Appendix 03-E: Department of Justice Investigation procedures manual for the Investigation of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes

DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
COORDINATION AND REVIEW SECTION

INVESTIGATION PROCEDURES MANUAL FOR THE INVESTIGATION AND RESOLUTION OF COMPLAINTS ALLEGING VIOLATIONS OF TITLE VI AND OTHER NONDISCRIMINATION STATUTES

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I. INTRODUCTION

The following manual is designed to provide guidance on the investigation of complaints of discrimination against recipients of Federal financial assistance. It has been prepared by the Coordination and Review Section (COR), Civil Rights Division, of the U.S. Department of Justice (DOJ). It is DOJ's responsibility under Executive Order 12250 to coordinate and ensure the enforcement of Title VI and similar nondiscrimination statutes by Federal agencies that provide Federal financial assistance. Many agencies have asked that we prepare guidance on the investigative techniques used in enforcement of Title VI and other nondiscrimination statutes. In this manual, we hope to provide that assistance.

This manual should be used in conjunction with the companion Legal Manual, which provides legal guidance on many of the questions and issues faced in ensuring civil rights compliance by recipients.

You will find the term "investigator" used throughout this manual. By

"investigator," we mean the person(s) responsible for conducting the investigation of the complaint -- he or she may be an Equal Opportunity Specialist, an Attorney, a Program Analyst, an Intern, or have some other job title. Investigation of the complaint may be part of his or her primary job duties, or a duty assigned only occasionally. Regardless of the situation, the consistent adherence to sound investigative techniques is important to ensure a thorough and legally sufficient investigation.

We would especially like to recognize and thank the U.S. Department of Education's Office for Civil Rights and the U.S. Department of Labor for the extensive and helpful information we used from their investigation manuals and other training documents. We also wish to thank DOJ's Office of Justice Programs' Office for Civil Rights, the U.S. Equal Employment Opportunity Commission, and the U.S. Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity for valuable investigative procedures materials, findings, and agreements used in developing this manual.

This manual is designed primarily for investigating complaints of violations of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the

basis of race, color, and national origin. However, its general investigative guidance may be applied to investigate complaints of discrimination under other statutes as well, including Title IX of the Education Amendments of 1972 (which prohibits sex discrimination in education programs).

This manual contains detailed discussions of the various aspects of complaint processing and resolution. We have suggested timeframes for completion of various tasks in the investigative process. These are only suggestions, and any timeframe contained in a program-specific statute or implementing regulation for your agency would be controlling. We have included a section on the "approach to complaint resolution" (Section IV), which emphasizes that there are many ways you can get to where you want to end up: the resolution of the complaint and the compliance of the recipient with the nondiscrimination statutes. The decision as to the best manner in which to approach a complaint will be based upon the specific allegations and issues raised in the complaint, whether it is an individual problem or one of general policy that will affect others in addition to the complainant, and whether you are dealing with a cooperative recipient.

Many investigative agencies have, in the past, followed procedures for their complaint investigations that required that the same process be followed for each case. In this period of Federal budget constraints, many agencies have found that they can accomplish more by varying the approach to each case, depending upon the specifics of the case and the recipient. One case may be appropriate for a full investigation, requiring a detailed investigative plan, a violation Letter of Findings, and a formal conciliation agreement, while another may be appropriate for resolution based upon notifying the recipient by telephone of the complaint and obtaining written confirmation from the recipient that the appropriate remedy has been provided.

This manual addresses many of the different approaches you can take; you will not use all of the approaches for every case. However, you should keep in mind that, regardless of the strategy used to resolve a complaint, you will need to document in the file the basis on which the case was closed. Your agency's ultimate responsibility with respect to complaint processing is to ensure that recipients of the financial assistance your agency provides do not discriminate.

II. RECEIVE AND REVIEW THE COMPLAINT

A. Initial Receipt

A complaint should always be date stamped by the receiving agency immediately upon receipt. This is important because the date your agency receives the complaint may be what ultimately determines the complainant's ability to seek redress of alleged discrimination, even if your agency is not the appropriate agency to investigate the complaint. The receipt date by a Federal agency becomes the receipt date for other Federal agencies.[1]

ASK YOURSELF: ***Is this piece of correspondence a complaint?***

A complaint asks a Federal agency to take action concerning an allegation of discrimination. The correspondence need not be directed to the correct agency or

1/ Your receipt date is especially important if the complaint alleges discrimination in employment, because it is the date the Equal Employment Opportunity Commission (EEOC) will use as the charge receipt date, if the complaint is referred to it for investigation. If the complainant wants to file a private action in Federal Court under a variety of statutes prohibiting employment discrimination, he or she will need a Notice of Right to Sue from the EEOC. If you fail to appropriately date stamp the complaint, the complainant could ultimately lose his or her private suit rights because the complaint was untimely filed.

part of an agency in order for it to be a complaint under Title VI.

The following are examples of items that should not be considered a complaint, unless the item contains a signed cover letter specifically asking that the Federal agency take action concerning the allegations:

- an anonymous complaint;
- inquiries seeking advice or information;
- courtesy copies of court pleadings;
- courtesy copies of complaints addressed to other local, State, or Federal agencies;
- newspaper articles;
- courtesy copies of internal grievances; or
- oral complaints.

Your agency may wish to take action in response to notification of alleged discrimination based on any of these. However, technically these are not complaints. For example, you may decide to use the information to schedule a preaward or postaward compliance review, or you may make inquiries to local organizations (e.g., National Association for the Advancement of Colored

People, Mexican American Legal Defense and Education Fund, Urban League, National Organization for Women, etc.) to explore whether further action is warranted. You may also decide to call or write the person sending the correspondence and ask him or her to file a complaint formally with your agency.

ASK YOURSELF: ***Should my agency keep this correspondence or complaint, or should it be referred to another agency?***

If you can tell from the information provided that your agency has no jurisdiction over the respondent alleged to have discriminated (see Section III), you should attempt to refer it to the appropriate agency. (See TAB 1, sample referral letter.)

If the correspondence is a complaint and it appears your agency may retain it, we recommend that it be assigned a case number at this point -- even if it does not contain enough information to clearly explain the discrimination that is alleged. (See "Incomplete Complaints" below.) Some agencies choose to assign a complaint a case number even if they know it will be referred immediately to another agency. A separate case number should be assigned to each named recipient in the complaint. In addition, complaints from more than one person

against the same recipient should generally be assigned separate case numbers to help your agency comply with the requirements of the Privacy Act and the Freedom of Information Act. (See TAB 2 for a discussion of these statutes.**)** In some cases, complaints from more than one person raising the same allegations may be combined into one complaint, although we recommend that this not be done if the investigation will result in the inclusion in the case file of personally identifiable information about any of the complainants.

> For example, several complaints that Hispanics as a class are not provided notice about public meetings of a town council can be combined into one case. On the other hand, complaints that several Hispanic parents were denied the opportunity to speak at a school board meeting about specific problems their children were encountering in the schools should be assigned separate case numbers. In the latter case, your investigation may address not only the failure of the school board to let the parents speak, but the parents' specific problems they wish to raise about their children, as well. As soon as it becomes clear that you will need to investigate the complaints about the services to or treatment of specific students, separate complaint numbers should be assigned to protect the personal information about each specific student.

Additional allegations from the same complainant against the same recipient after the investigative process has begun can be reviewed on a case-by-

case basis to determine whether the allegations should be added to the open complaint or treated as a new complaint. We recommend that retaliation complaints received after investigation has begun be assigned a new complaint number.[2]

A person may file a third party complaint, i.e., a complaint that is filed on behalf of another named individual(s).[3] You must contact that individual (or, where the victim is a minor child or incompetent adult, contact the victim's parent or guardian) on whose behalf the complaint is filed to ensure that the named victim wishes to pursue the allegations raised on his/her behalf. If the person (or his parent or guardian) declines to pursue the complaint, you should close the complaint and inform the third-party complainant of the reason for the closure. You should also put a memo in the file explaining the steps you took and the reasons that the alleged victim (parent or guardian) did not wish to pursue the

2/ One reason for this is that you may find, based on your investigation, that you will want to issue a violation Letter of Findings concerning the retaliation complaint, while there is no violation on the initial complaint.

3/ A complaint filed by an attorney on behalf of a complainant is not a third party complaint.

complaint. If the person, parent, or guardian does want to pursue the complaint, you will need to have him or her sign a Privacy Act Release Form. (See discussion of Privacy Act Release at TAB 3.)

B. Acknowledge the Complaint

We suggest that you acknowledge the complaint within 15 days of receipt with a simple letter stating that the correspondence has been received and is being reviewed for jurisdiction. (See sample letter, TAB 4.) Your letter need not state a deadline by which the decision will be made, unless a particular statute or regulation provides otherwise. The letter is simply to let the complainant know that you have the correspondence and are working on it. This is especially helpful if your office has a large caseload and you will not be able to actually work on the case for a while. It helps reduce the number of calls and congressional requests you will receive from upset complainants who don't even know if you have their correspondence. If you will be able to complete your initial review of the complaint for jurisdiction and completeness (see below) within 30 days of receipt, you may want to wait to acknowledge the complaint at that time.

C. Determine Whether the Complaint is Complete

Once you have determined that the correspondence you have received is a complaint and it has been assigned a docket number, you should

ASK YOURSELF: ***Is this complaint "complete"?***

In order for a complaint to be "complete," the information you will need includes at least the following:[4]

1. a signed, written explanation of what has happened;

2. a way to contact the complainant;

3. the basis of the complaint, i.e., identification of the person or group, including the race, sex, or other appropriate identification, injured by the alleged discrimination;

4. the respondent - identification of the person or agency/organization alleged to have discriminated; and

5. sufficient information to understand the facts that led the complainant to believe that discrimination has occurred and when the discrimination took place.

4/ The term "Complete Complaint" originated with the Adams Order in 1977, which placed certain requirements on the U.S. Department of Education in its civil rights compliance activities. That case was dismissed in 1990. We use the term here because it helps convey the concept of what you will need to know about a complaint before you can make a number of basic, yet important, decisions.

Your agency should work with each complainant to ensure that you have sufficient information to properly evaluate the complaint. You must provide appropriate assistance to complainants, including persons with disabilities and individuals who speak a language other than English, who may need help in providing the information you will need to properly assess jurisdiction and investigate the complaint.

Please note that, while the list above indicates a complaint must be in writing, you must accept complaints filed in alternate formats from persons with disabilities. For example, the complaint may be filed on a computer disk, by audio tape, or in Braille. If the complainant is unable to write and cannot have someone write out the complaint or cannot tape it, you may need to write out the allegations provided over the telephone by the complainant and send the complaint to him or her for signature. You should ask the complainant in what format s/he would like written documents you send; generally, they should be sent in the format in which you received the complaint from the complainant. In those cases in which complaints are filed in formats such as audio tape or

computer disk, you will need to ask that the complainant sign the Privacy Act Release Form before you can proceed with the investigation. (See discussion of Privacy Act Release at TAB 3.)

Complaints in languages other than English should be translated and responded to in the language in which they were sent, to the greatest extent possible. In addition the Privacy Act Release Form should also be translated or other steps taken to ensure that the complainant understands what is contained in it and the legal implications of signing the form.

1. Contact the Complainant, if Necessary

It is often most helpful to contact the complainant by telephone, if you can reach him or her, to discuss the information you need. In instances in which you will need further information in writing, especially when you cannot reach the complainant by telephone, you may wish to send the complainant a Complaint Form. (See sample form, TAB 5.) However, you should always be certain to advise the complainant that he or she is not required to use the Complaint Form to submit the complaint or additional information, but rather may choose to

simply provide the information it asks for in some other format.[5] You may explain that, without the information requested in the items marked with a star (*), you will be unable to process the complaint further.

2. If the Complainant is represented by an Attorney

It is important to note here that, if the complaint is submitted on behalf of a complainant by an attorney, you should call the attorney for the additional information you need. You may ask the attorney if you can contact the complainant directly to discuss the information you need; this will often be acceptable to the attorney. In addition, if it appears from the information you receive that the complainant is represented by an attorney (especially if the complaint states that the matter raised has been or soon will be filed in court), you should ask the complainant whether he or she is represented by an attorney concerning this complaint. If this is the case, contact the attorney to request the information you need or to request permission to contact the complainant

5/ An agency may only require the use of a specific form if it has requested and received an OMB number to place on the form. We recommend that agencies apply to OMB for a control number under the Paperwork Reduction Act if they wish to use a complaint form. However, we do not recommend requiring that a specific form be used as long as the complainant provides the relevant information.

directly. If the complainant is represented by an attorney, and you have made good faith efforts to contact the attorney (always make notes of your attempts to contact the attorney) by telephone with no success, put your request in writing to the attorney and send a copy to the complainant. If you are still unsuccessful, send a letter to the complainant notifying him/her that the complaint will be closed if the information you need is not received by a date that you specify; be sure to send a copy of your letter to the complainant's attorney.

3. Set a Deadline for the Complainant to Provide Information

You should give the complainant a specific deadline by which the requested information should be submitted, generally 30 days from the date of your written request, to complete a complaint. Explain in your letter that failure to provide the requested information by that date will result in closure of the complaint. If the information has not been received by that date, you may close the complaint and inform the complainant. Please note that if you have or receive enough information to complete some allegations in a complaint but not others, you may only close those allegations that remain incomplete and should proceed with the

analysis and investigation process (if appropriate) of the others.

In addition, if you have made appropriate attempts to clarify a complaint and the issues it raises, and the complaint is patently frivolous, it may be closed and the complainant notified.[6] "Patently frivolous" generally means: (1) a complaint that is so attenuated and unsubstantiated as to be absolutely devoid of merit, or (2) previous decisions of courts, your agency, or another investigative agency foreclose the subject and leave no room for inference that the question sought to be raised can be the subject of controversy.

D. Create the Investigative Case File

The Investigative Case File is a structured compilation and repository of **all** documents and information, within your agency's possession, pertaining to the case. An Investigative Case File should be established for each complaint which your agency accepts for investigation.

A six-section folder is useful for this purpose. Complaints that are

6/ If the correspondence is so devoid of any possible merit, you may wish to simply send the complainant a letter saying that the issues raised do not come within the authority of your agency.

administratively closed for lack of jurisdiction, because they are untimely filed, for failure to exhaust local remedies, or for failure to state a claim over which your office has jurisdiction do not require an Investigative Case File.

The purpose of the Investigative Case File is to establish a methodology for the systematic compilation and structured storage of all documents, records, and information associated with the case. This is done in such a manner that the Case File (a) provides the basis and supporting documentation for the Investigators' Draft Report, and (b) allows a reader of that report to easily verify the facts upon which it is based.

1. Format for the Investigative Case File

Although individual agencies may have their own set format for the Investigative Case File, generally the Case File includes the following:

Section I - Contents/Log - This section has two types of entries, and is attached to the inside left-hand of the file folder.

> Table of Contents. This entry describes each section in the Case File and identifies each entry under that section. The Table of Contents is attached as the top page of Section I.
>
> Case File Log. The purpose of the Case File Log is to record all

contacts and activities relevant to processing the complaint for which there is no paper trail. The log is to be as a reference of the actions taken by the investigator on the case. Space should be provided to record the date, summary of actions, and the name of the individual annotating the actions. Under "Action," enter a brief description of the activity, including any outcome and future action required.

For example:

DATE:	SUMMARY OF ACTION TAKEN:	BY:
4/6/95	*Telephone conversation with _____ to find out if the ACLU is representing him in complaint against police department. He indicated that the ACLU was not representing him, although he did ask the organization to send in a complaint on his behalf.*	

Section II - External Correspondence - All external correspondence is included under this section, and is attached immediately opposite Section I on the first page of the file folder. Enter external correspondence chronologically (i.e., most recent first), assigning sequential letters of the alphabet, i.e., A, B, C, D,….) to identify each exhibit, if desired.

Section III - Determination/Settlement Agreement - This section contains copies of the civil rights office's determination and, where appropriate, a conciliation agreement.

Section IV - Investigator's Documents - This section contains copies of all documents generated by and pertinent to the investigator's handling of the complaint. Analyzes made by the investigator (e.g., statistical tabulations, application of statistical techniques to a body of data, etc.) which later become a

part of his or her investigative report, should be included. You may wish to use a formal analysis form for this purpose.

Section V - Evidence - This section contains all documentary evidence relating to the case -- records, interview statements, etc. Where the recipient or complainant submitted a document being used as an exhibit, the letter transmitting the document would be filed in Section II - External Correspondence; but the document itself (with a copy of the cover letter), and its accompanying Analysis Form, would be filed in this section.[7] It will be most helpful if every exhibit in this section has an Analysis Form.

For example:

A Police Records
B Witness Statement: Jackie Jones
C Interview with Recipient Official: Michael Tucker, Chief of Police
D Recipient's Position Statement
E Witness Statement: Brian Jackson

Section VI - Internal Correspondence Exhibits - All internal correspondence should be included under this section. Enter internal correspondence exhibits chronologically so that the most current exhibit is on top, assigning sequential letters of the alphabet to identify each exhibit.

7/ The Analysis Form is used to describe what is contained in the document. The form can be used to summarize or list the important information you have identified in the document. For example, if you are reviewing applications for housing but are concentrating on only the income and race of the applicant, your form could be tailored to show that information. See sample Analysis Form, TAB 6.

For example:

A *Memo to attorney requesting leal opinion concerning jurisdiction*

B *Memo to attorney requesting legal review of proposed violation LOF*

C *Memorandum to File Outlining Conciliation/Settlement Attempts (top)*

III. DETERMINE JURISDICTION AND IDENTIFY ISSUES

Once you have determined that correspondence you have received is a complaint, you must determine whether your agency is responsible for investigating all or some of the allegations it raises. This means that you must confirm that your agency has jurisdiction over both (1) the organization or agency that is alleged to have discriminated, and (2) the subject matter of the issues the complaint addresses.

A. Jurisdiction

In order to determine whether your agency has jurisdiction to investigate a complaint, the complaint should meet certain basic criteria:

- It must allege discrimination on a basis prohibited by one of the statutes that you are responsible for enforcing.
- It must allege that discrimination is occurring in a program or activity that receives Federal financial assistance from your agency.
- The subject matter (i.e., issues) addressed by the complaint must be

covered by one or more of the statutes that you are responsible for enforcing.

- It must be <u>timely</u> filed, unless the requirement is waived.

If the complaint meets all four of these criteria and is not affected by any regulatory exemptions or exceptions, your agency most likely has jurisdiction to investigate the complaint. If there is insufficient information to determine whether it meets these four criteria, you will need to contact the complainant to get this information. (See discussion of complete and incomplete complaints in Section II.) (See TAB 28 for a "Title VI Coverage Checklist.")

