DEPARTMENT OF ENERGY

10 CFR Part 708

[RIN 1901–AA78]

Criteria and Procedures for DOE Contractor Employee Protection Program

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) proposes amendments for its contractor employee protection program which provides recourse to DOE contractor employees who believe they have been retaliated against for activities such as a disclosure of information regarding management of environmental, safety, health, and other matters, for participating in Congressional proceedings, or for refusing to engage in illegal or dangerous activities.

DATES: Written comments should be forwarded not later than March 6, 1998.

ADDRESSES: Comments (3 copies) may be submitted to William A. Lewis, Jr., Director, Office of Employee Concerns, Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585, 202–586–4034.

FOR FURTHER INFORMATION CONTACT: Richard S. Fein, Office of Employee Concerns, Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585, 202–586–4043.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

In the control and management of its nuclear weapon maintenance and environmental cleanup sites, research and development laboratories, test sites, and other Government-owned or -leased facilities, the DOE is responsible for safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing fraud, mismanagement, waste, and abuse. To this end, the Secretary of Energy has taken vigorous action to assure that all such DOE facilities are well-managed and efficient, while at the same time operated in a manner that does not expose the workers or the public to needless risks or threats to health and safety. The DOE is endeavoring to involve both DOE and contractor employees in an aggressive partnership to identify problems and seek their resolution. In that regard, employees of DOE contractors are encouraged to come forward with information that reasonably and in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices. Employees providing such information are entitled to protection from consequent discrimination by their employers with respect to compensation, terms, conditions, or privileges of employment.

The original rule was published in the **Federal Register** on March 3, 1992 (57 FR 7533). In order to assure workplace conditions at DOE facilities that are harmonious with safety and good management, the rule was intended to improve the procedures for resolving complaints of reprisal by establishing procedures for independent fact-finding and hearing before a Hearing Officer at the affected DOE field installation, followed by an opportunity for review by the Secretary or designee. These new procedures were made available to those contractor employees who allege health and safety violations, but are not covered by the Department of Labor (DOL) procedures. In addition, contractor employees who alleged employment reprisal resulting from the disclosure of information relating to waste, fraud, or mismanagement, or from the participation in proceedings conducted before Congress or pursuant to the rule, or from the refusal to engage in illegal or dangerous activities, could also utilize the procedures regardless of whether they are covered by the health and safety protection procedures of DOL. This rule was not intended to cover complaints of reprisal stemming from or relating to other types of discrimination by contractors, such as discrimination on the basis of race, color, religion, sex, age, national origin, or other similar basis.

After the operation of the rule for more than four years, the Department took steps to obtain the views of interested parties on the operation of the rule. A Notice of Inquiry was published on October 25, 1996 (61 FR 55230), in which DOE invited members of the public, particularly those persons with experience under the DOE contractor employee protection program (e.g., contractors, claimants and attorneys), to recommend regulatory changes that might help to streamline the process and make it more responsive to the needs of both claimants and contractors. Comments were received from 28 individuals or organizations in response to the Department of Energy's Notice of Inquiry. These comments are summarized in III. below.

The procedures set forth in part 708 are designed specifically to deal with allegations of reprisals against contractor employees and to provide relief where appropriate. Reprisals against contractor employees may also lead to the imposition of penalties under the Price Anderson Amendments Act of 1988 (Pub. L. 100–49, August 20, 1988), implemented by DOE under 10 CFR part 820 (part 820). Pursuant to Part 820, to the extent a reprisal by a DOE contractor results from an employee's involvement in matters of nuclear safety in connection with a DOE nuclear activity, the reprisal could constitute a violation of a DOE Nuclear Safety Requirement. The reprisal could therefore be subject to the investigatory and adjudicatory procedures of both part 820 and part 708, and could result in relief to the employee under part 708 and the imposition of civil penalties on the DOE contractor under part 820. A full discussion of the relationship between this part and 10 CFR part 820 and the procedures that would be followed in situations where an alleged reprisal action fell under both this part and part 820 can be found in **Federal Register** Volume 57, No. 95, Friday, May 15, 1992, at 20796–20798.

II. Summary of Changes

A. The employee coverage would be modified in §§ 708.1, 708.2(b), 708.3 and 708.4 by eliminating the requirement that persons need to be employed by contractors performing their work on sites owned or leased by DOE. The proposed new language would instead cover employees of contractors performing work directly related to the operation of programs and activities at DOE-owned or -leased sites, even if the contractor is located, or the work is performed, off-site. An example would be involvement in the preparation of environmental impact statements related to programs and activities on DOE-owned and -leased sites. The definition of ''work performed on-site,'' currently found in § 708.4, would be deleted since it would no longer be used as a basis for determining jurisdiction under the rule.

B. In order to fully meet the intent of the current rule not to duplicate protections available under other Federal statutory provisions, the proposed rule, in §§ 708.2(b) and 708.6(a)(i), would continue to exclude from coverage employee complaints for which protection is provided under 29 CFR part 24, ''Procedures for the Handling of Discrimination Under Federal Employee Protection Statutes.'' This exclusion would also reflect coverage of DOE employees contained in the Energy Policy Act of 1992, (Public Law 102–486) which amended section 210(a), now 211(a), of the Energy Reorganization Act of 1974 (42 U.S.C. 5851(a). That Act added protection for employees of ''a contractor or

subcontractor of the Department of Energy that is indemnified by the Department of Energy under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order 12344.''

Additional protections were afforded to contractor employees under section 6006 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) against reprisals for engaging in certain protected activities. Section 6006 (implementing regulations found in 48 CFR part 3, Subpart 3.9) assigns responsibilities to Inspectors General (including the Inspector General for the Department of Energy), to implement these protections. The proposed regulation would also exclude from coverage complaints that fall within the scope of Section 6006, and its implementing regulations found in 48 CFR part 3, Subpart 3.9.

C. The Office of Contractor Employee Protection, and the position of Director of the Office of Contractor Employee Protection, no longer exist within DOE. Under the proposed rule, therefore, references to the Office of Contractor Employee Protection or the Director of the Office of Contractor Employee Protection would be removed.

Responsibilities for certain functions currently assigned to the Director of the Office of Contractor Employee Protection would be the responsibilities of other officials under the proposed rule. The responsibility for making determinations of jurisdictional coverage of complaints where the jurisdictional coverage is questioned, currently contained in § 708.7(a), would be the responsibility of the Director of the Office of Employee Concerns. Responsibility for conducting inquiries under the proposed § 708.8 (formerly designated as investigations) would be the responsibility of the Deputy Inspector General for Inspections. The Deputy Inspector General for Inspections, under proposed § 708.8(f), would have the responsibility for serving copies of Reports of Inquiry on the parties. The responsibilities of the Director of the Office of Contractor Employee Protection to serve copies of initial and final decisions on the parties would be the responsibility of the Director of the Office of Hearings and Appeals under §§ 708.10(a) and (b) of the proposed rule.

D. The proposed language in §§ 708.3 and 708.5(a)(i) would cover protections for disclosures of ''substantial'' violations of laws, rule or regulations and ''gross'' mismanagement. The criteria of ''substantial'' violations of law is consistent with Section 6006 of the Federal Acquisition Streamlining Act of 1994, (Public Law 103–355). Similarly, the criterion of ''gross'' mismanagement is consistent with the provisions of the Whistleblower Protection Act of 1989 (5 U.S.C. 2302(b)(8)). (See also Sen. Rep. No. 413, 100th Cong., 2nd Sess., 13, 26, 34.)

E. Section 708.5(a)(1) of the proposed rule would expand coverage of disclosures to include those made to other government officials, such as those from other Federal or state agencies who have responsibility for oversight of activities on DOE-owned or -leased sites.

F. Section 708.5(a)(1) would further define the nature of the disclosure, requiring that the employee's disclosure involves information he or she ''reasonably and in good faith believes'' is true. The current rule in § 708.5(a)(1) only requires that the complainant ''in good faith believes'' the information he or she discloses. The additional criterion, that the complainant ''reasonably'' believes the information, is consistent with the Whistleblower Protection Act of 1989 and many State statutes which afford protection to both public and private sector employees against reprisal for whistleblowing activities.

