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## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### 29 CFR Part 1614

RIN 3046-AA74

### Posting Requirements in Federal Sector Equal Employment Opportunity

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Interim final rule.

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC) is issuing implementing rules under the No Fear Act regarding the posting of EEO complaint processing data. The rules tell Federal agencies what information to post, how to post it, and when to post it. EEOC wishes to emphasize that these are interim final rules and therefore subject to change based on the public comments EEOC receives.

**DATES:** This interim final rule is effective January 26, 2004. Comments must be submitted on or before March 26, 2004.

**ADDRESSES:** Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept comments of six pages or less transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. This is not a toll free number. The six-page limitation is necessary to assure access to the equipment. Receipt of FAX transmissions will not be acknowledged although a sender may request confirmation by calling the Executive Secretariat at (202) 663-4078 (voice) or (202) 663-4077 (TTY). These are not toll free numbers. Copies of comments

submitted by the public will be available for review at the Commission's library, room 6502, 1801 L Street NW., Washington, DC between the hours of 9:30 a.m. and 5 p.m.

#### FOR FURTHER INFORMATION CONTACT:

Thomas J. Schlageter, Assistant Legal Counsel, Gary John Hozempa, Senior General Attorney or Mona Papillon, Senior General Attorney at (202) 663-4669 (voice) or (202) 663-7026 (TTY). Copies of this interim final rule are also available in the following alternate formats: Large print, braille, audiotape and electronic file on computer disk. Requests for this notice in an alternative format should be made to EEOC's Publication Center at 1-800-669-3362.

#### SUPPLEMENTARY INFORMATION:

##### Introduction

EEOC is issuing rules to implement the posting requirements set forth in Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (the No Fear Act), Pub. L. 107-174. Pursuant to the No Fear Act, a federal agency must post on its public Web site summary statistical data pertaining to complaints of employment discrimination filed by employees, former employees and applicants for employment under 29 CFR part 1614 (*i.e.*, individual complaints, class complaints, and mixed-case complaints—but not mixed-case appeals that are filed with the U.S. Merit Systems Protection Board or grievances raising claims of employment discrimination filed under collective bargaining agreements). Title III authorizes EEOC to issue rules concerning the "time, form and manner" of the postings, to define the terms "issue" and "basis," and to issue any other "rules necessary to carry out" Title III.

Section 301 of the No Fear Act specifically sets forth the "summary statistical data" that each agency must post. It requires an agency to post quarterly year-to-date cumulative statistical data for the then current fiscal year. An agency also must post year end data for the five previous fiscal years or, if not available for all five fiscal years, the required data to the extent available for those five fiscal years. In addition, under section 302 of the No Fear Act, EEOC must post fiscal year data pertaining to requests for hearings before an EEOC administrative judge

(AJ) and appeals filed with EEOC. The data EEOC must post regarding hearings and appeals corresponds to that which agencies are required to post under section 301. The interim rule uses the same categories for posting hearings and appeals data that agencies will be using for complaint processing to the extent those categories are applicable to hearings and appeals.

The interim rule requires an agency to post its data in two computer-readable formats, PDF and one text format that complies with section 508 of the Rehabilitation Act. A link to an agency's No Fear Act data also must be prominently displayed on the agency's home Web page.

Congress has directed the time periods for which complaint data must be captured, and the interim rule tracks these time frames. Additionally, because Congress requires agencies to post the average length of time to process complaints "for each step of the process," EEOC has set forth definitions delineating the major steps of the complaint process under 29 CFR part 1614. Lastly, Congress wants agencies to list the number of complaints by basis and issue, so EEOC has defined these terms.

In promulgating this interim rule, EEOC has been cognizant of the fact that agencies already report to EEOC some of the data they are required to post under the No Fear Act. Every executive branch agency must submit to EEOC an "Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints," otherwise known as EEOC Form 462. Wherever possible, EEOC has attempted to conform an agency's posting requirements under the Act with the agency's Form 462 reporting obligations. In the event of future changes to Form 462 reporting requirements, the Commission will examine whether such changes are relevant to the posting requirements under the Act.

The posting of EEO data on agency public Web sites is intended to assist Congress, Federal agencies and the public to assess whether and the extent to which agencies are living up to their equal employment opportunity responsibilities. Currently, EEO data, such as that reported on the Form 462, is reported to Congress by EEOC and is available from EEOC or can be viewed on EEOC's public Web site. Congress

concluded, however, that by having each agency post its own EEO data on its public Web site, thereby more widely disseminating the data, Congress, agencies, and the public would be better able to see how many EEO complaints are filed at a particular agency, how many are filed government wide, what the complaints are about, and what becomes of the complaints. Moreover, it was determined that agency managers and employees would have easier access to the data if it was posted on the agency's public Web page. At the least, posting EEO data on its own Web page should better enable agency personnel to identify and understand the nature and scope of conflicts involving employment discrimination within that agency, thereby affording all agencies another tool in correcting any EEO problems that may exist.

#### Executive Order 12067

Pursuant to Executive Order 12067, EEOC circulated a draft of this interim final rule to the heads of all federal executive branch agencies. Twenty-four (24) agencies offered comments. The Commission carefully considered all of the comments it received and incorporated a number of the suggestions. Many of the comments suggested ways in which to make the posting requirements clearer. For example, a number of agencies expressed concern that the requirement that an agency post the number of complaints in which an investigation is not timely completed (§ 1614.704(l)) did not allow for authorized extensions of the normal 180-day period. The Commission has clarified this section to make it clear that a complaint is timely investigated if completed within 180 days plus any valid extensions.

A few agencies opposed EEOC's proposal that an agency revise its data where issues and bases are added to the initial allegations, on the grounds that it would be difficult to do. Some also suggested that if agencies must post the bases and issues that subsequently are added to complaints, withdrawn issues and bases should be accounted for as well. EEOC has decided to eliminate the requirement that agencies post the issues and bases added by amendment. A few agencies pointed out that not all agencies accept EEO complaints that are filed via email or facsimile. EEOC has eliminated this language. A number of agencies questioned EEOC's proposal to identify counseling as a step of the complaint process, noting that not all counseling contacts result in a formal complaint and that the No Fear Act requires posting only with respect to complaints. EEOC has decided to

eliminate counseling as a defined step in the complaint process.