1. <u>Immediate Referral to Another Agency</u>

If you can tell at this point that you do <u>not</u> have jurisdiction over the complaint (or a portion of it), you should

ASK YOURSELF: ***To what other Federal agency should I refer this complaint?***

Your agency has the responsibility to make a good faith effort to refer the complaint (or those allegations for which you do not have jurisdiction) to the appropriate agency that can handle the case. We have included a chart at TAB 7

that lists a variety of types of programs funded by various Federal agencies. You may call an agency to determine whether it covers the type of case you wish to refer. (See TAB 8 for a list of Civil Rights Directors at various Federal agencies. TAB 8 also contains lists of regional and field offices for a number of Federal agencies.) If, after trying to find the appropriate agency to which to refer a discrimination complaint, you are unsuccessful, you may call the Coordination and Review Section for guidance, or refer the complaint (or appropriate part of it) to the Coordination and Review Section and we will attempt to make an appropriate referral.

2. Complaint Basis

The complaint must allege that race, color, or national origin (sex, disability, age, etc. -- the bases that are covered by your agency) discrimination is wholly ***or at least in part*** responsible for the alleged harm.[8] Other reasons for the

8/ Procedures for the handling of age complaints alleging discrimination in services differ from those based on race, color, national origin, etc. The Department of Health and Human Services is the coordinating agency for age complaints. (See 45 C.F.R. 91.50, et seq.) (Complaints alleging employment discrimination based upon age are always referred to EEOC.) Age discrimination complaints are first sent to the Federal Mediation and Conciliation Service (FMCS) for mediation and are then investigated only if they cannot be

(continued…)

harm may also be alleged, but at least some portion of the case must involve one of the discriminatory bases you cover.

3. Federal Financial Assistance

It is important to remember that Federal financial assistance does not only include grants of money. It can also include the provision of surplus property, asset forfeiture funds, training, etc. (See the Legal Manual for a more detailed discussion of jurisdiction.)

In addition, it may not always be clear immediately whether an institution or organization is receiving assistance under the purview of the civil rights statutes. For example, some institutions may be receiving funds from a State under block grant programs but, in fact, those funds originated with the Federal

8/ (…continued)
resolved by FMCS. If you determine that the basis for the alleged discrimination is age, you must refer the complaint to FMCS. If the complaint alleges other bases (e.g., sex) FMCS will attempt to resolve those, as well, so you should not proceed on those other bases. Generally, FMCS has 60 days to resolve the complaint, although it may request an extension. You should notify the complainant and recipient that you have forwarded the complaint to FMCS and that, if a resolution is not reached, you will investigate those issues/bases over which you have jurisdiction. The complainant may file a private suit under the Age Discrimination Act in Federal Court 180 days after filing the administrative complaint. For more information, you may call HHS at (202) 619-0403.

government. It is, therefore, helpful for the investigator to be familiar with how and to whom your agency provides funds, either directly or through primary recipients to subrecipients.

The Civil Rights Restoration Act of 1987, provides very broad jurisdiction for investigative purposes when Federal financial assistance goes to any part of a program or activity. (See the Legal Manual for more information about the Restoration Act.) It is not uncommon for a number of components within a Federal agency to provide funding or other assistance; you should not close a complaint until you have checked all possible funding sources. Your work to verify funding may require that you contact State coordinators within the appropriate State and/or city/county governments to track your agency's funds and other assistance.

We have discussed how to address complaints that are "incomplete" (in which you do not have sufficient information to actually investigate the allegations) in detail in Section II, above, but it is important to note that your determination of jurisdiction and the question of "completeness" are two quite

different questions. If you have answered "yes" to the initial jurisdiction questions above, you will likely continue on with the complaint analysis process.

4. Issues/Subject Matter

Identify the specific practice or service involved in the alleged discrimination, e.g., denial of services or access to a covered program, harassment by the program's employees, unequal services in a program, etc. Even if discriminatory intent cannot be ascertained, identify the practice, procedure, policy, or service that is alleged to have a disparate effect on one or more members of a certain protected class.

Generally speaking, in identifying the subject matter, you are looking for allegations of one or more of the following on a covered basis or bases; i.e., race, color, sex, disability, etc:

- Any difference in the quality, quantity, or manner in which a service or benefit is provided;
- Segregation in any part of a program or separate treatment in any manner;
- Restriction in the enjoyment of any advantages, privileges, or other

benefits that are provided by the program;

- Different standards or requirements for participation or entry;
- Separate treatment in any manner related to receipt of services or benefits;
- Restriction of the membership of advisory or planning councils that are an integral part of Federally-funded programs;
- Failure to provide information or services in languages other than English where a significant number or proportion of potential beneficiaries are of limited English-speaking ability;
- Failure to adequately advise person(s) in the eligible population of the existence of services or benefits;
- Use of criteria or methods of administration that would defeat or substantially impair the accomplishment of program objectives or would impact more heavily on members of a protected group; or
- Discrimination in any aspect of employment when a primary purpose of the Federal funds is to provide employment, or where the employment discrimination results in discrimination against beneficiaries (for Title VI), or when an agency's program statute prohibits employment discrimination.[9] Employment discrimination

9/ In 1983, the Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC) set forth procedures for handling complaints of employment discrimination filed against recipients of Federal financial assistance. These procedures (often referred to as the "VI/VII Rule") are printed at 48 Fed. Reg. 3570, and have been implemented at 28 C.F.R. §§ 42.601-13 (DOJ regulations) and 29 C.F.R. §§ 1691.1-.13 (EEOC regulations).

(continued…)

is covered without limitations on the basis of sex, under Title IX, and on the basis of disability, under Section 504.[10] Employment discrimination complaints on the basis of age are not covered and must be referred to the EEOC.

5. Timeliness

In most instances, Title VI complaints must be filed within 180 calendar days of the last date of the alleged discrimination. However, some agencies have Title VI or other program-specific regulations with different filing time limitations. The filing date is generally the earlier of:

- the postmark of the complaint; or

9/ (…continued)

For complaints covered both by Title VI of the Civil Rights Act of 1964, as amended, and by Title VII of the Civil Rights Act of 1964, as amended, or the Equal Pay Act of 1963, these procedures require that complaints solely alleging employment discrimination against an individual will be referred to EEOC and that EEOC will conduct the investigation and conciliation efforts in most cases. Where the complaint alleges a pattern of employment discrimination by a recipient of Federal financial assistance, the procedures require the fund-granting Federal agency to keep the complaint unless special circumstances warrant referral to EEOC. Lastly, complaints alleging services and employment discrimination are to be investigated by the fund-granting agency, except in special circumstances.

10/ The procedures for coordinating the investigation of complaints alleging employment discrimination on the basis of disability that are covered by both Section 504 and Title I of the Americans with Disabilities Act were published jointly by DOJ and the EEOC on August 4, 1997. They may be found at 28 CFR Part 37 (DOJ regulations) and 29 CFR Part 1640 (EEOC Regulations).

- the date the complaint is received by any Federal, State, or local agency.[11]

In a case in which the complaint alleges a continuing pattern of discrimination, the date of discrimination for timeliness purposes is the most recent date the discrimination occurred (not when it began). If a complaint alleges the maintenance of a discriminatory policy by a recipient, the complainant need not identify victims who were discriminated against within the filing period; the alleged maintenance of the policy is sufficient to consider the complaint to be timely for investigative purposes.

Waiver of the Timeliness Requirement

Most agencies have the authority to waive the timeliness requirement for certain specific reasons. If a complaint is not filed in a timely manner, you may notify the complainant of the opportunity to request a waiver if, based on information you have, it is warranted. Your agency's designated official may

11/ Note that a copy of correspondence to another agency or person is not sufficient to make the correspondence a formal complaint for your agency and you generally will need to contact the complainant to see if he or she wants to file a complaint. However, it is sufficient for jurisdictional purposes as the receipt date for your agency if the case is referred to you or if the complainant subsequently files a complaint with your agency.

grant a waiver of the filing requirement under any of the following circumstances:

1) The complainant could not reasonably be expected to know the act was discriminatory within the respective filing period, and the complaint was filed within 60 days[12] after the complainant became aware of the alleged discrimination;

2) The complainant was unable to file a complaint because of illness or other incapacitating circumstances during the filing period, and the complaint was filed within 60 days after the period of illness or incapacitation ended;

3) The complainant filed a complaint alleging the same discriminatory conduct within the filing period with another Federal, State, or local civil rights enforcement agency, and filed a complaint with your agency within 60 days after the other agency completed its investigation or notified the complainant that it would take no further action;

4) The complainant filed, within the filing period, an internal grievance alleging the same discriminatory conduct that is the subject of this complaint, and the complaint is filed no later than 60 days after the internal grievance is concluded; and,

5) Unique circumstances generated by agency action have adversely affected the complainant;

12/ We recommend that you use 60 days as discussed below, but your agency may wish to make this time period longer or shorter. However, if the deadline is too short it may be unreasonable.

6) Such a waiver would not prejudice the respondent's ability to respond to the allegations.

Once you receive the complainant's request, the investigator should formalize the request for the approval or disapproval of the official with the authority to grant a waiver. The memo will generally summarize the justification provided by the complainant, include any additional explanation or pertinent documents the investigator has (such as a telephone memorandum of a conversation with a State or local agency explaining why the complaint investigation had been delayed), and a recommendation that the waiver be granted or denied. (See TAB 9 for a sample letter to the complainant asking if s/he wishes to request a waiver and an example of the memorandum requesting and approving a waiver.)

If a waiver is not requested, or is requested but is denied, the case should be closed and the complainant informed of the decision. Your letter should explain the basis for the denial of the waiver request, if appropriate.

In some instances, your agency will know by looking at the complaint that you want to waive the timeliness filing requirement and will decide you do not need to require the complainant to formally request a waiver. In this situation,

you should be certain to include the formal written internal recommendation or request in the case file along with the signature of the appropriate agency official approving the waiver.

B. Pre-Investigative Administrative Closures

Once you have all of the necessary information, the complaint is found to be timely or a waiver has been granted, and other aspects of jurisdiction have been established, the investigator should determine whether to proceed to the resolution process.

ASK YOURSELF: ***Is this complaint appropriate for investigation/resolution or should it be closed?***

Most agencies have regulations implementing Title VI that require a prompt investigation whenever a complaint or other information indicates a possible failure to comply with the regulation. However, an agency generally need not proceed with or continue a complaint investigation and attempts at resolution of an allegation under certain circumstances, which include[13]:

13/ If your agency has procedures or requirements that conflict with those listed below, you should comply with your specific agency statutes, regulations, or policies.

1) The complaint is so weak, attenuated, or insubstantial that it is facially without merit, or so replete with incoherent statements that the complaint, as a whole, cannot be considered to be grounded in fact.

2) The complaint is a continuation of a pattern of previously filed complaints involving the same or similar allegations against the same recipient or other recipients that repeatedly have been found factually or legally insubstantial by your agency.

3) The same allegations and issues of the complaint have been addressed in a recently closed complaint or compliance review you have conducted.

4) The complaint allegations are foreclosed by previous decisions by Federal courts, the Department of Justice, or agency policy determinations.

5) Litigation has been filed raising the same allegations. Such cases may be refiled within 60 days following termination of the proceeding if there has been no decision on the merits or settlement of the complaint allegations.[14] (Dismissal with prejudice is considered a decision on the merits.) As an alternative, your agency may wish to investigate the complaint if the trial will not begin for an extended period of time or if your agency believes that the case raises important legal or policy issues it wishes to pursue.[15] You may also consider suspending investigation of the complaint (rather

14/ As indicated above, we recommend 60 days as a time limit for the refiling of complaints following completion of litigation or an investigation by another agency. However, your agency may wish to use a different time period.

15/ Note that, if the court becomes aware of your investigation, it may take action affecting the investigation.

than closing it) and monitoring the court action.

6) The same complaint allegations have been filed with another Federal, State, or local agency, or through a recipient's internal grievance procedures, including due process proceedings, and you anticipate that the agency will provide the complainant with a comparable resolution process. The complainant should be advised that she or he may re-file within 60 days of the completion of the other agency's action. (Generally, your agency's consideration of such a complaint will not involve a reinvestigation of the case.)

7) Your agency obtains information that the complaint allegation is moot and there are no class allegations. This includes instances in which the recipient has offered the complainant full relief and the complainant has refused to accept full relief.[16]

8) The information received from the complainant does not provide sufficient detail to proceed with complaint resolution. Where appropriate, your agency may use the information as the basis for targeting future compliance reviews or technical assistance activities.

9) Your agency determines that its ability to complete the investigation is being substantially impaired by the complainant's or injured party's refusal to cooperate. In such a case, the complainant or injured party should be contacted as soon as possible to discuss the problem. If this does not resolve the matter, a letter should be sent to the complainant or injured party explaining why the failure to cooperate (including refusal to give permission to disclose his or her identity) has made it impossible to investigate further. The letter should inform the complainant or injured party that refusal to

16/ It is important that the recipient, despite the complainant's refusal to accept individual relief, has changed any discriminatory policies, procedures, or practices.

cooperate within a time certain will result in the closure of the case; and if the required information is not received within a specified time, the case will be closed. We recommend sending these types of letters by certified mail, return receipt requested.

10) A complaint over which your agency otherwise has jurisdiction may be closed when your agency transfers or refers the complaint to another agency for investigation.

11) The death of the complainant or injured party makes it impossible to investigate the allegations fully, or the death of the complainant or injured party forecloses the possibility of relief because the complaint involved potential relief solely for the complainant or injured party.

12) A complaint involving a priority issue, because of its scope, may require a massive amount of agency investigative resources. In such instances, the agency may consider treating such a complaint as a compliance review, after determining that it is a "complete complaint" and the information provided. (See Chapter X for more information concerning compliance reviews.)

13) If your agency determines that a compliance review is the most effective means of addressing multiple individual complaints against the same recipient, you should discuss the decision with the complainants, assign a review number, and initiate a review as soon as possible. You may close the individual complaints at that time if your agency wants to, but you must ensure that all appropriate individual relief for the complaint(s) is included. Any outstanding individual allegations that cannot be promptly resolved should be incorporated into the review. The results of the review will be shared with the complainants upon completion.

Notification of Closure

Notify the complainant (and the recipient if it had notice of the complaint) if you will not proceed further with the complaint. The letter to the complainant (and recipient, if appropriate) should state that the complaint is being closed and explain the reason(s) for the decision. The closure letter should also include the reminder of the retaliation prohibitions and the Freedom of Information Act notice (see TAB 10 for retaliation and FOIA paragraphs).

IV. APPROACHES TO COMPLAINT RESOLUTION

Now that you have completed the initial "intake" analysis of a complaint, determined that the complaint is complete, and decided that your agency will retain it for investigation/resolution, you should consider how to approach the case.

ASK YOURSELF: ***How complicated is this case?***

Does it allege that only the complainant has been harmed in an isolated incident, or that the recipient maintains a policy that has a discriminatory effect on a large class of people? Is this case a good candidate for early settlement negotiations or is a thorough investigation, with an onsite visit, necessary to identify violations, victims, and relief?

A Federal agency's ultimate responsibility is to ensure nondiscrimination in the programs to which it provides financial assistance. This section discusses a number of approaches to resolving complaints. In the past, many agencies investigated complaints by following procedures that required a full investigation,

violation Letter of Findings, and formal compliance agreement for every case in which a violation existed. Recently, many agencies have found that they can process their cases more efficiently by varying the approaches they take to complaint resolution based upon the nature of each case.

This section suggests a number of alternatives for resolving complaints of discrimination, including the use of alternative dispute resolution (ADR) techniques. As used here, ADR refers to settlement negotiations to resolve a complaint at any stage prior to the issuance of a formal violation Letter of Findings (LOF). Recipients are frequently very positive about resolving complaints in a manner that does not result in the issuance of a violation LOF.[17]

The decision concerning which approach to use is sometimes a difficult one; often, an appropriate resolution is not clear until at least some of the investigation has been completed. You should never feel that you should initiate ADR before you are actually ready to do so.

17/ Regardless of the approach you take to resolving a complaint, you should remember that all letters to the recipient should be addressed to its chief executive, unless the recipient has directed that correspondence be addressed to a lower ranking official or another designated representative, such as an attorney. It is useful to ask, in your first letter to the recipient, for the designation of a person with whom you should work during the investigation.

Investigators should also remember that, even if an individual complaint is resolved, information concerning potential class discrimination identified during the investigation or negotiations should not be overlooked.

> For example, during the investigation of an individual complaint from an African-American applicant about a training program, the investigator learns that the recipient maintains a policy that has the result of excluding African-Americans and Hispanics. While the agency may decide to close the initial complaint once the complainant has been admitted to the program (and provided other appropriate remedial relief), it should still address the discriminatory policy and attempt to identify any other victims. This may well include additional remedial relief for identified African-American and Hispanic victims, injunctive relief to change the policy, and training to staff to advise them of the changes.

In the example above, the class allegations may be handled as part of the individual complaint or may be assigned a new complaint number and investigated separately. Alternatively, the class allegations might be opened up as a separate compliance review. The individual case may be handled through alternative dispute resolution (ADR) methods, while the class issues are fully investigated.

A. Alternative Dispute Resolution (ADR/Settlement)

ADR can consist of anything from the use of a neutral third party or mediator to informally resolving a matter without completing a full investigation. Each agency should decide what methods it will utilize in investigating and resolving its complaints. Agencies are strongly encouraged to make use of ADR, whenever appropriate. Both the President and the Attorney General have encouraged the use of ADR in matters that are the subject of civil litigation.[18] The Administrative Dispute Resolution Act of 1966, Public Law 104-320, authorizes the use of ADR to resolve administrative disputes.[19] The opportunity for the recipient and Federal agency to negotiate a resolution for violations found in an investigation and resolve matters by voluntary means is required by all Title VI regulations. In fact, under Title VI an agency must make a determination that voluntary compliance cannot be achieved before taking formal enforcement

18/ See Executive Order 12988 and Attorney General Order OBD 1160.1. The Administrative Dispute Resolution Act of 1996, Pub. L. 104-320 is codified in relevant part at 5 U.S.C. § 571 et seq. For general information about ADR and who your agency ADR contact is, you may contact the Department of Justice's ADR office at (202) 616-9471.

19/ See 5 U.S.C. § 571 et seq.

action.

Your agency may wish to consider the following pre-finding settlement approaches as alternatives to a full investigation when determining how to resolve a complaint:

1) Expedited processing of complaints alleging imminent harm to the complainant or some other person protected by statute, generally conducted by telephone. This will frequently involve provision of technical assistance to the recipient or a modified mediation process between the parties.

   Once the case is resolved, a letter of resolution is sent to the recipient/complainant stating that the appropriate action has been taken and the case is closed.

