(2) Medical surveillance. (i) The employer shall establish and maintain an accurate record for each employee subject to medical surveillance as required by paragraph (n) of this section.

(ii) This record shall include:

(A) A copy of the physicians' written opinions or a written explanation of the absence of any such opinion or employee refusal to take the medical examination;

(B) Any employee medical complaints related to exposure to

(C) A copy of the information provided to the physician as required by paragraphs (n)(5)(ii)–(iv) of this section unless it is systematically retained elsewhere by the employer for the period of time specified in paragraph (q)(2)(iii); and,

(D) A copy of the employee's work history. (j) The employer shall assure that employee exposure measurement records, as required by this section, be made available upon request to the Assistant Secretary and the Director for examination and copying.

(iii) The employer shall assure that this record be maintained for the effective period of this emergency temporary standard, and for any additional period required by the permanent standard.

(3) Availability. (i) The employer shall assure that all records required to be maintained by this section be made available upon request, to the Assistant Secretary and the Director for examination and copying.

(ii) Employee exposure measurement records and employee medical records required by this section shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a) through (e) and (g) through (i).

(r) Observation of monitoring. (1) Employee observation. The employer shall provide affected employees, or their designated representatives, an opportunity to observe any monitoring of employee exposure to conducted pursuant to paragraph (e) of this section.

(2) Observation procedures. (i) Whenever observation of the monitoring of employee exposure to requires entry into an area where the use of protective clothing or equipment is required, the employer shall provide the observer with personal protective clothing or equipment required to be worn by employees working in the area, assure the use of such clothing and equipment, and require the observer to comply with all other applicable safety and health procedures.

(ii) Without interfering with the monitoring, observers shall be entitled to:

(A) Receive an explanation of measurement procedures;

(B) Observe all steps related to the measurement of airborne concentrations of performed at the place of exposure; and

(C) Record the results obtained and receive results supplied by the laboratory.

(s) Effective date. This section shall become effective (insert effective date).

(t) Appendices. The information contained in the appendices is not intended, itself, to create any additional obligations not otherwise imposed or to detract from any existing obligation. (In normal circumstances three appendices will be included in each standard, an “Appendix A—Substance Safety Data Sheet,” an “Appendix B—Substance Technical Guidelines,” and an “Appendix C—Medical Surveillance Guidelines.” Insert additional appendices or delete any of the suggested appendices as appropriate.)

## CHAPTER XX—OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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§ 2200.1 Definitions.

As used herein:


(b) Commission, person, employer, and employee have the meanings set forth in section 3 of the Act, 29 U.S.C. 652.

(c) Secretary means the Secretary of Labor or his duly authorized representative.

(d) Executive Secretary means the Executive Secretary of the Commission.

(e) Affected employee means an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations.


(g) Authorized employee representative means a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees.

(h) Representative means any person, including an authorized employee representative, authorized by a party or intervener to represent him in a proceeding.

(i) Citation means a written communication issued by the Secretary to an employer pursuant to 9(a) of the Act, 29 U.S.C. 658(a).

(j) Notification of proposed penalty means a written communication issued by the Secretary to an employer pursuant to 10 (a) or (b) of the Act, 29 U.S.C. 659(a) or (b).

(k) Day means a calendar day.

(l) Working day means all days except Saturdays, Sundays, or Federal holidays.

(m) Proceeding means any proceeding before the Commission or before a Judge.

(n) Pleadings are complaints and answers filed under §2200.34, statements of reasons and contestants’ responses filed under §2200.36, and petitions for modification of abatement and objecting parties’ responses filed under §2200.37. A motion is not a pleading within the meaning of these rules.


§ 2200.2 Scope of rules; applicability of Federal Rules of Civil Procedure; construction.

(a) Scope. These rules shall govern all proceedings before the Commission and its Judges.

(b) Applicability of Federal Rules of Civil Procedure. In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.

(c) Construction. These rules shall be construed to secure an expeditious, just and inexpensive determination of every case.

§ 2200.3 Use of gender and number.

(a) Number. Words importing the singular number may extend and be applied to the plural and vice versa.

(b) Gender. Words importing the masculine gender may be applied to the feminine gender.

§ 2200.4 Computation of time.

(a) Computation. In computing any period of time prescribed or allowed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or Federal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or Federal holiday. When the period of time prescribed or allowed is less than 11 days, the period shall commence on the first day which is not a Saturday.
§ 2200.7 Service and notice.

(a) When service is required. At the time of filing pleadings or other documents, a copy thereof shall be served by the filing party or intervenor on every other party or intervenor. Every paper relating to discovery required to be served on a party shall be served on all parties and intervenors. Every order required by its terms to be served shall be served upon each of the parties and intervenors.

(b) Service on represented parties or intervenors. Service upon a party or intervenor who has appeared through a representative shall be made only upon such representative.

(c) How accomplished. Unless otherwise ordered, service may be accomplished by postage pre-paid first class mail at the last known address, by electronic transmission, or by personal delivery. Service is deemed effected at the time of mailing (if by mail), at the time of receipt (if by electronic transmission), or at the time of personal delivery (if by personal delivery). Facsimile transmission of documents and documents sent by an overnight delivery service shall be considered personal delivery. Legibility of documents served by facsimile transmission is the responsibility of the serving party.
Documents may be served by electronic transmission only when all parties consent in writing and the certificate of service of the electronic transmission states such consent and the method of transmission. All parties must be electronically served. Electronic service must be accomplished by following the requirements set forth on the Commission’s Web site (http://www.OSHRC.gov).

(d) Proof of service. Proof of service shall be accomplished by a written statement of the same which sets forth the date and manner of service. Such statement shall be filed with the pleading or document.

(e) Proof of posting. Where service is accomplished by posting, proof of such posting shall be filed not later than the first working day following the posting.

(f) Service on represented employees. Service and notice to employees represented by an authorized employee representative shall be accomplished by serving the representative in the manner prescribed in paragraph (c) of this section.

(g) Service on unrepresented employees. In the event that there are any affected employees who are not represented by an authorized employee representative, the employer shall, immediately upon receipt of notice of the docketing of the notice of contest or petition for modification of the abatement period, post, where the citation is required to be posted, a copy of the notice of contest and a notice informing such affected employees of their right to party status and of the availability of all pleadings for inspection and copying at reasonable times. A notice in the following form shall be deemed to comply with this paragraph:

(Name of employer)

Your employer has been cited by the Secretary of Labor for violation of the Occupational Safety and Health Act of 1970. The citation has been contested and will be the subject of a hearing before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. Affected employees are entitled to participate in this hearing as parties under terms and conditions established by the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION in its Rules of Procedure. Notice of intent to participate must be filed no later than 10 days before the hearing. Any notice of intent to participate should be sent to: Occupational Safety and Health Review Commission, Office of the Executive Secretary, One Lafayette Centre, 1120 20th Street, NW., Suite 980, Washington, DC 20036-3457. All pleadings relevant to this matter may be inspected at: (Place reasonably convenient to employees, preferably at or near workplace.)

Where appropriate, the second sentence of the above notice will be deleted and the following sentence will be substituted:

The reasonableness of the period prescribed by the Secretary of Labor for abatement of the violation has been contested and will be the subject of a hearing before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.

(h) Special service requirements; authorized employee representatives. The authorized employee representative, if any, shall be served with the notice set forth in paragraph (g) of this section and with a copy of the notice of contest.

(i) Notice of hearing to unrepresented employees. Immediately upon receipt, a copy of the notice of the hearing to be held before the Judge shall be served by the employer on affected employees who are not represented by an authorized employee representative by posting a copy of the notice of such hearing at or near the place where the citation is required to be posted.

(j) Notice of hearing to represented employees. Immediately upon receipt, a copy of the notice of the hearing to be held before the Judge shall be served by the employer on the authorized employee representative of affected employees in the manner prescribed in paragraph (c) of this section, if the employer has not been informed that the authorized employee representative has entered an appearance as of the date such notice is received by the employer.

(k) Employee contest; service on other employees. Where a notice of contest is filed by an affected employee who is not represented by an authorized employee representative and there are other affected employees who are represented by an authorized employee representative, the employer shall, immediately upon receipt, a copy of the notice of the hearing to be held before the Judge shall be served by the employer on the authorized employee representative of affected employees in the manner prescribed in paragraph (c) of this section, if the employer has not been informed that the authorized employee representative has entered an appearance as of the date such notice is received by the employer.
representative, the unrepresented employee shall, upon receipt of the statement filed in conformance with §2200.38, serve a copy thereof on such authorized employee representative in the manner prescribed in paragraph (c) of this section and shall file proof of such service.

(l) Employee contest; Service on employer. Where a notice of contest is filed by an affected employee or an authorized employee representative, a copy of the notice of contest and response filed in support thereof shall be provided to the employer for posting in the manner prescribed in paragraph (g) of this section.

(m) Employee contest; service on other authorized employee representatives. An authorized employee representative who files a notice of contest shall be responsible for serving any other authorized employee representative whose members are affected employees.

(n) Duration of posting. Where posting is required by this section, such posting shall be maintained until the commencement of the hearing or until earlier disposition.

§2200.8 Filing.

(a) What to file. All papers required to be served on a party or intervenor, except for those papers associated with part of a discovery request under Rules 52 through 56, shall be filed either before service or within a reasonable time thereafter.

(b) Where to file. Prior to assignment of a case to a Judge, all papers shall be filed with the Executive Secretary at One Lafayette Centre, 1120 20th Street, NW., Suite 980, Washington, DC 20036–3457. Subsequent to the assignment to the case to a Judge, all papers shall be filed with the Judge at the address given in the notice informing of such assignment. Subsequent to the docketing of the Judge’s report, all papers shall be filed with the Executive Secretary, except as provided in §2200.90(b)(3).

(c) How to file. Unless otherwise ordered, filings may be accomplished by postage-prepaid first class mail, personal delivery, or electronic transmission or facsimile transmission.

(d) Number of copies. Unless otherwise ordered or stated in this part, only the original of a document shall be filed.

(e) Filing date. (1) Except for the documents listed in paragraph (e)(2) of this section, filing is effective upon mailing, if by mail, upon receipt by the Commission, if filing is by personal delivery, overnight delivery service, facsimile transmission or electronic transmission.

(2) Filing is effective upon receipt for petitions for interlocutory review (§2200.73), petitions for discretionary review (§2200.91), and EAJA applications (§2204.301).

(f) Counsel and the parties shall have sole responsibility for ensuring that the document is timely received by the Commission.

(1) Facsimile transmissions. (1) Any document may be filed with the Commission or its Judges by facsimile transmission. Filing shall be deemed completed at the time that the facsimile transmission is received by the Commission or the Judge. The filed facsimile shall have the same force and effect as an original.

(2) All facsimile transmissions shall include a facsimile of the appropriate certificate of service.

(3) It is the responsibility of parties desiring to file documents by the use of facsimile transmission equipment to utilize equipment that is compatible with facsimile transmission equipment operated by the Commission. Legibility of the transmitted documents is the responsibility of the serving party.

(g) Electronic filing. (1) Where all parties consent to electronic service and electronic filing, a document may be filed by electronic transmission with the Commission and its Judges. The certificate of service accompanying the document must state that the other parties consent to filing by electronic transmission. The electronic transmission shall be in the manner specified by the Commission’s Web site (http://www.OSHRC.gov).

(2) A document filed in conformance with these rules constitutes a written document for the purpose of applying these rules, and a copy printed by the
§ 2200.9 Consolidation.

Cases may be consolidated on the motion of any party, on the Judge's own motion, or on the Commission's own motion, where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the Act require.


§ 2200.10 Severance.

Upon its own motion, or upon motion of any party or intervenor, where a showing of good cause has been made by the party or intervenor, the Commission or the Judge may order any proceeding severed with respect to some or all claims or parties.

[57 FR 41684, Sept. 11, 1992]

§ 2200.11 [Reserved]

§ 2200.12 References to cases.

(a) Citing decisions by Commission and Judges—(1) Generally. Parties citing decisions by the Commission should include in the citation the name of the employer, a citation to either the Bureau of National Affairs' Occupational Safety and Health Cases ("BNA OSHC") or Commerce Clearing House's Occupational Safety and Health Decisions ("CCH OSHD"), the OSHRC docket number and the year of the decision. For example, Clement Food Co., 11 BNA OSHC 2120 (No. 80–607, 1984).

(2) Parenthetical statements. When citing the decision of a Judge, the digest of an opinion, or the opinion of a single Commissioner, a parenthetical statement to that effect should be included. For example, Rust Engineering Co., 1984 CCH OSHD ¶ 27,023 (No. 79-2090, 1984)

(3) Additional reference to OSHAHC Reports optional. A parallel reference to the Commission’s official reporter, OSHAHC Reports, which prints the full text of all Commission and Judges’ decisions in microfiche form, may also be included. For example, Texaco, Inc., 80 OSHAHC 74/B1, 8 BNA OSHC 1758 (No. 77–3040, 1980). See generally 29 CFR 2201.4(c) (on OSHAHC Reports).

(b) References to court decisions—(1) Parallel references to BNA and CCH reporters. When citing a court decision, a parallel reference to either the Bureau of National Affairs’ Occupational Safety and Health Cases (“BNA OSHC”) or Commerce Clearing House’s Occupational Safety and Health Decisions (“CCH OSHD”) is desirable. For example, Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 12 BNA OSHC 1401 (D.C. Cir. 1985); Deering Milliken, Inc. v. OSHRC, 630 F.2d 1094, 1980 CCH OSHD ¶ 24,991 (5th Cir. 1980).

(2) Name of employer to be indicated. When a court decision is cited in which the first-listed party on each side is either the Secretary of Labor (or the name of a particular Secretary of Labor), the Commission, or a labor union, the citation should include in parenthesis the name of the employer in the Commission proceeding. For example, Donovan v. Allied Industrial Workers (Archer Daniels Midland Co.), 760 F.2d 783, 12 BNA OSHC 1510 (7th Cir. 1985); Donovan v. OSHRC (Mobil Oil Corp.), 713 F.2d 918, 1983 CCH OSHD ¶ 26,627 (2d Cir. 1983).

§ 2200.21 Intervention; appearance by non-parties.

(a) When allowed. A petition for leave to intervene may be filed at any time prior to 10 days before commencement of the hearing. A petition filed less than 10 days prior to the commencement of the hearing will be denied unless good cause is shown for not timely filing the petition. A petition shall be served on all parties in accordance with § 2200.7.

(b) Requirements of petition. The petition shall set forth the interest of the petitioner in the proceeding and show that the participation of the petitioner will assist in the determination of the issues in question, and that the intervention will not unduly delay the proceeding.

(c) Granting of petition. The Commission or Judge may grant a petition for intervention to such an extent and upon such terms as the Commission or the Judge shall determine.

§ 2200.22 Representation of parties and intervenors.

(a) Representation. Any party or intervenor may appear in person, through an attorney, or through another representative who is not an attorney. A representative must file an appearance in accordance with § 2200.23. In the absence of an appearance by a
§ 2200.23 Appearances and withdrawals.

(a) Entry of appearance—(1) General. A representative of a party or intervenor shall enter an appearance by signing the first document filed on behalf of the party or intervenor in accordance with paragraph (a)(2) of this section, or thereafter by filing an entry of appearance in accordance with paragraph (a)(3) of this section.

(2) Appearance in first document or pleading. If the first document filed on behalf of a party or intervenor is signed by a representative, he shall be recognized as representing that party. No separate entry of appearance by him is necessary, provided the document contains the information required by §2200.6.

(3) Subsequent appearance. Where a representative has not previously appeared on behalf of a party or intervenor, he shall file an entry of appearance with the Executive Secretary, or Judge if the case has been assigned. The entry of appearance shall be signed by the representative and contain the information required by §2200.6.

(b) Affected employees in collective bargaining unit. Where an authorized employee representative (see §2200.1(g)) elects to participate as a party, affected employees who are members of the collective bargaining unit may not separately elect party status. If the authorized employee representative does not elect party status, affected employees who are members of the collective bargaining unit may elect party status in the same manner as affected employees who are not members of the collective bargaining unit. See paragraph (c) of this section.

(c) Affected employees not in collective bargaining unit. Affected employees who are not members of a collective bargaining unit may elect party status under §2200.20(a). If more than one employee so elects, the Judge shall provide for them to be treated as one party.

(d) Control of proceeding. A representative of a party or intervenor shall be deemed to control all matters respecting the interest of such party or intervenor in the proceeding.

[51 FR 32015, Sept. 8, 1986; 52 FR 13831, Apr. 27, 1987]

§ 2200.24 Brief of an amicus curiae.

The brief of an amicus curiae may be filed only by leave of the Judge or Commission. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support unless the Judge or Commission, for good cause shown, grants leave for later filing. In that event, the Judge or Commission shall specify within what period an opposing party may answer.

[57 FR 41684, Sept. 11, 1992]

Subpart C—Pleadings and Motions

§ 2200.30 General rules.

(a) Format. Pleadings and other documents (other than exhibits) shall be typewritten, double spaced, on letter size opaque paper (approximately 8 1/2 inches by 11 inches). All margins shall be approximately 1 1/2 inches. Pleadings and other documents shall be fastened at the upper left corner.

