation. Determination of undue hardship is always made on a case-by-case basis, considering factors that include the nature and cost of the reasonable accommodation needed and the impact of the reasonable accommodation on the operations of the agency.

8. **Reasonable Medical Documentation** – the employer may require only the documentation that is needed to establish that a person has a disability that necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. In addition, all medical documentation will be treated confidentially and the Employer will observe all requirements of the Privacy Act and other appropriate legal authorities. Medical documentation will be maintained in accordance with applicable provisions of 5 CFR, Section 293 and 5 CFR 297.
  
9. **Decision Maker** – For the purpose of this policy, decision maker is that person who has responsibility and authority to make certain determinations and decisions relative to an employee's request for reasonable accommodation. This individual initiates the interactive process in a timely fashion to an accommodation that balances the legitimate needs of both the employee and agency.

#### 4.3 Policy on Reasonable Accommodations

In accordance with the Rehabilitation Act of 1973 (as amended), it is the policy of HHS and its OPDIVs to provide reasonable accommodations for qualified individuals with disabilities. This chapter applies to HHS employees and applicants for employment with disabilities requiring a reasonable accommodation; including employees sustaining job-related injuries; and employees with temporary disabilities requiring a reasonable accommodation. United States Public Health Service Commissioned Corps Officers are excluded.

As the nation's principal agency for protecting the health of all Americans and providing essential human services, HHS continuously endeavors to be a model employer. HHS is particularly sensitive to the needs of People with Disabilities, a diverse segment of the American Public and critical members of our workforce. As such it is the policy of HHS to make agency facilities and services accessible to people with disabilities and provide reasonable accommodation to job applicants and qualified employees with disabilities. By providing reasonable accommodation and ensuring that our services, electronic and information technology are accessible, we reaffirm our commitment to diversity and equality; and to recruiting, promoting and retaining the very best that our Nation has to offer as well as complying with the mandates of the Rehabilitation Act of 1973 as amended.



Accommodations may include, but are not limited to, such modifications as: assistive devices; readers; or sign language interpreters; job restructuring; part-time or modified work schedules; physical accessibility to work site; ergonomic evaluations; or any adjustments that promote a positive work environment and facilitate the successful accomplishment of our mission. (A more precise definition of reasonable accommodation can be found in Subsection 4. 2.4).

HHS and HHS OPDIVs are committed to ensuring that our reasonable accommodation policies and procedures remain flexible and responsive to the needs of persons with disabilities. By doing so we remove barriers to HHS programs, services, activities and facilities, and ensure the full participation not only of diverse segments of our workforce, but also to the American public.

HHS employees and managers/supervisor are also encouraged to utilize reasonable accommodation resources outside the agency, such as the Job Accommodation Network, DoD Computer/Electronic Accommodations Program and USDA TARGET Center. Through these resources, employees, supervisors and managers can be informed about accommodations for various impairments, explore the latest assistive technology, or obtain equipment at no cost to the agency.

#### **4.4 Responsibilities**

##### **1. Agency Medical Reviewing Authority (Federal Occupational Health (FOH), Office Health and Safety (OHS), Occupational Medical Services (OMS))**

- a. At the request of agency management, provide medical assessments from the medical information submitted by the employee's physician and/or other health care provider related to continued employability in accordance with U.S. Office of Personnel Management (OPM) guidance;
- b. Provide medical or psychiatric recommendations pertaining to medical eligibility, medical abilities and limitations, and/or work restrictions as they relate to job requirements and environmental factors associated with an employee's current position and potential placements for which Human Resources Officers request advice;
- c. Provide detailed information on the employee's medical limitations to assist the supervisor in making decisions related to reasonable accommodation.

## 2. HHS OPDIV Heads

- a. Ensure organizational compliance with the HHS policies and procedures for the provision of reasonable accommodation;
- b. Provide leadership within the Agency to ensure adequate budget, staff and resources for the provision of reasonable accommodation;
- c. Provide leadership within the Agency in developing and carrying out a positive program for the continued employment of employees who develop a disabling condition;
- d. Ensure supervisors and managers are provided training on their responsibilities for the provision of reasonable accommodations;
- e. Ensure that the Agency's human resources and EEO functions are provided adequate staff and resources for the implementation of the Reasonable Accommodation Program;
- f. Ensure that its managers and supervisors are familiar with, follow, and implement the agency's reasonable accommodation policy; ensure that reasonable accommodations are made for employees or applicants for employment with disabilities in accordance with applicable law and regulations, supporting medical documentation, applicable bargaining agreements, and this policy.

## 3. Employee/Job Applicant

- a. Employees and applicants for employment are responsible for initially raising medical issues to the attention of management officials in accordance with the procedures outlined in this manual issuance, including the providing of medical documentation as requested. Each employee is responsible for:
  - b. Notifying the supervisor of any disability or medical condition that may interfere with the performance of essential duties of his/her position of record; submitting an OPM Self-Identification Standard Form 256 to the Human Resources Office on any disabling condition; (**NOTE:** Submission of form is optional, but submission of form would greatly assist in processing the request for reasonable accommodation.);
  - c. Suggesting reasonable accommodation possibilities that can be explored, and cooperate with management efforts to identify and effect accommodations and/or alternate placement if necessary; and

- d. Providing Agency Designated Physician, Appropriate Healthcare or Rehabilitation Professional with information relating to the medical condition and how it relates to the essential duties of the position.

**4. HHS Reasonable Accommodation Designee (Human Resources Office, Equal Employment Opportunity Office)<sup>1</sup>**

- a. Provides guidance on the agency's policy regarding reasonable accommodations to employees, applicants for employment, supervisors, and other management officials; The HHS Reasonable Accommodation Designee will:
  - 1. Coordinate and facilitate the implementation of the procedures in this policy;
  - 2. Advise management officials and supervisors on their responsibilities relating to reasonable of employees with disabilities;
  - 3. Consult with the Agency Designated Physician, Appropriate Healthcare or Rehabilitation Professional in assessing an individual's medical condition or disability and the need for reasonable accommodation;
  - 4. Work with supervisors and the employee with a disability to provide reasonable accommodation through job structuring, training, or work environment adjustments when an employee cannot perform the essential functions of his or her current position;
  - 5. Counsel employees to explore reasonable accommodations and, when appropriate, discussing alternatives open to the employee;
  - 6. Assist in obtaining adaptive equipment, including information technology and communications equipment, or specially designed furniture;
  - 7. Document efforts taken within HHS OPDIVs for providing appropriate reasonable accommodations; Track reasonable accommodation requests in their Agency, and prepare an annual summary report for submission to the ASAM/ODME;
  - 8. Consult and assists the Agency Selective Placement Coordinator in the implementation and provision of reasonable accommodation for applicants and employees; and

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<sup>1</sup> PSC is servicing agency for SAMHSA and AHRQ; OS is servicing agency for AoA and ACF.

9. Maintain liaison with public and private organizations concerned with the rehabilitation of persons with disabilities.

#### **5. Office of Human Resources (OHR)**

- a. Provide reasonable accommodation to applicants with a disability for any part of the application or hiring process;
- b. Ensure that all vacancy announcements include the following statement in accordance with Office of Personnel Management (OPM) guidelines “Applicants with a disability who need a reasonable accommodation for any part of the application or hiring process must notify OHR. The decision on granting reasonable accommodation will be made on a case-by-case basis”;
- c. Assist management in locating vacant positions that can be utilized for reassignment or change to lower grade as a reasonable accommodation.

#### **6. Agency Selective Placement Coordinator**

- a. Provide policy and regulatory guidance to the Agency on the Selective Placement Program;
- b. Coordinate Agency-wide placement assistance and documenting efforts to reasonable accommodate those employees who are medically unqualified for their current position; and
- c. Serve as an Agency resource.

#### **7. Work Force Relations and Partnership Branch**

Consult and advise all levels of management on issues related to reasonable accommodation in connection with employees’ performance or conduct issues.

#### **8. Agency Supervisors and Managers**

- a. Takes the request for accommodation seriously and actively engage employees who request reasonable accommodations to solicit any additional information needed to make timely determinations on all reasonable accommodation requests;
- b. Provide appropriate reasonable accommodations for applicants and employees with disabilities;

- c. Work with Agency Officials (Human Resources and EEO Office) and Agency Designated Physician, Appropriate Healthcare or Rehabilitation Professional to determine appropriate reasonable accommodations;
- d. Examine each job to determine which functions are essential to performance. These essential elements should be listed as major duties in the position description;
- e. Determine, based on advice from the HHS Reasonable Accommodation Designee and Financial Management Office, the feasibility of accommodating employees with disabilities and the assumption of costs associated with reasonable accommodation efforts (including costs of training the disabled employee); and
- f. Maintain written records on request (s) for accommodation and provides a copy of the request to the OPDIV Reasonable Accommodation Designee.

