10-8-1981

Year-End (FY '81) Report On EEOC Activities

J. Clay Smith Jr.
Several prominent civil rights groups, members of the business community and the House Subcommittee on Employment Opportunities chaired by the Honorable Augustus Hawkins, have asked me in my capacity as head of the Equal Employment Opportunity Commission to report to them on those matters which might be of interest concerning the on-going activities of the agency.

The Equal Employment Opportunity Commission is alive and well at this time, but I kid you not when I say that we are in a desperate fight for survival. The President has stated on several occasions that he is firmly committed to equal job opportunity for all Americans. I have not been informed that he has wavered, changed or altered this view. Yet there is that underlying perception, fear and apprehension that things are not the same and that there will not be continued vigorous enforcement of civil rights laws.

To allay some of the existing pessimism, I thought it would be appropriate for me to issue a first time ever report to the civil rights and business communities on the current status of the Commission's activities. So what will follow here will be a chronological play-by-play of the various program areas in the agency, followed-up by an urgent concern which faces us today. This report covers the following subjects:
Compliance Activity

Charge processing figures for the first three quarters of Fiscal Year 1981 show a continued climb in the area of production and benefits. During this period the Commission received for processing 40,293 charges. Our field offices have resolved 54,482 charges or 35% more charges than we have taken in. This represents a one-third increase in production over comparable figures for Fiscal Year 1980.

In the Title VII area, the Commission took in 31,751 charges and resolved 45,456 or almost 45% more than we have taken in. The Commission's Title VII backlog, which stood at almost 70,000 charges as of January 1979, is now below 24,000 charges.

More important, Commission processes continue to provide substantial relief. Despite the extraordinary number of resolutions, the Title VII rapid charge settlement rate is holding at 43%. The settlement rate for Age discrimination charges has risen to 25% and Equal Pay settlements have gone up to 27%.

Through nine months of 1981, approximately $60 million in relief was obtained for 36,682 people. These figures exceed benefits attained for all of Fiscal 1980.
**LITIGATION**

The Commission's litigation program continues on the upswing. During the fiscal year, the legal activity of the Commission is reflected as follows:

### Staff Litigation Recommendations

<table>
<thead>
<tr>
<th></th>
<th>FY '80</th>
<th>FY '81(9/25/81)</th>
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<tbody>
<tr>
<td>Title (VII)</td>
<td>247</td>
<td>291</td>
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<tr>
<td>Age (ADEA)</td>
<td>53</td>
<td>93</td>
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<tr>
<td>Equal Pay (EPA)</td>
<td>93</td>
<td>67</td>
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### Approvals by the Commission

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<th>FY '80</th>
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<tbody>
<tr>
<td>TITLE (VII)</td>
<td>195</td>
<td>199</td>
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<tr>
<td>Age (ADEA)</td>
<td>53</td>
<td>69</td>
</tr>
<tr>
<td>Equal Pay (EPA)</td>
<td>74</td>
<td>55</td>
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<tr>
<td></td>
<td>322</td>
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### Actual Cases Filed*

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<tbody>
<tr>
<td>TITLE (VII)</td>
<td>200</td>
<td>208</td>
</tr>
<tr>
<td>Age (ADEA)</td>
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<tr>
<td>Equal Pay (EPA)</td>
<td>79</td>
<td>46</td>
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<td></td>
<td>326</td>
<td>320</td>
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*Cases filed include interventions and requests for temporary preliminary relief under Section 706(f)(2), and does not include subpoena enforcements.
## Litigation Costs/Monetary Benefits

A Comparison of Half-Year Statistics

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<thead>
<tr>
<th></th>
<th>FY 80</th>
<th>FY 81</th>
<th>% Changed</th>
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</thead>
<tbody>
<tr>
<td>Obligated Litigation Costs</td>
<td>$736,500</td>
<td>$1,250,166</td>
<td>+70%</td>
</tr>
<tr>
<td>Monetary Benefits</td>
<td>2,064,250</td>
<td>3,897,705</td>
<td>+89%</td>
</tr>
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</table>

Court and Administrative Hearings Handled this fiscal year through 9/15/81 243

Lawsuits Currently Pending

- EEOC (Employees) 21
- Title VII
- FOIA (Freedom of Information Action) 33
- Other 4

Cases against EEOC decided between June 30 and Sept. 15, 1981

<table>
<thead>
<tr>
<th>Won</th>
<th>Lost</th>
<th>Settled</th>
</tr>
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<tbody>
<tr>
<td>16</td>
<td>0</td>
<td>4</td>
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This would make the cumulative figures

<table>
<thead>
<tr>
<th>Won</th>
<th>Lost</th>
<th>Settled</th>
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<tbody>
<tr>
<td>34</td>
<td>2-1/2</td>
<td>9</td>
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Not included in the above is the fact that on September 11, 1981, EEOC reached an agreement with Nabisco, Incorporated, who agreed to establish a settlement fund for the benefit of a nationwide class of female bakery employees. The settlement, upon final approval by the District Court in Pittsburgh, Pennsylvania, will exceed $5 million. Nabisco, Incorporated, agreed to the following significant provisions of the settlement:

1. Assign all new production trainees to perform tasks in both traditionally male and traditionally female entry level jobs to afford exposure to the duties of both jobs;

2. Conduct, semi-annually, a training program for the purpose of training female production employees to fill temporary openings in higher-paying job classifications;

3. Allow female employees the opportunity to work overtime without imposing certain conditions that interfered with overtime opportunities in the past;

4. Eliminate all differences in work rules between production departments;

5. Implement a sex-sensitivity program for management personnel to be monitored by counsel for plaintiffs and counsel for the EEOC;

6. Take steps necessary to discourage harassment of female employees—establish a procedure by which females' grievances of sexual harassment will be promptly resolved and take disciplinary action against any employee who engages in such harassment;