G. Section 708.6(c) of the proposed rule would increase the time limit for filing a complaint from 60 to 90 days. The time limit for filing a complaint would still be tolled during the time a complainant is seeking remedial action through internal contractor procedures. The use of internal grievance procedures would still be required under the rule, but the proposed rule would permit individuals to file a complaint if they have not received a response on a grievance relating to the subject of the complaint within 120 days of the filing of the grievance.

H. Under § 708.6(d), the proposed rule would not cover allegations of reprisal for having engaged in protected activities if those issues had been ruled upon in binding arbitration pursuant to a collective bargaining agreement. Such binding arbitration would be considered the pursuit of a remedy under ''other applicable law.'' This approach respects the labor-management relationship that applies to many DOE contractor employees, and is consistent with the deference given to binding arbitration decisions issued pursuant to collective bargaining agreements.

I. Section 708.7(a) would continue to encourage informal resolution, and language has been added to specify the use of mediation as a means for resolving disputes. Settlement agreements under the rule would be between the parties; the language in the current rule that ''the Head of the Field Elements or designee shall enter into a settlement agreement which terminates the complaint'' has been deleted.

J. Section 708.7(b)(3) and (c) of the proposed rule would give complainants the right, if informal resolution is unsuccessful, to elect to have the complaint submitted directly to the Office of Hearings and Appeals for a hearing, thereby bypassing the inquiry phase. Under the current rule, all complaints that are accepted for processing and which have not been informally resolved are investigated prior to the parties having the right to request a hearing.

K. Section 708.8(a) of the proposed rule would grant discretion to the Deputy Inspector General for Inspections whether or not to direct the conduct of an inquiry into a complaint.

L. Section 708.8(c) would provide for complainants to be advised of their right to request a hearing on their complaint in cases where the Deputy Inspector General for Inspections decides not to conduct an inquiry into the complaint.

M. Under § 708.8(g) of the proposed rule, complainants would have a right to request a hearing if a Report of Inquiry has not been issued within 240 days of the date the Deputy Inspector General for Inspections was advised that informal resolution of the complaint was not reached.

N. Language would be added to § 708.8(d) that would provide for the taking of sworn statements as part of inquiries conducted at the direction of the Deputy Inspector General for Inspections, when deemed appropriate by the inspector.

O. Language would be added in § 708.9(c)(2) authorizing the Hearing Officer to provide for reasonable discovery by the parties as part of hearing proceedings.

P. Section 708.9(b) would extend the time for holding a hearing from 60 to 90 days after the complaint file is received by the Office of Hearings and Appeals.

Q. Section 708.10(b) would extend the time for the issuance of a decision by the Office of Hearings and Appeals from 30 to 60 days after the receipt of the transcript of the hearing or after post-hearing briefs or other evidence permitted under § 708.9(h), whichever is later.

No changes are being proposed with respect to §§ 708.13, 708.14 or 708.15, and those sections are therefore not included in this notice.

Consideration is being given to publishing the final rule in a different format, which might make the requirements and procedures of the

program more easily understood by users of the program. One possible alternative is to use a question and answer format. An example of this format might be as follows:

Which Contractor Employees Are Covered?

This part applies to any contractor employee if the employee works for a contractor responsible for the conduct of DOE programs or the operation of DOE-owned or leased facilities, regardless of the employee's work location.

III. Summary of Public Comments Received Pursuant to the October 25, 1996, Notice of Inquiry

Substantive comments were received from 28 individuals or organizations in response to the Department of Energy's Notice of Inquiry, published in the **Federal Register** on October 25, 1996. For purposes of summarizing the comments, references made to the Office of Contractor Employee Protection (OCEP) by the commenters have been retained, even though that office was abolished and its functions were absorbed into existing Office of Inspector General functions as of October 1, 1996.

Comments 1–11

One commenter, a public interest group that represents whistleblowers, submitted eleven comments regarding possible modifications to the contractor employee protection program. Twenty-four other commenters specifically endorsed four of these recommendations (comments 1, 3, 5 and 9 below). The rationales for the comments of these 24 other commenters parallel those contained in the comments submitted by the public interest organization. The eleven comments submitted by the public interest organization were:

Comment 1: Reconstitute the Office of Contractor Employee Protection under the newly created Office of Employee Concerns, and have it ensure ''independent investigations; performed in a timely manner; supported by a verifiable report of investigation, with supporting evidence in the way of relevant records and sworn statements attached;'' and ''aggressively pursue its mandate to attempt to mediate and resolve concerns at an early stage.''

Response: Since the Office of Contractor Employee Protection became a part of the Office of Inspector General on October 1, 1996, the Office of Inspector General has provided a significant amount of training to its inspection staff on the review of complaints under the DOE Contractor Employee Protection Program. The proposed revisions to the regulations institutionalize the responsibility for conducting inquiries (formerly referred to as investigations) under the Deputy Inspector General for Inspections. The Department believes the continuation of this responsibility in the Office of Inspector General will meet the needs of the parties to a complaint in an effective and efficient manner. This includes the specific goals cited by the commenter, i.e., the availability of independent, timely investigations, with reports of investigation containing supporting evidence.

Attempts at informal resolution remain a crucial aspect of the rule. DOE is proposing amendments to section 708.7(a) to further encourage the use of various Alternative Dispute Resolution mechanisms, primarily mediation.

Comment 2: Expand the coverage of the OCEP to include DOE employees, not just contractor employees, change the definition of a protected disclosure to include reports to any governmental agency, not just to Congress or the DOE, clarify the protections under Part 708 to be extended to employees of contractors performing work at or related to DOE-owned or leased facilities, and clarify that the ''disclosure of a 'substantial and specific danger to employee or public health and safety' includes current dangers as well as dangers arising in the future as a result of action or inaction at DOE sites.''

Response: The Department does not believe that it is either necessary or appropriate to duplicate protections of Federal employees beyond those specifically provided to Federal employees by the Whistleblower Protection Act of 1989, implemented by the Merit Systems Protection Board and the Office of Special Counsel.

The coverage of the scope of disclosures would be modified in section 708.5(a) to include disclosures to other governmental officials who have responsibility for the oversight of activities at DOE sites.

The scope of the rule would be modified to cover employees engaged in work related to activities on DOE-owned or -leased sites, and would not require that the employee or the contractor actually be located at the DOE site. The tests for employee coverage would be the nature of the work being performed and the substance of the disclosure.

With respect to the issue of the required specificity of disclosures related to the environment, safety or health, the proposed rule would retain the current language. The language is consistent with the provisions of the whistleblower protections available to Federal employees. The Senate Report accompanying the Civil Service Reform Act of 1978 explained that general criticisms or complaints, or those of a non-substantial nature, were not intended to be covered. The Report stated that ''the Committee intends that only disclosures of public health and safety dangers which are both *substantial* and *specific* are to be protected. Thus, for example, general criticism by an employee of the Environmental Protection Agency that the Agency is not doing enough to protect the environment would not be protected under this subsection.'' (S. Rep. No 969, 95th Cong., 2nd Sess. 21 (1978) *reprinted* in 1978 U.S. Code Cong. & Ad. News 2730.)

Comment 3: Guarantee employees a right to a timely investigation, and provide employees the right to request a full hearing if a report has not been issued on a complaint within 180 days of its having been filed.

Response: One of the primary goals of the proposed rule is to streamline the process in order to provide a timely review of complaints. A proposed provision would permit a complainant to request a hearing if a report of inquiry has not been issued within 240 days of the complaint being referred to the Deputy Inspector General for Inspections. While this time frame is slightly longer than recommended by the commenter, the Department believes it provides a more realistic time frame for the issuance of a report of inquiry. In addition, complainants would have the option under the proposed rule to elect to bypass the inquiry phase and go directly to a hearing if informal resolution is unsuccessful.

Comment 4: Require DOE investigators to take sworn testimony from all witnesses interviewed, or, in the alternative, produce an affidavit from the investigator certifying that the notes reflect the substance of the witness interview.

Response: The Department believes that inspectors of the Office of Inspector General must retain the discretion to determine when sworn statements will be taken. Language has been added to the rule specifying that sworn statements may be part of the record of inspection when deemed appropriate.