(b) Clarity. Each allegation or response of a pleading or motion shall be simple, concise and direct.
(c) Separation of claims. Each allegation or response shall be made in separate numbered paragraphs. Each paragraph shall be limited as far as practicable to a statement of a single set of circumstances.

(d) Adoption by reference. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(e) Alternative pleading. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them would be sufficient if made independently, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may state as many separate claims or defenses as he has regardless of their consistency or the grounds on which based. All statements shall be made subject to the signature requirements of §2200.32.

(f) Content of motions and miscellaneous pleadings. A motion shall contain a caption complying with §2200.31, a signature complying with §2200.32, and a clear and plain statement of the relief that is sought together with the grounds on which based. All requirements also apply to any pleading not governed by more specific requirements in this subpart.

(g) Burden of persuasion. The rules of pleading established by this subpart are not determinative in deciding which party bears the burden of persuasion on an issue. By pleading a matter affirmatively, a party does not waive its right to argue that the burden of persuasion on the matter is on another party.

(h) Enforcement of pleading rules. The Commission or the Judge may refuse for filing any pleading or motion that does not comply with the requirements of this subpart.

[51 FR 32015, Sept. 8, 1986, as amended at 57 FR 41885, Sept. 11, 1992]
§ 2200.33 Notice of contest.

Within 15 working days after receipt of—

(a) Notification that the employer intends to contest a citation or proposed penalty under section 10(a) of the Act, 29 U.S.C. 659(a); or

(b) Notification that the employer wishes to contest a notice of a failure to abate or a proposed penalty under section 10(b) of the Act, 29 U.S.C. 659(b); or

(c) A notice of contest filed by an employee or representative of employees under section 10(c) of the Act, 29 U.S.C. 659(c),

the Secretary shall notify the Commission of the receipt in writing and shall promptly furnish to the Executive Secretary of the Commission the original of any documents or records filed by the contesting party and copies of all other documents or records relevant to the contest.

[51 FR 32015, Sept. 8, 1986; 52 FR 13831, Apr. 27, 1987]

§ 2200.34 Employer contests.

(a) Complaint. (1) The Secretary shall file a complaint with the Commission no later than 20 days after receipt of the notice of contest.

(2) The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:

(i) The basis for jurisdiction;

(ii) The time, location, place, and circumstances of each such alleged violation; and

(iii) The considerations upon which the period for abatement and the proposed penalty of each such alleged violation are based.

(3) Where the Secretary seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with particularity the change sought.

(b) Answer. (1) Within 20 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.

(2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted.

(3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, “infeasibility,” “unpreventable employee misconduct,” and “greater hazard.”

(4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

[57 FR 41685, Sept. 11, 1992]

§ 2200.35 Disclosure of corporate parents, subsidiaries, and affiliates.

(a) General. All answers, petitions for modification of abatement period, or other initial pleadings filed under these rules by a corporation shall be accompanied by a separate declaration listing all parents, subsidiaries, and affiliates of that corporation or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is applicable.

(b) Failure to disclose. The Commission or Judge in its discretion may refuse to accept for filing an answer or other initial pleading that lacks the disclosure declaration required by this paragraph. A party that fails to file an adequate declaration may be held in default after being given an opportunity to show cause why it should not be held in default.

(c) Continuing duty to disclose. A party subject to the disclosure requirement of this paragraph has a continuing duty to notify the Commission or the Judge of any change in the information on the disclosure declaration until the
Commission issues a final order disposing of the proceeding.

(d) **Show cause orders.** All show cause orders issued by the Commission or Judge under paragraph (b) of this section shall be served upon the affected party by certified mail, return receipt requested.

[57 FR 41685, Sept. 11, 1992]

§ 2200.36 [Reserved]

§ 2200.37 Petitions for modification of the abatement period.

(a) **Grounds for modifying abatement date.** An employer may file a petition for modification of abatement date when such employer has made a good faith effort to comply with the abatement requirements of a citation, but such abatement has not been completed because of factors beyond the employer’s reasonable control.

(b) **Contents of petition.** A petition for modification of abatement date shall be in writing and shall include the following information:

1. All steps taken by the employer, and the dates of such action, in an effort to achieve compliance during the prescribed abatement period.

2. The specific additional abatement time necessary in order to achieve compliance.

3. The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

4. All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.

(c) **When and where filed; Posting requirement; Responses to petition.** A petition for modification of abatement date shall be filed with the Area Director of the United States Department of Labor who issued the citation no later than the close of the next working day following the date on which abatement was originally required. A later-filed petition shall be accompanied by the employer’s statement of exceptional circumstances explaining the delay.

1. A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice thereof or near each location where the violation occurred. The petition shall remain posted for a period of 10 days.

2. Affected employees or their representatives may file an objection in writing to such petition with the aforesaid Area Director. Failure to file such objection within 10 working days of the date of posting of such petition shall constitute a waiver of any further right to object to said petition.

3. The Secretary or his duly authorized agent shall have the authority to approve any uncontested petition for modification of abatement date filed pursuant to paragraphs (b) and (c) of this section. Such uncontested petitions shall become final orders pursuant to sections 10(a) and (c) of the Act, 29 U.S.C. 659(a) and (c).

4. The Secretary or his authorized representative shall not exercise his approval power until the expiration of 15 working days from the date the petition was posted pursuant to paragraphs (c)(1) and (2) of this section by the employer.

(d) **Contested petitions.** Where any petition is objected to by the Secretary or affected employees, such petition shall be processed as follows:

1. The Secretary shall forward the petition, citation and any objections to the Commission within 10 working days after the expiration of the 15 working day period set out in paragraph (c)(4) of this section.

2. The Commission shall docket and process such petitions as expedited proceedings as provided for in §2200.103 of this part.

3. An employer petitioning for a modification of the abatement period shall have the burden of proving in accordance with the requirements of section 10(c) of the Act, 29 U.S.C. 659(c), that such employer has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond the employer’s control.

4. Where the petitioner is a corporation, it shall file a separate declaration listing all parents, subsidiaries, and affiliates of that corporation or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is
§ 2200.38 Employee contests.

(a) Secretary's statement of reasons. Where an affected employee or authorized employee representative files a notice of contest with respect to the abatement period, the Secretary shall, within 10 days from his receipt of the notice of contest, file a clear and concise statement of the reasons the abatement period prescribed by him is not unreasonable.

(b) Response to Secretary's statement. Not later than 10 days after receipt of the statement referred to in paragraph (a) of this section, the contestant shall file a response.

(c) Expedited proceedings. All contests under this section shall be handled as expedited proceedings as provided for in §2200.103 of this part.

§ 2200.39 Statement of position.

At any time prior to the commencement of the hearing before the Judge, any person entitled to appear as a party, or any person who has been granted leave to intervene, may file a statement of position with respect to any or all issues to be heard. The Judge may order the filing of a statement of position.

§ 2200.40 Motions and requests.

(a) How to make. A request for an order shall be made by motion. Motions shall be in writing or, unless the Judge directs otherwise, may be made orally during a hearing on the record and shall be included in the transcript. In exigent circumstances in cases pending before Judges, a motion may be made telephonically if it is reduced to writing and filed as soon as possible but no later than 3 working days following the time the motion was made. A motion shall state with particularity the grounds on which it is based and shall set forth the relief or order sought. A motion shall not be included in another document, such as a brief or a petition for discretionary review, but shall be made in a separate document. Prior to filing a motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion.

(b) When to make. A motion filed in lieu of an answer pursuant to §2200.34(b) shall be filed no later than 20 days after the service of the complaint. Any other motion shall be made as soon as the grounds therefor are known.

(c) Responses. Any party or intervenor upon whom a motion is served shall have 10 days from service of the motion to file a response. A procedural motion may be ruled upon prior to the expiration of the time for response; a party adversely affected by the ruling may within 5 days of service of the ruling seek reconsideration.

(d) Postponement not automatic upon filing of motion. The filing of a motion, including a motion for a postponement, does not automatically postpone a hearing. See §2200.62 with respect to motions for postponement.

§ 2200.41 [Reserved]
after the filing of the answer, enter a scheduling order that limits the time:
(i) To join other parties and to amend the pleadings;
(ii) To file and hear motions; and
(iii) To complete discovery.
(2) The scheduling order also may include:
(i) The date or dates for conferences before hearing, a final prehearing conference, and hearing; and
(ii) Any other matters appropriate to the circumstances of the case.
(b) Prehearing conference. In addition to the prehearing procedures set forth in Federal Rule of Civil Procedure 16, the Judge may upon his own initiative or on the motion of a party direct the parties to confer among themselves to consider settlement, stipulation of facts, or any other matter that may expedite the hearing.

§ 2200.52 General provisions governing discovery.
(a) General—(1) Methods and limitations. In conformity with these rules, any party may, without leave of the Commission or Judge, obtain discovery by one or more of the following methods:
(i) Production of documents or things or permission to enter upon land or other property for inspection and other purposes (§ 2200.53);
(ii) Requests for admission to the extent provided in § 2200.54; and
(iii) Interrogatories to the extent provided in § 2200.55. Discovery is not available under these rules through depositions except to the extent provided in § 2200.56. In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure, except that the provisions of Federal Rule of Civil Procedure 26(a) do not apply to Commission proceedings.
(2) Time for discovery. A party may initiate all forms of discovery in conformity with these Rules at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss. Discovery shall be initiated early enough to permit completion of discovery no later than 7 days prior to the date set for hearing, unless the Judge orders otherwise.
(3) Service of discovery papers. Every paper relating to discovery required to be served on a party shall be served on all parties.
(b) Scope of discovery. The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of which party has the burden of proof.
(c) Limitations. The frequency or extent of the discovery methods provided by these rules may be limited by the Commission or Judge if it is determined that:
(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
(2) The party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action; or
(3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues in litigation.
(d) Privilege—(1) Claims of privilege. The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from the Judge or the Commission, or in response to a motion to compel, the claim shall:
Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon in camera, that is, with the record and
hearing room closed to the public, or ex parte, that is, without the participation of parties and their representatives. The Judge may enter an order and impose terms and conditions on his or her examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be disclosed until after the examination is completed.

(2) Upholding or rejecting claims of privilege. If the Judge upholds the claim of privilege, the Judge may order and impose terms and conditions as justice may require, including a protective order. If the Judge overrules the claim, the person claiming the privilege may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission. Interlocutory review of such an order shall be given priority consideration by the Commission.

(e) Protective orders. In connection with any discovery procedures and where a showing of good cause has been made, the Commission or Judge may make any order including, but not limited to, one or more of the following:

(1) That the discovery not be had;
(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
(5) That discovery be conducted with no one present except persons designated by the Commission or Judge;
(6) That a deposition after being sealed be opened only by order of the Commission or Judge;
(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or Judge.

(f) Failure to cooperate; Sanctions. A party may apply for an order compelling discovery when another party refuses or obstructs discovery. For purposes of this paragraph, an evasive or incomplete answer is to be treated as a failure to answer. If a Judge enters an order compelling discovery and there is a failure to comply with that order, the Judge may make such orders with regard to the failure as are just. The orders may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party. The orders may include any sanction stated in Federal Rule of Civil Procedure 37, including the following:

(1) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;
(2) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;
(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed; and
(4) An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(g) Unreasonable delays. None of the discovery procedures set forth in these rules shall be used in a manner or at a time which shall delay or impede the progress of the case toward hearing status or the hearing of the case on the date for which it is scheduled, unless, in the interests of justice, the Judge shall order otherwise. Unreasonable delays in utilizing discovery procedures may result in termination of the party’s right to conduct discovery.

(h) Show cause orders. All show cause orders issued by the Commission or Judge under paragraph (f) of this section shall be served upon the affected party by certified mail, return receipt requested.

(i) Supplementation of responses. A party who has responded to a request for discovery with a response that was
complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to:
   (i) The identity and location of persons having knowledge of discoverable matters; and
   (ii) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the person is expected to testify, and the substance of the person’s testimony.
(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:
   (i) The party knows that the response was incorrect when made; or
   (ii) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to the hearing through new requests for supplementation of prior responses.
   (j) Filing of discovery. Requests for production or inspection under §2200.53, requests for admission under §2200.54 and responses thereto, interrogatories under §2200.55 and the answers thereto, and depositions under §2200.56 shall be served upon other counsel or parties, but shall not be filed with the Commission or the Judge. The party responsible for service of the discovery material shall retain the original and become the custodian.
   (k) Relief from discovery requests. If relief is sought under §§2200.101 or 2200.52(e), (f), or (g) concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories, or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers, or responses in dispute shall be filed with the Judge or Commission contemporaneously with any motion filed under §§2200.101 or 2200.52(e), (f), or (g).
      (l) Use at hearing. If interrogatories, requests, answers, responses, or depositions are to be used at the hearing or are necessary to a prehearing motion which might result in a final order on any claim, the portions to be used shall be filed with the Judge or the Commission at the outset of the hearing or at the filing of the motion insofar as their use can be reasonably anticipated.
   (m) Use on review or appeal. When documentation of discovery not previously in the record is needed for review or appeal purposes, upon an application and order of the Judge or Commission the necessary discovery papers shall be filed with the Executive Secretary of the Commission.

§2200.53 Production of documents and things.
   (a) Scope. At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve on any other party a request to:
      (1) Produce and permit the party making the request, or a person acting on his or her behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served;
      (2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served;
   (b) Procedure. The request shall set forth the items to be inspected, either by individual item or by category and describe each item and category with reasonable particularity. It shall specify a reasonable time, place and manner of making the inspection and performing related acts. The party upon whom the request is served shall serve
§ 2200.54 Requests for admissions.

(a) Scope. At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve upon any other party written requests for admissions, for purposes of the pending action only, of the genuineness and authenticity of any document described in or attached to the requests, or of the truth of any specified matter of fact. Each matter of which an admission is requested shall be separately set forth. The number of requested admissions shall not exceed 25, including subparts, without an order of the Commission or Judge. The party seeking to serve more than 25 requested admissions, including subparts, shall have the burden of persuasion to establish that the complexity of the case or the number of citation items necessitates a greater number of requested admissions.

(b) Response to requests. Each matter is deemed admitted unless, within 30 days after service of the requests or within such shorter or longer time as the Commission or Judge may allow, the party to whom the requests are directed serves upon the requesting party a written answer specifically admitting or denying the matter involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or an objection, stating in detail the reasons therefor. The response shall be made under oath or affirmation and signed by the party or his representative.

(c) Effect of admission. Any matter admitted under this section is conclusively established unless the Judge or Commission on motion permits withdrawal or modification of the admission. Withdrawal or modification may be permitted when the presentation of the merits of the case will be subserved thereby, and the party who obtained the admission fails to satisfy the Commission or Judge that the withdrawal or modification will prejudice him in presenting his case or defense on the merits.

§ 2200.55 Interrogatories.

(a) General. At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve interrogatories upon any other party. The number of interrogatories shall not exceed 25 questions, including subparts, without an order of the Commission or Judge. The party seeking to serve more than 25 questions, including subparts, shall have the burden of persuasion to establish that the complexity of the case or the number of citation items necessitates a greater number of interrogatories.

(b) Answers. All answers shall be made in good faith and as completely as the answering party’s information will permit. The answering party is required to make reasonable inquiry and ascertain readily obtainable information. An answering party may not give lack of information or knowledge as an answer or as a reason for failure to answer, unless he states that he has made reasonable inquiry and that information known or readily obtainable by him is insufficient to enable him to answer the substance of the interrogatory.

(c) Procedure. Each interrogatory shall be answered separately and fully
under oath or affirmation. If the interrogatory is objected to, the objection shall be stated in lieu of the answer. The answers are to be signed by the person making them and the objections shall be signed by the party or his counsel. The party on whom the interrogatories have been served shall serve a copy of his answers or objections upon the propounding party within 30 days after the service of the interrogatories. The Judge may allow a shorter or longer time. The burden shall be on the party submitting the interrogatories to move for an order with respect to any objection or other failure to answer an interrogatory.

§ 2200.56 Depositions.

(a) General. Depositions of parties, intervenors, or witnesses shall be allowed only by agreement of all the parties, or on order of the Commission or Judge following the filing of a motion of a party stating good and just reasons. All depositions shall be before an officer authorized to administer oaths and affirmations at the place of examination. The deposition shall be taken in accordance with the Federal Rules of Civil Procedure, particularly Federal Rule of Civil Procedure 30.

(b) When to file. A motion to take depositions may be filed after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss.

(c) Notice of taking. Any depositions allowed by the Commission or Judge may be taken after 10 days written notice to the other party or parties. The 10-day notice requirement may be waived by the parties.

(d) Expenses. Expenses for a court reporter and the preparing and serving of depositions shall be borne by the party at whose instance the deposition is taken.

(e) Use of depositions. Depositions taken under this rule may be used for discovery, to contradict or impeach the testimony of a deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence and the Federal Rules of Civil Procedure, particularly Federal Rule of Civil Procedure 32.

(f) Excerpts from depositions to be offered at hearing. Except when used for purposes of impeachment, at least 5 working days prior to the hearing, the parties or counsel shall furnish to the Judge and all opposing parties or counsel the excerpts from depositions (by page and line number) which they expect to introduce at the hearing. Four working days thereafter, the adverse party or counsel for the adverse party shall furnish to the Judge and all opposing parties or counsel additional excerpts from the depositions (by page and line number) which they expect to be read pursuant to Federal Rule of Civil Procedure 32(a)(4), as well as any objections (by page and line number) to opposing party’s or counsel’s depositions. With reasonable notice to the Judge and all parties or counsel, other excerpts may be read.