7. Post openings for all production jobs bakery-wide rather than departmentally;

8. Include in all job postings a description of the job, a statement that the successful bidder will be trained, and a statement that the successful bidder has a right to return to her former classification without loss of seniority;
(9) engage in good faith efforts to recruit women to fill at least 60 percent of the vacancies that occur in the assistant foreperson position and at least 60 percent of the vacancies that occur in the foreperson position at each bakery;

(10) immediately promote certain long-term female supervisory personnel to higher level positions;

(11) post in all bakeries, for a period of six months, a notice, to be approved by counsel for plaintiffs and counsel for EEOC, highlighting the affirmative relief provisions;

(12) provide the EEOC with reports which will be used to monitor compliance with the terms of the agreement;

(13) evaluate management employees and use as a criterion for promotion their performance in securing and enforcing equal employment opportunities for female employees;

(14) abolish the practice of allowing employees in male-dominated jobs to have first choice in bidding on most desirable shifts before the jobs are posted for bid bakery-wide;

(15) have no rules prohibiting the carry over of seniority between departments or classifications.

The agreement resolved a lengthy and complex litigation matter which arose out of a complaint filed in 1975 by two employees at the Nabisco Bakery in Pittsburgh.

The EEOC intervened in the lawsuit in 1977, following an investigation of the numerous charges of sex discrimination filed by the Pittsburgh bakery women on behalf of themselves and all other female employees working in the production departments of the bakery.

The settlement, one of the most far-reaching in EEOC history, may impact as many as 8,000 women. The settlement fund will be distributed to all female employees working in production departments at the 11 bakeries any time on or after January 21, 1983.
Nabisco will bear the cost of notifying all eligible claimants and distributing awards.

We also signed a settlement agreement with Sears, Roebuck and Co., that resolved four EEOC employment discrimination suits against this nation's largest retailer. The terms of the agreement were directed at insuring that Sears would implement procedures to monitor its own hiring practices in ways that should assure compliance with the law. We believe then and now that the agreement will enhance minority opportunities at Sears, and we hope to observe signs that will justify that belief in the near future.

The suits, filed in October 1979, alleged that Sears used discriminatory hiring practices involving race and national origin at seven facilities in Atlanta, Memphis, Montgomery and New York. This suit largely involved procedural issues. A few days prior to the settlement the U.S. Court of Appeals in New York affirmed a lower court's dismissal of the New York suit. It ruled that the Commission had not adequately negotiated the practices of the facilities named in that suit.

The settlement agreement called for Sears to modify its personnel practices at every facility throughout the nation. While the agreement recognizes Sears' voluntary affirmative action efforts, it required amendment of Sears' affirmative action program.

According to the agreement, Sears will have to give greater attention to the minority composition of applicants and establish procedures to monitor, at several levels, the comparison of a minority group's composition of applicants and the group's composition of hires in order to insure there is no discrimination at any stage of the hiring process.
The agreement has a duration of five years during which, if Sears complies with the agreement, the EEOC will not sue to seek class-wide relief for hiring discrimination, although the EEOC may seek relief for individuals alleged to be victims of hiring discrimination. The agreement does not affect the rights of private parties to seek individual or class-wide relief for allegations of hiring discrimination.

The settlement agreement does not affect the EEOC's nationwide sex discrimination suit against Sears which was also brought in October 1979. A Federal judge recently ordered the parties to be ready for trial in that case by June 1982.
Office of Systemic Programs

The Office of Systemic Programs has made significant progress during the latter half of FY '81. A number of new charges were issued, and charges which had been previously issued began moving through the administrative process at a much more rapid pace. The program is now fully staffed and operating at its projected workload. The Office anticipates continued progress leading to a significant number of settlements and the initiation of as many as 15 lawsuits in the coming year, depending on budgetary constraints.

During the latter half of FY '81, OSP issued 23 Commissioner Charges, bringing its total to date to 130. Included in the last group of new charges was the first charge ever issued by the Headquarters Unit. This is especially significant since it reflects substantial progress in the processing of the large number of backlogged pattern and practice charges inherited by that unit at its inception.

The process of issuing charges was more firmly structured with the completion of OSP's targeting model which compares the employment profiles of similar employers within a given area. This system permits OSP units to concentrate their limited resources on specific targets. The targeting model will be updated this year as soon as the most current EEO-1's are placed on computer, and will be expanded to permit the review of the employment membership practices of unions and joint apprenticeship programs. We believe that this expansion will represent a major advance in the area of efficient resource allocation.
Of the 104 charges issued prior to FY '81, 20% have now been fully investigated, most of these in the past six months. During the 4th quarter of FY '81, the Commission issued its first 7 decisions based on systemic charges and achieved settlement of one additional charge. The 7 decided charges are now in conciliation, and will either result in settlement or be referred for litigation early next fiscal year. An additional 8 charges have been fully investigated, with decisions drafted, but are being held pending settlement discussions and 4 other decisions are presently undergoing headquarters review. Moreover, a number of charges pending in the investigative phase are the subject of ongoing settlement discussions. We project that more than 50% of the present charge load (i.e., that which has not yet reached the decision stage) will either reach decision or settle prior to decision during the next fiscal year.

OSP's Technical Services Division has continued in its role as expert advisor to field and headquarters investigative and legal units. The Technical Services Division has assumed a particularly important role with respect to the Uniform Guidelines on Employee Selection Procedures. During the 4th Quarter, the Division compiled its first comprehensive data on review of test validation studies and found that approximately 75% of such studies have been approved either in whole or in part. This information has been published in a number of EEO newsletters in order to allay employers' concerns that the UGESQP standards are exceedingly difficult to meet. Additionally, in keeping with EEOC's position that the UGESQP should
be consistent with current professional standards on test validation, TSD staff members have been active participants in the American Psychological Association's current review of its standards.