Comment 5: Guarantee the right of employees to engage in reasonable discovery at the hearing stage, including the right for parties at the hearing stage to obtain documentary and other physical evidence through interrogatories and requests for production, to take depositions of necessary witnesses, enter and examine premises of contractors where necessary and relevant, and the right to obtain continuances in order to engage in

reasonable discovery. The commenter noted that discovery is permitted under whistleblower hearings before Department of Labor Administrative Law Judges, reflected in 29 CFR 18.13 through 18.24.

Response: Discovery has been available as part of the hearing process before the Office of Hearings and Appeals, and additional, clarifying language has been added to the rule recognizing the availability of discovery at the hearing stage.

Comment 6: Require that DOE Office of Hearings and Appeals Hearing Officers have a Juris Doctorate from an accredited law school and/or relevant and significant amounts of legal training in order to protect the procedural and substantive due process rights of the parties.

Response: The Department believes that the part 708 hearing process must be conducted with professionalism, the highest integrity and demonstrated competence. The expressed concern that hearing officers are not now required to possess law degrees might be a valid concern if evidence indicated that an unfair, inadequate or unprofessional adjudications have occurred as a consequence of this fact. This has not been the case. In addition, there is no such positive educational requirement for Federal employees serving in the capacity of Hearing Officer.

Comment 7: Abolish the requirement that employees first exhaust available corporate grievance processes or certify the futility of doing so. This is an unnecessary, and usually fruitless and often counterproductive step that facilitates coverups.

Response: The Department continues to believe that allegations of whistleblower reprisal should be resolved at the lowest possible levels, and that this includes seeking remedies through procedures made available by contractors to its employees. The current and proposed rules require the use of internal procedures first, but provide for bypassing such procedures if they are, as the commenter argues, futile. The Department believes that the complainant who does not wish to utilize available internal procedures must establish that available procedures are not operated in good faith. The proposed rule would, however, allow an employee to file a complaint under the rule where internal grievance procedures exist, but where the employee has not received a final decision on the grievance within 120 days of having filed the grievance with the contractor.

Comment 8: Expand the period for filing a complaint from the present 60-day requirement to 180 days, with a provision that if the contractor has failed to adequately notify employees of provisions of part 708, the limitation period would be waived. The commenter cited Congress' extension of the period for filing whistleblower complaints under the Energy Reorganization Act to 180 days (42 U.S.C. 2000e-5(e)(1)).

Response: The time for filing would be increased from 60 to 90 days under the proposed rule. Because the rule tolls the period for filing while a complainant seeks remedial action through internal contractor procedures, the time frame for filing in essence would extend the 90-day filing requirement. In addition, since the implementation of the Contractor Employee Protection Program in April 1992, the 60-day filing requirement has not been applied where good cause was shown for extending the filing deadline.

Comment 9: Include, in the definition of discrimination, the abuse of the security clearance process against an employee who falls within the category of a protected employee under the rule, and permit the investigation of personnel security abuses to be investigated and remedied under part 708.

Response: Allegations that the security clearance procedure has been abused may be raised in the regulatory process, found in 10 CFR Part 710, provided to employees for challenging adverse security determinations. There is no need to duplicate that process under this rule, especially since remedial action under this rule cannot include determinations that an adverse security clearance determination should be changed. In addition, personnel security actions are taken by DOE officials, not contractor management, and neither the current nor this proposed rule includes the review of actions taken by DOE officials.

Comment 10: Specify that the rule is additive, rather than substitutive or a precondition for the exercise of other rights and remedies.

Response: The current rule was intended to provide whistleblower protection for contractor employees who lacked standing to raise allegations of reprisal under statute, specifically, Department of Labor procedures. The current rule excludes from coverage employees who have the ability to raise allegations of whistleblower reprisal to the Department of Labor. The proposed rule would continue that policy, and also exclude from coverage complaints that fall within the statutory jurisdiction of the Office of Inspector General under section 6006 of the Federal Acquisition Streamlining Act of 1994. The Department believes that it should not duplicate remedies available to contractor employees under statute.

Comment 11: Expand available remedies to allow for the award of compensatory damages, including damages for mental anguish, pain and suffering, and emotional distress resulting from an contractor's wrongful actions.

Response: The current rule provides make whole remedies, primarily in the area of unwarranted personnel actions, and to prevent the continuation of discrimination against employees in reprisal for their having engaged in protected activities. DOE presently is unaware of substantial policy reasons or other justifications for revising and expanding the remedies available under part 708. The proposed rule would therefore continue the make whole damages available under the rule.

Recommendations received from other commenters were:

Comment: A commenter recommended that complainants should be required to document their certifications that internal procedures have been exhausted or that such procedures are nonexistent, ineffectual or expose the employee to reprisal.

Response: This comment has been addressed in response to Comment 7 above.

Comment: A commenter recommended that final orders on whistleblower complaints should be subject to judicial review, either under a provision of the Wunderlich Act found at 41 U.S.C. 321, due to the contractual basis for part 708, or under the Administrative Procedure Act provisions found at 5 U.S.C. 701–706, if part 708 was promulgated under statute, i.e., the Atomic Energy Act.

Response: The Department believes that the determination as to the availability of judicial review for complaints processed under this rule is a subject for courts to rule upon, and therefore the rule is silent on the issue.

Comment: A commenter recommended that DOE streamline the intake process by assigning an individual to determine whether the claimant has stated a prima facie case.

Response: Initial determinations of jurisdiction, including the establishment of a prima facie case, is a basic part of the processing of complaints. This function, under the proposed rule, would rest initially with the Director of the Office of Employee Concerns, the Heads of Field Elements, or their designees, with complainants having the right to seek a review of adverse jurisdictional determinations

from the Secretary or designee. The assignment of particular individuals or staffing levels to this function would not be appropriate under the rule.

Comment: A commenter recommended that bargaining unit employees be required to make use of grievance provisions, including binding arbitration. Where there is a finding for the employee, or the employee does not believe he or she has not been made whole, the employee should be able to file with DOE; if the ruling is in favor of the company, the employee should not be permitted to file a complaint with DOE.

Response: The proposed rule would continue the policy that the use of negotiated grievance procedures is required as an available internal grievance process. The proposed rule would also provide that determinations under binding arbitration, pursuant to a bargaining unit agreement, will be considered dispositive of the issues under appropriate statute, to the extent the arbitration included the allegation that an action was taken against the employee in reprisal for activities protected under this rule.

Comment: A commenter recommended that a contractor be allowed 30 days to respond to a complaint, or an extension of 30 days upon request of both parties. Following that period, investigations should be completed within 60 days and a preliminary decision issued.

Response: The proposed rule would continue to provide a 30-day period during which the parties are encouraged to seek informal resolution of the issues presented in a complaint. The rule would not preclude these efforts from extending beyond the 30-day period, and extensions can be sought for these efforts where it appears progress on resolution is possible. The proposed rule would eliminate some of the timeframes for processing specified in the original rule because they created unrealistic expectations, and therefore a 60-day time frame for the completion of inquiries is not included in the proposed rule.

Comment: A commenter recommended that settlements should not be encouraged immediately, but should be addressed after a preliminary decision has been issued.

Response: Experience had shown that complaints are often settled successfully when the parties engage in informal resolution, especially mediation, early in the process. The President has also directed the use of alternative dispute resolution when appropriate in Executive Order 12988. Mediation provides an excellent means for the parties to address the issues raised and their interests. Where cases are not resolved early in the process, further attempts at resolution are always available, including after the issuance of an initial decision.

Comment: A commenter recommended that from the time a complaint is filed until there is a preliminary decision, complainants or their representatives should not be permitted to have access to OCEP or other DOE offices without advance notice to the other party, and an opportunity for the opposing counsel to participate and rebut either in person or by telephone conference allegations raised by a complainant. The commenter also stated that remedies should be reinstatement for wrongful discharge; back pay for the discharged employee to the date of reinstatement or the offer of reinstatement; or transfer preference. It was also recommended that there be a $10,000 cap on complainant attorney fees and that no front end or extended benefits should be permitted as remedies.