(g) Telephone depositions. (1) Telephone depositions may be conducted pursuant to Federal Rule of Civil Procedure 30(b)(4).

(2) If a party objects to a telephone deposition, he shall make known his objections at least 5 days prior to the taking of the deposition. If the objection is not resolved by the parties or the Judge before the scheduled deposition date, the deposition shall be stayed pending resolution of the dispute.

(h) Video depositions. By indicating in its notice of a deposition that it wishes to record the deposition by videotape (and identifying the proposed videotape operator), a party shall be deemed to have moved for such an order under Federal Rule of Civil Procedure 30(b)(3). Unless an objection is filed and served within 10 days after such notice is received, the Judge shall be deemed to have granted the motion pursuant to the following terms and conditions:

(1) Stenographic recording. The videotaped deposition shall be simultaneously recorded stenographically by a qualified court reporter. The written transcript by the court reporter shall constitute the official record of the deposition for purposes of Federal Rule of Civil Procedure 30(e) (submission to witness).

(2) Cost. The noticing party shall bear the expense of both the videotaping and the stenographic recording. Any
party may at its own expense obtain a copy of the videotape and the stenographic transcript.

(3) **Video operator.** The operator(s) of the videotape recording equipment shall be subject to the provisions of Federal Rule of Civil Procedure 28 (c). At the commencement of the deposition the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

(4) **Attendance.** Each witness, attorney, and other person attending the deposition shall be identified on camera at the commencement of the deposition. Thereafter, only the deponent (and demonstrative materials used during the deposition) will be videotaped. Identification on camera of each witness, attorney, and other person attending the deposition may be waived by the attorneys for the parties.

(5) **Standards.** The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a hearing. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. Eating and smoking by deponents or counsel during the deposition will not be permitted.

(6) **Interruptions.** Videotape recording will be suspended during all “off the record” discussions.

(7) **Index.** The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which examination by different counsel begins and ends; at which objections are made and examination resumes; at which exhibits are identified; and at which any interruption of continuous tape recording occurs, whether for recesses, “off the record” discussions, mechanical failure, or otherwise.

(8) **Filing.** If a videotaped deposition is used at the hearing, the original of the videotape recording, together with the transcript, the operator’s log index, and a certificate of the operator attesting to the accuracy of the tape, shall be filed with the Judge. No part of a videotaped deposition shall be released or made available to any member of the public unless authorized by the Commission or the Judge.

(9) **Objections.** Requests for prehearing rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If the objection involves matters peculiar to the videotaping, a copy of the videotape and equipment for viewing the tape shall also be provided to the Commission or Judge.

(10) **Use at hearing; purged tapes.** A party desiring to offer a videotape deposition at the hearing shall be responsible for having available appropriate playback equipment and a trained operator. After the designation by all parties of the portions of a videotape to be used at the hearing, an edited copy of the tape, purged of unnecessary portions (and any portions to which objections have been sustained), must be prepared by the offering party to facilitate continuous playback; but a copy of the edited tape shall be made available to other parties at least 10 days before it is used, and the unedited original of the tape shall also be available at the hearing.


§ 2200.57 Issuance of subpoenas; petitions to revoke or modify subpoenas; right to inspect or copy data.

(a) **Issuance of subpoenas.** On behalf of the Commission or any member thereof, the Judge shall, on the application of any party, issue to the applying party subpoenas requiring the attendance and testimony of witnesses and
the production of any evidence, including relevant books, records, correspondence, or documents, in his possession or under his control. The party to whom the subpoena is issued shall be responsible for its service. Applications for subpoenas, if filed prior to the assignment of the case to a Judge, shall be filed with the Executive Secretary at One Lafayette Centre, 1120-20th Street NW., 9th Floor, Washington, DC 20036-3457. After the case has been assigned to a Judge, applications shall be filed with the Judge. Applications for subpoena(s) may be made ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) Service of subpoenas. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein may be made by service on the person named, by certified mail return receipt requested, or by leaving a copy at the person’s principal place of business or at the person’s residence with some person of suitable age and discretion residing therein.

(c) Revocation or modification of subpoenas. Any person served with a subpoena, whether ad testificandum or duces tecum, shall, within 5 days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena if he does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The Judge or the Commission shall revoke or modify the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Judge or the Commission, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto, and any ruling thereon shall become a part of the record.

(d) Rights of persons compelled to submit data. Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies of transcripts of the data or evidence submitted by them.

(e) Failure to comply with subpoena. Upon the failure of any person to comply with a subpoena issued upon the request of a party, the Commission by its counsel shall initiate proceedings in the appropriate district court for the enforcement thereof. If in its judgment the enforcement of such subpoena would be consistent with law and with policies of the Act. Neither the Commission nor its counsel shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

Subpart E—Hearings

§ 2200.60 Notice of hearing; location.

Except by agreement of the parties, or in an expedited proceeding under §2200.103, notice of the time, place, and nature of the first setting of a hearing shall be given to the parties and intervenors at least 30 days in advance of the hearing. If a hearing is being rescheduled, or if exigent circumstances are present, at least 10 days notice shall be given. The Judge will designate a place and time of hearing that involves as little inconvenience and expense to the parties as is practicable.

§ 2200.61 Submission without hearing.

A case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure
of proof. Motions for summary judgment are covered by Federal Rule of Civil Procedure 56.

§ 2200.62 Postponement of hearing.

(a) Motion to postpone. A hearing may be postponed by the Judge on his own initiative or for good cause shown upon the motion of a party. A motion for postponement shall state the position of the other parties, either by a joint motion or by a representation of the moving party. The filing of a motion for postponement does not automatically postpone a hearing.

(b) Grounds for postponement. A motion for postponement grounded on conflicting engagements of counsel or employment of new counsel shall be filed promptly after notice is given of the hearing, or as soon as the conflict is learned of or the engagement occurs.

(c) When motion must be received. A motion to postpone a hearing must be received at least 7 days prior to the hearing. A motion for postponement received less than 7 days prior to the hearing will generally be denied unless good cause is shown for late filing.

(d) Postponement in excess of 60 days. No postponement in excess of 60 days shall be granted without the concurrence of the Chief Administrative Law Judge. The original of any motion seeking a postponement in excess of 60 days shall be filed with the Judge and a copy sent to the Chief Administrative Law Judge.

§ 2200.64 Failure to appear.

(a) Attendance at hearing. The failure of a party to appear at a hearing may result in a decision against that party.

(b) Requests for reinstatement. Requests for reinstatement must be made, in the absence of extraordinary circumstances, within 5 days after the scheduled hearing date. See §2200.90(b)(3).

(c) Rescheduling hearing. The Commission or the Judge, upon a showing of good cause, may excuse such failure to appear. In such event, the hearing will be rescheduled as expeditiously as possible from the issuance of the Judge’s order.

§ 2200.65 Payment of witness fees and mileage; fees of persons taking depositions.

Witnesses summoned before the Commission or the Judge shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witness appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

§ 2200.66 Transcript of testimony.

(a) Hearings. Hearings shall be transcribed verbatim. A copy of the transcript of testimony taken at the hearing, duly certified by the reporter, shall be filed with the Judge before whom the matter was heard.

(b) Payment for transcript. The Commission shall bear all expenses for court reporters' fees and for copies of the hearing transcript received by it. Each party is responsible for securing and paying for its copy of the transcript.

(c) Correction of errors. Error in the transcript of the hearing may be corrected by the Judge on his own motion, on joint motion by the parties, or on motion by any party. The motion shall state the error in the transcript and the correction to be made. Corrections will be made by hand with pen and ink and by the appending of an errata sheet.

§ 2200.67 Duties and powers of Judges.

It shall be the duty of the Judge to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay. The Judge shall have authority with respect to cases assigned to him, between the time he is designated and the time he issues his decision, subject to the rules and regulations of the Commission, to:

(a) Administer oaths and affirmations;

(b) Issue authorized subpoenas;

(c) Rule upon petitions to revoke subpoenas;

(d) Rule upon offers of proof and receive relevant evidence;

(e) Take or cause depositions to be taken whenever the needs of justice would be served;

(f) Regulate the course of the hearing and, if appropriate or necessary, exclude persons or counsel from the hearing for contemptuous conduct and strike all related testimony of witnesses refusing to answer any proper questions;

(g) Hold conferences for the settlement or simplification of the issues;

(h) Dispose of procedural requests or similar matters, including motions referred to the Judge by the Commission and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened or, upon motion, consolidated prior to issuance of his decision;

(i) Make decisions in conformity with section 557 of title 5, United States Code;

(j) Call and examine witnesses and to introduce into the record documentary or other evidence;

(k) Request the parties to state their respective positions concerning any issue in the case or theory in support thereof;

(l) Adjourn the hearing as the needs of justice and good administration require;

(m) Take any other action necessary under the foregoing and authorized by the published rules and regulations of the Commission.

§ 2200.68 Disqualification of the Judge.

(a) Discretionary withdrawal. A Judge may withdraw from a proceeding whenever he deems himself disqualified.

(b) Request for withdrawal. Any party may request the Judge, at any time following his designation and before the filing of his decision, to withdraw on ground of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

(c) Granting request. If, in the opinion of the Judge, the affidavit referred to in paragraph (b) of this section is filed with due diligence and is sufficient on its face, the Judge shall forthwith disqualify himself and withdraw from the proceeding.

(d) Denial of request. If the Judge does not disqualify himself and withdraw from the proceedings, he shall so rule upon the record, stating the grounds for his ruling and shall proceed with the hearing, or, if the hearing has closed, he shall proceed with the issuance of his decision, and the provisions of § 2200.90 shall thereupon apply.
§ 2200.69 Examination of witnesses.

Witnesses shall be examined orally under oath or affirmation. Opposing parties have the right to cross-examine any witness whose testimony is introduced by an adverse party. All parties shall have the right to cross-examine any witness called by the Judge pursuant to §2200.67(j).

§ 2200.70 Exhibits.

(a) Marking exhibits. All exhibits offered in evidence by a party shall be marked for identification before or during the hearing. Exhibits shall be marked with the case docket number, with a designation identifying the party or intervenor offering the exhibit, and numbered consecutively.

(b) Removal or substitution of exhibits in evidence. Unless the Judge finds it impractical, a copy of each exhibit shall be given to the other parties and intervenors. A party may remove an exhibit from the official record during the hearing or at the conclusion of the hearing only upon permission of the Judge. The Judge, in his discretion, may permit the substitution of a duplicate for any original document offered into evidence.

(c) Reasons for denial of admitting exhibit. A Judge may, in his discretion, deny the admission of any exhibit because of its excessive size, weight, or other characteristic that prohibits its convenient transportation and storage. A party may offer into evidence photographs, models or other representations of any such exhibit.

(d) Rejected exhibits. All exhibits offered but denied admission into evidence, except exhibits referred to in paragraph (c) of this section, shall be placed in a separate file designated for rejected exhibits.

(e) Return of physical exhibits. A party may on motion request the return of a physical exhibit within 30 days after expiration of the time for filing a petition for review of a Commission final order in a United States Court of Appeals under section 11 of the Act, 29 U.S.C. 660, or 30 days after completion of any proceedings initiated thereunder.

§ 2200.71 Rules of evidence.

The Federal Rules of Evidence are applicable.

§ 2200.72 Objections.

(a) Statement of objection. Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the Judge, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and shall be included in the record. No such objection shall be deemed waived by further participation in the hearing.

(b) Offer of proof. Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record of the proceeding.

§ 2200.73 Interlocutory review.

(a) General. Interlocutory review of a Judge’s ruling is discretionary with the Commission. A petition for interlocutory review may be granted only where
the petition asserts and the Commission finds:

(1) That the review involves an important question of law or policy about which there is substantial ground for difference of opinion and that immediate review of the ruling may materially expedite the final disposition of the proceedings; or

(2) That the ruling will result in a disclosure, before the Commission may review the Judge’s report, of information that is alleged to be privileged.

(b) Petition for interlocutory review. Within 5 days following the receipt of a Judge’s ruling from which review is sought, a party may file a petition for interlocutory review with the Commission. Responses to the petition, if any, shall be filed within 5 days following service of the petition. A copy of the petition and responses shall be filed with the Judge. The petition is denied unless granted within 30 days of the date of receipt by the Commission’s Executive Secretary. A corporate party that files a petition for interlocutory review or a response to such a petition under this section shall file with the Commission a copy of its declaration of corporate parents, subsidiaries, and affiliates previously filed with the Judge under the requirements of §2200.35 or §2200.37(d)(4). In its discretion the Commission may refuse to accept for filing a petition or response that fails to comply with this disclosure requirement. A corporate party filing the declaration required by this paragraph shall have a continuing duty to advise the Executive Secretary of any changes to its declaration until the Commission either denies the petition for interlocutory appeal or issues its decision on the merits of the appeal.

(c) Denial without prejudice. The Commission’s action in denying a petition for interlocutory review shall not preclude a party from raising an objection to the Judge’s interlocutory ruling in a petition for discretionary review.

(d) Stay—(1) Trade secret matters. The filing of a petition for interlocutory review of a Judge’s ruling concerning an alleged trade secret shall stay the effect of the ruling until the Commission denies the petition or rules on the merits. (2) Other cases. In all other cases, the filing or granting of a petition for interlocutory review shall not stay a proceeding or the effect of a ruling unless otherwise ordered.

(e) Judge’s comments. The Judge may be requested to provide the Commission with his written views on whether the petition is meritorious. The Judge shall serve copies of these comments on all parties when he files them with the Commission.

(f) Briefs. Should the Commission desire briefs on the issues raised by an interlocutory review, it shall give notice to the parties. See §2200.93—Briefs before the Commission.

(g) When filing effective. A petition for interlocutory review is deemed to be filed only when received by the Commission.

§2200.74 Filing of briefs and proposed findings with the Judge; oral argument at the hearing.

(a) General. A party is entitled to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of hearing, to file a brief, proposed findings of fact and conclusions of law, or both, with the Judge. In lieu of briefs, the Judge may permit or direct the parties to file memoranda or statements of authority.

(b) Time. Briefs shall be filed simultaneously on a date established by the Judge. A motion for extension of time for filing any brief shall be made at least 3 days prior to the due date and shall recite that the moving party has advised the other parties of the motion. Reply briefs shall not be allowed except by order of the Judge.

(c) Untimely briefs. Untimely briefs will not be accepted unless accompanied by a motion setting forth good cause for the delay.
§ 2200.90  Decisions of Judges.

(a) Contents. The Judge shall prepare a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented on the record. The decision shall include an order affirming, modifying or vacating each contested citation item and each proposed penalty, or directing other appropriate relief. A decision finally disposing of a petition for modification of the abatement period shall contain an order affirming or modifying the abatement period.

(b) The Judge’s report—(1) Mailing to parties. The Judge shall mail or otherwise transmit a copy of his decision to each party.

(2) Docketing of Judge’s report by Executive Secretary. On the eleventh day after the transmittal of his decision to the parties, the Judge shall file his report with the Executive Secretary for docketing. The report shall consist of the record, including the Judge’s decision, any petitions for discretionary review and statements in opposition to such petitions. Promptly upon receipt of the Judge’s report, the Executive Secretary shall docket the report and notify all parties of the docketing date. The date of docketing of the Judge’s report is the date that the Judge’s report is made for purposes of section 12(j) of the Act, 29 U.S.C. 661(j).

(3) Correction of errors; Relief from default. Until the Judge’s report has been directed for review or, in the absence of a direction for review, until the decision has become a final order of the Commission, the Judge may correct clerical errors and errors arising through oversight or inadvertence in decisions, orders or other parts of the record. If a Judge’s report has been directed for review the decision may be corrected during the pendency of review with leave of the Commission. Until the Judge’s report has been docketed by the Executive Secretary, the Judge may relieve a party of default or grant reinstatement under §§2200.101(b), 2200.52(f) or 2200.64(b).

(c) Filing documents after the docketing date. Except for papers filed under paragraph (b)(3) of this section, which shall be filed with the Judge, on or after the date of the docketing of the Judge’s report all documents shall be filed with the Executive Secretary.

(d) Judge’s decision final unless review directed. If no Commissioner directs review of a report on or before the thirtieth day following the date of docketing of the Judge’s report, the decision of the Judge shall become a final order of the Commission.

§ 2200.91  Discretionary review; petitions for discretionary review; statements in opposition to petitions.

(a) Review discretionary. Review by the Commission is not a right. A Commissioner may, as a matter of discretion, direct review on his own motion or on the petition of a party.

(b) Petitions for discretionary review. A party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a petition for discretionary review. Discretionary review by the Commission may be sought by filing with the Judge a petition for discretionary review within the 10-day period provided by §2200.90(b)(2). Review by the Commission may also be sought by filing directly with the Executive Secretary a petition for discretionary review. A petition filed directly with the Executive Secretary shall be filed within 20 days after the date of docketing of the Judge’s report. The earlier a petition is filed, the more consideration it can be given. A petition for discretionary review may be conditional, and may state that review is sought only if a Commissioner were to direct review on the petition of an opposing party.