In the area of litigation, the Office has achieved several major resolutions this fiscal year. Early in 1981, we entered into a $1.1 million settlement with the Commonwealth Oil Refining Company. The Commission's suit against CORCO had alleged pervasive sex and national origin discrimination by the Puerto Rican refinery. Two other settlements were tendered to district courts within the past six months, but final decrees have not been entered. An Office of Systemic Programs lawsuit against the Alabama Power Co. and IBEW was settled for approximately $2.2 million and included increased job opportunities for minorities and women, company-wide. Most recently, the Office settled a major portion of its protracted litigation against the Operating Engineers unions in New York City. Total monetary relief in that case was $81,500. More importantly, in the light of current ongoing discussions relating to a changing policy pertaining to affirmative action requirements, the settlement provided for preferential work referrals for identified victims of past discrimination. These referrals are especially significant as the funding of the West Side Highway project in New York insures the availability of jobs and the opportunity to acquire necessary skills.
The Litigation Enforcement Division filed four new actions during 4th Quarter FY '81 and these, along with its existing docket, will proceed in FY '82. The major focus of the Division's resources over the next several months, however, will be the nationwide sex discrimination action against Sears, Roebuck & Co., which is scheduled for trial in June 1982. Preparation for this trial has been a major activity during the past six months. Such activity, coupled with the ongoing and intensive settlement negotiations with another major corporation and union, makes it extremely likely that FY '82 will see all of the backlogged SICD charges resolved.

Office of Policy Implementation

One of the issues that has increasingly attracted the interest of both the public and private sector is the need for regulatory reform. Depending upon one's political or economic perspective, the term "regulatory reform" may have many different meanings. Regardless of the philosophical perspective of who is addressing this issue, almost everyone will agree that the issue of regulatory reform is one that needs to be addressed in a very systematic and intelligent manner, with an eye to developing a less burdensome regulatory framework without dismantling the underlying rationale which initially dictated the need for such government interest. I will attempt to bring you up to date on the past and present efforts on the part of the Commission to reduce the burdensomeness of government regulations and to clarify some common misconceptions that currently exist about Commission regulatory activity.
It seems in order at this time to make a general comment about the terminology often used by individuals when discussing this general area of governmental regulations. This misuse of terminology alone can often lead to unnecessary misunderstandings when discussing regulatory reform. First of all, when Congress passed the Civil Rights Act of 1964, it specifically rejected proposals authorizing EEOC to issue substantive regulations. Congress only authorized the Commission to issue procedural regulations to carry out the provisions of Title VII, and in addition, gave us power to provide technical assistance to persons subject to Title VII. Accordingly, the Commission has historically chosen the vehicle of interpretative guidelines to provide such technical assistance. This distinction is not a minor one and needs to be kept in mind, at least by our critics, when discussing the issue of regulatory reform. Guidelines, unlike regulations, create no legal rights or obligations, have no binding effect, and do not in and of themselves have the force of law. Guidelines instead play the important role of educating and advising employers about the day-to-day application of a complex statute that can have far-reaching consequences for employers. The guidelines are based primarily upon court rulings regarding the application of the statute to the specific issue discussed in the guidelines, or if there is little, if any, legal precedent on the issue, what Courts have held in the application of general Title VII principles.

Even though guidelines create no substantive legal obligations on the part of employers, the Commission is keenly aware of the fact that the guidelines are regarded very seriously by the Commission, employers and the courts, because they articulate EEOC's enforcement position in regard to employers' practices and policies. Because of this, proposed guidelines are always published in the Federal Register with an invitation to the public to submit written comments on the proposed guidelines. The comments are then reviewed by Commission staff, and often addressed in the preamble to any guidelines the Commission might issue or used as the basis of revisions to the proposed guidelines. Sometimes the Commission may also schedule a public hearing on the subject matter of proposed guidelines. A recent example is the Guidelines on Discrimination Because of Religion where the Commission held public hearings in April and May of 1978 in New York City, Los Angeles and Milwaukee.

As pointed out above, the guidelines create no substantive legal obligations on the part of the employer. However, the guidelines themselves are sensitive to the fact that very rigid criteria would often be particularly burdensome for employers, especially
those who may wish to voluntarily pattern their employment practices after those suggested in the Commission guidelines for purposes of creating equal job opportunities for all workers and for protecting themselves from possible Title VII liability. For example, the Uniform Guidelines on Employee Selection Procedures (UGESP) include a less stringent recordkeeping requirement for employers with less than 100 employees. UGESp also adopted the "bottom line" approach, meaning that even if certain components of the employer's total selection process might have an adverse impact on a class protected by Title VII, the Commission would look only at the final result, i.e., did the selection process as a whole have an adverse impact. Alternative methods of test validating are also permitted by the UGESp so that an employer is free to choose whatever method of validation it prefers. Like other Commission guidelines, the UGESp advises employers by what criteria their employee selection procedures will be evaluated should they be charged with a violation of Title VII.

Executive Order 12291 requires that each federal executive agency publish in April and October of each year a semi-annual agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to the Executive Order.
In August of 1981 the Vice President's Task Force on Regulatory Relief announced a list of government regulations that would be subjected to review under Executive Order 12291. This list contains two of the Commission's guidelines, namely, the Guidelines on Sexual Harassment and the Uniform Guidelines on Employee Selection Procedures. The Vice President has identified the Sexual Harassment Guidelines because of public comments criticizing them for failing to provide adequate guidance to employers on such questions as to what constitutes unwelcome sexual advances or prohibited verbal sexual conduct under the statute. As to the Uniform Guidelines on Employee Selection Procedures, the burdensomeness and the utility of the record-keeping requirements are the subject of review. The Task Force requested that we submit workplans for the review of these guidelines by September 15, 1981. After meeting with the Task Force representatives and under my direction, our proposed workplans were delivered to the Task Force on September 9, 1981. We expect to begin working on these reviews in the near future.