In a few places, EEOC's initial approach in implementing a particular posting requirement was discarded because one or more agencies suggested a better means of accomplishing the same result. For example, in the initial draft, the Commission proposed that agencies post both aggregate agency-wide data and separate data for their respective subelements. The proposed regulation then went on to list the affected subelements. A number of agencies pointed out that EEOC's list was incomplete and that subelements can be subsequently created, merged, or disbanded, thus making the list potentially obsolete. It was suggested that a subelement be defined based on the number of employees working at the subelement and that only those agencies with subelements employing a threshold number of employees be required to post subelement data. EEOC has adopted this approach. A question arose whether subelements must post No Fear Act data on their public Web sites. EEOC has decided not to mandate that subelements post their own data because EEOC does not know if every subelement as defined by the interim rule has a public Web site. Those which do have a public Web site are required to have a hyperlink to the parent agency's posting of the subelement's data.

Other parts of the proposed rule were not changed based on the comments. EEOC did not eliminate the requirement that agencies post data on dismissals. A few agencies argued that the No Fear Act does not require agencies to post this information. EEOC believes that agency dismissals represent a significant aspect of the EEO complaint process and that the value in capturing this information outweighs the minimal effort it will take to track and post this data. Agencies currently are required to report dismissals to the EEOC on Form 462. At the suggestion of a few agencies, EEOC revised this section of the rule to make it clear that it does not apply to partial dismissals.

In a similar vein, a few agencies requested that the final rule allow agencies to post data which they deem will present a more complete view of the EEO process but which is not required to be posted by the No Fear Act. The kind of data agencies would like to post include the number of complaints in which no discrimination is found, the number of complaints that are resolved through an agency's ADR program, the number that are settled by other means, and the number that are withdrawn. Some agencies want to post

data regarding the number of AJ findings of discrimination that are reversed on appeal, and the number of findings of no discrimination that are reversed on appeal. The Commission concludes that too many additional categories will detract from those required to be posted under the Act. Therefore, EEOC has not added any additional categories. Agencies, of course, are free to post whatever EEO data they desire on their public Web sites so long as it does not appear with their No Fear Act data. Agencies may insert a hyperlink to this additional data on the page on which the No Fear Act data appears.

A handful of agencies suggested EEOC eliminate the "non-EEO basis" category under "bases of discrimination" because a complaint that raises a non-EEO basis does not constitute an EEO complaint. Therefore, they argued, such "complaints" need not be tracked for purposes of the No Fear Act. Even a complaint that fails to state a claim or raises a basis that is not covered by the EEO statutes, however, must be processed by an agency, even if that means the complaint is immediately dismissed. Moreover, EEOC believes it will be helpful to see how many complaints that are filed under the 29 CFR part 1614 procedures do not raise the requisite jurisdictional basis. Accordingly, EEOC has decided to keep the "non-EEO basis" category.

One agency objected to the requirement that a hyperlink to the No Fear Act data be posted prominently on the agency's Web site homepage. This agency argues that a hyperlink is not explicitly required by the statute. While true, EEOC believes the hyperlink requirement falls well within the "time, form, and manner" authority given to EEOC under the Act. Additionally, given the fact that the No Fear Act data is one of only a few categories of information which Congress has decreed be posted by all executive branch agencies on their public Web sites, it simply makes sense that members of the public be able to access this data as easily as possible.

Some other suggested changes were not made because they were based on a misreading of the draft regulations. In those instances, EEOC has clarified the regulations and preamble to address the misunderstood language. A number of agencies, for example, expressed the concern that agencies would be held accountable for the time a complaint is with an EEOC AJ. However, EEOC, and not the agencies, is required to post hearing data.

A number of agencies requested that EEOC mandate a uniform format for

posting. While EEOC considered mandating the format and layout that all agencies would adhere to so that one agency's posted data would be indistinguishable from another's in terms of look and feel, EEOC did not initially propose such an approach because it was reluctant to impose unilaterally a standardized posting design or format. As a result of the agency comments, EEOC will revisit this issue, but will do so during the public comment period. It is the obligation of agencies covered by the Act to begin posting data at the conclusion of the first quarter of fiscal year 2004.

#### Form and Manner of Data

EEOC believes that some uniformity in how data is posted is necessary in order to make each agency's data easily accessible to the public. Interim rule 29 CFR 1614.703 therefore specifies that the data must be posted in two formats: Portable Document Format (PDF); and an accessible text format of the agency's choosing that complies with the agency's obligation under section 508 of the Rehabilitation Act.

The interim rule requires each agency to prominently post on its primary Web homepage a link to the data required to be posted under the Act and designate the link and that data as "Equal Employment Opportunity Data Posted Pursuant to the No Fear Act." This is to make finding and then viewing the data as easy as possible, with a minimum of navigation clicks or jumps. An agency also must prominently post the date its data was last updated.

EEOC believes that posted data will be more meaningful and useful if, in addition to showing agency-wide statistics, certain large agencies show how each subelement of the particular agency is performing. Given that many agency subelements employ more employees than are employed by entire agencies, EEOC believes it simply makes good sense to see how each subelement is complying with the EEO laws, especially when compared to the parent agency. Therefore, an agency containing subelements as defined in section 1614.702(l) must post both agency-wide aggregate data and subelement-specific data.

#### Data To Be Posted

*Number of complaints.* No Fear requires an agency to post the number of EEO complaints filed with it under 29 CFR part 1614 in a given fiscal year. If the same individual files four separate complaints, they should be counted as four complaints. Even if complaints later are consolidated for processing, they should still be counted as separate

complaints for purposes of this posting requirement.

*Number of filers.* Under section 1614.704(b), an agency must post the number of individuals who file complaints with the agency in a given fiscal year. Where the same individual files multiple complaints, the agency counts the complainant only once under this section. For example, if the same person files five complaints in a given fiscal year, the agency will count five complaints as having been filed, but only one filer.

If a class complaint is filed, the agency shall treat the class agent as the filer. If the class complaint has multiple class agents, they should all be considered filers. An agency should not post the total number of class members involved in a class complaint.

*Number of repeat filers.* The No Fear Act requires an agency to post the number of individuals who file multiple complaints during a fiscal year. By "multiple" section 1614.704(c) means more than one. If a single individual files two or more complaints during the fiscal year, then that person is counted once as a repeat filer regardless of how many complaints he or she files. If a person files an individual complaint and is a class agent for a separate class complaint during the reporting period, then that person is counted as a repeat, or multiple, filer. This same person also is to be counted as a filer under section 1614.704(b).

*The basis of a complaint.* Each agency must post the number of complaints in which each of the various bases of discrimination is alleged. The basis of the complaint is the discriminatory factor asserted by the complainant that is protected by the statute under which the complaint is filed. The bases protected by the EEO statutes are race, color, religion, national origin, sex, disability, age, and retaliation (for participating in the EEO complaint process or for opposing practices made illegal under the EEO laws). A complaint brought under the Equal Pay Act is considered to be a complaint on the basis of sex. To the extent any other "basis" is alleged (e.g., marital status, parental status, union membership), the interim rule contemplates that such basis will be listed in a "non-EEO basis" category.