(c) Cross-petitions for discretionary review. Where a petition for discretionary review has been filed by one party, any other party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a cross-petition for discretionary
review. The cross-petition may be conditional. See paragraph (b) of this section. A cross-petition shall be filed with the Judge during the 10 days provided by §2200.90(b) or directly with the Executive Secretary within 27 days after the date of docketing of the Judge's report. The earlier a cross-petition is filed, the more consideration it can be given.

(d) Contents of the petition. No particular form is required for a petition for discretionary review. A petition should state why review should be directed, including: Whether the Judge's decision raises an important question of law, policy or discretion; whether review by the Commission will resolve a question about which the Commission's Judges have rendered differing opinions; whether the Judge's decision is contrary to law or Commission precedent; whether a finding of material fact is not supported by a preponderance of the evidence; whether a prejudicial error of procedure or an abuse of discretion was committed. A petition should concisely state the portions of the decision for which review is sought and should refer to the citations and citation items (for example, citation 3, item 4a) for which review is sought. Brevity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition.

(e) When filing effective. A petition for discretionary review is filed when received. If a petition has been filed with the Judge, another petition need not be filed with the Commission.

(f) Failure to file. The failure of a party adversely affected or aggrieved by the Judge's decision to file a petition for discretionary review may foreclose court review of the objections to the Judge's decision. See Keystone Roofing Co. v. Dunlop, 539 F.2d 960 (3d Cir. 1976).

(g) Statements in opposition to petition. Statements in opposition to petitions for discretionary review may be filed in the manner specified in this section for the filing of petitions for discretionary review. Statements in opposition shall concisely state why the Judge's decision should not be reviewed with respect to each portion of the petition to which it is addressed.

§2200.92 Review by the Commission.

(a) Jurisdiction of the Commission; issues on review. Unless the Commission orders otherwise, a direction for review establishes jurisdiction in the Commission to review the entire case. The issues to be decided on review are within the discretion of the Commission but ordinarily will be those stated in the direction for review, those raised in the petitions for discretionary review, or those stated in any later order.

(b) Review on a Commissioner's motion; issues on review. At any time within 30 days after the docketing date of the Judge's report, a Commissioner may, on his own motion, direct that a Judge's decision be reviewed. In the absence of a petition for discretionary review, a Commissioner will normally not direct review unless the case raises novel questions of law or policy or questions involving conflict in Administrative Law Judges' decisions. When a Commissioner directs review on his own motion, the issues ordinarily will be those specified in the direction for review or any later order.

(c) Issues not raised before Judge. The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

§2200.93 Briefs before the Commission.

(a) Requests for briefs. The Commission ordinarily will request the parties
to file briefs on issues before the Commission. After briefs are requested, a
demand may, instead of filing a brief, file a letter setting forth its arguments, a
letter stating that it will rely on its petition for discretionary review or
previous brief, or a letter stating that it will file the case decided without its
brief. The provisions of this section apply to the filing of briefs and letters
filed in lieu of briefs.

(b) Filing briefs. Unless the briefing notice states otherwise:

(1) Time for filing briefs. The party re-
quired to file the first brief shall do so
within 40 days after the date of the
briefing notice. All other parties shall
file their briefs within 30 days after the
first brief is served. Any reply brief permitted by these rules or by order
shall be filed within 15 days after the
second brief is served.

(2) Sequence of filing. (i) If one peti-
tion for discretionary or interlocutory
review has been filed, the petitioning
party shall file the first brief.

(ii) If more than one petition has
been filed but only one was granted,
the party whose petition was granted
shall file the first brief.

(iii) If more than one petition has
been filed, and more than one has been
granted or none has been granted, the
Secretary shall file the first brief.

(iv) If no petition has been filed, the
Secretary shall file the first brief.

(3) Reply briefs. The party who filed
the first brief may file a reply brief.
Additional briefs are otherwise not al-
lowed except by leave of the Commis-
sion.

(c) Motion for extension of time for fil-
ing brief. An extension of time to file a
brief will ordinarily not be granted ex-
cept for good cause shown. A motion for extension of time to file a brief
shall be filed at the Commission no
later than 3 days prior to the expira-
tion of the time limit prescribed in
paragraph (b) of this section, shall
comply with §2200.40 and shall include
the following information: When the
brief is due, the number and duration
of extensions of time that have been
granted to each party, the length of ex-
tension being requested, and an assurance that the
brief will be filed within the time ex-
tension requested.

(d) Consequences of failure to timely file brief. The Commission may decline to
accept a brief that is not timely filed. If a petitioning party fails to respond
to a briefing notice or expresses no in-
terest in review, the Commission may
vacate the direction for review, or it
may decide the case without that par-
ty’s brief. If the non-petitioning party
fails to respond to a briefing notice or
expresses no interest in review, the
Commission may decide the case with-
out that party’s brief. If a case was di-
rected for review upon a Commis-
sioner’s own motion, and any party
fails to respond to the briefing notice,
the Commission may either vacate the
direction for review or decide the case
without briefs.

(e) Length of brief. Except by permis-
sion of the Commission, a main brief,
including briefs and legal memoranda
it incorporates by reference, shall con-
tain no more than 35 pages of text. A
reply brief, including briefs and legal
memoranda it incorporates by refer-
ce, shall contain no more than 20
pages of text.

(f) Table of contents. A brief in excess
of 15 pages shall include a table of con-
ts.

(g) Failure to meet requirements. The
Commission may return briefs that do
not meet the requirements of para-
graphs (e) and (f) of this section.

(h) Brief of an amicus curiae. The
Commission may allow a brief of an
amicus curiae pursuant to the criteria
of §2200.24. Any brief of an amicus curiae
must meet the requirements of para-
graphs (b) through (g) of this sec-
tion. No reply brief of an amicus curiae
will be received.

[51 FR 32015, Sept. 8, 1986, as amended at 57
FR 41687, Sept. 11, 1992; 62 FR 35963, July 3,
1997; 74 FR 63987, Dec. 7, 2009]

§2200.94 Stay of final order.

(a) Who may file. Any party aggrieved
by a final order of the Commission
may, while the matter is within the ju-
risdiction of the Commission, file a
motion for a stay.

(b) Contents of motion. Such motion
shall set forth the reasons a stay is
sought and the length of the stay re-
quested.
(c) Ruling on motion. The Commission may order such stay for the period requested or for such longer or shorter period as it deems appropriate.

§ 2200.95 Oral argument before the Commission.

(a) When ordered. Upon motion of any party, or upon its own motion, the Commission may order oral argument. Parties requesting oral argument must demonstrate why oral argument would facilitate resolution of the issues before the Commission. Normally, motions for oral argument shall not be considered until after all briefs have been filed.

(b) Notice of argument. The Executive Secretary shall advise all parties whether oral argument is to be heard. Within a reasonable time before the oral argument is scheduled, the Executive Secretary shall inform the parties of the time and place therefor, the issues to be heard, and the time allotted to the parties.

(c) Postponement. (1) Except under extraordinary circumstances, a request for postponement must be filed at least 7 days before oral argument is scheduled.

(2) The Executive Secretary shall notify the parties of a postponement in a manner best calculated to avoid unnecessary travel or inconvenience to the parties. The Executive Secretary shall inform all parties of the new time and place for the oral argument.

(d) Order and content of argument. (1) Counsel shall be afforded such time for oral argument as the Commission may provide by order. Requests for enlargement of time may be made by motion filed reasonably in advance of the date fixed for the argument.

(2) The petitioning party shall argue first. If the case is before the Commission on cross-petitions, the Commission will inform the parties in advance of the order of appearance.

(3) Counsel are expected to cover all anticipated issues in their arguments in chief. Therefore, rebuttal will normally not be allowed. Should unexpected matters arise, the Commission, in its discretion, may give counsel additional time.

(4) Oral argument should undertake to emphasize and clarify the written arguments appearing in the briefs. The Commission will look with disfavor on any oral argument that is read from a previously filed document.

(5) At any time, the Commission may terminate a party’s argument or interrupt the party’s presentation for questioning by the Commissioners.

(e) Failure to appear. Should either party fail to appear for oral argument, the party present may be allowed to proceed with its argument.

(f) Consolidated cases. Where two or more consolidated cases are scheduled for oral argument, the consolidated cases shall be considered as one case for the purpose of allotting time to the parties unless the Commission otherwise directs.

(g) Multiple counsel. Where more than one counsel argues for a party to the case or for multiple parties on the same side in the case, it is counsels’ responsibility to agree upon a fair division of the total time allotted. In the event of a failure to agree, the Commission will allocate the time. The Commission may, in its discretion, limit the number of counsel heard for each party or side in the argument. No later than 3 days prior to the date of scheduled argument, the Commission must be notified of the names of the counsel who will argue.

(h) Exhibits/visual aids. (1) The parties may use models, specimens, samples, charts or exhibits introduced into evidence at the hearing. If a party wishes to use a visual aid not part of the record, written notice of the proposed use shall be given to opposing counsel 15 days prior to the argument. Objections, if any, shall be in writing, served on all adverse parties, and filed not fewer than 5 days before the argument.

(2) No visual aid shall introduce or rely upon facts or evidence not already part of the record.

(3) If visual aids or exhibits other than documents are to be used at the argument, counsel shall arrange with the Executive Secretary to have them placed in the hearing room on the date of the argument before the Commission convenes.

(4) Parties using visual aids not introduced into evidence shall have them removed from the hearing room unless the Commission directs otherwise. If
such visual aids are not reclaimed by the party within a reasonable time after notice is given by the Executive Secretary, such visual aids shall be disposed of at the discretion of the Executive Secretary.

(i) Recording oral argument. (1) Unless the Commission directs otherwise, oral arguments shall be electronically recorded and made part of the record. Any other sound recording in the hearing room is prohibited. Oral arguments shall also be transcribed verbatim. A copy of the transcript of the oral argument taken by a qualified court reporter, shall be filed with the Commission. The Commission shall bear all expenses for court reporters’ fees and for copies of the hearing transcript received by it.

(2) Persons desiring to listen to the recordings shall make appropriate arrangements with the Executive Secretary. Any party desiring a written copy of the transcript is responsible for securing and paying for its copy.

(3) Error in the transcript of the oral argument may be corrected by the Commission on its own motion, on joint motion by the parties, or on motion by any party. The motion shall state the error in the transcript and the correction to be made. Corrections will be made by hand with pen and ink and by the appending of an errata sheet.

(j) Failure to file brief. A party who fails to file a brief shall not be heard at the time of oral argument except by permission of the Commission.

(k) Participation in oral argument by amicus curiae. (1) An amicus curiae will not be permitted to participate in oral argument without leave of the Commission upon proper motion.

(2) A motion by amicus curiae seeking leave to participate in oral argument shall be filed no later than 14 days prior to the date oral argument is scheduled.

(3) The motion of an amicus curiae for leave to participate at oral argument shall identify the interest of the applicant and shall state the reason(s) why its participation at oral argument is desirable.

(4) Motions in opposition to the motion of an amicus curiae for leave to participate in the oral argument must be filed within 7 days of the date of the motion.

§ 2200.96 Commission receipt pursuant to 28 U.S.C. 2112(a)(1) of copies of petitions for judicial review of Commission orders when petitions for review are filed in two or more courts of appeals with respect to the same order.

The Commission officer and office designated to receive, pursuant to 28 U.S.C. 2112(a)(1), copies of petitions for review of Commission orders, from the persons instituting the review proceedings in a court of appeals, are the Executive Secretary and the Office of the Executive Secretary at the Commission’s office, One Lafayette Centre, 1120–20th Street NW., 9th Floor, Washington, DC 20036–3457. Five copies of the petition shall be submitted pursuant to this section. Each copy shall state that it is being submitted to the Commission pursuant to 28 U.S.C. 2112 by the persons or person who filed the petition in the court of appeals and shall be stamped by the court with the date of filing.

Note: 28 U.S.C. 2112(a) contains certain applicable requirements.

§ 2200.100 Settlement.

(a) Policy. Settlement is permitted and encouraged by the Commission at any stage of the proceedings.

(b) Requirements. The Commission does not require that the parties include any particular language in a settlement agreement, but does require that the agreement specify the terms of settlement for each contested item, specify any contested item or issue that remains to be decided (if any remain), and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. Unless the settlement agreement states otherwise, the withdrawal of a
notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period will be with prejudice.

(c) Filing; service and notice. A settlement submitted for approval after the Judge’s report has been directed for review shall be filed with the Executive Secretary. When a settlement agreement is filed with the Judge or the Executive Secretary, proof of service shall be filed with the settlement agreement, showing service upon all parties and authorized employee representatives in the manner prescribed by §2200.7(c) and the posting of notice to non-party affected employees in the manner prescribed by §2200.7(g). The parties shall also file a final consent order for adoption by the Judge. If the time has not expired under these rules for electing party status, or if party status has been elected, an order terminating the litigation before the Commission because of the settlement shall not be issued until at least 10 days after service or posting to consider any affected employee’s or authorized employee representative’s objection to the reasonableness of any abatement time. If such objection is filed or stated in the settlement agreement, the Commission or Judge shall provide an opportunity for the affected employees or authorized employee representative to be heard and present evidence on the objection, which shall be limited to the reasonableness of the abatement time.

(d) Form of settlement document. It is preferred that settlement documents be typewritten in conformance with §2200.30(a). However, a settlement document that is hand-written or printed in ink and is legible shall be acceptable for filing.

[51 FR 32015, Sept. 8, 1986, as amended at 57 FR 41688, Sept. 11, 1992]

§ 2200.103 Expedited proceeding.

(a) When ordered. Upon application of any party or intervenor or upon its own motion, the Commission may order an expedited proceeding. When an expedited proceeding is ordered by the Commission, the Executive Secretary shall notify all parties and intervenors.
§ 2200.104 Standards of conduct.

(a) General. All representatives appearing before the Commission and its Judges shall comply with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association.

(b) Misbehavior before a Judge—(1) Exclusion from a proceeding. A Judge may exclude from participation in a proceeding any person, including a party or its representative, who engages in disruptive behavior, refuses to comply with orders or rules of procedure, continuously uses dilatory tactics, refuses to adhere to standards of orderly or ethical conduct, or fails to act in good faith. The cause for the exclusion shall be stated in writing, or may be stated in the record if the exclusion occurs during the course of the hearing. Where the person removed is a party’s attorney or other representative, the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or other representative.

(2) Appeal rights if excluded. Any attorney or other representative excluded from a proceeding by a Judge may, within 5 days of the exclusion, appeal to the Commission for reinstatement. No proceeding shall be delayed or suspended pending disposition of the appeal.

(c) Disciplinary action by the Commission. If an attorney or other representative practicing before the Commission engages in unethical or unprofessional conduct or fails to comply with any rule or order of the Commission or its Judges, the Commission may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action, including suspension or disbarment from practice before the Commission.

(d) Show cause orders. All show cause orders issued by the Commission under paragraph (c) of this section shall be served upon the affected party by certified mail, return receipt requested.


§ 2200.105 Ex parte communication.

(a) General. Except as permitted by §2200.120 or as otherwise authorized by law, there shall be no ex parte communication with respect to the merits of any case not concluded, between any Commissioner, Judge, employee, or agent of the Commission who is employed in the decisional process and any of the parties or intervenors, representatives or other interested persons.

(b) Disciplinary action. In the event an ex parte communication occurs, the Commission or the Judge may make such orders or take such actions as fairness requires. The exclusion of a person by a Judge from a proceeding shall be governed by §2200.104(b). Any disciplinary action by the Commission, including suspension or disbarment, shall be governed by §2200.104(c).

(c) Placement on public record. All ex parte communications in violation of this section shall be placed on the public record of the proceeding.

[51 FR 32015, Sept. 8, 1986, as amended at 70 FR 22790, May 3, 2005]

§ 2200.106 Amendment to rules.

The Commission may at any time upon its own motion or initiative, or upon written suggestion of any interested person setting forth reasonable
§ 2200.120 Settlement procedure.

(a) Voluntary Settlement—(1) Applicability and duration. This section applies only to notices of contests by employers, and to applications for fees under the Equal Access to Justice Act and 29 CFR Part 2204.

(ii) Upon motion of any party after the docketing of the notice of contest, or otherwise with the consent of the parties at any time in the proceedings, the Chief Administrative Law Judge may assign a case to a Settlement Judge for proceedings under this section. In the event either the Secretary or the employer objects to the use of a Settlement Judge procedure, such procedure shall not be imposed.

(2) Length of voluntary settlement procedures. The settlement procedures under this section shall be for a period not to exceed 45 days.

(b) Mandatory settlement—(1) Applicability. This section applies only to notices of contest by employers in which the aggregate amount of the penalties sought by the Secretary is $100,000 or greater.

(2) Proceedings under this part. (i) Assignment of case and appointment of Settlement Judge. Notwithstanding any other provisions of these rules, upon the docketing of the notice of contest the Chief Administrative Law Judge shall assign to the Settlement Part any case which satisfies the criteria set forth in paragraph (b)(1) of this section. The Chief Administrative Law Judge shall appoint a Settlement Judge, who shall be a Judge other than the one assigned to hear and decide the case, except as provided in paragraph (f)(2) of this section.