The semi-annual agenda that has been approved by the Commission for publication in the Federal Register during the month of October describes current Commission regulatory activity. Although the Commission is of the opinion that none of its proposed guidelines or procedural regulations fall within the Executive Order's definition of a "major rule," the Commission, nevertheless, chose to include all of the items that appear in the October semi-annual regulatory agenda because of its desire to keep all interested parties fully informed of Commission activities and to provide parties an early opportunity
to comment on proposed Commission policy statements, regulations or guidelines, as early as possible.

The first category of guidelines appearing on the October semi-annual agenda lists the current Guidelines on Sexual Harassment and the Uniform Guidelines on Employee Selection Procedures, both of which have been targeted for review by the Vice President's Task Force, as discussed above.

The second category of Commission regulatory activity included on the semi-annual agenda as required by E.O. 12291 contains an itemized list of proposed regulations and guidelines that are currently pending before the Commission. Each of the items has been published in proposed form at least once in the Federal Register for the purpose of soliciting written comments from interested parties. Most of the items are procedural regulations governing the processing of Title VII charges or areas of EEOC's enforcement responsibility, such as the Equal Pay Act and the Age Discrimination in Employment Act, which were transferred to the Commission under the President's Reorganization Plan of 1978 (43 FR 19807). Five of the items are procedural regulations to expedite the processing of federal sector complaints of discrimination. Included are:

1. Employment Discrimination; Procedure for Handling Complaints

The EEOC and the Department of Justice jointly issued proposed rules (published on April 17, 1981, in 46 FR 22395) setting forth procedures for the handling of complaints of employment discrimination which are
filed with Federal fund granting agencies under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 and other provisions of Federal law which prohibit discrimination on the grounds of race, color, religion, age, sex or national origin in programs or activities receiving Federal financial assistance. The regulations allow the fund granting agency to refer complaints to the Equal Employment Opportunity Commission (EEOC). For complaints covered both by Title VII of the Civil Rights Act of 1964, as amended, or other statutes within EEOC's jurisdiction and by Title VI of the Civil Rights Act or Title IX, the regulations contemplate that most complaints of individual acts of discrimination will be referred to EEOC for investigation and conciliation, while most complaints of systemic discrimination will be retained by the fund granting agency. Employment discrimination complaints which are not covered by Title VI or Title IX will be transferred to EEOC. 46 FR 22395 (April 17, 1981). The period for submitting written comments ended on June 16, 1981.

2. Non-Discrimination on the Basis of Handicap Federally Assisted Programs

These proposed regulations (published on November 29, 1979, at 44 FR 68482) set forth procedures and policies to assure non-discrimination on the basis of handicap. The regulations define and forbid acts of discrimination against qualified handicapped individuals in employment and in the operation of programs and activities receiving assistance from the Equal Employment Opportunity Commission. These proposed regulations implement Section 504 of the Rehabilitation Act of 1973, as amended, in compliance with Executive Order 11914, April 29, 1976. The proposed regulations have been approved in final form by the Commission and are now in inter-agency coordination pursuant to E.O. 12067.


The Equal Employment Opportunity Commission (pursuant to notice published in 45 FR 24130 on April 9, 1980) proposes to amend its regulations concerning complaints
of handicap discrimination in order to authorize awards of back pay to applicants for Federal employment. The proposed regulations also make clear that a complainant has the right to file suit in Federal court if dissatisfied with final agency action, or failure to act, on a complaint of handicap discrimination. These changes are necessary in order to conform to the 1978 amendments to the Rehabilitation Act of 1973. Final regulations have been approved by the Commission and are currently in the clearance process under E.O. 12291.

4. Equal Opportunity in the Federal Government; Remedial Relief Under Section 717

Interim regulations, effective April 11, 1980, were published in 45 FR 24130 on April 9, 1980, revising EEOC's regulations on equal opportunity in the Federal government (29 CFR 1613) to provide that an agency or the Commission may award a complainant reasonable attorney's fees and costs and backpay when a complaint of discrimination under Section 717 of Title VII of the Civil Rights Act of 1964, as amended, is resolved in favor of the complainant.

5. Procedures; Age Discrimination in Employment

On January 30, 1981, in 46 FR 9970, the Commission published for comment proposed procedural regulations (29 CFR 1626) advising the public as to those proposes to follow in processing charges and issuing interpretations and opinions under the Age Discrimination in Employment Act. These regulations will complement the Commission's existing procedural regulations under Title VII of the Civil Rights Act of 1964, as amended. The Commission hopes to schedule a vote on final regulations before the end of 1981.

6. 706 State and Local Agencies

On July 21, 1981, in 46 FR 37523, the Commission published notice of its proposal to revise its procedural regulations by the addition of §§1601.75, 1601.77, 1601.78, 1601.79 and 1601.80 to 29 CFR Part 1601. These sections set forth procedures whereby the Commission and certain State and local fair employment practices agencies (706 agencies) are relieved of the present Commission individual, case-by-case review of cases processed by these agencies under contract with the
Commission, as provided in Section 709(b) of Title VII of the Civil Rights Act of 1964, as amended. These sections set forth the procedures by which the Commission may certify certain State and local agencies which meet prescribed criteria. These regulations are expected to become final in October 1981.

Four of the items on the semi-annual regulatory agenda required by E.O. 12291 discuss recordkeeping requirements proposed by the Commission.