#### **9. HHS OPDIV EEO Director**

- a. Provide oversight of Agency programs and activities relating to reasonable accommodation;
- b. Develop and issue policies and procedures for the application of reasonable accommodations;
- c. Provide consulting services to Agency Officials regarding procedures for administering reasonable accommodation policies;
- d. Conduct appropriate reviews of complaints relating to reasonable accommodations;
- e. Conduct periodic reviews of the Agency to ensure compliance with the policies and guidance outlined with these procedures;
- f. Ensure dissemination throughout their Agency of policies and procedural requirements associated with providing reasonable accommodations for employees and applicants;

- g. Provide training to managers and employees on policies and procedures for the application of reasonable accommodation to the employment of individuals with disabilities and the retention of employees who develop disabling conditions;
- h. Ensure that the Agency follows procedural requirements associated with reasonable accommodations for employees.

#### **10. Agency Complaints Manager**

- a. Process discrimination complaints based on disability regarding reasonable accommodations and work towards resolution; and
- b. Consult with Agency Director on technical issues concerning allegations of discrimination.

#### **11. Buildings and Facilities Manager**

- a. Ensure facility accessibility of buildings, restrooms, conference rooms, ramps, doorways and other architectural features.
- b. Establish a method to track work orders associated with reasonable accommodation requests to ensure timely completion.

### **4.5 Procedures**

Reasonable Accommodations are considered where a particular disability creates a limitation that impedes an individual with a disability from performing the essential functions of the job. The need for reasonable accommodation is determined on a case-by-case basis, taking in consideration the applicant's or employee's specific disability and existing limitations to performance of a particular job function; the essential duties of a job; the work environment; and whether the proposed accommodation would create an undue hardship on the Agency.

### **4.6 Requests for Reasonable Accommodation**

When an employee is disabled at the time of employment, or becomes disabled while employed at the HHS, he/she should notify the supervisor of his/her impairment or limitation and of the need for reasonable accommodation, either orally or in writing. Under either situation, the employee can request a reasonable accommodation for the temporary or permanent disability.

1. A request for reasonable accommodation is a statement that an individual needs an adjustment or change at work, in the application process, or in a benefit or privilege of employment for a reason related to a medical condition. **The reasonable accommodation process begins as soon as the request for the change or identification of a barrier is made.** An employee may request reasonable accommodation orally or in writing.
2. A request does not have to use any special words, such as “reasonable accommodation,” “disability,” or “Rehabilitation Act.” An individual with a disability may request a reasonable accommodation whenever s/he chooses, even if she has not previously disclosed the existence of a disability. Any HHS employee or applicant may consult the OPDIV Reasonable Accommodation Designee for further information or assistance in connection with requesting or processing a request for reasonable accommodation.
3. An applicant may request reasonable accommodation from any HHS OPDIV employee with whom the applicant has contact in connection with the application process. OPDIV Reasonable Accommodation Designees will train staff members who are involved in the application process to recognize requests for reasonable accommodation and to respond appropriately. All staff that has contacts with applicants needs to know how to recognize and respond to requests for reasonable accommodation. It is the responsibility of the applicant to inform the HR specialist, selecting official or an official within the recruitment process, of the need for a reasonable accommodation prior to an interview or visit.
4. A family member, health professional, or other representative may request reasonable accommodation on behalf of an employee or applicant. The request should go to one of the same persons to whom the employee or applicant would make the request. Whenever possible, the management official will confirm the request with the person with the disability.

#### **4.7 The Interactive Process**

Parties begin the interactive process to determine what, if any, accommodation should be provided. This means that the individual requesting the accommodation and the decision maker must talk to each other about the request, the process for determining whether an accommodation will be provided, and the potential accommodation.

In requests that are more complex in nature, the designated decision maker should seek additional information or clarification from the individual requesting the accommodation when specific limitations, problems, or barriers are unclear; where an effective accommodation is not obvious; or where the parties are identifying different possible reasonable accommodations. These discussions are crucial and form the basis and justification for granting or denying the reasonable accommodation request.

Communication is a priority throughout the entire process. The applicant or employee requesting accommodation should also participate to the extent possible in helping to identify effective accommodation. Resources available to help both the decision maker and the individual requesting the accommodation to identify possible accommodation are listed in Appendix B. The OPDIV Reasonable Accommodation Designee is available to provide assistance.

As the first step, the HHS OPDIV's decision maker will: (1) acknowledge the request, (2) explain to the applicant or employee that s/he will be making the decision on the request; and (3) describe what will happen in the processing of the request. This initial discussion should take place as soon as possible.

When a request for accommodation is made by a third party, the decision maker should, if possible, confirm with the applicant or employee who has the disability that s/he, in fact, wants a reasonable accommodation before proceeding. It may not be possible to confirm the request if the employee has, for example, been hospitalized in an acute condition. In this situation, the management official will process the third party's request and consult directly with the individual needing the accommodation as soon as it is practicable.

Ongoing communication is particularly important where the specific limitation, problem, or barrier is unclear; an effective accommodation is not obvious; or the parties are considering different possible reasonable accommodations.

In cases where the disability, the need for accommodation, and the type of accommodation to be provided are clear, extensive discussions are not necessary. Every reasonable accommodation is provided on a case-by-case basis. The accommodation that suits one individual may be totally unsuitable for another individual with the same disability. The management official and requesting individual should communicate to ensure a full exchange of relevant information.



The decision maker or any other HHS official who receives information in connection with a request for reasonable accommodation may share information connected with that request with other agency officials only when the officials need to know the information in order to make determinations on a reasonable accommodation request. The decision maker should notify the OPDIV Reasonable Accommodation Designee to obtain guidance, as necessary, to ensure that the proper procedures have been followed. See Section 4.5.5 on confidentiality of medical information.

The HHS OPDIV's office that manages information resources or information technology may be consulted in connection with requests for adaptive equipment for computers. However, this office would not have a need to know the medical condition of the person seeking the accommodation. It only needs the individual's functional limitations and how the limitations affect technology needs. Also the Department of Defense and HHS have an Interagency Agreement with the Computer/Electronic Accommodations Program (CAP), to provide assistive technology, devices and services to HHS employees with disabilities at no cost (See Appendix B).

#### **4.8 Determining Which Official Will Respond to the Request:**

As the first step in processing a request for reasonable accommodation, the OPDIV staff member who receives the request must determine who will be responsible for handling it and forward it, if necessary. The request should be forwarded to the appropriate person **as soon as possible but in no more than five business days.**(2)

1. Requests from applicants will be handled by the HR Specialist responsible for the recruitment and/or selection process.
2. Requests from employees will be handled by the requesting employee's immediate supervisor or designated management official within the organization in consultation with the OPDIV Reasonable Accommodation Designee.
3. The OPDIV Reasonable Accommodation Designee will respond to the following:

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(2) In certain circumstances, referring and processing a request will have to be made very quickly. For example, an applicant may need an accommodation, such as help filling out an application form immediately. See Section 4.5.6 Time Frames for Processing Requests and Providing Reasonable Accommodation for more information, including when a request must be expedited.

- a. Requests for adaptive equipment, including information technology and communications equipment, or specially designed furniture. HHS OPDIVs shall designate the process for coordination with the appropriate information technology, procurement and other offices.
  - b. Requests for a reader, sign language interpreter, or other personal assistant to enable employees to perform their job functions, when the accommodation cannot be provided by current staff. Each OPDIV shall identify the process for coordinating requests and providing sign language interpreters, readers, or other personnel assistants.
  - c. Request for removal of architectural barriers, including reconfigured work spaces.<sup>3</sup> The HHS OPDIV procedures shall describe how such requests will be coordinated by facilities staff with the General Services Administration and/or the owner of a particular building
  - d. Requests for accessible parking will be handled through each OPDIV's internal procedures. Information on these accommodations shall be documented and included in the reports of all reasonable accommodations.
  - e. Requests for materials in alternative formats (e.g., Braille) that cannot be provided by the supervisor or Administrative Officer.
  - f. Requests for reassignment to another job in coordination with the HHS OPDIV's Office of Human Resources.
4. The OPDIV Reasonable Accommodation Designee will be available, as needed, to provide assistance to employees and management officials in processing requests.
  5. All decision makers must have designated back-ups to continue receiving and processing requests, and providing reasonable accommodations when the decision maker is unavailable. Decision makers should ensure that individuals know who has been designated as back-up. The time frames discussed in Section 4.11 will not be suspended or extended because of the unavailability of a decision maker.
  6. The Human Resource Management Specialist (for applicants) and the

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<sup>3</sup> If a request that involves removal of an architectural barrier(s) is not feasible, the employee should be provided a temporary accommodation until or in lieu of removal of the barrier.

OPDIV Reasonable Accommodation Designee must each designate a back-up.

