

# Interim Case Resolution Manual: Executive Summary

## December 1, 2015

### Background

The U.S. Environmental Protection Agency's (EPA's) Office of Civil Rights (OCR) is responsible for carrying out four critical programs. Three of these are internal programs and concern EPA's processing and resolution of discrimination complaints filed by EPA employees and employment applicants; overseeing and coordinating EPA's Reasonable Accommodations Program for employees with disabilities; and EPA's identifying and eliminating barriers to equal employment opportunity.

In addition, OCR's External Compliance and Complaints Program is responsible for enforcing several federal civil rights laws that together prohibit discrimination on the bases of race, color, national origin (including limited English proficiency), disability, sex and age, in programs or activities that receive financial assistance from EPA. (Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972, *see* Section 2.4(2))

OCR is responsible for carrying out compliance with these federal nondiscrimination statutes through a variety of means, including complaint investigation; agency-initiated compliance reviews; pre-grant award assurances and audits; and technical assistance and outreach activities.

In undertaking a holistic approach to strengthening OCR's external compliance program, OCR has developed a draft External Compliance and Complaints Program Strategic Plan for FY 2015-2020. The External Compliance Strategic Plan, issued in draft for informal public comment<sup>1</sup> on September 10, 2015, promotes mission-critical program accountability through measurable goals that will: (1) ensure prompt, effective, and efficient complaint docket management; (2) enhance OCR's external compliance program through proactive compliance reviews, strategic policy development, and engagement of critical EPA, federal and external partners and stakeholders (*e.g.*, recipients and communities); and, (3) strengthen OCR's workforce through strategic human capital planning, organizational development and technology and training to promote a high-performing organization.<sup>2</sup> As identified in the Strategic Plan (Goal 1, Benchmark 1), one critical accountability measure to ensure prompt, effective, and efficient docket management and carry out compliance reviews as part of its proactive compliance program, is to have in place a CRM.

On December 1, 2015, OCR posted, along with this interim draft CRM, a Notice of Proposed Rulemaking (NPRM) to amend EPA's Nondiscrimination regulation. The NPRM is also one of several accountability measures to ensure prompt, effective, and efficient docket management.

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<sup>1</sup>Neither the Strategic Plan nor this CRM is considered "rulemaking" such that formal notice and comment would be required. However, the agency has elected to seek informal comments from the public consistent with its commitment to transparency and public engagement.

<sup>2</sup>[http://www2.epa.gov/sites/production/files/2015-10/documents/strategic\\_plan.pdf](http://www2.epa.gov/sites/production/files/2015-10/documents/strategic_plan.pdf).

This document, which incorporates the modifications proposed in the NPRM, is being issued for public comment as an “interim” CRM pending the final issuance of the proposed modifications to EPA’s nondiscrimination regulations. OCR will revise the CRM as necessary to ensure congruence with any rulemaking finalizing modifications to EPA’s Nondiscrimination regulation.

### Interim Case Resolution Manual

This Interim Case Resolution Manual (CRM) is intended to provide procedural guidance to OCR case managers to ensure EPA’s prompt, effective, and efficient resolution of civil rights cases consistent with science and the civil rights laws. The CRM is not intended to address substantive civil rights policy or legal standards or processes outside of OCR’s jurisdiction and responsibility to enforce the federal civil rights laws described above.

EPA Orders 4700<sup>3</sup> and 4701<sup>4</sup> establish a protocol for processing complaints of discrimination that brings program and regional offices throughout the agency into a collaborative process for coordinating and committing the analytical resources, expertise, and technical support needed to address civil rights compliance. Although the OCR retains the primary authority and responsibility for carrying out the civil rights program, the orders clearly emphasize a “One-EPA” commitment with the support of a network of Deputy Civil Rights Officials (DCROs) established under Order 4700, to support the civil rights mission and ensure its success throughout EPA. The 2013 protocol (Order 4701) anticipated that OCR would develop specific procedures to improve implementation of the protocol and ensure the prompt, effective, and efficient resolution of civil rights cases.<sup>5</sup>

This CRM is designed to allow OCR, in consultation with DCROs, to determine and tailor the appropriate resolution path for each case based on the nature, scope and complexity of the issues presented in each complaint. This CRM is consistent with federal best practices, and, through the expert assistance of the DCROs, provides OCR with procedures, strategies and resources to most promptly, effectively and efficiently evaluate, investigate, and resolve complaints and conduct compliance reviews.

The CRM includes:

- Procedures for addressing all phases of the case resolution process for external civil rights cases, in furtherance of EPA Orders 4700 and 4701; and
- Reference and management tools such as a model Strategic Case Management Plan that includes specific goals or target dates for ensuring timely and effective processing of cases, particularly within the first 90-calendar days after receipt of complaints.

To heighten transparency and accountability, OCR is posting this interim CRM on EPA’s internet website for informal comment and will post all subsequent versions. Moreover, OCR will work to

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<sup>3</sup> See Section 8.2(1); *Deputy Civil Rights Officials*, EPA Order No. 4700 (May 1, 2013).

<sup>4</sup> See Section 8.2(2); *Title VI Case Management Protocol*, EPA Order No. 4701 (May 1, 2013).

<sup>5</sup> See also Chapter 1

distribute this resource to the public through its network of DCROs, which will also assist the EPA in its efforts to increase engagement with critical external partners and stakeholders, such as recipients and communities. This engagement effort will allow the public and our recipients to understand better OCR's case management process. The CRM will be evaluated, updated, and revised periodically to ensure that it remains a dynamic, interactive and effective tool.

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## **CHAPTER 1 DEPUTY CIVIL RIGHTS OFFICIALS and TITLE VI CASE MANAGEMENT PROTOCOL ORDERS**

In a 2012 report entitled, “Developing a Model Civil Rights Program for the Environmental Protection Agency,” the EPA Civil Rights Executive Committee outlined recommendations for strengthening civil rights, equal employment opportunities, and diversity in the workplace. To that end, the Committee also recommended the creation of the Deputy Civil Rights Officials (DCROs) – a cadre of senior level officials in EPA’s regional offices and national programs who would assure accountability for civil rights compliance across the agency. As a result, the EPA issued EPA Orders 4700 (“Deputy Civil Rights Officials”) and 4701 (“Title VI Case Management Protocol”) in 2013. Together, these orders formally established a protocol for processing, investigating, and resolving complaints under Title VI of the Civil Rights Act of 1964 and other non-discrimination laws enforced by OCR (“Title VI Protocol”). The Title VI Protocol brings headquarters and regional program offices into a collaborative process for coordinating and committing analytical resources, expertise and technical support needed to investigate and resolve complaints, where necessary.

The DCROs are a critical resource in support of EPA’s civil rights program. This CRM contemplates OCR going beyond to establish a new standard of excellence. This new standard includes the DCROs who serve as civil rights champions throughout the EPA, and who provide prompt programmatic, regulatory, analytical, scientific, and technical expertise and support in addition to their vast network of critical stakeholder contacts at a regional level and in specific program areas. By maximizing the use of the EPA’s preexisting, in-house expertise, the EPA relies less on developing redundant competencies in OCR or using costly contracts to fill gaps in OCR’s technical and scientific expertise to effectively investigate and resolve environmental civil rights cases consistent with the agency’s commitment to sound science and civil rights law.

Robust internal collaboration will ensure a constructive feedback loop between OCR and the DCRO network — where knowledge and expertise is shared, and grows along institutional pathways, and where civil rights is championed throughout the agency. The active feedback loop between OCR and the DCROs at key stages of the case investigation and resolution process furthers the promptness, efficiency, and effectiveness of case resolution.

### **Section 1.1      EPA Order 4700**

This order establishes the position of DCROs within each EPA regional and program office to serve as that office’s primary point of accountability for assisting OCR with promptly, effectively, and efficiently meeting the EPA’s civil rights responsibilities and goals. DCROs will, consistent with applicable laws, provide executive support in furthering the EPA’s commitment to creating a model civil rights program. It does not relieve other agency officials, including career and appointed officials, line managers and other staff, of their responsibilities with respect to civil rights. *See* Section 8.2(1)

## **Section 1.2      EPA Order 4701**

The purpose of the EPA Order 4701 is to provide cross-agency support for resolving complaints filed under Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes applicable to recipients of EPA's financial assistance, and to ensure that EPA resources are supportive of the civil rights mission. It provides that the OCR director will oversee and manage the Title VI Protocol to bring together the necessary parties to promptly investigate, adjudicate, or resolve civil rights complaints through a case management team made up of the necessary technical, legal, and policy experts from appropriate offices based on the facts of the civil rights issue, as determined by the OCR director. *See* Section 8.2(2).

## **Section 1.3      DCRO Roles and Responsibilities**

This active feedback loop between OCR and DCROs includes:

- Immediate notification to appropriate DCRO(s) by OCR regarding receipt of complaints;
- Immediate identification by DCROs of a point-of-contact to whom and from whom OCR can provide and obtain any information relevant to specific cases;
- Inclusion of DCROs by OCR at key stages of case processing to seek input, as well as specific case briefings, and general or issue-specific civil rights trainings;
- Timely inclusion of DCROs and/or their identified point of contact in OCR's monthly External Compliance and Complaints Activities meeting;
- Immediate notification to OCR by DCROs regarding specific programmatic, policy, regulatory, technical or scientific information relevant to specific cases;
- Timely sharing of information gathered by DCROs through engagement with external stakeholders, for example, pertinent/material information suggesting that a civil rights complaint may be filed;
- Timely sharing of information by DCROs regarding local context or facts that could affect a pending case, such as, for example, relevant information gathered by the Office of Environmental Justice that could facilitate comprehensive EPA action in line with the "One EPA" commitment; and
- Similarly, OCR recognizes that as part of their general engagement responsibilities, DCROs may be reviewing and, where appropriate, addressing the concerns of the affected communities outside of the OCR civil rights enforcement process as an important complement to further the agency's efforts to make a prompt and visible difference in communities.

## CHAPTER 2 EVALUATION OF COMPLAINTS

This Chapter sets out OCR's procedures when it receives a correspondence from an external source, or has such correspondence referred to it from another EPA office or an external agency.

### **Section 2.1**      **Acknowledge the Receipt of Correspondence Which Could Constitute a Complaint**

OCR will promptly issue a standardized letter to the individual (or group) issuing the correspondence as well as to any named entity (potential/alleged recipient) to acknowledge receipt of the correspondence. A copy of the acknowledgement letter and the correspondence received will be sent immediately to the appropriate DCRO(s) and the Office of General Counsel (OGC) by both email and US postal service. The DCRO(s) and OGC will promptly inform OCR of any information that should be considered in its evaluation of the correspondence pursuant to Section 2.4. Additionally, the DCRO(s) will identify a point of contact with whom OCR can coordinate, consult, and confer about the specific case pursuant to Section 1.3.

### **Section 2.2**      **Assign a Case Number and Establish a File**

Immediately upon receipt of the correspondence, OCR will assign a case number and establish a case file. OCR's case "opening" date for a complaint investigation is the date OCR receives the correspondence. Correspondence received over a weekend, or on a holiday, will be considered received on the next business day. OCR's case "opening" date for a compliance review is the date when the recipient is notified by letter that OCR will initiate a compliance review.<sup>6</sup>

OCR will enter all appropriate case management information into OCR's External Compliance Activity Tracking System (EXCATS) including all required documents.<sup>7</sup> OCR will establish a case file for each complaint. In cases involving multiple separate complaints or allegations pertaining to multiple recipients, the following guidelines will apply in determining how many case numbers should be assigned:

- OCR will assign a separate case number to each named entity (potential alleged recipient) named in the correspondence. If, during the course of the investigation, OCR determines that other entities are involved in the alleged acts of discrimination, OCR will open separate complaints and assign a separate case number for each such entity. The case opening date for those entities is the date on which OCR notifies those additional entities that they are involved.
- Correspondence from more than one person or organization against the same entity that contain different allegations are treated as separate cases.

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<sup>6</sup>A compliance review is an OCR-initiated investigation of a particular aspect of an EPA recipient's programs or activities to determine compliance with the civil rights laws enforced by OCR. *See* Chapter 5.

<sup>7</sup>EXCATS is an automated case, activity, and document management system used by OCR to track and manage all OCR discrimination cases. DCROs will have viewing rights to EXCATS data so that they can stay well informed about cases of interest.

- Multiple correspondences sent by one or more than one person that raise substantially identical allegations against the same entity may be treated as one case and assigned one case number. When OCR investigates a correspondence, a subsequent correspondence that raises substantially identical allegations against the same entity will be reviewed to determine whether to incorporate it into the existing case(s). If the subsequent correspondence raises distinct allegations, OCR should assign separate case numbers.
- New allegations filed by the same person against the same entity after OCR has begun to investigate the original correspondence are reviewed on a case-by-case basis to determine whether the allegations should be added to the open case or treated as a new case.

Staff should follow OCR's file management protocol to maintain physical and electronic case files once a case file is created.

### **Section 2.3**      **Strategic Case Management Plan**

OCR will create a Strategic Case Management Plan (*see* Section 8.1) for all complaints acknowledged pursuant to Section 2.1. The Strategic Case Management Plan (SCMP) outlines processing goals or targets for ensuring prompt, effective, and efficient processing of cases, particularly within the first 90-calendar days after receipt of complaints.

### **Section 2.4**      **Evaluation of Correspondence**

OCR conducts a preliminary review of correspondence to determine whether it constitutes a complaint. A complaint is a written statement to the agency alleging that the federal civil rights of one or more persons have been violated by a recipient of financial assistance from EPA and requesting that the agency take action. Complainants must also sign or electronically sign the complaint and provide their contact information. Complaints may be filed by electronic mail, regular mail, fax, or in person.<sup>8</sup> Anonymous correspondence may be considered as one factor in a decision to initiate a compliance review, but will not be sufficient to constitute a complaint.