1. **Recordkeeping Regulations**

   Pursuant to notice of proposed rulemaking published in 43 FR 32280 on July 25, 1978, the Commission proposes to revise its recordkeeping regulations to require certain employers and labor unions to retain lists of applications for employment for 2 years. This action is taken because the Commission has found itself in a position of being unable to secure specific relief for the victims of discriminatory hiring or referral practices. The Commission believes that a recordkeeping requirement would assure more adequate redress for the victims of discrimination. The period for recordkeeping of other documents is proposed to be extended. In addition, the definition of "employee" for reporting purposes is proposed to be modified. 3/

2. **Collection of Applicant Data for Affirmative Action Purposes**

   This interim regulation was published in 46 FR 11285 on February 6, 1981, effective immediately. This amendment will permit agencies to collect handicap information from applicants in order to implement and evaluate

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3/ The Regulatory Flexibility Act of 1980 also requires that executive agencies publish a semi-annual agenda listing proposed regulations that will have an impact on small entities as defined in the Act. The only item appearing on EEOC's October semi-annual as required by the Regulatory Flexibility Act of 1980 is the proposed recordkeeping regulations.
special recruitment programs undertaken for affirmative action purposes. Specifically, agencies will be allowed to invite applicants, on a voluntary basis, to identify themselves as handicapped and specify the nature of their disabilities. Agencies will be permitted to use this information only for purposes related to affirmative action and equal employment opportunity.

3. Privacy Act of 1974; Proposed Privacy Act System of Records

On April 14, 1981, in 46 FR 21819, the Commission published notice of its proposal to establish a system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. The proposed system, EEOC-I, Age and Equal Pay Act Discrimination Case Files, will contain information on individuals who file charges or complaints of discrimination under the Age Discrimination in Employment Act or the Equal Pay Act. 4/

4. Privacy Act Regulations

On April 14, 1981, in 46 FR 21784, the Commission published notice of its proposal that pursuant to subsection (k)(2) of the Privacy Act, the Commission is exempting System EEOC-I, Age and Equal Pay Act Discrimination Case Files, from certain provisions of the Act. The Commission is concerned that the lack of this exemption would impede law enforcement activities of the Commission.

The Reorganization Plan of 1978 (43 FR 19807) transferred to EEOC the responsibility of enforcing the Equal Pay Act and Age Discrimination in Employment Act. Currently pending before the Commission are proposed interpretations of these two acts.

4/ The proposed Privacy Act System of Records and the Privacy Act Regulations each require separate Commission action but are related matters.
1. The Equal Pay Act; Interpretations

On September 1, 1981, in 46 FR 43848, the Commission published its proposed interpretations with respect to the enforcement of the Equal Pay Act. These interpretations would replace those issued by the Department of Labor at 29 CFR Part 800. Comments on the proposed regulations must be received on or before November 2, 1981. The Commission proposes to consider the submissions for a period of at least ten days thereafter before adopting any final regulations.

2. Proposed Interpretations of the Age Discrimination in Employment Act

On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978) responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 (ADEA) was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The Commission assumed enforcement of the ADEA on that date. Prior to the assumption of jurisdiction, the Commission commenced an in-depth review of all existing interpretations of the ADEA which were promulgated by the Department of Labor. See 44 FR 37974 (June 29, 1979). On November 30, 1979, the Commission published in the Federal Register its proposed interpretations of the ADEA. See 44 FR 68858 (November 30, 1979). On September 29, 1980 in 45 FR 64212, the Commission rescinded its earlier proposed interpretation. In August of 1981 the Commission approved the interpretation originally proposed in November of 1979 which will rescind the interpretations issued by the Department of Labor. Final interpretations are expected to be published by October of 1981.

Pursuant to a request of the Office of Management and Budget (OMB) under the authority of the Federal Reports Act, as amended by the Paperwork Reduction Act of 1980, EEOC is seeking OMB approval of the recordkeeping requirements contained in the Uniform Guidelines on Employee Selection Procedures (UGESP). EEOC's completion of this survey has been made a condition for OMB clearance. As defined by OMB, this Survey will focus on the practical utility of the UGESP recordkeeping requirements.
In September 1977, EEOC entered into an agreement with NAS pursuant to which NAS's Committee on Occupational Classification and Analysis was to thoroughly examine the question of what methods can be developed to assess the validity of principles used to establish and apply compensation systems.

Subsidiary questions that were to be explored by the Committee included: what systems are currently available or could be envisioned that would objectively measure the comparability of jobs; to what extent are systems of job analysis and classification currently in use biased by traditional stereotypes and by other factors; and in what ways have other nations developed approaches to deal with the structural bias in compensation systems.

On September 1, 1981, the National Academy of Sciences (NAS) presented to the Commission its final report on the subject of job segregation and wage discrimination.

The report was prepared by NAS's Committee on Occupational Classification and Analysis and is entitled, "Women, Work and Wages: Equal Pay for Jobs of Equal Value." The report represents an important milestone in the EEOC's continuing review of the complex issue of whether wages for historically segregated jobs have been
discriminatorily depressed because those jobs are held predominately by minorities and women. This issue is one of the largest and most complex left unresolved under Title VII today." The final report of NAS is only one part of the Commission's comprehensive and systematic review of this issue.

Public hearings were held before the Commission on this issue in Washington, D. C., on April 28, 29 and 30, 1980; and NAS submitted an interim report on this subject entitled, "Job Evaluation: An Analytic Review" to the Commission in February 1979.

Although the report was prepared by NAS under a contract with EEOC, the report does not necessarily reflect the official opinion or policy of EEOC. The National Academy of Sciences is solely responsible for the contents of the report which was written by a distinguished and balanced group chosen by NAS, and will be carefully studied by the Commission.
Office of Interagency Coordination

The Commission's coordination role, under Section 715 of the Civil Rights Act of 1964 and Executive Order 12067, has been extremely active during my tenure.

On July 1, 1981, we responded to OFCCP's request for pre-publication consultation pursuant to Executive Order 12067 on OFCCP's proposed withdrawal of its regulations dealing with payment by contractors of membership fees to private clubs which discriminate in their membership policies.