   Especially helpful if:

   - You have a heavy caseload, would normally only investigate complaints in the order received, and a delay could result in serious financial or other harm to the alleged victim(s).[20]

20/ In cases where imminent harm is alleged, such as denial of emergency medical treatment, termination of important benefits, eviction from housing, etc., it can be helpful to ask the recipient to hold the action in abeyance while you expedite the complaint investigation. You can explain that this can be a benefit to the recipient were you to find a violation and the remedial relief could be extensive and/or costly. If the recipient agrees to wait, you should hold up your end of the "bargain" by using the most expeditious means to conduct the investigation.

- The complaint involves only the complainant or a few victims.

- The complaint involves a policy or procedure, the remedy for which will only require changes to the policy and not a thorough investigation to identify victims and appropriate remedial relief.

- The complaint alleges both imminent harm to an individual along with class allegations that would require extensive investigation. The case can be bifurcated, the individual issue resolved, and the rest of the case handled at a later time.

2) Formal offer of settlement negotiations at the point of notification and data request to an entity alleged to have violated the law, thereby allowing the recipient to avoid the burden of a full investigation.

   With this approach, your notification/data request letter should state that you believe the case may be amenable to ADR and that you are willing to enter into settlement negotiations. Ask the recipient to notify you within a time certain if it is interested in entering into negotiations. As encouragement to use ADR, we suggest that you indicate that response to the entire data request may not be necessary if the recipient agrees to enter into settlement negotiations. (You will likely need the response to some of the questions in order to develop the proposed Settlement Agreement.)

   Especially helpful if:

   - The data request is lengthy in order to address all of the allegations and issues raised.

- The recipient will need to participate with your agency in active negotiations to discuss the issues, to identify what modifications in policies and procedures would be necessary, and to identify victims and relief.

3) Informal process whereby the recipient is contacted by telephone, notified of the allegations, and (if appropriate) is provided technical assistance in resolving the complaint.[21] The recipient then submits a letter explaining the steps it has taken to resolve the problem, or making a written commitment to take corrective action. The case is closed based upon the completed action or commitment, with a letter of resolution notifying the recipient/complainant the case will be reopened if the action is not taken as promised.

Especially helpful if:

- You are confident that the corrective action has been or will be taken. In this case, you may close the complaint based upon the commitment. However, you may request that their commitment include submission of some monitoring reports for a given time period.

- The recipient was unaware of the problem and needed your assistance in coming into compliance.

- The complaint does not raise complex allegations requiring investigation to identify victims and determine appropriate relief.

21/ See TAB 11 for sample letter confirming notification to recipient of complaint and offer to settle, with a request for a report from the recipient explaining its efforts to resolve the complaint.

4) The informal process, discussed in #3 above, but in which you discuss the allegations and offer to provide the recipient with a draft Settlement Agreement. If the recipient agrees, and the Settlement Agreement is subsequently finalized, the case is closed based upon the signing of the Settlement Agreement.

   Especially helpful if:

   - The complaint involves changes to a policy or procedure, and that extensive investigation to identify victims and determine appropriate relief in not required.

   - You have other similar agreements that you can send to the recipient as a sample to show how previous cases have been resolved. You may suggest that the recipient contact the other recipient(s) that have faced the same problem, if the other(s) recipients agree.

5) Formal Mediation - Formal mediation is an approach to resolution that may be considered in a variety of circumstances, both prior to or following the issuance of findings. In mediation, the mediator attempts to assist the parties in working out a resolution to their dispute that is acceptable to both sides. This does not mean that your agency will lose its ability (or its responsibility) to reach an agreement that is legally sufficient. Rather, you have a non-partisan third party who is assisting you and the recipient in reaching a resolution of your "dispute." A mediator will attempt to develop a relationship of trust between the parties that could be important to your agency in its future dealings with the recipient. Your office may consult with your agency's ADR office for additional information as to how ADR is applied by that agency and whether the use of a mediator may be appropriate. For information on who your agency ADR contact is, you may contact the Department of

Justice's ADR office at (202) 616-9471. In addition you may contact the ADR Services, which is part of the Special Programs Office of the Federal Mediation and Conciliation Service at (202) 606-5445.

Especially helpful if:

- Your agency appears to be approaching or has reached an impasse with the recipient, i.e., negotiations are breaking down, but you believe it may not be in your best interests or that you are prepared to issue formal findings or proceed to enforcement.

- It is important to develop and/or maintain a constructive working relationship with the recipient for the future, but this is unlikely without the intervention of a skilled third party to move beyond the impasse you have reached.

The "aggressive" use of ADR as an approach to processing complaints can result in an extensive saving of staff time and, perhaps more importantly, in a good working relationship with your recipients. The fact that you are saving your staff time probably also means that you are requiring that less staff time be expended by the recipient. It allows your agency to appear less confrontational

and to provide technical assistance up front, where it may be most helpful.[22]

However, we recommend that agencies only use ADR if they have staff who are experienced in doing complaint investigations, as the ability to "jump" from the initial allegations to an appropriate resolution requires a thorough understanding of the issues, legal concepts, and scope of the relief that would be involved.

A disadvantage of using ADR to resolve a case through a Settlement Agreement prior to issuing findings is that, if the recipient fails to meet the terms of the Settlement Agreement, DOJ can only sue the recipient based on its failure to comply with the terms of the Agreement, and not based on an actual violation of Title VI. In order to sue for a violation of Title VI, a formal violation Letter of Findings must have been issued, the recipient must have been given an opportunity to come into compliance, and a determination must have been made that voluntary compliance cannot be achieved. Also, your agency may prefer,

22/ Where an investigation is needed to determine relief, settlement may still be discussed with the entity at any time during the process. The offer of ADR and an expedited closure of the case may be a sufficient enticement for the recipient to assist in the identification of victims and relief and the offer to provide the relief.

for policy or programmatic reasons, to issue a violation Letter of Findings rather than to resolve the complaint through ADR.

> For example, the complainant and other victims have faced discrimination for an extended period of time with this recipient and specifically request that a violation Letter of Findings be issued to make clear the recipient's obligations under Title VI; even without the complainants' request, you may believe a violation LOF is appropriate. Or, the case raises important policy issues that your agency wants to address and clarify in formal findings, both for this recipient and as a way of clarifying your position for other recipients that may have the same problems.

In the types of situations described above, you would not discuss settlement with the recipient until after the findings have been issued. Likewise, a recipient who has cooperated in an investigation may wish a formal compliance Letter of Findings to "clear its name."

If your agency determines that it will use ADR methods to resolve complaints, it may find that it will rarely issue Letters of Findings, which are written after investigations are completed. This is, of course, dependent upon the nature of the complaints you receive and the cooperation of the recipients with which you are dealing. For a more thorough discussion of the provisions that should be included in Settlement Agreements, see Section VIII.

You should keep in mind that the use of ADR does not mean that you can ignore the relief that would be appropriate if you conducted a full investigation. Rather, ADR is a means of resolving cases with basically the same relief you would get after a full investigation, while avoiding the expenditure of staff time the full investigation requires. Remember the following when considering whether to use ADR at any point during your case processing:

- you can/should be open to negotiate a resolution to a case at any point during the processing of a complaint;
- the type of ADR (your "settlement approach") should be selected carefully, based upon the allegations, number of persons affected, type and extent of relief involved, cooperation of the recipient, and other factors;
- the case file should include an explanation of how the resolution was determined to constitute adequate relief;
- the resolution should provide for monitoring whenever appropriate; and,
- you may always reopen a complaint if you learn that the recipient has not complied with its commitments.

If the Complainant does not Agree to Settlement

In some cases, investigators are concerned that the complainant will not

agree with the resolution of their complaint through ADR. Unless there are factors necessitating that the complainant be a party to the resolution (e.g., in a case in which the recipient wants the complainant to agree not to sue for additional relief), it is your agency's responsibility to determine what constitutes "full relief." Your agency does not represent the complainant, but rather the interests of the Federal government in ensuring nondiscrimination by its recipients. Therefore, the relief you seek is dictated by the facts of the case and not by the complainant.

If the recipient has agreed to provide what you have determined would constitute full relief (in changes to policies/procedures, relief to the complainant and other victims, etc.) and the complainant disagrees with the policy changes or refuses to accept individual relief, you may complete the agreement with the recipient and close the complaint on that basis. If the recipient has already offered full relief to the complainant and no other relief is appropriate (e.g., change in policies or practices, or relief for other victims), and the complainant refuses to accept it, you may administratively close the complaint for "failure to

accept full relief."

B. Pre- Investigation Case Closure through ADR

If a complaint is resolved without an investigation, the complaint resolution letter to the complainant and recipient should contain:

1) the basis for the complaint (race, color, national origin, sex, disability, religion, and/or age);

2) a brief statement of the allegations over which your agency has jurisdiction;

3) a brief statement of your agency's jurisdiction over the recipient;

4) an explanation of the basis for your agency's determination that the complaint has been resolved;

5) the protection from retaliation and the Freedom of Information Act/Privacy Act paragraphs;

6) a copy of any written agreement should be attached;

7) a notation for the recipient as to when the first monitoring report will be due, if applicable; and,

8) if appropriate, that the complainant has the right to file his/her own

private lawsuit in Federal District Court.[23]

C. Full Investigation Approach

Those cases that do not appear to be appropriate for early ADR processing should be handled according to the more standard investigative procedures. As indicated above, you may still be able to resolve the complaint successfully prior to issuance of formal findings. This will become evident as you proceed with the investigation. The following section discusses the steps involved in a full investigation of a complaint of discrimination.

23/ You would not include the notification of the complainant's right to file in Federal District Court if s/he has specifically waived his/her private suit rights in the Settlement Agreement, if the relief the complainant got in your Settlement Agreement was what s/he indicated s/he was seeking as relief for the alleged discrimination, or if the complaint is satisfied with the relief agreed to.

V. COMPLAINT INVESTIGATION

This section discusses the steps involved in a complete investigation of a complaint of discrimination. These steps would also occur when you conduct a compliance review (see Chapter X for a discussion of Compliance Reviews). As discussed in the previous section, Approaches to Complaint Resolution, you may decide that it is appropriate to initiate settlement negotiations at any time during an investigation. However, you should ensure that you have enough information when you do discuss settlement to be certain that the relief you are agreeing to is sufficient for the case at hand.

In cases where a full investigation is needed to make legally sufficient findings, identify all aggrieved victims, and determine appropriate relief, you will be the most efficient if you have carefully planned your investigation in advance. Identify the legal approach you will take up front to the extent possible, determine what kind and how much evidence will be needed, and remember that

you will need to meet your burden of proof.

The standard of proof applied in making a determination of noncompliance, absent contrary statutory command, should be one of "preponderance of the evidence."[24] The primary reason for this is because a formal noncompliance finding may be challenged at an administrative hearing, and the evidentiary

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24/ The Administrative Procedure Act (APA) states that:

> A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative and substantial evidence.

5 U.S.C. § 556(d). The Supreme Court has ruled that "reliable, probative and substantial evidence" commands an agency to use a preponderance of the evidence standard. Steadman v. Securities and Exchange Commission, 450 U.S. 91, 98-102 (1981); reh'g denied, 451 U.S. 933 (1981). Section § 556(d) "was intended to establish a standard of proof and . . . the standard adopted is the traditional preponderance-of-the-evidence standard." Id. at 102.

The Court further found that the legislative history resolved any ambiguities in the statute as to the standard of proof. The House Report "expressly adopted" a preponderance of the evidence standard: "Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance." Id. at 101.

Courts have consistently held that the APA's standard of proof for the "vast majority of agency decisions" at formal adjudicatory hearings is the preponderance of the evidence. Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise § 10.7 (3d ed. 1994). This standard has varied in rare circumstances that are not applicable here: where Congress explicitly requires a different standard, where the Constitution requires a higher standard (which is narrowly applied), or where agency action is not subject to § 556(d). Id. at 171-172. Most agency Title VI regulations provide that hearings are conducted in conformity with the APA.

standard that will be applied by the hearing examiner will be a preponderance of the evidence.[25] Thus, formal findings of noncompliance should not be issued unless the preponderance standard is met.

A. Complainant and Recipient Notification

If you decide to proceed with investigation of the complaint, you should **notify the complainant and the recipient** that you have accepted the complaint for investigation. (See TAB 12 for Letter to Recipient and TAB 13 for Letter to Complainant.) Your notification letter to the complainant and recipient should contain:

1) the basis for the complaint;

2) a brief statement of the allegations over which your agency has jurisdiction;

3) a brief statement of your agency's jurisdiction over the recipient to investigate the complaint; and

25/ Title VI regulations specifically provide that "[t]he hearing . . . shall be conducted in conformity with . . . the Administrative Procedure Act . . . ." See, e.g., Department of Justice Title VI regulations at 28 C.F.R. § 42.109(d)(1). An Administrative Law Judge (ALJ) would receive testimony and documentary evidence, and allow for cross-examination of witnesses, according to these procedures.

4) an indication of when the parties will be contacted.[26]

If you are prepared to do so at this point, you can consider the following two options in complaints that raise limited (usually individual) allegations:

1) Request a position statement from the recipient in response to the allegations. You would ask the recipient to include with its response all appropriate policies, procedures, and documents relating to the complaint.

2) Include in your notification an offer to engage in ADR (settlement negotiations) to resolve the complaint. This should only be done if you believe you have a good idea of the nature of the relief you are seeking and you already have some of the information you need to determine relief.

Again, these options would not be appropriate if the complaint includes class or complex allegations that must be fully investigated and that could require extensive relief. However, the request for an initial position statement can help you determine how you should approach a complaint because it gives you information about the recipient's defense. If you determine it is not appropriate to call or write a recipient and ask it to enter into settlement negotiations, in most

26/ Your agency may wish to have a "handout" explaining your investigative procedures, which you can provide to complainants, recipients, and prospective complainants.

cases you should be open to settlement at any point during the investigative process.

B. Planning for the Investigation

Complaint investigation and resolution should be preceded by planning, and the approach should be developed based on the nature and complexity of the issues involved. Whether or not an **Investigative Plan (IP)** is prepared, all case files should set out the specific allegations to be resolved and, if appropriate, the expected internal time frames to be adhered to by the investigator or investigative team.[27]

The extensiveness of an IP depends on the complexity of the issues involved. Some investigations may require revisions to the IP, or a supplemental IP, after receipt of information from the recipient or after an onsite investigation is conducted.

The basic IP will help the investigator focus on the principle issues to be

27/ See TAB 14 for sample investigative plan format and plans.

explored in the course of the investigation, as well as the sources of evidence available to resolve them. An IP should include at least the following:

1) Jurisdictional information;

2) Identification of bases and issues;

3) Identification of the applicable legal theories;

4) Conclusions drawn from the analysis of the data or other evidence already gathered;

5) Description of the documentary, testimonial, and statistical evidence required to complete the investigation and the best sources and means of obtaining each type of evidence;

6) Anticipated sequence of case activities, including onsite visits if needed;

7) Anticipated timeframes for obtaining and analyzing evidence (if appropriate); and,

8) Statement of likely or enunciated recipient defenses and a description of the evidence required to test their validity.

A discussion of each of these aspects of the investigation follows. As a method of setting out information that is already known and that which is needed, you may wish to use a "chart" format. (See TAB 14 for sample IP charts for

hypothetical complaint(s).)

1. Jurisdictional Information

Any jurisdictional questions should be resolved at the outset, prior to investigating the allegations. Basically, this means determining that a covered basis of discrimination (e.g., race, sex, national origin) has been alleged in a timely fashion against an agency's recipient, giving the agency jurisdiction to investigate. (See discussion of jurisdiction in Section III.A.)

2. Identification of Bases and Issues

The investigator should determine if the complainant alleges that discrimination against one or more members of a protected class -- because of race, color, national origin, sex, religion, disability or age -- is wholly, or at least in part, responsible for the complaint: this is the basis for the complaint.[28]

The investigator should also identify the specific action, policy, or practice responsible for the alleged discrimination (e.g., denial of educational or health

28/ Procedures for the handling of age complaints alleging discrimination in services differ from those based on race, color, national origin, etc. See footnote 8, pages 28 - 29.

services, harassment, retaliation for filing a complaint or giving testimony in an investigation, provision of unequal services, etc.). Even if intentional discriminatory treatment cannot be ascertained, does the practice, procedure, or service identified have a disparate effect on a certain protected class?

3. Identification of the Applicable Legal Theories

Regardless of whether you develop a formal Investigative Plan or not, you must know what theory or theories of discrimination you are using in your investigation in order to understand the standards of proof needed to establish a violation. Two primary legal theories are used to establish a case of prohibited discrimination: intentional discrimination/disparate treatment and disparate impact/effects.[29] In thinking about the potential legal theories raised by a complaint, it is important to remember two things: (1) intentional discrimination may take many forms (some of the most common of which are discussed below), and (2) the complaint may raise allegations based on more than one legal theory,

29/ See Chapter VIII of the Legal Manual for a full discussion of these two theories of discrimination. The information provided here is a limited discussion for the purposes of developing an investigative plan or approach for investigation and resolution of a complaint.

especially if it involves allegations that an applicant or potential participant did not meet entry or participation requirements for a federally assisted program.

a. Intentional Discrimination/Disparate Treatment

As noted above, intentional discrimination may take many forms. One of the most common forms of intentional discrimination is disparate treatment. Simply put, disparate treatment means that similarly situated persons are treated differently (i.e., less favorably) than others because of their race, color, national origin, sex, etc. Disparate treatment cases can involve either "individual" or "class"[30] discrimination (or both). For example, if two individuals apply to participate in a federally funded program and one is rejected because the interviewer dislikes members of the rejected applicant's race, this constitutes disparate treatment. If the interviewer repeatedly rejects members of a particular race, this may indicate class discrimination or a "pattern and practice" of discriminatory conduct by the recipient.

Another type of intentional discrimination involves the use of policies or

30/ Class cases are often referred to as "pattern or practice" cases.

practices that explicitly classify individuals on the basis of their membership in a particular group. Such "classifications" may constitute unlawful discrimination if they are based on characteristics such as race, color, sex, etc. For example, the Supreme Court has held in a Title VII case that a policy which required female employees to make larger contributions to the pension fund than male employees created an unlawful classification based on sex. See City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978).

The analysis of intentional discrimination under Title VI is equivalent to the analysis of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment. To prove intentional discrimination under Title VI you must show that "a challenged action was motivated by an intent to discriminate." Elston v. Talladega County Board of Education, 997 F.2d 1394 (11th Cir. 1993). This requires a showing that the recipient was not only aware of the complainant's race, color, or national origin, but that the recipient acted, at least in part, because of the complainant's race, color, or national origin.