We are including a "non-EEO basis" category as a catch-all in order to cause agencies to post the number of complaints in which a basis not covered by the EEO statutes is alleged. In this way, persons viewing an agency's complaint statistics will not have to wonder whether they contain discrepant numbers. For example, if an agency

posts that ten complaints were filed and then posts that only eight complaints raised race as a basis (because the remaining two complaints raised non-EEO bases), a viewer might well wonder whether the agency neglected to note the bases alleged in those two complaints. Having the agency post that two complaints raised a "non-EEO basis" fills in that gap.

Where multiple EEO bases are alleged, the agency must post data showing that a complaint was filed on each basis. Thus, if a complainant alleges discrimination based on race and national origin, the agency is to count that complaint as one filed based on race and one filed based on national origin. Consequently, if one complaint is filed based on sex and age, a second complaint is filed based on race, sex and age, and a third complaint is based on national origin, disability and sex, the required (and correct) posting would be that for the basis of race one complaint was filed, for the basis of disability one complaint was filed, for the basis of national origin one complaint was filed, for the basis of age two complaints were filed, and for the basis of sex three complaints were filed.

*The issue raised in a complaint.* Each agency must post the number of complaints in which each of the various issues of alleged discrimination is alleged. The issue of a complaint is the matter about which the individual is complaining. The issue sets forth the alleged discriminatory incident for which the individual seeks redress.

As with bases of discrimination, the agency must list each issue that is raised and the number of complaints that raised that issue. Thus, if a complainant alleges in a single complaint that he was denied training and not promoted, the agency should count this as one complaint on the issue of training and one complaint on the issue of promotion/non-selection.

Unlike bases of discrimination, the number and types of potential issues are not finite. Therefore, defining an issue will not always be as exact as defining a basis. This is because the same issue can be described in different ways. When a complainant alleges she was discriminated against because she is female, there is no dispute that the alleged basis is sex. On the other hand, if an individual files a complaint challenging her nonselection for a promotion, the issue could be described in a number of ways, including "promotion," "nonpromotion," "non-selection," "failure to be promoted," or "not selected for a promotion."

Consequently, in order to avoid the confusion that can result from varying

descriptions of the same issue, and to make the posted data as uniform as possible, EEOC is providing a list of issues most commonly raised in complaints. This list of issues contains the same issues currently used by agencies in reporting statistics to EEOC on EEOC Standard Form 462. Agencies must choose an issue from this list when posting the type of issue that is alleged. A list of the issues appears on page 2 of Form 462 and the specific issues are included in the definition of "issue" in the regulation. An "other" category will capture all issues not listed on Form 462. Unlike Form 462, however, where an agency must describe the "other" issue, here the agency merely will note the number of complaints that raise issues not listed on Form 462.

*Amendments or changes made to a complaint.* With respect to the posting of bases and issues pursuant to sections 1614.704(d) and (e), an agency must list all bases and issues initially raised regardless of whether a complainant subsequently adds or withdraws, or an agency declines to accept, a basis or issue. This is to ensure that a complete picture is presented as to the matters that are being raised initially in filed complaints. Bases or issues that are added by amendment are not to be posted.

*Processing time.* The No Fear Act requires an agency to post the average length of time it takes an agency to complete "each step of the process" for every complaint that is pending during any time of the then fiscal year. The interim rule tracks this requirement. If a complaint is pending at any time during the fiscal year for which data is being posted, the agency must post processing time data for each step even if the complaint was filed in a prior fiscal year and even if any discrete step commenced or ended in a prior fiscal year. Example 1. A complaint is filed on July 1, 2003 (fiscal year 2003), the investigation concludes on March 1, 2004, the complainant requests an immediate final decision on March 2, and the agency issues a final decision on June 1, 2004. In posting its fiscal year 2004 data, the agency will have to factor into its average processing times the fact that this complaint was pending at the investigative stage for 8 months and at the final action stage for 3 months. Example 2. A complaint is filed on March 1, 2003, the investigation is completed on September 1, 2003, the complainant requests an immediate final decision on September 29, 2003, and the agency issues a final decision on November 30, 2003 (fiscal year 2004). In posting its fiscal year 2004

data, the agency will have to factor into its average processing times the fact that this complaint was pending at the investigative stage for 6 months and at the final action stage for 2 months. Example 3. A complaint is filed on September 1, 2003, the investigation is completed on February 1, 2004, the complainant requests a hearing on February 15, 2004, the AJ issues a decision on September 1, 2004, and the agency issues its final order on October 5, 2004 (fiscal year 2005). In posting its fiscal year 2004 data, the agency will have to factor into its average processing times the fact that this complaint was pending at the investigative stage for 5 months. Since final action did not occur in FY 2004, average processing time for final action by the agency would not be factored into FY 2004 data. The processing time for the final action step of this complaint along with the time for completion of the investigation will be factored into the agency's fiscal year 2005 average processing time data.

The Act requires an agency to post average processing times under three categories: All complaints pending during the fiscal year; complaints in which a hearing is not requested; and complaints in which a hearing is requested. Using examples 1 and 2, above, the agency must use the time it took to investigate the complaint and issue its final decision in calculating average processing times when it reports those times for both "all complaints" and "complaints for which a hearing was not requested." Using Example 3, above, the agency must use the time it took to investigate the complaint in calculating average processing times when it reports that time for both "all complaints" and "complaints for which a hearing was requested." The operative word here is "requested." Regardless of whether a hearing is actually held, the agency is to report processing times based on whether a request for a hearing was made.

The Act does not define the phrase "each step of the process." Consequently, EEOC has defined those steps pursuant to its rulemaking authority under the Act. The interim rule divides the EEO complaint process into four steps: Investigation; hearing; final action by an agency after an investigation or hearing; and appeal. Under section 1614.704, an agency must report, for the then fiscal year, the average time it takes to complete two of these steps: Investigations; and final actions by an agency after an investigation or hearing. The precise time when each of these steps begins and ends is part of the definition of the respective steps. It is contemplated,

therefore, that the steps as defined by their beginning and ending times will control for posting purposes under the Act regardless of when an agency may deem a step to begin or end for its own internal purposes. This means, of course, that an agency will have to track its processing times according to the definitions set forth in the interim rule if it does not do so already. When reporting processing times for final actions by an agency, the definition of final action by an agency contained in section 1614.702(g) ensures that an agency will not be charged for the time in which a complaint is with an administrative judge.