Response: It is often necessary to follow-up with complainants in order to clarify the issues presented to make jurisdictional determination, or to determine appropriate parties who need to be contacted in order to pursue informal resolution. The Department believes these initial contacts are necessary for the effective implementation of the rule, but recognizes that they must be carried out in a manner that does not unfairly prejudice either party.

The remedies in the rule are intended to be make whole remedies, and the Department therefore is not proposing to set arbitrary limits on possible remedies.

Comment: A commenter recommended that if DOE will be disallowing costs to contractors found to have violated the rule, complainants who lose should be required to reimburse the contractor or DOE.

Response: The rule has been established to provide a mechanism for employees who believed they have been subjected to wrongful discriminatory acts to obtain appropriate remedies. The Department believes the adoption of the recommendation would discourage employees from coming forward with allegations of wrongdoing, and therefore has not included it in the proposed rule.

Comment: A commenter recommended that regulatory revisions to the Contractor Employee Protection Program should become fully effective on publication, and not be dependent on the inclusion of the rule in contractual agreements.

Response: The Department believes that the provisions of the proposed rule would not create an undue burden on DOE contractors whose contracts include a clause requiring compliance with Part 708. The proposed rule would therefore not require renegotiation of the contract clause in order to become effective with respect to contractors currently subject to the rule.

Comment: A commenter recommended that DOE make the punishment of the contractors severe by permitting compensatory damages and require action against managers found to have discriminated against whistleblowers.

Response: The comment regarding compensatory damages has been addressed in response to Comment 11 above. The focus of the rule is corrective, and not punitive. With respect to requiring action against management officials, as noted in the comments that accompanied the publication of the current rule, the Department believes it is within the contractor's managerial responsibility and discretion to address matters associated with employees found to have participated in discriminatory conduct. The proposed rule therefore does not contain provisions for the Department to require disciplinary action against contractor employees.

Comment: A commenter recommended that employees should be kept informed as to the status of their cases.

Response: The recommendation of the commenter is an operational suggestion that does not rise to the level of an issue that needs to be included in the rule, but is a suggestion that will be fully considered by the various offices responsible for the implementation of the rule.

Comment: A commenter recommended that time frames contained in Part 708 should be followed.

Response: The original rule contained time frames for complaint processing that were not realistic, and therefore led to dissatisfaction with the process. One primary goal of the proposed rule is to streamline, and therefore speed up, the complaint process. The proposed rule therefore has more realistic time frames, and in some cases, processing time frames have been removed where they cannot be estimated.

Comment: A commenter recommended that attorneys should be assigned to assist whistleblowers whose cases go to the Office of Hearings and Appeals for a hearing due to the limited funds available to whistleblowers. Another commenter recommended that

OCEP receive additional staffing and resources in order to improve the timeliness of whistleblower complaint processing.

Response: The Department may not assist whistleblowers in processing their cases since this would constitute providing Government attorneys to private citizens. It would also be impermissible with respect to the requirement that the Department remain neutral in these matters. The staffing requirements within the Department are dependent on a number of factors, and it is neither possible nor appropriate to reflect staffing decisions as part of the rule.

Comment: A commenter recommended that outcomes of investigations under Part 708 should be made public similar to the publication of Office of Hearing and Appeals decisions on the World Wide Web.

Response: The processing of complaints under this rule almost always involves highly personal information about the complainant and other individuals, including witnesses and co-workers. As a result, consideration must be given to the protection of personal privacy of individuals involved in the complaints. This comment is not being adopted, but comments on this issue may be submitted under this Notice of Proposed Rulemaking.

Comment: A commenter recommended that contractors should be required to adhere to agreements made in settlement of whistleblower complaints.

Response: Under the proposed rule, settlement agreements, as well as their enforcement, would be between the parties. The language in the current rule that ''the Head of the Field Elements or designee shall enter into a settlement agreement which terminates the complaint'' has been deleted.

Comment: A commenter recommended that DOE cease paying litigation costs to contractors in whistleblower cases.

Response: This issue has been considered by the Department and is the subject of a separate Notice of Proposed Rulemaking.

Comment: A commenter recommended that any disclosure of official or incidental misconduct anywhere in the course of DOE contractor business by any person should be protected under Part 708, including disclosures of business or scientific fraud, waste of government resources, abuse or misuse of staff or resources, and false claims in the course of program proposals.

Response: The coverage of protected disclosures in the proposed rule is consistent with those found in almost all whistleblower protection statutes, including the Whistleblower Protection Act of 1989, as amended, which provides protections for Federal employee whistleblowers. In Senate Report No. 413, 100th Congress, 2nd Session, page 12, it was stated that

> While the Committee is concerned about improving the protection of whistleblowers, it is also concerned about the exhaustive administrative and judicial remedies . . . that could be used by employees who have made disclosures of trivial matters. CSRA [Civil Service Reform Act of 1978] specifically established a de minimus standard for disclosures affecting the waste of funds by defining such disclosures as protected only if they involved ''a gross waste of funds.'' Under S.508, the Committee establishes a similar de minimus standard for disclosures of mismanagement only if they involve ''gross mismanagement.''

Comment: A commenter recommended that whistleblowers should be granted protection against reprisal after bringing charges of reprisal under part 708, and investigations should be reopened, regardless of initial findings, if a negative personnel action is taken against an employee who had filed a complaint under part 708.

Response: Both the current and proposed rule would protect employees from discriminatory acts, including retaliation for having previously filed a complaint.

Comment: A commenter recommended that complainants be required only to show that retaliatory consequences followed a protected disclosure, and not be required to prove, by a preponderance of the evidence, a linkage between the disclosure and the negative action.

Response: Whistleblower protection programs consistently require a *prima facie* showing by a complainant that his or her protected activity was a consideration in the alleged discriminatory act taken against them. This usually consists of proving, by a preponderance of the evidence, that the complainant had engaged in a protected activity; that they were subjected to a discriminatory act; that the person taking the discriminatory act was aware of the protected activity; and that from the circumstances, a reasonable inference can be drawn that the protected activity was a consideration in taking the alleged discriminatory act. Once a *prima facie* case is established, the contractor must provide by a more difficult burden of proof, i.e., clear and convincing evidence, that it would have taken the same action absent the protected activity. The proposed rule would not change the burdens of proof currently applicable to the parties.

Comment: A commenter recommended that in order to avoid the need for employees to ''blow the whistle,'' a procedure could be followed that provides a ''due process'' for resolving ethical conflict and dissent. The procedure, which was to be submitted, was published in the Professional Ethics Report of the American Association for the Advancement of Science and in the Ethics Update by the National Institute of Engineering Ethics.

Response: In some situations, differences of professional opinion may not in fact constitute disclosures protected under the rule, but are issues that require consideration and resolution between employees and contractors. The availability of these and similar procedures aimed at resolving differences of professional opinions are encouraged by the Department both to deal with important issues that are raised and as a means for informally resolving differences.

IV. Public Comments

A. Consideration and Availability of Comments

Interested persons are invited to participate by submitting data, views, or arguments with respect to the proposed modifications to the provisions of the DOE Contractor Employee Protection Program, 10 CFR Part 708, set forth in this notice. Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. All written comments received by the date indicated in the **DATES** section of this notice and all other relevant information in the record will be carefully assessed and fully considered prior to publication of the final rule. All comments received will be available for public inspection in the DOE Reading Room, Room 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, between the hours of 9 am and 4 pm, Monday through Friday, except Federal holidays. Any information considered to be confidential must be so identified and submitted in writing, one copy only. DOE reserves the right to determine the confidential status of the information and to treat it according to our determination (See 10 CFR 1004.11).

B. Public Hearing Determination

The Department has concluded that this proposed rule does not involve a substantial issue of fact or law and that

the proposed rule should not have a substantial impact on the nation's economy or a large number of individuals or businesses. Therefore, pursuant to Public Law 95–91, the DOE Organization Act, and the Administrative Procedure Act (5 U.S.C. 553), the Department does not plan to hold a public hearing on the proposed rule. However, should a sufficient number of people request a public hearing, the Department will reconsider its determination.

V. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be ''a significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' (61 FR 4729, February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This proposed rule has been reviewed under the Regulatory Flexibility Act of 1980, Public Law 96–354, that requires preparation of an initial regulatory flexibility analysis for any rule that is likely to have a significant economic impact on substantial numbers of small entities. The contracts and employees to which this rulemaking would apply are for the most part covered by the current DOE Contractor Employee Protection Program, which prohibits discrimination against employees who engage in protected activities relating to the disclosure of certain types of information or for refusing to engage in unsafe or illegal practices. Many of the proposed changes are procedural in nature aimed at streamlining the process, and the nature of available remedies has not changed. The emphasis on the use of early resolution through Alternative Dispute Resolution, primarily mediation, may in fact lessen adverse economic impacts.

Similarly, the expected shortening of the overall processing time of complaints may well result in remedies to be less than under the current rule where violations are found. Accordingly, DOE certifies that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

No additional information or record keeping requirements are proposed to be imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR part 1021, Subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this proposed rule is an employee-relations mechanism and deals only with administrative procedures regarding reprisal protection for employees of DOE contractors and subcontractors. Accordingly, DOE has determined that this is not a major Federal action with significant impact on the quality of the human environment and, therefore, the preparation of neither an environmental assessment nor an environmental impact statement is required.

F. Review Under Executive Order 12612

Executive Order 12612 (52 FR 41685, October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal government and the States, or in the distribution of power and responsibilities among the various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This proposed rule, when finalized, would only affect employee-contractor relations with respect to the operation of the DOE Contractor Employee Protection Program. States which contract with DOE will be subject to this rule. However, DOE has determined that this rule will not have a substantial direct impact on the institutional interests or traditional functions of the States.

List of Subjects in 10 CFR Part 708

Administrative Practice and Procedure, Energy, Fraud, Government contracts, Health and safety, Whistleblowing.

Issued in Washington, on December 22, 1997.

Federico Peña,

Secretary of Energy.

For the reasons set forth in the preamble, Chapter III of title 10 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 708—DOE CONTRACTOR EMPLOYEE PROTECTION PROGRAM

1. The authority citation for part 708 is revised to read as follows:

Authority: 42 U.S.C. 2201(b), 2201(c), 2201(i), and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254 7255, and 7256; and 5 U.S.C. Appendix 3.

Subpart A—General Provisions

2. Section 708.1, Purpose, is revised to read as follows:

§ 708.1 Purpose.

This part establishes procedures for timely and effective processing of complaints by employees of contractors performing work on behalf of the

Department of Energy (DOE), concerning alleged discriminatory actions taken by their employers in retaliation for the disclosure of information involving danger to health and safety, gross mismanagement, and other matters as provided in § 708.5(a), for the participation in proceedings before Congress or pursuant to this part, or for the refusal to engage in illegal or dangerous activities.

3. Section 708.2, Scope, is revised to read as follows:

§ 708.2 Scope.

(a) This part is applicable to complaints of reprisal filed after [the effective date of the final rule] that stem from disclosures, participations, or refusals involving health and safety matters, if the underlying procurement contract described in § 708.4 contains a clause requiring compliance with all applicable safety and health regulations and requirements of 48 CFR (DEAR) 970.5204–2. For all other complaints, this part is applicable to acts of reprisal when, after [the effective date of the final rule], a clause requiring compliance with this part is included in the underlying procurement contract.

(b) This part is applicable to employees of contractors performing work on behalf of DOE, directly related to activities at DOE-owned or -leased sites, unless the procedures contained in 29 CFR part 24, ''Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes,'' or 48 CFR part 3, ''Federal Acquisition Regulation; Whistleblower Protection for Contractor Employees (Ethics),'' are applicable. The procedures of this part do not apply to complaints of reprisal stemming from, or relating to, discrimination by contractors on a basis such as race, color, religion, sex, age, national origin, or other similar basis not specifically discussed in this part. The protections afforded by this part are not applicable to any employee who, acting without direction from his or her employer, deliberately causes, or knowingly participates in the commission of, any misconduct set forth in § 708.5 that is the subject of the disclosure.

(c) For complaints not covered by § 708.5(a), the Director, for good cause shown, may accept a complaint for processing under this part. However, in no event will coverage under this part be extended to employees of contractors over whom DOE does not exercise enforcement authority with respect to the requirements of this part. A determination by the Director not to accept a complaint pursuant to this section may be appealed to the Secretary.

4. Section 708.3, Policy, is revised to read as follows:

§ 708.3 Policy.

(a) It is the policy of DOE that employees of contractors performing work on behalf of DOE related to activities at DOE-owned or -leased sites should be able to:

(1) Provide information to DOE, to Congress, to other governmental officials who have responsibility for the oversight of the conduct of operations at DOE sites, or to their contractors, concerning substantial violations of law, danger to health and safety, or matters involving gross mismanagement, gross waste of funds, or abuse of authority;

(2) Participate in proceedings conducted before Congress or pursuant to this part; and

(3) Refuse to engage in illegal or dangerous activities, without fear of contractor reprisal.

(b) Contractor employees who believe they have been subject to such reprisal may submit their complaints to DOE for review and appropriate administrative remedy as provided in §§ 708.6 through 708.11 of this part.

5. Section 708.4, Definitions, is amended by revising the definitions for *Contractor, Director, Employee or employees, and Head of field element;* by revising the definition heading *Discrimination or discriminatory acts* to read *Discriminatory acts* and revising the definition; by removing the definition for *Work performed on site;* and by adding definitions for *Deputy Inspector General for Inspections*, and *Secretary*, in alphabetical order to read as follows:

§ 708.4 Definitions.

* * * * *

Contractor means a seller of goods or services who is a party to a procurement contract as follows:

(1) A Management and Operating Contract or other types of contracts with DOE involving responsibility for the conduct of DOE programs or the operation of DOE-owned or -leased facilities, or

(2) Subcontracts under paragraph (1) of this definition; but this part shall apply to such subcontracts only with respect to work involving responsibility for the conduct of DOE programs or the operation of DOE-owned or -leased facilities.

* * * * *

Deputy Inspector General for Inspections means, unless otherwise indicated, the Deputy Inspector General for Inspections, Office of Inspector General, or any official to whom the Inspector General delegates the functions of the Deputy Inspector General for Inspection under this part.

Director, unless otherwise specified, means the Director of the Office of Employee Concerns, or any official to whom the Director of the Office of Employee Concerns delegates his or her functions under this part.

Discriminatory act(s) means action(s) taken by a contractor with respect to employment, e.g., discharge, demotion, or other actions with respect to the employee's compensation, terms, conditions or privileges of employment, or intimidation, threats, restraining, coercing or other similar negative action taken against a contractor employee by a contractor, as a result of the employee's disclosure of information, participation in proceedings, or refusal to engage in illegal or dangerous activities, as set forth in § 708.5(a) of this part.

Employee or *employees* mean(s) any person(s) employed by a contractor having responsibility for the conduct of DOE programs or the operation of DOE-owned or -leased facilities, and any person(s) previously employed by a contractor if such prior employee's complaint alleges that employment was terminated in violation of § 708.5.

* * * * *

Head of Field Element means an individual who is the manager or head of a DOE operations office or field office or any official to whom the Head of the Field Element delegates his or her functions under this part.

* * * * *

Secretary means the Secretary of Energy or any official to whom the Secretary delegates his or her functions under this part.

Subpart B—Procedures

6. In § 708.5, Prohibition against reprisals, paragraphs (a) introductory text, (a)(1) and (a)(3)(iii) are revised to read as follows:

§ 708.5 Prohibition against reprisals.

(a) A DOE contractor covered by this part may not engage in discriminatory acts as defined in § 708.4 because the employee has—

(1) Disclosed to an official of DOE, to a member of Congress, to other governmental officials who have responsibility for the oversight of the conduct of operations at DOE sites, or to the contractor (including any higher tier contractor), information that the employee reasonably and in good faith believes evidences—

(i) A substantial violation of any law, rule, or regulation;

(ii) A substantial and specific danger to employees or public health or safety; or

(iii) Fraud, gross mismanagement, gross waste of funds, or abuse of authority;

* * * * *

(3) * * *

(iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, a government official who has responsibility for the oversight of the conduct of operations at the DOE site, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

* * * * *

7. Section 708.6, Filing a complaint, is revised to read as follows:

§ 708.6 Filing a complaint.