However, it is important to remember that the record need not contain

evidence of "bad faith, ill will or any evil motive on the part of the [recipient]." Elston, 997 F.2d at 1406 (quoting Williams v. City of Dothan, Alabama, 745 F.2d 1406, 1414 (11th Cir. 1984)). For example:

- A recipient official denies a woman's application to participate in a training program for construction workers. He does not select her because he thinks that it's not safe for women to do this type of work and he's concerned for her safety. Although this official did not act with any ill will toward this woman or women in general, he has considered this female applicant differently than male applicants and denied her admission to the training program because of her sex.

Evidence of discriminatory intent may take many forms and may be found in various sources, including statements by decisionmakers, the historical background of the events at issue, the sequence of events leading to the decision at issue, a departure from standard procedure (e.g., failure to consider factors normally considered), legislative or administrative history (e.g., minutes of meetings), a past history of discriminatory or segregated conduct, and evidence of a substantial disparate impact on a protected group.

In some cases, you will find that there is direct evidence of discrimination. For example, the facts may show that a member of the recipient's management

staff was overheard commenting that the complainant was not selected for a particular program because of his or her race. More frequently, however, the investigation will be based on circumstantial or indirect evidence. In such cases, the analytic framework used by courts evaluating Title VII claims may provide a useful guide. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Applying this framework to a Title VI claim, you must first determine whether the complainant can raise an inference of discrimination by establishing a prima facie case. The elements of a prima facie case may vary depending on the facts of the complaint, but such elements often include the following:

1. that the aggrieved person was a member of a protected class;

2. that this person applied for, and was eligible for, a federally assisted program that was accepting applicants:

3. that despite the person's eligibility, he or she was rejected; and,

4. that the recipient selected applicants of a different race, color, or national origin than the complainant -- or that the program remained open and the recipient continued to accept applications from applicants of a different race, color, or national origin than the complainant.

If the record contains sufficient evidence to establish a prima facie case of

discrimination, you must then determine whether the recipient can articulate a "legitimate, nondiscriminatory reason" for the challenged action. See McDonnell Douglas, 411 U.S. at 802. If the recipient can articulate a nondiscriminatory explanation, you must determine whether the record contains sufficient evidence to establish that the recipient's stated reason was a pretext (i.e., an excuse) for discrimination. Id. In other words, the evidence must support a finding that the reason articulated by the recipient was not the true reason for the challenged action, and that the real reason was discrimination based on race, color, or national origin.

Similar principles may be used to analyze claims that a recipient has engaged in a "pattern or practice" of unlawful discrimination. Such claims may be proven by a showing of "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977). The evidence must establish that a pattern of discrimination based on race, color, or national origin was the recipient's "standard operating procedure the regular rather than the unusual

practice." Id. Once the existence of such a discriminatory pattern has been proven, you may assume that every disadvantaged member of the protected class was a victim of the discriminatory policy, unless the recipient can show that its action was not based on its discriminatory policy. Id. at 362.

Finally, you should also remember that some cases of intentional discrimination may involve the use of "classifications" based on race, sex, or some other prohibited characteristic. If the facts of a case reveal that the recipient utilizes a policy or practice that explicitly treats members of a protected group differently from others, your investigation should focus on the recipient's reasons for utilizing the challenged classification policies. Most such policies will be deemed to violate Title VI, unless the recipient can articulate a lawful justification for classifying people on the basis of race, color, or national origin.

b. Disparate Impact/Effects

The second primary theory for proving a Title VI violation is based on Title VI regulations and is known as the discriminatory "effects" or disparate impact theory. In contrast to disparate treatment, the disparate impact/effects theory

does not require proof of discriminatory intent. Rather, disparate impact cases involve claims that a recipient is violating Title VI regulations by utilizing a neutral policy or practice that has the effect of disproportionately excluding or adversely affecting members of a protected group, and the recipient's policy or practice lacks a "substantial legitimate justification."

The Supreme Court has held that Title VI regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory (Guardians, supra; Alexander v. Choate, supra.), and many subsequent cases have also recognized the validity of Title VI disparate impact claims. See Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996); Chicago v. Lindley, 66 F.3d 819 (7th Cir. 1995); Georgia State Conf. v. Georgia, 775 F.2d 1403 (11th Cir. 1985); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984). In addition, by memorandum dated July 14, 1994, the Attorney General directed the Heads of Departments and Agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of Federally financed programs." (See

TAB 15 for a copy of the Attorney General's memorandum.)

Pursuant to Title VI regulations, all entities that receive Federal funding enter into standard agreements or provide assurances that require certification that the recipient will comply with the implementing regulations under Title VI. Guardians, 463 U.S. 582, 642 n. 13. You should carefully examine the assurances signed by the recipient in question when investigating any claim.

The principles used to analyze a Title VI disparate impact claim are similar to those used to analyze a Title VII disparate impact claim. New York Urban League, Inc. v. State of New York, 71 F.3d 1031, 1036 (2nd Cir. 1995). In a disparate impact case, the focus of your investigation will center on the consequences of the recipient's practices, rather than the recipient's intent.

To establish liability under a disparate impact scheme, you must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI.[31] Larry P. v. Riles,

31/ The policy or procedure in question need not be formalized in writing, but can also be a practice that is understood as a "standard operating procedure" by employees or others who implement it.

793 F.2d 969, 982; Elston, 997 F.2d at 1407 (citing Georgia State Conference, 775 F.2d 1403, 1417 (11th Cir. 1985)). This showing requires a comparison of the effects of the policy or practice on members within the protected class relative to the effect on persons outside the protected class. For example, if a recipient has a policy that applicants for its entry-level vocational training program for plumbers must have a high school diploma, and you show that this policy results in the elimination of 90 percent of the Hispanic applicants but only 15 percent of the white applicants, then the recipient's policy has an adverse impact on Hispanics.

If your investigation proves that there is a statistically significant adverse impact on members of a protected class, you must then determine whether the recipient can articulate a "substantial legitimate justification" for the challenged practice. Georgia State Conference, 775 F.2d at 1417. "Substantial legitimate justification" is similar to the Title VII concept of "business necessity," which involves showing that the policy or practice in question is related to performance on the job. Griggs v. Duke Power, 401 U.S. 424 (1971).

To prove a "substantial legitimate justification," the recipient must show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission." Sandoval, supra, 1998 WL 295891, at *36 (M.D.Ala.), ___ F.Supp. ___, (quoting Elston, 997 F.2d at 1413). The justification must bear a "manifest demonstrable relationship" to the challenged policy or program. Georgia State Conference, 775 F.2d. At 1418. See, e.g., Elston v. Talladega County Board of Education, 997 F.2d 1394 (11th Cir.), reh'g denied, 7 F.3d 242 (11th Cir. 1993). In an education context, the practice must be demonstrably necessary to meeting an important educational goal, i.e., there must be an "educational necessity" for the practice. See Larry P., supra.

If the recipient articulates a "substantial legitimate justification" for the challenged policy, you must carefully examine that justification in order to determine whether it is a pretext for discrimination. You must also consider whether there are any less discriminatory alternatives that would still accomplish the recipient's program objectives. If you find that the "substantial legitimate

justification" is a pretext for discrimination, or if there are any less discriminatory alternatives, the evidence will support a finding of a violation.

In the example given above, you would critically evaluate the recipient's asserted "substantial legitimate justification" for its policy of requiring a high school diploma. The burden is now on you to either show that the claimed need for the diploma is merely a pretext for discrimination (e.g., by showing that it is not related to the training program at all, for example, because many plumbers in that State or county never finish high school) or that there are other less discriminatory alternatives to attaining the level of education needed to participate in the program (e.g., by earning a G.E.D., through experience in internship programs, or by performing certain types of work in a related field, etc.).[32]

Courts have often found Title VI disparate impact violations in cases where recipients utilize policies or practices that result in the provision of fewer services or benefits, or inferior services or benefits, to members of a protected group. Larry P. v. Riles, 793 F.2d 969, 983 (9th Cir. 1984) (Use of IQ tests for placing

32/ The applicable case law provides that the burden would shift to the plaintiff, but as an investigator, you are responsible for meeting this burden.

school children in special classes had discriminatory effect); Sandoval, 1998 WL 295891, *46 (M.D.Ala.) (Discrimination on the basis of language, in the form of an English-only policy, had an unjustified disparate impact on the basis of national origin); Meek v. Martinez, 724 F.Supp. 888 (S.D.Fla. 1987) (Florida's use of funding formula in distributing aid resulted in a substantially adverse disparate impact on minorities and the elderly); Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 1995 N.Y. Lexis 1145 (New York. Ct. App. June 15, 1995) (Allocation of educational aid had a racially disparate impact).

Other examples of the types of policies/standards that might result in a disparate impact on protected groups include:

- imposing financial or other requirements (e.g., home ownership, residence at one address or in a certain city for a specified time period, ability to read and write English, ownership of a car, education credentials) for which there are no legitimate program justifications;
- insisting on experience or training of a certain type when experience or training in a related field would be equally useful; or
- using personal information (e.g., number of children, marital status, potential lack of child care, arrest records) as a basis for making

> decisions on who can participate in a program, when these factors have not been shown to have any relevance to the program requirements or are not required by the program statute or regulations.

The most important thing to remember when investigating a disparate impact claim is that the primary focus of the analysis will be on the results of the policy or practice as opposed to the intent of the decisionmaker.

c. **Retaliation**

A complainant may bring a retaliation claim under Title VI or under a Title VI regulation that prohibits retaliation. For example, most agency Title VI regulations provide that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title VI], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subpart." 28 C.F.R. § 42.108(e) (Department of Justice Regulation).

To establish a case based upon a claim of retaliation, the elements of proof utilized in a Title VII retaliation complaint again provide a useful guide:

1) that the person allegedly retaliated against engaged in a protected activity (i.e., filed a complaint, participated in an investigation, testified in a hearing, etc.);

2) that the person retaliating was aware of the protected activity;

3) that the party alleging the violation suffered adverse treatment after engaging in the protected activity; and

4) that there was a causal connection between the protected activity and the adverse action.

See Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2nd Cir. 1980). See also Davis v. Halpern, 768 F.Supp. 968, 985 (E.D.N.Y. 1991) (Defendant's summary judgment motion to dismiss Title VI retaliation claim was denied because plaintiff established evidence of prima facie case). It is important to remember that it is not necessary that any underlying discrimination complaint be proven in order to make a prima facie case, and ultimately prove, a subsequent retaliation complaint. DeCintio v. Westchester County Medical Ctr., 821 F.2d 111, 116, n. 8 (2d Cir.1987), cert. denied, 484 U.S. 965 (1987).

4. Conclusions Drawn From the Analysis of the Data or Other Evidence Already Gathered

You should carefully analyze what you have received from the complainant and from the recipient (if, for example, you have received a position statement or the complainant has provided you with letters written to him/her by the recipient). This information will be important in deciding how much and what kind of additional information you will need to request and which theory of discrimination may apply. You may also wish to conduct some preliminary interviews with the complainant's witnesses and include this information in your analysis of how to proceed.

5. Description of the Evidence Required to Complete the Investigation and the Best Sources and Means of Obtaining Each Type of Evidence

Documentary evidence is in written form, and may consist of business records, memoranda, letters , applications, charts , logs, handwritten notes, etc; virtually any material or format. You should also include computerized data within the general category of documentary evidence, and consider whether data should be requested in computerized form and "hard copy." If voluminous

records are needed from the recipient, it will be useful and timesaving to obtain data in computer form in order that assessments and calculations can be made more readily. Documentary evidence is essential from the recipient, and in many cases from the complainant, in order to fully investigate a complaint of discrimination.

Testimonial evidence refers to oral evidence. To obtain testimonial evidence, you should develop interview questions based on oral and written information and any other available data, and conduct interviews with the complainant, recipient's staff, and witnesses, as appropriate. Remember that, in gathering evidence to investigate and prove your case, you should not only look for evidence to support a prima facie case, but also to test the validity or truthfulness of any stated or anticipated defenses that the recipient has or may assert in your case. Therefore, you will want to include a statement of the likely or enunciated defenses of the recipient and describe the evidence you will need to test their validity. By addressing asserted or anticipated defenses "up front" when you plan your investigation and identify the evidence you will want to obtain, you will save

yourself (and the recipient) a lot of time and the possible aggravation of additional requests for data and interviews.

a. Types of Evidence

It is important that, during the planning and investigation/resolution process, you keep in mind the types of evidence you will need and how each type of evidence relates to the theory or theories of discrimination that apply to your case. Evidentiary proof is an inductive process where demonstrable facts (e.g., items of evidence) serve as building blocks to structure a determination of compliance or noncompliance. This "structure" can only be as sound as the evidence that is its foundation. You must keep in mind that different types of evidence can contribute in different ways to the proof for your findings; a little of one kind of evidence may be just as good or better than a lot of another type of evidence, if the latter is weak and unreliable.

(1) Direct Evidence

Direct evidence is evidence of the actual, subjective intent of the person(s) charged with discrimination. It may take the form of an admission of

discriminatory purpose, although this will rarely occur. You will most often find such admissions during an interview, when a person is explaining or justifying his or her actions (e.g., "… but you know that women don't really want that kind of work, so why train them for it?").[33]

Direct evidence encompasses more than just admissions; it includes any facts tending to establish the subjective motives of persons involved in the alleged discrimination. This might include any of the following:

- public statements or speeches
- minutes of hearings
- facially discriminatory actions/legislation; and
- contemporaneous statements (e.g., attributed by third parties).

(2) Circumstantial Evidence

Circumstantial evidence includes facts from which one may infer intent or discriminatory motive; it generally forms the bulk of investigative findings in

33/ It is important to note that such comments are unlikely to result from "confrontational" interviews, but rather from interviews in which the person is comfortable and is given the time to explain his actions in response to open-ended questions. See Chapter V for a discussion of interviews of witnesses.

disparate treatment cases. Circumstantial evidence proves intent by using objectively observable data (i.e., focusing on the results or effects of an action or on the action itself). It does not, however, prove anything directly about actual subjective intent (i.e., why an action was taken). Circumstantial evidence collectively leads to an inference of discriminatory motive. For example, historical information on how members of the protected group at issue have been treated by the recipient, and the extent of similar complaints (and corrective actions taken, if any) can aid in developing an inference of discriminatory intent and the context for the claim at issue.

(3) Comparative Evidence

Comparative evidence is most often thought of as that which identifies difference(s) in treatment accorded similarly situated individuals or groups based on their identification with or membership in a protected class. Comparative evidence may also focus on program or employment results. For example, this might involve comparing the quality and quantity of services provided one group with another. Properly presented, comparative evidence constructs, through

rules of logic, the following rebuttable proposition:

If: 1) similarly-situated persons of different races (or sexes, colors, etc.) receive different treatment or evidence different program or employment results, and

2) there is no adequate non-racial explanation for the differences,

Then: 3) it is reasonable to infer that race, sex, etc. was a factor in that treatment or in those results.

In order to be probative, the comparative evidence used must demonstrate two things: first, that persons who are similarly situated are being compared[34] and, second, that the comparisons being made are significant and inclusive. You must show that the sample of "similarly situated" is sufficient from which to draw a conclusion and that all or a statistically representative sample of those persons who are "similarly situated" have been included in the universe from which you selected your sample.

(4) Statistical Evidence

Statistical evidence is an important category of comparative evidence. It

34/ You must show that it is reasonable to expect that those persons, despite differences in race, sex, etc., are eligible to receive the same treatment, and that a basis for concluding that they are "similarly situated" has been established.

generalizes about the experience of a class rather than focusing on the experience of an individual member of that class. This type of evidence is important because, if the proper statistical techniques are rigorously applied, the resulting inference has a certain and predictable validity (e.g., there is a 95 percent probability that the results are not due to chance). The statistical proposition is very similar to the comparative proposition, varying only in its scope:

If: 1) evidence reveals a statistically significant difference in the treatment of similarly situated classes of different races (or sexes) in the delivery of services (or receipt of benefits, in employment levels, etc.), and

2) there is no legitimate non-discriminatory reason for the observed pattern of disparities,

Then: 3) it is reasonable to infer that race was a factor in creating such a pattern.

It is important to note that statistics alone will not prove an individual claim of disparate treatment. Statistical evidence, however, can be helpful in proving individual cases of disparate treatment because it can be used as circumstantial evidence to establish the presence of discriminatory motive.

Statistics are most often used under the disparate impact model to

demonstrate the adverse effect of a procedure, policy, rule, selection criteria, or method of administration. Where evidence of disparate impact reaches significant levels, statistics alone may establish a prima facie case of discrimination.[35] In order to do this, you must present statistical evidence that demonstrates that a rule, procedure, policy, practice, or method of administration has a substantial disparate impact and that it is statistically improbable that the observed pattern of events occurred by chance. As a rule of thumb, the investigator must show that the observed (i.e., the actual) results had a chance occurrence probability of less than five percent or were at what statisticians call the ".05 level of confidence." In such a case, your statistics will meet two tests:

1) that a substantial disparate impact exists, and

2) that the observed impact is statistically significant (i.e., not due to chance).

35/ If you will need a statistical analysis to prove your case (or allow you to determine that the statistical evidence does not support the finding of a violation), you must be certain to ensure that your sample is chosen properly and that you have made the appropriate comparison. If you or your office do not have the capability of performing this analysis, you should find out whether your agency employs a statistician with this capability; if not, you may need to hire an outside consultant to perform the statistical analysis. Remember that statistical findings used to support a violation may ultimately need to withstand the scrutiny of an administrative hearing or Federal court.

It is important to keep in mind that statistics are not irrefutable. Like any other kind of evidence, they may be rebutted. In addition, while statistics are the central evidence for a disparate impact case, most successful cases also include anecdotal and/or other types of evidence to support the statistics. For example, witnesses who have been denied services because of the criteria at issue bring the statistics "to life" and help establish a more compelling case.

b. Evidence to Prove Disparate Treatment

You must prove that the recipient had a discriminatory motive to establish a disparate treatment violation. Evidence of discriminatory intent may be shown through direct evidence, or more commonly, through circumstantial evidence.[36]

(1) Direct Evidence of Motive/Intent

Direct evidence directly establishes the recipient's discriminatory motive and is one element of a prima facie case of disparate treatment. Most often, this will be statements by recipient officials or decision-makers expressing a biased or stereotypical view. For example, "…we send most of our Black patients to the

36/ See the discussion of types of evidence later in this Chapter.

City hospital; you know, they never have health insurance…".

(2) Circumstantial Evidence of Motive/Intent

Circumstantial evidence includes facts from which one may infer intent or discriminatory motive; it generally forms the bulk of the evidence supporting investigative findings in disparate treatment cases. Circumstantial evidence can include, but is not limited to, comparative evidence regarding the treatment of similarly-situated individuals, and statistical evidence of an adverse impact on a protected group.