Another aspect of the EEO complaint process which is not actually a "step of the process" is when an agency dismisses a complaint pursuant to 29 CFR 1614.107(a). These dismissals constitute an important aspect in the processing time of complaints. The interim rule therefore requires an agency to post for the fiscal year the number of complaints that are dismissed pursuant to 29 CFR 1614.107(a) and the average length of time such complaints were pending at the time of dismissal.

Dismissals pursuant to § 1614.107(a) are dismissals of the "entire complaint." These are the only dismissals section 1614.704(g) seeks to track. Where an agency follows the procedure outlined in 29 CFR 1614.107(b) (declining to investigate some claims in a complaint which the agency believes should be dismissed), there is not a dismissal of the entire complaint and so these complaints would not be reported under section 1614.704(g). Similarly, dismissals by an administrative judge pursuant to 29 CFR 1614.109(b) are not dismissals by the agency and therefore are not the types of dismissals contemplated by section 1614.704(g).

*Final actions by an agency involving discrimination:* The No Fear Act requires an agency to post for the then fiscal year the total number of final actions by an agency involving a finding of discrimination. EEOC interprets this to mean that an agency must post the total number of complaints in which the agency's final action addresses a finding of discrimination whether that finding is rendered by the agency or an administrative judge. Even if an agency issues a final order informing a complainant that it will not implement an administrative judge's finding of discrimination, the agency's final action "involves" a finding of discrimination and therefore must be listed as a final action by an agency involving discrimination.

Of the total number of final actions by an agency involving discrimination, the Act requires an agency to post the number and percentage that pertain to findings of discrimination “rendered without a hearing” and the number and percentage having to do with findings of discrimination after a hearing has been held.

It is clear that final action is taken without a hearing when a complainant requests an agency decision without a hearing, or fails to request a hearing within the requisite time period. It is also clear that final action is taken without a hearing when the complainant requests a hearing and subsequently withdraws that request, or events occur which cause the administrative judge to cancel the hearing without issuing a decision. Thus, if a hearing is requested and then cancelled, or the complainant withdraws the hearing request and the agency ultimately issues a finding of discrimination, the finding would be noted in the subcategory pertaining to a decision without a hearing.

In those cases in which a hearing is held and an agency final order informs the complainant that the agency will or will not implement the finding of discrimination issued by an administrative judge, this will be deemed to constitute an agency final action involving a finding of discrimination “after a hearing” for posting purposes.

There also are instances when a hearing is requested but the administrative judge renders a decision without holding a hearing. Under the federal sector complaint processing procedures, an administrative judge can issue a decision without a hearing pursuant to 29 CFR 1614.109(f)(3)(iv) (sometimes referred to as an adverse inference finding) or section 1614.109(g) (sometimes referred to as a summary judgement decision). The interim rule envisions that any agency final order that informs the complainant that the agency will or will not implement a finding of discrimination issued by an administrative judge, regardless of what proceeded the administrative judge’s decision, will be deemed to constitute an agency final action involving a finding of discrimination “after a hearing” for posting purposes. Thus, the form of the administrative judge’s decision is irrelevant, as is whether a hearing actually took place. An agency’s implementation or appeal of an administrative judge’s finding of discrimination, including a bench decision or a finding issued without a hearing pursuant to 29 CFR 1614.109(f)(3)(iv) or (g), is to be reported

under the subcategory pertaining to a finding of discrimination after a hearing. EEOC adopts this position because we believe it most closely adheres to the intent of Congress, which is to track how often an agency chooses to implement or not implement a finding of discrimination rendered by an administrative judge.

*Findings of discrimination sorted by basis and whether there was a hearing.* In posting the total number of final actions by an agency in which a finding of discrimination is made during a fiscal year, the No Fear Act requires an agency to post the number and percentage of such findings according to the basis on which discrimination was found. The Act requires an agency to further subdivide such data and post the total number and percentage of such findings of discrimination based on the type of discrimination that is found according to whether a hearing was held. The interim rule tracks these requirements. For purposes of this posting requirement, the identification of bases and whether a hearing was held will be governed by the same factors noted in the discussions above concerning postings by basis and postings by findings of discrimination.

With respect to posting findings of discrimination according to basis, what is determinative is the basis on which the finding of discrimination is made. This usually will be the same as the basis initially alleged in the complaint, but not always. If a person alleges multiple bases of discrimination, such as race, sex and retaliation, and the agency or administrative judge finds that the complainant was discriminated against solely because she had engaged in prior EEO activity, the agency will post information reflecting that it rendered a finding of retaliation.

*Findings of discrimination sorted by issue and whether there was a hearing.* In posting the total number of final actions by an agency in which a finding of discrimination is made during a fiscal year, the No Fear Act requires an agency to post the number and percentage of such findings according to the issue on which the complainant prevailed. The Act requires an agency to further subdivide such data and post the total number and percentage of such findings of discrimination sorted by issue according to whether a hearing was held. The interim rule tracks this requirement. For purposes of this posting requirement, the identification of issues and whether a hearing was held will be governed by the same factors noted in the discussions above concerning postings by issue and postings by findings of discrimination.

The data posted under this subsection of the interim rule will be characterized based on what action or actions the agency found to be discriminatory, regardless of what was initially challenged in the complaint.

*Number of pending complaints that were filed in prior fiscal years.* The No Fear Act specifies that an agency must look at all complaints pending in a current fiscal year and post the number that were filed before the start of that fiscal year. The interim rule tracks this requirement. EEOC interprets the requirement as applying to all pending complaints filed in a prior fiscal year, regardless of how long ago a complaint was filed. Thus, if a complaint filed 15 years earlier is still pending, the agency must count this complaint when posting the amount of pending complaints that were filed in prior fiscal years.

“Filed” is to be given its generally accepted meaning. Thus, a complaint is deemed filed on the date it is postmarked. If there is no postmark or the complaint is hand-delivered, the complaint is deemed filed on the date it is received by the agency. See 29 CFR 1614.604(b). An agency is to use these filing dates in ascertaining which complaints were filed before the start of the current fiscal year.

The Act further requires an agency to post the number of individuals who filed the complaints that were filed before the start of the current fiscal year. This number is to be based on the original number of persons who filed the complaints.

The Act requires that, of the complaints that were filed prior to the current fiscal year and are still pending, the agency shall specify how many of the complaints are at each specific processing step. The interim rule requires an agency to account for all prior fiscal year complaints including those pending at the hearings and appeals processing steps. The interim rule contemplates that the step at which a prior fiscal year complaint is pending shall be based on its status as of the end of the applicable reporting quarter.