When evaluating the correspondence to determine if it constitutes a complaint, the regulation requires OCR to consider:

- (1) Whether it is in writing;
- (2) Whether it alleges a discriminatory act(s) that, if true, may violate EPA's nondiscrimination regulations, such as an act or policy that subjects a person or class of persons to discriminatory treatment or an act or policy that results in discriminatory impact on a person or class of persons on the basis of their race, color, national origin (including limited English proficiency), disability, sex, or age;
- (3) Whether it identifies an applicant for, or a recipient of, EPA financial assistance as the entity that committed the alleged discriminatory act; and

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<sup>8</sup> U.S. EPA, Office of Civil Rights (Mail Code 1201A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460. Complaints may be faxed to (202) 5601-1836.

- (4) Whether it was received by OCR within 180 calendar days of the alleged discriminatory act.<sup>9</sup>

If a correspondence does not meet these jurisdictional requirements, it will be rejected or may be referred to other agencies or offices that may have jurisdiction over the issues and/or entity described in the correspondence, in accordance with Section 2.5.

OCR will provide to individuals wishing to file a complaint information to assist in understanding the jurisdictional requirements under the regulation. This includes explaining the nondiscrimination rights covered by the statutes and regulations enforced by OCR. OCR will provide assistance to help complainants and recipients understand the administrative procedures and processes associated with the External Compliance Program's complaint processing. However, OCR is a neutral decision-maker and is not an advocate on behalf of complainants or recipients.

The following will not be considered a complaint:

- Oral allegations that are not reduced to writing;
- Anonymous correspondence;
- Courtesy copies of correspondence or a complaint filed with or otherwise submitted to another person or other entity;
- Inquiries that seek advice or information but do not seek action or intervention from the agency; or
- Correspondence expressing general concerns regarding general issues of discrimination.

(1) Determine that the correspondence is in "writing"

A complaint need not be written in English. OCR will take all necessary steps to ensure that persons who have limited English proficiency can participate meaningfully in its complaint process. Similarly, OCR will take all necessary steps to ensure that persons with disabilities can effectively participate in the complaint process.

(2) Determine subject matter jurisdiction

OCR must have jurisdiction over the subject matter of the complaint. For OCR to establish subject matter jurisdiction, the complaint must allege, or OCR must be able to infer from the facts given, an allegation of (1) discrimination based on race, color, national origin (including limited English proficiency), sex, disability or age, or (2) retaliation for the purpose of interfering with any right or privilege secured by the civil rights laws enforced by OCR, or as a result of making a complaint, testifying, or participating in any manner in an OCR proceeding. *See* [40 C.F.R. §§ 5.400 – 5.550](#), [40 C.F.R. §§ 7.30-7.75](#), [40 C.F.R. §§ 7.100 – 7.180](#); and [28 C.F.R. § 35.134](#). If OCR lacks subject matter jurisdiction over any of the issues raised in the correspondence, it will not proceed further regarding those issues and will reject the issues and/or complaint in accordance with Section 2.5.

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<sup>9</sup> *See* [40 C.F.R. § 7.120](#).

OCR has jurisdiction pursuant to the following statutory and regulatory authorities:

- Title VI of the Civil Rights Act of 1964, [42 U.S.C. §§ 2000d et seq.](#), [40 C.F.R. Part 7](#).

Under Title VI, OCR has jurisdiction to investigate complaints alleging discrimination by applicants and recipients based on race, color, or national origin, including limited English proficiency. For employment complaints, OCR follows procedures consistent with the employment coordinating regulations at [28 C.F.R. Part 42](#) and [29 C.F.R. Part 1691](#).<sup>10</sup>

- Title IX of the Education Amendments of 1972, as amended, [20 U.S.C. §§ 1681 et seq.](#), [40 C.F.R. Part 5](#).

Under Title IX, OCR has jurisdiction to investigate complaints alleging discrimination on the basis of sex in any education program or activity receiving financial assistance from EPA. For employment complaints in general, OCR follows procedures consistent with the employment coordinating regulations at [28 C.F.R. Part 42](#) and [29 C.F.R. Part 1691](#).

- Section 504 of the Rehabilitation Act of 1973, as amended, [29 U.S.C. § 794](#), [40 C.F.R. Part 7](#).

Under Section 504, OCR has jurisdiction to investigate complaints alleging discrimination on the basis of disability in a program or activity receiving financial assistance from EPA. For employment complaints, OCR follows procedures consistent with the employment coordination regulations at [28 C.F.R. Part 37](#) and [29 C.F.R. Part 1640](#).

- Age Discrimination Act of 1975, [42 U.S.C. §§ 6101 et seq.](#), [40 C.F.R. Part 7, Subpart F](#).

Under the Age Discrimination Act, OCR has jurisdiction to investigate complaints alleging discrimination on the basis of age in a program or activity receiving financial assistance from EPA. Accepted complaints of this nature are subject to mandatory referral for mediation to the Federal Mediation and Conciliation Service (FMCS) before investigation. However, complaints of employment discrimination based on age against an individual by recipients of Federal financial assistance are subject to the Age Discrimination in Employment Act of 1967 and should be filed administratively with the Equal Employment Opportunity Commission. For age complaints, OCR follows procedures consistent with the age coordination regulations at [28 C.F.R. Part 42](#) and [29 C.F.R. Part 1626](#).

- Federal Water Pollution Control Act Amendments of 1972, [Pub. L. 92-500 § 13](#), 86 Stat. 903 (codified as amended at [33 U.S.C. § 1251](#) (1972)), [40 C.F.R. Part 7](#).

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<sup>10</sup>With respect to alleged discrimination in employment. OCR's jurisdiction is limited to alleged discrimination in employment on the basis of sex in any program or activity subject to section 13, or on the basis of race, color, or national origin in any program or activity whose purpose is to create employment; or, by means of employment discrimination, deny intended beneficiaries the benefits of EPA assistance, or subject the beneficiaries to prohibited discrimination. [40 C.F.R. § 7.35\(6\)](#)

Under Section 13 of the Federal Water Pollution Control Act Amendments, OCR has jurisdiction to investigate complaints alleging discrimination on the basis of sex involving a program or activity receiving financial assistance under the Clean Water Act.

(3) Determine personal jurisdiction

OCR must also have jurisdiction over the entity or potential recipient, including sub-recipients, alleged to have committed the discriminatory act. Under the statutes listed above, OCR has jurisdiction over entities that receive financial assistance from EPA. Determining whether an entity classifies as a recipient of EPA financial assistance may require more complex analysis including, for example, examining the flow-through of federal funds. Under these circumstances, OCR will work with OGC and the DCRO(s) to make an informed determination about whether a particular entity satisfies the criteria. (See DOJ Legal Manual and Investigation Procedures Manual. See DOJ, Title VI Legal Manual, 20-40 (Jan 1, 2001), available at <http://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf>; DOJ, *Investigation Procedures Manual for the Investigation of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes*, 29-31 (Sept. 1998), available at <http://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/complain.pdf>).

When a complaint is filed against an entity that does not receive financial assistance from EPA, OCR will not proceed further and will reject the complaint in accordance with Section 2.5.

(4) Determine whether the allegations are timely

OCR will accept as timely only those allegations that have been filed within 180 calendar days of the date of the last act of alleged discrimination, unless the complainant is granted a waiver under this Section. If a case does not satisfy this condition, is not a continuing policy or practice as defined below, and/or is not granted a waiver, it will be rejected under Section 2.5.

The filing date of a complaint is the date the complaint is received by OCR on a business day or non-federal holiday between 8:00AM EST and 5:00PM EST.<sup>11</sup>

(a) Continuing Policy or Practice

Timely allegations may include those where the complainant alleges a continuing discriminatory policy or practice. When determining whether an alleged timely continuing violation claim exists, the emphasis should not be placed on mere continuity.<sup>12</sup> The critical question is whether any

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<sup>11</sup> The filing date of complaints sent by electronic mail or by fax will be the date the complaint was received by OCR.

<sup>12</sup> *United Air Lines, Inc. v Evans*, 431 U.S. 553, 557 (1977). See also *Del. State College v. Ricks*, 449 U.S. 250, 258 (1980) (holding that the proper focus for statute of limitations periods is upon the time of the discriminatory act, not upon the time that the consequences of the act became most painful, that is, the denial of tenure was the discriminatory act and not the termination of employment which was the natural consequence of that act); *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (finding that the statute of limitations did not begin to run until the landfill permit was issued because there was no “obvious factual contingency that put construction seriously in doubt.”); *Rozar v. Mullis*, 85 F.3d 556, 561-562 (11th Cir. 1996) (determining in the environmental permitting context that the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent, so the time

present violation exists. In other words, correspondence claiming continuing violations must do more than allege that an individual or a group is subjected to a continuing violation. The complainant must allege facts that are sufficient to indicate either a series of related, discrete acts of which one occurred within the 180-day filing period or a systematic policy or practice that operated within the 180-day period.<sup>13</sup>

In evaluating the correspondence's allegations, OCR will determine whether there is a continuing discriminatory policy or practice. In order to accept allegations of a continuing policy or practice as timely, OCR must be able to identify, generally through clarification from the complainant, a discrete act that occurred within 180 calendar days of filing the correspondence. OCR also must be able to determine whether the continuing violation reflects a discriminatory act occurring within the 180-day period or is merely the consequences of a decision made earlier, because the latter would not constitute a continuing violation. Finally, OCR may also determine the existence of a continuing violation if the complainant shows a systematic policy or practice of discrimination that operated within the limitations period, *i.e.*, a systemic violation.

(b) Determine whether a waiver should be granted

If an allegation<sup>14</sup> is not filed in a timely manner, OCR will independently assess the record to determine whether a waiver is appropriate while simultaneously notifying the complainant of the opportunity to request a waiver. OCR may grant a waiver of the 180-day filing requirement for various reasons, such as:

- The complainant could not reasonably be expected to know the act was discriminatory within the 180-day period, and the correspondence was filed within 60 calendar days after the complainant became aware of the alleged discrimination. (Note that lack of previous awareness of OCR or the civil rights laws enforced by OCR is not a basis for a waiver).
- The complainant was unable to file a correspondence because of an incapacitating illness or other incapacitating circumstances during the 180-day period, and the allegation was filed within 60 calendar days after the period of incapacitation ended.
- The complainant filed a correspondence alleging the same discriminatory act within the 180-day period with a federal, state, or local civil rights enforcement agency, and then the complainant filed a correspondence with OCR within 60 calendar days from the date on which the other agency issued a decision reflecting completion of its investigation. Additionally, if the complainant files a correspondence within 60 calendar days from the date of issuance of the decision by a state or federal court about the complainant's

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period was triggered when the county vote selecting a landfill site occurred and was known as evidenced by one plaintiff voicing protest prior to that vote).

<sup>13</sup> See generally *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 100, 107 (2002)

<sup>14</sup> Although the manual refers to "complaints" and "complaint allegations," OCR makes a determination as to each individual allegation separately in a complaint. For example, in a single complaint, OCR may decide that it is appropriate to proceed to complaint investigation on one or more allegations while dismissing or closing another allegation. The complainant will be informed of OCR's decision with respect to each allegation.

allegations that was not a decision on the merits or settlement of the discrimination allegations. (Dismissal with prejudice is considered a decision on the merits.)

- The complainant filed, within the 180-day period, an internal grievance with the recipient of financial assistance, or a due process hearing, alleging the same discriminatory conduct that is the subject of the OCR complaint, and the complaint is filed no later than 60 calendar days after the internal grievance is concluded.

When a waiver is not requested and not independently granted by OCR based on the record, or when a waiver is requested but not granted, the allegation and/or complaint will be rejected in accordance with Section 2.5.

#### (5) Additional considerations for evaluating correspondence

If OCR receives a correspondence that articulates allegations or concerns about low-income communities, OCR will communicate to the complainant that, even if the allegation were true, it would not violate one of the federal nondiscrimination laws enforced by OCR because income level is not a protected class under these laws. OCR will also engage the Office of Environmental Justice and the appropriate DCROs. Further, OCR does not investigate alleged noncompliance with Executive Order 12898, [Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 \(Feb. 16, 1994\)](#), which is generally applicable only to Federal agencies and is intended only to improve the internal management of the executive branch. This Executive Order is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. More information about EO 12898, may be found at EPA's Office of Environmental Justice's internet website at [http://www.epa.gov/environmental\\_justice](http://www.epa.gov/environmental_justice).

OCR may contact the complainant to remedy specific problems with their correspondence and provide appropriate assistance by explaining in writing (by letter or via electronic mail) the information necessary for OCR to open an investigation of the complaint allegation. In doing so, OCR will ask the complainant to provide this information to OCR within 30 calendar days from receipt of the written request and advise the complainant that the complaint allegation will be rejected if the information is not received by that date. When a complainant fails to provide the requested information within 30 calendar days of the OCR's written request and there is insufficient information in the record to evaluate jurisdiction, OCR will reject the complaint.

#### **Section 2.5**      **Determine Whether to Reject the Allegation/Complaint**

If a correspondence lacks the necessary elements described in Section 2.4 and/or the regulations ([40 C.F.R. § 7.120](#)), OCR will prepare a draft rejection letter. The draft rejection letter will be shared with the appropriate DCRO(s) for prompt input or information that could inform OCR's decision regarding the disposition of the correspondence.

When a complaint allegation is rejected, OCR will issue a closure letter to the complainant and potential recipient explaining the reason for the decision.

## **Section 2.6      Other Factors That May Be Considered Before Accepting a Case for Investigation**

In general, OCR will accept, reject, or refer a complaint after considering the four fundamental jurisdictional factors as described in the regulation. *See* Section 2.4, [40 C.F.R. § 7.120](#). However, if OCR obtains information from DCROs, the complainant, the potential recipient, or other credible sources leading OCR to conclude that an investigation is unjustified for prudential reasons, OCR may reject a complaint allegation in accordance with Section 2.5.