#### 4.9 Requests for Medical Information

When requests for medical information are necessary, the only information that should be requested is: a short description of the disability; how the disability or barrier limits the employee's ability to do the job or participate in HHS activities or the applicant's ability to apply or interview for the job; and how the requested accommodation is expected to improve the situation.

1. HHS OPDIVs are not required to obtain medical documentation, and may not request it when the disability and need for accommodation is obvious or otherwise already known. In these cases, the HHS OPDIV will **not** seek any further medical information. However, when a disability and/or need for reasonable accommodation is not obvious or already on file, the HHS OPDIV has the right to request relevant documentation about the disability, functional limitations related to the duties at issue, and the need for accommodation. The request for medical documentation will be limited to the job related functions for which the accommodation is requested. In most situations, this means the HHS OPDIV may not request access to a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.
2. If a decision maker believes that medical information is necessary in order to evaluate the suitability of the requested reasonable accommodation, s/he will make a request to the OPDIV Reasonable Accommodation Designee to obtain the information.
3. The OPDIV Reasonable Accommodation Designee will make a determination as to whether medical documentation is necessary. If it is, s/he will request the necessary medical information. If it is not necessary, the request for accommodation will be returned promptly to the decision maker with instructions to complete the processing.
4. If a determination is made to seek medical information, the OPDIV Reasonable Accommodation Designee will request information only to substantiate the individual has a disability covered by the Rehabilitation Act and require the reasonable accommodation requested; it will not ask for unrelated documentation. Requests for medical information will follow the requirements set forth in EEOC's *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* (See Section 4.22), Reference I of this policy, also available on EEOC's Internet Web Site). The employee

requesting a reasonable accommodation will be given fifteen calendar days to provide medical information, barring extenuating circumstances.

5. The OPDIV Reasonable Accommodation Designee will seek information or documentation about the disability and/or functional limitations from the individual, and/or ask the individual to obtain such information from an appropriate professional, such as a doctor, social worker, or rehabilitation counselor. In order to get the most helpful possible information, all requests for information from outside sources will describe the nature of the job, the essential functions the individual is expected to perform, and any other relevant information. The OPDIV Reasonable Accommodation Designee may work with the supervisor and/or other management officials in identifying and providing appropriate information on the job and functions. The types of medical information or documentation that may and may not be requested by the agency are described in the *EEOC Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Section II.D.17*. If the employee refuses to provide the requested information, the Agency can no longer provide assistance.
6. Once the medical documentation is received, the OPDIV Reasonable Accommodation Designee, in consultation with Agency Medical Reviewing Authority, will evaluate it. This evaluation will be performed at the agency's expense.
7. If the initial medical documentation is provided by the employee at the time of the request and it is insufficient to enable the decision maker to determine whether an accommodation is appropriate, the OPDIV Reasonable Accommodation Designee may request additional information:
8. First, the OPDIV Reasonable Accommodation Designee will explain to the individual seeking the accommodation, in specific terms, why the information which has been provided is insufficient, what additional information is needed, and why it is necessary for a determination of the reasonable accommodation request.
9. The individual requesting accommodation may then contact the health care or other appropriate professional to request the missing information.

10. Alternatively, the individual requesting the accommodation and the OPDIV Reasonable Accommodation Designee may agree on a list of specific questions to be sent to the individual's health care professional. With the written permission from the employee, the OPDIV Reasonable Accommodation Designee or an Agency Medical Reviewing Authority may directly contact the individual's health care professional. There may be instances where the Agency Medical Reviewing Authority may not be in the best position to formulate an opinion on the occupational limitations imposed on a disabled individual and therefore may consult with other medical experts outside HHS OPDIV for assistance. Appropriate professionals include, but are not limited to doctors (including psychiatrists), psychologist, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals. This evaluation will be performed at the agency's expense. (*EEOC Policy Guidance on Executive Order 13164: Establishing Procedures To Facilitate the Provision of Reasonable Accommodation, Section II, D, 17-18*).
11. If, after a reasonable period of time, the individual's health care professional has not provided sufficient information to demonstrate that the individual has a disability and require reasonable accommodation, the OPDIV Reasonable Accommodation Designee may request that the individual be examined by a physician chosen by the Agency Medical Reviewing Authority at the agency's expense. (*EEOC Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Section II, D, 17-19*).
12. The OPDIV Reasonable Accommodation Designee will inform the management official whether the documentation demonstrates that a reasonable accommodation is appropriate and provide, as necessary, additional relevant information about the individual's functional limitations.
13. In some cases, the individual requesting the accommodation will supply medical information directly to the decision maker without being asked. In these cases, the decision maker will consider such documentation and, if additional information is needed, the decision maker will work with the OPDIV Reasonable Accommodation Designee as set forth in this section. (See Section 4.17) for instructions on storage of this information.)
14. The failure to provide appropriate documentation or to cooperate with the HHS OPDIV efforts to obtain such documentation can result in a denial of the request for reasonable accommodation (EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act) – (See Section 4.22)

15. The entitlement of the HHS OPDIV to reasonable medical documentation may necessitate the periodic review of updated documentation to insure that the need for accommodation is effective and needs to be continued (See Section 4.14 Reasonable Accommodations Agreement).

#### **4.10 Confidentiality Requirements Regarding Medical Information and the Reasonable Accommodation Process**

1. Under the Rehabilitation Act, medical information obtained in connection with the reasonable accommodation process must be kept confidential. All medical information, including information about functional limitations and reasonable accommodation needs, obtained in connection with a request for reasonable accommodation must be kept in files separate from the individual's personnel file. Any HHS employee who obtains or receives such information is strictly bound by these confidentiality requirements.
2. The OPDIV Reasonable Accommodation Designee will maintain custody of all records obtained or created during the processing of a request for reasonable accommodation, including medical records, and will respond to all requests for disclosure of the records. All records will be maintained in accordance with the Privacy Act, and EEOC and HHS requirements. This information may be disclosed **only** as follows:
  - a. Supervisors and managers with a need to know may be told about necessary restrictions on the work or duties of the employee and about the necessary accommodation, but medical information should only be disclosed if strictly necessary.
  - b. first aid and safety personnel may be informed, when appropriate, *if* the disability might require emergency treatment;
  - c. government officials may be given information necessary to investigate or provide technical assistance to ensure compliance with the Rehabilitation Act;
  - d. And, in certain circumstances, the information may be disclosed to Workers' Compensation offices or insurance carriers.
3. Whenever medical information is disclosed, the individual disclosing the information must inform the recipients of the information about the confidentiality requirements.

#### 4.11 Time Frames for Processing Requests and Providing Reasonable Accommodation

1. HHS OPDIVs will process requests for reasonable accommodation, as appropriate, in short a time frame as reasonably possible. HHS recognizes, however, that the time necessary to process a request will depend on the nature of the accommodation requested and whether there is a need to obtain supporting information.
2. Expedited processing: In certain circumstances, a request for reasonable accommodation requires an expedited review and decision in a time frame that is no more than five business days as discussed below. This includes where a reasonable accommodation is needed:
  - a. to enable an applicant to apply for a job. Depending on the timetable for receiving applications, conducting interviews, taking tests, and making hiring decisions, there may be a need to expedite a request for reasonable accommodation in order to ensure that an applicant with a disability has an equal opportunity to apply for a job. Therefore, human resources staff needs to act as quickly as possible to make a decision and, if appropriate, provide reasonable accommodation;
  - b. to enable an employee to attend a meeting or event scheduled to occur shortly. For example, an employee may need a sign language interpreter for a meeting within a short time frame.
  - c. If a request for an accommodation can be processed by the requesting management official, no supporting medical information is required, and no extenuating circumstances apply, the decision should be given to the employee as soon as possible but **no more than fifteen business days** from the date the individual made the request. However, prior to approval, the management official will contact the OPDIV Reasonable Accommodation Designee.

- d. The accommodation, if granted, should be provided within **ten business days** from the date of the approval unless there are extenuating circumstances. Items that must be ordered from non-local sources may take longer than the ten-day limit. However, officials should move quickly to comply with requests because failure to respond promptly to a request may result in a violation of the Rehabilitation Act. Since decision makers may need the full **15 business days** to engage in the interactive process and collect all relevant information about possible accommodations, they should not delay beginning this process. Failure to meet this time frame solely because a management official delayed processing the request is not an extenuating circumstance.
- e. If the decision maker believes that it is necessary to obtain medical information to determine whether the requesting individual has a disability and/or identify the functional limitations, the decision maker will make such request to the OPDIV Reasonable Accommodation Designee as soon as possible after receipt of the request for accommodation, but before the fifteen-day period ends. HHS recognizes that the need for documentation may not become apparent until after the interactive process has begun.
- f. If the decision maker requests that the OPDIV Reasonable Accommodation Designee obtain medical documentation, the time period for the decision process is frozen until the medical information is provided. If after reviewing with the agency medical reviewing authority, the OPDIV Reasonable Accommodation Designee determines that medical information is not needed, s/he will notify the management official and the **15-day time period** for processing the request resumes.
- g. If the OPDIV Reasonable Accommodation Designee determines that medical documentation is needed, the decision shall be made and the accommodation, if granted will be provided within 15 business days from the date of the decision maker receives the relevant medical information.