(ii) Discovery proceedings to be followed by settlement proceedings. The Settlement Judge shall issue a discovery scheduling order and supervise all discovery proceedings. At the conclusion of discovery the Settlement Judge will conduct settlement proceedings during a period not to exceed 60 days. If, at the conclusion of the settlement proceedings the case has not been settled the Settlement Judge shall promptly notify the Chief Administrative Law Judge in accordance with paragraph (f) of this section.

(c) Powers and duties of Settlement Judges. (1) The Judge shall confer with the parties on subjects and issues of whole or partial settlement of the case and seek resolution of as many of the issues as is feasible.

(2) The Judge may require the parties to provide statements of the issues in controversy and the factual predicate for each party’s position on each issue and may enter other orders as appropriate to facilitate the proceedings.
(3) In voluntary settlement proceedings the Judge may allow or suspend discovery during the settlement proceedings.

(4) The Judge may suggest privately to each attorney or other representative of a party what concessions his or her client should consider and assess privately with each attorney or other representative the reasonableness of the party’s case or settlement position.

(5) The Judge may, with the consent of the parties, conduct such other settlement proceedings as may aid in the settlement of the case.

(d) Settlement conference—(1) General. The Settlement Judge shall convene and preside over conferences between the parties. Settlement conferences may be conducted telephonically or in person. The Judge shall designate a place and time of conference.

(2) Participation in conference. The Settlement Judge may require that any attorney or other representative who is expected to try the case for each party be present. The Settlement Judge may also require that the party’s representative be accompanied by an official of the party having full settlement authority on behalf of the party. The parties and their representatives or attorneys are expected to be completely candid with the Settlement Judge so that he may properly guide settlement discussions. The failure to be present at a settlement conference or otherwise to comply with the orders of the Settlement Judge or the refusal to cooperate fully within the spirit of this rule may result in the imposition of sanctions under §2200.101.

(3) Confidentiality of settlement proceedings. All statements made and all information presented during the course of settlement proceedings under this section shall be regarded as confidential and shall not be divulged outside of these proceedings except with the consent of the parties. The Settlement Judge shall issue appropriate orders to protect confidentiality of settlement proceedings. The Settlement Judge shall not divulge any statements or information presented during private negotiations with a party or his representative during settlement proceedings except with the consent of that party. No evidence of statements or conduct in settlement proceedings under this section within the scope of Federal Rule of Evidence 408, no notes or other material prepared by or maintained by the Settlement Judge in connection with settlement proceedings, and no communications between the Settlement Judge and the Chief Administrative Law Judge in connection with settlement proceedings including the report of the Settlement Judge under paragraph (f) of this section, will be admissible in any subsequent hearing except by stipulation of the parties. Documents disclosed in the settlement proceeding may not be used in litigation unless obtained through appropriate discovery or subpoena. With respect to the Settlement Judge’s participation in settlement proceedings, the Settlement Judge shall not discuss the merits of the case with any other person, nor appear as a witness in any hearing of the case.

(e) Record of settlement proceedings. No material of any form required to be held confidential under paragraph (d)(3) of this section shall be considered part of the official case record required to be maintained under section 12(g) of the Act, 29 U.S.C. 661(g), nor shall any such material be open to public inspection as required by section 12(g), unless the parties otherwise stipulate. With the exception of an order approving the terms of any partial settlement agreed to between the parties as set forth in paragraph (f)(1) of this section, the Settlement Judge shall not file or cause to be filed in the official case record any material in his possession relating to these settlement proceedings, including but not limited to communications with the Chief Administrative Law Judge and his report under paragraph (f) of this section, unless the parties otherwise stipulate.

(f) Report of Settlement Judge. (1) The Settlement Judge shall promptly notify the Chief Administrative Law Judge in writing of the status of the case at the conclusion of the settlement period or such time that he determines further negotiations would be fruitless. If the Settlement Judge has made such a determination and a settlement agreement is not achieved
within 45 days for voluntary settlement proceedings or 60 days for mandatory settlement proceedings, the Settlement Judge shall then advise the Chief Administrative Law Judge in writing. The Chief Administrative Law Judge may then in his discretion allow an additional period of time, not to exceed 30 days, for further proceedings under this section. If at the expiration of the period allotted under this paragraph the Settlement Judge has not approved a full settlement, he shall furnish to the Chief Administrative Law Judge copies of any written stipulations and orders embodying the terms of any partial settlement the parties have reached.

(2) At the termination of the settlement period without a full settlement, the Chief Administrative Law Judge shall promptly assign the case to an Administrative Law Judge other than the Settlement Judge or Chief Administrative Law Judge for appropriate action on the remaining issues. If all the parties, the Settlement Judge and the Chief Administrative Law Judge agree, the Settlement Judge may be retained as the Hearing Judge.

(g) Non-reviewability. Notwithstanding the provisions of §2200.73 regarding interlocutory review, any decision concerning the assignment of any Judge and any decision by the Settlement Judge to terminate settlement proceedings under this section is not subject to review, appeal, or rehearing.

§2200.201 Application.

The rules in this subpart will govern proceedings before a Judge in a case chosen for Simplified Proceedings under §2200.203.

§2200.202 Eligibility for Simplified Proceedings.

(a) Those cases selected for Simplified Proceedings will be those that do not involve complex issues of law or fact. Cases appropriate for Simplified Proceedings would generally include those with one or more of the following characteristics:

(1) Relatively few citation items,
(2) An aggregate proposed penalty of not more than $20,000,
(3) No allegation of willfulness or a repeat violation,
(4) Not involving a fatality,
(5) A hearing that is expected to take less than 2 days, or
(6) A small employer whether appearing pro se or represented by counsel.

(b) Those cases with an aggregate proposed penalty of more than $20,000, but not more than $30,000, if otherwise appropriate, may be selected for Simplified Proceedings at the discretion of the Chief Administrative Law Judge.

§ 2200.203 Commencing Simplified Proceedings.

(a) Selection. Upon receipt of a Notice of Contest, the Chief Administrative Law Judge may, at his or her discretion, assign an appropriate case for Simplified Proceedings.

(b) Party request. Within 20 days of the notice of docketing, any party may request that the case be assigned for Simplified Proceedings. The request must be in writing. For example, “I request Simplified Proceedings” will suffice. The request must be sent to the Executive Secretary. Copies must be sent to each of the other parties.

(c) Judge’s ruling on request. The Chief Administrative Law Judge or the Judge assigned to the case may grant a party’s request and assign a case for Simplified Proceedings at his or her discretion. Such request shall be acted upon within 15 days of its receipt by the Judge.

(d) Time for filing complaint or answer under §2200.34. If a party has requested Simplified Proceedings or the Judge has assigned the case for Simplified Proceedings, the times for filing a complaint or answer will not run. If a request for Simplified Proceedings is denied, the period for filing a complaint or answer will begin to run upon issuance of the notice denying Simplified Proceedings.

§ 2200.204 Discontinuance of Simplified Proceedings.

(a) Procedure. If it becomes apparent at any time that a case is not appropriate for Simplified Proceedings, the Judge assigned to the case may, upon motion by any party or upon the Judge’s own motion, discontinue Simplified Proceedings and order the case to continue under conventional rules. Before discontinuing Simplified Proceedings, the Judge will consult with the Chief Administrative Law Judge.

(b) Party motion. At any time during the proceedings any party may request that Simplified Proceedings be discontinued and that the matter continue under conventional procedures. A motion to discontinue must be in writing and explain why the case is inappropriate for Simplified Proceedings. All other parties will have 7 days from the filing of the motion to state their agreement or disagreement and their reasons. Joint motions to return a case to conventional proceedings shall be granted by the Judge and do not require a showing of good cause.

(c) Ruling. If Simplified Proceedings are discontinued, the Judge may issue such orders as are necessary for an orderly continuation under conventional rules.

§ 2200.205 Filing of pleadings.

(a) Complaint and answer. Once a case is designated for Simplified Proceedings, the complaint and answer requirements are suspended. If the Secretary has filed a complaint under §2200.34(a), a response to a petition under §2200.37(d)(5), or a response to an employee contest under §2200.38(a), and if Simplified Proceedings have been ordered, no response to these documents will be required.

(b) Motions. A primary purpose of Simplified Proceedings is to eliminate, as much as possible, motions and similar documents. A motion will not be viewed favorably if the subject of the motion has not been first discussed among the parties.

§ 2200.206 Disclosure of information.

(a) Disclosure to employer. (1) Within 12 working days after a case is designated for Simplified Proceedings, the
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Secretary shall provide the employer, free of charge, copies of the narrative (Form OSHA 1–A) and the worksheet (Form OSHA 1–B), or their equivalents. (2) Within 30 calendar days after a case is designated for Simplified Proceedings, the Secretary shall provide the employer with reproductions of any photographs or videotapes that the Secretary anticipates using at the hearing. (3) Within 30 calendar days after a case is designated for Simplified Proceedings, the Secretary shall provide to the employer any exculpatory evidence in the Secretary’s possession. (4) The Judge shall act expeditiously on any claim by the employer that the Secretary improperly withheld or redacted any portion of the documents, photographs, or videotapes on the grounds of confidentiality or privilege. (b) Disclosure to the Secretary. Where the employer raises an affirmative defense, the presiding Judge shall order the employer to disclose to the Secretary such documents relevant to the affirmative defense as the Judge deems appropriate. [60 FR 41809, Aug. 14, 1995, as amended at 62 FR 40934, July 31, 1997; 70 FR 22792, May 3, 2005]

§ 2200.207 Pre-hearing conference. (a) When held. As early as practicable after the employer has received the documents set forth in § 2200.206(a)(1), the presiding Judge will order and conduct a pre-hearing conference. At the discretion of the Judge, the pre-hearing conference may be held in person, or by telephone or electronic means. (b) Content. At the pre-hearing conference, the parties will discuss the following: settlement of the case; the narrowing of issues; an agreed statement of issues and facts; defenses; witnesses and exhibits; motions; and any other pertinent matter. Except under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing conference may not be raised later. At the conclusion of the conference, the Judge will issue an order setting forth any agreements reached by the parties and will specify in the order the issues to be addressed by the parties at the hearing. [60 FR 41809, Aug. 14, 1995, as amended at 62 FR 40934, July 31, 1997]

§ 2200.208 Discovery. Discovery, including requests for admissions, will only be allowed under the conditions and time limits set by the Judge.

§ 2200.209 Hearing. (a) Procedures. As soon as practicable after the conclusion of the pre-hearing conference, the Judge will hold a hearing on any issue that remains in dispute. The hearing will be in accordance with subpart E of these rules, except for § 2200.60, 2200.73, and 2200.74 which will not apply. (b) Agreements. At the beginning of the hearing, the Judge will enter into the record all agreements reached by the parties as well as defenses raised during the pre-hearing conference. The parties and the Judge then will attempt to resolve or narrow the remaining issues. The Judge will enter into the record any further agreements reached by the parties. (c) Evidence. The Judge will receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious or unreliable. Testimony will be given under oath or affirmation. The Federal Rules of Evidence do not apply. (d) Reporter. A reporter will be present at the hearing. An official verbatim transcript of the hearing will be prepared and filed with the Judge. Parties may purchase copies of the transcript from the reporter. (e) Oral and written argument. Each party may present oral argument at the close of the hearing. Post-hearing briefs will not be allowed except by order of the Judge. (f) Judge’s decision. Where practicable, the Judge will render his or her decision from the bench. In rendering his or her decision from the bench, the Judge shall state the issues in the case and make clear both his or her findings of fact and conclusions of law on the record. The Judge shall reduce his or her order in the matter to writing and transmit it to the parties as soon as practicable, but no later than 45 days.
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after the hearing. All relevant transcript paragraphs and pages shall be excerpted and included in the decision. Alternatively, within 45 days of the hearing, the Judge will issue a written decision. The decision will be in accordance with §2200.90. If additional time is needed, approval of the Chief Administrative Law Judge is required.

(g) Filing of Judge’s decision with the Executive Secretary. When the Judge issues a written decision, it shall be filed simultaneously with the Commission and the parties. Once the Judge’s order is transmitted to the Executive Secretary, §2200.90(b) applies, with the exception of the 11-day period provided for in rule §2200.90(b)(2).

§ 2200.211 Applicability of subparts A through G.

The provisions of subpart D (except for §2200.57) and §§2200.34, 2200.37(d)(5), 2200.38, 2200.71, 2200.73 and 2200.74 will not apply to Simplified Proceedings. All other rules contained in Subparts A through G of the Commission’s rules of procedure will apply when consistent with the rules in this subpart governing Simplified Proceedings.

PART 2201—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

Sec.
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2201.2 Description of agency.
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APPENDIX A TO PART 2201—SCHEDULE OF FEES

AUTHORITY: 29 U.S.C. 661(g); 5 U.S.C. 552.

SOURCE: 71 FR 56350, Sept. 27, 2006, unless otherwise noted.

§ 2201.1 Purpose and scope.

This part prescribes procedures to obtain information and records of the Occupational Safety and Health Review Commission (OSHRC or Commission) under the Freedom of Information Act (FOIA), 5 U.S.C. 552. It applies only to records or information of the Commission or in the Commission’s custody. This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission’s Rules of Procedure in 29 CFR part 2200, subpart D.

§ 2201.2 Description of agency.

OSHRC adjudicates contested enforcement actions under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651–678. The Commission decides cases after the parties are given an opportunity for a hearing. All hearings are open to the public and are conducted at a place convenient to the parties by an Administrative Law Judge. Any Commissioner may direct that a decision of a Judge be reviewed by the full Commission. The President designates one of the Commissioners as Chairman, who is responsible on behalf of the Commission for the administrative operations of the Commission.

§ 2201.3 Delegation of authority and responsibilities.

(a) The Chairman delegates to the Chief FOIA Officer the authority to act upon all requests for agency records. The Chief FOIA Officer shall, subject to the authority of the Chairman:

(1) Have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) Monitor implementation of the FOIA throughout the agency and keep the Chairman and the Attorney General appropriately informed of the agency’s performance in implementing this section;
§ 2201.4 General policy and definitions.

(a) Non-exempt records available to public. Except for records and information exempted from disclosure by 5 U.S.C. 552(b) or published in the FEDERAL REGISTER under 5 U.S.C. 552(a)(1), all records of the Commission or in its custody are available to any person who requests them in accordance with §2201.5(a). Records include any information that would be a record subject to the requirements of 5 U.S.C. 552 when maintained by the Commission in any format, including electronic format. In response to FOIA requests, the Commission will search for records manually or by automated means, except when an automated search would significantly interfere with the operation of the Commission’s automated information system.

(b) Examination of records in cases appealed to courts. A final order of the Commission may be appealed to a United States Court of Appeals. When this occurs, the Commission may send part or all of the official case file to the court and may retain other parts of the file. Thus, a document in a case may not be available from the Commission but only from the court of appeals. In such a case, the FOIA Disclosure Officer may inform the requester that the request for a particular document should be directed to the court.

(c) Record availability at the OSHRC e-FOIA Reading Room. The records of Commission activities are publicly available for inspection and copying, and may be accessed electronically through the Commission’s Web site at http://www.oshrc.gov/foia/foia_reading_room.html. These records include:

(1) Final decisions, including concurring and dissenting opinions, remand orders, as well as Administrative Law Judge decisions pending OSHRC review, issued as a result of adjudication of cases;

(2) OSHRC Rules of Procedure and Guides to those procedures;

(3) Agency policy statements and interpretations adopted by OSHRC and not published in the FEDERAL REGISTER, if any;

(4) Administrative staff manuals that affect a member of the public, if any;

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(4) Administrative staff manuals that affect a member of the public, if any;
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(5) Copies of records that have been released to a person under the FOIA that, because of the subject matter, the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(6) A general index of records referred to under paragraph (c)(5) of this section.

(d) Record availability at the OSHRC on-site e-FOIA Reading Room. Any member of the public may, upon request, access OSHRC’s e-FOIA Reading Room via a computer terminal at the OSHRC National Office, located at 1120 20th St., NW., 9th Floor, Washington, DC 20036–3457. Such a request must be made in writing to the FOIA Requester Service Center, and indicate a preferred date and time for the requested access. OSHRC reserves the right to arrange a different date and time with the requester, if necessary.

(e) Definitions. For purposes of this part:

Commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. The FOIA Disclosure Officer shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because the FOIA Disclosure Officer has reasonable cause to doubt a requester’s stated use, the FOIA Disclosure Officer shall provide the requester a reasonable opportunity to submit further clarification.

Direct costs means those expenses that the Commission actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating duplication machinery. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

Duplication means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others. The FOIA Disclosure Officer shall honor a requester’s specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format.

Educational institution means a pre-school, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

Exceptional circumstances does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

Noncommercial scientific institution means an institution that is not operated on a “commercial” basis, as that term is defined in this paragraph, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

Record means any information that would be an OSHRC record subject to the requirements of the FOIA when maintained by OSHRC in any format, including an electronic format, and any such OSHRC record that is maintained for OSHRC by an entity under
Occupational Safety and Health Review Commission § 2201.5

Government contract, for the purposes of records management.

Representative of the news media, or news media requester is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. For purposes of this definition, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of “news”) who make their products available for purchase or subscription by, or free distribution to, the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. For “freelance” journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSHRC shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. However, a request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure—for example, doing all that is necessary to redact it and prepare it for disclosure. Review costs are recoverable even if a record ultimately is not disclosed. Review time does not include time spent resolving legal or policy issues regarding the application of exemptions.

Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The FOIA Disclosure Officer shall ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, the FOIA Disclosure Officer shall not search line-by-line where duplicating an entire document would be quicker and less expensive.

Working day means a regular Federal working day. It does not include Saturdays, Sundays, or Federal legal public holidays.

[71 FR 56350, Sept. 27, 2006, as amended at 75 FR 41371, July 16, 2010]

§ 2201.5 Procedure for requesting records.

(a) Requests for information. All requests for information must be made in writing and must be mailed or delivered to the FOIA Disclosure Officer at the address in §2201.3(d). The words “Freedom of Information Act Request” must be printed on the face of the request’s envelope or covering as well as the request itself. Requests for information must describe the particular record requested to the fullest extent possible and specify the preferred form or format (including electronic formats) of the response. The Commission shall accommodate requesters as to form or format if the record is readily reproducible in the requested form or format. When requesters do not specify the preferred form or format of the response, the Commission shall respond in the form or format in which the record is most accessible to the Commission.

(b) Date of receipt. A request that complies with paragraph (a) of this section is deemed received on the actual date it is received by the Commission. A request that does not comply with paragraph (a) of this section is deemed received when it is actually received by the FOIA Disclosure Officer. For requests that are expected to result in fees exceeding $250, the request shall not be deemed to have been received until the requester is advised of the anticipated costs and the Commission has
§ 2201.6 Responses to requests.

(a) Responses within 20 working days. The FOIA Disclosure Officer will either grant or deny a request for records within 20 working days after receiving the request. The 20-day period shall not be tolled by the agency except in the following cases. In these cases, the agency’s receipt of the requester’s response to the agency’s request for information or clarification ends the tolling period.

(1) The agency may toll the 20-day period once while awaiting information that it has reasonably requested from the requester under this section. The agency may make more than one request to the requester for information not related to issues regarding fee assessment, but can only toll the 20-day period once; or

(2) The agency may toll the 20-day period as many times as are necessary to clarify any issues regarding fee assessment.

(b) Extensions of response time in unusual circumstances. In unusual circumstances, the Commission may extend the time limit prescribed in paragraph (a) of this section by not more than 10 working days. The FOIA Disclosure Officer shall notify the requester in writing of the extension, the reasons for the extension and the date on which a determination is expected. “Unusual circumstances” exists, but only to the extent reasonably necessary to the proper processing of the particular request, when there is a need to:

(1) Search for and collect the requested records from one of OSHRC’s regional offices or off-site storage facilities;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or

(3) Consult, with all practicable speed, with another agency having a substantial interest in the determination of the request.

(c) Additional extension. The FOIA Disclosure Officer shall notify the requester in writing when it appears that a request cannot be completed within the allowable time (20 working days plus a 10-working-day extension). In such instances, the requester will be provided an opportunity to limit the scope of the request so that it may be processed in the time limit, or to agree to a reasonable alternative time frame for processing.

(d) Two-track processing. To ensure the most equitable treatment possible for all requesters, the Commission will process requests on a first-in, first-out basis using a two-track processing system based upon the estimated time it will take to process the request.

(1) The first track is for requests of simple to moderate complexity that are expected to be completed within 20 working days.

(2) The second track is for requests involving “unusual circumstances” that are expected to take between 21 to 30 working days to complete and those that, because of their unusual volume or other complexity, are expected to take more than 30 working days to complete.

(3) A requester should assume, unless otherwise notified by the Commission, that its request is in the first track of processing. The Commission will notify a requester when its request is placed in the second track for processing and that notification will include the estimated time for completion. Should subsequent information substantially change the estimated time to process a request, the requester will be notified in writing. In the case of a request expected to take more than 30 working days for action, a requester may modify the request to allow it to be processed faster or to reduce the cost of processing. Partial responses may be sent to a requester as documents are obtained by the FOIA Disclosure Officer from the supplying offices.

(e) Expedited processing. (1) The Commission may place a person’s request at the front of the queue for the appropriate track for that request upon receipt of a written request that clearly demonstrates a compelling need for expedited processing. Requesters must provide detailed explanations to support their expedited requests. For purposes of determining expedited processing, the term compelling need means:

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(i) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of any individual; or

(ii) That a request is made by a person primarily engaged in disseminating information, and that person establishes that there is an urgency to inform the public concerning actual or alleged Federal Government activity.

2. A person requesting expedited processing must include a statement certifying the compelling need given to be true and correct to the best of his or her knowledge and belief. The certification requirement may be waived by the Commission as a matter of agency discretion.

3. The FOIA Disclosure Officer will make the initial determination whether to grant or deny a request for expedited processing and will notify a requester within 10 calendar days after receiving the request whether processing will be expedited.

(f) Content of denial. When the FOIA Disclosure Officer denies a request for records, either in whole or in part, a request for expedited processing, and/or a request for fee waivers (see §2201.8), the written notice of the denial shall state the reason for denial, give a reasonable estimate of the volume of matter denied (unless doing so would harm an interest protected by the exemption(s) under which the request was denied), set forth the name and title or position of the person responsible for the denial of the request, and notify the requester of the right to appeal the determination as specified in §2201.9. A refusal by the FOIA Disclosure Officer to process the request because the requester has not made advance payment or given a satisfactory assurance of full payment required under §2201.7(f) may be treated as a denial of the request and appealed under §2201.9.

(g) Deletions. The FOIA Disclosure Officer shall provide to the requester in writing a justification for deletions within records. The amount of information deleted from records shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption under which the deletion is made. If technically feasible, the place in the record where the deletion is made, and the exemption under which the deletion is made, shall be marked.

(h) Tracking numbers. The FOIA Disclosure Officer shall assign an individualized tracking number to each request received for processing and provide to each person making a request the tracking number assigned to the request. For any request that will take ten or more days to process, OSHRC will send the requester a postcard indicating the request’s receipt date and its assigned tracking number.

(i) Determining responsive records. In determining which records are responsive to a request, OSHRC ordinarily will include only records in its possession as of the date it begins its search for them. If any other date is used, OSHRC shall inform the requester of that date.

§ 2201.7 Fees for copying, searching, and review.

(a) Fees required unless waived. The FOIA Disclosure Officer shall charge the fees in paragraph (b) of this section unless the fees for a request are less than the threshold amount as provided in OSHRC’s fee schedule, in which case no fees shall be charged. See Appendix A. The FOIA Disclosure Officer shall, however, waive the fees in the circumstances stated in §2201.8.

(b) Calculation of fees. Fees for copying, searching and reviewing will be based on the direct costs of these services, including the average hourly salary (base plus DC locality payment), plus 16 percent for benefits, of the following three categories of employees involved in responding to FOIA requests: clerical—based on an average of all employees at GS–9 and below; professional—based on an average of all employees at GS–10 through GS–14; and managerial—based on an average of all employees at GS–15 and above. OSHRC will calculate a schedule of fees based on these direct costs. The schedule of fees under this section appears in Appendix A to this part 2201. A copy of the schedule of fees may also be obtained at no charge from the FOIA Disclosure Officer. See §2201.3(d).
§2201.7  

(1) **Copying fee.** The fee per copy of each page shall be calculated in accordance with the per-page amount established in OSHRC’s fee schedule. See Appendix A to this part. For other forms of duplication, direct costs of producing the copy, including operator time, shall be calculated and assessed. Copying fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use. No copying fee shall be charged for educational, scientific, or news media requests if the agency fails to comply with any time limit in §2201.6, provided that no unusual or exceptional circumstances (as those terms are defined in §2201.4(e), respectively) apply to the processing of the request.

(2) **Search fee.** Search fees shall be calculated in accordance with the amounts established in OSHRC’s fee schedule. See Appendix A to this part. Commercial requesters shall be charged for all search time, except as described below. Search fees shall be charged even if the responsive documents are not located or if they are located but withheld on the basis of an exemption. However, search fees shall be limited or not charged as follows:
   
   (i) **Easily identifiable decisions.** Search fees shall not be charged for searching for decisions that the requester identifies by name and date, or by docket number, or that are otherwise easily identifiable.
   
   (ii) **Educational, scientific or news media requests.** No fee shall be charged if the request is not for a commercial use and is by an educational or scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.
   
   (iii) **Other non-commercial requests.** No fee shall be charged for the first two hours of searching if the request is not for a commercial use and is not by an educational or scientific institution, or a representative of the news media.
   
   (iv) **Requests for records about self.** No fee shall be charged to search for records filed in the Commission’s systems of records if the requester is the subject of the requested records. See the Privacy Act of 1974, 5 U.S.C. 552a(c)(5) (fees to be charged only for copying).
   
   (v) **Failure to comply with time limits.** No search fee shall be charged if the agency fails to comply with any time limit in §2201.6, provided that no unusual or exceptional circumstances (as those terms are defined in §2201.6(b) and §2201.4(e), respectively) apply to the processing of the request.

(3) **Review fee.** A review fee shall be charged only for commercial requests. Review fees shall be calculated in accordance with the amounts established in OSHRC’s schedule of fees. See Appendix A. A review fee shall be charged for the initial examination of documents located in response to a request to determine if it may be withheld from disclosure, and for the excision of withholdable portions. However, a review fee shall not be charged for review by the Chairman under §2201.9 (Appeal of denials).

(c) **Invoices.** The FOIA Disclosure Officer shall provide the requester with an invoice containing an itemization of assessed fees.

(d) **Aggregation of requests.** When the FOIA Disclosure Officer reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, the FOIA Disclosure Officer may aggregate any such requests and charge accordingly.

(e) **Fees likely to exceed $25.** If the total fee charges are likely to exceed $25, the FOIA Disclosure Officer shall notify the requester of the estimated amount of the charges, unless the requester has indicated a willingness to pay fees up to the estimated amount. The notification shall offer the requester an opportunity to confer with the FOIA Disclosure Officer to reformulate the request to meet the requester’s needs at a lower cost. In cases in which a requester has been notified that actual or estimated fees amount to more than $25, the request shall not be considered received and further work shall not be done on it until the requester agrees to pay the actual or estimated total fee. Any such agreement shall be memorialized in writing.

(f) **Advance payments.** Advance payment of fees will generally not be required. If, however, charges are likely...
to exceed $250, the FOIA Disclosure Officer shall notify the requester of the likely cost and: if the requester has a history of prompt payment of FOIA charges, obtain satisfactory assurance of full payment; or if the requester has no history of payment, require an advance payment of an amount up to the full estimated charge. If the requester has previously failed to pay a fee within 30 days of the date of billing, the FOIA Disclosure Officer shall require the requester to pay the full amount owed plus any interest owed as provided in paragraph (h) of this section or demonstrate that he or she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated charges before the FOIA Disclosure Officer begins to process the new request or a pending request from that requester.

(g) Fees for services not required by the Freedom of Information Act. The Commission has discretion regarding its response to requests for services not required by the FOIA. For example, the FOIA does not require agencies to certify or authenticate responsive documents, nor does it require responsive documents to be sent by express mail. If these services are requested, the FOIA Disclosure Officer shall assess the direct costs of such services.

(h) Interest on unpaid bills. The Commission’s Office of Administration shall begin assessing interest charges on unpaid bills starting on the thirty-first day after the date the bill was sent. Interest will accrue from the date of billing until the Commission receives full payment. Interest will be at the rate described in 31 U.S.C. 3717.

(i) Debt collection procedures. If bills are unpaid 60 days after the mailing of a written notice to the requester, the Commission’s Office of Administration may resort to the debt collection procedures set out in the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

§ 2201.8 Waiver of fees.

(a) General. The FOIA Disclosure Officer shall waive part or all of the fees assessed under §2201.7(b) if two conditions are satisfied: Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and disclosure is not primarily in the commercial interest of the requester. Where the FOIA Disclosure Officer has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the FOIA Disclosure Officer may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes. The FOIA Disclosure Officer shall afford the requester the opportunity to show that the requester comes within these two conditions. The following factors may be considered in determining whether the two conditions are satisfied:

(1) Whether the subject of the requested records concerns the operations or activities of the government;
(2) Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;
(3) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so, whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(b) Partial waiver of fees. If the two conditions stated in paragraph (a) of this section are met, the FOIA Disclosure Officer will ordinarily waive all fees. In exceptional cases, however, only a partial waiver may be granted if the request for records would impose an exceptional burden or require an exceptional expenditure of Commission resources, and the request for a waiver minimally satisfies the “public interest” requirement in paragraph (a) of this section.
§ 2201.9 Appeal of denials.

A denial of a request for records, either in whole or in part, a request for expedited processing, or a request for fee waivers, may be appealed in writing to the Chairman of the Commission within 20 working days of the date of the letter denying an initial request. The Chairman shall act on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within 20 working days after the receipt of the appeal. If the Chairman wholly or partially upholds the denial of the request, the Chairman shall notify the requesting person that the requester may obtain judicial review of the Chairman’s action under 5 U.S.C. 552(a)(4)(B)–(G).

§ 2201.10 Maintenance of statistics.

(a) The FOIA Disclosure Officer shall maintain records of:

(1) The number of determinations made by the agency not to comply with the requests for records made to the agency and the reasons for those determinations;

(2) The number of appeals made by persons, the results of those appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) A complete list of all statutes that the agency used to authorize the withholding of information under 5 U.S.C. 552(b)(3), which exempts information that is specifically exempted from disclosure by other statutes and the number of occasions on which each statute was relied upon;

(4) A description of whether a court has upheld the decision of the agency to withhold information under each of those statutes cited, and a concise description of the scope of any information upheld;

(5) The number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that these requests had been pending before the agency as of that date;

(6) The number of requests for records received by the agency and the number of requests the agency processed;

(7) The median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(8) The average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(9) Based on the number of business days that have elapsed since each request was originally received by the agency—

(i) The number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) The number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) The number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) The number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(10) The average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(11) The median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(12) Data on the 10 active requests with the earliest filing dates pending at the agency, including the amount of time that has elapsed since each request was originally received by the agency;
(13) Data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;
(14) The number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;
(15) The number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;
(16) The total amount of fees collected by the agency for processing requests;
(17) The number of full-time staff of the agency devoted to the processing of requests for records under this section; and
(18) The total amount expended by the agency for processing these requests.

(b) The FOIA Disclosure Officer shall annually, on or before February 1 of each year, prepare and submit to the Attorney General an annual report covering each of the categories of records to be maintained in accordance with paragraph (a) of this section, for the previous fiscal year. A copy of the report will be available for public inspection and copying at the OSHRC FOIA Reading Room, and a copy will be accessible through OSHRC’s Web site at http://www.oshrc.gov.

APPENDIX A TO PART 2201—SCHEDULE OF FEES

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PART 2202 [RESERVED]

PART 2203—REGULATIONS IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT

§ 2203.1 Purpose and scope.
This part applies to all meetings of the Occupational Safety and Health Review Commission. Its purpose is to implement the Government in the Sunshine Act, 5 U.S.C. 552b. The rules in this part are intended to open to public observation, to the extent practicable, the meetings of the Commission, while preserving the Commission’s ability to fulfill its adjudicatory responsibilities and protecting the rights of individuals.

§ 2203.2 Definitions.
For the purposes of this part:
*Expedited closing procedure* means the simplified procedures described at 5 U.S.C. 552b(d)(4) for announcing and closing certain agency meetings.
*General Counsel* means the General Counsel of the Commission, or any other person designated by the General Counsel.
§ 2203.3 Public attendance at Commission meetings.

(a) Policy. Commissioners will not jointly conduct or dispose of official Commission business in a meeting unless it is conducted in accordance with this part. Because the Commission was created for the purpose of adjudicating litigated cases, it can be expected that most of its meetings will be closed to the public. However, meetings that do not involve Commission adjudication or discussion of issues in cases before it will be open to the extent practicable. The public will not be allowed to participate in discussions during open meetings.

(b) Grounds for closing meetings. Except where the Commission finds that the public interest requires otherwise, all or part of a meeting may be closed to the public, and information about a meeting may be withheld from the public, where the Commission determines that the meeting, or part of the meeting, or information about the meeting, is likely to:

(1) Disclose matters that are:
   (i) Specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and
   (ii) In fact properly classified pursuant to such Executive order;

(2) Relate solely to the internal personnel rules and practices of the Commission;

(3) Disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5), provided that such statute
   (i) Requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or
   (ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Disclose trade secrets and commercial or financial information obtained from a person that are privileged or confidential;

(5) Involve accusing any person of a crime, or formally censuring any person;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:
   (i) Interfere with enforcement proceedings,
   (ii) Deprive a person of a right to a fair trial or an impartial adjudication,

Meeting means the deliberations of at least two Commissioners, where such deliberations determine or result in the joint conduct or disposition of “official Commission business.” A conference telephone call among the Commissioners is a meeting if it otherwise qualifies as a meeting under this paragraph. The term does not include:

(a) The deliberations required or permitted under §§ 2203.4(d) and 2203.5, e.g., a discussion of whether to open or close a meeting under this part;

(b) Business that is conducted by circulating written materials sequentially among the Commissioners for their consideration on an individual basis;

(c) A gathering at which the Chairman of the Commission seeks the advice of the other Commissioners on the carrying out of a function that has been vested in the Chairman, by statute or otherwise; or

(d) Informal discussions of the Commissioners that clarify issues and expose varying views but do not effectively predetermine official actions.