Direct and circumstantial evidence can be found in various sources, including:

- statements by decision-makers (e.g., stereotypical or biased views towards members of the complainant's class);
- statistical data;
- the historical background of the events at issue;
- the sequence of events leading to the decision at issue (e.g., the recipient's failure to respond to complaints of denial of services or racial harassment by members of its staff, or changes in eligibility requirements after protected class members became a significant proportion of those eligible for a program);

- a departure from standard procedure (e.g., failure to consider factors normally considered);
- legislative or administrative history (e.g., minutes of meetings); and,
- a past history of discriminatory or segregated conduct.

See Arlington Heights v. Metropolitan Housing Authority, 429 U.S. at 266-68 (evaluation of intentional discrimination claim under the Fourteenth Amendment); Elston, supra, 997 F.2d at 1394, 1406.

(3) Recipient's Defense of a Prima Facie Intent Case

In a disparate treatment/intentional discrimination case, the recipient can rebut the prima facie case by showing that the finding is factually incorrect or demonstrating that the discrimination was required by law, for example by showing that actions were taken pursuant to a consent decree or remedial plan. The most common defense is that the treatment at issue was due to an alternative nondiscriminatory reason.[37] Defenses also may attempt to undermine the

37/ Note that the reason need not be objective, fair, or ethical, so long as it is not discriminatory on grounds that violate the law(s) you enforce. If you find evidence of a violation of some other civil or criminal law(s), it may be appropriate to refer the case to another Federal or State agency or to another office within your agency, such as the Inspector General. For example, the decision may have been made on the basis of nepotism or favoritism.

credibility of the evidence establishing intent. In addition, the defendant recipient may also present other members of the complainant's class who were not treated like the complainant or a person not of the complainant's class who was treated in the same manner as the complainant.[38]

(4) Overcoming the Recipient's Defense in an Intent Case

If the recipient's defense is not based upon a Federal requirement, the investigator may show that the rebuttal evidence presented by the recipient was merely a "pretext" for discrimination. Often the determination of whether or not the asserted nondiscriminatory "reason" provided by the recipient is pretextual is based on the investigator's judgment, rather than documentary evidence. Where facts are in dispute, the investigator should attempt to corroborate the facts independently.

Rebuttal evidence may challenge the credibility of the recipient's

38/ The fact that some members of the protected class were not subject to disparate treatment does not automatically rebut the complainant's claim of disparate treatment. All of the evidence will need to be considered.

nondiscriminatory reasons for its actions. More often, however, rebuttal evidence may not be any different than the evidence of intent presented to establish the prima facie case. Since the ultimate evaluation in disparate treatment cases is often one of assessing witness credibility, the strength of evidence to prove discriminatory motive is critical. Types of evidence that may be helpful in proving pretext are:

- the recipient failed to follow its own rules, policies, and procedures in making the decision;
- the recipient acted inconsistently with its own stated legitimate nondiscriminatory reason;
- testimony or documentary evidence obtained in the investigation contradicts the nondiscriminatory reasons; or
- the reason offered now was not offered to support the challenged decision at the time it occurred, suggesting the reason was offered as an afterthought.

c. Evidence to Prove Disparate Impact

Rather than seeking to prove that the recipient had a discriminatory motive, you are seeking to prove that a policy or practice has an adverse impact. The evidence you will need to gather in an investigation of a case involving disparate

impact will likely include both statistical and comparative evidence.[39] You will initially want to determine whether there is a disproportionate representation of protected class members participating in the program in question (e.g., four percent of participants in a housing program are African American, while 43 percent of the statutorily eligible population is African American). If this is the case, you will want to look at the application process and other aspects of program administration to determine if there is evidence that a policy or practice is causing the disparity. In complex cases, this could involve a separate analysis of each step or requirement in the process.[40]

You will need to develop evidence that will allow you to test for adverse impact by making a comparison of the effects of the policy, requirement, or practice in question on members of the complainant's protected class with persons not in the protected class. You will need to determine the representation of people within the protected class as a whole prior to the application of the

39/ See the discussion of types of evidence earlier in this Chapter.

40/ For example, if the process involves a written application, a test, and an oral interview, you would examine the operation and scoring or success/failure rates in each of these steps separately to determine where the discrimination is actually occurring.

policy/requirement (e.g., the number of statutorily eligible low income African Americans in a metropolitan area), as well as the proportion of protected class members who remain after you apply the policy/requirement in question (e.g., those low income African Americans who can meet a residency requirement). You must then determine the same numbers for persons outside the protected class in both circumstances. If there is a statistically significant disparity between the proportion of protected class members remaining after application of the policy or practice when compared with that proportion of persons not in the protected class, you have established a prima facie case.

> For example, assume that 200 African Americans and 300 whites apply for benefits from a Federally funded disaster relief program after a hurricane destroys a town. The African Americans make up 40% of the applicants, and the whites make up 60% of the applicants. However, even though all of the applicants are found to be eligible for the relief in question, the local recipient administering the program provides benefits to only 100 of the African American applicants, while providing relief to all of the white applicants. Of those receiving relief, African Americans comprised 25 % and the whites comprised 75%. Stated another way, 50% of the African Americans received assistance, while 100% of the whites received assistance.

By establishing a prima facie case in this manner, the burden shifts to the

recipient to defend its policy or practice.

If the number of protected class members in the universe of potential applicants for or participants in the program is small, you will most likely not be able to develop statistical evidence that is reliable because of the limited numbers. In that instance, you will want to develop your case based upon comparative evidence to determine whether essentially all of the protected class members are eliminated based upon the policy or procedures in question. For example, a town to which a small population of Native Americans moved within the past five years requires seven years of residency in the town in order to qualify for certain services. Even though you may not be able to develop a statistical case because the number of Native Americans is small, you may be able to prove disparate impact by showing that virtually all Native Americans will be excluded from services based upon the application of this rule, yet nonminorities are not similarly affected. (Note: You would also want to look for evidence of disparate treatment/discriminatory intent in a case such as this. For example, proof that the town changed its residency requirements only after Native Americans moved

in may provide circumstantial evidence to prove intentional discrimination.)

Even in a case that lends itself to statistical analysis, you will want to conduct your investigation so that you are not only analyzing the "numbers," but also looking behind the statistics at the actual practices. You will want to include as witnesses, to the extent possible, examples of individuals who are qualified yet who are adversely affected by the policy or practice in question. This type of evidence will add "life" to your statistics and help rebut the recipient's justification for its policy or practice.

(1) Recipient's Defense to a Prima Facie Impact Case

In a disparate impact case, the recipient must establish a "substantial, legitimate justification" for the policy or practice in question to rebut a prima facie finding against it. In some cases, the recipient may chose to rebut the presumption in some other fashion, such as disputing the facts, presenting new or different facts, or challenging the statistical analysis. More specifically, some examples of rebuttals to a prima facie finding of disparate impact include:

- the finding is factually incorrect;

- the individuals compared were not "similarly situated";
- the comparison was not inclusive (i.e., some persons who were similarly situated were not included);
- the statistical evidence is not probative or was inaccurately calculated (e.g., irrelevant to the issue, insufficient sample, inappropriate universe for comparison, etc.);
- presentation of contrary statistical evidence;
- demonstration that actions were taken pursuant to a consent decree or remedial plan;
- proof that the rule, policy, procedure, etc., under attack did not cause the adverse impact (i.e., by questioning the "significance" of the finding); or
- demonstration that a facially neutral practice or procedure had a manifest relationship to a legitimate business or program objective of the recipient.

(2) Overcoming the Recipient's Defense in a Prima Facie Impact Case

If the recipient shows a disputed practice is necessary to achieve a program objective, an investigator may rebut this by showing that the practice is not necessary to achieve the objective or by showing that there is a less

discriminatory alternative that achieves the same objective.[41] The alternative must meet all the recipient's needs or overall objectives. The determination of whether there is a less discriminatory method to accomplish the recipient's asserted business or program necessity frequently requires that the investigator possess a thorough understanding of the recipient's program and how it operates. The more you work with your recipients, the more knowledge you will develop in how they work and the options available that could meet the specific "business" or program needs so as not to result in discrimination. You may find that, in especially important or complex cases, it is necessary to hire a consultant with the specialized knowledge and experience you need to help you determine whether a less discriminatory alternative is available.

d. Quality and Usefulness of Evidence

Your investigation must gather sufficient good quality evidence. To gather too much or unreliable evidence is to waste valuable resources -- both your own and that of the recipient and complainant. You must keep some guidelines in

41/ See Footnote 29, Page 64.

mind when developing your Investigative Plan or complaint investigation/resolution approach in order to make the most of the information you gather. In order to support a determination of noncompliance, the evidence contained in the case file must be **material** to the allegation raised, **relevant**, and **reliable**.

(1) Material evidence

Material evidence relates to one or more of the issues raised in an allegation. You must make sure that every piece of evidence you seek is material to one or more of the allegations raised in the complaint, or to an issue that your agency has determined must be investigated.

(2) Relevant evidence

Relevant evidence is that which tends to either prove or disprove an issue raised in an allegation. For example, if a complainant alleged race discrimination in the provision of program benefits, information concerning the sex of the trainees would not be relevant proving race discrimination.

(3) Reliable evidence

Reliable evidence is that which is dependable and/or trustworthy. You should always attempt to get the most reliable evidence. Some factors to consider in determining whether testimony is reliable are:

- whether the witness is disinterested in the outcome of the complaint;
- whether the witness is qualified to testify concerning matters in his or her statement; and,
- whether the statements are factual rather than conclusory.

For example, if the head of a department alleged to have discriminated states the events never happened, his/her testimony should be taken with a "grain of salt" for it is in his/her interest to deny the events at issue. The weight to be given such testimony depends on whether it is corroborated by other evidence. Similarly, the reliability of a statement by a program administrator that an alleged discriminatory practice is absolutely necessary for the functioning of the program depends on whether the administrator has the knowledge, experience, and expertise to know what is "absolutely necessary" and whether there is corroborating evidence.

Investigators will discover that, in most cases, statements will come from witnesses who do not meet all of the criteria for reliability. The weight to be given such testimony requires a balancing of all of the factors, such as, are the statements consistent or inconsistent with other witnesses, are the statements supported by objective evidence, etc. Reliability is a relative concept and requires the exercise of judgment. It is a standard to be used in determining the weight that a particular piece of evidence should be given relative to other evidence gathered during the investigation. Evidence that meets the standards of reliability should be given more weight in making a finding of discrimination than evidence that does not.

e. Quantity of Evidence

While planning for the investigation, you must make a preliminary determination concerning the amount of evidence you will need to resolve the allegation(s) raised. This decision will be reexamined periodically throughout the investigation/resolution process, based upon the information you are gathering.

Initially, you will want to request enough information from the complainant

to have a clear picture of the allegations -- the who, what, when, where, why -- the evidence that the complainant believes would help support his or her assertion that discrimination has occurred.[42] Complainants can be very helpful in providing information on the types of records a recipient keeps that will lend support to their allegations. They can also suggest important witnesses to interview who could give testimony to support their allegations. In addition, the initial data request to the recipient should ask the recipient to identify and submit documentation to support its defenses and understanding of the events at issue.

Further, before reviewing material or interviewing witnesses, ask the complainant or recipient what the documents that they want you to examine, or the person(s) whom they want you to interview, will reveal and how the documents or interview will support their respective positions. Either party may, knowingly or not, attempt to "drown" you in documents or interviews to convince you of his/her position, even though those documents or interviews will not provide relevant evidence.

42/ Judgment has to be used in pursuing what the complainant believes relevant. What the complainant believes relevant and what is legally relevant may not always coincide.

It is important to note, however, that you are not required to interview all of a complainant's witnesses if the evidence you have gathered shows that additional interviews will not change your findings. Similarly, you are not required to interview all of a recipient's witnesses if you have documentation or irrefutable testimony to show that additional witness statements will not change your findings.

The investigator need only exhaust all sources likely to support the complainant and all sources likely to support the recipient; there need not be equal amounts of evidence for each party. An investigation conducted in this manner might reveal that there is no evidence to support the complainant's allegations and ample evidence to support the recipient's version of the facts. In this case, the investigation would be complete.

6. Anticipated Sequence of Case Activities, Including Onsite Visits, if Needed

Your anticipated sequence of activities will be important in proving whether discrimination occurred or not. The burden of proof is on the investigator to

show that the recipient has violated the statute. You want to conduct your investigation in such a manner that you can anticipate what you will need and when you will need to have it. The first step is generally the notification to the recipient and a request for information. As you plan your investigation, you must allow yourself sufficient time to request and analyze the initial data prior to conducting interviews either by telephone or onsite. You should plan your investigation carefully, to avoid having to make many subsequent data requests and to return onsite for additional interviews.

7. Anticipated Timeframes for Obtaining and Analyzing Evidence

Your agency may require that you include timeframes in your IP, especially if its regulations or a court order provide such requirements. Even if you are not required to include timeframes, it may be helpful to set out some general timeframes for yourself as a guideline to keep your investigation "moving."

8. Statement of Likely or Enunciated Recipient Defenses and a Description of the Evidence Required to Test Their Validity

This section of the IP is essential if you are to develop a legally sufficient

showing that discrimination has occurred. As we discussed in the section on "Applicable Legal Theories" earlier in this Chapter, the burden of proof is initially upon the agency to establish a prima facie case through the preponderance of evidence on the record. Where this is accomplished, the burden then shifts to the recipient. The recipient may rebut the prima facie case by providing a valid, reasonable, nondiscriminatory purpose for the actions it has taken. If it does so, the burden then shifts back to the investigating agency to demonstrate that the stated reasons are merely a pretext for discrimination. A "pretext" is an excuse to disguise discrimination. The burden of "persuasion" always remains with the agency. The "preponderance of evidence" simply means that the evidence on one side outweighs the evidence on the other side.

a. Establishing a prima facie case

In a civil rights context, a prima facie case is made by presenting sufficient evidence which, if unrebutted, would be legally sufficient to establish a discrimination violation. Mere allegations of discrimination do not constitute a prima facie case. As already discussed, what constitutes a prima facie case will

change depending on the theory of proof utilized. Already discussed were the general rules for proving a prima facie case under Title VI utilizing both an disparate impact/effects and an disparate treatment/intent standard.

b. Recipient's Rebuttal of a Prima Facie Case

In every case, after a prima facie case has been established, the recipient should be provided the opportunity to rebut the evidence presented. This is to ensure that the investigator has not overlooked anything.

In a disparate treatment/intentional discrimination case, the recipient can rebut the prima facie case by showing that the finding is factually incorrect or demonstrating that the discrimination was required by law, for example by showing that actions were taken pursuant to a consent decree or remedial plan. The most common defense is that the treatment at issue was due to an alternative nondiscriminatory reason.

In a disparate impact case, the recipient need only articulate a legitimate nondiscriminatory reason for its actions. This means that the recipient need establish the existence of a nondiscriminatory reason for the demonstrated

disparate impact. The reason must be clear and reasonably specific. In some cases, the recipient may chose to rebut the presumption in some other fashion, such as disputing the facts or presenting new or different facts. Following are some examples of typical rebuttals of this type to a prima facie finding of disparate impact:

- the finding is factually incorrect;
- individuals compared were not "similarly situated";
- the comparison was not inclusive (i.e., some persons who were similarly situated were not included);
- statistical evidence is not probative (e.g., irrelevant to the issue, insufficient sample, inappropriate comparison, etc.);
- presentation of contrary statistical evidence;
- demonstration that actions were taken pursuant to a consent decree or remedial plan;
- use of rebuttal witnesses (e.g., other members of the complainant's class who were not treated like the complainant; a person not of the complainant's class who was treated in the same manner as the complainant);
- the difference in treatment was based on some other objective reason

(e.g., qualifications, favoritism, nepotism, etc.);[43]

- proving that the rule, policy, procedure, etc., under attack did not cause the adverse impact (i.e., by questioning the "significance" of the finding); or

- demonstrating that a facially neutral practice or procedure had a manifest relationship to a legitimate business or program objective of the recipient.

c. Overcoming the Recipient's Rebuttal

Under the disparate treatment theory, once you have shown intentional bias -- discriminatory motive -- the recipient has virtually no defense. Most defenses will attempt to undermine the credibility of the evidence establishing intent and attempt to show the alleged discrimination actually resulted because of nondiscriminatory reasons.

This is not the situation in a disparate impact case. A recipient need only show proof of business necessity or other legally acceptable reason to escape liability. For example, if the Federal program statute required that a program be

43/ Note that the reason need not be objective, fair, or ethical, so long as it is not discriminatory on grounds that violate the law(s) you enforce. If you find evidence of a violation of some other civil or criminal law(s), it may be appropriate to refer the case to another Federal or State agency or to another office within your agency, such as the Inspector General.

conducted in a particular way, even if a disparate impact results, following Federal law would be a valid defense.

If the recipient's defense is not based upon a Federal requirement, the investigator may show that the rebuttal evidence presented by the recipient was merely a "pretext" for discrimination. Often the determination of whether or not the nondiscriminatory "reason" provided by the recipient is pretextual is based on the investigator's judgment, rather than documentary evidence. Where facts are in dispute, the investigator should attempt to corroborate the facts independently.

If the recipient shows a disputed practice was necessary to achieve a program objective, an investigator may rebut this by showing that the practice is not necessary to achieve the objective or by showing that there are less discriminatory alternatives that achieve the same objective. The determination of whether there is a less discriminatory method to accomplish the recipient's asserted business or program necessity frequently requires that the investigator possess a thorough understanding of the recipient's program and how it operates. The more you work with your recipients, the more knowledge you will develop

in how they work and the options available that could meet the specific "business" or program needs so as not to result in discrimination. You may find that, in especially important or complex cases, it is necessary to hire a consultant with the specialized knowledge and experience you need to help you determine whether a less discriminatory alternative is available.

C. Data Collection

The importance of diligently gathered and thoroughly analyzed data cannot be overstated. Civil rights cases can be made or broken on the basis of well thought-out data analyses that are precise, systematic, and resistant to rebuttal.

Data is gathered during the course of the investigation to answer two main questions concerning the allegations:

What happened? (Including when, where, and how.) The complaint alleges that something did or did not happen. Data must be gathered to determine whether the alleged event occurred or not.

Why did it happen? On what basis? For what reason? The information gathered must help the investigator determine whether the reasons alleged in the complaint are accurate or not.

Thus, gathering and analyzing data will enable the investigator to document statements and draw conclusions relating to all aspects of the complaint. Well-conceived data collection and enables investigators to relate facts, figures, and statements in a manner conducive to drawing conclusions by thoughtful structuring of the data.