*Examples of accommodations that can be provided immediately include:*

- g. An employee with diabetes who sits in an open area asks for four breaks a day to test his/her blood sugar levels so that s/he may do these tests in private.
- h. An employee with a disability that affects his/her arm strength requests that certain files in his/her office be moved from the overhead storage to the desktop.



*Examples of accommodations that can easily be provided within two business days include:*

- i. An employee who takes anti-depressants that make it hard to get up in time to get to the office at 9:00, requests that s/he be allowed to start work at 10:00 and still put in an 8 hour day.
  - j. A supervisor distributes detailed agendas at the beginning of each staff meeting. An employee with a learning disability asks that the agenda be distributed ahead of time because the disability makes it difficult to read and he needs more time to prepare.
3. **Extenuating Circumstances:** Where extenuating circumstances are present, the time for processing a request for reasonable accommodation and providing the accommodation will be extended as necessary. All HHS staff is expected to act quickly in processing requests and providing accommodations. The following are examples of extenuating circumstances:
  - a. There is an outstanding initial or follow-up request for medical information.
  - b. Purchase of equipment may take longer than 15 or 20 business days because of requirements under the Federal Acquisition Regulation.
  - c. Equipment may be back-ordered; the vendor typically used for goods or services has gone out of business or cannot promptly supply the needed goods or services and another vendor is not immediately available.
  - d. New staff needs to be hired or architectural barriers must be removed.
4. **Extenuating circumstances** covers limited situations in which unforeseen or unavoidable events occurring outside of HHS OPDIVs prevent prompt processing and delivery of an accommodation.
5. For example, a HHS OPDIV may **not** delay processing or providing an accommodation because a particular staff member is unavailable. (See Section VII. For information on designating back-ups to respond to request when the decision maker is unavailable.)

6. When extenuating circumstances exist, **the decision maker must notify the individual of the reason for the delay, and the approximate date on which a decision, or provision of the reasonable accommodation, is expected.** Any further developments or changes should also be communicated promptly to the individual. The following are examples, not intended to be exhaustive, of delays and possible temporary measures that can be taken:
  - a. If there is a delay in providing an accommodation which has been approved, the decision maker must determine if **temporary measures can** assist the employee. This could include providing the requested accommodation on a temporary basis or providing a less effective form of accommodation. In addition, the decision maker may provide measures that do not constitute reasonable accommodation within the meaning of the law (e.g., temporary removal of an essential function) if: (1) they do not interfere with the operations of the agency; and (2) the employee is clearly informed in writing that they are being provided only on a temporary, interim basis.
  - b. There may be a delay in receiving adaptive equipment for an employee with a vision disability. The supervisor might arrange for other employees to act as readers as a temporary measure. This may not be as effective as the adaptive equipment, but it will allow the employee to perform as much of the job as possible until the equipment arrives.
  - c. If a delay is attributable to the need to obtain or evaluate medical documentation and it has not yet determined that the individual is entitled to an accommodation, an accommodation may be provided on a temporary basis. In such a case, the decision maker will notify the individual in writing that the accommodation is being provided on a temporary basis pending a decision on the accommodation request.
6. HHS decision makers who approve temporary measures are responsible for assuring that they do not take the place of permanent accommodations and that all necessary steps to secure permanent accommodation are being taken.

#### 4.12 Reassignment

Reassignment will only be considered if no other accommodation enables the individual to perform his or her current job, or if the only effective accommodation would cause undue hardship for the agency. Reassignment is available only to employees, not to applicants. (NOTE: reassignment is only available to a probationary employee if the employee adequately performed the essential elements of the position, with or without reasonable accommodation, before the need for the accommodation arose.) Neither HHS nor its OPDIVs are required to create new positions or move employees from their jobs to create a vacancy.

In considering whether there are positions available for reassignment, the OPDIV Reasonable Accommodation Designee will work with both Human Resources and the individual requesting the accommodation to identify; (1) all vacant positions within the affected employee's agency for which the employee may be qualified with or without the accommodation; (2) all current vacancies identified by the servicing Human Resource Center within the affected employee's current commuting area; and (3) all projected vacancies (over the next **60 business days**) throughout the Department for which the employee may be qualified.

The agency will first focus on positions which are equivalent to the employee's current job in terms of pay, status, and other relevant factors. If there is no vacant equivalent position, the organization will consider vacant lower level positions for which the individual is qualified.

Reassignment may be made to a vacant position outside of the employee's commuting area if the employee is willing to relocate. As with other transfers not required by management, HHS will not pay for the employee's relocation costs. In addition, as part of the interactive process and if reassignment is contemplated, the individual should be asked to identify qualifications, interests, and willingness to accept a reassignment outside the local commuting area and to accept a downgrade if no vacant positions are identified at the same grade.

#### **4.13 Granting the Reasonable Accommodation Request**

Upon request for reasonable accommodation, the decision maker will contact the OPDIV Reasonable Accommodation Designee of such requests and coordinate the processing of the reasonable accommodation request. As soon as the decision maker determines that reasonable accommodation will be provided, the decision should be immediately communicated to the individual. If the accommodation cannot be provided immediately, the decision maker must inform the individual of the projected time frame for providing the accommodation. This notice can be provided in writing if it is requested by the employee. Since the HHS OPDIVs are required to track the processing of reasonable accommodation requests, disposition of each request should be monitored and information provided to the appropriate individual responsible for collecting such information. (See Section 4.6 “Information Tracking and Reporting”)

#### **4.14 Reasonable Accommodations Agreement**

1. Once an accommodation has been approved, the Reasonable Accommodation Designee may recommend that both the supervisor and employee enter into a reasonable accommodation agreement. Although not required, such an agreement serves to clarify the nature of the accommodation granted. Reasons for having such an agreement include the following:
  - a. In some cases, the accommodated employee's functional limitations might increase or decrease, thus requiring periodic reviews and adjustments to the approved accommodation(s). For example, some disabilities are degenerative in nature and may require additional accommodation(s).
  - b. Conversely, a disability may improve to the point that an approved accommodation can be ameliorated or removed.
  - c. Once an accommodation has been approved and a Reasonable Accommodation Agreement entered into, if requested, the Reasonable Accommodation Designee will review the accommodation on an ‘as needed basis’ with the supervisor and employee to determine if any changes are needed or if continued accommodation is required.

2. Such an agreement should contain the following:
  - a. The accommodation approved;
  - b. The responsibilities and expectations of both parties; and
  - c. Need for periodic evaluations/review, if applicable.
3. Once a permanent (long-term) medically stable impairment has been documented, the decision-maker's request for further information should be limited to reasonable documentation on the need for further accommodation (if the need is not obvious) and not on the existence of the disability/impairment itself.

#### **4.15 Denial of the Reasonable Accommodation Request**

1. The decision maker must consult with the OPDIV Reasonable Accommodation Designee before moving ahead with the decision to deny a request.
2. As soon as the decision maker decides that a request for reasonable accommodation should be denied, s/he must complete the "Denial of Reasonable Accommodation Request" (Appendix D), and give the completed form to the individual requesting the accommodation. The explanation for the denial should be written in plain language, clearly stating the specific reasons for the denial.
3. When the management official has denied a specific requested accommodation, but offered to make a different one in its place which was not agreed to during the interactive process, the denial notice should explain both the reasons for the denial of the requested accommodation and the reasons that the management official believes that the chosen accommodation will be effective.
4. Reasons for the denial of a request for reasonable accommodation may include the following (keeping in mind that the actual notice to the individual must include specific reasons for the denial, or example, *why* the accommodation would not be effective or *why* it would result in undue hardship):

- a. The requested accommodation would not be effective.
  - b. Providing the requested accommodation would result in undue hardship. Before reaching this determination, the management official must have explored whether other effective accommodation options exist that would *not* impose undue hardship and therefore can be provided. A determination of undue hardship means that the HHS OPDIV finds a specific accommodation would result in significant difficulty or expense, or would fundamentally alter the nature of the OPDIV's operations. When evaluating budgetary or administrative concerns to determine if undue hardship exists, HHS and its OPDIV will follow the standards enunciated in the regulations and in the "*Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act.*" Oct 17, 2002 (See Section VIII G, also available on the EEOC Internet Web Site <http://www.eeoc.gov/policy/docs/accomodation.html> ).
  - c. Medical documentation is inadequate to establish that the individual has a disability and/or needs a reasonable accommodation.
  - d. The requested accommodation would require the removal of an essential function.
  - e. The requested accommodation would require the lowering of a performance or production standard.
  - f. The failure by the employee to provide appropriate documentation or cooperate with the management official's efforts to obtain necessary information to address the request for reasonable accommodation.
5. The written notice of denial shall inform the individual that s/he has the right to file an EEO complaint and may have rights to pursue MSPB and union grievance procedures. The notice shall also explain the HHS procedures for appeal of a denial of reasonable accommodation available for informal dispute resolution.