On previous occasions the Commission had stated its position that such payments constitute a violation of Title VII of the Civil Rights Act. We noted, however, the Department of Labor's acknowledgment in the proposed preamble that it had authority to address instances of employment discrimination which may arise from contractors' use of private clubs in the absence of a specific rule such as Section 60-1.11.

The Commission did not object to the withdrawal of the rule, provided that the following sentence was added to the preamble to the withdrawal:

Accordingly, the Department will act upon complaints alleging that the payment by contractors of fees to private clubs which discriminate in membership has resulted in employment discrimination against an employee or applicant for employment (individual complaints received by OFCCP normally are forwarded for handling to the EEOC pursuant to a Memorandum of Understanding between the two agencies), and the Department will include an analysis of contractors' private club policies and practices as part of compliance reviews where appropriate.
The purpose of our recommended addition was to affirm that OFCCP and EEOC will investigate these matters in response to complaints.

In the crucial area of review of agency regulatory issuances, the Commission met and was able to issue a timely response to OFCCP's Notice of Proposed Rulemaking dealing with its affirmative action regulations for Federal contractors. While I strongly endorsed the need for regulatory reform and paperwork reduction, I expressed concern and a willingness to negotiate a few of the substantive changes proposed by OFCCP.

In July I wrote OMB concerning my desire to ensure that coordination of Federal equal employment programs remain as effective as possible.

Shortly thereafter, in August, based on OMB's response, EEOC and OMB entered into an agreement governing the sequence of reviews of agency regulatory issuances concerning equal employment opportunity. The agreement, which strengthens the effectiveness of Executive Order 12067, requires that EEOC complete its analysis of agency NPRMs (Notice of Proposed Rulemaking), final rules and information collection instruments under Executive Order 12067 prior to their submittal to OMB for review under Executive Order 12291 and the Paperwork Reduction Act. On August 26, I sent a memorandum outlining the new procedures to the Heads of All Federal Agencies. Submissions recently reviewed by OIC staff include proposals from the Department of Education, the Legal Services Corporation, the Office of Personnel Management, Office of Revenue Sharing, and the Environmental Protection Agency.
Progress was also made in another important area. EEOC and the Department of Justice have completed review of public comments on and are moving ahead with a proposed regulation which requires funding agencies to forward individual complaints of employment discrimination to EEOC for processing. This regulation, which I personally support, will eliminate duplication in the handling of complaints and provide faster service to employers and complainants.

In order to assist those covered by equal employment laws, the Commission recently issued a bibliography of Federal agency publications on that subject. The Commission also has approved for publication a report covering the last two years' activities of its Office of Interagency Coordination. That report also contains the results of the Commission's survey of agency equal employment programs and its questionnaire survey of a representative sample of private and public sector employers. In addition, the report describes present Commission activities designed to resolve the problems of inefficiency, inconsistency and duplication identified in the two surveys.

Office of Government Employment

During January 1981, EEOC issued advanced instructions to all Federal agencies for the implementation of the multi-year affirmative action plans through our Management Directive (M.D. 707). This plan will cover the period from FY '82 to FY '86.
After the issuance of M.D. 707, several factors came to light which forced us to consider alternative immediate action to effect the Federal Affirmative Action Program. Prominent among these was the denial of clearance for our reporting requirements by the National Archives and Records Services (NARS). NARS concluded that the data to be developed by Federal agencies under M.D. 707 essentially duplicated the data which is reported to and retrievable from the Central Personnel Data File (CPDF), maintained by the Office of Personnel Management (OPM). However, the retrieval capability of CPDF, as it presently exists, is too limited to provide appropriate breakouts of data for affirmative action purposes. The Equal Employment Opportunity Commission cannot fully utilize the CPDF until the system has been redesigned. However, OPM's Director, Donald J. Devine, notified us that his agency lacks the necessary resources to permit the immediate redesigning and use of the CPDF for affirmative action purposes.

This complex situation required from us immediate action to provide guidance to all agencies to continue the development of their plan. Our Office of Government Employment conferred with representatives of some thirty agencies to explain the situation and to seek recommendations for a solution of the problem. Based on these recommendations, on June 15, 1981, I wrote to all Federal agencies spelling out a more flexible framework in which they could continue the development of their plans and reluctantly
postponed the date for the initial submission of affirmative action plans.

After several meetings with NARS and OPM personnel, NARS recognized the impossibility of using the CPDF and granted clearance for our M.D.-707, as amended by a June 15 memorandum. On August 12, 1981, I once again wrote to all Federal agencies requesting them to complete their planning at the first possible moment to meet the operative date of October 1, 1981.

To obtain NARS clearance and because for the last two years EEOC has acknowledged the benefits of the CPDF, we made a commitment to find a solution for the better use of CPDF for affirmative action purposes. We have therefore continued our conversations and meetings with OPM personnel in an effort to find ways to support program needs. However, our efforts have just reached a critical point based on budgetary considerations. For on September 21, 1981, Mr. Devine wrote to me advising that while they are prepared from a management point of view to provide CPDF data support service to the Commission, the FY '82 budget reductions directed by OMB have caused OPM to reduce the level of resources allocated to the CPDF. He therefore requested that EEOC make whatever arrangements are necessary to allocate to OPM the necessary fund and ceiling required to support our program. We are presently preparing a response to Mr. Devine for the purpose of advising him of our lack of resources to provide these funds and of our ongoing efforts to obtain the necessary amount from the Office of
Management and Budget. OMB, however, has been conducting a study of the CPDF on its own and cannot make any money immediately available to the project at this time.