Such prudential factors include but are not limited to:

- The allegation is not ripe for review because it is speculative in nature and anticipates future events that may or may not unfold as outlined in the complaint, so a meaningful review of the allegation cannot be conducted at the time OCR receives the complaint.<sup>15</sup>
- The allegations are moot because OCR obtains credible information indicating that the allegations raised by the complaint have been resolved and there are no systemic allegations. In such a case, OCR will attempt to ascertain the apparent resolution. When OCR determines that there are no current allegations appropriate for further resolution, the complaint will be rejected.
- The same complaint allegations have been filed, are currently pending, and/or are already resolved 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 30 days of the completion of the other agency's action.
- The same civil rights allegations have been filed by the complainant against the same recipient with state or federal court individually or through a class action. A complaint may be re-filed with OCR within 30 calendar days following termination of the court proceeding if there has been no decision on the merits or settlement of the complaint civil rights allegations. (Dismissal with prejudice is considered a decision on the merits.)

If OCR determines that these or other prudential factors argue to reject a complaint, it will draft a rejection letter in accordance with Section 2.5. The draft rejection letter will be shared with the appropriate DCRO(s) for prompt input or information that could inform OCR's decision. In certain circumstances, OCR may refer the correspondence to other state or federal agencies for their review, if OCR determines those agencies may have jurisdiction related to the concerns raised in the correspondence.

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<sup>15</sup> This type of allegation is considered to be rejected without prejudice. The complainant may re-file within 60 days of a subsequent act or event that raises an allegation of discrimination.

## **Section 2.7      Opening an Investigation**

Before issuing a letter accepting an allegation or a complaint for investigation, OCR will share a draft acceptance letter with the appropriate DCRO(s) for input. OCR will evaluate the scope of the investigation in light of any relevant information received, articulated in Section 2.6 and/or Section 3.4. OCR will open a case for investigation by issuing letters of acceptance to the complainant and the recipient that contain, at a minimum, the following information:

- (1) OCR's jurisdiction with applicable regulatory citations;
- (2) A clear statement of the issue(s) to be investigated;
- (3) A statement that OCR is a neutral fact-finder;
- (4) Information about OCR's Early Complaint Resolution process, if appropriate. (*See* Section 3.5);
- (5) Information about OCR's Alternative Dispute Resolution process. (*See* Section 3.11);
- (6) Information about the Informal Complaint Resolution Process. (*See* Section 3.12); and
- (7) Contact information for the OCR staff person who will serve as the complainant's and the recipient's primary contact during the investigation and resolution of the complaint.

## CHAPTER 3 ACCEPTED CASES: PRELIMINARY INVESTIGATION AND RESOLUTION

The investigation and resolution of open complaints, is primarily the responsibility of OCR. However, collaboration and consultation with the DCRO network will ensure the prompt, effective, and efficient resolution of cases.

This Chapter discusses the importance of case planning and the full consideration and utilization of the various resolution approaches. The resolution options included in the nondiscrimination regulation emphasize informal resolution and voluntary compliance.

### **Section 3.1**      **Role of Complainants and Recipients**

The EPA's regulations do not prescribe a role for the complainant once s/he has filed a complaint. Nevertheless, one of the EPA's goals is to promote appropriate involvement by complainants and recipients in the External Compliance complaint process.

The EPA's policy paper on the *Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, published May 4, 2015, clarifies EPA's approaches to providing appropriate involvement of both complainants and recipients in the complaint process.<sup>16</sup>

An OCR complainant is not like a plaintiff in court. Rather a complainant's role is to report what s/he believes is an act violating nondiscrimination statutes by an entity receiving federal financial assistance to the associated agency. The EPA is not in an adjudicatory role, evaluating evidence produced by opposing sides, but instead investigates allegations about its recipient, and reaches a conclusion regarding whether that recipient is in compliance with its civil rights obligations to the EPA.

### **Section 3.2**      **Early Case Planning**

Case planning should begin as early as possible and will be conducted throughout the duration of every case to ensure high quality decisions, prompt investigations and efficient use of OCR's resources. Case Managers should begin to draft an Investigative Plan, *see* Section 4.2, as early as possible and soon after a decision to accept the case for investigation has been made. OCR will share with appropriate DCROs a draft Investigative Plan, draft requests for information pursuant to Section 4.3, or requests for internal analytical or technical review (*e.g.* of air modelling data) as early as possible to solicit relevant input and ensure prompt, effective, and efficient case processing. Additionally, Case Managers will determine whether a "Communication and Outreach Plan" beyond a "desk statement" is warranted in order to assist in handling public or media inquiries.

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<sup>16</sup> See EPA, *Roles of Complainants and Recipients in the Title VI Complaints and Resolution Process* (May 4, 2015), <http://www2.epa.gov/ocr/epas-title-vi-policies-guidance-settlements-laws-and-regulations>.

### **Section 3.3      Identification of the Applicable Legal Theories**

Part of effective case planning includes the identification of all legal theories that would be applicable to the issues identified for investigation. The Investigative Plan should establish a factual record sufficient to prove or disprove the applicable legal theory. In general, these fall into three categories of legal claims: (a) Disparate/Different Treatment, (b) Disparate Impact/Effects, and (c) Retaliation.

#### **(1) Disparate/Different Treatment**

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, disability, or age. Disparate treatment cases can involve either “individual” or “class” discrimination (or both). *See* Department of Justice *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* at Section (B)(3), <http://www.justice.gov/crt/investigation-procedures-manual-civil-rights-division#theories> (last visited Oct. 27, 2015).

#### **(2) Disparate Impact/Effects**

The second primary theory for proving a violation is based on nondiscrimination regulations and is known as the discriminatory “effects” or disparate impact theory. Simply put, disparate impact means that an entity’s otherwise neutral policy had the unintended effect of treating similarly situated persons differently (*i.e.*, less favorably) than those who differ on the basis of their race, color, national origin, sex, disability, or age. *See* Department of Justice *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* at Section (B)(3), <http://www.justice.gov/crt/investigation-procedures-manual-civil-rights-division#theories> (last visited Oct. 27, 2015).

#### **(3) Retaliation**

A complainant may bring a retaliation claim under nondiscrimination statutes or under EPA’s regulations that prohibit retaliation. For example, EPA’s Title VI regulations provide that “[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual or group for the purpose of interfering with any right or privilege guaranteed by [this regulation,] or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subpart, or has opposed any practice made unlawful by this regulation” *See* 40 C.F.R. § 7.100; *see also*, Department of Justice *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* at Section (B)(3), <http://www.justice.gov/crt/investigation-procedures-manual-civil-rights-division#theories> (last visited Oct. 27, 2015).

### **Section 3.4      Other Factors to Consider After Opening an Investigation**

If, after opening a complaint for investigation, OCR determines in consultation with the DCROs that any of the criteria below has been met, a complaint may be “administratively closed.” OCR retains its discretion to continue or close any investigation to ensure that the EPA complies with its obligations under the nondiscrimination statutes. Factors that may support the administrative closure of a complaint after opening an investigation include:

- The allegation is not ripe for review because it is speculative in nature and anticipates future events that may or may not unfold as outlined in the complaint, so a meaningful review of the allegation cannot be conducted at the time OCR receives the complaint.<sup>17</sup>
- The allegations are moot because OCR obtains credible information indicating that the allegations raised by the complaint have been resolved and there are no systemic allegations. In such a case, OCR will attempt to ascertain the apparent resolution. When OCR determines that there are no current allegations appropriate for further resolution, the complaint will be administratively closed.
- 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 30 days of the completion of the other agency's action.
- The same civil rights allegations have been filed by the complainant against the same recipient with state or federal court individually or through a class action. A complaint may be re-filed with OCR within 30 calendar days following termination of the court proceeding if there has been no decision on the merits or settlement of the complaint civil rights allegations. (Dismissal with prejudice is considered a decision on the merits.) Where OCR has obtained sufficient evidence to support a finding under Section 4.6(1) (insufficient evidence) or Section 4.6(2) (non-compliance) with regard to any civil rights allegation(s) being investigated by OCR which are not before the court, OCR may not close the civil rights allegation(s), but may proceed in accordance with the appropriate provisions set forth in Section 4.6.
- The complaint allegations are foreclosed by legally binding decisions of state or federal courts, adjudication decisions of the EPA, or by Department of Justice’s or EPA’s policy determinations regarding agency enforcement of nondiscrimination statutes.
- A complaint’s allegations would be better resolved through a compliance review (*see* Chapter 5) or OCR has recently addressed or is currently addressing the same issues involving the same recipient in a compliance review or an OCR complaint.

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<sup>17</sup> This type of allegation is considered to be administratively closed without prejudice. The complainant may re-file within 60 days of a subsequent act or event that raises an allegation of discrimination.

- The complainant withdraws the complaint after OCR has opened it for investigation; however where the complainant has alleged systemic violations, OCR may determine that it will continue the investigation notwithstanding the complainant's withdrawal of the complaint. Moreover, where OCR has obtained sufficient evidence to support a finding of a violation with regard to any allegation(s), OCR will not close the allegation(s), but will proceed in accordance with the appropriate provisions set forth in Section 4.6.
- OCR determines that its ability to complete the investigation is substantially impaired by the complainant's loss of contact, death, or refusal to provide information that is reasonably accessible to the complainant and is necessary for investigation of the complaint. Generally, this factor does not apply where the investigation raises systemic issues that warrant continuing the investigation. OCR will include documentation in the case file of its efforts to contact the complainant by phone, in writing, or via electronic mail to request the necessary information and of the complainant's refusal to provide information.
- OCR determines that another office or agency for investigation is a more appropriate forum for the allegations' review.

### **Section 3.5      Early Complaint Resolution (ECR)**

The Early Complaint Resolution (ECR) process facilitates the resolution of accepted complaints by providing an early opportunity for the complainant(s) and recipient(s) involved to resolve the complaint allegations informally.<sup>18</sup> ECR involves informal facilitation by OCR so that the complainant(s) and recipient(s) can come to a mutually acceptable agreement. ECR does not involve formal mediation. In general, ECR is only appropriate for use in addressing specific and discrete issues that involve individual remedies. OCR will consider whether an accepted complaint is appropriate for ECR, as early as possible. When OCR determines that an accepted complaint is appropriate (see criteria below) for ECR, it shall contact the complainant(s) and recipient(s) to offer this resolution option.

#### (1) Questions to ask in considering whether ECR is appropriate

- Are there specific/discrete issues that involve individual remedies (*i.e.* not affecting a class of persons)?
- Can those individual specific/discrete issues be addressed in full through ECR without affecting OCR's ability to investigate or resolve the other issues raised in the complaint?
- If yes to both of these questions, ECR may be appropriate.

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<sup>18</sup> While ECR occurs between the complainant and recipient soon after a complaint is accepted for investigation, Informal Resolution occurs between the EPA and the Recipient at any point in time. (*see* Section 3.12)

(2) OCR's role:

- To serve as an impartial, confidential facilitator between the complainant(s) and recipient(s).
- To inform the complainant(s) and recipient(s) of ECR procedures, establish a constructive tone, and encourage the complainant(s) and recipient(s) to work expeditiously and in good faith toward a mutually acceptable resolution.
- To review the allegations that OCR has accepted for investigation with the complainant(s) and recipient(s) and assist both in understanding the pertinent legal standards and possible remedies.
- To facilitate a discussion between the complainant(s) and recipient(s) regarding possible actions that they may consider in working toward a resolution.
- To offer assistance, as appropriate, with regard to reducing any resolution to writing. When an agreement is reached, the complainant(s) and recipient(s) are informed that OCR will issue a closure letter reflecting the resolution of the complaint by agreement of the complainant(s) and recipient(s).

(3) Role of the participants:

- To participate in the discussions in good faith.
- To consider offers or suggestions with an open mind and to work constructively toward a mutually acceptable resolution.
- To implement any agreement in good faith.

(4) DCRO's role

- The DCRO's may be requested by OCR to assist in facilitating conversations between the recipient(s) and complainant(s).
- If OCR believes ECR may be appropriate for resolving one or more issues, OCR will consult the appropriate DCRO (s) for input.

Note that OCR does not sign, approve, endorse or monitor any agreement reached between the complainant(s) and recipient(s).

**Section 3.6**      **Initiation and Termination of the ECR Process**

When OCR determines that ECR is appropriate and the complainant(s) and the recipient(s) are willing to proceed with this resolution option, OCR will designate staff to facilitate an agreement between the recipient and the complainant. To the extent possible, staff assigned to conduct ECR of a complaint shall not be staff assigned to the investigation of that complaint.

An Agreement to Participate in ECR must be reviewed and either signed or verbally agreed to by the complainant and recipient. In circumstances where verbal agreement is obtained, the ECR facilitator shall send a letter or electronic mail to the complainant(s) and recipient(s) confirming the Agreement. This agreement will include a confidentiality agreement pursuant to Section 3.7.

In general, OCR may suspend its investigation for up to 30 calendar days to facilitate an agreement between the complainant(s) and recipient(s). If an agreement has not been reached, OCR will resume its investigation if it had been suspended. *See* Section 3.10. If an agreement is reached, OCR will close the case file in accordance with Section 3.8.

### **Section 3.7**      **Confidentiality of the ECR Process**<sup>19</sup>

A Confidentiality Agreement must be reviewed and signed or verbally agreed to by the ECR facilitator and the complainant(s) and recipient(s) to the ECR, (*i.e.* by the complainant or complainant's representative and the recipient or recipient's representative). In circumstances where verbal agreement is obtained, the ECR facilitator shall send a letter or electronic mail to the complainant(s) and recipient(s) confirming this Agreement.

In order to maintain confidentiality of the ECR process, any notes taken during ECR by the facilitator and/or any records or other documents offered by either party to the facilitator during ECR will be kept in a separate file and will not be shared with the staff member(s) assigned to investigate the complaint.