Finally, the Act requires, as a general rule, that an agency look at all complaints pending in the current fiscal year, determine how many of the complaints were not timely investigated, and post that total number of complaints. As set forth in section 1614.702(c), the investigative step is deemed to commence on the date the complaint is filed. This is consistent with 29 CFR 1614.106(e)(2), specifically cited in the Act, which requires that the investigation be completed within 180 days of the date the complaint is filed, with certain exceptions (e.g., the parties

can agree in writing to extend the time period).

In this regard, section 301(b)(10)(C) of the No Fear Act couches this posting requirement in terms of how often "the agency violated the requirements of section 1614.106(e)(2)." This is significant in that, under 29 CFR 1614.106(e)(2) and 1614.108(e), the 180 day time period in which a complaint normally must be investigated can be extended by mutual written agreement between the parties for a period not exceeding 90 days and is automatically extended when a complaint is amended or a file needs to be sanitized because it contains classified information pursuant to Executive Order No. 12356, or successor orders. The Commission interprets this section of the Act as requiring an agency to post data only when an agency completes an investigation beyond 180 days plus any authorized extensions, including those contained in section 1614.108(e).

Thus, for example, where the parties mutually agree on the 179th day to extend the investigation another 90 days and the investigation is completed on the 260th day, the agency will not have to list this complaint as not having been timely investigated. If, on the other hand, the investigation is not completed until the 275th day, the agency will have to report that the complaint was not investigated in a timely manner since the investigative period exceeded 180 days plus the 90 day extension (*i.e.*, the investigation was completed beyond the allowable 270 days).

*Types of Complaints Covered.* As noted in the "Introduction" above, the posting requirement applies to all complaints filed with an agency under Part 1614. This includes individual complaints, class complaints and mixed-case complaints but not mixed-case appeals or grievances. While all complaints are covered under No Fear, not all the posting categories apply to all complaints (*e.g.*, mixed-case complaints). Posting data for class complaints and mixed-case complaints will, therefore, present some difficulty regarding some of the categories because of the different procedures that apply to them. For class complaints, agencies do not investigate the class complaint and class agents do not request hearings. For mixed-case complaints, the time limits for investigation (120 days) and decision (45 days) are different and complainants do not request or have hearings before an EEOC administrative judge. Thus, some adjustments will have to be made when posting data. Agencies shall post data on all individual, class and mixed-case complaints except as follows: (1) agencies should not include data on

class complaints for sections 1614.704(f)(2), (f)(3), and the part of (f)(1) requiring data on complaints pending at the investigation step; and (2) agencies should not include data on mixed-case complaints for sections 1614.704(f)(2), (f)(3), (h)(2), (h)(3), (i)(2), (i)(3), (j)(2), (j)(3), and (k)(3).

#### Timing of Posting Data

When posting data for a current fiscal year, the No Fear Act requires an agency to post on a year-to-date basis, updated quarterly. When posting data for prior years, the Act requires an agency to post on a fiscal year basis. These requirements are reflected in section 1614.703(e). Using fiscal year 2004 as an example, the agency's first posting of data will occur within thirty (30) calendar days of December 31, 2003 (the end of the first quarter). That posting must then be updated to reflect all pertinent data through March 31, 2004 (the end of the second quarter), no later than 30 calendar days after March 31. Another update will occur at the end of the third quarter. Within 30 calendar days of the end of fiscal year 2004, the agency shall post its final fiscal year data. This pattern then continues for each subsequent fiscal year. In updating current fiscal year data on a quarterly basis, the agency should not post separate data for each relevant quarter. Rather, an agency must post only one set of cumulative data that has been updated quarterly.

In addition to posting current fiscal year data, updated quarterly, the No Fear Act requires an agency to maintain on its Web site year-end data for each of the five immediately preceding fiscal years. Taking fiscal year 2004 as an example, this means that in February 2004, the agency's Web site will contain year-end data for fiscal years 1999, 2000, 2001, 2002, and 2003, as well as first quarter interim year-to-date data for fiscal year 2004. In subsequent years, when first quarter data for a new fiscal year is posted, the fiscal year comparison data that is more than six (6) years old will be dropped, *i.e.*, when first quarter 2005 data is posted, the year-end totals for 2004 will become the most recent comparison year-end data and the 1999 year-end data will be omitted. If an agency does not have data for one or more of the preceding five fiscal years, the Act requires that the agency post whatever data it has available for any of those five years. The year-end data that is to be posted for past fiscal years is to be in the same form and manner as current fiscal year data and contain the same categories of information with corresponding content. With respect to those agencies

containing subelements as defined in section 1614.702(l), the parent agency shall post both agency-wide aggregate past fiscal year data as well as subelement-specific past fiscal year data.

#### Additional Information To Be Posted by EEOC

Pursuant to the Act, EEOC is required to post government-wide statistical data on hearings and appeals in addition to the data EEOC must post as an employing agency on the complaints filed against it. This additional information is of the same type, consists of the same categories, and will have the same time requirements, as that posted by an employing agency concerning complaints that are filed with that agency, except that the additional data EEOC posts will reflect information about requests for hearings and appeals filed with EEOC. Sections 1614.706(a) and (b) on hearings and appeals track the Act's posting requirements on complaints as closely as possible. The posting of this data is intended to give a viewer an instant government-wide view of the number of hearings requested and appeals filed, what issues and bases are raised, the average processing times for each step, and how often discrimination is found at each step.

EEOC will not take the data that is posted by all agencies under the interim rule, aggregate the data, and then post that data on EEOC's Web site under a heading such as "Government-Wide EEO Complaint Data for Fiscal Year 200X." EEOC's only posting obligations under the No Fear Act are two: like any other executive branch agency, EEOC must post EEO complaint data pertaining to internal EEO complaints filed with EEOC; EEOC also must post government-wide aggregate summary statistical data, but only under two categories: hearing requests; and appeals filed.

#### Regulatory Procedures

##### *Executive Order 12866*

Pursuant to Executive Order 12866, EEOC has coordinated this final interim rule with the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities.

The posting requirements contained in Title III of The No Fear Act apply only to Federal executive agencies, the United States Postal Service, and the Postal Rate Commission. All of these agencies, including EEOC, are required by the No Fear Act to post statistical data on their public Web sites pertaining to EEO complaints filed with them. In addition, EEOC has to post government-wide data pertaining to requests for EEO hearings and appeals of EEO complaints.