The specific approach to data collection varies from case to case, depending on the issue in question, the extent to which the relevant data are in the control of the recipient or others, and the investigative strategy being utilized. Three key principles that guide decision-making during data collection are:

1) If possible, attempt to obtain independently written documentation to corroborate oral statements that are critical to proving your case;

2) Always clearly label evidence, both documents and written records of contact, with information identifying the case under investigation and the circumstances under which the evidence was obtained (e.g., where and when an interview was conducted; who provided a given document); and

3) Keep in mind that you cannot always rely on documents to provide verification.[44]

44/ This is true both because documents can be altered and because a document does not tell you the entire story. For example, a recipient may give you a copy of the complainant's application as documentation that she did not meet the entry requirements into a program. However, until you review other applications to determine whether the complainant was

(continued…)

1. Access to Information

Agencies' regulations provide legal authority to require recipients to provide access to records and sources of information necessary to determine whether the recipient is in compliance with Title VI and other nondiscrimination statutes enforced by agencies.[45] The information submitted by the recipient should generally be provided in the form requested by the agency, within reason. Also, agencies may request the recipient to provide access to its employees for interviews and produce relevant documents for examination during normal business hours.

44/ (…continued)
treated the same as other applicants whose applications contained similar information, the application may not prove what the recipient says it proves.

As another example, you could be given a copy of the recipient's policy regarding tardiness and the complainant's clock-in sheets to his training class. The recipient has given you these documents as verification of its claim that its termination of the student from the vocational training program was nondiscriminatory. However, the fact that it appears to have followed its policy and terminated the student from the program is not proof that it did not discriminate, as you must look at how other students who were tardy were treated in order to determine whether discrimination occurred.

45/ In addition, your agency may have program-specific regulations that include provisions for access to records.

2. Requesting Information from the Recipient

Generally, in gathering information from the recipient, an information letter is sent to the recipient requesting information relevant to the allegations under investigation. The initial information request can be combined with the initial formal notification letter to the recipient, or it can be sent at a later time. (See TAB 16 for sample notification/data request letter.)

The information request letter may take any of several forms. It may be:

1) A comprehensive request for information covering all allegations made by the complainant and all data needed; or

2) A preliminary request for information from the recipient to assist the investigator in determining more specific information needed; or

3) A request for information that the recipient should provide during the onsite visit; or,

4) A combination of (2) and (3).

An information request letter should contain:

1) Identification by case number;

2) Citation to the statute and/or regulations under which the investigation is being conducted;

3) Reference to the agency's legal authority for access to information;

4) The information requested;

5) An offer to settle or resolve the complaint, if appropriate; and,

6) A deadline for responding to the request for information.

3. Determining Whether an Onsite is Necessary

An onsite investigation normally is not necessary where all of the following conditions are present:

1) Individuals are not the primary source of information needed (i.e., interviews are unnecessary or can be conducted by telephone);

2) All needed information and documentation can be specified precisely in the information request letter and can be easily provided by the recipient;

3) The recipient can provide written documentation to verify its position in its response to the agency's information request letter; and,

4) There is good reason to conclude that the complainant is the only person affected by the allegations of discrimination.

However, you may want to consider the possibility of conducting at least a portion of the investigation onsite if any of the following apply:

- Personal contact with the complainant and the recipient may yield

information and clarification that you might not otherwise discover by just reviewing written documents or speaking over the telephone;

- You can obtain a more accurate impression of the physical environment and general atmosphere of the recipient and the surrounding community, which may help you in making a determination on the complaint;

- More effective communication can be established with representatives of the recipient, which can be of assistance to you in the present or future complaint investigation; and

- Some printed data can only be examined onsite for reasons of convenience, cost, format or bulk.

You can generally determine whether you need to conduct an onsite visit when the Investigative Plan is developed. However, you should keep in mind that a final decision should not be made until you have received and analyzed the recipient's response to your initial information request letter. You may decide that the documentation provided by the recipient verifies the recipient's written position and is sufficient to reach a decision. On the other hand, you may find that an onsite visit is still necessary in order to obtain additional information that cannot be conveniently obtained (i.e., bulky material) and/or to verify what the recipient has already provided to you.

D. Onsite Investigation

1. Pre-Onsite Activities

When you determine that an investigation requires an onsite visit to the recipient, a notification letter should be sent to the recipient, as well as the complainant, advising them of the planned onsite in writing. (TAB 17)

a. Complainant Notification of Onsite

You may have already informed the complainant at the time of the acknowledgment of the complaint of your office's intention to investigate his/her allegations. Your onsite notification letter to the complainant should include, but need not be limited to, the following:

1) Anticipated date of the onsite visit.

2) Time and place for interviewing the complainant. (The interview should not take place at the recipient's place of business.)

3) Request for the complainant to provide any additional information and documentation he/she considers relevant to the investigation. This should include a list of witnesses whom the complainant believes have information relevant to the allegations.

4) A timeframe to provide the additional information or documentation and list of witnesses.

b. Recipient Notification of Onsite

At this point of the review process, the recipient is already aware of the existence of the complaint, your agency's jurisdiction, the basis of the complaint, and your agency's legal authority to investigate the complainant's concerns. However, your letter notifying the recipient of the scheduled onsite visit should:

1) Restate the allegations made by the complainant, the basis on which they are made, and the legal authority under which the complaint is being investigated.

2) State the section of the appropriate regulation that prohibits the discrimination (e.g., harassment, retaliation, etc.).

3) Provide the general time schedule under which your agency will conduct its investigation.

4) Request the additional information or data you want the recipient to submit for review prior to the onsite, including a timeframe for submission of the information.

5) Identify additional data you want to review during the onsite, as a result of your review of information and data obtained prior to the onsite.

6) Request that all of the recipient's staff to be interviewed and staff responsible for the release of additional records be asked to be available as appropriate during your onsite. This is particularly necessary if you intend to collect a large amount of hard, raw data.

Also, the letter should request an orientation meeting with staff (state the date and time -- usually the second day of the onsite).

7) Identify the recipient's staff to be interviewed, if you can determine this in advance. You should request that the recipient set up the interview schedule at convenient times and private locations during the onsite visit.

8) Suggest that the recipient designate a liaison person, if it has not already done so.

NOTE: The sequence and spacing of interviews should be carefully planned. Individuals should be interviewed according to the information they may have that bears on questions you will want to ask of other staff or witnesses to be interviewed. Enough time should be allowed between interviews to allow you time to review the notes of the last interview to see what impact the information just collected may have on the questions you will be asking of the next interviewee. Be certain to keep this in mind when scheduling the interviews.

2. Onsite Activities

a. Interviews

Before conducting an interview, the investigator should know as much as possible about the purpose(s) intended to be served by the interview. He/she should know in advance on which subjects he/she wants the interviewee's unequivocal statement and in which areas he/she might want to wait to pursue

questioning. The investigator should make certain strategic decisions as to which witnesses to interview for which purpose, and in what sequence the interviews are to be conducted.

Often, investigators are tempted to interview everyone who might have knowledge of a particular problem area, or every witness the complainant identifies, but it is usually more effective and efficient to select a smaller number people to interview first. Although there is no set "rule of thumb" in determining who should be interviewed, certain categories of people are advisable:

1) People who have first-hand knowledge (should be interviewed first):

    a) Persons who were directly involved in the situation that the complainant has alleged occurred.

    b) Persons who were not directly involved, but who have first-hand knowledge of the processes, events, and issues, being investigated.

2) People who have second-hand knowledge (should be interviewed later, if you determine that it is necessary)[46]:

    a) Persons who make decisions that are relevant to the issues under investigation, but who were not actually involved in the situation or the decision in question.

46/ See the discussion of hearsay on Page 133.

b) Persons with some familiarity with the criteria used in the various processes and policies on the issue(s) under investigation.

(1) Preparing for the Interviews

When preparing for your interviews, always remember that the main objective of interviews is to obtain information from witnesses who can provide information that will either **support or refute the allegations that violations of law have taken place**. You should prepare a list of major questions you intend to ask during the interviews. These questions should address and be related to the issues involved.

Generally, in interviewing, you should:

- Introduce yourself and frame the interviewing process for the interviewees;
- Listen effectively during the interview;
- Distinguish factual information from opinions;
- Be able to deal with negative reactions during the interview;
- Use effective probes;
- Plan and take clear, precise notes; and

- Obtain a signed summary statement of the interview from an interview.

(See TAB 18 for additional guidance materials on interviewing techniques.)

A written record of both telephone interviews and face-to-face interviews should be made to preserve the probative value of the information obtained. Whether notes are taken during a particular interview depends on the investigative technique of the interviewer involved and the reactions of the interviewee.

If notetaking appears to impede the flow of information, the interview should be conducted without taking notes, but you should immediately reduce your recollections to writing after you have completed your interview.

Notes and subsequent reports of the interview should contain the following information:

- Case number;
- Name, address, and phone number of the witness;
- Date, time, and location of interview, including whether the interview was conducted by telephone;
- Name of the investigator or person conducting the interview;

- A record of whether the interviewee was informed of the required Privacy Act notifications (include signed Consent Form - TAB 3);
- A summary of the questions and responses. (This need not be a verbatim transcript but should accurately reflect the questions posed and the responses of the witness);
- Signature of the interviewee (if required by your agency).

You may tape record an interview only if the person you are interviewing agrees to this. You may never record an interview with a concealed tape recorder. If you wish to record an interview, it is helpful to explain to the person you will be interviewing that the interview will go more smoothly and expeditiously if you can record it and take only a few notes.

(2) Witness' Right to Representation

The witness' right to representation does not include a general right to have other persons present during the interview. Besides the investigator, the person being interviewed and any needed interpreters/translators, the only other persons present during any interview should be the witness' personally designated representative.

If the witness, other than a manager, supervisor, or policy maker of the recipient, identifies the recipient's counsel or a supervisor or manager for the recipient as a personal representative, the witness should be informed that such a person may have a conflict of interest between that person's responsibilities to the recipient and the person's responsibilities as a personal representative. The witness should also be informed that if a representative with responsibilities to the recipient appears to interfere with the investigator's ability to interview the witness or obtain requested information, the representative will be asked to leave. The witness should then be asked again if the witness wishes to have a personal representative and whom the witness wishes to have as that representative. If the witness still identifies the same person as the witness and the investigator has no other reason to believe the presence of the identified representative will interfere with gathering information, the investigator should proceed with the interview.

If the person you are interviewing is a manager, supervisor, or policy maker of the recipient, s/he is, in essence, an agent of the recipient. If the recipient is represented by an attorney, the attorney may be present during your interview of

this person.

Investigators should discuss these considerations with the witness prior to scheduling the interview, if at all possible.

(3) Interviews with Minors (Persons Under 18) or Legally Incompetent Individuals

Generally, written consent of a parent or guardian should to be obtained when interviewing a person under 18 years of age or otherwise legally incompetent, for example, someone with a mental impairment. However, parental or guardian consent may not be necessary for students when the questions are of a general nature, not related to any specific events in which the interviewee was involved, and there are no records kept to identify the student. If a recipient refuses to allow students or others under 18 years of age to be interviewed without parental or guardian consent, even for general information, parental or guardian consent must be obtained.

If parents or guardians refuse to provide consent for an interview, and the investigator determines that the child's information is critical, the investigator

may attempt to secure parental or guardian consent by inviting the parent or guardian to be present during the interview. If consent is denied, the investigator should not interview the child.

b. Interview with the Complainant

Prior to meeting with the recipient, you should hold an in-depth meeting with the complainant. The meeting should be held at a place other than the recipient's business office. Based on prior information you received from the complainant (and the recipient), you should have already developed a list of questions for the complainant. The purpose of the meeting with the complainant is to:

- Explain the investigation and the conciliation process;
- Remind the complainant that your role is only to determine, in connection with each issue raised by the complainant, whether the recipient did or did not violate specific legal authorities your agency is responsible for enforcing, and that your agency is not representing the complainant in the matters involved;
- Secure any additional information with respect to the allegations;
- Explain the complainant's rights under the Privacy Act and Freedom of Information Act; and

- Explain that the complainant may be contacted periodically, as necessary, during the investigative process to be given an opportunity to respond to any information that is presented by the recipient that is a factor in your findings.

- Remind the complainant of the prohibitions against retaliation and intimidation.

The desired rapport between you and the complainant is a relationship in which each understands and accepts the role that the other has in the investigation and resolution of the case at hand.

The complainant should be made to understand:

- That he or she can influence the investigation by the manner in which he or she discloses background information, issues, and sources for further inquiry;

- That some or all of the persons the complainant names as witnesses will be contacted and may be required at a later date or at the time of the onsite visit to furnish formal testimony;[47]

- That the recipient has been contacted in order to obtain its side of the allegations and to obtain names of persons it wants you to interview; and

- That you will seek other appropriate sources of pertinent information.

47/ Generally, most Federal agencies do not have the authority to take sworn affidavits. However, a complainant could be asked to read, correct or amend, and sign a written statement that you have developed based upon your interview.

Generally, you should have already obtained at least the following information from the complainant in the first interview (which is usually by telephone or, if that is not possible, in writing):

- The name and location of the recipient and individuals involved in the case;
- The precise circumstances and chronology of events that led to the action, decision, or condition giving rise to the complaint;
- The identity of any witnesses who can attest to the validity of the complainant's statements, and some indication of the matter on which each witness may be expected to provide information;
- The specific relief sought by the complainant; and
- Any additional information essential to an understanding of the specific matter giving rise to the case and the environment in which it occurred.

Since much of the information described above should have been gathered and is already in the Complaint Investigative File, a face-to-face interview with the complainant will provide you with an opportunity to evaluate the information given in the context of the complainant's presentation of what happened. In some cases, you also may wish to obtain a signed statement from the complainant. Whether you use a signed statement or not, you will want to confirm with the

complainant that he/she received important documents the recipient asserts it gave the complainant, such as disciplinary warnings, requests for documents or payments, notification of deadlines, etc.

c. Opening Meeting with the Recipient

Immediately upon arrival onsite, and after meeting with the complainant, you should hold an opening meeting with the head of the agency or organization or his or her designee to ensure that adequate preparation for the investigation has taken place and satisfactory arrangements have been made to allow you to interview the recipient's management and other employees and to conduct a review of the recipient's records and other information. At this point, you have already notified the recipient of your planned on-site visit, its purpose, the allegations/issues involved, your agency's legal authority to conduct the investigation, the date of the onsite, which staff you wish to interview, what documents you wish to review and photocopy, as necessary, and a private area where you may conduct interviews and review records. (See TAB 17 for sample letter to the Recipient notifying it of your planned on-site visit and what you will

need.)

At the opening meeting, you should do the following:

- Introduce yourself and others from your office assisting in the investigation, present your government credentials, explain your respective positions and the duties and responsibilities of your office and the procedures used in the processing of discrimination complaints;

- Give a brief description of the complaint being investigated, including the specific allegation(s) and issue(s) under investigation and your agency's authority to investigate them;

- Confirm interview schedules and determine arrangements made by the recipient for interviewing and record review;

- Explain that the recipient's upper level employees you will interview are allowed to have the agency's or organization's legal counsel present during the interview;

- Explain that additional interviews and collection of additional information may be necessary while onsite or once you return to the office;

- Assure the recipient concerning the confidentiality of the investigation; and,

- Have a copy of your agency's regulations and the notification letter sent to the recipient of your investigation and onsite review.

You should begin interviewing persons named in the complaint at the earliest appropriate time after you have had your opening meetings with the complainant

and with the recipient's official. You should remember that, in many cases, the recipient normally feels that he or she has done the best job possible to resolve the matter (if he or she is aware of the situation) within his or her authority and resources. It is, therefore, critical that you accord the recipient the same courtesy and understanding given to the complainant.

Your opening meeting with the recipient's officials should **not** include discussions about the relative merits of the case or other fact-finding material your office has relative to the case. The primary purpose of this interview is to derive information -- to secure as much information and supportive documentation and data as possible from the recipient. Detailed and accurate notes should be taken of your interviews, which you will later develop into an investigative report for the investigative file.

The following is a list of some of the main data that you should have requested in writing prior to the onsite and will seek to verify or supplement during the on-site the investigation:

- The recipient’s position statement, including its account of the facts and the recipient's agreement or disagreement with each of the complainant's

allegations;

- Names of persons the recipient wants you to interview and an indication of the information each witness can be expected to provide information; and

- Documentation the recipient wants you to review in defense of its position.

d. "Off the Record" Remarks

Occasionally, a recipient official or representative may believe that he or she has gained your confidence to the extent that an "off the record" conversation or statement would help the recipient's position. You should explain to any recipient representative that any information secured that is pertinent to the case cannot be considered "off the record," since the use of any information that is unofficial (i.e., not for quotation or recording) is prohibited.

e. Recipient Staff Orientation Meeting

After you have completed the opening meeting with the recipient, the substantive portion of your onsite of conducting interviews and reviewing records now begins. Unless you have thoroughly discussed the data you need in your

opening meeting with the recipient, an orientation meeting for information collection is necessary, especially when the investigation requires extensive information collection from a variety of sources. The recipient's employees responsible for keeping records that you need should be present at the orientation, if they were not present at the opening meeting. The purpose of the orientation meeting is to:

- acquaint you with the recipient's information systems;
- acquaint the recipient's staff with your office's information needs;
- work out the most reasonable way of matching the above two items; and
- make specific requests for documents and/or information to the appropriate recipient staff.

This may also be a good time to schedule follow-up interviews with staff you have determined need to be interviewed in greater detail.

f. Interviewing Recipient's Witnesses/Employees

Recipients must provide the investigator with access to all books, records, videos, electronic tapes, logs, internal memoranda, accounts, and other sources

of written information and unwritten information and facilities that the civil rights office may find necessary to determine compliance, as well as any oral or written communication an employee can supply that are not maintained elsewhere by the recipient. While the civil rights office cannot compel a recipient's witnesses/employees to provide information if an employee/witness refuses to cooperate, the recipient in appropriate circumstances should be informed of its employee's unwillingness to cooperate. The recipient is still responsible for providing the information by any other possible method. (See discussion of Witness' Right to Representation, page 121.) Assuming that the recipient's employee/witness either agrees to provide information or begins to cooperate despite reservations, you may want to keep these two tips in mind:

- **Reassure witness/employee** who seems reluctant to participate in the investigation that he/she is legally protected against interference, retaliation, coercion, discrimination, or reprisal for providing information and cooperating in the investigation.

- **Avoid behaviors and body language** that generate either empathy or antipathy toward the interviewee; do not imply either a subjective acceptance or rejection of the information being divulged.