### **Section 3.8**      **Successful Conclusion of ECR**

At the conclusion of ECR, OCR will obtain a copy of the agreement that has been signed by the complainant(s) and recipient(s). Once resolution of any allegation has been obtained, OCR will notify the complainant(s) and recipient(s) in writing that the allegation(s) has been resolved and that OCR will close the case. *See* Section 3.16. Other outstanding issues, if any, are to be resolved through the investigation and resolution process. *See* Chapter 4. A copy of the ECR agreement between the complainant(s) and recipient(s) will be attached to the closure letter.

### **Section 3.9**      **Breach of ECR Agreements**

OCR will not monitor the agreement between the parties reached through the ECR process, but will inform the complainant(s) and recipient(s) that if a breach occurs, the complainant has the right to file another complaint. If a new complaint is filed, OCR will not address the alleged breach of the agreement. Instead, OCR will determine whether to investigate the original allegation. *See* Chapter 2. When making this determination, OCR will consider the nature of the alleged breach, its relation to any alleged discrimination and any other factors as appropriate. To be considered timely, the new complaint must be filed either within 180 calendar days of the date of the last act of alleged discrimination or within 60 calendar days of the date the complainant obtains information that a breach occurred, whichever date is later.

### **Section 3.10**      **Investigative Determination When ECR Is Not Achieved**

OCR will monitor the amount of time in the ECR process to ensure adequate time for completion of the investigation in the event that ECR is unsuccessful. In general, OCR may suspend its

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<sup>19</sup> Subject to the applicable federal laws such as the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

investigation for up to 30 calendar days to facilitate an agreement between the complainant(s) and recipient(s). If an agreement has not been reached, OCR will resume its investigation if it had been suspended. Where ECR is unsuccessful, an investigation must proceed to ensure completion in accordance with case processing procedures in this manual. *See* Chapter 4.

### **Section 3.11      Alternative Dispute Resolution**

EPA OCR's Alternative Dispute Resolution (ADR) process involves the formal mediation of a complaint or complaint allegations between the complainant and recipient, through the use of a professionally trained mediator. The EPA considers the ADR process to be a viable option for complainants and recipients to address some, if not all, of the issues raised in nondiscrimination complaints.<sup>20</sup> As appropriate, the EPA may offer the complainant and the recipient an opportunity to engage in the ADR process at any stage in the complaint process, even if an investigation has started. OCR will seek the appropriate DCROs' engagement and assistance in the ADR process to ensure prompt, effective, and efficient case resolution.

The decision to attempt to resolve a discrimination complaint through ADR is completely voluntary for complainants and recipients. ADR participants can withdraw from the process at any time without penalty if they determine that they cannot meet their interests and achieve a satisfactory outcome. If this happens, complaint investigation and resolution will resume.

If the recipient and complainant agree to engage in ADR (that is, they advise the neutral third party that they are willing to participate in ADR), the EPA will suspend its investigation of the complaint. A letter will be issued to the parties reflecting the suspension of the investigation once the complainant and recipient agree upon a mediator.

If, after an offer of ADR, the complaint(s) and recipient(s) have not agreed to engage in ADR within 90 calendar days of the offer, OCR may withdraw its offer of ADR.

If the ADR participants reach a mutually acceptable agreement to resolve the complaint, the proposed terms of the agreement will be shared with OCR by the mediator. Once OCR determines the terms are reasonable, OCR will communicate its determination to the mediator who will facilitate the recipients and complainants' signing and finalization of the ADR Resolution Agreement.<sup>21</sup>

Once notified by the mediator that the ADR Resolution Agreement has been finalized, OCR will promptly issue a letter notifying the complainant and recipient that the ADR Resolution Agreement serves to resolve the complaint fully and that OCR will issue a letter closing the case as of the date of that letter. OCR will not monitor the implementation of the ADR Resolution Agreement, but will respond to complaints by the parties of Resolution Agreement breaches pursuant to Section 3.9.

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<sup>20</sup> See <http://www.epa.gov/ocr/faq-adrt6.htm> (soon to be under revision.)

<sup>21</sup> OCR will ensure that one of the terms articulated by the mediator is that the complainant and recipient acknowledge that the finalization of the ADR Resolution Agreement will result in the full resolution of the complaint and that OCR will issue a letter closing the complaint.

### **Section 3.12      Informal Resolution Process in General**

After acceptance of a complaint, and at any point during the investigation, OCR or the recipient may seek to informally resolve complaints of discrimination. Informal Resolution occurs between OCR and the recipient.<sup>22</sup> OCR will seek the appropriate DCROs' engagement and assistance in the Informal Resolution process to ensure prompt, effective, and efficient case resolution. *See also* Section 3.13. The EPA's nondiscrimination regulations allow OCR to pursue informal resolution wherever practicable. [40 C.F.R. 7.120\(d\)\(2\)](#). The term "informal resolution" refers to any resolution of complaint allegations prior to the issuance of a finding of compliance or noncompliance. Informal Resolution agreements must be in writing, set forth the specific steps the recipient has agreed to take and any specific monitoring requirements and be signed by the Director of OCR or designee and an official with legal authority to bind the recipient.<sup>23</sup>

### **Section 3.13      Engagement with Complainants and Recipients during Informal Resolution**

OCR will seek the appropriate DCROs' assistance in the Informal Resolution process to ensure prompt, effective, and efficient case resolution. If resolution discussions are occurring between OCR and the recipient, OCR will use its discretion, when appropriate, to engage complainants who want to provide input on potential resolution issues. OCR will determine, based on its enforcement discretion, when such engagement may occur during the process. For instance, in appropriate cases, OCR may request and consider the complainant's input on potential resolution issues and may forward the suggested resolution issues to the recipient for further discussion with OCR.<sup>24</sup> OCR may undertake the gathering of such additional information, in appropriate cases, because the information could help it evaluate whether informal resolution is in the agency's best interest.<sup>25</sup>

In addition, depending on the complaint, OCR may use its enforcement discretion to seek and consider the complainant's input on potential terms of a resolution agreement between OCR and the recipient.<sup>26</sup>

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<sup>22</sup> Unlike ECR, which occurs between the complainant and the recipient. *See* Section 3.5.

<sup>23</sup> Settlement after a finding of non-compliance is referred to as a "voluntary compliance agreement." The required elements of voluntary compliance agreements are in Section 4.9.

<sup>24</sup> *See generally* EPA, *Roles of Complainants and Recipients in the Title VI Complaints and Resolution Process* (May 4, 2015), <http://www2.epa.gov/ocr/epas-title-vi-policies-guidance-settlements-laws-and-regulations>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

**Section 3.14**      **Informal Resolution Agreement Reached During an Investigation**

Allegations and issues under investigation may be resolved at any time during the investigation prior to the issuance of findings if the recipient expresses an interest in resolving the allegations and issues informally independently and OCR determines that it is appropriate to resolve them with an informal resolution agreement, or at OCR's offering of informal resolution. OCR will seek the appropriate DCROs' engagement and assistance in the Informal Resolution process to ensure prompt, effective, and efficient case resolution.

In consultation with the appropriate DCRO(s), OCR will prepare a proposed informal resolution agreement. The proposed resolution agreement will be shared with the recipient for consideration. From the date that the proposed informal resolution agreement is shared with the recipient, OCR and the recipient will have a period of 60 calendar days within which to reach final agreement. During the negotiations period (which may be less than 60 calendar days, at the discretion of OCR), OCR may suspend its investigation of the case. This 60-day period for suspension of the investigation in order to conduct negotiations cannot be restarted but may be extended at any time by OCR if a recipient(s) negotiates in good faith and an agreement is likely to be reached. If negotiations are successful, OCR will close the case in accordance with Section 3.16. If negotiations are unsuccessful, OCR will re-open the case in accordance with Section 3.17.

OCR will monitor the implementation of the agreement until the recipient has fulfilled the terms of the agreement. *See* Chapter 6. If a recipient fulfills the terms of the agreement, OCR will close its monitoring of the case and close the case file in accordance with Section 6.4. If a recipient fails to fulfill the terms of the agreement, OCR will reopen the investigation pursuant to Section 3.17.

**Section 3.15**      **Informal Resolution Agreement Reached After the Completion of an Investigation but Prior to the Issuance of Findings**

Allegations and issues under investigation may be resolved after the completion of an investigation but prior to the issuance of findings if the recipient expresses an interest in resolving the allegations and issues informally and OCR determines that it is appropriate to resolve them with an informal resolution agreement. OCR will seek the appropriate DCROs' collaboration, input, and assistance in the Informal Resolution process to ensure prompt, effective, and efficient case resolution.

For cases with allegations and issues that have been investigated but a finding has not been issued, OCR will prepare a Statement of the Case (including a proposed resolution agreement). The Statement of the Case must set forth:

- A statement of OCR's jurisdictional authority, including recipient status and the statutory basis for the investigation.
- An explanation of the pertinent legal standard(s).
- A statement of each allegation(s) and issue(s) investigated to date supported by any necessary explanation or analysis of the evidence.

- The outstanding areas that OCR would have to investigate in order to reach a determination regarding compliance.
- The date of the recipient's expression of interest in resolving the complaint.
- OCR's basis for entering into the resolution agreement.
- An explanation of how the terms of the agreement are aligned with the allegations and issues investigated and are consistent with applicable law and regulation(s).

The Statement of the Case must address all of the allegations and issues proposed for resolution, as well as any other allegation(s) or issue(s) that will be resolved by other means. A copy of the resolution agreement will be included with the resolution letter.

From the date that the proposed terms of the resolution agreement are shared with the recipient, OCR and the recipient will have a period of 60 calendar days within which to reach final agreement. If after 60 days OCR and the recipient cannot reach a mutually acceptable informal resolution agreement, OCR will prepare to issue a letter of findings. *See* Section 4.7.

OCR will monitor the implementation of the agreement until the recipient has fulfilled the terms of the agreement. If a recipient fulfills the terms of the agreement, OCR will close its monitoring of the agreement and close the case file in accordance with Chapter 6. If a recipient fails to fulfill the terms of the agreement, OCR will prepare a letter of findings and prepare for possible enforcement. *See* Section 4.7.

### **Section 3.16      When ECR, ADR or Informal Resolution is Achieved**

When a recipient(s) enters into an agreement through any informal resolution avenue (*e.g.* ECR, ADR or Informal Resolution) OCR will address the final agreement in a resolution letter to both the complainant(s) and the recipient(s). OCR will also seek the appropriate DCROs' engagement and assistance in the process to ensure prompt, effective, and efficient case resolution. This letter may or may not set out any major aspects of the agreement as appropriate. For Informal Resolution reached between OCR and the Recipient, the Informal Resolution Agreement will always accompany the Resolution letter. After a Resolution Agreement is in place, OCR will monitor the recipient pursuant to Chapter 6.

### **Section 3.17      When Informal Resolution or ADR is not Achieved**

OCR will monitor the Informal Resolution and ADR process to ensure the investigation resumes in a prompt manner in the event that the Informal Resolution or ADR is unsuccessful. *See* Chapter 4. If OCR has sufficient evidence to support a letter of findings on some or all of the allegation(s) it may issue the letter of finding(s) when Informal Resolution or ADR is determined to be unsuccessful. *See* Section 4.7. If an agreement has not been reached, OCR will resume its investigation if it had been suspended. *See* Section 3.10.

## CHAPTER 4 INVESTIGATION AND VOLUNTARY COMPLIANCE

This Chapter discusses the steps involved in completing an investigation of a complaint of discrimination, the issuance of a letter of findings, and the process of seeking voluntary compliance. OCR will ensure that investigations are legally sufficient and that they are dispositive of the issues accepted for investigation.

### Section 4.1      Case Planning

As discussed in Chapter 2, OCR will create a Strategic Case Management Plan for all complaints acknowledged pursuant to Section 2.1 and outline processing goals or expectations for ensuring timely and effective processing of cases, particularly within the first 90-calendar days after receipt of complaints. *See* Section 2.3; *see also* Section 8.1.

Case planning will begin as early as possible, will involve the DCROs, and continue throughout the duration of every case with adjustments made as necessary to ensure high quality decisions, prompt investigations and efficient use of OCR resources. The scope of OCR's investigation and resolution activities will depend upon the particular issues(s) accepted for investigation and applicable legal standards.

Planning documentation should be organized so that it can be readily located in the case file. All investigative planning activities will address:

- Required action(s) to achieve compliance, including determining whether it is appropriate to obtain interim relief for the complainant. If interim relief is appropriate, as soon as OCR identifies the need for such relief, OCR will contact the recipient as early as possible to secure it.
- Dates for completion of specific actions.
- Verification/reporting requirements (*e.g.* a description of specific data, documentation and other needed information).
- Efficient resource use, including investigation methods used by recipients to track and evaluate their compliance with their legal responsibilities (*e.g.*, climate surveys and other self-assessment tools), individual interviews, onsite visits, use of surveys, where appropriate, to obtain information from a large number of witnesses.

OCR will document its efforts to obtain data from the complainants and the recipient. *See* Sections 1.4 and 6.3.

When during the course of the investigation of a complaint, OCR identifies new compliance concerns involving unrelated issues that were not raised in the complaint or issues under investigation, OCR may follow up on those issues and address them within the resolution of the original complaint and through the resolution letter and voluntary compliance agreement, inform the parties of the concerns and provide technical assistance, consider the compliance concerns for a possible compliance review, or any other action in its enforcement discretion. In consultation with the appropriate DCRO(s), OCR will inform the recipient of any "new compliance concerns" and

OCR's intent to pursue those issues. Additionally, if OCR identifies non civil rights issues relating to compliance with environmental law (s), OCR will inform the relevant DCRO(s) and EPA office.

## **Section 4.2**      **Investigation Plan**

Complaint investigations and resolutions should be preceded by planning, and the approach should be developed based on the nature and complexity of the issues involved. All Investigation Plans (IP) should set out the specific allegations to be resolved and, if appropriate, the expected internal time frames to guide the investigator or investigative team. The extensiveness of an IP depends on the complexity of the issues involved. The basic IP will help the investigator focus on the principle issues to be explored in the course of the investigation, as well as the sources of evidence available to resolve them.