(a) *Who may file a complaint.* An employee who believes that he or she has been discriminated against in violation of this part, and who does not have a statutory right to raise the issue under 29 CFR part 24, ''Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes,'' or 48 CFR part 3, ''Federal Acquisition Regulation; Whistleblower Protection for Contractor Employees (Ethics),'' or has not, with respect to the same facts, pursued a remedy available under State or other applicable law, including binding arbitration pursuant to a collective bargaining agreement, may file a complaint with DOE through the Head of the Field Element at the field organization with jurisdiction over the contract under which the complainant was employed or with the Director of the Office of Employee Concerns with respect to a contract that is the responsibility of a contracting officer located in DOE Headquarters. The identity of an employee who files a complaint under this part cannot be kept confidential. Two copies of the complaint, with all attachments, must be filed. Within 15 days of receipt of a complaint, the Director or the Head of a Field Element, shall provide notification of the filing of the complaint and a statement of the issues raised in the complaint, to the contractor or person named in the complaint.

(b) *Content of complaint.* A complaint filed under paragraph (a) of this section need not be in any specific form provided it is signed by the complainant and contains the following: a statement setting forth specifically the nature of the alleged discriminatory act, and the disclosure, participation or refusal giving rise to such act; a statement that the complainant has not, as described in paragraph (f) of this section, pursued a remedy available under State or other applicable law; and an affirmation that all facts contained in the complaint are true and correct to the best of the complainant's knowledge and belief.

(c) *Affirmations required.* The complaint must contain a statement affirming that:

(1) All attempts at resolution through an internal company grievance procedure have been exhausted; or

(2) The company grievance procedure is ineffectual or exposes the complainant to contractor reprisals; or

(3) An internal grievance was filed, but a final decision on the grievance has not been issued within 120 days of its filing; or

(4) The company has no such procedure.

(d) *Factual basis for affirmation.* The complaint must state the factual basis for such affirmation; and, if applicable, the date on which internal company grievance procedures were terminated and the reasons for termination. A failure to provide this information is a basis to dismiss the complaint for lack of jurisdiction under 708.8(a)(5).

(e) *Time frame for filing a complaint.* A complaint filed pursuant to paragraph (a) of this section must be filed within 90 days after the alleged discriminatory act occurred or within 90 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later. If a complaint is not filed within the 90-day time limit, the complainant will be provided an opportunity to show a good reason for the delay. In cases where the employee has attempted resolution through internal company grievance procedures, the 90-day period for filing a complaint shall be tolled during such resolution period and shall not again begin to run until the day following termination of such dispute-resolution efforts, or 120 days after the filing of an internal grievance where a final decision on the grievance has not been issued, whichever is sooner.

(f) *Tolling of filing deadline.* The limitations period specified in paragraph (e) of this section is suspended upon the filing of a complaint pursuant to State or other applicable law, and the mere filing of a complaint pursuant to State or other applicable law does not bar the employee from re-instituting or filing a complaint with DOE if the matter cannot be resolved under State or other applicable law due to a lack of jurisdiction. For purposes of this part, a complaint is deemed to have been pursued under State or other applicable law if the employee has, pursuant to proceedings established or mandated by State or other applicable law, at any time prior to, or concurrently with, the filing of a complaint with DOE, or at any time during the processing of a complaint filed with DOE, filed or submitted a timely complaint, or other pleading with respect to that same matter. The pursuit of a remedy under a negotiated collective bargaining agreement is considered to be the pursuit of a remedy through internal company grievance procedures and not the pursuit of a remedy under State or other applicable law. However, to the extent a decision is rendered in binding arbitration, pursuant to a collective bargaining agreement, on issues related to alleged reprisal for having made disclosures or engaging in protected activities covered by this part, such arbitration decision is considered to be a resolution of the matter under applicable law.

8. Section 708.7 is revised to read as follows:

§ 708.7 Acceptance of a complaint and informal resolution.

(a) *Jurisdictional determinations.* (1) If the Head of Field Element has cause to believe the complaint does not meet the requirements of this part, or for other good cause does not merit further review, the jurisdictional determination will be made by the Director in accordance with paragraphs (a)(2) through (5) of this section. Reasons for dismissing complaints for good cause would include determinations that the facts, as alleged by the complainant, do not present issues for which relief can be granted under this part; the complaint or disclosure is frivolous, on its face without merit; the issues presented have been rendered moot; or the contractor has made a formal offer to provide remedial action that the complainant has requested or that is equivalent to what could be provided as a remedy under § 708.10(c) as an appropriate resolution of the complaint. The Director shall have the authority to issue determinations of jurisdiction with respect to complaints filed with the Office of Employee Concerns.

(2) The Head of Field Element, within 15 days from the date of receipt of the complaint, shall request a determination from the Director as to whether attempts at informal resolution should be undertaken pursuant to this part, or the complaint should be dismissed The

request should include a statement as to the basis for questioning the jurisdictional coverage of the complaint.

(3) If the Director determines to dismiss the complaint summarily, the complaint shall be dismissed and the parties notified by certified mail of the specific reasons for such dismissal. If the Director determines preliminarily that there is jurisdiction, he or she shall, within 15 days from the date he or she received the request for a jurisdictional determination, so advise the Head of the Field Element and return the complaint to the Head of the Field Element who shall thereupon have 30 days to attempt informal resolution of the complaint.

(4) Request for review of dismissal of complaint. If the Director dismisses a complaint pursuant to paragraph (a)(3) of this section, the administrative process is terminated unless within 10 calendar days of receipt of the notice of dismissal the complainant files a written request for review by the Secretary. Copies of any request for review shall be served by the complainant on all parties by certified mail, and the Director shall promptly send a copy to the Secretary.

(5) If the Secretary determines that the complaint should be considered further, the Secretary shall order the Director or Head of the Field Element to reinstate the complaint and resume the administrative process.

(b) *Informal resolution.* (1) If the complaint is within the jurisdiction of this part, the Director or the Head of Field Element shall have 30 days from the date of receipt of a complaint in which to attempt an informal resolution of the complaint. To this end, the Director or Head of Field Element may attempt to resolve the complaint through various Alternative Dispute Resolution techniques, primarily by encouraging the parties to engage in mediation.

(2) If informal resolution is reached, the Director or the Head of Field Element shall obtain a copy of the settlement agreement which terminates the complaint, or a written statement from the complainant withdrawing the complaint. The agreement or withdrawal of the complaint shall be made part of the complaint file, with a copy provided to all parties.

(3) If informal resolution cannot be reached, the Director or Head of Field Element shall advise the complainant of his or her right to elect to either have a copy of the complaint forwarded to the Deputy Inspector General for Inspections for further processing in accordance with § 708.8; have a copy of the complaint forwarded to the Director of the Office of Hearings and Appeals for processing in accordance with § 708.9; or withdraw his or her complaint.

(4) The complainant, within 10 days of receipt of the notice of a right to make an election under paragraph (b)(3) of this section, shall indicate his or her election to the Director or the Head of the Field Element.

(c) The Director or the Head of the Field Element shall advise the Deputy Inspector General for Inspections or the Director of the Office of Hearings and Appeals, of the election within 5 days of receipt of the complainant's response, and shall provide a copy of the complaint to the appropriate official for further processing. A copy of this notification shall also be provided to the complainant and the contractor named in the complaint.

9. Section 708.8 is revised to read as follows:

§ 708.8 Acceptance of complaint for inquiry.

(a)(1) Following receipt of notification from the Director or Head of Field Element that attempts at informal resolution under § 708.7 have been unsuccessful, and that the complainant has elected to have the complaint referred in accordance with this section, the Deputy Inspector General for Inspections, unless he or she declines to conduct an inquiry, may direct the conduct of an inquiry of the complaint.

(2) If informal resolution is reached while an inquiry is being conducted by the Deputy Inspector General for Inspections, the Director or the Head of Field Element shall obtain a copy of the settlement agreement which terminates the complaint, or a written document from the complainant referencing a final settlement and requesting withdrawal of the complaint. This document shall be made part of the file. The Deputy Inspector General for Inspections shall be advised in writing of the withdrawal of the complaint.