#### **4.16 Appeal of Denial of Reasonable Accommodation - Reconsideration**

Individuals with disabilities can request prompt reconsideration of a denial of reasonable accommodation.

- a. The request for reconsideration will be submitted to the original decision maker within **five business days**. If the original decision maker denies the request for reconsideration, the individual will present the request to the next level supervisor who will respond to the request within **five business days**. If the original decision is not reversed, the request for reconsideration will be elevated to the next management official within the chain of command who will, in turn, respond within **five business days**.
- b. At any point in this process, the individual may also contact the Alternative Dispute Resolution Office and initiate the Informal Mediation Process.
- c. Pursuing any of the informal dispute resolution procedures identified above, including seeking reconsideration from the decision maker and appealing to the next person in the decision maker's chain of command, does not affect the time limits for initiating statutory and collective bargaining claims. An individual's participation in any or all of these informal dispute resolution processes does not satisfy the requirements for bringing a claim under EEO, MSPB, or union grievance procedures.

#### **4.17 Information Tracking and Reporting**

1. To enable HHS to keep accurate records regarding requests for accommodation, the decision maker who receives the request must follow up an oral request either by requesting the employee to complete the "Confirmation of Request for Reasonable Accommodation" form or otherwise confirming the request in writing (including by e-mail) to the OPDIV Reasonable Accommodation Designee. However, if the employee refuses to do so, the request must still be responded to through the normal procedures. At this point, the decision maker may be asked to provide as much information as possible that would have been provided through the form to the Reasonable Accommodation Designee.
2. For applicants seeking a reasonable accommodation, the Human Resources Management Specialist handling the request must give them the "Confirmation of Request for Reasonable Accommodation" form to complete.
3. If an individual with a disability requires assistance with this requirement, the staff member receiving the request will provide that assistance. Decisions regarding a request for reasonable accommodation will be made by the employee's immediate supervisor or other designated management official within the organization.

4. While the written confirmation should be made as soon as possible following the request, it is not a requirement for the request itself. The decision maker will begin processing the request as soon as it is made, whether or not written confirmation has been provided.
5. A written confirmation is not required when an individual needs a reasonable accommodation on a repeated basis (e.g., the assistance of sign language interpreters and readers, etc). The written form is required only for the first request although, of course, appropriate notice must be given each time the accommodation is needed.
6. The management official will complete the “Reasonable Accommodation Information Tracking” form (Appendix E) and submit it to the OPDIV Reasonable Accommodation Designee within **ten business days** of the decision. The management official should attach to the form copies of all information, including medical information s/he received as part of processing the request.
7. The OPDIV Reasonable Accommodation Designee will maintain the records for the length of the employee’s tenure with HHS or five years.
8. The OPDIV Reasonable Accommodation Designee will prepare an annual report, to be made available to all employees.
9. This annual report will also be provided to the ODME Diversity Management Division with the EEOC Federal Agency Annual EEO Program Status Report: Special Program Plan for the Recruitment, Hiring, and Advancement of Individuals with Targeted Disabilities. The report will contain the following information, presented in the aggregate:
  - a. the number of reasonable accommodations, by type, that were requested in the application process and whether these requests were granted or denied;
  - b. the jobs (occupational series, grade level, and agency component) for which reasonable accommodation has been requested;
  - c. the types of reasonable accommodation that have been requested for each of those jobs;
  - d. the number of reasonable accommodations, by type, for each job that were approved, and the number of accommodations, by type, that were denied;
  - e. the number of requests for reasonable accommodation, by type, that relate to the benefits or privileges of employment, and whether those requests were granted or denied;



- f. the reasons for denial of requests for reasonable accommodation;
  - g. the amount of time taken to process each request for reasonable accommodation; and
  - h. the sources of technical assistance that were consulted in trying to possible reasonable accommodations.
10. In addition, the report will provide a qualitative assessment of the HHS and its OPDIVs' reasonable accommodation policies and procedures, including recommendations for improvement.

#### **4.18 Relation of Procedures to Statutory and Collective Bargaining Claims**

1. This policy is **in addition to** statutory and collective bargaining protections for persons with disabilities and the remedies they provide for the denial of requests for reasonable accommodation and does not supplant these provisions. Requirements governing the initiation of statutory and collective bargaining claims, including time frames for filing such claims remain unchanged.
2. Each HHS OPDIV should have their procedures reviewed by their respective Union organizations.
3. An individual who chooses to pursue statutory or collective bargaining remedies for denial of reasonable accommodation **must:**
  - a. For an EEO complaint: contact an EEO Counselor in the HHS OPDIV's Equal Employment Office within 45 days from the date of receipt of the written "Denial of Reasonable Accommodation Request" or reconsidered denial;
  - b. For a collective bargaining claim, file a written grievance in accordance with the provisions of the Collective Bargaining Agreement; or
  - c. Initiate an appeal to the Merit Systems Protection Board within 30 days of an appealable adverse action as defined in 5 C.F.R. § 1201.3.

4. If a member of any HHS or HHS OPDIV Equal Employment Opportunity Office has had any involvement in the processing of the request for reasonable accommodation, that staff member shall recuse him or herself from any involvement in the processing of an EEO counseling contact or complaint in connection with that request.

#### **4.19 Provision of Accommodation – Funding**

All HHS OPDIVs shall identify in their reasonable accommodation procedures the source of funding for reasonable accommodation. The reasonable accommodation procedures shall also designate who to contact concerning funding.

#### **4.20 Inquiries**

Any person wanting further information concerning these procedures may contact the HHS Diversity Management Division in ODME.

#### **4.21 Distribution**

The HHS reasonable accommodation procedures shall be posted on the HHS web site. Copies of HHS OPDIV procedures shall be distributed to their respective OPDIV employees after issuance and annually thereafter. Procedures shall be available in EEO and HHS Human Resources offices. They shall also be distributed to new employees as part of their orientation. These procedures will be provided in alternative formats, when requested by or on behalf of any employee or applicant.

#### **4.22 References**

- A. The Rehabilitation Act of 1973, as amended
- B. The Americans with Disabilities Act of 1990
- C. 29 CFR 1614, Federal Sector Equal Employment Opportunity
- D. 29 CFR 1630, Regulations to Implement the EEO Provisions of the Americans with Disabilities Act
- E. 5 CFR 339, Medical Qualification Determinations  
See [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html) re F-I.
- F. EEOC Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations, October 1995
- G. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, October 2002
- H. EEOC Enforcement Guidance on the Americans with Disabilities and Psychiatric Disabilities, March, 1997
- I. EEOC Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, July 2000

## APPENDIX A

### Readers, Interpreters and Other Personal Assistants

HHS and its OPDIVs will make readers, interpreters, and other personal assistants available, as appropriate. Other personal assistants perform physical tasks that an employee cannot perform because of a disability. For example, an investigator with limited or no upper extremity mobility may need assistance in physically organizing a file. The investigator would perform the essential functions of the position - e.g., conduct the investigation and draft documents - and the assistant would perform only the physical task. In no case should a staff assistant be called upon - by management or by the employee(s) to whom he or she is assigned - to perform the essential functions of the job held by the employee with the disability.

**HIRING AUTHORITY.** Readers, interpreters, or other personal assistants hired to fill approved positions may be appointed under the non-competitive Schedule A Authority, 5 CFR 213.3102 (II) ["I" is lower case, double "L"]. Persons with disabilities hired as readers, interpreters, or assistants may also be hired under the 213.3102 (u) authority.

### Sign Language Interpreters

1. **SCHEDULING INTERPRETER SERVICES:** The individual or office scheduling a meeting or event which will require interpreting services (staff meeting, training, office function, etc.) is responsible for directing the request to the HHS OPDIV office designated to provide interpreting services. Please check to see if a sign language interpreter is available before scheduling the date, time, and place of the event.

Advance scheduling – preferably one to two weeks – is strongly encouraged, to the extent possible. Although it is not possible to foresee every occasion for which interpreting services may be required, failure to schedule interpreting services well in advance may result in the necessity to reschedule meetings until interpreter services are available.

The length of the meeting or event will determine if arrangements must be made for more than one interpreter to be present, or the meeting or event must be scheduled to include sufficient rest periods including a "sign-free" lunch break, if necessary. Generally, one interpreter can work 45-60 minutes and then needs a 15-minute break. A break during a meeting or event does not constitute a rest period for the interpreter if s/he is expected to continue working (e.g., deaf and hearing parties wish to communicate during the break and look to the interpreter to facilitate the exchange).