Much of the information that will be used as source material to post the statistical data required by Title III already is collected and maintained by the agencies in connection with their pre-existing reporting obligations. All affected agencies currently maintain public Web sites. Consequently, the Congressional Budget Office estimated that the total cost for all agencies to comply with No Fear's posting requirements will not exceed \$5 million annually. House Rept. 107-101 part 1, June 14, 2001, p 11-12. Also, according to the CBO, it will cost EEOC \$500,000 annually to post the additional government-wide data required by § 302. Id. Thus, the total cost of Title III of No Fear should be less than \$5.5 million annually.

The benefits of posting EEO data will flow not just to the federal agencies but to the public. An agency will be able to compare its EEO program statistics against prior quarters and years to determine if there are trends that need to be addressed or whether progress is being made. An agency can also compare its statistics against those of other agencies. Both types of analyses should be useful to the agency in monitoring its own compliance with 29 CFR part 1614 and ensuring equal opportunity in the agency's employment programs. Public posting will ensure that members of the public will have access to this information and will be able to make independent assessments of agencies' compliance and progress. Agency employees will be able to assess the degree to which their agency provides equal employment opportunity. Likewise, potential job applicants will be able to judge the relative desirability of each agency's working environment. The public display of this information should provide agencies with added incentives to improve their EEO programs and to prevent discrimination proactively so that they can demonstrate that they are true equal employment opportunity employers. Increased monitoring and improved compliance through public posting of EEO statistics should lead to a decline in incidents of employment

discrimination, which is the primary goal of the No Fear Act.

#### *Paperwork Reduction Act*

This proposal contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### *Administrative Procedure Act*

Immediate implementation of this rule as an interim final rule with provision for post-promulgation public comment is based upon the exceptions found at 5 U.S.C. 553(b)(A), (b)(B) and (d). Agency posting requirements under Title III of the No Fear Act begin in FY 2004. It is essential that all agencies understand their responsibilities regarding these requirements so that they can begin capturing this data immediately. EEOC has determined under 5 U.S.C. 553(b)(A) that this regulation, which covers the time, form and manner of agency postings under Title III affects agency organization, procedure, or practice and has no effect on the substantive rights of non-agency parties. In addition, the absence of rules or a later promulgation of rules might result in confusion concerning the posting requirements, to the detriment of the public. EEOC has determined under 5 U.S.C. 553(b)(B) that it would be contrary to the public interest to delay promulgation of these rules. For the same reasons, EEOC has determined under 5 U.S.C. 553(d)(3) that there is good cause for the interim final rule to become effective immediately upon publication with provision for post-promulgation public comment. EEOC is seeking public comment on the regulation and will consider all comments before promulgating a final rule.

#### *Regulatory Flexibility Act*

The Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities, because it does not affect any small business entities. The regulation affects only federal government entities. For this reason, a regulatory flexibility analysis is not required.

#### *Unfunded Mandates Reform Act of 1995*

This final interim rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions

of the Unfunded Mandates Reform Act of 1995.

#### *Congressional Review Act*

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

#### **List of Subjects in 29 CFR Part 1614**

Administrative practice and procedure, Age discrimination, Equal employment opportunity, Government employees, Individuals with disabilities, Race discrimination, Religious discrimination, Sex discrimination.

For the Commission,

Dated: January 16, 2004.

**Cari M. Dominguez.**  
*Chair.*

■ Accordingly, for the reasons set forth in the preamble, EEOC amends 29 CFR part 1614 as follows:

#### **PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY**

■ 1. The authority citation for Part 1614 continues to read as follows:

**Authority:** 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16; E.O. 10577, 3 CFR, 1954-1958 Comp., p.218; E.O. 11222, 3 CFR, 1964-1965 Comp., p.306; E.O. 11478, 3 CFR, 1069 Comp., p.133; E.O. 12106, 3 CFR, 1978 Comp., p.263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p.321.

■ 2. Subpart G is added to read as follows:

#### **Subpart G—Procedures Under the Notification and Federal Employee Antidiscrimination and Retaliation Act (No Fear Act) of 2002**

Sec.

1614.701 Purpose and scope.

1614.702 Definitions.

1614.703 Manner and format of data.

1614.704 Information to be posted—all  
Federal agencies.

1614.705 Comparative data—all Federal  
agencies.

1614.706 Additional data to be posted by  
EEOC.

**Authority:** Sec. 303, Pub. L. 107-174, 116 Stat. 574.



## Subpart G—Procedures Under the Notification and Federal Employee Antidiscrimination and Retaliation Act (No Fear Act) of 2002

### § 1614.701 Purpose and scope.

This subpart implements Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No Fear Act), Public Law 107–174. It sets forth the basic responsibilities of federal agencies and the Commission to post certain information on their public Web sites.

### § 1614.702 Definitions.

The following definitions apply for purposes of this subpart:

(a) The term *Federal agency* means an Executive agency (as defined in 5 U.S.C. 105), the United States Postal Service, and the Postal Rate Commission;

(b) The term *Commission* means the Equal Employment Opportunity Commission and any subdivision thereof authorized to act on its behalf;

(c) The term *investigation* refers to the step of the federal sector EEO process described in 29 CFR 1614.108 and, for purposes of this subpart, it commences when the complaint is filed and ceases when the complainant is given notice under § 1614.108(f) of the right to request a hearing or to receive an immediate final decision without a hearing;

(d) The term *hearing* refers to the step of the Federal sector EEO process described in 29 CFR 1614.109 and, for purposes of this subpart, it commences when the EEOC Administrative Judge (AJ) receives the complaint file from the agency and ceases when the AJ returns the case to the agency to take final action;

(e) For purposes of § 1614.704(h), (i) and (j), the phrase *without a hearing* refers to a final action by an agency that is rendered;

(1) When an agency does not receive a reply to a notice issued under § 1614.108(f);

(2) After a complainant requests an immediate final decision,

(3) After a complainant withdraws a request for a hearing; and

(4) After an administrative judge cancels a hearing and remands the matter to the agency;

(f) For purposes of § 1614.704(h), (i) and (j), the term *after a hearing* refers to a final action by an agency that is rendered following a decision by an administrative judge under § 1614.109(f)(3)(iv), (g) or (i).

(g) The phrase *final action by an agency* refers to the step of the federal sector EEO process described in 29 CFR 1614.110 and, for purposes of this

subpart, it commences when the agency receives a decision by an Administrative Judge (AJ), receives a request from the complainant for an immediate final decision without a hearing or fails to receive a response to a notice issued under § 1614.108(f) and ceases when the agency issues a final order or final decision on the complaint.