(b)(1) *Determination not to conduct an inquiry.* If the Deputy Inspector General for Inspections declines to process a complaint for inquiry, either after an initial review of the complaint or based upon information acquired during the inquiry of a complaint, the Deputy Inspector General of Inspections shall notify the complainant and contractor, by certified mail or by personal service, that an inquiry into the complaint will no longer be pursued by that office and that the complainant has the right to request a hearing on the complaint in accordance with the provisions of § 708.9. A copy of such notice declining to pursue an inquiry shall be sent to the Director of the Office of Hearings and Appeals, and the Director of the Office of Employee Concerns or the Head of Field Element, as appropriate. Requests for a hearing under this paragraph must be filed with the Director of the Office of Hearings and Appeals within 15 days of the receipt of the determination of the Deputy Inspector General for Inspections that an inquiry will not be conducted or continued. Copies of any request for a hearing shall be served by the complainant on all parties by certified mail.

(2) The authority of the Deputy Inspector General for Inspections to make the determination not to pursue an inquiry is wholly independent from jurisdictional determinations made by the Director, Heads of Field Elements, or the Secretary. Such a determination by the Deputy Inspector General for Inspections is not subject to review by the Office of Hearings and Appeals or appealable to the Secretary.

(c) *Conducting an inquiry—obtaining information.* In conducting an inquiry under this part, the inspector, for the purpose of determining whether a violation of § 708.5 has occurred, may enter and inspect places and records (and make copies thereof), may question persons alleged to have been involved in discriminatory acts and other employees of the charged contractor, may take sworn statements, as deemed necessary, and may require the production of any documentary or other evidence deemed necessary. At interviews conducted on behalf of the Deputy Inspector General for Inspections under this part, the person being interviewed shall have the right to be represented by a person of his or her own choosing. Parties to the complaint do not have an independent right to be present at such interviews. The contractor shall cooperate fully with the inspector in making available employees and all pertinent evidence.

(d) *Confidentiality.* The identity of a person, other than the complainant, requesting confidentiality shall not be released by the Office of Inspector General unless the Inspector General determines that it is unavoidable. The inspector shall advise the person to whom confidentiality is granted that such a grant of confidentiality is limited to mean that the Office of Inspector General will not disclose his or her identity as the source of information to anyone outside the Office of Inspector General, as required by statute, or as determined by the Inspector General to be unavoidable.

(e) *Reports of inquiry.* Upon completion of an inquiry, the Deputy Inspector General for Inspections shall

issue a Report of Inquiry that shall present the findings reached by the Deputy Inspector General for Inspections resulting from the conduct of the inquiry. The Report of Inquiry may also contain recommendations for remedial action, where appropriate, consistent with the remedies available under §§ 708.10(c) and 708.11(c). The Deputy Inspector General for Inspections shall provide the Report of Inquiry to the parties involved by certified mail, or by personal service, and provide a copy to the Director of the Office of Hearings and Appeals.

(f) If a Report of Inquiry has not been issued within 240 days of the date the Deputy Inspector General for Inspections was advised by the Director or Head of the Field Element that attempts at informal resolution were unsuccessful, the complainant may request a hearing in accordance with § 708.9. When a complainant exercises his or her right to request a hearing under this section, the Deputy Inspector General for Inspections will usually terminate any activities related to the inquiry being conducted on that complaint.

10. Section 708.9, Hearing, is revised to read as follows:

§ 708.9 Hearing.

(a) *Request for a hearing.* (1) Within 15 days of receipt of notification of his or her right to elect to proceed to a hearing if informal resolution efforts are not successful, pursuant to § 708.7(b)(3), a complainant may, in writing to the director of the Office of Hearings and Appeals, request a hearing.

(2) Within 15 days of receipt of the Report of Inquiry, a party may, in writing to the Director of the Office of Hearings and Appeals, request a hearing on the complaint. If a request for a hearing is not submitted by either party after the Deputy Inspector General for Inspections has completed an inquiry, the Director of the Office of Hearings and Appeals shall issue an initial agency decision pursuant to § 708.10.

(3) A complainant may, in writing to the Director of the Office of Hearings and Appeals, request a hearing on the complaint within 15 days of receipt of a notification of a decision by the Deputy Inspector General for Inspections not to open or continue an inquiry. If a hearing is not requested, the Director of the Office of Hearings and Appeals shall dismiss the complaint.

(4) A complainant may, in writing to the Director of the Office of Hearings and Appeals, request a hearing if a Report of Inquiry has not been issued within 240 days of the date the Deputy Inspector General for Inspections was advised by the Director or Head of the Field Element of the complainant's election to request an inquiry, pursuant to § 708.7(b)(3), after attempts at informal resolution were unsuccessful.

(b) If a request for a hearing is filed, the Director of the Office of Hearings and Appeals shall appoint, as soon as practicable, a Hearing Officer to conduct a hearing. Hearings will normally be held at or near the appropriate DOE field organization, within 90 days from the date the complaint file is received by the Hearing Officer unless the Hearing Officer determines that another location would be more appropriate, or unless the complaint is earlier settled by the parties. The Hearing Officer may, at his or her discretion, recommend to the parties that they attempt informal resolution of the complaint, through various Alternative Dispute Resolution techniques, including mediation, prior to the conduct of the hearing.

(c)(1) *Requests for discovery.* Upon the request of a party, the Hearing Officer may order discovery based upon a showing that the requested discovery is designed to produce evidence that will materially advance the proceeding. The parties may engage in reasonable discovery regarding any matter, not privileged, that is relevant to the subject matter of the complaint. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission.

(2) *Hearing procedures.* In all proceedings under this part, the parties shall have the right to be represented by a person of their own choosing. Formal rules of evidence shall not apply, but shall be used as a guide for application of procedures designed to assure production of the most probative evidence available. The Hearing Officer may exclude evidence which is immaterial, irrelevant, or unduly repetitious. The Hearing Officer is specifically prohibited from initiating or otherwise engaging in ex parte discussions on a complaint matter at any time during the pendency of the complaint proceeding under this part.

(d) *Burdens of proof.* The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in the alleged discriminatory action(s) taken or intended to be taken against the complainant. Once the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action(s) absent the complainant's disclosure, participation, or refusal.

(e) *Testimony.* Testimony of witnesses shall be given under oath or affirmation, and the witnesses shall be subject to cross-examination. Witnesses shall be advised of the applicability of 18 U.S.C. 1001 and 1621, dealing with the criminal penalties associated with false statements and perjury.

(f) *Subpoenas.* The Hearing Officer may subpoena witnesses to attend the Hearing on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing of the necessity for such witness or evidence has been made to the satisfaction of the Hearing Officer.

(g) *Recording of hearings.* All hearings shall be mechanically or stenographically reported. All evidence upon which the Hearing Officer relies for the recommended decision under § 708.10(b) shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits and other pertinent documents or records, either in whole or in material part, introduced as evidence, shall be marked to identification and incorporated into the record.

(h) *Post-hearing submissions.* Any party, upon request, may be allowed a reasonable time to file with the Hearing Officer a brief or statement of fact or law. A copy of any such brief or statement shall be filed with the Hearing Officer and shall be served by the submitting party upon each other party. The parties may make oral closing arguments, but post-hearing briefs will only be permitted at the direction of the Hearing Officer. When permitted, any such brief shall be limited to the issue or issues specified by the Hearing Officer and shall be due within the time prescribed by the Hearing Officer.

(i) At the request of any party, the Hearing Officer may, at his or her discretion, extend the time for any hearing held pursuant to this § 708.9. Additionally, the Hearing Officer may, at the request of any party, or on his or her own motion, dismiss a claim, defense, or party and make adverse findings—

(1) Upon the failure without good cause of any party or his or her representative to attend a hearing; or

(2) Upon the failure of any party to comply with a lawful order of the Hearing Officer.

(j) In any case where a dismissal of a claim, defense, or party is sought, the Hearing Officer shall take such action as is appropriate to rule on the dismissal,

which may include an order dismissing the claim, defense, or party. An order dismissing a claim, defense, or party may be appealed to the Secretary for reconsideration within 15 days of the dismissal order.