Another recent activity of our Federal Affirmative Action (FAA) division has been the development of our Management Directive (M.D.)-710 with instructions to Federal agencies on their affirmative action accomplishment report for minorities and women for FY '81. These will be the last instructions concerning the two years' transition period which allowed agencies to "learn" the new planning process as we moved away from the annual planning concept to the multi-year approach (M.D.-707). M.D.-710 has just been properly cleared for presentation to the Commission for approval.

Handicapped Individuals Program

The week of October 5, 1981, is National Employ the Handicapped Week, thus in this, the International Year of Disabled Persons, we should also take this opportunity to reflect on problems of the handicapped in all spheres of the republic.

There are approximately 35 million disabled persons in the United States, or about 15% of the total population. The Department of Labor reports that there are 7.2 million severely disabled persons of working age, or about 6% of the national work force.

OPM's Central Personnel Data File (CPDF) indicates that in 1979 there were 134,026 disabled Federal employees, who comprised 6.4% of the total Federal non-postal work force.
For the EEOC, this is not just a week to listen to speeches and then return to business as usual. We have substantive responsibility for government-wide handicapped efforts. The EEOC in July 1979, under the Civil Rights Reorganization Plan No. 1 of 1978, became the Federal agency responsible for federal sector affirmative action planning. The EEOC is also responsible for hearings, the oversight of the processing of EEO complaints and appeals of agency decisions on EEO complaints, including handicap issues.

Our Office of Government Employment recently issued a Management Directive (M.D.)-708 transmitting instructions for reporting the accomplishments of FY 1980 affirmative action programs and for preparing affirmative action program plans for the last half of FY 1981. A proposed management directive, M.D.-709, has also been drafted, and the document, although not a multi-year, moves to a longer period of planning. It covers the accomplishment reports for FY 1981, the affirmative action program plans for FY 1982 and the accomplishment report covering the same period. M.D.-709 has already been cleared by SCIP and NARS. We expect to obtain the Commission's approval next week.

During the development of M.D.-709, an issue was raised concerning our authority to handle the Disabled Veterans Program (Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974) together with the Handicapped Individuals Program (Section 501 of the Rehabilitation Act of 1973). The President's Reorganization Plan No. 1 of 1978 transferred to EEOC the responsibility for administering
several affirmative action programs, but no mention was made of Section 403 of the Veterans Assistance Act. Later, when Congress amended this same Act, it did not substitute EEOC for the Civil Service Commission as the agency with authority to handle the program. However, there has been a generally implied understanding of all the parties concerned that EEOC was to also handle this program. The situation is complicated by the fact that the Act requires each agency to include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals (Section 501), a separate specification of plans for the disabled veterans. Once the issue was raised, the Office of Government Employment met with OPM staff to discuss the problem while the legal offices of both agencies developed opinions. OPM staff gave us to understand that they wanted EEOC to continue with the program; however, Mr. Devine publicly announced that OPM was going to take charge of the program. Meanwhile, our proposed M.D.-709 has instructions for the disabled veterans affirmative action program. Within the last few days we have reached an agreement with OPM by which EEOC will continue with this program during FY '82 but advising agencies through our M.D.-709 that thereafter OPM will assume responsibility for the program. We are currently developing modifications to M.D.-709 concerning this matter.

The Office of Government Employment has been in general conducting other activities such as the development of a staff guide for our programs and a conference held during September in Dallas with our Federal Affirmative Action Field Managers, several District Directors and Headquarters personnel.
BUDGET

Last, but by no stretch of the imagination least, is the critical status of our current and future year budget. The fiscal health of this Commission can be summarized in a few words, uncertain and desperate. The changes in the federal budget with the resulting changes in the Commission's budget point to a return of the mid-seventies without any corresponding reduction in EEOC's obligation to provide relief/services under its governing status for Title VII, Age, Equal Pay, Federal Sector Complaints and the State & Local Grants Program.

I was scheduled to attend the meeting at OMB on September 22, 1981, to present and defend the Commission's 1983 budget request, at a time when the base of fiscal year '82 funds have not yet been postponed for a second time. I was informed that the meeting was cancelled by OMB principally because they (OMB) had not formally presented to us their "new" reduced 1982 Budget for Congressional approval.

I have reason to believe, based on my staff discussion with the OMB Examiner, that OMB plans to reduce EEOC's FY '82 budget by 17 million, from $140 million to approximately $123 million. The reduction in positions has not been determined. However, we cannot adequately support the existing staff and/or even the authorized FY '82 staff years with a $123 million budget. I am praying and hoping that what appears to be the worst scenario ever will not prevail and that someone in a position of authority will come to our aid.
Unfortunately, I cannot announce to you or speculate as to what our 1982 operating budgets will be until the Executive and Congressional Branches have approved an interim or final FY '82 budget for EEOC. However, as of now we have been told that a minimum 12% will be formalized and presented to us. Thus, if this severe reduction remains firm, it appears fairly evident that if we are required to operate at the $123,542,000 level instead of the $140,389,000 as planned, it will result in the immediate following effect:

- Staff year (SY) will be reduced from 3,376 to 2,971, a reduction of 405 staff years equalling positions;
- State & local grant funds will most likely be reduced from $19,000,000 to $16,720,000; and,
- A reduction in the Salary & Expense funds from $121,389,000 to $106,822,000.

We have just been notified that our employment targets for FY '82, FY '83, and FY '84 are those set forth below, and under certain circumstances may be even lower.

<table>
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<th>FY 1982</th>
<th>FY 1983</th>
<th>FY 1984</th>
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<td>Total employment, excluding disadvantaged youth and personnel participating in the Worker-Trainee Opportunity Program (WTOP)</td>
<td>3,000</td>
<td>3,040</td>
<td>2,970</td>
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<tr>
<td>Full-time permanent employment, excluding personnel participating in WTOP</td>
<td>2,955</td>
<td>2,994</td>
<td>2,924</td>
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A reduction of the foregoing magnitude occurring right after a recently completed agency-wide reduction-in-force of 287 positions and an absorption of increases in operating support costs, would seriously weaken the Commission's ability to meet its statutory and programmatic responsibilities and commitments.