An employee who knows sign language or who is taking a sign language class is not an acceptable substitute for a sign language interpreter.

A Qualified Sign Language Interpreter is one who is fluent in sign communication [be it American Sign Language, PSE, or manually coded English] to the extent that the deaf/hard of hearing employee can fully participate in any discussion, meeting or event in the workplace; and conversely, that any hearing person can fully understand the Sign-to-English spoken communication the deaf person expresses. This communication must be conveyed effectively, accurately, and impartially, through the use of any necessary specialized vocabulary.

2. **WORK EVENTS OUTSIDE THE WORKPLACE.** HHS will provide an interpreter for an employee who is deaf or hard of hearing who, as part of his/her job, attends a meeting or event outside the workplace. If s/he attends a conference or training program sponsored by an outside organization, the sponsoring organization is principally responsible for providing interpreters. The HHS OPDIV will provide interpreting services, however, if the sponsoring agency fails to do so.

When an employee goes to a meeting, conference, or training program outside the workplace, HHS OPDIVs will assess whether it would be effective to send staff or contract interpreter(s). If the OPDIV determines it would be more effective to send staff interpreter(s) and provides transportation for or reimburse the travel cost of the employee, then the office of the employee with the disability must also provide or reimburse travel costs for the staff interpreter(s). Similarly, if (agency) pays for meals for the employee who is deaf or hard of hearing while attending these types of events, then the office of the employee with the disability must also pay for the meals for the staff interpreter(s).

3. **SPECIAL EVENTS TO WHICH STAFF INTERPRETERS ARE INVITED:** Interpreting services are routinely request for special events during official government time and which might be attend by employees who are deaf or hard of hearing. In HHS OPDIVs that have staff interpreters who express the desire to attend these “all-employee” functions in an off-duty capacity, arrangements will be made by the HHS OPDIV for contract interpreting services.
4. **INTERPRETING PHONE CALLS.** Employees who are deaf or hard of hearing should schedule an interpreter when services are needed to interpret business-related phone calls. These employees may also request that the interpreters retrieve and report all voice-mail messages. Telecommunication relay services are available to all employees to serve telephone needs when a sign language interpreter is not available.

## APPENDIX B

### EXAMPLES OF REASONABLE ACCOMMODATION

The types of actions that can be taken in connection with reasonable accommodation can best be determined on a case-by-case basis, taking into consideration the employee, his/her specific disability and the resulting limitations, the essential duties of the particular job, the work environment, and the feasibility of the proposed accommodation. Reasonable accommodation may include, but is not limited to, the following:

#### 1. Modification of the Worksite

Facilities should be made readily accessible. Modifications may include, but are not limited to: arranging files or shelves for accessibility; raising or lowering equipment and work surfaces to provide comfortable working heights; installing special holding devices on seats, desks, or machines; using Braille labels or other tactile cues for identification purposes; and installing special equipment such as telephone amplifiers.

#### 2. Assistive Devices

HHS OPDIVs are authorized to purchase equipment or assistive devices if they are necessary to fulfill the official business of the agency. Equipment or assistive devices may not be provided if they are of a personal nature such as eyeglasses or hearing aids. In determining whether the purchase of equipment and assistive devices should be authorized, consideration should be given as to whether the device will enable the person with a disability to perform tasks he/she would otherwise be unable to carry out, and whether the major benefit would be an increase in the quantity, quality, or efficiency of the employee's work.

#### 3. Readers, Interpreters, and Personal Assistants

Reader- It may be a reasonable accommodation to provide a reader for a qualified individual with a disability, if this would not impose an undue hardship. In some job situations, a reader may be the most effective and efficient accommodation, but in other situations, equipment or an assistive device may enable a visually impaired individual to read independently. A reader may be an employee who performs other duties.

Qualified Sign Language Interpreter – See definition under Appendix A.

**Captioning** - The process of converting the audio portion of a video production or live event onto text which is displayed on a television or film screen. The captions are typically white upper-case against a black background and, when pre-recorded, displayed live as the show is broadcast. They may also be permanently visible (open-caption) or viewable only through a decoder (closed-caption) attached to or built in to the television.

**Computer-Aided Real-time Translation (CART)** - A form of captioning which provides a word-for-word transcription of what is being said. It may be read on a laptop computer or projected on to screen television or, for a large audience, on to a full-size screen.

**Personal Assistant** - Providing a personal assistant on an "as-needed" basis may be a reasonable accommodation for a person with a disability. If an individual is so severely disabled that he/she needs assistance arranging work materials, or transferring from a wheelchair to a taxi or other modes of transportation, this assistance may be provided by a personal assistant.

#### 4. Flexible Leave Policies

HHS OPDIVs have authority to adopt flexible leave policies, subject to appropriate laws and regulations that will accommodate employees with disabilities.

#### 5. Adjusting Work Schedules

HHS OPDIVs are encouraged to approve flexible or altered work schedules for employees who cannot meet the requirements of the regularly scheduled tour of duty for their position for reasons associated with their disability (examples include requirement for medical treatment, need for rest periods, or difficulty getting to work).

#### 6. Restructuring Jobs

Job restructuring is one of the major means by which an employee with a disability can be accommodated. Supervisors should consult with the Human Resources Office, Selective Placement Coordinators, EEO Officers, and/or specialists in the fields of vocational rehabilitation and medicine, to discuss changes that can be made to enable the person with a disability to perform the job.

#### 7. Training

The HHS OPDIVs employing a person with a disability will accommodate and assume the costs incurred when that employee attends training. The HHS OPDIVs will also arrange reasonable accommodation needs for approved courses, whether held at the Agency or other locations, including arrangement of transportation to and from the training site.

## APPENDIX C

### SELECTED REASONABLE ACCOMMODATION RESOURCES

#### **U. S. Equal Employment Opportunity Commission**

1-800-669-3362 (Voice)

1-800-800-3302 (TTY)

The EEOC's Publication Center has many free documents on the Title I employment provisions of the ADA, including both the statute, 42 U.S.C. § 12101 et seq. (1994), and the regulations, 29 C.F.R. § 1630 (1997). In addition, the EEOC has published a great deal of basic information about reasonable accommodation and undue hardship. The two main sources of interpretive information are: (1) the Interpretive Guidance accompanying the Title I regulations (also known as the "Appendix" to the regulations), 29 C.F.R. pt. 1630 app. §§ 1630.2(o), (p), 1630.9 (1997), and (2) A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act III, 8 FEP Manual (BNA) 405:6981, 6998-7018 (1992). The Manual includes a 200-page Resource Directory, including federal and state agencies, and disability organizations that can provide assistance in identifying and locating reasonable accommodations.

The EEOC also has discussed issues involving reasonable accommodation in the following guidance and documents: (1) Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations at 5, 6-8, 20, 21-22, 8 FEP Manual (BNA) 405:7191, 7192-94, 7201 (1995); (2) Enforcement Guidance: Workers' Compensation and the ADA at 15-20, 8 FEP Manual (BNA) 405:7391, 7398-7401 (1996); (3) Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 19-28, 8 FEP Manual (BNA) 405:7461, 7470-76 (1997); (4) Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 at 6-9, 8 FEP Manual (BNA) 405:7371, 7374-76 (1996); and (5) Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act at 20, 22, 23, 24-5, 8 FEP Manual (BNA) 405:7701, 7711, 7712-14, 7715-16 (2000).

All of the above-listed documents, with the exception of the ADA Technical Assistance Manual and Resource Directory are also available through the Internet at <http://www.eeoc.gov>.

#### **Job Accommodation Network (JAN)**

1-800-232-9675 (Voice/TTY)

<http://janweb.icdi.wvu.edu>

A service of the Department of Labor's Office of Disability Employment Policy, JAN can provide information, free-of-charge, about many types of reasonable accommodation.

**ADA Disability and Business Technical Assistance Centers (DBTACs)**  
1-800-949-4232 (Voice/TTY)

The DBTACs consist of ten federally funded regional centers that provide information, training, and technical assistance on the ADA. Each center works with local business, disability, governmental, rehabilitation, and other professional networks to provide current ADA information and assistance, and places special emphasis on meeting the needs of small businesses. The DBTACs can make referrals to local sources of expertise in reasonable accommodations.

**Registry of Interpreters for the Deaf**

333 Commerce Street  
Alexandria, VA 22314

(703) 838-0030 V  
(703) 838-0459 TTY  
(703) 838-0454 Fax

Office hours -- Monday - Friday, 9:00 AM to 5:00 PM EST

The Registry of Interpreters for the Deaf, Inc. (RID), is a national membership organization of professionals who provide sign language interpreting/transliterating services for Deaf and Hard of Hearing persons. It is the goal of RID to promote the profession of interpreting and transliterating of both American Sign Language and English. RID's mission is to provide international, national, regional, state, and local forums by providing an organizational structure for the continued growth and development of the professions of interpretation and transliteration of American Sign Language and English.