At a minimum, the IP should include the following:

- (1) Jurisdictional information;
- (2) Identification of discrimination 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, including interviews, 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);
- (8) Statement of likely or enunciated recipient responses and a description of the evidence required to test their validity; and,
- (9) A determination whether additional information is needed from a recipient and whether OCR will issue Request(s) for Information pursuant to Section 4.3 in consultation with the appropriate DCRO(s).

OCR will also seek the appropriate DCROs' input, engagement and assistance in the process to ensure prompt, effective, and efficient case resolution.

Generally, if an IP has been developed, OCR will not release the IP to the complainant or the recipient during the pendency of the investigation.

## **Section 4.3**      **Request for Information**

If additional information is needed from a recipient or complainant, OCR will prepare and issue a Request(s) for Information (RFI). The RFI will include, at a minimum, (1) a clear description of the additional information being requested of the recipient(s)/complainant(s) in light of the issues under investigation, and (2) specific timeframes for recipient's/complainant's response to the RFI.

## **Section 4.4**      **Investigation Report**

An Investigation Report (IR) may be developed when a case(s) undergoes a full investigation and findings are made. The IR is a detailed and logical document that (1) sets forth all facts pertinent to the case, (2) analyzes those facts in light of the complainant's allegation(s) and applicable legal theories, and (3) recommends a determination as to the validity of the allegation(s) based on that analysis. OCR will also seek the appropriate DCROs' engagement and assistance in developing an IR, to ensure prompt, effective, and efficient case resolution.

Generally, if an IR has been developed, OCR will not release the IR to the complainant or the recipient during the pendency of the investigation.

#### **Section 4.5**      **Resolution after an Investigation Is Completed**

Generally, allegations under investigation may be resolved informally in several ways, as also discussed in Chapter 3. Where OCR has completed the investigation and if, in consultation with the appropriate DCRO it determines that a post-investigation informal resolution agreement is not appropriate, OCR will prepare to issue a letter of findings.

Note that a "mixed resolution" may be appropriate for complaints with multiple allegations and issues. A "mixed resolution" occurs where the investigation thus far has found any or all of the following: (1) sufficient evidence to find a violation with regard to some allegations and issues, (2) insufficient evidence to find a violation with regard to some allegations and issues, and/or (3) some allegations and issues that are appropriate to resolve prior to the conclusion of the investigation. The letter that OCR issues in such a "mixed resolution" case must state the allegations and issues for which OCR has made a finding(s) (either violation or insufficient evidence), state OCR's finding(s) and the basis therefor, and must state the allegations and issues that are being resolved prior to the conclusion of the investigation.

#### **Section 4.6**      **Investigative Determination**

At the conclusion of the investigation of all allegations and issues, OCR will determine, using a preponderance of the evidence standard, whether:

- There is insufficient evidence to support a conclusion of noncompliance.
- The preponderance of evidence supports a conclusion of noncompliance.<sup>27</sup>

OCR will issue a letter of finding(s) to the complainant(s) and recipient(s) explaining the reason(s) for its decision.

##### (1) Insufficient Evidence Determination

When OCR determines that the preponderance of the evidence does not support a conclusion that the recipient failed to comply with applicable regulations, OCR may issue a letter of insufficient evidence to the complainant(s) and recipient(s) explaining the reasons for its decision. *See* Section 4.7

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<sup>27</sup>A preponderance of evidence means that the version of facts alleged is **more likely than not** the correct version.

## (2) Non-Compliance Determination

When OCR determines that the preponderance of the evidence supports a conclusion that the recipient failed to comply with applicable regulation(s), in addition to the Statement of the Case, OCR may prepare a letter of finding(s), and a proposed voluntary compliance agreement. The Statement of the Case must set forth:

- A statement of OCR's jurisdictional authority, including recipient status and the statutory basis for the investigation;
- An explanation of the pertinent legal standard(s);
- A statement of each allegation and issue investigated and the findings of fact for each, supported by any necessary explanation or analysis of the evidence on which the findings are based;
- Conclusions for each allegation and issue that reference the relevant facts, the applicable regulation(s), and the appropriate legal standards;
- OCR's basis for entering into the voluntary compliance agreement; and
- An explanation of how the terms of the agreement are aligned with the allegations and issues investigated and are consistent with applicable law and regulation(s).

### **Section 4.7**      **Insufficient Evidence or Non-Compliance Letters of Finding(s)**

In general, a letter of finding(s) is developed after an investigation is conducted and may set forth conclusions of law and facts per OCR's investigation. OCR will also seek the appropriate DCROs' engagement and assistance in the process to ensure prompt, effective, and efficient case resolution. The letter may include, as appropriate for the type of closure:

- A statement of allegation(s) and issue(s) in the case;
- A statement of OCR's jurisdictional authority, including recipient status and the statutory basis for the investigation;
- A statement of the findings of fact for each, allegation(s) and issue(s) supported by any necessary explanation or analysis of the evidence on which the findings are based;
- When negotiations have resulted in an agreement pursuant to Section 3.12 (Informal Resolution), a statement that, when fully implemented, the voluntary compliance agreement will address all of OCR's compliance concerns and that OCR will monitor the implementation of the agreement until the recipient complies with terms of the agreement pursuant to Chapter 6. The letter will include a copy of the agreement;
- When negotiations have not resulted in an agreement, a description of OCR's unsuccessful attempts to resolve the complaint;
- Conclusions for each allegation and issue that reference the relevant facts, the applicable regulation(s), and the appropriate legal standards;
- Notice that the letter of findings is not intended and should not be construed to cover any other issue regarding the recipient's compliance;
- Notice of the time limit on OCR's resolution process and the consequence of failure to reach agreement;
- A description of OCR's unsuccessful attempts to resolve the case;

- A statement of the Recipient’s right to request a hearing within 30 calendar days by an Administrative Law Judge, pursuant to [40 C.F.R. § 7.130\(b\)](#);
- A statement that limits the scope of the decision to (1) the particular applicant or recipient and (2) the particular program, activity, or part of the applicant/recipient, in which the discrimination was found.

#### **Section 4.8      Voluntary Compliance Agreements**

A voluntary compliance agreement to address a finding of discrimination must include action steps that, when implemented, will remedy both the individual discrimination at issue as well as any systemic discrimination. OCR will develop a draft voluntary compliance agreement to share with the appropriate DCRO(s) for prompt comment and input. In consultation with the appropriate DCRO(s), OCR will contact the recipient and attempt to secure the recipient’s willingness to negotiate a voluntary compliance agreement. In addition, OCR will notify the complainant that it intends to negotiate a voluntary compliance agreement.

##### **(1) Timeframes and Procedures for Negotiations**

After receiving a finding of noncompliance, the recipient will have 50 calendar days to agree to a voluntary compliance agreement or submit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended by OCR.<sup>28</sup>

If the recipient does not take one of these actions within 50 calendar days after receiving the preliminary findings, OCR shall send in 14 calendar days a formal written determination of noncompliance to the recipient and copies to the DCRO, the Award Official, and Department of Justice’s Assistant Attorney General.<sup>29</sup>

The recipient will have 10 calendar days from receipt of the formal determination of noncompliance in which to come into voluntary compliance. If the recipient fails to meet this deadline, OCR will issue a Notice of Impending Enforcement Action that states the recipient’s refusal to enter into a voluntary compliance agreement and provides notice that EPA will commence enforcement action immediately to terminate or refuse to award or to continue financial assistance or to refer the matter to the Department of Justice for judicial enforcement.<sup>30</sup>

#### **Section 4.9      Guidelines for Voluntary Compliance Agreements**

The complaint will be considered resolved, under monitoring pursuant to Chapter 6, and the recipient deemed “compliant” when the recipient enters into an agreement after negotiating with OCR on terms that, when fully and effectively implemented, will address all of OCR’s compliance concerns and/or the identified violations. A copy of the agreement will be included with the resolution letter or letter of finding(s).

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<sup>28</sup> See [40 CFR § 7.115\(d\)](#).

<sup>29</sup> See *id.*

<sup>30</sup> See [40 CFR § 7.130 \(a\)](#).

Where the settlement is memorialized through an exchange of letters or other written communications, each of the below elements must be satisfied.

Voluntary Compliance Agreements:

- Must be signed by a person with authority to bind the recipient; and
- Must include:
  - Specific acts or steps the recipient will take to resolve compliance issues;
  - Dates for implementing each act or step;
  - Dates for submission of reports and documentation;
  - Where appropriate, language requiring submission of documents and/or other information or actions for OCR's review and approval, and timeframes for their submission;
  - Timeframes requiring the recipient to implement what OCR has approved, and language requiring documentation verifying implementation; and
  - The following statements of principles:
    - The recipient understands that by signing the Agreement, it agrees to provide data and other information in a timely manner. Further, the recipient understands that, during the monitoring of the Agreement, OCR may visit the recipient, interview staff, community members, and knowledgeable persons, and request such additional reports or data as are necessary for OCR to determine whether the recipient has fulfilled the terms of the Agreement and complies with the statute(s) and regulations that were at issue in this case;
    - The recipient understands that OCR will not close the monitoring of the Agreement until such time that OCR determines that the recipient has fulfilled the terms of the Agreement; and
    - The recipient understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement or judicial proceedings to enforce the Agreement, OCR shall give the recipient written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

## CHAPTER 5 COMPLIANCE REVIEWS

All federal agencies are required to maintain an effective program of post-award compliance reviews. *See* [28 C.F.R. § 42.407\(c\)](#). A compliance review is an OCR-initiated investigation of a particular aspect of an EPA recipient's programs or activities to determine compliance with the civil rights laws enforced by OCR. OCR's External Compliance Strategic Plan has prioritized the enhancement of an external compliance program through proactive compliance reviews.

In addition to the regulations implementing Title VI that require OCR to investigate complaints that are filed with the agency, the regulations specify that OCR may initiate "periodic compliance reviews" to assess the practices of recipients to determine whether they comply with the Title VI regulations. *See* 40 C.F.R. §§ [7.110](#), [7.115](#). This regulatory provision is incorporated by reference in the regulations implementing other statutes enforced by OCR. *See* [40 C.F.R. § 5.605](#).

The compliance review regulations afford OCR discretion to determine the substantive issues for investigation and the number and frequency of the investigations.<sup>31</sup> To address issues of strategic significance in civil rights areas, OCR will identify, plan, and implement a docket of compliance reviews in consultation with the appropriate DCROs. In selecting specific recipients for compliance reviews, OCR will consider a number of factors, including statistical data, prior complaints, reports by other EPA offices, information shared by other federal agencies, and other specific and reliable information from communities and/or sources, which further our strategic goals. OCR's objective will be to engage early and often with recipients of federal assistance to collaboratively identify resolution approaches.

### Section 5.1      Post-Award Compliance Reviews

The agency may periodically conduct reviews of any recipient's programs or activities to ensure compliance with the nondiscrimination laws enforced by OCR. After selecting a recipient for review, OCR will inform the recipient of the nature of and schedule for review and its opportunity to make a written submission responding to, rebutting, or denying the issues raised in the review.<sup>32</sup>

These compliance reviews may include information and data requests. They may also include on-site reviews when the EPA has reason to believe that discrimination may be occurring in those programs or activities. *See* [40 C.F.R. § 7.115](#).

The investigation and resolution options and procedures identified throughout the CRM will be utilized for compliance reviews, as appropriate. *See* Chapter 2, Chapter 3, Chapter 4, and Chapter

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<sup>31</sup> "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 applicable. The Court considered three factors: (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 target of the search. *Id.* at 101." *See* DOJ, Title VI Legal Manual, 78-79 (Jan 1, 2001), available at <http://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf>.

<sup>32</sup> *See* [40 CFR § 7.115\(b\)](#).

6. The “initiation date” for the purposes of post-award compliance reviews is the date of the letter notifying the recipient of the compliance review.

## **Section 5.2      Pre-Award Compliance Reviews**

Additionally, the EPA may conduct pre-award compliance reviews if it deems the review to be appropriate. Within EPA’s application processing period, it will determine whether the applicant complies with non-discrimination regulations pertaining to recipients of financial assistance. *See* [40 C.F.R. § 7.110](#). To obtain the information necessary to make that determination, the EPA requires applicants to submit notice of any pending lawsuits alleging discrimination, any civil rights compliance reviews regarding the applicant conducted during the two-year period before the application, the name and title of its compliance coordinator, and a copy of the applicant’s grievance procedures, if any. *See* [40 C.F.R § 7.110\(a\)](#). In addition, applicants may be required to submit any other information that the EPA determines is necessary to make the pre-award compliance determination. *See* [EPA Form 4700-4](#).

## **CHAPTER 6 MONITORING OF INFORMAL RESOLUTION AGREEMENTS AND VOLUNTARY COMPLIANCE AGREEMENTS**

Effective, and vigorous case resolution monitoring is essential to ensuring compliance with civil rights laws. OCR will promptly conduct its monitoring activities. OCR will closely monitor the recipient's implementation of the informal resolution agreement or voluntary compliance agreement to ensure that the commitments made are implemented. OCR may conduct onsite visits as part of its monitoring. OCR may publicize these visits in order to obtain information from the public concerning the recipient's implementation of the voluntary compliance agreement. OCR may also conduct individual interviews and focus groups as part of the onsite monitoring activities. *See* Section 6.1. OCR will plan all monitoring activities to ensure that it results in compliance with the resolution agreement. OCR will not cease monitoring an informal resolution agreement or voluntary compliance agreement (or associated cases) until such time that OCR determines that the recipient has fulfilled the terms of the informal resolution agreement or voluntary compliance agreement.