(h) The phrase *final action by an agency involving a finding of discrimination* means:

(1) A final order issued by an agency pursuant to § 1614.110(a) following a finding of discrimination by an administrative judge; and

(2) A final decision issued by an agency pursuant to § 1614.110(b) in which the agency finds discrimination;

(i) The term *appeal* refers to the step of the federal sector EEO process described in 29 CFR 1614.401 and, for purposes of this subpart, it commences when the appeal is received by the Commission and ceases when the appellate decision is issued;

(j) The term *basis of alleged discrimination* refers to the individual's protected status (*i.e.*, race, color, religion, sex, national origin, age, disability, or retaliation). Only those bases protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.*; the Equal Pay Act of 1963, 29 U.S.C. 206(d); and the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 *et seq.*, are covered by the federal EEO process.

(k) The term *issue of alleged discrimination* means one of the following challenged agency actions affecting a term or condition of employment as listed on EEOC Standard Form 462 (Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints): Appointment/hire; assignment of duties; awards; conversion to full time; disciplinary action/demotion; disciplinary action/reprimand; disciplinary action/suspension; disciplinary action/removal; duty hours; evaluation/appraisal; examination/test; harassment/non-sexual; harassment/sexual; medical examination; pay/overtime; promotion/non-selection; reassignment/denied; reassignment/directed; reasonable accommodation; reinstatement; retirement; termination; terms/conditions of employment; time and attendance; training; and, other.

(l) The term *subelement* refers to any organizational sub-unit directly below the agency or department level which has 1,000 or more employees.

### § 1614.703 Manner and format of data.

(a) Agencies shall post their statistical data in the following two formats: Portable Document Format (PDF) and an accessible text format that complies with section 508 of the Rehabilitation Act.

(b) Agencies shall prominently post the date they last updated the statistical information on the Web site location containing the statistical data.

(c) In addition to providing aggregate agency-wide data, each agency shall include separate data for each subelement listed in § 1614.702(l). Such data shall be identified as pertaining to the particular subelement.

(d) Data posted under this subpart will be titled "Equal Employment Opportunity Data Posted Pursuant to the No Fear Act" and a hyperlink to the data will be posted prominently on the homepage of each agency's public Web site. In the case of agencies with subelements, the data shall be made available by hyperlinks from the Web sites of both the subelement (if one exists) as well as the parent agency.

(e) Agencies must post cumulative data pursuant to § 1614.704 for the current fiscal year. Agencies may not post separate quarterly statistics for the current fiscal year.

### § 1614.704 Information to be posted—all Federal agencies.

Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, each federal agency must post the following current fiscal year statistics on its public Internet Web site regarding EEO complaints filed under 29 CFR part 1614:

(a) The number of complaints filed in such fiscal year;

(b) The number of individuals filing those complaints (including as the agent of a class);

(c) The number of individuals who filed two or more of those complaints;

(d) The number of those complaints raising each of the various bases of alleged discrimination and the number of complaints in which a non-EEO basis is alleged;

(e) The number of those complaints raising each of the various issues of alleged discrimination;

(f) The average length of time it has taken an agency to complete respectively investigation and final action by an agency for:

(1) All complaints pending for any length of time during such fiscal year,

(2) All complaints pending for any length of time during such fiscal year in which a hearing was not requested and



(3) All complaints pending for any length of time during such fiscal year in which a hearing was requested;

(g) The number of complaints dismissed by an agency pursuant to 29 CFR 1614.107(a), and the average length of time such complaints had been pending prior to dismissal;

(h)(1) The total number of final actions by an agency rendered in such fiscal year involving a finding of discrimination and, of that number,

(2) The number and percentage that were rendered without a hearing and

(3) The number and percentage that were rendered after a hearing;

(i) Of the total number of final actions by an agency rendered in such fiscal year involving a finding of discrimination,

(1) The number and percentage of those based on each respective basis,

(2) The number and percentage for each respective basis that were rendered without a hearing and

(3) The number and percentage for each respective basis that were rendered after a hearing;

(j) Of the total number of final actions by an agency rendered in such fiscal year involving a finding of discrimination,

(1) The number and percentage for each respective issue,

(2) The number and percentage for each respective issue that were rendered without a hearing and

(3) The number and percentage for each respective issue that were rendered after a hearing;

(k) Of the total number of complaints pending for any length of time in such fiscal year,

(1) The number that were first filed before the start of the then current fiscal year,

(2) The number of individuals who filed those complaints in earlier years, and

(3) The number of those complaints that are respectively pending at the investigation, hearing, final action by an agency, and appeal step of the process; and

(l) Of the total number of complaints pending for any length of time in such fiscal year, the total number of complaints in which the agency has not completed its investigation within the time required by 29 CFR 1614.106(e)(2) plus any extensions authorized by that section or § 1614.108(e).

#### **§ 1614.705 Comparative data—all Federal agencies.**

Commencing on January 31, 2004 and no later than January 31 of each year thereafter, each federal agency shall post year-end data corresponding to that

required to be posted by § 1614.704 for each of the five immediately preceding fiscal years (or, if not available for all five fiscal years, for however many of those five fiscal years for which data are available). For each category of data, the agency shall post a separate figure for each year.

#### **§ 1614.706 Additional data to be posted by EEOC.**

(a) Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, the Commission must post the following current fiscal year statistics on its public Internet Web site regarding hearings requested under this part 1614:

(1) The number of hearings requested in such fiscal year;

(2) The number of individuals filing those requests;

(3) The number of individuals who filed two or more of those requests;

(4) The number of those hearing requests involving each of the various bases of alleged discrimination;

(5) The number of those hearing requests involving each of the various issues of alleged discrimination;

(6) The average length of time it has taken EEOC to complete the hearing step for all cases pending at the hearing step for any length of time during such fiscal year;

(7)(i) The total number of administrative judge (AJ) decisions rendered in such fiscal year involving a finding of discrimination and, of that number,

(ii) The number and percentage that were rendered without a hearing, and

(iii) The number and percentage that were rendered after a hearing;

(8) Of the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage of those based on each respective basis,

(ii) The number and percentage for each respective basis that were rendered without a hearing, and

(iii) The number and percentage for each respective basis that were rendered after a hearing;

(9) Of the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage for each respective issue,

(ii) The number and percentage for each respective issue that were rendered without a hearing, and

(iii) The number and percentage for each respective issue that were rendered after a hearing;

(10) Of the total number of hearing requests pending for any length of time in such fiscal year,

(i) The number that were first filed before the start of the then current fiscal year, and

(ii) The number of individuals who filed those hearing requests in earlier years; and

(11) Of the total number of hearing requests pending for any length of time in such fiscal year, the total number in which the Commission failed to complete the hearing step within the time required by § 1614.109(i).