The RID national office has at its disposal a vast array of informational resources on the field of interpreting, including papers on Interpreting Standards and Practices and How to Hire and Work with an Interpreter.

**RESNA Technical Assistance Project**

(703) 524-6686 (Voice) (703) 524-6639 (TTY)  
<http://www.resna.org>

RESNA, the Rehabilitation Engineering and Assistive Technology Society of North America, can refer individuals to projects in all 50 states and the six territories offering technical assistance on technology-related services for individuals with disabilities. Services may include:

- \* Information and referral centers to help determine what devices may assist a person with a disability (including access to large data bases containing information on thousands of commercially available assistive technology products),



- \* Centers where individuals can try out devices and equipment,
- \* Assistance in obtaining funding for and repairing devices, and
- \* Equipment exchange and recycling programs.

### **USDA TARGET Center**

1400 Independence Ave.  
Room 1006-S  
Washington DC 20250-9876  
(202) 720-2600 (Voice/TTY)  
(202) 720-2681 (FAX)

The Target Center has a wide variety of assistive devices available for Federal employees to examine and test.

### **CAP (Department of Defense)**

(703) 681-8813 (Voice) (703) 681-0881 (TTY)

<http://www.tricare.osd.mil/cap/requests>

<http://www.HHS.cap@hhs.gov>

CAP “Computer/Electronic Accommodations Program”, the Department of Defense (DoD) established CAP in 1990 to eliminate employment barriers for its employees with disabilities. Providing real solutions for real needs to ensure people with disabilities have equal access to the information environment and opportunities in the Federal Government are the mission of the Computer/Electronic Accommodations Program (CAP). HHS entered into an agreement with CAP to provide free computer/electronic equipment to employees with disabilities.

### **Rehabilitation Services Agencies**

Rehabilitation Services Agencies are state agencies that provide support for the employment, economic self-sufficiency and independence of individuals with disabilities. Local phone book should list them under state services. Sometimes they are listed by Vocational Rehabilitation Offices.

### **Services for the Visually Impaired**

Judy Rasmussen  
8720 Georgia Avenue, Suite 210  
Silver Spring, MD 20910  
(301) 589-0894  
Email: [judyras@tidalwave.net](mailto:judyras@tidalwave.net)

Some people who have minimal vision use Braille. This organization can convert documents to Braille. After arranging for payment, documents can be sent to the Services for the Visually Impaired as an e-mail attachment and the Braille copy will be mailed to the agency.

**National Captioning Institute**

1900 Gallows Road, Suite 3000

Vienna, VA 22182

703-917-7600

Federal law requires that all videos include captions, preferably open captions. The National Captioning Institute can add captions to videos.

## APPENDIX D

### HHS REASONABLE ACCOMMODATION FORMS

1. (HHS Form 557) Confirmation of Request for Reasonable Accommodation



Adobe Acrobat 7.0  
Document

2. (HHS Form 557a) Denial of Reasonable Accommodation Request



Adobe Acrobat 7.0  
Document

3. (HHS Form 577b) Reasonable Accommodation Information Tracking



reasonable  
accommodation infor

4. Standard Form 256, Self Identification of Handicap



Adobe Acrobat 7.0  
Document

## **Chapter 5 – Diversity and Special Emphasis Observances Policy**

## **Chapter 5 - DIVERSITY AND SPECIAL EMPHASIS OBSERVANCES POLICY**

### **5.1 PURPOSE**

This policy establishes guidance for planning, conducting, and improving Diversity and Special Emphasis Observances for the Department of Health and Human Services (HHS).

### **5.2 SCOPE**

This policy extends to Diversity and Special Emphasis Observances sponsored by the Assistant Secretary of Administration and Management, Office of Diversity Management and Equal Employment Opportunity (ASAM/ODME) and all HHS OPDIVs.

### **5.3 POLICY**

Recognizing the HHS workforce as the foundation for our strength as an organization, HHS fully supports Equal Employment Opportunity (EEO) policies and objectives that will enhance the quality of work life and workforce productivity. Diversity and Special Emphasis Observances are management programs designed to embrace diversity and inclusion by recognizing historical racial, gender, and social disparities, as well as celebrate the accomplishments and contributions of minorities, women, and persons with disabilities in various organizational components throughout HHS.

This policy is designed to:

- a. Provide Operating Divisions (OPDIVs) within HHS with guidance to plan, sponsor, coordinate, and evaluate programs for the purposes of educating and promoting a greater understanding and awareness of diversity
- b. Establish a mechanism to evaluate processes and outcomes to facilitate collaboration among sponsors to promote continuous program improvement efforts.

## **5.4 AUTHORITY**

- Title VII of the Civil Rights Act of 1964, as amended
- Rehabilitation Act of 1973
- Title 29 Code of Federal Regulations Part 1614
- Office of Personnel Management Guidance on Special Emphasis Programs
- EEOC Management Directives 110 and 715
- HHS Diversity Management Plan

## **5.5 RESPONSIBILITIES**

### **5.5.1 ODME/ASAM**

1. Develop departmental policy for Diversity and Special Emphasis Observances
2. Conduct program evaluation and analysis
3. Complete an annual activity report by calendar year

**5.5.2 OPDIV HEADS.** Provide leadership and organizational resources to plan, coordinate, and conduct Diversity and Special Emphasis Observances within their OPDIV. Through personal leadership and involvement, proactively support and promote the Department's Equal Employment Opportunity (EEO) and Diversity management programs to achieve a more diverse workforce and promote a workplace free of discrimination.

### **5.5.3 Diversity and Special Emphasis Observance Organizers**

1. Plan, coordinate, and manage Diversity and Special Emphasis Observances
2. Collect post-event customer service feedback data
3. Report feedback data quarterly on Key Performance Indicator (KPI) quarterly report
4. Coordinate activities with OPDIV Heads to facilitate support from senior leadership

## GUIDANCE ON DIVERSITY AND SPECIAL EMPHASIS OBSERVANCES

- A. **Tailor Activity to Workforce:** When planning Diversity and Special Emphasis Observances, tailor activities to the needs of the workforce. OPDIVs are not limited to Title VII groups and persons with disabilities when planning observances. OPDIV Heads may approve additional events, such as observances that mark the birth of Martin Luther King, Jr. or the Holocaust Days of Remembrance, etc.
- B. **At a minimum, OPDIVs should use the following calendar, and Exhibit A, as a planning guide for Diversity and Special Emphasis Observances:**
- February: African American Heritage Month
  - March: National Women’s History Month
  - May: National Asian American/Pacific Islander Heritage Month
  - September: National Hispanic Heritage Month (September 15 – October 15)
  - October: National Disability Awareness Month
  - November: National American Indian/Alaskan Native Heritage Month
- C. **Coordinate and Collaborate:** OPDIVs may sponsor Diversity and Special Emphasis Observances within their own organizations; however, collaboration among OPDIVs and ASAM/ODME is strongly encouraged to benefit from the talents of their employees and to benchmark successful events
- D. **Involve Leadership:** Leadership commitment and participation are key elements in successfully planning and hosting Diversity and Special Emphasis Observances. Organizers must coordinate activities with their leadership to maximize marketing and attendance support. Managers and supervisors must leverage work center requirements with the goal of promoting maximum participation for observances. It is the responsibility of managers and supervisors to afford employees the opportunity to participate and encourage attendance at Diversity and Special Emphasis Observances, when their attendance does not conflict with mission requirements.

## 5.6 GUIDANCE ON PLANNING DIVERSITY AND SPECIAL EMPHASIS OBSERVANCES

- A. **Develop a Detailed Plan:** A well planned Diversity and Special Emphasis Observance promotes the overall diversity goals and objectives of HHS. OPDIVs should develop an organized and structured approach to planning events, which include at a minimum, development of a timeline of key deliverables and milestones, assignment of a team or individual responsible for the deliverables and milestones, projected costs of the project, and an evaluation of the project's processes and outcomes. Applying principles of project management are an excellent way for OPDIVs to develop Diversity and Special Emphasis Observances – see Exhibit B.
- B. **Educate Participants About the Observance.** When planning Diversity and Special Emphasis Observances, ensure they are educational in nature, demonstrate positive contributions in recognition of the subject event, and conducted within the targeted budget. Consultation with HHS University and the OPDIV's workforce development and training offices, when developing educational objectives and outcomes, is strongly encouraged.
- C. Examples of appropriate educational objectives for Diversity and Special Emphasis Observances are:
1. *Participants gain an awareness of the group(s) being emphasized at the event*
  2. *Participants demonstrate ability to identify one or more organizational benefits of diversity*
  3. *Participants demonstrate an understanding of how diversity impacts organizational performance*
  4. *Receive Prior Approval of Guest Speakers:* Guest speakers are also an excellent source for Diversity and Special Emphasis Observances. However, it is important organizers coordinate requests for and approval of guest speakers with the lead OPDIV's Head. Planners are strongly advised to contact the Public Affairs Office to solicit their coordination and or recommendations regarding the proposed speakers. Guest speakers should promote diversity in a positive manner by highlighting the event's theme and the overall value of diversity. Final approval of guest speakers for Diversity and Special Emphasis Observances rests with the lead OPDIV's Head, unless otherwise further delegated to the OPDIV EEO Director.