Official Commission business means matters that are the responsibility of the Commission acting as a collegial body, including the adjudication of litigated cases. The term does not include matters that are the responsibility of the Commission’s Chairman. See, e.g., 29 U.S.C. 661(e).

Regularly-scheduled meetings means meetings of the Commission that are held at 10:30 a.m. on Thursday of each week, except on legal holidays. The term includes regularly-scheduled meetings that have been rescheduled for another time or day.

(iii) Constitute an unwarranted invasion of personal privacy,
(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,
(v) Disclose investigative techniques and procedures,
(vi) Endanger the life or physical safety of law enforcement personnel;
(viii) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
(ix) Disclose information the premature disclosure of which would:
   (i) Be likely to (A) lead to significant financial speculation in currencies, securities, or commodities, or (B) significantly endanger the stability of any financial institution, or
   (ii) Be likely to significantly frustrate implementation of a proposed Commission action, except where the Commission has already disclosed to the public the content or nature of its proposed action, or where the Commission is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or
   (x) Specifically concern the Commission’s issuance of a subpoena or the Commission’s participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, discussion or disposition by the Commission of a particular case of formal Commission adjudication.

§ 2203.4 Procedures applicable to regularly-scheduled meetings.

(a) Statutory authority to adopt expedited closing procedure. The Government in the Sunshine Act provides, at 5 U.S.C. 552b(d)(4), that qualified agencies may establish by regulation expedited procedures for announcing and closing certain meetings. Specifically, “[a]ny agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c) [of the statute], or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof [through the expedited closing procedure].” See §2203.3(b)(4), (8), (9)(i) and (10), which are equivalent to the referenced paragraphs of the statute. The Commission had determined, for the reasons stated in paragraph (b) of this section, that it is qualified to adopt implementing regulations under 5 U.S.C. 552b(d)(4). It hereby announces that it will follow the expedited closing procedure authorized under that statutory provision in conducting its regularly-scheduled meetings.

(b) Commission qualification to adopt expedited closing procedure. The Commission has determined that a majority of its meetings may be closed to the public under 5 U.S.C. 552b(c)(10). See §2203.3(b)(10). The Commission is an adjudicatory agency that has no regulatory functions. It was established to
resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651–678. See 29 U.S.C. 659(c). The Commission’s experience under the Government in the Sunshine Act has been that almost all of its meetings have been closed, in whole or in part, under 5 U.S.C. 552b(c)(10) because they involved only formal agency adjudication of specific cases.

(c) Announcements. Regularly-scheduled meetings of the Commission will be held at 10:30 a.m. every Thursday, except for legal holidays, in the Hearing Room (Suite 965) of the Commission’s national office at One Lafayette Centre, 1120–20th Street NW., Washington, DC 20036-3457. If a regularly-scheduled meeting is scheduled, public announcement of the time, date and place of the meeting will be made at the earliest practicable time by posting a notice in a prominent place at the Commission’s national office. If a regularly-scheduled meeting is cancelled, a notice of cancellation will be posted in the same manner. Information about the subject of each regularly-scheduled meeting will be made available in the Office of the General Counsel, telephone number (202) 606-5410, at the earliest practicable time. Inquiries from the public regarding any regularly-scheduled meeting will be directed to the Office of the General Counsel.

(d) Voting. At the beginning of each regularly-scheduled meeting, the Commission will vote on whether to close the meeting. No proxy vote will be permitted and the vote of each Commissioner will be recorded. This record of each Commissioner’s vote will be made available to the public at the Commission’s national office immediately after the meeting.

meeting that is not regularly scheduled, under any paragraph of §2203.3(b), will be taken only when at least two Commissioners vote to take the proposed action.

(2) Separate votes required. A separate vote of the Commissioners will be taken with respect to each Commission meeting or each part of a meeting that is proposed to be closed under paragraph (b) of this section or with respect to any information that is proposed to be withheld under paragraph (b) of this section.

(3) Single vote on a series of meetings. A single vote may be taken with respect to closing all or part of a series of meetings under paragraph (b) of this section, or with respect to any information concerning a series of meetings, so long as each meeting in the series involves the same particular matters and is scheduled to be held no more than 30 days after the initial meeting in the series.

(4) Public requests to close meetings. Any person whose interest may be directly affected by a portion of an open meeting may request that the Commission close that portion to the public for any of the reasons referred to in paragraph (b)(5), (6) or (7) of §2203.3. Upon the motion of any Commissioner, the Commission will vote by recorded vote whether to grant the request.

(5) Proxy votes; recording of votes. No proxy vote will be permitted for any vote required under paragraph (b) of this section. The vote of each participating Commissioner will be recorded.

(6) Public announcement of votes. Within one day after any vote taken under paragraph (b) of this section, the vote of each Commissioner on the question will be made publicly available at the Commission’s national office. If any part of a meeting is to be closed under paragraph (b) of this section, a full written explanation of the Commission’s action, together with a list of all persons expected to attend the meeting and their affiliation, will be made publicly available at the Commission’s national office within one day after the vote to close.

§ 2203.6 Certification by the General Counsel.

For every meeting closed under any provision of these rules, the General Counsel will be asked to certify before the meeting that in his opinion the meeting may properly be closed to the public, and to state which exemptions he has relied upon. A copy of this certification, together with a statement (from the Commissioner presiding over the meeting) setting forth the time and place of the meeting and the persons present, shall be retained by the Commission as part of the transcript, recording or minutes of the meeting described in §2203.7.

§ 2203.7 Transcripts, recordings and minutes of closed meetings.

(a) Record of meeting. The Commission will make a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public. However, if all or part of a meeting is closed under paragraph (b)(8), (9)(i) or (10) of §2203.3, the Commission shall maintain either such a transcript or recording, or a set of minutes. Such minutes will fully and clearly describe all matters discussed and will provide a full and accurate summary of any actions taken, and the reasons for the actions. The minutes will also include a description of each of the views expressed on any item and a record of any roll call vote (reflecting the vote of each Commissioner on the question). In addition, the minutes will identify all documents considered in connection with any action.

(b) Public access to records. The Commission will make promptly available to the public, at its national office, the transcript, electronic recording, or minutes of the discussion of any item on the agenda, or of any testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the Commission determines to contain information which may be withheld under §2203.3(b). Copies of the transcript, the minutes, or a transcription of the recording disclosing the identity of each speaker, with the deletions noted in the preceding sentence, will be furnished to any person at the actual cost
of duplication or transcription. Requests to inspect or to have copies made of any transcript, electronic recording or set of minutes of any meeting, or any item(s) on the agenda of any meeting, should be made in writing to the General Counsel at the Office of the General Counsel, Occupational Safety and Health Review Commission, Room 941, One Lafayette Centre, 1120-20th Street NW., Washington, DC 20036-3457. The request should identify the time, date, and place of the meeting and briefly describe the items sought. The Commission will maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each closed meeting, or closed portion of a meeting, for a period of at least two years after the meeting, or until one year after the conclusion of any Commission proceeding with respect to which all or part of the meeting was held, whichever occurs later.


PART 2204—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN PROCEEDINGS BEFORE THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Subpart A—General Provisions

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2204.103 When the EAJA applies.
2204.104 Proceedings covered.
2204.105 Eligibility of applicants.
2204.106 Standards for awards.
2204.107 Allowable fees and expenses.
2204.108 Delegation of authority.

Subpart B—Information Required From Applicants

2204.201 Contents of application.
2204.202 Net worth exhibit.
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2204.302 When an application may be filed.
2204.303 Answer to application.
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SOURCE: 46 FR 48080, Sept. 30, 1981, unless otherwise noted.


Subpart A—General Provisions

§ 2204.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary’s position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards and the procedures and standards that the Commission uses to make awards.


§ 2204.102 Definitions.

For the purposes of this part,
(a) The term agent means any person other than an attorney who represents a party in a proceeding before the Commission pursuant to §2200.22;
(b) The term Commission means the Occupational Safety and Health Review Commission;
(d) The term judge means an administrative law judge appointed by the Commission under 29 U.S.C. 661(j);
§ 2204.103 When the EAJA applies.

The EAJA applies to adversary adjudications before the Commission pending or commenced on or after August 5, 1985. The EAJA also applies to adversary adjudications commenced on or before October 1, 1984, and finally disposed of before August 5, 1985, if an application for an award of fees and expenses, as described in subpart B of these rules, has been filed with the Commission within 30 days after August 5, 1985.

§ 2204.104 Proceedings covered.

The EAJA applies to adversary adjudications before the Commission. These are adjudications under 5 U.S.C. 554 and 29 U.S.C. 659(c) in which the position of the Secretary is represented by an attorney or other representative. The types of proceedings covered are the following proceedings under section 10(c), 29 U.S.C. 659(c), of the OSH Act:

(a) Contests of citations, notifications, penalties, or abatement periods by an employer;
(b) Contests of abatement periods by an affected employee or authorized employee representative; and
(c) Petitions for modification of the abatement periods by an employer.

§ 2204.105 Eligibility of applicants.

(a) To be eligible for an award of attorney or agent fees and other expenses under the EAJA, the applicant must be a party to the adversary adjudication. The term “party” is defined in 5 U.S.C. 551(3). The applicant must show that it satisfies the conditions of eligibility set out in this subpart and subpart B.

(b) The types of eligible applicants are as follows:

(1) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interest, and employs not more than 500 employees;
(2) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;
(3) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (22 U.S.C. 1141j(a)) with not more than 500 employees;
(4) Any other partnership, corporation, association, unit of local government, or public or private organization that has a net worth of not more than $7 million and employs not more than 500 employees; and
(5) An individual with a net worth of not more than $2 million.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the notice of contest was filed, or, in the case of a petition for modification of abatement period, the date the petition was received by the Commission under §2200.37(d).

(d) An applicant who owns an unincorporated business shall be considered as an “individual” rather than a “sole owner of an unincorporated business” only if the issues on which the applicant prevails are related primarily to personal interests rather than business interests.

(e) For the purpose of determining eligibility under the EAJA, the employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant’s direction and control. Part-time employees shall be included on a proportional basis.

§ 2204.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings, unless the position of the Secretary was substantially justified. The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden
§ 2204.107 Allowable fees and expenses.

(a) Awards shall be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) An award for the fee of an attorney or agent under these rules shall not exceed $125 per hour, unless the Commission determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for Commission proceedings, justifies a higher fee. An award to compensate an expert witness shall not exceed the highest rate at which the Secretary pays expert witnesses. However, an award may include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Commission shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant’s case.

§ 2204.108 Delegation of authority.

The Commission delegates to each judge authority to entertain and, subject to §2204.309, take final action on applications for an award of fees and expenses arising from the OSH Act cases that are assigned to the judge under section 12(j) of the OSH Act, 29 U.S.C. 661(j). However, the Commission retains its right to consider an application for an award of fees and expenses without assignment to a judge or to assign such an application to a judge other than the one to whom the underlying OSH Act case is assigned. When entertaining an application for an award of fees and expenses pursuant to this section, each judge is authorized to take any action that the Commission may take under this part, with the exception of actions provided in §§2204.309 and 2204.310.

Subpart B—Information Required From Applicants

§ 2204.201 Contents of application.

(a) An application for an award of fees and expenses under the EAJA shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified. The application also shall state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application also shall include a statement that the applicant’s net
§ 2204.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Commission may require the applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

§ 2204.204 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association shall provide with its application a detailed exhibit showing the net worth of the applicant as of the date specified by §2204.105(c). The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant’s assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Commission may require an applicant to file additional information to determine its eligibility for an award.

(b)(1) The net worth exhibit shall be included in the public record of the proceeding except as provided in paragraph (b)(2) of this section.

(2) An applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit in a sealed envelope labeled “Confidential Information,” accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on the Secretary but need not be served on any other party to the proceeding. If the Commission finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission’s procedures under the Freedom of Information Act, part 2201.

§ 2204.301 Filing and service of documents.

An EAJA application is deemed to be filed only when received by the Commission. In all other respects, an application for an award and any other pleading or document related to an application shall be filed and served on all parties to the proceeding in accordance with §§ 2200.7 and 2200.8, except as provided in § 2204.202(b) for confidential financial information.


§ 2204.302 When an application may be filed.

(a) An application may be filed whenever an applicant has prevailed in a proceeding or in a discrete substantive portion of the proceeding, but in no case later than thirty days after the period for seeking appellate review expires.

(b) If Commission review is sought or directed of a judge’s decision as to which an application for a fee award has been filed, proceedings concerning the award of fees shall be stayed until there is a final Commission disposition of the case and the period for seeking review in a court of appeals expires.

(c) If review of a Commission decision, or any item or items contained in that decision, is sought in the court of appeals under section 11 of the OSH Act, 29 U.S.C. 660, an application for an award filed with the Commission with regard to that decision shall be dismissed under 5 U.S.C. 554(c)(1) as to the item or items of which review is sought. If the petition for review in the court of appeals is thereafter withdrawn, the applicant may reinstate its application before the Commission within thirty days of the withdrawal.


§ 2204.303 Answer to application.

(a) Within 30 days after service of an application, the Secretary shall file an answer to the application.

(b) If the Secretary and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted upon request.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied upon in support of the Secretary’s position. If the answer is based on any alleged facts not already in the record of the proceeding, the Secretary shall include with the answer either supporting affidavits or a request for further proceedings under § 2204.307.

§ 2204.304 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 2204.307.

§ 2204.305 Comments by other parties.

Any party to a proceeding other than the applicant and the Secretary may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Commission determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 2204.306 Settlement.

The applicant and the Secretary may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and the Secretary agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 2204.307 Further proceedings.

(a)(1) The determination of an award shall be made on the basis of the record made during the proceeding for which
fees and expenses are sought, except as provided in paragraphs (a)(2) and (a)(3) of this section.

(2) On the motion of a party or on the judge’s own initiative, the judge may order further proceedings, including discovery and an evidentiary hearing, as to issues other than substantial justification (such as the applicant’s eligibility or substantiation of fees and expenses).

(3) If the proceeding for which fees and expenses are sought ended before the Secretary had an opportunity to introduce evidence supporting the citation or notification of proposed penalty (for example, a citation was withdrawn or settled before an evidentiary hearing was held), the Secretary may supplement the record with affidavits or other documentary evidence of substantial justification.

(b) A request that the judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.


§ 2204.308 Decision.

The preparation and issuance of decision shall be in accordance with § 2200.90. Additionally, the judge’s decision shall include written findings and conclusions on the applicant’s eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Secretary’s position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

§ 2204.309 Commission review.

Commission review shall be in accordance with §§ 2200.91 and 2200.92. The applicant, the Secretary, or both may seek review of the judge’s decision on the fee application, and the Commission may grant such petitions for review or direct review of the decision on the Commission’s own initiative. The Commission delegates to each of its members the authority to order review of a judge’s decision concerning a fee application. Whether to review a decision is a matter within the discretion of each member of the Commission. If the Commission does not direct review, the judge’s decision on the application shall become a final decision of the Commission 30 days after it is received and docketed by the Executive Secretary of the Commission. If review is directed, the Commission shall issue a final decision on the application or remand the application to the judge for further proceedings.

§ 2204.310 Waiver.

After reasonable notice to the parties, the Commission may waive, for good cause shown, any provision contained in this part as long as the waiver is consistent with the terms and purpose of the EAJA.

§ 2204.311 Payment of award.

An applicant seeking payment of an award shall submit to the officer designated by the Secretary a copy of the Commission’s final decision granting the award.

PART 2205—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND IN ACCESSIBILITY OF COMMISSION ELECTRONIC AND INFORMATION TECHNOLOGY

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§ 2205.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability in programs or activities conducted by Executive agencies or the United States Postal Service. This part also effectuates section 508 of the Rehabilitation Act of 1973, as amended, with respect to the accessibility of electronic and information technology developed, procured, maintained, or used by the agency.

§ 2205.102 Application.

This part applies to all programs or activities conducted by the agency and to its development, procurement, maintenance, and use of electronic and information technology.

§ 2205.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD’s), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant’s name and address and describes the agency’s alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504 or section 508. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Electronic and Information technology includes information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term electronic and information technology includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines. The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation are not information technology.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for
Individual with a disability means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) **Physical or mental impairment** includes—
   (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
   (ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) **Major life activities** includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) **Has a record of such an impairment** means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) **Is regarded as having an impairment** means—
   (i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;
   (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
   (iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

**Information technology** means any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. The term information technology includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

**Qualified individual with a disability** means—
(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with a disability who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, an individual with a disability who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) **Qualified individual with a disability** is defined for purposes of employment in 29 CFR 1630.2(m), which is made applicable to this part by §2205.140.


**Section 508** means section 508 of the Rehabilitation Act of 1973, Pub. L. 93–
§§ 2205.104–2205.110  29 CFR Ch. XX (7–1–15 Edition)


Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 2205.104–2205.110 [Reserved]

§ 2205.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the Chairman finds necessary to apprise such persons of the protections against discrimination assured them by section 504 or the access to technology provided under section 508 and this regulation.