11. Section 708.10 is revised to read as follows:

708.10 Initial and final agency decision.

(a) If a hearing is not requested, the Director of the Office of Hearings and Appeals, within 60 days of expiration of the time set forth in § 708.9(a) for request of a hearing, shall issue an initial agency decision based upon the record, which decision shall be served upon the parties by certified mail. The initial agency decision shall contain appropriate findings, conclusions, and an order, and shall set forth the factual basis for each and every finding with respect to each alleged discriminatory act. In making such findings, the Director of the Office of Hearings and Appeals, may rely upon, but shall not be bound by, the findings contained in the Report of Inquiry. The burdens of proof set forth in § 708.9(d) are applicable to decisions made under this paragraph.

(b) If a hearing has been held, the Hearing Officer shall issue an initial agency decision within 60 days after the receipt of the transcript of the hearing or within 60 days after receipt of any post-hearing briefs or other information permitted under § 708.9(h), whichever is later. The initial agency decision shall contain appropriate findings, conclusions, and an order, and shall set forth the factual basis for each and every finding with respect to each alleged discriminatory act. In making such findings, the Hearing Officer may rely upon, but shall not be bound by, the findings contained in the Report of Inquiry. The Hearing Officer shall promptly serve the initial agency decision upon all parties to the proceeding by certified mail, and send a copy of the initial agency decision to the Deputy Inspector General for Inspections.

(c) The initial agency decision shall award such relief as is necessary to abate the violation, including, but not limited to, an award of reinstatement, transfer preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued.

(1) If the initial agency decision contains a determination that the complaint is without merit, it shall also include a notice stating that the decision shall become the final decision of DOE denying the complaint unless, within 15 days of its receipt, a written request for review by the Secretary is filed with the Director of the Office of Hearings and Appeals. Copies of any request for review shall be served by the requesting party upon all parties.

(2) If the initial agency decision contains a determination that a violation of § 708.5 has occurred, it shall also include an appropriate order to the contractor to abate the violation and to provide the complainant with relief, as well as notice to the parties that the decision shall become the final decision of DOE unless, within 15 days of its receipt, a written request for review by the Secretary is filed with the Director of the Office of Hearings and Appeals. Copies of any request for review shall be served by the requesting party upon all parties by certified mail.

(3) Notwithstanding the provisions of paragraph (c)(2) of this section, if the agency decision contains a determination that a violation of § 708.5 has occurred, it may contain an order requiring the contractor to provide the complainant with interim relief, including but not limited to reinstatement, pending the outcome of any request for review. This paragraph shall not be construed to require the payment of any monetary award before the DOE decision is final.

(d) If a request for review of the initial agency decision is not filed pursuant to paragraphs (c)(1) or (2) of this section, the Director of the Office of Hearings and Appeals, shall notify the parties by certified mail that the initial agency decision is the final agency decision. A copy of the notification shall be sent to the Director or the Head of the Field Element, as appropriate.

12. Section 708.11 is revised to read as follows:

§ 708.11 Secretarial review and final decision.

(a) Upon receipt of a request for review of an initial agency decision by the Secretary, the Director of the Office of Hearings and Appeals shall forward the request, along with the entire record, to the Secretary.

(b) Within 60 days after the Director of the Office of Hearings and Appeals has sent the record in a case to the Secretary, the Secretary shall either direct further processing of the complaint or, pursuant to paragraph (c) or (d) of this section, issue a final decision, based on the record, including the Report of Inquiry. The final decision shall be forwarded by the Secretary to the Director of the Office of Hearings and Appeals who shall serve it upon all parties by certified mail.

(1) If the Secretary determines that further processing of the complaint is necessary, the Secretary will return the case to the Director of the Office of Hearings and Appeals for appropriate action.

(2) Except to the extent prohibited by law, regulation, or Executive Order, all parties will be provided copies of any information compiled as a result of actions taken under paragraph (b)(1) of this section.

(c) If the Secretary determines that a violation of § 708.5 has occurred, the Secretary shall issue a final decision and shall instruct the Director of the Office of Hearings and Appeals to take appropriate action to implement that decision in accordance with § 708.12. The Secretary may provide such relief as is necessary to abate the violation, including, but not limited to, an award of reinstatement, transfer preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued or such other relief as is deemed necessary to abate the violation and provide the complainant with relief.

(d) If the Secretary determines that the party charged has not committed a discriminatory act in violation of § 708.5, the Secretary shall so notify the Director of the Office of Hearings and Appeals and issue a final decision dismissing the complaint. If the Secretary determines that there has been no discrimination, the complainant shall not receive reimbursement for the costs and expenses provided in paragraph (c) of this section.

13. Section 708.12, Implementation of decision, is revised to read as follows:

§ 708.12 Implementation of decision.

(a) Upon receipt of the final decision of the Secretary under § 708.11, or if the initial agency decision becomes the final decision pursuant to § 708.10(c) (1) or (2), the Director of the Office of Hearings and Appeals shall serve the final decision upon all parties by certified mail, and upon the head of the program or field office with jurisdiction over the contract under which the complainant was employed. The DOE official so served shall take all necessary steps to implement the final decision.

(b) For purposes of sections 6 and 7 of the Contract Disputes Act (41 U.S.C. 605 and 606), a decision implemented by DOE pursuant to this part shall not be considered a ''claim by the

government against a contractor'' or ''a decision by the contracting officer.'' However, a contractor's disagreement, and refusal to comply, with a final decision under this part could result in the contracting officer's decision to disallow certain costs or terminate the contract for default. In such case, the contractor could file a claim under the disputes procedures of the contract.

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DEPARTMENT OF ENERGY

48 CFR Parts 922, 952, and 970

RIN 1991–AB36

Acquisition regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) proposes to amend the Department of Energy Acquisition Regulation (DEAR) to implement a recommendation of its Department-wide contract reform initiative concerning costs in whistleblower actions. The effect of the rule, when finalized, will be to clarify those costs that are allowable and those that are unallowable in processing whistleblower cases.

DATES: Written comments should be forwarded no later than March 6, 1998.

ADDRESSES: Comments are to be submitted to P. Devers Weaver, Office of Policy (HR–51), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0705, facsimile 202–586–0545.

FOR FURTHER INFORMATION CONTACT: P. Devers Weaver, Office of Policy (HR–51), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0705, telephone 202–586–8250.

SUPPLEMENTARY INFORMATION:

I. Background

An action item under the Department's Contract Reform Team Report was the development of an explicit policy concerning the allowability of defense costs in ''whistleblower'' cases. On October 17, 1994, the Secretary of Energy publicly released and solicited comments on a set of proposals concerning whistleblower reforms. These proposals were designed to strengthen the ability of the Department's federal and contractor employees to raise concerns relating to waste, fraud and abuse; environment, safety and health; and other matters. One of these proposals called for the development of provisions to limit the Department's reimbursement of contractor litigation costs in whistleblower cases. This rulemaking contains a new clause, Costs Associated with Whistleblower Actions, which is a proposal for implementation of the contractor employee whistleblower reform initiative in the Department's contracting activities.

II. Section-by-Section Analysis

Section 922.7101 and subsection 952.222–70 are amended to add a new clause prescription.

Section 970.3103, Contract clauses, is amended to add a new paragraph (e) to prescribe the use of the new clause.

Section 970.5204–13, Allowable costs and fixed-fee (management and operating contracts), is amended to add a new paragraph (e)(3__).

Section 970.5204–14, Allowable costs and fixed-fee (support contracts), is amended to add a new paragraph (e)(3__).

Section 970.5204–XX, Costs Associated with Whistleblower Actions, is added.

III. Procedural Requirements

A. Review Under Executive Order 12612

Executive Order 12612, entitled ''Federalism,'' 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. The Department has determined that this proposed rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

B. Review Under Executive Order 12866

This regulatory action has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

C. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department of Energy has completed the required review and determined that, to the extent permitted by law, the proposed regulations meet the relevant standards of Executive Order 12988.

D. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500–1508), the Department has established guidelines for its