Your agency's investigation procedures may require that you obtain a signed

statement from the complainant confirming the pertinent information s/he has provided. When you have completed your interview, thank the witness for his/her time and cooperation and explain that you may need to speak with him/her again if additional questions come up during the investigation.

g. Interviewing Complainant's Witnesses/Hearsay

Basically, the same principles apply when interviewing a complainant's witnesses as when interviewing witnesses/employees of the recipient. Occasionally, a witness will make statements based not upon what he/she knows, but upon what he/she heard. Such hearsay information is not "evidence," since its credibility depends upon another person or source. However, it may have relevance to the investigation. Therefore, hearsay evidence should not be eliminated, but should be used if appropriate to lead you to sources that will allow you to use the information as evidence.

h. Collection of Additional Written Information Onsite

You will have already determined, based upon your Investigative Plan, the

type of documentation that you should review to understand previous events and to determine whether the recipient is in compliance with applicable regulations. You should have reviewed a number of documents prior to the onsite investigation and will frequently be given access to additional documents while you are onsite. Interviews with the recipient staff and other witnesses will often identify additional documents that might support or negate the complainant's allegation(s). As each evidentiary document is obtained, you should immediately attach an Analysis Form (TAB 6) as a cover sheet. You should fill out the following information on the form:

- Description of the document, including the number of pages in complete document (only where you have obtained excerpts from the document);
- Source and location of the document (e.g., file maintained in the personnel office);
- The name(s) of the person(s) who provided the information and what they provided;
- Your name or the name of other agency investigators who received and reviewed the document; and
- The case number.

Remember that the actual analysis of the contents of the document need not (but may) be completed at the time of your onsite. You should ensure that all documents obtained are properly identified to serve their purpose as evidence. Some documents stand by themselves; it is clear from the document what it is about, where it came from, when it was written and by whom. There should be little room for doubt as to a document's authenticity and, if challenged, you should be able to easily verify its validity.

> For example, a piece of signed correspondence, where the signature is reproduced with the text, should withstand scrutiny. However, a page out of a larger document that contains a discriminatory policy statement would be of less value as evidence unless you can identify the larger document during your investigation.

In cases where you are reviewing numerous records, such as applications, discipline records, personnel/administrative files, or complaint files, you will probably want to develop a specific analysis form for this purpose. This will allow you to focus on the exact information you are seeking to investigate your case. Leave room on the form for comments, but put the most important information (in the form of lines to check or numbers to list) on the form to save

yourself time when reviewing the files.

On the other hand, excerpts from records, correspondence or local regulations that are vital to possible analysis and conclusions may be weak evidence unless their authenticity is attested to by someone who is in a position to do so. However, rather than obtain a complete copy of a lengthy or otherwise bulky document, only a few pages of which are relevant to the investigation but which would then necessarily become a part of the official case file, you may choose, for reasons of resources, to obtain a certified excerpt.

> For example, if a recipient under investigation has a 300-page Procedures Manual, of which only the six pages relating to the recipient's grievance procedures are relevant to the complaint under investigation, you should obtain a copy of those six pages, and ask the recipient to attest that those pages are true copes of the original. (See TAB 19 for sample forms certifying documents.)

3. Confidentiality and Denial of Access

a. Confidentiality

Your agency should have access to a recipient's records, even if those records identify individuals by name, including those not relevant to the

investigation. To protect the confidential nature of the records, your agency should be creative in working with the recipient. For example, you may want to permit a recipient to code names and retain a key to that code. Your agency should, however, inform the recipient that if at any time such a procedure impedes the timely investigation of the case, your agency will need access to the names and addresses and the recipient must provide them. (See also FOIA/PA discussion, TAB 2.)

b. Recipient's Employees

Recipients must provide your agency with access to all books, records, accounts, computer discs, tapes, and other sources of information or facilities that you finds necessary to determine compliance. This includes what an employee can supply orally as well as any written information he/she may have that is not maintained elsewhere by the recipient. You cannot compel a recipient's employees to provide information, if the employee refuses. The recipient, in appropriate circumstances, should be informed of its employee's unwillingness to cooperate with the investigation, and that it is responsible for providing the

information by any other possible method.

c. Denial of Access

It is a denial of access when a public entity either explicitly or implicitly:

- refuses to permit the investigator access to written or unwritten information, such as electronic storage media, microfilm, retrieval systems, photocopies, etc., and its facilities during its regular business hours;

- refuses access to the investigator during its normal business hours; or,

- fails to provide accessible information if one or more of its employees refuses to do so or to provide access to information maintained exclusively by an employee in his/her official capacity.

In the event of a denial of access, the investigator should do the following:

- If the denial is stated orally, either in person or telephonically, you should ascertain the basis for the recipient's refusal and, where possible, explain the agency's authority to collect information or provide other information to address the recipient's concerns.

- If you are denied access, you should consult with your office's legal advisor (when on-site this should be done by telephone, whenever possible, before you leave the recipient's premises). Where appropriate, the legal advisor should discuss the denial directly with the recipient's legal or other representative.

- Where attempts to persuade a recipient to provide information have

failed, a letter should be prepared, in consultation with the legal advisor, setting forth the agency's authority to obtain access to the information and addressing as fully as possible any particular concerns expressed by the recipient. The letter should state a date by which, if the information is not provided, the civil rights office will refer the case for litigation.

- If access is not provided, the case should be prepared for referral for litigation under the referral for litigation procedures. Contact your agency's Office of General Counsel and/or the Coordination and Review Section for further guidance.

4. Impartiality of the Investigator

Investigators must conduct unbiased investigations. In situations where there may be an appearance of bias on the part of any team member, you should inform your supervisor. In addition, the investigator and any other onsite team members should not express opinions or conclusions to the public/complainant/recipient concerning matters under investigation unless specifically authorized to do so.

5. Exit Interview

Upon completion of the onsite, the information should be reviewed onsite with the Investigative Plan as a check to make certain that you have all of the

information you need. It is often both difficult and very costly to have to conduct an additional onsite because important documents or interviews are overlooked. At this stage of the investigation, new questions and issues may arise. If you will not be able to clarify these issues and answer these questions during your exit interviews, or by telephone or in writing from your office, you should be certain to get the documents and conduct the interviews before you leave.

The exit interview is conducted separately for the complainant and the recipient. The exit interviews provide an opportunity for you, as well as the recipient and the complainant, to clarify any questions that may have arisen and to respond to any additional requests you may have for information. You should explain that this exit interview does not mean an end to the investigation. If appropriate, you should explain that you may be returning to seek additional information after reviewing the information collected doing the onsite. Be sure to explain to all parties the process your office will follow, should you find that a violation has occurred.

You may have already reached a conclusion as to whether the recipient is in compliance or noncompliance with the agency's requirements. Should this happen, it is important that you not communicate that opinion during the exit interview, **unless you have been authorized to do so**.

Examples of situations in which your agency may wish to give you approval is when the following conditions are met:

1) You have identified clear violations that the recipient should begin addressing immediately, especially if they involve the safety of beneficiaries or others, or because of imminent harm to the complainant or others if you delay. If you do not want to say it is a violation, you may wish to identify the problem as a "serious concern."

   and

2) Your supervisor has given you his or her permission to provide the recipient with this preliminary information at the exit interview. In that case, you should be prepared to provide the recipient with guidance (to the extent possible and if you are asked) as to how the violation should be corrected or what may be involved in developing a corrective plan for remedial and prospective relief. If you do not wish to provide this type of guidance, simply explain that you are not at liberty to discuss it at this time.

These circumstances may occur only rarely and more likely in single-issue cases. The benefit of this practice is that it allows your agency to provide

technical assistance to the recipient, and allows the recipient to take immediate action to correct clear violations, rather than waiting until your findings are complete. You should consider this option (or the issuance of a partial letter of findings) when the rest of the investigation will obviously take some time to complete.

6. Analyzing Evidence (Post-Onsite)

As we discussed in Section IV of this manual, the information and data collected depends upon the issues involved in the case. Properly collected and analyzed information is central to compliance investigations. The importance of developing a thorough and complete investigative plan of the information you need in order to determine compliance cannot be overemphasized.

Evidence standing alone does not prove a violation. It must be related to the policies and procedures of the recipient and issues under investigation.

To assure the value of the collected and analyzed evidence you should:

- Make sure you note when the document was received and from whom.

- Keep the original copy of the document clean and free from marks, tears, etc. Photocopies of the documents should be made for work sheets.

- Keep the documents filed in a safe place so that they won't get lost or inadvertently removed by co-workers.

- Document the circumstances under which the evidence was collected. Remember why the evidence was collected; what questions elicited the evidence; whether any statistical techniques were applied to the evidence, and if so, what they were. If computer-readable material is gathered, you should obtain a file layout that describes what the data is in what space or slot on the storage medium. You may wish to contact your agency's computer systems personnel to determine what documentation is necessary.

Determining compliance can be done by the analysis of non-numerical evidence as well as numerical evidence, or both.

When reviewing non-numerical data you should remember to do the following:

Read and Interpret

- Be sure you have a clear and thorough understanding of what the document says. You should seek clarification where needed to understand the written language, i.e., obtain definitions for abbreviations; identify words and phrases that are key to proper interpretation of the message; where words used within a given

context do not take on an obvious meaning, ask interpretive questions; do not make assumptions about the author's thinking.

- Never read meanings into the evidence. Accept the evidence at face value.

Determine Relevance

- Read with a purpose. Know what information or answers you are looking for and recognize their presence or absence. Where the evidence (1) does not provide the answers needed, (2) does not provide any direction to a source for the answers needed, or (3) does not raise additional questions (issue-related), the evidence, at least for the moment, is not relevant. (However, the fact that evidence is not relevant at this time does not mean that it could not become relevant at a later stage of the investigation.)

- Categorize the evidence by issue and/or allegation. (This is another test of the relevance of evidence.)

Verify the Evidence

- Develop a system for cross-checking.

- Identify conflicting information and resolve the conflict to the extent possible. (Conflicts should be resolved in order to establish validity of the evidence.)

Assemble the Evidence

- Develop an information flow pattern. Put the evidence together so that it illustrates a logical continuity of dependent, or related

independent, occurrences leading to a conclusion.

- Be sure to "plug up the gaps" in any information you have gathered.

Draw Conclusions

- Allow the evidence to speak for itself.
- Test conclusions. Try to consider all possible rebuttal arguments by the recipient and the complainant.

The analysis of numerical evidence can range from easily calculated averages (or means) to very complex techniques that can be performed efficiently by computers. Generally, a statistician may need to be consulted on all but the most routine and basic quantitative analyses.[48]

Analyses of statistical data should be performed cautiously. All statistical tests have underlying assumptions that must be met if the test is to be valid. If the case should go to administrative hearing or to court, someone will have to testify about the appropriateness, validity, and meaningfulness of the analyses.

48/ As discussed earlier in this manual, if you or your office does not have expertise in statistical analysis, you should seek the assistance of a statistician in your agency or consider hiring a consultant. Statistical analyses used to make findings (especially those supporting a violation) must be able to withstand scrutiny before an Administrative Law Judge or in Federal Court.

For these reasons, it may be wise to obtain the services of a statistician before performing very complex statistical analyses. In some instances, talking with a consultant by telephone may be all that is necessary to assure that you are on the "right track." In other instances, the issues may be so complex that an expert may need to be consulted before any evidence is even collected.

Whenever a statistical consultant actually performs an analysis, the methodology, results, and implications should be reported in writing and signed by the expert, preferably in a notarized affidavit. This protects the "standing" of the evidence, should the expert not be available at a later time.

There are two kinds of analysis that can be easily performed by investigators using hand calculators. These are not definitive analyses that will make the case, but they are very useful as clues or leads and will indicate if the services of an expert are needed.

The first is an **average** or mean. It is obtained by adding up all the scores and dividing by the number of persons receiving those scores. Scores may be salaries, arrests, disciplinary actions, etc. The second kind of analysis that the

investigator can perform is the computation of **percentages**. A figure expressed as a percent represents the portion of a whole, where the whole can be expressed as 100 percent. Percentages are useful to compare relationships. As an example, the investigator may want to compare the percent that a group participates in receiving a benefit or service to the percent that represents their distribution in a relevant population or service area.

It very important that the investigator chooses similar, related, analogous denominators when making this comparative analysis. The analysis must compare like with like or it will result in invalid or false conclusions.

VI. INVESTIGATIVE REPORT

A. When to Prepare an Investigative Report

Ideally, an Investigative Report (IR) should be prepared whenever a full investigation is completed. If an IR is not done in every case, it should be prepared for all cases in which the Letter of Findings will not stand on its own as support for the findings -- this will be the case in more complex or class cases that involve extensive analysis of written and/or testimonial evidence, rebuttal evidence from either party that must be addressed, or other factors that must be explained to support the findings. An IR will should also be prepared for all cases resulting in a violation Letter of Findings.[49]

If your case is straightforward, raises only limited issues, does not involve significant rebuttal by either party, and results in a compliance or "no violation"

49/ An alternative to the IR, when you need to set out your analysis and findings but not in as great detail as might be necessary in an IR, is to write a Statement of Findings, which will be issued to the recipient and complainant with a cover letter.

finding, an IR may not be necessary. In this case, we recommend a Closure Memorandum briefly outlining the basis for the no violation LOF, Resolution, or Settlement Agreement. Your memo should address each allegation of the complaint so that you can ensure that the allegations have all been addressed. (See TAB 20 for sample cover memo for closure recommendation.)

The IR is a detailed and logical document that (a) sets forth **all** facts pertinent to the case, (b) analyzes those facts in light of the complainant's allegation(s), and (c) recommends a determination as to the validity of the allegation(s) based on that analysis and the compliance status of the recipient. The report should be a document separate from the formal findings, whether they be in the form of an Preliminary Findings or a formal Letter of Findings. Generally, the IR is not released to the complainant or the recipient except in conjunction with a judicial or administrative proceeding.

It may sometimes be appropriate to release sections of the IR to buttress your agency's response to appeals of, and rebuttals to the Preliminary Findings or formal LOF from the complainant or recipient. If your agency determines that

the IR should be released to anyone outside your agency, the investigator should consult with your office's legal advisor to ensure that your agency has complied with the provisions of the Privacy Act and Freedom of Information Act, i.e., that personally identifiable or confidential information is not released.[50]

Purpose of the Investigative Report

The purpose of the IR is to:

- Organize and present the factual information collected during the investigation.
- Identify the location in the case file of the specific supportive documentation from which each statement, allegation, conclusion, or determination was drawn.
- Present an analysis of the information to determine the relevance of the facts to the allegations.
- Draw conclusions based on the analysis.
- Recommend corrective and/or remedial action, as appropriate.

50/ See TAB 2 for a more detailed discussion of the requirements of the Freedom of Information Act and Privacy Act.

B. Format of the Investigative Report

The IR should contain the following major Sections:

I Introduction (optional)

II Allegations

III Methodology

IV Position Statement from the Recipient

V Findings of Fact

VI Analysis and Recommended Determination

VII Proposed Corrective/Remedial Action

Regardless of the format you or your agency chooses to use, citations should be included to direct the reader of the report to the appropriate supporting documentation in the Investigative Case File. (A sample IR may be found at TAB 21.)

Introduction - This section should provide the reader with an historical overview of the actions taken on the case prior to your agency's involvement and should chart your office's activities prior to accepting the complaint for

investigation.

For example:

> The complainant filed her complaint with the local Human Rights Commission in Washington, D.C. on May 16, 1995. The Commission investigated her allegations of race discrimination and found in favor of the Police Department on January 7, 1996. The complainant failed to appeal the findings in the case. The complainant filed a complaint with the Department of Justice, Civil Rights Division, Coordination and Review Section on January 15, 1996. She asked COR to investigate her allegations against the police department because she believed that important information had been overlooked during the investigation and that a conflict of interest existed between the Commission and the Police Department.

Allegations - In this section of the IR, the investigator should describe each individual or class allegation, stating it as succinctly and clearly as possible. For each allegation, the statutory or regulatory provision which the allegation would violate, <u>if true</u>, should be cited, as well as the ground(s) upon which the allegation is based. Citations to the applicable statute and regulation should be listed. Note, the investigator should organize the complainant's allegations into a logical sequence that would be necessary to sustain a finding of compliance or noncompliance.

Methodology - Here the investigator should explain **how** the investigation was conducted, **what** documents were reviewed, and **which** witnesses were interviewed. The investigator need not provide the names and addresses of the witnesses, but should provide the reader with both quantitative and qualitative information about what he or she did with sufficient specificity to identify the types of documents reviewed (e.g., disciplinary files, rental applications, citizen complaints, internal grievances, etc.) and the category and number of witnesses interviewed (e.g., three witnesses for the complainant, seven witnesses for the recipient [three management, four non-management, including two witnesses at the scene of the incident giving rise to the complaint] and two individuals identified by the investigator).

Position of the Recipient - No investigative report should be completed or accepted without an entry under this section of the IR. You should be able to obtain this information from primary source documents such as the local hearing transcript, correspondence with the recipient, or interviews with the recipient's officials.

Where attempts have been made to provide the recipient with an opportunity to reply to the complainant's allegations, but the recipient has failed to respond or provide any support for its position, a description of your efforts to let the recipient respond should also be included in this section.

For example:

> *Position of the Recipient*
>
> *The recipient, Jackson County, New York, Sheriff's Department, maintains that it followed all police procedures when arresting complainant on (date) and maintains that the Sheriff Department's deputies treat on persons with respect, courtesy, regardless of race, color, etc.*

Findings of Fact - All facts relevant to the investigator's analysis and recommended determination in the case should be set forth in this section. It is important both to the settlement/conciliation process and for establishing credibility of the your determination that only clear, accurate and factual evidence be included in this section. Facts should be presented in a logical sequence, such as the chronological order of the events or by subject matter. Factual issues in dispute should be resolved through examination of the relevant

documents and the testimony in the record. Where appropriate, specific evidence supporting a finding should be cited, e.g., "statement of John Doe, who was at the meeting with the Director on June 2, 1996."

Do not draw conclusions. This section is intended only to establish the factual and logical basis for a determination on the merits of the allegations; the investigator's analyses and conclusions will come in the next section.

Each fact or series of related facts should be sequentially numbered and listed separately.

Analysis and Recommended Determination - In this section, the investigator conducts an analysis of the facts presented, and draws his or her conclusions as to the validity of the complainant's allegations based on that analysis. Each fact should be weighed against the allegation to which it pertains, and a prima facie case of discrimination either established based on the preponderance of the evidence or the allegation rejected as without merit. Each analysis, comparison, induction, deduction, generalization, or conclusion should cite the supporting fact(s), by number, from the preceding section. All

conclusions must be logical and reasonable reflections of the factual evidence as presented, and drawn in accordance with the standards of proof discussed in Section V of this manual.

In this section, the investigator should also discuss any allegation(s) rejected by the civil rights office and the reasons for the rejection. However, the focus of the determination rests entirely on whether or not the weight of the evidence supports the complainant's allegation(s), and not on the existence or absence of procedural violations. Where those occur, unless they constitute a violation of one of the statutes you enforce, they should be brought to the attention of your agency's program office. If your office is responsible for addressing program (procedural) violations, you should address them separately (even if in the same report or letter) from your determinations regarding alleged discrimination.