5. *Develop a Marketing Strategy:* Organizers should develop an aggressive marketing strategy during the planning phase, with the goal of reaching 100 percent of their workforce. Organizers will market observances by distributing memoranda to employees about the activity and inviting employees to attend; disseminating the associated Presidential Proclamation commemoration, when available; posters, flyers, etc., to maximize attendance. Marketing of events should begin well enough in advance to allow for maximum attendance and provide supervisors and managers with enough lead-time to leverage mission needs with support for the events. Use of physical and electronic bulletin boards, including web sites and electronic mail are excellent sources for marketing.
6. *Extend Special Invitations:* Organizers should extend special event invitations to the Secretary, Deputy Secretary, Assistant Secretaries, Chief of Staff, OPDIV/STAFFDIV heads, and ASAM/ODME. For events planned at the Southwest Complex or in the Hubert H. Humphrey Building, coordinate invitations through ASAM/ODME. Invitations may also be extended to the HHS recognized employee organizations, special interest organizations, HHS partnership organizations, and/or other Federal agencies. All announcements of HHS-sponsored activities to the public and to the HHS workforce must include interpretive services language and the reasonable accommodation statement, including a contact person for requesting reasonable accommodation for persons with disabilities.
7. *Prepare an Agenda:* Organizers should carefully plan the agenda for Diversity and Special Emphasis Observances to meet the desired outcome of the event and support mission requirements. To encourage maximum participation and support, organizers must plan and schedule the events appropriately, in terms of program length. In general, observances that are one hour in length are more desirable; however, those that include cultural entertainment, such as food sampling may require additional time.

## **5.7 GUIDANCE ON EVALUATING DIVERSITY AND SPECIAL EMPHASIS OBSERVANCES**

Evaluation of Diversity and Special Emphasis Observances is an important step in identifying opportunities for improvement. Sponsors of events are encouraged to collect KPIs for Special Emphasis Observances, in the form of a customer feedback survey.

Exhibit C is a feedback tool to assist organizers in collecting relevant data. Sponsors and organizers may use a different tool to collect and measure customer feedback; however, to ensure measurement of reportable KPIs, incorporate the questions from the attached tool with the locally developed instrument. In addition, ASAM/ODME will periodically collect lessons learned data for the purpose of collaboration and continuous program improvement.

## **5.8 RESPONSIBLE OFFICE**

Any questions or comments regarding the contents of this policy should be directed to the Director, Office of Diversity Management and EEO, HHS/ASAM.

## **Chapter 6 – EEO and Diversity Policy**

## **Chapter 6 - EEO AND DIVERSITY TRAINING POLICY**

### **6.1 PURPOSE**

This policy establishes mandatory training requirements for all employees assigned to the Department of Health and Human Services (HHS).

### **6.2 SCOPE**

This policy extends to EEO and Diversity Management training which is prescribed by the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Assistant Secretary for Administration and Management in his/her capacity as the HHS Director of Equal Employment Opportunity.

### **6.3 POLICY**

HHS employees and supervisors/managers are required to receive training as specified in this manual.

### **6.4 AUTHORITY**

- Title VII of the Civil Rights Act of 1964, as amended
- Rehabilitation Act of 1973
- Age Discrimination in Employment Act (ADEA) of 1967
- Title 29 Code of Federal Regulations Part 1614
- Office of Personnel Management Guidance on NoFEAR training
- EEOC Management Directives 110 and 715

### **6.5 RESPONSIBILITIES**

#### **6.5.1 ODME/ASAM**

1. Develop Departmental policy for EEO and Diversity training
2. Evaluate OPDIV training programs to ensure consistency and standardization of desired learning outcomes
3. Advocate for needed resources to enhance the training capability of the Department

## 6.5.2 OPDIV HEADS

- A. Provide leadership and organizational resources to ensure all eligible employees receive the required training.
- B. Plan, coordinate, and conduct EEO and Diversity training within their OPDIV.

## 6.6 REQUIRED TRAINING

### 6.6.1 Employee and Supervisor/Management Training

- A. NoFEAR Training:
  - 1. All new employees must complete NoFEAR training within 90 days of assignment
  - 2. All employees must complete refresher training every 2 years before the anniversary of their initial training.
- B. Reasonable Accommodation, Harassment (Sexual & Non-Sexual), Alternative Dispute Resolution, and Diversity Training
  - 1. All new employees must complete initial training within the first year of assignment
  - 2. All employees must complete refresher training in each of these areas every 3 years.

### 6.6.2 EEO Counselor Training

OPDIVs will ensure all EEO Counselors complete the 32 hour Basic Counselor Training Course and the requisite 8 hour refresher training.

### 6.6.3 EEO Practitioner Training

OPDIVs will ensure all EEO Practitioners receive training in the following areas:

- A. EEO Practitioner Update:** This course will provide an update on recent developments in the federal sector EEO which will affect the administration of EEO programs. Trainers should use case studies, and practical scenarios to assist participants in understanding concepts and issues. Upon completing this course the employee should be aware of the latest developments in federal sector EEO law, regulations and policy, be able to apply case law to facts to reach procedural and merit decisions, and have increased knowledge and skills in the performance of EEO job responsibilities.

**B. Developing Acceptance/Dismissal Letters:** This course will provide EEO Specialists with an understanding of how to accept and dismiss claims of discrimination raised in formal EEO complaints. The course is designed to serve as a refresher and to provide guidance to newly-hired EEO Specialists in order to address situations with which they are inexperienced. Specifically, the course will focus upon the regulatory criteria for accepting or dismissing claims for further processing. Techniques in framing claims and applying regulatory prerequisites will also be shared to ensure the acceptance/dismissal letter properly defines the focus/scope of the investigation for further processing and/or procedural grounds for dismissal. Upon completing this course, the practitioner should understand relevant EEO laws, regulations and procedures, and be able to identify the bases for filing EEO complaints, determine whether a formal complaint has sufficient information to determine whether to accept or dismiss a claim, apply regulatory prerequisites for procedural dismissal of formal complaints, and identify problems/pitfalls in drafting the highest quality Accept/Dismiss correspondence.

**C. Drafting Final Agency Decisions:** This course is designed to equip the learner with the fundamentals of how to prepare final agency decisions (FADs) concerning complaints of discrimination utilizing well-established methodologies for review, analyses and remedial relief determinations. Upon completion of this course, the practitioner should be able to identify the theories and basis of discrimination, burdens and standards of proof, identify prima facie case elements relative to specific bases, organize notes and/or outline investigative report utilizing techniques which will demonstrate recognition of relevant testimony, analyze contents of the investigative report to identify prima facie case, rebuttal or pretext and to determine whether complainant's claims have been substantiated, formulate remedial relief by matching action to harm when there is a finding of discrimination, and draft well-written and concise final agency decision document in conformance with procedural and substantive requirements as outlined in complaint processing regulations.

#### **6.6.4 Training Waivers**

The Department has worked with the OPDIVs and HHS-University to develop standardized training modules which meet the basic employee and supervisory training requirements. OPDIVs are highly encouraged to use these instructional materials. However, to afford OPDIVs maximum flexibility to train their employees and meet mission requirements, OPDIVs may wish to pursue alternative means of instruction (contract instructors, web-based instruction, etc). In such cases, the OPDIV will submit their training lesson plans and course materials to ODME for review to ensure the desired learning objectives are met. Once approved, ODME will issue the OPDIV a training waiver.

In addition, collaboration among OPDIVs is highly encouraged. OPDIVs may sponsor training opportunities within their own organizations, but wish to collaborate with other OPDIVs to benefit from consolidated training or cost saving opportunities.

## **6.7 LEARNING MANAGEMENT SYSTEM**

All training will be documented via the HHS-University Learning Management System. OPDIVs will contact HHS-University to coordinate system integration, course development, employee registration, etc. Only in extreme situations will OPDIVs be allowed to deviate from the LMS process. (NOTE: HHS is required to routinely report formal training to OPM. The LMS system is the primary Departmental tool to capture this data. In addition, OPDIV training statistics are derived from the LMS system and reported via Key Performance Indicators with regard to Performance Management.

## **6.8 RESPONSIBLE OFFICE**

Any questions or comments regarding the contents of this policy should be directed to the Director, Office of Diversity Management and EEO, HHS/ASAM.

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