### **Section 6.1 Respond to Monitoring Reports and Verify Recipient's Implementation**

OCR will promptly acknowledge receipt of interim and final monitoring reports. OCR will evaluate the report and issue an appropriate response (*e.g.* that OCR determines actions taken are sufficient or insufficient under the agreement). OCR must obtain sufficient information to determine whether the commitments made by the recipient have been implemented consistent with the terms of the voluntary compliance agreement. Depending on the nature of the agreement, OCR may verify implementation and/or remedial actions by reviewing reports, required documentation, and/or other information submitted by recipients; interviewing the recipients and/or knowledgeable persons; and/or conducting site visit(s). OCR will also seek the appropriate DCROs' engagement and assistance in the process to ensure prompt, effective, and efficient verification of recipient implementation.

### **Section 6.2 Implementation Problems**

OCR will promptly provide written notice to the recipient of any deficiencies with respect to implementation of terms of the agreement, and will promptly request appropriate action to address such deficiencies. When OCR has determined that a recipient has failed to comply with the agreement or any of the terms thereof for reasons that do not justify modification of the agreement, OCR will take prompt action, enforce the agreement, and ensure that the recipient complies.<sup>33</sup>

### **Section 6.3 Modifications of Agreements**

#### **(1) Changed Circumstances Affecting Agreements**

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<sup>33</sup> Note that failure or refusal to implement an Informal Resolution Agreement will result in OCR's re-opening the case investigation and issuing a finding when appropriate. The failure or refusal to implement a Voluntary Compliance Agreement may result in enforcement action against the recipient. *See* Chapter 7.

OCR may agree to modify or terminate an informal resolution or voluntary compliance agreement when it learns that circumstances have arisen that substantially change, fully resolve, or render moot some or all of the compliance concerns that were addressed by the voluntary compliance agreement. OCR may also modify the agreement in response to changes in controlling case law, statutes, regulations, or agency policy. OCR will also consult appropriate DCROs in the process to ensure prompt, effective, and efficient verification of changed circumstance.

(2) New Compliance Issues

OCR may address a new compliance issue(s) identified for the first time during monitoring by providing technical assistance or considering the issue(s) as factors to initiate a compliance review. *See* Chapter 5.

(3) Approval of Modifications

OCR must approve modifications to the agreement (*e.g.*, requests to change the substance of any provision in the agreement, requests for extension of time to submit a report or to complete a required action). Approved modifications must be set forth in writing and appended to the original agreement. Requests for modification must be documented in the case file. The complainant will be notified in writing of approved modification(s) to the substance of the agreement and extension(s) of the timeframe within which to complete a required act(s).

**Section 6.4**      **Conclusion of Monitoring**

OCR will conclude the monitoring of a case when it determines that the recipient has implemented the terms of the informal resolution agreement or voluntary compliance agreement, including any subsequent approved modifications to the agreement, and complies with the statute(s) and regulation(s) at issue. OCR will also seek the appropriate DCROs' engagement and assistance in the process to ensure prompt, effective, and efficient verification of effective implementation. The recipient and the complainant will be promptly notified in writing of this determination.

## CHAPTER 7 INITIATION OF ENFORCEMENT ACTION

If a recipient continues to refuse to enter voluntary compliance, OCR may either: (1) initiate administrative proceedings to suspend, terminate, or refuse to grant or continue and defer financial assistance from the recipient; (2) refer the case to DOJ for judicial proceedings to enforce any rights of the United States under any of its laws; or (3) use any other means authorized by law. Both of these options are available under [40 C.F.R. § 7.130](#).

### **Section 7.1**      **Initiate Administrative Proceedings Where Appropriate**

When negotiations do not result in a voluntary compliance agreement after the Notice of Impending Enforcement Action, where appropriate, OCR will initiate an administrative enforcement proceeding. OCR will also seek the appropriate DCROs' engagement and assistance in the process to ensure prompt, effective, and efficient administrative enforcement. OCR will notify the applicant or recipient of a finding of noncompliance, the action proposed to be taken, and the opportunity for an evidentiary hearing by registered mail, return receipt requested. *See* [40 C.F.R. § 7.130](#).

### **Section 7.2**      **Refer To DOJ Where Appropriate or Use Any Other Means Authorized By Law**

When negotiations do not result in a voluntary compliance agreement after the Letter of Impending Enforcement Action, where appropriate, OCR will issue a letter to the recipient stating that the case will be referred to DOJ. Alternatively, the EPA may also use any other means authorized by law to obtain compliance. *See* [40 C.F.R. § 7.130](#). OCR will also seek the appropriate DCROs' engagement and assistance in this process.

### **Section 7.3**      **Enforcement for Denial of Access<sup>34</sup>**

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.

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<sup>34</sup> *See* [40 C.F.R. § 7.85\(f\)](#).

Where the recipient has refused to provide OCR access orally, in writing, in person, over the telephone, or through use of other media, OCR will attempt to ascertain the exact basis for the recipient's refusal and explain OCR's authority to obtain the information.. Where attempts to persuade the recipient to provide access have failed, OCR will collaborate with the appropriate DCRO(s) to develop a letter to the recipient that sets forth in detail the evidence (*e.g.*, documents, data, witnesses, and other information) to which the recipient denied OCR access and specifies the efforts that OCR has made to obtain the evidence. If the recipient does not voluntarily provide OCR with access to the requested evidence within 30 calendar days of OCR's issuance of the letter to recipient, OCR will issue a Non-Compliance Letter of Finding(s). *See* Section 4.7. If the recipient continues to deny OCR access to the requested evidence, OCR will issue a letter to the recipient stating OCR's intention to use any other means authorized by law to achieve compliance, including initiating administrative proceedings or referral to DOJ for judicial enforcement. OCR will consult the appropriate DCROs to ensure prompt, effective, and efficient resolution of denial of access enforcement actions.

#### **Section 7.4      Enforcement for Failure to Comply with OCR Compliance Agreement**

Where the recipient has failed to comply with the terms of a voluntary compliance agreement, OCR will issue a formal Non-Compliance Letter of Findings. If the recipient does not come into compliance after issuance of the Letter of Findings, OCR will initiate enforcement action. OCR will also seek the appropriate DCROs' engagement and assistance in the process to ensure prompt, effective, and efficient verification that a recipient failed to comply with the terms of a voluntary compliance agreement.

## CHAPTER 8 APPENDICES

### Section 8.1 Strategic Case Management Plan

Action Item	Questions/Considerations	Offices Involved	Date Completed / Confirmed	Target Timeframes <sup>1</sup>
<b>I. CASE MANAGEMENT STEPS</b>				
<b>Acknowledge Receipt of Correspondence and Proceed to Evaluation of Correspondence. (See Section 2.1)</b>	Refer to case management requirements in CRM.	OCR		1-5 Business Days after receipt
<b>Initiate Case Management/Tracking Procedures</b>	Enter all appropriate case management information into EXCATS including all required documents (use established G Drive for certain investigative documents if EXCATS document management component has not been completed.) <sup>2</sup> Follow OCR hard copy case file management process in accordance with Section 2.2.	OCR		1-5 Business Days after receipt
<b>Immediately Notify Appropriate DCROs of Incoming Correspondence and Evaluation of Correspondence.</b>	Request appropriate regional and program office points of contact.	OCR, DCRO(s), Region/ Program Office		1-10 Business Days after receipt

<sup>1</sup>All target timeframes in this document are aspirational. They represent goals OCR will aim to achieve in the majority of cases. However, in setting these targets or goals, OCR recognizes that unexpected complexities and exigencies may arise and lengthen the time needed for effective case processing. It should be noted that the goals or targets are written in light of the notice of proposed rulemaking published to be published in the Federal Register and posted informally on OCR’s Internet Website on December 1, 2015. However, in the interim this document may still assist case managers in promptly, efficiently and effectively taking steps to resolve complaints in the early days, although it is recognized that until the NPRM becomes final, case managers will adjust the target timeframes to be consistent with the current regulations.

<sup>2</sup> The External Compliance Activity Tracking System (EXCATS) is an automated case, activity and document management system which is used to track and manage all OCR discrimination cases. DCROs will have viewer rights and can access the EXCATS in order to obtain status, monitor progress of cases, etc.

<b>II. JURISDICTIONAL REVIEW STEPS</b>				
<b>Action Item</b>	<b>Questions/Considerations</b>	<b>Offices Involved</b>	<b>Date Completed / Confirmed</b>	<b>Target Timeframes</b>
<b>Conduct Jurisdictional Review to Determine Whether 40 CFR § 7.120 Requirements are Met<sup>3</sup> (See Section 2.4)</b>	Is the complaint in writing?	OCR, OGC		1-45 Business Days after receipt
	Does the complaint allege a violation of 40 CFR Parts 5 or 7?	OCR, OGC		1-45 Business Days after notification of receipt
	Does the complaint allege a violation by a recipient of or applicant for EPA financial assistance?	OCR, OGC		1-45 Business Days after receipt

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<sup>3</sup> OCR will seek input from appropriate DCROs in making a decision on whether to refer, reject, or accept a complaint. (See Chapter 2).

	Was the complaint filed within 180 days of alleged discriminatory act?  Is there evidence to support waiver of the 180-day period for filing timely complaint on any of the grounds listed below? <sup>4</sup>	OCR, OGC		1-45 Business Days after notification of receipt
<b>Action Item</b>	<b>Questions/Considerations</b>	<b>Offices Involved</b>	<b>Date Completed / Confirmed</b>	<b>Target Timeframes</b>
<b>In general, OCR will accept, reject, or refer a complaint after considering the four jurisdictional criteria as described in the regulation (see 40 C.F.R. § 7.120). However, if OCR obtains certain information from DCROs, the complainant, the potential recipient, or other credible source suggesting that investigating the complaint is</b>	Such prudential factors include: <ul style="list-style-type: none"> <li>The allegation is not ripe for review because it is speculative in nature and anticipates future events that may or may not unfold as outlined in the complaint, so a meaningful review of the allegation cannot be conducted at the time OCR receives the complaint.</li> </ul>	DCRO, OCR, OGC		1-45 Business Days after receipt

<sup>4</sup> The following may be grounds for waiver:

- The complainant could not reasonably be expected to know the act was discriminatory within the 180-day period, and the correspondence was filed within 60 calendar days after the complainant became aware of the alleged discrimination (Note that lack of previous awareness of OCR or the civil rights laws enforced by OCR is not a basis for a waiver).
- The complainant was unable to file a correspondence because of an incapacitating illness or other incapacitating circumstances during the 180-day period, and the allegation was filed within 60 calendar days after the period of incapacitation ended.
- The complainant filed a correspondence alleging the same discriminatory act within the 180-day period with a federal, state, or local civil rights enforcement agency, and then the complainant filed a correspondence with OCR within 60 calendar days from the date on which the other agency issued a decision reflecting completion of its investigation. Additionally, if the complainant files a correspondence within 60 calendar days from the date of issuance of the decision by a state or federal court about the complainant’s allegations that was not a decision on the merits or settlement of the discrimination allegations. (Dismissal with prejudice is considered a decision on the merits.)
- The complainant filed, within the 180-day period, an internal grievance with the recipient of financial assistance, or a due process hearing, alleging the same discriminatory conduct that is the subject of the OCR complaint, and the complaint is filed no later than 60 calendar days after the internal grievance is concluded.

<p><b>unjustified for prudential reasons, OCR may, after verifying the information, reject a complaint as a result of the following prudential factors.</b></p> <p><i>(See Section 2.6)</i></p>	<ul style="list-style-type: none"> <li>The allegations are moot because OCR obtains credible information indicating that the allegations raised by the complaint have been resolved and there are no systemic allegations. In such a case, OCR will attempt to ascertain the apparent resolution. When OCR determines that there are no current allegations appropriate for further resolution, the complaint will be rejected.</li> </ul>	DCRO, OCR, OGC		1-45 Business Days after receipt
	<ul style="list-style-type: none"> <li>The same complaint allegations have been filed, are currently pending, and/or are already resolved 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 30 days of the completion of the other agency's action.</li> </ul>	DCRO, OCR, OGC		1-45 Business Days after receipt
<b>Action Item</b>	<b>Questions/Considerations</b>	<b>Offices Involved</b>	<b>Date Completed / Confirmed</b>	<b>Target Timeframes</b>
	<ul style="list-style-type: none"> <li>The same civil rights allegations have been filed by the complainant against the same recipient with state or federal court individually or through a class action. A complaint may be re-filed with OCR within 30 calendar days following termination of the court proceeding if there has been no decision on the merits or settlement of the</li> </ul>	DCRO, OCR, OGC		1-45 Business Days after receipt

	complaint civil rights allegations. (Dismissal with prejudice is considered a decision on the merits.)			
<b>DECISION: REJECT (Section 2.5), AND/OR REFER (Section 2.6) COMPLAINT ALLEGATIONS IF WARRANTED –NOTIFY REGION, AWARD OFFICIAL, AND APPROPRIATE OFFICES</b>				
<b>III. FOR ISSUES ACCEPTED FOR INVESTIGATION, ADDITIONAL STEPS PRIOR TO ISSUING ACCEPTANCE LETTER</b>				
<b>Draft Brief Desk Statement</b>	Clearly set forth the issues OCR will investigate and draft an appropriate public statement.	OCR, DCRO, OPA		1-45 Business Days after notification of receipt
<b>DECISION: ISSUE LETTER OF ACCEPTANCE (See Section 2.7)</b>				

Action Item	Questions/Considerations	Offices Involved	Date Completed / Confirmed	Target Timeframes
<b>Issue Letter of Acceptance</b>	With respect to letters of acceptance, the letter will notify <sup>5</sup> the recipient and complainants of issues accepted for investigation and give the recipient the opportunity, per the regulations, to make a written submission responding to, rebutting, or denying the allegations accepted from the complaint within 30 days from receipt of the notification letter.	OCR, DCROs, OGC		1-45 Business Days after notification of receipt
	Include ADR information as well as information about OCR’s willingness to consider informal resolution at any time during the investigation in the Acceptance Letter.	OCR, DCRO(s)		1-45 Business Days after notification of receipt
	Begin to Draft Investigation Plan (IP) to outline approach to complaint.	OCR, DCRO(s)		1-45 Business Days after notification of receipt
	Have the confidentiality requirements of 40 CFR § 7.120(e) been met generally and with respect to all materials for public distribution (e.g. Desk Statement)?	OCR, OGC		1-45 Business Days after notification of receipt
<b>IV. PRELIMINARY EVALUATION STEPS FOR ISSUES ACCEPTED FOR INVESTIGATION</b>				
<b>Conduct Early Case Planning (See Section 3.2).</b>	Identify point(s) of contacts in the Regional/Program offices.  Set regular schedule for case management team review and update IP every 30 days.	OCR		45-90 Business Days after receipt

<sup>5</sup> Notice to recipient of allegations, as well as offer to submit written rebuttal, should be included in the Acceptance Letter.