Proposed Corrective/Remedial Action - In this section, the investigator describes the action(s) (if any) required of the recipient in order to make the complainant whole and eliminate the discriminatory practices. The investigator may want to seek those remedies suggested by the complainant, but you should

remember that the complaint is between the recipient and your agency concerning a violation(s) of a Federal civil rights statute(s). You should take care to ensure that the remedy your agency seeks will provide both remedial relief for identified victims and prospective relief (e.g., changes in policies and procedures, training for staff, development of adequate complaint procedures, a public notice to beneficiaries concerning new procedures, etc.) required to bring the recipient into compliance. Both remedial and prospective relief (corrective action) should be specifically identified, not implied. You should also ensure that it is legally permissible.

VII. LETTERS OF FINDINGS AND RESOLUTIONS

A. Types of Closures

To complete a complaint investigation or compliance review, there are usually three types of letters you can use. The first is a **Letter of Resolution**. This letter is issued when the recipient has voluntarily taken actions to come into compliance before a Letter of Findings (LOF) is issued (see TAB 22). A Letter of Resolution can simply explain the steps the recipient has taken or promises to take, or it can include a formal Settlement Agreement. (If the recipient has agreed to voluntarily take actions that will need to be monitored, see Settlement Agreements, Section VIII.)

The second letter is a **No Violation Letter of Findings**. This letter is issued when the recipient is found to be in compliance (see TAB 23).

The third letter is a **Violation Letter of Findings**. This letter is to be issued when the recipient is found to be in noncompliance and pre-findings voluntary

compliance cannot be achieved (see TABS 24 and 26).

All letters are sent both to the complainant or the complainant's representative and the recipient. There may be a combination of letters if, for example, one issue is resolved, no violation is found in another issue, and a violation is found on the last issue.

An additional type of letter your agency may wish to consider is what may be called a "**Letter of Concerns**." This type of letter is used when, following an investigation, you have not found sufficient evidence to support findings of actual violations but you, nevertheless, have identified concerns that you believe should be shared with the recipient. The purpose is to put the recipient on notice that you do not believe that "all is well" and encourage it to take steps to rectify a problem or problems that, without corrective steps, may result in a violation at some point in the future. For example, you may be unable to prove a violation because records have not been kept or witnesses cannot be found, but you believe that the alleged discrimination may well have occurred. Rather than issue a No Violation Letter of Findings, a Letter of Concerns may be appropriate. (See

TAB 25 for sample letter of concerns.)

B. Contents of Closure Letters

1. All Closure Letters should include the following:

i. The complaint or compliance review number, the name of the complainant, if revealed, and the date the complaint was received.

ii. A statement of the jurisdictional authority, including the recipient status and the statutory basis for the investigation. If the allegation(s) is against a specific part or program, such as a specific nursing home of a healthcare organization or the parks department of a town, of the recipient, this should be mentioned. The particular Federal program providing the financial assistance to the recipient, such as Medicare or COPS, should also be mentioned.

iii. A statement of each allegation and the applicable regulation.

iv. An explanation of the status of any issues that were investigated but are not included in the letter or any issues that were raised but not investigated.

v. A paragraph on the prohibition of retaliation by the recipient against the complainant or anyone who has either taken action or participated in an action to secure rights protected by the civil rights statutes. (See TAB 10.)

vi. A paragraph on the Freedom of Information Act and the Privacy Act. (See TAB 10.)

vii. The name and telephone number of the staff person to contact for additional information.

viii. Thanks to the recipient for its cooperation (optional).

2. **Letters of Resolution** should include, in addition to the items in Part 1, above, the following:

i. The steps that the recipient has taken to come into compliance and an explanation of how these actions meet the requirements of the applicable regulation.

ii. Notice that failure to continue these actions may result in the finding of a violation and that compliance will be monitored, if necessary.

iii. If applicable, the date(s) that any promised action will occur and when monitoring or other reports will be due.

3. **Letters of Findings** should include in addition to items in Part 1, above, the following:

i. If necessary, a brief background and chronological history.

ii. A methodology or brief description of how the complaint was investigated or the compliance review conducted, if necessary.

iii. A statement of each issue and the findings of fact for each, supported by any necessary explanation or analysis of the

information on which the findings are based. Each allegation and the respondent's position should be addressed.

iv. A conclusion for each issue that references the relevant facts, the applicable regulation, and the appropriate legal standards.

v. Notice that the LOF is not intended and should not be construed to cover any other issue regarding the recipient's compliance status.

a. **No Violation Letters of Findings** should include, in addition to the items listed in Parts 1 and 2, above:

i. An explanation of why the recipient was found in compliance (see Parts 3(iii) and 3(iv), above).

ii. Notification of a complainant's appeal rights (Letter to Complainant only), if applicable.

iii. Notification of a complainant's right to file a private right of action (Letter to Complainant only).

iv. Procedural violations, such as lack of a posted notice, may be mentioned if uncovered during the investigation.

b. **Violation Letters of Findings** should include, in addition to the items listed in Parts 1 and 3, above, the following:

i. Each violation referenced as to the applicable regulations and the specific citations under the regulation.

ii. A brief description of proposed remedies. A proposed

conciliation agreement setting out what constitutes full injunctive and remedial is generally attached and constitutes the basis for conciliation negotiations.

iii. Notice of the time limit on the conciliation process and the consequence of failure to achieve voluntary compliance.

iv. An offer of assistance to the recipient in devising a remedial plan for compliance (if a proposed formal agreement is not included), if appropriate.

v. If a decision is made to defer final approval of any application by the recipient for additional financial assistance, notice of that deferral will be provided.

c. <u>Important Elements of Every Violation LOF</u>:

i. The LOF must stand on its own.

ii. The LOF should present a complete discussion of the facts in a clear, concise, and logical manner. There should be a neutral review of the facts.

iii. Where the investigation has revealed two different versions of the facts, state both sides.

iv. The intended reader should be considered to have no knowledge of civil rights laws or the facts of the particular investigation.

v. The LOF cannot assume facts or the law. These elements must be clearly articulated in the LOF.

vi. The general prohibition contained in the relevant statute and the particular regulation governing the issues should be cited. Only focus on those parts of the regulations necessary to resolve the complaint.

vii. The LOF should tell the reader why a particular set of facts demonstrates compliance or noncompliance.

viii. Where it is necessary to credit one version of the facts and discredit another version, the LOF should state the basis on which the one version was determined to be more credible than the other.

ix. In the conclusion of the LOF, the determinations of compliance, noncompliance or both should be highlighted.

x. Most important, your LOF must contain the information necessary to meet your burden of proof. The legal standard for an LOF, as well as any resulting administrative hearing or trial in Federal Court, is the "preponderance of the evidence." (See Section V.)

C. Complainant Appeals

If you have kept the complainant(s) advised of the progress of your investigation and thoroughly explained the basis for your agency's resolution or closure of the case, you will generally find that the complainant will accept the results. However, this is clearly not always the case. A complainant may

believe that the investigator has overlooked important evidence or failed to interview key witnesses. If a formal appeal process does not exist, we recommend that each agency have an informal review procedure and be open to revising its findings if a major substantive error is brought to its attention.

VIII. SETTLEMENT AGREEMENTS

The importance of settlement cannot be overstated. It is important to bear in mind that when settling a case, the investigator is representing his or her agency, not the complainant. The primary objective is to enforce the law -- that is, to ensure that the federally assisted program or activity in question comes into compliance.

The investigator should contact both the complainant and the recipient to determine options to be considered in settling a case during both the investigation phase as well as after a letter of findings has been issued. Settlement Agreements can be negotiated before or after a Letter of Findings is issued.[51] (See TABS 24 and 26 for sample Agreements.)

51/ The term used for the agreement that resolves a case varies among Federal agencies, e.g., Settlement Agreement, Resolution Agreement, Voluntary Compliance Agreement, Settlement Agreement, Conciliation Agreement, Negotiated Agreement, etc. An agency may wish to use a different term for a pre-finding, as opposed to a post-violation, agreement. We have used the term "Settlement Agreement" in this manual to cover both pre- and post-finding agreements.

A. The Elements of a Settlement Agreement

The following provisions should be included in all Settlement Agreements:

1) The name of the two parties (the Federal agency and the recipient) and a brief description of the allegation(s).

2) The authority of the Federal agency to investigate the complaint and secure voluntary compliance.

3) The jurisdiction of the agency to cover the entity (receives funds from specific agency program).

4) Addresses each potential violation (pre-LOF) and each violation (post-LOF).

5) If appropriate, states that the Agreement does not constitute an admission by the recipient of any violation of the regulation.[52]

6) Specifies the remedial relief and corrective action (prospective relief) to be taken, within a stated period, to come into compliance:

   a) specific acts or steps the recipient will take to come into compliance;

   b) timetable for implementing the various steps of the agreement; and

52/ We suggest that you not put this language in the Agreement unless the recipient asks to include it; therefore, you would generally not include it in the initial proposed Settlement Agreement you send to the recipient for negotiation purposes.

c) description and timetable for submission of documentation that the recipient will provide periodically as the remedy is implemented.

7) Provides assurance that discrimination will not reoccur.

8) Provision for enforcement by the Federal agency in the appropriate Federal Court and/or for special conditioning the drawdown of future grants for failure to comply with the agreement.

9) A statement that the agency's failure to enforce the entire Agreement or any provision thereof with respect to any deadline or any other provision therein shall not be construed as a waiver of the agency's right to enforce other deadlines and provisions of the Agreement.

10) Prohibition of retaliation by the recipient against any person who has either taken action or participated in action to secure rights protected by the civil rights statute.

11) A statement of the duration of the Agreement.

12) A statement that the Agreement has no effect on other pending cases against same recipient nor does it remedy any other potential violation not contained within the Agreement.

13) Is signed by the responsible official for the Federal agency and the recipient.

14) A statement that the Agreement is available to members of the public upon request, unless it contains confidentiality provisions.

15) A statement that compliance with the Agreement may be reviewed at any time by the Federal agency.

16) A statement of the effective date of the Agreement.

17) A statement that the Agreement does not affect the recipient's continuing responsibility to comply with the Federal statute(s).

B. Cover Letter for Settlement Agreements

The Settlement Agreement should be finalized (i.e., signed by both the responsible official of the Federal agency and the responsible official of the recipient). Copies of the finalized Agreement should then be sent with a cover letter to the recipient and the complainant, with an explanation of the closure (see Section VII on Letters of Findings). The letter should state the date that the Agreement becomes effective and, if appropriate, the date on which the first monitoring report is due. The complaint is generally closed on the date the letters are sent to the complainant and recipient with the attached Agreement.

C. Failure to Comply with the Agreement

If the agency learns or has reason to believe that the Agreement is not being complied with, it should contact the recipient immediately. If the matter can not be resolved expeditiously, the subsequent actions of the agency will depend on

how far along in the investigation the agency was when the Agreement was developed and the enforcement language contained in the Agreement.

1. Agreements containing Provisions for Enforcement in Federal Court

If you include a provision for the enforcement of the Agreement in the appropriate Federal District Court, you may move to have the Agreement enforced as a "contract." If your Agreement was entered into prior to the issuance of a violation Letter of Findings, the advantage of this language is that it allows you to move to enforcement without the need to first issue a violation LOF. If you believe that you may wish to pursue enforcement of the Agreement as a "contract," you should contact the Coordination and Review Section for further guidance and collaboration. Alternatively, you may include this provision in your Agreement (if the recipient will agree to it) and then decide not proceed in this manner, but rather take one of the other approaches discussed below.

2. Agreements That do not Contain Provisions for Enforcement in Federal Court, in Cases where Violations were Identified but no LOF was Issued

If you find that the recipient is failing to comply with a pre-LOF Settlement

Agreement, and your case had been fully investigated (i.e., you have the enough evidence to issue a Violation LOF) but no findings were issued, you will need to issue the violation Letter of Findings and attempt to negotiate a resolution to the case. In this instance, conciliation negotiations need not be lengthy because the recipient has already apparently shown its "bad faith" by failing to comply with the Agreement it signed. Such a case may well be referred for enforcement fairly expeditiously.

3. Pre-finding Agreements That do not Contain Provisions for Enforcement in Federal Court, in Cases That were not Fully Investigated

If the case was not fully investigated, you will likely need to complete your investigation prior to taking further action against the recipient. Without the "contract language" in your Agreement and with insufficient evidence to issue the violation Letter of Findings, your only option (other than renegotiating the Agreement) is to complete the investigation and issue the Letter of Findings. Once you have done so, you will then begin a new negotiation period to attempt to reach a Settlement Agreement. While this may mean simply negotiating to

come to the same Agreement you have already signed, you will at least by this time have sufficient evidence to strengthen your legal position during conciliation negotiations.

IX. MONITORING

Agencies should monitor agreements that require actions to be taken subsequent to the effective date of the Settlement Agreement. Monitoring may or may not require on-site visits, depending on the type of issues involved.

Monitoring activities should be tailored to follow the agreement.[53] The recipient should be notified upon successful implementation of the agreement. Where the agency determines that the recipient has failed to implement the agreement, the recipient should be immediately notified. For information on what your agency can do if it finds during monitoring that one or more of the terms of the agreement are not being met, see Section VIII of this Manual.

53/ See TAB 27 for sample Monitoring Review Sheet.

X. COMPLIANCE REVIEWS

Federal agencies are required to maintain an effective program of post-award compliance reviews.[54] Federal agency Title VI regulations reiterate this requirement.[55] Compliance reviews can be large and complex, or more limited in scope.

Federal agencies have broad discretion in determining which recipients and subrecipients to target for compliance reviews. However, this discretion is not unfettered. In United States v. Harris Methodist Fort Worth, 970 F.2d 94 (5th Cir. 1992), the Fifth Circuit found that a Title VI compliance review involves an administrative search and, therefore, Fourth Amendment requirements for reasonableness of a search are applied. The Court looked at: (1) whether the proposed search is authorized by statute; (2) whether the proposed search is properly limited in scope; and (3) how the administrative agency designated the

54/ See Coordination Regulations, 28 C.F.R. § 42.407(c).

55/ See, e.g., Department of Justice Title VI Regulations, 28 C.F.R. § 42.107(a).

target of the search.[56]

The Harris Court suggested that selection of a target for a compliance review will be reasonable if it is based either on (1) specific evidence of an existing violation, (2) a showing that "reasonable legislative or administrative standards for conducting an … inspection are satisfied with respect to a particular [establishment]," or (3) a showing that the search is "pursuant to an administrative plan containing specific neutral criteria."[57]

Agencies are cautioned that they should not select targets randomly for compliance reviews but, rather, they should base their decisions on neutral criteria or evidence of a violation.

In developing targets for compliance reviews, you may wish to take into consideration the following:

- Issues targeted in your agency's strategic plan;
- Issues frequently identified as problems faced by program beneficiaries;

56/ Id. at 101.

57/ Id. at 101 (citations omitted).

- Geographical areas you wish to target because of the many problems you know beneficiaries are experiencing or because your agency has not had a "presence" there for some time;

- Issues raised in a complaint or identified during a complaint investigation that could not be covered within the scope of the complaint investigation;

- Problems identified to your agency by community organizations or advocacy groups that are familiar with actual incidents to support their concerns;

- Problems identified to your agency by its block grant recipients;[58] and

- Problems identified to your agency by other Federal, State, or local civil rights agencies.

Remember that you should not assume that, simply because you have not received complaints from a particular segment of beneficiaries or those in a particular area, problems do not exist. In fact, it is likely that people in under-served communities will not be aware of their rights to either program services or to file a complaint for a denial of those services.

If you are in the process of analyzing for review a potential target that would

58/ Your agency may wish to consider involving the block grant recipient (generally, a State agency) in the review and in any subsequent negotiations to resolve identified violations.

receive Federal financial assistance from other Federal agencies, we suggest that you contact those other agencies to determine whether they have investigated complaints or conducted a compliance review of the recipient you are considering. You will especially want to know whether the recipient is operating under a settlement or other compliance agreement (or consent decree) with another agency. You should also consider contacting the State and local civil rights organizations that have jurisdiction over the issues you are considering to determine whether they have information that would be helpful to you. These organizations are generally willing to share information with Federal agencies, although they may want a request from you in writing before releasing documents or other information to you.

Once you have sufficient information to justify a compliance review, your planning for the review will follow the procedures we have discussed earlier in this manual concerning identification of issues and bases, the applicable legal theory or theories, and the collection and analysis of evidence. In fact, your agency may have required that you set out your justification and approach to the

review in a formal proposal. Because compliance reviews generally cover a number of issues and bases (although that is not always the case), we suggest that you develop a formal Investigative Plan for a compliance review.

Regardless of whether you conduct a large scale multi-issue review or a smaller limited-scope review, we suggest that your agency consider including the following questions in your investigation:

1) Does the recipient have a complaint procedure that is easy to use and is accessible to the public? How are members of the public notified of how they can file a complaint if they believe they have been discriminated against by the recipient? Does the complaint procedure provide for an unbiased investigation of the complaint, allow input of the complainant and his/her witnesses, and an appeal if the complainant is not satisfied with the results? Are complainants advised that they can file a complaint with your agency if they are dissatisfied with the results of the recipient's finding/resolution of their allegations?

2) Does the recipient conduct community outreach, i.e., does it make all segments of the community (including minority members and those who are not fluent in English) aware of its programs, who can participate, and how? Has it contacted local organizations, such as churches, community groups, civil rights or advocacy groups, that could assist in making potential beneficiaries aware of the recipient's programs?

Often, the only way to ensure that you know the answer to these questions is to

contact community members directly and interview them concerning these issues. We recommend that you not limit your interviews of community members to names of persons provided by the recipient, but also attempt to independently confirm information provided by the recipient concerning its outreach efforts and the community's awareness of its complaint procedures.

The procedures for issuing findings and/or reaching a resolution of your investigation in a compliance review are similar to those for complaints. We recommend that a formal Investigative Report and Letter of Findings (with a formal Settlement/Compliance Agreement, if appropriate) be developed, especially in the case of a multi-issue compliance review. (See TABS 24 and 26 for sample violation Letters of Findings and Compliance Agreements.) Because your investigation was agency-initiated, and not the result of a complaint, the recipient will be more likely to expect a formal statement of your findings. This is also protection for your agency to show that you did not simply go on a "fishing expedition" and then abandon the investigation without following through with findings or resolution of violations, if any. As with other settlement

agreements, an agreement resolving violations identified during a compliance review should include reporting and monitoring, where appropriate, to ensure that the violations have been and continue to be resolved.