(b) Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, the Commission must post the following current fiscal year statistics on its public Internet Web site regarding EEO appeals filed under this part 1614:

(1) The number of appeals filed in such fiscal year;

(2) The number of individuals filing those appeals (including as the agent of a class);

(3) The number of individuals who filed two or more of those appeals;

(4) The number of those appeals raising each of the various bases of alleged discrimination;

(5) The number of those appeals raising each of the various issues of alleged discrimination;

(6) The average length of time it has taken EEOC to issue appellate decisions for:

(i) All appeals pending for any length of time during such fiscal year,

(ii) All appeals pending for any length of time during such fiscal year in which a hearing was not requested, and

(iii) All appeals pending for any length of time during such fiscal year in which a hearing was requested;

(7)(i) The total number of appellate decisions rendered in such fiscal year involving a finding of discrimination and, of that number,

(ii) The number and percentage that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage that involved a final action by an agency after a hearing;

(8) Of the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage of those based on each respective basis of discrimination,

(ii) The number and percentage for each respective basis that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage for each respective basis that involved a final action by an agency rendered after a hearing;

(9) Of the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage for each respective issue of discrimination,

(ii) The number and percentage for each respective issue that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage for each respective issue that involved a final action by an agency rendered after a hearing; and

(10) Of the total number of appeals pending for any length of time in such fiscal year,

(i) The number that were first filed before the start of the then current fiscal year, and

(ii) The number of individuals who filed those appeals in earlier years.

[FR Doc. 04-1505 Filed 1-23-04; 8:45 am]

BILLING CODE 6570-01-P

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

#### 30 CFR Part 203

RIN 1010-AD01

#### Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Relief or Reduction in Royalty Rates—Deep Gas Provisions

**AGENCY:** Minerals Management Service (MMS), Interior.

**ACTION:** Final rule.

**SUMMARY:** This rule provides temporary incentives in the form of royalty suspension volumes for producing gas from certain deep wells (at least 15,000 feet below sea level). The rule also provides a royalty suspension supplement for drilling certain unsuccessful deep wells. The rule also provides price thresholds that may result in discontinuation of the royalty relief.

**EFFECTIVE DATE:** This rule is effective March 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Marshall Rose, Chief, Economics Division, Minerals Management Service, at (703) 787-1536. E-mail: [Marshall.Rose@mms.gov](mailto:Marshall.Rose@mms.gov). Address: Minerals Management Service, MS 4050, 381 Elden Street, Herndon, Virginia 20170.

**SUPPLEMENTARY INFORMATION:** Title 30 CFR part 203 regulates the reduction of oil and gas royalty under 43 U.S.C. 1337(a)(3). Under section 1337(a)(3)(B), MMS may reduce, modify, or eliminate royalties on certain producing or non-

producing leases or categories of leases to promote development or increased production or to encourage production of marginal resources, in the Gulf of Mexico (GOM) west of 87 degrees, 30 minutes West longitude.

**Objective:** The objective of the deep gas incentive provided in this rule is to increase the volume of natural gas production from the Outer Continental Shelf (OCS) by encouraging lessees to quickly explore for and develop deep-well gas reserves. That activity will provide near-term supplies to help alleviate potential natural gas shortages and help moderate prices over the next decade.

In the short-term, supply and demand for natural gas tend to be relatively inelastic, which can cause large fluctuations in price during periods of relative scarcity or abundance of supply. In recent years, higher prices during periods of tight supply have been evident, spiking at over \$8 per million British thermal units (MMBtu) on the New York Mercantile Exchange (NYMEX) during the winter of 2000-2001. High and volatile natural gas prices contribute to a climate of uncertainty, thereby inhibiting continuous, sustained investment in deep gas development. High natural gas prices during periods of tight supply have hurt households, farmers, businesses, and negatively affected our economy as a whole. Without new sources of domestic natural gas, the United States (U.S.) will likely experience continued tightness of supply, price volatility, and increased reliance on imports from Canada and liquefied natural gas (LNG) from overseas.

While our nation's natural gas resources are substantial, much of the remaining resources on available Federally regulated lands (*i.e.*, those areas which remain open to leasing and exploration), will be increasingly costly to produce because of higher exploration and production costs and greater technical challenges of recovering gas from deep-water, deep formations, and harsh environments. Though significant potential natural gas finds may exist in the deep-water OCS and from areas in Alaska or onshore in the Rocky Mountain States, significant contribution from these areas is not expected until after 2008.

For new sources of gas supply in the near-term, the shallow waters of the GOM hold the greatest promise. MMS determined that one initiative to encourage rapid exploration and development of new natural gas reserves is to provide financial incentives to encourage new and earlier drilling of

deep gas resources—approximately three miles and deeper—below existing platforms in the GOM. Natural gas prospects at this depth pose a technological challenge, but the gas can be accessed and transported using existing infrastructure in this mature oil- and gas-producing basin. Providing royalty relief can encourage timely and profitable deep gas production. Suspending some of the royalty payments due the Government on lease production can promote and accelerate new natural gas production by ensuring a viable rate of return to lessees for exploration and development of certain otherwise marginal deep gas prospects or by increasing industry's expected financial return from exploring and developing deep gas on their shallow water OCS leases relative to other (*e.g.*, foreign) investments.

The continued success of the Federal offshore oil and gas program is due, in part, to the judicious use of leasing, financial, and other incentives to promote continued industry interest and investment in new technologies for exploration and development in frontier areas of the OCS. The U.S. can benefit in many ways from increased domestic natural gas production. Exploration, development, and production of Federal natural gas resources by private firms yield significant economic benefits including payment of \$2 to \$4 billion in royalties annually to the Federal Treasury. The incentive in this rule is intended to provide significant social benefits by helping sustain domestic natural gas supplies and moderate energy costs to consumers, while minimizing costs to the Federal Treasury. The effects of this rule can help consumers by expanding the supply of natural gas from sources that might never have been discovered or accelerating production that may not have occurred until much later in the future.

MMS estimates that this incentive could provide about 4.4 trillion cubic feet (TCF) of additional hydrocarbon production (of which 3.6 TCE is gas) over the next 16 years, which will help moderate prices and save consumers about \$500 million in natural gas costs per year over the next decade. Although Federal royalty payments will be lower while any gas production is royalty-free, MMS expects that the increased production will eventually provide royalty revenue that would offset the lost revenue experienced during early years of the incentive program. MMS estimates that the rule could result in a present value loss in Federal royalty collections over 16 years of from \$150 million to \$220 million (depending on