Action Item	Questions/Considerations	Offices Involved	Date Completed / Confirmed	Target Timeframes
<p><b>Other Factors to Consider After Opening an Investigation (See Section 3.4). If any of these factors apply, OCR may decide to close an allegation administratively.</b></p>	<p>These determinations may be applicable at any point during the investigation</p> <ul style="list-style-type: none"> <li>The allegation is not ripe for review because it is speculative in nature and anticipates future events that may or may not unfold as outlined in the complaint, so a meaningful review of the allegation cannot be conducted at the time OCR receives the complaint.<sup>6</sup></li> </ul>	<p>OCR, OGC</p>		<p>45-90 Business Days after receipt</p>
	<ul style="list-style-type: none"> <li>The allegations are moot because OCR obtains credible information indicating that the allegations raised by the complaint have been resolved and there are no systemic allegations. In such a case, OCR will attempt to ascertain the apparent resolution. When OCR determines that there are no current allegations appropriate for further resolution, the complaint will be closed administratively.</li> </ul>	<p>OCR, OGC</p>		<p>45-90 Business Days after receipt</p>
	<ul style="list-style-type: none"> <li>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</li> </ul>	<p>OCR, OGC</p>		<p>45-90 Business Days after receipt</p>

<sup>6</sup> This type of allegation is considered to be rejected without prejudice. The complainant may re-file within 60 days of a subsequent act or event that raises an allegation of discrimination.

	<p>process. The complainant should be advised that she or he may re-file within 30 days of the completion of the other agency's action.</p>			
	<ul style="list-style-type: none"> <li>The same civil rights allegations have been filed by the complainant against the same recipient with state or federal court individually or through a class action. A complaint may be re-filed with OCR within 30 calendar days following termination of the court proceeding if there has been no decision on the merits or settlement of the complaint civil rights allegations. (Dismissal with prejudice is considered a decision on the merits.) Where OCR has obtained sufficient evidence to support a finding under Section 4.6(1) (insufficient evidence) or Section 4.6(2) (non-compliance) with regard to any civil rights allegation(s) being investigated by OCR which are not before the court, OCR may not close the civil rights allegation(s), but may proceed in accordance with the appropriate provisions set forth in Section 4.6.</li> </ul>	<p>OCR, OGC</p>		<p>45-90 Business Days after receipt</p>
	<ul style="list-style-type: none"> <li>The complaint allegations are foreclosed by legally binding decisions of state or federal courts, adjudication decisions of the EPA, or by Department of Justice's or EPA's policy determinations regarding agency enforcement of nondiscrimination statutes.</li> </ul>	<p>OCR, OGC</p>		<p>45-90 Business Days after receipt</p>

	<ul style="list-style-type: none"> <li>• A complaint's allegations would be better resolved through a compliance review (<i>see</i> Chapter 5) or OCR has recently addressed or is currently addressing the same issues involving the same recipient in a compliance review or an OCR complaint.</li> </ul>	<p>OCR, OGC</p>		<p>45-90 Business Days after receipt</p>
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Action Item	Questions/Considerations	Offices Involved	Date Completed / Confirmed	Target Timeframes
	<ul style="list-style-type: none"> <li>The complainant withdraws the complaint after OCR has opened it for investigation, however where the complainant has alleged systemic violations, OCR may determine that it will continue the investigation notwithstanding the complainants withdrawal of the complaint. Moreover, where OCR has obtained sufficient evidence to support a finding of a violation with regard to any allegation(s), OCR will not close the allegation(s), but will proceed in accordance with the appropriate provisions set forth in Section 4.6.</li> </ul>	OCR		45-90 Business Days after receipt
	<ul style="list-style-type: none"> <li>OCR determines that its ability to complete the investigation is substantially impaired by the complainant’s loss of contact, death, or refusal to provide information that is reasonably accessible to the complainant and is necessary for investigation of the complaint. Generally, this subsection does not apply where the investigation raises systemic issues that warrant continuing the investigation.<sup>7</sup></li> </ul>	OCR		45-90 Business Days after receipt
	<ul style="list-style-type: none"> <li>OCR determines that another office or agency for investigation is a more appropriate forum for the allegations’ review.</li> </ul>	OCR		45-90 Business Days after receipt

<sup>7</sup> Include documentation in the case file of OCR’s efforts to contact the complainant by phone, in writing, or via electronic mail to request the necessary information and of the complainant’s refusal to provide information.

Action Item	Questions/Considerations	Offices Involved	Date Completed / Confirmed	Target Timeframes
<p><b>Determine whether ECR is appropriate. (See Section 3.5).</b></p>	<p>If yes to both of these questions, ECR may be appropriate.</p> <ul style="list-style-type: none"> <li>• Are there specific/discrete issues that involve individual remedies (<i>i.e.</i> not affecting a class of persons)?</li> <li>• Can those individual specific/discrete issues be addressed in full through ECR without affecting OCR’s ability to investigate or resolve the other issues raised in the complaint?</li> </ul> <p>If so, <i>see</i> Section 3.6</p>	<p>OCR, DCRO(s)</p>		<p>45-90 Business Days after receipt</p>
<p><b>Determine whether to offer ADR to Complainant and Recipient. (See Section 3.11).</b></p>	<p>Identify any existing information outside of the civil rights arena that might encourage recipient and complainant to explore ADR</p>	<p>OCR, OGC, DCRO(s)</p>		<p>45-90 Business Days after receipt</p>
	<p>Approach recipient and complainant to assess level of interest by each of the parties in engaging in ADR.</p>	<p>OCR, OGC, DCRO(s)</p>		<p>45-90 Business Days after receipt</p>
	<p>If Recipient and Complainant express interest in ADR, ask Alternative Dispute Resolution Law Office (ADRLO) to discuss ADR with recipient and complainant, provide additional information about the process, answer questions, etc., if appropriate.</p>	<p>OCR, OGC, ADRLO</p>		<p>45-90 Business Days after receipt</p>
<p><b>If Recipient and Complainant agree to engage in ADR, issue a letter to notify the parties that OCR is suspending the investigation. (See Section 3.11). If after the offer of ADR the recipient and complainant have not agreed to engage in ADR, revoke ADR offer and continue preliminary investigation. (OCR, OGC, DCRO(s))</b></p>				

Action Item	Questions/Considerations	Offices Involved	Date Completed / Confirmed	Target Timeframes
<p><b>Determine whether any information from either the recipient/complainant is needed to continue (See Section 4.3).</b></p>	<p>If additional information is needed from a recipient, or complainant, OCR will prepare and issue a Request(s) for Information (RFI). The RFI will include, at a minimum, (1) a clear description of the additional information being requested of the recipient(s) or complainant(s) in light of the issues under investigation, and (2) specific timeframes for recipient's/complainant's response to the RFI.</p>	<p>OCR, OGC, DCROs</p>		<p>45-90 Business Days after receipt</p>
<p><b>Consider whether to attempt Informal Resolution between Recipient and the EPA (See Section 3.12)</b></p>	<p>Consider engaging complainants for input regarding potential issues to address in Informal Resolution. See Section 3.13</p>	<p>OCR, OGC, DCROs</p>		<p>45-90 Business Days after receipt</p>
	<p>Contact point of contact(s) in the Regional/Program office to discuss available information and voluntary agreement terms that could contribute to informal resolution</p>	<p>OCR</p>		<p>45-90 Business Days after receipt</p>
	<p>Draft Informal Resolution Agreement. See Section 3.12.</p>	<p>OCR, OGC, DCROs</p>		<p>45-90 Business Days after receipt</p>
	<p>Contact Recipient to discuss Informal Resolution and if appropriate, share draft Informal Resolution Agreement.</p>	<p>OCR, OGC, DCROs</p>		<p>45-90 Business Days after receipt</p>
	<p>If the recipient agrees to enter into an Informal Agreement, draft an appropriate resolution letter. See, Section 3.14.</p>	<p>OCR, OGC, DCROs</p>		<p>45-90 Business Days after receipt</p>

Action Item	Questions/Considerations	Offices Involved	Date Completed / Confirmed	Target Timeframes
	Notify Complainants informally prior to issuing Resolution Letter.	OCR, OGC, DCROs		45-90 Business Days after receipt
	Issue Resolution Letter with signed, attached Resolution Agreement and close the investigation in light of the agreement. <i>See</i> , Section 3.16.			
<b>90 BUSINESS DAYS AFTER RECEIPT – COMPLETE JURISDICTIONAL REVIEW, PRELIMINARY RESOLUTION ATTEMPTS and PRELIMINARY INVESTIGATION</b> <i>See Chapter 2 &amp; Chapter 3</i>				
<b>CONTINUE INVESTIGATION OF ISSUES ACCEPTED FOR INVESTIGATION IN LIGHT OF EPA ORDERS 4700 AND 4701.</b> <i>See Chapter 1.</i>				
Identify and Convene, as appropriate, DCROs to investigate unresolved issues accepted for investigation.	As necessary, identify and convene a panel of DCROs and any relevant senior officials to inform of OCR’s investigation plan and proposed action; to provide background information; and keep panel apprised in the event the panel will be asked to participate in full investigation at later date.	OCR, DCROs		Post 90 Business Days after receipt
Consider whether there are any necessary point(s) of contacts for expert review	In consultation with DCROs/the panel, consider whether additional technical Expert resources and support, including staff for data analysis from EPA regional and/or program offices.	OCR, DCROs		
Continue to circulate the Investigation Plan (IP)	Update and circulate the IP every 30 days for DCRO input (IP updates should be at a minimum of every 30 days). <i>See</i> Section 4.2	OCR		
Determine whether any additional information from either the recipient/complainant is needed to continue	In consultation with DCROs, if additional information is needed from recipients and/or complainant, consider additional request for information letter. <i>See</i> Section 4.3	OCR, OGC, DCROs		

Action Item	Questions/Considerations	Offices Involved	Date Completed / Confirmed	Target Timeframes
Identify additional materials, information, data, or other sources to gather	If there is reasonable basis, schedule and conduct on-site visit if needed.	OCR, DCRO, OGC		
	Schedule and conduct interviews of witnesses, experts, and others if needed.	OCR, DCRO, OGC		
<p align="center"><b>AT ANY TIME DURING THE INVESTIGATION OCR SHALL SEEK INFORMAL RESOLUTION.</b></p> <p align="center"><b>WHERE INFORMAL RESOLUTION IS NOT VIABLE, CONTINUE THROUGH POST-ACCEPTANCE ACTIONS</b>  <i>See</i> CHAPTER 4, CHAPTER 6, AND WHERE APPROPRIATE, CHAPTER 7.</p>				

## **Section 8.2**      **EPA Orders 4700 (DCRO) And 4701 (Title VI Case Management Protocol)**

EPA Order 4700,  
DCROsEPA Order 4701  
Title VI Case Management

### (1) EPA Order 4700 (Deputy Civil Rights Officials)



**Identification Number:4700**

**Approval Date:            05/01/2013**

## **Deputy Civil Rights Officials**

### **I.      Purpose**

This order establishes the position of deputy civil rights official within each regional office and assistant administrator's office to serve as that office's primary point of accountability for assisting the Office of Civil Rights with effectively meeting the U. S. Environmental Protection Agency's civil rights responsibilities and goals. DCROs will, consistent with applicable laws, provide executive support in furthering the EPA's commitment to creating a workplace free of unlawful discrimination and implementing measures to prevent or remedy discrimination by recipients of agency financial assistance. This order establishes the procedures for designating DCROs and outlines the role of DCROs. No statement in this order relieves other agency officials, including career and appointed officials, line managers and other staff, of their responsibilities with respect to civil rights.

### **II.     Authority**

The authority to establish the position of the DCRO derives from the Administrator's authority to organize the work of the agency under 40 C.F.R. §§1.5(a), 1.23, Section 3 of Reorganization Plan No. 3, and Order 1110.2. The Administrator specifically authorized the establishment of DCROs in a decision memorandum produced by the EPA Executive Committee on Civil Rights and signed by the Administrator on April 13, 2012.

### **III.    Background**

In March 2011, Administrator Lisa P. Jackson appointed the Civil Rights Executive Committee, chaired by Deputy Administrator Bob Perciasepe, to recommend actions

necessary for building a model civil rights program at the agency. After extensive review of the program, the Civil Rights Executive Committee submitted a final report, *Developing a Model Civil Rights Program for the Environmental Protection Agency*, to the Administrator outlining the agency's commitment to strengthening civil rights, equal employment opportunities, diversity in the workplace and revitalizing the agency's implementation of external civil rights laws. The Administrator approved the report and recommendations on April 13, 2012. The Executive Committee highlighted the importance of engaging management from across the agency to successfully implement a model civil rights program, recognizing that the agency's civil rights program cannot solely be the responsibility of one office or program, but instead must reflect "One EPA" principles. To that end, the Executive Committee identified two recommendations for which formal orders were appropriate: to establish DCROs and to establish a Title VI Case Management Protocol. The Title VI Case Management Protocol is the subject of Order 4701.