Of the previously approved level of $140 million, $96 million would have been expended for personnel compensation, $18 million for Fair Employment Practices Agency grants, $16 million for fixed operational support expenses, and $10 million for critical program-related expenses. Having reviewed a number of comprehensive alternatives modifying this set of assumptions, the Commission would be left with limited flexibility. In the area of staff, for example, our analysis reveals that the $6.8 million severance and unemployment compensation costs associated with a reduction-in-force would minimize any net savings. Fair Employment Practice Agencies program funds are earmarked and, therefore, cannot be used for other purposes. Operational support costs such as space, telephone and postage are controlled by the General Services Administration. Thus, the Commission will be forced to absorb the bulk of its $17 million reduction through sizable decreases in critical program-related costs such as case processing, essential travel, litigation support and data processing services.

The collective impact on operations will be: (1) an inability to process the Title VII, Age Discrimination in Employment Act (ADEA), and Equal Pay Act (EPA) complaint inventories within a reasonable
timeframe; (2) a dramatic reduction in the number of cases filed for litigation; and (3) reduced efficiency in the critical staff functions of policy direction, program guidance, coordination, and monitoring and evaluation of the Commission's charge processing and litigation programs.

Our major concern is that the Commission's inventory of Title VII complaints will grow by 65 percent, from 37,000 complaints, or 8-1/2 months of workload, to 62,200 complaints, or 12 months of workload during FY '82. Similarly, the Fair Employment Practices Agency inventory will rise from 36,000 complaints to 48,000 complaints. Moreover, without adequate resources, the Commission will not be able to eliminate the pre-1979 Title VII backlog by the end of 1983 as planned. In addition, ADEA complaints will rise by over 50 percent to 10,000 complaints, or a 13-month inventory by the end of FY '82; EPA complaints will rise by 40-45 percent to 2700 complaints, or a 15-month inventory by the end of FY '82.

In the past, the Commission has been heavily criticized by Congress and the private and public sectors for not eliminating its Title VII backlog and thus, stretching out the charge processing timeframes. To address this issue, the Commission has already restructured its organization and has overhauled its charge processing procedures. As a result, charges are now settled on the average within 115 days. The negotiated settlements success rate is nearly 45 percent nationwide. Individual remedies amounted to over $59 million during the first nine months of FY '81.
This rapid charge approach has been applauded and supported by business and protected classes because swift processing lessens the burden on employers and provides reasonable remedies to charging parties. The system has worked so well that other government agencies which have similar responsibilities have adopted these procedures. In recognition of the development and implementation of these workload management and processing systems and procedures, OMB praised EEOC's overall managerial effectiveness in its management publication. Further, in its January 1981 report, the Government Accounting Office (GAO) noted a high level of employer satisfaction with the Commission's expedited charge processing procedures. Seventy-three percent of the employers were satisfied with the procedures used by the Commission to investigate charges; 72 percent overall were satisfied with the way complaints were resolved.

While these dramatic improvements have benefited all of the parties concerned, the Commission would be hard-pressed to effectively deliver its essential services at the proposed reduced level. Under these constraints, it will take the Commission a year to address a charge, as contrasted with the present six month figure. Every analysis the Commission has conducted shows that without speedy resolution, there is little likelihood of settlement. Moreover, the Commission, under law, must investigate a case if it does not settle; thus, delaying final resolution even further.
Another concern is that the Commission may have to abolish a large number of field offices across the country. Many are located within major cities and, therefore, serve a large segment of the American people. Such a cutback would further hinder the Commission's ability to process charges in a timely manner and will probably result in more independent court suits being filed by charging parties. This workload will become an additional burden to an already overloaded court docket thereby shifting the costs from this agency to the courts which are not prepared to accept this burden.

With respect to the Commission's litigation program, additional cuts will force the Commission to release legal staff and dramatically reduce litigation support funds. From an original projected need of $3.4 million to fund current cases pending in federal courts, and a modest docket of new cases, the current projection would amount to $2.2 million, or 1/3 less funds for litigation support and a corresponding reduction in staff. Nearly 1/2 if these funds are needed immediately to pay for pending litigation support contracts generated by some of our largest and most complex cases. At the reduction budget level, the number of cases the Commission could file would be reduced by 40-45 percent from FY '81.

Currently, EEOC has more than 800 cases in litigation. They represent enforcement actions under Title VII, Age Discrimination in Employment Act and Equal Pay Act. Approximately 1/3 of these cases are class-action suits. The development of most of these cases will
be seriously underfunded, affecting the relief for those who are protected by these statutes.

In conclusion, a budget reduced by the amount being contemplated for EEOC would significantly impair the Commission's charge processing and litigation programs and as such, would have an adverse impact on the business community and on minorities and women who have filed charges. Employers would have to retain records and maintain active case files for a prolonged period of time at great expense. Relief for those charging parties whose charges have merit would be irreparably delayed and jeopardized. The court system would become intolerably backlogged with cases which would otherwise be settled at the administrative level. State agencies would also be burdened with a huge backlog. If the case and complaint processing system and enforcement mechanisms are adversely affected, the ability to obtain voluntary compliance would be seriously impaired.

We at EEOC are prepared to assume our fair share of the economic burden. However, anything that goes beyond a 5% reduction will be too severe for us to sustain. In the family of agencies, EEOC is a small unit of the republic. Its mission is to enforce the law in cases where various forms of discrimination exist in the workplace. The proposed reduction in the Commission's budget will send a signal to the American people that EEOC will be unable to enforce the law whenever the business community violates the prohibitions against discrimination. We do not believe that this signal should be sent - however unintentional.