§§ 2205.112–2205.129 [Reserved]

§ 2205.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with a disability the opportunity to participate in programs or activities that are not separate or different, despite the existence of permisibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with disabilities to discrimination on the basis of disability; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with disabilities from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(5) The agency, in the selection of procurement contractors, may not use
criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of individuals without disabilities from the benefits of a program limited by Federal statute or Executive order to individuals with disabilities or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive order to a different class of individuals with disabilities is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

§§ 2205.131–2205.134 [Reserved]

§ 2205.135 Electronic and information technology requirements.

(a) In accordance with section 508 and the standards published by the Architectural and Transportation Barriers Compliance Board at 36 CFR part 1194, the agency shall ensure, absent an undue burden, that the electronic and information technology developed, procured, maintained, or used by the agency allows:

(1) Individuals with disabilities who are agency employees or applicants to have access to and use of information and data that is comparable to the access to and use of information and data by agency employees who are individuals without disabilities; and

(2) Individuals with disabilities who are members of the public seeking information or services from the agency to have access to and use of information and data by such members of the public who are not individuals with disabilities.

(b) When development, procurement, maintenance, or use of electronic and information technology that meets the standards at 36 CFR part 1194 would impose an undue burden, the agency shall provide individuals with disabilities covered by this section with the information and data involved by an alternative means of access that allows the individuals to use the information and data.

§§ 2205.136–2205.139 [Reserved]

§ 2205.140 Employment.

No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1614, shall apply to employment in federally conducted programs or activities.

§§ 2205.141–2205.148 [Reserved]

§ 2205.149 Program accessibility: discrimination prohibited.

Except as otherwise provided in §2205.150, no qualified individual with a disability shall, because the agency’s facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 2205.150 Program accessibility: existing facilities.

(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph (a) does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) In the case of historic preservation programs, require the agency to
§ 2205.151 Program accessibility: new construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with disabilities. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 102-76.60 to 102-76.95, apply to buildings covered by this section.

§§ 2205.152–2205.159 [Reserved]

§ 2205.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with a disability an equal opportunity to participate in,
and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with a disability.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, TDD’s or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

§§ 2205.161–2205.169 [Reserved]

§ 2205.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of disability in programs or activities conducted by the agency in violation of section 504. Paragraphs (c) through (j) of this section also apply to all complaints alleging a violation of the agency’s responsibility to procure electronic and information technology under section 508, whether filed by members of the public or agency employees or applicants.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c)(1) Any person who believes that he or she has been subjected to discrimination prohibited by this part or that the agency’s procurement of electronic and information technology has violated section 508, or an authorized representative of such person, may file a complaint with the Executive Director.

(2) The Executive Director shall be responsible for coordinating implementation of this section. Complaints shall be sent to Executive Director, Occupational Safety and Health Review Commission, One Lafayette Centre, 1120-20th Street NW., 9th Floor, Washington, DC 20036-3457. Complaints shall be filed with the Executive Director within 180 days of the alleged act of discrimination. A complaint shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the agency. The agency may extend this time period for good cause.

(d)(1) The agency shall accept a complete complaint that is filed in accordance with paragraph (c) of this section and over which it has jurisdiction. The Executive Director shall notify the
complainant and the respondent of receipt and acceptance of the complaint.

(2) If the agency receives a complaint that is not complete, the Executive Director shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the Executive Director shall dismiss the complaint without prejudice and shall so inform the complainant.

(3) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(e) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by individuals with disabilities.

(f) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall make reasonable efforts to refer the complaint to the appropriate government entity.

(g) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by individuals with disabilities.

(h) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall make reasonable efforts to refer the complaint to the appropriate government entity.

(i) Appeals of the findings of fact and conclusions of law, or remedies, must be filed with the Chairman by the complainant within 90 days of receipt from the agency of the letter required by paragraph (f) of this section. The agency may extend this time for good cause. Appeals shall be sent to the Chairman, Occupational Safety and Health Review Commission, One Lafayette Centre, 1520 20th Street, NW., 9th Floor, Washington, DC 20036-3457. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the agency. It should be clearly marked “Appeal of Section 504 decision” or “Appeal of Section 508 decision” and should contain specific objections explaining why the complainant believes the initial decision was factually or legally wrong. Attached to the appeal letter should be a copy of the initial decision being appealed.

Chapter XX (7–1–15 Edition)

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PART 2400—REGULATIONS IMPLEMENTING THE PRIVACY ACT

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2400.7 Special procedures for requesting medical records.
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AUTHORITY: 5 U.S.C. 552a(f); 5 U.S.C. 553.

SOURCE: 71 FR 51421, Sept. 29, 2006, unless otherwise noted.

§ 2400.1 Purpose and scope.

The purpose of the provisions of this part is to provide procedures to implement the Privacy Act of 1974 (5 U.S.C. 552a). This part is applicable only to records that are maintained by the Occupational Safety and Health Review Commission.
§ 2400.2 Description of agency.

The Commission adjudicates contested enforcement actions under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651–677). Decisions of the Commission on such actions are issued only after the parties to the case are afforded an opportunity for a hearing in accordance with section 554 of title 5, United States Code. All such hearings are conducted by an OSHRC Administrative Law Judge at a place convenient to the parties and are open to the public. Each Commission member has the authority to direct that a decision of a Judge be reviewed by the full Commission before becoming a final order. The President designates one of the Commissioners as Chairman, who is responsible on behalf of the Commission for the administrative operations of the Commission.

§ 2400.3 Delegation of authority.

(a) The Chairman shall designate an OSHRC employee as the Privacy Officer, and shall delegate to the Privacy Officer the authority to ensure agency-wide compliance with this part.

(b) Custodians of the systems of records are responsible for the following:

(1) Adhering to this part within their respective units and, in particular, collecting, using and disclosing records, and affording individuals the right to inspect, obtain copies of and correct records concerning them;

(2) Reporting the existence of systems of records, changes to the contents of those systems and changes of routine use to the Privacy Officer, and also establishing the relevancy of records within those systems; and

(3) Maintaining an accurate accounting of each disclosure in conformance with §2400.4(c) of this part.

§ 2400.4 Collection and disclosure of personal information.

(a) The following rules govern the collection of personal information throughout OSHRC operations:

(i) OSHRC shall:

(ii) Maintain all records which are used by OSHRC in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual in the determination;

(iii) Collect information, to the greatest extent practicable, directly from the subject individual when such information may result in adverse determinations about an individual’s rights, benefits or privileges under Federal programs; and

(iv) Inform any individual requested to disclose personal information whether that disclosure is mandatory or voluntary, by what authority it is solicited, the principal purposes for which it is intended to be used, the routine uses which may be made of it, and any penalties or consequences known to OSHRC which shall result to the individual from such non-disclosure.

(b) OSHRC shall not discriminate against any individual who fails to provide personal information unless that information is required or necessary for the conduct of the system or program in which the individual desires to participate. See §2400.4(a)(1)(i).

(c) No record shall be collected or maintained which describes how any individual exercises rights guaranteed by the First Amendment unless the Commission specifically determines that such information is relevant and necessary to carry out a statutory purpose of OSHRC, and the collection or maintenance of the record is expressly
authorized by statute or by the individual about whom the record is maintained, or unless the record is pertinent to and within the scope of an authorized law enforcement activity.

(4) OSHRC shall not require disclosure of any individual’s Social Security account number or deny a right, privilege or benefit because of the individual’s refusal to disclose the number unless disclosure is required by Federal law.

(b) Disclosures—(1) Limitations. OSHRC shall not disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.

(2) Exceptions. A record may be disseminated without satisfying the requirements of paragraph (b)(1) of this section if disclosure is made:

(i) To a person pursuant to a requirement of the Freedom of Information Act (5 U.S.C. 552);

(ii) To those officers and employees of OSHRC who have a need for the record in the performance of their duties;

(iii) For a routine use as contained in the system notices published in the FEDERAL REGISTER;

(iv) To a recipient who has provided OSHRC with adequate advance written assurance that the record shall be used solely as a statistical reporting or research record, and the record is to be transferred in a form that is not personally identifiable;

(v) To the Bureau of the Census for purposes of planning or carrying out a census or survey, or related activity pursuant to the provisions of title 13, United States Code;

(vi) To the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(vii) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual, if upon such disclosure notification is transmitted to the last known address of such individual;

(viii) To another agency or an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity, if such activity is authorized by law and if the head of the agency or instrumentality has made a written request to OSHRC specifying the particular portion of the record desired and the law enforcement activity for which the record is sought;

(ix) To either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, or any joint committee of Congress or subcommittee of any such joint committee;

(x) To the Comptroller General or any of his authorized representatives in accordance with section 3711(e) of title 31, United States Code.

(3) Employee credit references. OSHRC’s Office of Administration shall verify the following information provided by an employee to a credit bureau or commercial firm from which an employee is seeking credit: Length of service, job title, grade, salary, tenure of employment, and Civil Service status.

(4) Employee job references. Prospective employers of an OSHRC employee or a former OSHRC employee may be furnished with the information in paragraph (b)(3) of this section in addition to the date and reason for separation, if applicable, upon the request of the employee or former employee.

(5) Disclosures to third parties. Prior to disseminating any record about an individual to any person other than an agency, unless the record is disseminated pursuant to paragraph (b)(2)(i) of this section, OSHRC shall make reasonable efforts to ensure that the record is accurate, complete, timely and relevant.

(6) Anticipated legal action. Nothing in this section shall allow an individual access to any information compiled in
§ 2400.5 Notification.

(a) Notification of systems. The following procedures permit individuals to determine the types of systems of records maintained by OSHRC.

(1) Upon written request, OSHRC shall notify any individual whether a specific system named by him contains a record pertaining to him. See §2400.6 for suggested form of request.

(2) Upon establishing or revising a system of records, OSHRC shall publish in the FEDERAL REGISTER a notice of the existence and character of the system of records. This notice shall contain the following information:

(i) System name and location;
(ii) Security classification;
(iii) Categories of individuals covered by the system;
(iv) Categories of records in the system;
(v) Authority for maintenance of the system;
(vi) Purpose(s) of the system;
(vii) Routine uses of records maintained in the system, including categories of users and the purpose(s) of such uses;
(viii) Disclosures to consumer reporting agencies;
(ix) Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system;
(x) System manager(s) and address;
(xi) Procedures by which an individual can be informed whether a system contains a record pertaining to himself, gain access to such record, and contest the content, accuracy, completeness, timeliness, relevance and necessity for retention of the record;
(xii) Record source categories; and
(xiii) Exemptions claimed for the system.

(3) OSHRC shall submit a report, in accordance with guidelines provided by the Office of Management and Budget (OMB), in order to give advance notice to the Committee on Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and OMB of any proposal to establish a new system of records or to significantly change an existing system of records.

(b) Notification of disclosure. OSHRC shall make reasonable efforts to serve notice on an individual before any record pertaining to the individual is made available to any person under compulsory legal process when such process becomes a matter of public record.

(c) Notification of amendment—(1) OSHRC shall inform any person or other agency about any correction or notation of dispute made by OSHRC to any record that has been disclosed to the person or agency, if the correction or notation was made pursuant to §2400.8, and an accounting of the disclosure was made pursuant to §2400.4(c).

(2) In any disclosure to a person or other agency containing information about which the individual has filed a statement of disagreement and occurring after the statement was filed, OSHRC shall clearly note any portion of the record which is disputed and provide copies of the statement and, if OSHRC deems appropriate, copies of a concise statement of OSHRC’s reasons for not making the requested amendments.

(d) Notification of new routine use. Any new or revised routine use of a system of records maintained by OSHRC shall
be published in the Federal Register thirty (30) days before such use becomes operational. Interested persons may then submit written data, views, or arguments to OSHRC.

(e) Notification of exemptions. OSHRC shall publish in the Federal Register its intent to exempt any system of records and shall specify the nature and purpose of that system.

§ 2400.6 Procedures for requesting records.

The purpose of this section is to provide procedures by which an individual may gain access to his records.

(a) Submission of requests for access—
(1) Manner. An individual seeking information regarding the contents of records systems or access to records about himself in a system of records should present a written request to that effect either in person or by mail to the Privacy Officer, OSHRC, One Lafayette Centre, 1120–20th Street, NW., Ninth Floor, Washington, DC 20036–3457.

(2) Specification of records sought. Requests for access to records shall describe the nature of the record sought, the approximate dates covered by the record, and the system in which the record is thought to be included as described in the "Notification" for that system as published in the Federal Register. The requester should also indicate whether he wishes to review the record in person or obtain a copy by mail. If the information supplied is insufficient to locate or identify the record, the requester shall be notified promptly and, if necessary, informed of additional information required.

(3) Period for response. Upon receipt of an inquiry the Privacy Officer shall respond promptly to the request and no later than 10 working days from receipt of such inquiry.

(b) Verification of identity. The following standards are applicable to any individual who requests records concerning himself:

(1) An individual seeking access to records about himself in person may establish his identity by the presentation of a single document bearing a photograph (such as a passport, employee identification card, or valid driver’s license) or by the presentation of two items of identification which do not bear a photograph but do bear both a name and address (such as a valid driver’s license, or credit card).

(2) An individual seeking access to records about himself by mail shall establish his identity by a signature, address, date of birth, place of birth, employee identification number, if any, and one other identifier such as a photocopy of an identifying document.

(3) An individual seeking access to records about himself by mail or in person who cannot provide the necessary documentation of identification may provide a notarized statement, or a declaration in accordance with 28 U.S.C. 1746, swearing or affirming to his identity and to the fact that he understands the penalties for false statements pursuant to 18 U.S.C. 1001. Forms for notarized statements may be obtained on request from the Privacy Officer.

(c) Verification of guardianship. The parent or guardian of a minor or a person judicially determined to be incompetent and seeking to act on behalf of such minor or incompetent shall, in addition to establishing his own identity, establish the identity of the minor or other person he represents as required in paragraph (b) of this section and establish his own parentage or guardianship of the subject of the record by furnishing either a copy of a birth certificate showing parentage or a court order establishing the guardianship.

(d) Accompanying persons. An individual seeking to review records about himself may be accompanied by another individual of his own choosing. Both the individual seeking access and the individual accompanying him shall be required to sign a form provided by OSHRC indicating that OSHRC is authorized to discuss the contents of the subject record in the presence of both individuals.

(e) When compliance is possible—(1) The Privacy Officer shall inform the requester of the determination to grant the request and shall make the record available to the individual in the manner requested, that is, either by forwarding a copy of the information to him or by making it available for review, unless:
§ 2400.8 Procedures for requesting amendment.

(a) Submission of requests for amendment. Upon review of an individual's personal record, that individual may submit a request to amend such record. This request shall be submitted in writing to the Privacy Officer and shall include a statement of the amendment requested and the reasons for such amendment, e.g., relevance, accuracy, timeliness or completeness of the record.

(b) Action to be taken by the Privacy Officer. Upon receiving an amendment request, the Privacy Officer shall promptly:

(1) Acknowledge in writing within ten (10) working days the receipt of the request;

(2) Make such inquiry as is necessary to determine whether the amendment is appropriate; and

(3) Correct or eliminate any information that is found to be incomplete, inaccurate, irrelevant to a statutory purpose of OSHRC, or untimely and notify...
the requester when this action is complete; or

(4) Notify the requester of a determination not to amend the record, of the reasons for the refusal, and of the requester's right to appeal in accordance with §2400.9.

§ 2400.9 Procedures for appealing.

(a) Submission of appeal—(1) If a request to inspect, copy or amend a record is denied, in whole or in part, or if no determination is made within the period prescribed by this part, then the requester may appeal to the Chairman, Attn: Privacy Appeal, OSHRC, One Lafayette Centre, 1120–20th Street, NW., Ninth Floor, Washington, DC 20036–3457.

(2) The requester shall submit his appeal in writing within thirty (30) days of the date of denial, or within ninety (90) days of such request if the appeal is from a failure of the Privacy Officer to make a determination. The letter of appeal should include, as applicable:

(i) Reasonable identification of the record to which access was sought or the amendment of which was requested.

(ii) A statement of the OSHRC action or failure to act being appealed and the relief sought.

(iii) A copy of the request, the notification of denial and any other related correspondence.

(b) Final decisions. The Chairman shall make his final decision not later than thirty (30) working days from the date of the request, unless he extends the time for good cause to be shown by him but not to exceed ninety (90) days from the date of the request. Any record found on appeal to be incomplete, inaccurate, irrelevant, or untimely, shall within thirty (30) working days of the date of such findings be appropriately amended.

(c) Decision requirements. The decision of the Chairman constitutes the final decision of OSHRC on the right of the requester to inspect, copy, change or update a record. The decision on the appeal shall be in writing and, in the event of a denial, shall set forth the reasons for such denial and state the individual's right to obtain judicial review in a district court of the United States. An indexed file of the agency's decisions on appeal shall be maintained by the Privacy Officer.

(d) Submission of statement of disagreement. If the final decision does not satisfy the requester, then any statement of reasonable length, provided by that individual, setting forth a position regarding the disputed information, shall be accepted and included in the relevant record.

§ 2400.10 Schedule of fees.

(a) Policy. The purpose of this section is to establish fair and equitable fees to permit reproduction of records for concerned individuals.

(b) Reproduction—(1) For the fees associated with reproduction of records, refer to Appendix A to part 2201, Schedule of Fees.

(2) OSHRC shall not normally furnish more than one copy of any record.

(c) Limitations. No fee shall be charged to any individual for the process of retrieving, reviewing, or amending records.

PARTS 2401–2499 [RESERVED]