The establishment of DCROs through this order advances the agency towards a model civil rights program wherein senior managers across the agency have an explicit role in, and share responsibility for, implementation of the agency's civil rights program and policies. This order does not, however, delegate any authorities that are formally delegated or assigned to the director of the Office of Civil Rights. The director serves as the principal advisor to the Administrator with respect to the agencywide equal employment opportunity program, affirmative employment programs, and external nondiscrimination program. As such, the director is tasked with providing sound and timely policy advice to the Administrator and other senior management officials on a wide range of issues including but not limited to Titles VI and VII of the Civil Rights Act of 1964, as amended; Title IX of the Education Act Amendments of 1973; Sections 501-504 of the Rehabilitation Act of 1973, as amended; Executive Order 11478; and a number of U.S. Equal Employment Opportunity Commission management directives. Nothing contained in this order changes or supersedes the director's authorities.

#### **IV. Mission**

DCROs in each program office and region will be accountable for implementing civil rights programs within their respective organizations, and will provide senior level involvement in the development of national strategies and policies pertaining to civil rights. As part of their ongoing responsibilities, DCROs will assure the participation of their organization in agency civil rights programs and initiatives including implementation of the Title VI Case Management Protocol established under Order 4701.

#### **V. Meeting Requirements and Calendar**

The OCR director may call meetings of the DCROs as appropriate, to be determined in consultation with DCROs. DCRO meetings should be held in conjunction with other senior management meetings, such as executive management council meetings. A subset of DCROs or their designees may be called upon by the director to participate in meetings called pursuant to order 4701. Based on their role in ensuring senior leadership

accountability in civil rights, DCROs also may be called upon to participate in other agency meetings involving issues or initiatives related to civil rights.

#### **VI. Appointment**

Within 30 calendar days of the issuance of this order each assistant administrator and regional administrator, the General Counsel, the chief financial officer and the chief of staff shall notify the OCR director of the selection of a DCRO for his/her respective organization. Within 60 calendar days of the issuance of this order, the AA or RA shall by memorandum to the director confirm the appointment of a DCRO for their organization, and shall confirm that the role of the DCRO as outlined in section IX of this order has been incorporated into the incumbent's position description. The role of the DCRO shall remain in the position description permanently; however, the AA/RA may, in consultation with the director, change the designation to another official within the organization and make necessary adjustments to position descriptions. Model language for DCRO performance agreements will be developed by the OCR director and brought before the agency's Executive Resources Board by the fourth quarter of FY 2013. The DCRO must have broad management authority to carry out civil rights programs and activities consistent with agency policy and directives within their organization, and must be a member of the career senior executive service.

#### **VII. Alternate Deputy Civil Rights Official**

When necessary, an alternate DCRO, who also must be a member of the career SES, may be appointed by the AA or RA to perform the DCRO role when, for example, the DCRO is recused from a matter or absent. If an ADCRO performs DCRO duties for an on-going or extended period of time, the official's position description should be amended to include the DCRO role as outlined in Section IX.

#### **VIII. Persons Acting in a DCRO Position**

Whenever a person is acting in a position that is designated as a DCRO whether by position, re-delegation or appointment, that person assumes the DCRO role. The DCRO designation resides in the position and therefore the role of DCRO is assumed by the incumbent of that position, even on an acting basis.

#### **IX. Role of the Deputy Civil Rights Officials**

DCROs have broad oversight authority within their respective office or region for implementation of the civil rights program consistent with agency policy and directives, recognizing that offices or regions may need different staffing profiles for some functions. For example, Equal Employment Opportunity counselors are needed in every region, but at headquarters EEO counselors report to OCR rather than individual program offices. DCROs will identify and/or request adequate funding and resources for civil rights work

and ensure their organizations have well-functioning policies, processes and management controls for:

1. Assuring that appropriate staff and expertise are available for their organizations to carry out an effective civil rights program including EEO counselors, alternate dispute resolution staff, special emphasis program managers and EEO officers.
2. Developing and implementing the Equal Employment Opportunity Commission's Management Directive 715 Action Plans for their offices and regions that promote equal employment opportunity in a manner consistent with the agency's MD 715 Report, promote diversity and inclusion, and address other issues as required. Ensuring that the goals and objectives are communicated to subordinate management officials.
3. Timely reporting of information for various civil rights and diversity related reports and data-calls including the Equal Employment Opportunity Commission's Management Directive 715.
4. Training civil rights staff consistent with EEOC or OCR policy, and meeting agencywide mandatory requirements for training managers and employees within their office or region *e.g.* Civil Rights EEO Training and the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002.
5. Promoting equal employment opportunity and assuring their organization carries out other responsibilities under the agency's civil rights program.
6. Incorporating appropriate EEO and civil rights language into performance agreements as required for managers and as necessary for certain other positions.
7. Facilitating informal EEO complaint resolution in conformance with Delegation 1-39, assuring the broad integration of well-functioning alternate dispute resolution approaches across the agency civil rights and employee relations activities and promoting the use of pre-complaint processes as a means of resolving EEO matters.
8. Effectively participating in and or leading activities including investigations for the purposes of implementing Order 4701, Title VI Case Management Protocol.
9. Effectively participating in the agency's implementation of external civil rights policies for financial assistance monitoring, compliance, grant reviews and other external civil rights laws activities consistent with the Order 4701.

#### **X. Coordination of EPA Civil Rights and Diversity Policies and Strategies**

DCROs will constitute a network of senior officials to provide advice and guidance to the director and other agency senior managers on the development of agencywide civil rights policies and

strategies. In addition, while DCROs have formal responsibilities associated with the agency's civil rights programs, the network also may provide informal advice and guidance to the agency's diversity and inclusion activities/initiatives. OCR and the Office of Diversity, Outreach, and Collaboration, are expected to work in close cooperation to advance their respective missions, and to assure efficient use of resources.

## **XI. References**

1. Developing a Model Civil Rights Program for the Environmental Protection Agency
2. Administrator's Approval of Final Report Memorandum
3. Deputy Administrator's Implementation Memorandum

(2) EPA Order 4701 (Title VI Case Management Protocol)

**Identification Number:** 4701  
**Approval Date:** 05/01/2013

## **Title VI Case Management Protocol**

### **I. Purpose**

This order formally establishes the Title VI Case Management Protocol for processing, investigating and resolving complaints under Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes applicable to recipients of the U. S. Environmental Protection Agency assistance<sup>42</sup>. The EPA expects this protocol will improve the agency's ability to review and act on Title VI complaints in a timely way. The Title VI Protocol will bring offices and regions throughout the agency into a consensus-oriented process for coordinating and committing analytical resources, expertise and technical support needed to investigate and reach decisions on Title VI complaints. The Title VI Protocol creates a system to assure clear accountability among agency program offices and regions for conducting investigations and, producing analyses, and it establishes a framework for sustaining high-level attention necessary for timely decision-making. The Office of Civil Rights is expected to establish procedures to improve implementation of this protocol in consultation with Deputy Civil Rights Officials and offices and regions.

### **II. Authority**

The authority to establish the Title VI Protocol derives from the Administrator's authority to organize the work of the agency under 40 C.F.R. §§ 1.5(a), 1.23, and 7.25, Section 3 of Reorganization Plan No. 3 and EPA Order 1110.2. The Administrator authorized the establishment of the Title VI Protocol in a decision memorandum produced by the agency's Civil Rights Executive Committee and signed by the Administrator on April 13, 2012.

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<sup>42</sup> While this Order refers to "Title VI," it includes all recipient nondiscrimination requirements found in 40 C.F.R. Parts 5 and 7.

### **III. Background**

In March 2011, Administrator Lisa P. Jackson appointed the Civil Rights Executive Committee, chaired by Deputy Administrator Bob Perciasepe, to recommend actions necessary for building a model civil rights program at the agency. After extensive review of the program, the Civil Rights Executive Committee submitted the final report, *Developing a Model Civil Rights Program for the Environmental Protection Agency*, to the Administrator outlining the agency's commitment to strengthening civil rights, equal employment opportunities, diversity in the workplace and revitalizing the agency's implementation of Title VI. The Administrator approved the report and recommendations on April 13, 2012. The Executive Committee highlighted the importance of engaging management from across the agency to successfully implement a model civil rights program, recognizing that the agency's civil rights program cannot solely be the responsibility of one office or program, but instead must reflect "One EPA" principles. To that end, the Executive Committee identified two recommendations for which formal orders were appropriate: to establish the Title VI Protocol and to establish Deputy Civil Rights Officials. The establishment of DCROs is the subject of Order 4700.

The establishment of the Title VI Protocol order advances the agency towards a model civil rights program wherein senior managers across the agency have an explicit role in, and share responsibility for implementation of the agency's civil rights program and policies. This order does not however, delegate any authorities that are formally delegated or assigned to the OCR director. The OCR director serves as the principal advisor to the Administrator with respect to the agency wide equal employment opportunity programs and affirmative employment programs and external nondiscrimination program. As such, the director is tasked with providing sound and timely policy advice to the Administrator and other senior management officials on a wide range of issues including but not limited to Titles VI and VII of the Civil Rights Act of 1964, as amended; Title IX of the Education Act Amendments of 1973; Sections 501504 of the Rehabilitation Act of 1973, as amended; Executive Order 11478; and a number of U.S. Equal Employment Opportunity Commission Management Directives. Nothing contained in this order changes or supersedes the director's authorities.

### **IV. Title VI Network**

The OCR director will coordinate a network of technical, legal, and policy experts and practitioners from appropriate offices and regions throughout the agency that can serve to answer questions, provide advice and review draft policies and decisions for Title VI issues. The network will meet as appropriate, as determined by the director.

### **V. Title VI Case Management Protocol**

The OCR director will oversee and manage the Title VI Protocol to bring together the necessary parties to investigate, adjudicate or resolve Title VI complaints. All agency participants engaged in the Title VI Protocol will strive for consensus, seek agreement on

draft decisions and consult with the case management team on recommended final actions. The director will develop standard operating procedures in consultation with offices and regions that include recommended timeframes, goals, milestones and informal resolution processes for the elements listed below. Additionally, OCR will develop as needed appropriate guidance, templates and training to facilitate the effective, and efficient implementation of the provisions of this order. The Title VI Protocol consists of the following elements, at a minimum:

1. OCR will process complaints that are filed with or referred to the agency including: entering the complaint into OCR's Title VI tracking system; creating all necessary official files; preparing and sending appropriate external notification letters pursuant to 40 C.F.R. § 7.120(c) and providing copies of the complaint to the appropriate offices and regions.
2. For filed or referred complaints, OCR will conduct jurisdictional reviews pursuant to 40 C.F.R. § 7.120 after soliciting input and views from other agency offices and regions on whether to refer, reject, or accept a complaint. If OCR does not accept the complaint, the remaining elements of this protocol do not apply.
3. If OCR accepts the complaint, OCR will lead the development of a Preliminary Case Management Plan in partnership with offices and regions. This plan will propose specific responsibilities for appropriate agency offices and regions, as well as specific time frames for completion of tasks. The Preliminary Case Management Plan will be reviewed by a panel convened as specified at element 4 below.
4. The OCR director will designate a panel to review the Preliminary Case Management Plan and, to the extent possible, reach agreement on organizational roles in case management, investigation, and proposed action. The panel typically will include DCROs or, on a case-by-case basis, other senior officials from organizations with relevant expertise for a particular case or specialized legal, policy or technical expertise in Title VI. In considering the roles of offices and regions in the investigation and decision-making process, the panel will take into account existing expertise and experience, as well as any previous involvement in the case that may adversely affect an appearance of neutrality.
5. Informed by the panel discussion, the OCR director will identify a lead office or region for case management and investigation. The director can assume the lead role in case management and investigation when necessary, for example, to assure the neutrality of an investigation. OCR will remain actively engaged in case management, investigation, and decision-making whether or not the lead office.
6. The lead office or region and OCR will finalize the Case Management Plan and obtain final concurrence from other offices or regions represented on the panel.

7. If at any point the panel cannot reach consensus on roles and responsibilities, or on a final Case Management Plan and the milestones included therein, the OCR director will propose resolution of disputed issues. The OCR director will then notify all members of the panel of the proposed resolution and shall provide an opportunity for any member of the panel to request a meeting with the Deputy Administrator to address disputed issues. All members of the panel must be provided an opportunity to attend a meeting with the Deputy Administrator scheduled for the purposes of addressing disputed issues in accordance with this paragraph. The director's proposed resolution becomes final if the Deputy Administrator declines to consider the disputed issues, or declines to direct changes to the director's proposed resolution.
8. As specified in the final Case Management Plan, case teams are led by the office or region, or by OCR, with established governing rules and formal work role definitions. Prior to the start of any investigation, team members will receive briefings on decision criteria, current legal, and policy matters in the Title VI context from OCR and other experts. The briefings will include up-to-date information on decision criteria, guidance, policies, rules and relevant legal and policy precedents.
9. The lead office or region in consultation with OCR (and *vice versa*, if OCR leads the case management team) will lead the investigation and informal resolution efforts, including consulting with an agency dispute resolution specialist in the use of alternative dispute resolution, and complete the investigation(s). The OCR director must approve any informal resolution before it becomes final.
10. The lead office or region in consultation with an EPA dispute resolution specialist will support the use of alternative dispute resolution by complaints and recipients to address issues raised in the complaint.
11. An office or region, when selected to lead the case team, will in writing recommend to OCR final action on a case. OCR, when selected to lead the case team, will in writing provide to offices/regions an opportunity to review and comment on proposed final action on a case.
12. The OCR director is authorized to issue final agency decisions on Title VI cases, but may allow another official to represent the agency on decisions or agreements other than a decision to dismiss a complaint.

## **VI. References**

1. Developing a Model Civil Rights Program for the U.S. Environmental Protection Agency
2. Administrator's Approval of Final Report Memorandum
3. Deputy Administrator's Implementation Memorandum